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# EPA Legal Tools to Advance Environmental Justice



# **EPA Legal Tools to Advance Environmental Justice**

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Office of General Counsel

U.S. Environmental Protection Agency  
Washington, D.C. 20460

This document discusses a variety of federal statutory and regulatory provisions, but does not itself have legal effect, and is not a substitute for those provisions and any legally binding requirements that they may impose. It does not expressly or implicitly create, expand, or limit any legal rights, obligations, responsibilities, expectations or benefits to any person. To the extent there is any inconsistency between this document and any statutes, regulations or guidance, the latter take precedence. EPA retains discretion to use or deviate from this document as appropriate.



“At EPA, we know that our most vulnerable communities bear a disproportionate burden when it comes to the impacts of pollution and climate change. That’s why advancing environmental justice is so critical to our mission. In support of this mission, the Agency is releasing EPA Legal Tools to Advance Environmental Justice, a document that identifies a wide range of legal authorities that EPA can deploy to ensure its programs and activities protect the health and environment of all people, no matter the color of their skin, their zip code, or how much money they have in their pocket.”

Michael S. Regan  
Administrator  
U.S. Environmental Protection Agency

## FOREWORD



I am proud to present *EPA Legal Tools to Advance Environmental Justice (Legal Tools)*. This document is a review of legal authorities under environmental and civil rights statutes administered by U.S. Environmental Protection Agency (EPA) that inform the Agency's efforts to advance environmental justice and equity. Advancing environmental justice and equity is integral to the mission of the EPA: to protect the health and environment of all persons across the United States and in all communities.

President Biden has called on EPA and all federal agencies to pursue a comprehensive approach to advancing equity for all, including communities which have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality. Administrator Regan has committed EPA to making environmental justice, equity, and civil rights a centerpiece of the Agency's mission. For far too long, people of color, low-income communities, Indigenous communities, and other underserved communities in our country have suffered disproportionate pollution burdens.

*Legal Tools* updates and builds on the initial noteworthy analysis in the *Plan EJ 2014 Legal Tools*. Like the original document, *Legal Tools* identifies a wide range of legal authorities that EPA can deploy to ensure its programs and activities protect the health and environment of all communities. It also addresses new statutory authorities promulgated since the earlier analysis, more consistent approaches to advancing environmental justice and equity through cooperative federalism, and additional opportunities to ensure civil rights compliance by recipients of EPA funding. I welcome feedback on this document so that we can ensure future iterations are even more useful.

Of course, *Legal Tools* should be viewed as only one type of tool, albeit an important one, in EPA's toolkit for promoting environmental justice and equity. *Legal Tools* should be read in tandem with various Agency guidance, much of it cited within this document, that provides technical information and describes how to integrate environmental justice and equity into the Agency's work. Such guidance includes ways to identify and address, under EPA's existing authorities, public health and environmental quality disparities in communities with environmental justice concerns—disparities that will be exacerbated or remain in place if we fail to act. I will be encouraging the Office of General Counsel and Offices of Regional Counsel attorneys to exercise leadership in identifying options to advance environmental justice and equity, as well as civil rights compliance for their Headquarters and Regional program clients. This document also reflects important opportunities under the

cooperative federalism framework established in a number of EPA statutes. Accordingly, it is intended to be useful for EPA's state and tribal partners, and other EPA stakeholders, as a catalogue of the considerable authority afforded by statutes EPA administers to integrate environmental justice and equity in decision-making.

EPA has an extraordinary opportunity to work collaboratively to fill a historic gap in our work and build a future for our nation where everyone enjoys clean air, water, and land in the places where they live, work, learn, and play and everyone is safer from the risks of climate change. The Office of General Counsel and Offices of Regional Counsel are committed to helping EPA work toward realizing that shared future.

A handwritten signature in black ink, appearing to read "Jeffrey M. Prieto". The signature is fluid and cursive, with a prominent flourish at the end.

Jeffrey M. Prieto  
General Counsel  
U.S. Environmental Protection Agency

## **Acknowledgements**

*EPA Legal Tools to Advance Environmental Justice* benefitted from significant input from across the Agency. The effort was coordinated by the Cross-Cutting Issues Law Office in EPA's Office of General Counsel (OGC). The OGC and Office of Regional Counsel (OGC/ORC) Environmental Justice and Equity Working Group, comprised of representatives from each OGC law office and the ORCs, took a leadership role, working with expert staff within their law offices. Many thanks, also, to staff in EPA programs and regions for their input, and to all EPA staff, including administrative staff, who contributed to this valuable resource.



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The image features a white background with a large, dark teal horizontal bar across the middle. On the left side, there is a vertical teal bar that overlaps the horizontal bar. Below the horizontal bar, there are several overlapping geometric shapes in various shades of teal and blue, creating a layered, abstract effect. The word "INTRODUCTION" is centered in white, bold, uppercase letters within the dark teal bar.

# INTRODUCTION

# INTRODUCTION

*EPA Legal Tools to Advance Environmental Justice (Legal Tools)* is intended to help EPA, together with its state, tribal, and local partners, achieve the shared goal of protecting the health and environment of all persons across the United States and in all communities. Environmental justice is first and foremost about achieving EPA’s mission to protect public health and the environment in those communities where we have yet to achieve our mission to ensure that everyone enjoys clean air, land, and water. Research has reaffirmed what underserved and environmentally overburdened communities have for years expressed—that many communities in this country that are underserved are also exposed to higher pollution burdens and as a result have higher rates of morbidity and mortality.<sup>1</sup> Furthermore, many overburdened or underserved communities have also been effectively cut out of decision-making processes, raising basic procedural fairness issues. No one should be disenfranchised from decisions that affect their health, the health of their families, and the future vitality of their communities. EPA is committed to ensuring meaningful engagement for all communities.<sup>2</sup>

## Lessons Learned Since Issuance of Plan EJ 2014 Legal Tools

ORC and OGC office-wide training on environmental justice, equity, and civil rights is vital to supporting Agency efforts to advance environmental justice and equity.

Early program engagement with OGC or ORC staff is important for ensuring effective legal counseling on assessing and addressing environmental justice and equity issues.

OGC and ORC should further explore EPA’s authority to advance environmental justice and equity within the cooperative federalism framework, and further clarify the Agency’s authority to address cumulative impacts.

A priority focus for EPA lawyers should be assisting programs not only with identifying disproportionate impacts, but also with ways to address them.

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<sup>1</sup> See, e.g., Tessum, C.W., Paoella, D.A., Chambliss, S.E., Apte, J.S., Hill, J.D., & Marshall J.D. (2021). *PM2.5 pollutants disproportionately and systemically affect people of color in the United States*, *Science Advances* 7(18), available at [10.1126/sciadv.abf4491](https://doi.org/10.1126/sciadv.abf4491); Ihab Mikati, Adam F. Benson, Thomas J. Luben, Jason D Sacks, and Jennifer Richmond-Bryant, *Disparities in Distribution of Particulate Matter Emission Sources by Race and Poverty Status*, *Am J Public Health*, 2018 April; 108(4): 480–485; available at: [10.2105/AJPH.2017.304297](https://doi.org/10.2105/AJPH.2017.304297); *Technical Guidance for Assessing Environmental Justice in Regulatory Analysis*, Section 4, U.S. Env’t Prot. Agency, available at: [https://www.epa.gov/sites/default/files/2016-06/documents/ejtg\\_5\\_6\\_16\\_v5.1.pdf](https://www.epa.gov/sites/default/files/2016-06/documents/ejtg_5_6_16_v5.1.pdf); Catherine Jampel, *Intersections of Disability Justice, Racial Justice, and Environmental Justice*, *Environmental Sociology* (2018); available at: [10.1080/23251042.2018.1424497](https://doi.org/10.1080/23251042.2018.1424497); USGCRP, 2018: *Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II*, Chapter 19 (discussing rural communities) [Reidmiller, D.R., C.W. Avery, D.R. Easterling, K.E. Kunkel, K.L.M. Lewis, T.K. Maycock, and B.C. Stewart (eds.)]. U.S. Global Change Research Program, Washington, DC, USA, 1515 pp. doi: 10.7930/NCA4.2018, available at: <https://nca2018.globalchange.gov>.

<sup>2</sup> The terms “environmental justice factors” and “environmental justice considerations,” as used in this document, refer to factors that are considered the social determinants of health in the agency’s statutory and regulatory authorities that provide explicit or implicit authority to protect public health.

This document identifies a broad range of EPA legal authorities to advance environmental justice and equity in Agency actions consistent with the statutes EPA administers. *Legal Tools* is intended to help decisionmakers understand their authorities to consider and address environmental justice and equity in decision-making, and to promote meaningful engagement. It is intended to foster routine, sustained dialogue between Headquarters programs, the Regions, the Office of the General Counsel (OGC), and the Offices of Regional Counsel (ORC). This dialogue should extend to state, local and tribal partners where efforts are being made to advance environmental justice and equity in EPA-approved or authorized state and tribal programs (and similar regulatory partnerships). Routine consideration of these issues should also involve ensuring compliance with civil rights laws, including Title VI of the Civil Rights Act of 1964, by recipients of EPA funds, where appropriate.

***Legal Tools* Discusses a Range of Authorities to Address Environmental Justice, for Example:**

Under CAA § 109, NAAQS reviews identify at-risk subpopulations, which may include groups more susceptible to pollution or facing higher pollution burdens, based on evidence of higher risk of adverse health effects.

RCRA §§ 1008(a) and 4002(c) provide authority to consider and address environmental justice in the development of regulations, standards, and guidelines for solid waste management.

CERCLA § 104(a)(1) authorizes response actions “necessary to protect the public health or welfare or the environment,” which may include consideration of cumulative impacts in taking response actions.

Water infrastructure amendments to the SDWA in 2016 and 2018 authorize EPA to provide drinking water grants to assist vulnerable, small, and disadvantaged communities.

EPA is responsible for ensuring recipients of EPA funding comply with Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, and national origin (including limited English proficiency).

*Legal Tools* is not intended to prescribe when and how the Agency should undertake specific actions. While many of EPA’s legal authorities are clear, others may involve interpretive issues or consideration of legal risk calling for further analysis. Without the context of specific applications, this document does not attempt to characterize any such legal risk. Policy decisions about undertaking particular actions are the responsibility of the Agency’s headquarters and regional programs, which consider a wide range of decision-making factors, including resource constraints. OGC is committed to more frequent updates of *Legal Tools* to reflect changes in the law, emerging policy, hands-on experience, and program input. Importantly, *Legal Tools* is not an



exhaustive inventory of every conceivable EPA legal authority; rather, it attempts to identify leading opportunities to consider and integrate environmental justice into decision-making.

### Recent Actions Taken by EPA to Address Environmental Justice Concerns

In May 2021, Administrator Regan requested that the City of Chicago prepare a robust environmental justice analysis before deciding whether to issue an operating permit for a metal shredding facility in a Southside Chicago community that is already overburdened by pollution. The City committed to conducting a health impact assessment before making a final decision on the permit.

In September 2021, Region 5, in comments submitted on a proposed CAA permit for an asphalt plant in Flint, MI, recommended that the state conduct a cumulative analysis of the projected air emissions from the plant and nearby industrial facilities.

In St. John the Baptist Parish, EPA used its CAA authority to require the Denka chloroprene facility in LaPlace, Louisiana to install fence-line monitors to identify sources of emissions onsite, allowing the EPA and communities to better understand air pollutants in a quick, reliable way.

*Legal Tools* is informed by a number of Executive Orders across administrations that establish federal executive policy on environmental justice and equity.<sup>3</sup> EO 12898 lays the foundation of that policy, directing each federal agency, to the greatest extent practicable and permitted by law, to "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." As underscored in the Presidential memorandum accompanying EO 12898,<sup>4</sup> existing environmental and civil rights<sup>5</sup> statutes provide many opportunities to ensure that all communities and persons live in a safe and healthful environment.<sup>6</sup> EO 14008 affirms the importance of environmental justice, and makes explicit that agencies should address "climate-related and other cumulative impacts on disadvantaged communities, as well as the accompanying economic challenges of such impacts."<sup>7</sup> EO 14008 further declares a policy "to secure environmental justice

<sup>3</sup> See, EOs 12898 *Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations*; 13985 *Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*; 13563 *Improving Regulation and Regulatory Review*; and, 14008 *Tackling the Climate Crisis at Home and Abroad*.

<sup>4</sup> See <https://www.govinfo.gov/content/pkg/WCPD-1994-02-14/pdf/WCPD-1994-02-14-Pg279.pdf>.

<sup>5</sup> EPA enforces several federal civil rights laws that, together, prohibit discrimination on the bases of race, color, national origin (including limited-English proficiency), disability, sex, age, and retaliation/intimidation in programs or activities that receive federal financial assistance from the EPA. See 40 C.F.R. Part 7; Title VI of the Civil Rights Act of 1964 (42 United States Code §§ 2000d to 2000d-7); Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794); Title IX of the Education Amendments of 1972 (20 U.S.C. §§ 1681 et seq.); Section 13 of the Federal Water Pollution Control Act Amendments of 1972 Pub. L. 92-500 § 13, 86 Stat. 903 (codified as amended at 33 U.S.C. § 1251); Age Discrimination Act of 1975 (42 U.S.C. § 6101 et seq.); 40 C.F.R. parts 5 and 7.

<sup>6</sup> Civil rights laws also create independent obligations for recipients of federal financial assistance to provide meaningful access to their programs and activities, including access for those with limited English proficiency, as well as to ensure their programs and activities do not result in discriminatory effects. See Chapter 7 "Civil Rights in Federal Assistance Programs," *infra*. States may also have independent obligations to consider environmental justice, either procedurally or substantively, based on state environmental justice or civil rights laws.

<sup>7</sup> Addressing climate-related cumulative impacts involves both decreasing GHG emissions to reduce longer term climate risks, and promoting resilience to climate change in vulnerable communities. See, e.g., *Climate Change and*

and spur economic opportunity for disadvantaged communities that have been historically marginalized and overburdened by pollution and underinvestment in housing, transportation, water and wastewater infrastructure, and health care.”<sup>8</sup> EO 13985 establishes a whole-of-government equity agenda to address inequities in the implementation of laws, policies and programs and in the protection afforded by those laws and policies, to promote equal opportunity for underserved communities that have been denied fair, just, and impartial treatment.<sup>9</sup> With respect to rulemaking, EO 13563<sup>10</sup> reminds federal agencies that they may consider equity, human dignity, fairness, and distributional considerations in rulemaking, where appropriate and permitted by law. The Presidential Memorandum on Modernizing Regulatory Review also calls for procedures to “take into account the distributional consequences of regulations, including as part of any quantitative or qualitative analysis of the costs and benefits of regulations, to ensure that regulatory initiatives appropriately benefit and do not inappropriately burden disadvantaged, vulnerable, or marginalized communities.”<sup>11</sup> *Legal Tools* helps identify specific authorities available to EPA to fulfill these EOs and carry out the Agency’s core mission.

An understanding of the Agency’s legal tools for advancing environmental justice and equity is critical because EOs themselves are not an independent source of legal authority. Therefore, this document identifies where EPA’s authorities mandate or provide the agency with discretion to consider the environmental justice-related impacts of its actions, and uses the term “communities with environmental justice concerns” to refer to communities overburdened by pollution as identified in EO 12898. Those communities include communities of color, low-income communities, and Indigenous Peoples.<sup>12</sup> Generally, where EPA has authority to consider impacts to those communities, EPA is also likely to have authority to consider equitable treatment of underserved communities consistent with EO 13985.

This document relies on a number of other key concepts and terms, in addition to those discussed above:

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*Social Vulnerability in the United States*, U.S. ENV’T PROT. AGENCY, [https://www.epa.gov/system/files/documents/2021-09/climate-vulnerability\\_september-2021\\_508.pdf](https://www.epa.gov/system/files/documents/2021-09/climate-vulnerability_september-2021_508.pdf); *Climate Adaptation Action Plan*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/system/files/documents/2021-09/epa-climate-adaptation-plan-pdf-version.pdf> (“Of particular concern is that the impacts of climate change within and across U.S. regions and across the world will not be distributed equally . . . EPA will prioritize the most vulnerable populations with the goal of attaining a more equitable, just, and resilient future within and across communities.”).

<sup>8</sup> Section 223 of EO 14008 also establishes the Justice40 Initiative, considering federal investments toward a goal that 40 percent of the overall benefits flow to disadvantaged communities, including investments in the areas of remediation and reduction of legacy pollution, and the development of critical clean water infrastructure. Exec. Order No. 14008, 86 Fed. Reg. 7619 (Jan. 27, 2021).

<sup>9</sup> 86 Fed. Reg. 7009 (Jan. 20, 2021).

<sup>10</sup> 76 Fed. Reg. 3821 (Jan. 18, 2011).

<sup>11</sup> See *Modernizing Regulatory Review*, THE WHITE HOUSE (Jan. 20, 2021) <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/modernizing-regulatory-review/>.

<sup>12</sup> “Indigenous Peoples” includes indigenous and tribal community-based organizations; individual members of federally recognized tribes, including those living on a different reservation or living outside Indian country; individual members of state-recognized tribes; Native Hawaiians; Native Pacific Islanders; and individual Native Americans. “Tribes” for purpose of this document refers to federally recognized tribes unless otherwise specified. “Federally recognized tribe” includes an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1944, 25 U.S.C. § 479a.

- ***Disproportionate impacts*** refers to differences in impacts or risks that are extensive enough that they may merit Agency action and should include cumulative impacts where appropriate.<sup>13</sup>
- ***Environmental justice*** is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.<sup>14</sup>
- ***Equity*** is the consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment.<sup>15</sup>
- ***Fair treatment*** means no group of people should bear a disproportionate share of the negative environmental consequences resulting from industrial, governmental, and commercial operations or policies.<sup>16</sup>
- ***Meaningful involvement*** means: (1) potentially affected communities have an appropriate opportunity to participate in decisions about a proposed activity that will affect their environment and/or health; (2) the public's contribution can influence the regulatory agency's decision; (3) the concerns of all participants involved will be considered in the decision-making process; and (4) decision-makers seek out and facilitate the involvement of those potentially affected.<sup>17</sup>
- ***Underserved communities*** refers to populations sharing a particular characteristic, as well as geographic communities, that have been systematically denied a full opportunity to participate in aspects of economic, social, and civic life, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality.<sup>18</sup>

While EPA has issued several guidance documents on environmental justice,<sup>19</sup> these documents do not prescribe a single specific approach or methodology for conducting an environmental justice analysis. Under existing rulemaking guidance, an action raises

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<sup>13</sup> See, e.g., *Technical Guidance for Assessing Environmental Justice in Regulatory Analysis*, U.S. ENV'T PROT. AGENCY, at 4. [https://www.epa.gov/sites/production/files/2016-06/documents/ejtg\\_5\\_6\\_16\\_v5.1.pdf](https://www.epa.gov/sites/production/files/2016-06/documents/ejtg_5_6_16_v5.1.pdf)

<sup>14</sup> <https://www.epa.gov/environmentaljustice/learn-about-environmental-justice>.

<sup>15</sup> See, EO 13985 *Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*.

<sup>16</sup> <https://www.epa.gov/environmentaljustice/learn-about-environmental-justice>.

<sup>17</sup> *Id.*

<sup>18</sup> See, EO 13985 *Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*.

<sup>19</sup> See, e.g., *Guidance on Considering Environmental Justice During the Development of an Action*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/environmentaljustice/guidance-considering-environmental-justice-duringdevelopment-action>; *Technical Guidance for Assessing Environmental Justice in Regulatory Analysis*, U.S. ENV'T PROT. AGENCY, [https://www.epa.gov/sites/production/files/2016-06/documents/ejtg\\_5\\_6\\_16\\_v5.1.pdf](https://www.epa.gov/sites/production/files/2016-06/documents/ejtg_5_6_16_v5.1.pdf); *EPA Activities To Promote Environmental Justice in the Permit Application Process*, 78 Fed. Reg. 27220 (May 9, 2013); *Guidance for Consideration of Environmental Justice in Clean Air Act 309 Reviews*, U.S. ENV'T PROT. AGENCY (1999), [https://www.epa.gov/sites/default/files/2014-08/documents/enviro\\_justice\\_309review.pdf](https://www.epa.gov/sites/default/files/2014-08/documents/enviro_justice_309review.pdf)

environmental justice concerns if it could: (1) create new disproportionate impacts;<sup>20</sup> (2) exacerbate existing disproportionate impacts; or (3) present opportunities to address existing disproportionate impacts through the action under development.<sup>21</sup> The guidance also indicates it is the role of the analyst to assess and present differences in anticipated impacts across communities with environmental justice concerns—for both the baseline and proposed action or options, using the best available information (quantitative and/or qualitative) to inform the decisionmaker and the public.<sup>22</sup>

Concerns about cumulative impacts have been raised by environmental justice communities since the 1980s.<sup>23</sup> In response, EO 12898 directed agencies to perform “[e]nvironmental human health analyses, whenever practicable and appropriate, [to] . . . identify multiple and cumulative exposures.”<sup>24</sup> As the chapters of *Legal Tools* indicate, various environmental and civil rights statutes give EPA authority to assess, consider and address cumulative impacts<sup>25</sup> and risks,<sup>26</sup> e.g., a community’s cumulative exposure to pollutant and non-pollutant stressors through multiple pathways and from multiple sources. Non-pollutant stressors include, for example, indicators of sensitive populations (such as incidence of asthma, cardiovascular disease, or low birthweight), and socioeconomic factors (such as educational attainment, linguistic isolation, and poverty).<sup>27</sup> Current EPA guidance emphasizes the importance of considering cumulative impacts,<sup>28</sup> and is explicitly reinforced by the direction in EO 14008 to address “climate-related and other cumulative impacts on disadvantaged communities . . . .”<sup>29</sup> And in 2003, EPA published broad guidance on

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<sup>20</sup> EPA’s 2015 *Guidance on Considering Environmental Justice During the Development of Regulatory Actions*, at 9 notes, however, that “consistent with its mission, the Agency may address adverse impacts in the context of developing regulatory actions without the need to show that the impacts are disproportionate. Unless prohibited by statutory or regulatory authority, the EPA can and should consider action to address adverse health and environmental impacts on populations of concern, consistent with this guidance.”

<sup>21</sup> See, e.g., *Technical Guidance for Assessing Environmental Justice in Regulatory Analysis*, supra note 8, at 4.

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

<sup>23</sup> Solomon GM, Faust JB, Morello-Frosch, R, Zeise, L. Integrating environmental justice into public health: approaches for understanding cumulative impacts. *Front Public Health Serv Sys Res* 2016; 5(5):9–14.

<sup>24</sup> 59 Fed. Reg. 7629 (Feb. 16, 1994), Sec. 3-301(b).

<sup>25</sup> The terms “cumulative impacts” and “cumulative effects” are used synonymously throughout the document.

<sup>26</sup> EPA has defined cumulative risks as the combined risks from aggregate exposure to multiple agents and stressors. U.S. EPA. Framework for Cumulative Risk Assessment. 2003. U.S. Environmental Protection Agency, Office of Research and Development, National Center for Environmental Assessment, Washington Office, Washington, DC, EPA/600/P-02/001F. For the purpose of this document, the term “cumulative impact” is used unless there is a statute or regulation that requires the analysis of “cumulative risks.”

<sup>27</sup> See, Social Determinants of Health, CDC webpage at <https://www.cdc.gov/publichealthgateway/sdoh/index.html>.

Two additional useful concepts, as defined in EPA guidance, also help capture these concerns: 1) “vulnerability” is defined as “physical, chemical, biological, social, and cultural factors that result in certain communities and population groups being more susceptible or more exposed to environmental toxins, or having compromised ability to cope with and/or recover from such exposure” and 2) “susceptibility” is defined as “the increased likelihood of an adverse effect, often discussed in terms of relationship to a factor that can be used to describe a population group (e.g., life stage, demographic feature, or genetic characteristic). The term refers to an individual’s responsiveness to exposure.” *Technical Guidance for Assessing Environmental Justice in Regulatory Analysis*, U.S. ENV’T PROT. AGENCY, [https://www.epa.gov/sites/production/files/2016-06/documents/ejtg\\_5\\_6\\_16\\_v5.1.pdf](https://www.epa.gov/sites/production/files/2016-06/documents/ejtg_5_6_16_v5.1.pdf) (Glossary p. 69).

<sup>28</sup> See, e.g., *Technical Guidance for Assessing Environmental Justice in Regulatory Analysis*, U.S. ENV’T PROT.

AGENCY, [https://www.epa.gov/sites/production/files/2016-06/documents/ejtg\\_5\\_6\\_16\\_v5.1.pdf](https://www.epa.gov/sites/production/files/2016-06/documents/ejtg_5_6_16_v5.1.pdf), supra note 8 (section 4.2.4, Multiple Stressors, Multiple Sources, and Cumulative Impacts, p. 18).

<sup>29</sup> Exec. Order 14008, 86 Fed. Reg. 7619 (Jan. 27, 2021).

preparing cumulative risk assessments, tools to analyze, characterize, and possibly quantify the combined risks to human health or the environment from multiple agents or stressors.<sup>30</sup>

How EPA may consider and address cumulative impacts will depend on the statutory and regulatory context. Although they may vary in their scope and definition of cumulative impacts, there are several statutory provisions that afford opportunities to take such impacts into account in decision-making. Depending on the context, consideration may be given to:

- The cumulative effects of multiple chemicals through a particular pathway of exposure (such as inhalation, ingestion or absorption) or medium (such as air or drinking water);
- The cumulative effects of chemicals through multiple pathways of exposure or media; and
- The cumulative effects of chemical and non-pollutant stressors.

#### **Examples of Explicit EPA Statutory Authority to Consider Cumulative Impacts**

The Food Quality Protection Act, Public Law 104-170, requires EPA to aggregate the pesticide exposures from all sources—food, drinking water, and use of pesticides resulting in non-occupational exposures—and also mandates that EPA take into account the cumulative effects from exposures to multiple pesticides that have a common mechanism of toxicity.

The Agency has authority to require the development of information on cumulative or synergistic effects and any other effect that may present an unreasonable risk of injury to health or the environment.

In addition to explicit statutory authority to consider cumulative impacts (see Box above), there are instances where EPA has explicit regulatory authority to consider cumulative impacts. For Corps-issued Clean Water Act § 404 permits, for example, EPA may comment on and encourage the U.S. Army Corps of Engineers to consider, among other factors, “cumulative effects” when conducting the public interest review.<sup>31</sup> Moreover, in both statute and regulation, as discussed throughout this document, EPA has additional implicit authorities to consider cumulative impacts in the context of environmental justice, sometimes more open-ended, and in other contexts partially constrained. Although EPA may have authority in a particular statute or regulatory context, the Agency may or may not have fully utilized this authority in the past.

While much of EPA’s EJ guidance to date has focused on the rulemaking process, EPA is strongly committed to advancing environmental justice and equity in permitting, and issued guidance on meaningful outreach to permit writers in 2013.<sup>32</sup> EPA’s authority to consider and address environmental justice in permitting has been affirmed by EPA’s Environmental Appeals

<sup>30</sup> U.S. EPA. Framework for Cumulative Risk Assessment. 2003. U.S. Environmental Protection Agency, Office of Research and Development, National Center for Environmental Assessment, Washington Office, Washington, DC, EPA/600/P-02/001F.

<sup>31</sup> 33 C.F.R. § 320.4(a)(1).

<sup>32</sup> See EPA Activities to Promote Environmental Justice in the Permit Application Process, 78 Fed. Reg. 27,220, 27,222 (May 9, 2013).

Board (EAB).<sup>33</sup> For example, the EAB has explained that, in Underground Injection Control (UIC) permitting under the Safe Drinking Water Act, there are two areas where EPA has the discretion to implement EO 12898: the participation procedures of 40 C.F.R. part 124 and the UIC regulatory “omnibus authority.”<sup>34</sup> EPA has discretion under 40 C.F.R. part 124 “to assure early and ongoing opportunities for public involvement in the permitting process,” “if a Region has a basis to believe” that a proposed UIC permit “may somehow pose a disproportionately adverse effect on the drinking water of a minority or low-income population.”<sup>35</sup> Under the UIC regulatory omnibus authority, a Region has authority to impose, on a case-by-case basis, conditions necessary to prevent the migration of fluids into underground sources of drinking water.<sup>36</sup> It is also important to note, more generally, a number of federal courts have recently made clear the legal consequences, including remanding agency actions, of agencies’ not carefully considering environmental justice concerns when they do so.<sup>37</sup>

Beyond rulemaking and permitting, EPA is re-committed to moving expeditiously toward employing all of its existing environmental statutes and regulations, where appropriate, to consider and address environmental justice and equity concerns. These authorities encompass the full breadth of the Agency’s activities—including standard-setting, licensing, cleanup, emergency response, infrastructure funding, awarding grants, planning, reviews, monitoring, reporting, research, procurement, working with sister agencies, state program oversight, and ensuring meaningful public involvement.

In addition to identifying a wide range of opportunities to advance environmental justice and equity in EPA’s organic statutes, this document addresses civil rights laws and EPA implementing regulations that independently apply to recipients of EPA funding. Title VI of the Civil Rights Act of 1964 prohibits actions that either intentionally discriminate on the basis of race, color, or national origin (including limited English proficiency) or have a disparate impact.<sup>38</sup> Moreover, Title VI applies even where all applicable environmental requirements are met. Beyond Title VI, EPA enforces federal civil rights laws and regulations that, together, also prohibit discrimination on the basis of disability, sex, age, and retaliation/intimidation in programs or activities receiving EPA funding.

Finally, although *Legal Tools* does not cover EPA’s vital enforcement authorities under the environmental statutes, guidance on addressing environmental justice and equity when exercising the agency’s enforcement authorities is readily available on the Office of Enforcement and Compliance Assurance (OECA) environmental justice website.<sup>39</sup> OECA has established specific enforcement program goals to advance environmental justice, which include increasing inspections and cleanup oversight in overburdened communities, pursuing timely and comprehensive relief

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<sup>33</sup> See *In re Chemical Waste Management*, 6 E.A.D. 66 (E.P.A.), 1995 WL 395962 (June 25, 1995) (RCRA); *In re Prairie State Generating Company*, 13 E.A.D. 1, 123 (EAB 2006) (citing *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 174–75 (EAB 1999)) (CAA).

<sup>34</sup> *In re Muskegon Development Co.*, 17 E.A.D. 740, 754 (EAB 2019) (citing *In re Envotech, L.P.*, 6 E.A.D. 260, 280 (EAB 1996)).

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

<sup>36</sup> *Id.* See 40 C.F.R. § 144.52(a)(9).

<sup>37</sup> See, e.g., *Vecinos para el Bienestar de la Comunidad Costera v. FERC*, 6 F.4th 1321 (D.C. Cir. 2021); *Friends of Buckingham v. Air Pollution Control Board*, 947 F. 3d 68, 85 (4<sup>th</sup> Cir. 2020); *Standing Rock Sioux v. U.S. Army Corps of Engineers*, 255 F.Supp.3d 101, 136-140 (D. D.C. 2017).

<sup>38</sup> 42 U.S.C. §§ 2000d–2000d-7; 40 C.F.R. parts 5 and 7.

<sup>39</sup> <https://www.epa.gov/enforcement/environmental-justice-enforcement-and-compliance-assurance-initiative>

through remedies with tangible benefits for communities, enhancing transparency through greater public access to compliance data, and increasing engagement with communities impacted by environmental violations and assistance to victims of environmental crimes. These efforts are critical to ensuring that strong environmental laws work to benefit everyone.





# **CHAPTER 1**

## **Clean Air Act Programs**



# CHAPTER ONE: CLEAN AIR ACT PROGRAMS

EPA has a variety of authorities that present, or may present, opportunities to promote environmental justice under programs implementing the Clean Air Act (CAA).<sup>40</sup> The following discussion focuses on addressing and describing opportunities identified to date in permitting and rule development under the CAA.<sup>41</sup>

The potential for taking environmental justice considerations into account varies across CAA programs. In some programs, EPA exercises direct regulatory authority. In other programs, the initial responsibility to select and implement air pollution control measures rests with the states and with authorized federally recognized tribes. Nevertheless, across all programs, the CAA affords EPA opportunities to consider the impacts of its actions on communities with environmental justice concerns<sup>42</sup> in how it defines or interprets requirements, whether implemented by states and tribes, and in a variety of standard-setting and permitting contexts. In general, program and regional offices should consult with the relevant ORC and OGC attorneys regarding potential legal issues associated with considering, not considering, or how to consider environmental justice in their CAA work.

This chapter groups the relevant CAA authorities into five broad categories: (1) standard setting, which includes new source performance standards, standards for solid waste incinerators, hazardous air pollutant standards, national ambient air quality standards (NAAQS), and mobile source standards; (2) NAAQS implementation; (3) permitting, which includes the new source review preconstruction permit program and the Title V operating permit program; (4) provisions relating to Clean Air Act implementation in Indian country; and (5) miscellaneous additional provisions.

## STANDARD SETTING

### I. NEW SOURCE PERFORMANCE STANDARDS

Section 111 of the CAA contains several provisions that authorize the incorporation of environmental justice considerations, such as impacts on or participation in decision-making by

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<sup>40</sup> 42 U.S.C. §§ 7401–7671q.

<sup>41</sup> In addition to its authority under the CAA, EPA has a responsibility to ensure that recipients and subrecipients of federal financial assistance from EPA—including states, municipalities, and other public and private entities—comply with federal civil rights laws that prohibit discrimination on the basis of race, color, national origin (including limited English proficiency), disability, sex and age, including Title VI of the Civil Rights Act. Moreover, EPA’s implementing regulation generally prohibits discrimination in any programs, activities and services receiving federal financial assistance. *See* Chapter 7 for a more in-depth discussion of civil rights authorities.

<sup>42</sup> This document uses the term “communities with environmental justice concerns” to refer to communities overburdened by pollution as identified in EO 12898. Those communities include communities of color, low-income communities, and Indigenous communities. Generally, where EPA has authority to consider impacts to those communities, EPA is also likely to have authority to consider equitable treatment of underserved communities consistent with EO 13985. “Underserved communities” in EO 13985 refers to populations sharing a particular characteristic, as well as geographic communities, that have been systematically denied a full opportunity to participate in aspects of economic, social, and civic life, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality.

communities with environmental justice concerns. First, § 111(b)(1)(A) requires EPA to list categories of stationary sources that “cause[], or contribute[] significantly to, air pollution which may be reasonably anticipated to endanger public health or welfare.” After listing a source category, EPA is then required to promulgate standards of performance for new sources pursuant to § 111(b)(1)(B) and, for certain pollutants, to promulgate regulations pursuant to § 111(d) under which states establish standards of performance for existing sources. Together, these two provisions provide authority to facilitate the advancement of environmental justice by giving EPA discretion to consider how or whether emissions of certain categories of stationary sources have a disparate impact on communities with environmental justice concerns, and to consider the health impacts of the emissions from those sources. First, EPA retains the authority to add new source categories to the list and could consider disparate environmental justice impacts as one factor in deciding what categories to add. Second, EPA has the authority to prioritize the promulgation of standards for source categories that have a disparate health impact on communities with environmental justice concerns.<sup>43</sup> EPA has already promulgated standards pursuant to § 111(b) for all of the listed source categories and is required by statute to review and, if appropriate, revise those standards at least every eight years. EPA retains the authority to review and revise the standards of performance more quickly where communities with environmental justice concerns are disparately impacted by pollution from a particular source category, as well as to prioritize the issuance of standards pursuant to § 111(d) for such source categories, where authorized under the statute.

Additionally, § 111(d) requires EPA to establish a “procedure similar to that provided by [§ 110]” under which states submit plans that include standards of performance for existing sources. By delegating the obligation to establish that procedure to the Agency, the statute provides EPA with the discretion to specify the individual requirements that must be satisfied in the state planning process under § 111(d). EPA could exercise that discretion to establish requirements concerning the participation of communities with environmental justice concerns. For example, the EPA has recently proposed to require states to undertake certain outreach to and meaningful engagement with communities with environmental justice concerns as part of their development of state plans in response to the proposed oil & gas emission guidelines under 40 C.F.R. 60 subpart OOOOc.<sup>44</sup>

## **II. STANDARDS FOR SOLID WASTE INCINERATORS**

### ***A. Siting Requirements***

The CAA provides specific authority to EPA to establish siting requirements for solid waste incinerators that could include environmental justice considerations, such as impacts on or participation in decision-making by communities with environmental justice concerns. Section 129(a)(3) of the CAA provides that standards for new solid waste incinerators include “siting requirements that minimize, on a site-specific basis, to the maximum extent practicable, potential risks to public health or the environment.”

The current standards for large and small municipal waste incinerators require new sources to develop a siting analysis that evaluates how the facility’s combustion of municipal waste affects ambient air quality, visibility, soils, vegetation, and other relevant factors. In that

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<sup>43</sup> In determining priorities for promulgating standards for listed categories of sources that had been listed at the time of the 1990 CAA Amendments, EPA was directed to consider under § 111(f)(2)(B) “the extent to which each such pollutant may reasonably be anticipated to endanger public health or welfare.”

<sup>44</sup> 86 Fed. Reg. 63,110, 63,253–55 (Nov. 15, 2021).

analysis, the source must consider the impacts from other industrial facilities near the site. New municipal waste incinerators must also develop a materials separation plan that addresses separation of certain municipal waste components to make such components available for recycling. The siting plans and the materials separation plans must be made available to the public for comment. Similarly, in September 1997, EPA issued initial emissions standards for medical waste incinerators under § 129 of the CAA. These standards require new sources to develop a siting analysis that considers air pollution control alternatives that minimize, on a site-specific basis and to the maximum extent practicable, potential risks to public health and the environment. EPA issued revisions to significantly tighten the medical waste incinerator standards in October 2009 but did not revise these siting requirements.

The emissions standards for sewage sludge incinerators and commercial and industrial solid waste incinerators also include siting requirements for new sources. Specifically, owners or operators of new sewage sludge incinerators are required to conduct a siting analysis, which includes submitting a report that evaluates site-specific air pollution control alternatives that minimize potential risks to public health or the environment, considering costs, energy impacts, non-air environmental impacts, and any other factors related to the practicability of the alternatives. In conducting an analysis to meet the siting requirements of more recent and earlier municipal and medical waste incinerators rules, the owner or operator of the planned new source could consider environmental justice factors as part of the analysis of minimizing potential risks to public health, to the extent a community or demographic category is more vulnerable to the air pollution produced by the source. The regulatory text of the siting requirements does not currently require such consideration; however, EPA could consider revising the regulations to do so.

### ***B. Residual Risk***

Section 129(h)(3) requires EPA to promulgate standards to address residual risk from a category of solid waste incineration units if EPA determines such standards are required to protect public health with an ample margin of safety and to prevent adverse environmental effects, taking into consideration costs, energy, safety, and other relevant factors. If EPA determines such standards are required, EPA may consider and regulate only the pollutants listed in § 129(a)(4). These pollutants are particulate matter, opacity, sulfur dioxide, hydrogen chloride, oxides of nitrogen, carbon monoxide, lead, cadmium, mercury, and dioxins and dibenzofurans. This provision of § 129 provides EPA with authority to determine whether additional controls are necessary to protect public health with an ample margin of safety, including the health of communities with environmental justice concerns.

## **III. HAZARDOUS AIR POLLUTANT STANDARDS**

### ***A. List of Hazardous Air Pollutants***

Section 112(b) of the CAA contains an initial list of hazardous air pollutants (HAPs) and states that EPA shall, “where appropriate,” revise the list through rulemaking to add substances that “present, or may present . . . a threat of adverse human health effects . . . or adverse environmental effects.”<sup>45</sup> Additions may be made in response to a petition or on the Agency’s own initiative. EPA is required to add an air pollutant to the HAPs list if it determines, or if a petitioner shows, that “emissions, ambient concentrations, bioaccumulation or deposition of the

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<sup>45</sup> 42 U.S.C. § 7412.

substance are known to cause or may be reasonably anticipated to cause adverse effects to human health or adverse environmental effects.”<sup>46</sup> In reaching such a determination, EPA has the authority to take into account environmental justice factors in its consideration of adverse human health effects to the extent a particular demographic category is a population that is more vulnerable to the air pollutant at issue.

### ***B. MACT Standards***

Under § 112 of the CAA, EPA is required to establish emissions standards for major sources of HAPs, requiring the maximum achievable degree of reduction in HAPs emissions. These standards are technology-based and are calculated using the emission control achieved by the best performing sources. Therefore, EPA does not have discretion to consider public health impacts in setting the floor for the maximum achievable control technology (MACT) standards.

Section 112(d)(4) of the CAA provides that, for HAPs with an established health threshold, EPA may consider such health threshold when establishing emissions standards under § 112(d). This provision has historically been interpreted as allowing EPA to set emissions standards that are less stringent than the MACT floor, where a less stringent standard would ensure that the health threshold is not exceeded, with an ample margin of safety. The legislative history indicates that a health-based emissions limit under § 112(d)(4) should be set at the level at which no observable effects occur and provide for an ample margin of safety. EPA has exercised this discretionary authority in the past to effectively exempt from the MACT requirement pollutants for which EPA concluded there was a health threshold.

The D.C. Circuit in *United States Sugar Corp. v. EPA*<sup>47</sup> upheld EPA’s decision not to exercise its authority under § 112(d)(4) to establish a health-based standard for boilers under § 112(d)(4). The court held that the Act “allows, but does not require” EPA to establish a standard that is less stringent than a MACT standard under certain conditions. In particular, the court agreed that EPA could consider the adverse health effects due to exposure to other HAP or air emissions from other sources nearby as well as emissions reductions in non-HAP pollutants that would be achieved as co-benefits of a numeric MACT limit in deciding whether to establish a health-based standard. The court’s holding supports EPA’s authority to reject use of § 112(d)(4) to set less stringent standards based on consideration of factors such as the potential for cumulative adverse health effects due to concurrent exposure to other HAPs with similar biological endpoints, from either the same or other source categories, where the concentration of the threshold pollutant emitted from the given source category is below the health threshold; the potential impacts on ecosystems of releases of the pollutant; and reductions in criteria pollutant emissions and other co-benefits that would be achieved via the MACT standard. These factors could be applied to consider impacts on communities with environmental justice concerns, particularly in urban areas where there may be a large number of industrial sources of HAPs located close together.

### ***B. GACT Standards***

EPA has discretion to set emissions standards representing generally available control technology (GACT) for area sources (i.e., sources that are not major sources), instead of MACT standards. The Senate report on the 1990 CAA Amendments describes GACT as “methods,

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<sup>46</sup> 42 U.S.C. § 7412.

<sup>47</sup> *United States Sugar Corp. v. EPA*, 830 F.3d 579 (D.C. Cir. 2016).

practices, and techniques which are commercially available and appropriate for application by the sources in the category considering economic impacts and the technical capabilities of the firms to operate and maintain the emissions control systems.”<sup>48</sup> Like MACT, GACT standards are technology-based and the CAA does not explicitly provide for consideration of public health risk in establishing the GACT standards. However, the CAA does not specify any criteria that EPA must consider when exercising its authority to promulgate GACT standards, as opposed to MACT standards, for an area source category or subcategory. EPA therefore has the authority to consider non-technology factors, including environmental justice considerations, in choosing between MACT or GACT standards for individual area source categories or subcategories.

### ***C. Regulation of Area Sources Based on an “Adverse Effects” Finding***

Section 112(c)(3) of the CAA provides that EPA shall list each area source category or subcategory that the Administrator finds presents a threat of adverse effects to human health or the environment (by such sources individually or in the aggregate) warranting regulation under § 112. EPA must then issue § 112(d) emission standards for the listed category or subcategory. EPA has previously stated that it “believes that it has discretion to consider a range of health effect endpoints and exposure criteria in making [an adverse effect finding under § 112(c)(3)]” and that it “may consider factors such as the number of sources in a category, the quantity of emissions, the toxicity of the HAPs, the potential for individual and population exposures and risks, the geographical distribution of the sources and the reasonableness of control measures.”<sup>49</sup> Although EPA is not aware of any previous adverse effect finding under § 112(c)(3) that specifically considered environmental justice factors, the range of factors identified above could include consideration of potential adverse health effects to communities with environmental justice concerns.

### ***D. Residual Risk***

Section 112(f) of the CAA requires EPA within eight years after promulgation of each technology-based emission standard for major sources under § 112(d) to review and revise such standards, if necessary to protect public health with an ample margin of safety and to prevent adverse environmental effects, taking into consideration costs, energy, safety, and other relevant factors. For many years, EPA has included an environmental justice analysis as part of its rulemakings that provides information on the impacts of proposed rules across different demographics. If EPA determines that additional controls are necessary to protect public health with an ample margin of safety, including the health of impacted communities with environmental justice concerns, EPA will promulgate regulations with additional controls to provide such protection.

## **IV. NATIONAL AMBIENT AIR QUALITY STANDARDS (NAAQS)**

Section 109(d) of the CAA provides that EPA periodically review and revise, as appropriate, the NAAQS, which are designed “to protect the public health” and the public welfare. In setting the NAAQS, EPA focuses on the health effects on population groups that are at higher risk of adverse health effects. Thus, the NAAQS are required to take certain environmental justice factors into account as part of the standard-setting process where those

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<sup>48</sup> S. Rep. No. 101-228 (1989).

<sup>49</sup> 59 Fed. Reg. 29750, 29754–55 (June 9, 1994).

factors are consistent with consideration of at-risk populations. The legislative history of § 109 indicates that a primary (health-based) standard is to be set at “the maximum permissible ambient air level . . . which will protect the health of any [sensitive] group of the population,” and that for this purpose “reference should be made to a representative sample of persons comprising the sensitive group rather than to a single person in such a group.”<sup>50</sup> This can include, for example, groups that are more vulnerable to harm from a given exposure to a pollutant like ozone, such as persons with asthma or pre-existing respiratory conditions, or groups that are more exposed to the pollution, such as children or outdoor workers. In each NAAQS review EPA identifies at-risk subpopulations based on evidence about increased risk to these groups.

## V. MOBILE SOURCES

### ***A. Fuel Controls or Prohibitions***

Section 211(c) of the CAA provides that EPA may control or prohibit the manufacture or sale of any fuel or fuel additive that causes or contributes to air pollution that may reasonably be anticipated to endanger public health or welfare. As with other regulations implementing health-based standards, EPA can take into account impacts on “sensitive populations” in setting and designing standards under § 211(c). EPA used the predecessor of current § 211(c) to control the use of lead in gasoline to protect the public health, considering among other factors the impact of ambient lead and related blood-lead levels on children, including children living in cities.<sup>51</sup> In the 1977 amendments to the CAA, Congress cited this example in support of its revisions to § 211(c) and various other CAA provisions. The current language on endangerment to public health or welfare in § 211(c) and other provisions is designed, among other things, “[t]o assure that the health of susceptible individuals, as well as healthy adults, will be encompassed in the term ‘public health.’”<sup>52</sup>

### ***B. Motor Vehicles and Nonroad Engines and Vehicles***

Section 202(a) of the CAA provides for the regulation of emissions from new motor vehicles and engines that cause or contribute to air pollution, and that, in the judgment of the Administrator, may reasonably be anticipated to endanger public health or welfare. Similar language is found in § 213(a) for nonroad engines and vehicles. As in the § 211(c) context, EPA has the authority to take into account impacts on sensitive populations from both engine emissions and upstream emissions (from fuel production) in setting and designing standards.

### ***C. Renewable Fuel Standards***

Section 211(o) of the CAA directs EPA to ensure the use of renewable fuels in transportation fuel. Section 211(o)(2)(B)(ii) authorizes EPA to establish renewable fuel volumes for certain years based on its consideration of various economic and environmental factors. EPA has authority under this provision to account for impacts on communities with environmental justice concerns. Among other things, EPA is required to consider “the impact of the use of

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<sup>50</sup> S. Rep. No. 91-1196, at 10 (1970); see also *Coalition of Battery-Recyclers Ass’n v. EPA*, 604 F.3d 613 (D.C. Cir. 2010) (“this court has held that ‘NAAQS must protect not only average healthy individuals, but also “sensitive citizens”’ such as children, and ‘[i]f a pollutant adversely affects the health of these sensitive individuals, EPA must strengthen the entire national standard.’” (quoting *American Lung Association v. EPA*, 134 F.3d 388, 389 (D.C. Cir. 1998))).

<sup>51</sup> *Ethyl v. EPA*, 541 F.2d 1, 40, 44, 47–48 (D.C. Cir. 1978).

<sup>52</sup> H.R. Rep. No. 95-294, at 50 (1977).

renewable fuels on the cost to consumers of transportation fuel and on the cost to transport goods”<sup>53</sup> and “the impact of the use of renewable fuels on other factors, including job creation, the price and supply of agricultural commodities, rural economic development, and food prices.”<sup>54</sup> These factors could affect environmental justice communities.

## NAAQS IMPLEMENTATION

The CAA provides for implementation of the NAAQS through a system of shared federal and state responsibility, assigning to the states the primary responsibility for developing and implementing enforceable strategies for attaining and maintaining the NAAQS, known as state implementation plans (SIPs), and assigning to EPA the responsibility to determine whether the states have satisfied CAA requirements. Federally recognized tribes may also develop and implement tribal implementation plans (TIPs) to protect air quality in Indian country.<sup>55</sup> EPA interprets CAA requirements through regulations and guidance documents and works cooperatively with state, local, and tribal agencies during their development of SIPs and TIPs to ensure that they address the statutory and regulatory requirements. Generally, if EPA disapproves a submitted SIP, finds that a state has failed to submit certain mandatory SIP revisions, finds that a state has failed to submit a complete submission for certain mandatory SIP revisions, or finds that any requirement of an approved plan is not being implemented, the CAA mandates that sanctions apply and that EPA promulgate a federal implementation plan (FIP), unless the state corrects the deficiency within prescribed timeframes. This section identifies opportunities to consider and promote environmental justice during the SIP development and other regulatory processes that EPA, state and local agencies, and federally recognized tribes engage in to implement the NAAQS nationwide.

## VI. AMBIENT AIR QUALITY MONITORING DATA AND MONITORING NETWORKS

The CAA authorizes EPA to promulgate regulations establishing a nationwide monitoring system and additional regulations as needed to carry out EPA’s responsibilities under the CAA.<sup>56</sup> The CAA also requires in § 110(a)(2)(B) that each implementation plan submitted by a State “provide for establishment and operation of appropriate devices, methods, systems, and procedures necessary to: (i) monitor, compile, and analyze data on ambient air quality, and (ii) upon request, make such data available to the Administrator.”

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<sup>53</sup> CAA § 211(o)(2)(B)(ii)(V).

<sup>54</sup> *Id.* (VI).

<sup>55</sup> “Indian country” is: (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. 18 U.S.C. § 1151.

<sup>56</sup> *See, e.g.*, CAA § 319(a) (requiring EPA to promulgate regulations establishing a nationwide monitoring system that, among other things, measures air quality according to a uniform air quality index, provides for monitoring stations supplementing those carried out by the states, and provides for periodic analysis of air quality and reporting by EPA to the general public); CAA § 301(a)(1) (authorizing the Administrator to “prescribe such regulations as are necessary to carry out his functions under this chapter”); 42 U.S.C. § 7412.

Pursuant to these provisions, Federal, state, local, and tribal air agencies have created and maintain a variety of ambient air monitoring systems across the United States. The existing NAAQS compliance networks, mainly the State and Local Air Monitoring Stations (SLAMS), focus on monitoring for the criteria pollutants: oxides of sulfur (with sulfur dioxide [SO<sub>2</sub>] as the indicator), oxides of nitrogen (with nitrogen dioxide [NO<sub>2</sub>] as the indicator), carbon monoxide (CO), ozone, lead, and particulate matter (PM).<sup>57</sup> EPA has established a suite of regulations that specifies network design requirements for these ambient monitors, including provisions for periodic assessment and updating of the networks in 40 C.F.R. part 58.

EPA has several means for encouraging or requiring state, local, and federally recognized tribal air agencies to consider environmental justice in the design and maintenance of their ambient air monitoring networks. First, EPA may revise the minimum criteria for monitoring networks in 40 C.F.R. part 58 to address environmental justice factors. For example, as part of the 2010 revisions to the primary NO<sub>2</sub> NAAQS, EPA recognized that the data available from the existing NO<sub>2</sub> network at the time was inadequate to fully assess compliance with the revised NAAQS, prompting the amendments to the monitoring network requirements.<sup>58</sup> EPA required changes to the monitoring network to capture short-term NO<sub>2</sub> concentrations such as those that occur near roads and community-wide NO<sub>2</sub> concentrations.<sup>59</sup> The Administrator also required the Regional Administrators to use their authority to site a specific number (40) of monitors nationwide with a primary focus on susceptible and vulnerable populations, which include asthmatics and disproportionately exposed groups. EPA determined that it was necessary and appropriate to site monitors in such locations to address the risk of increased exposure to these populations.<sup>60</sup> Similarly, as part of the 2010 revisions to the primary SO<sub>2</sub> NAAQS, the Administrator authorized the Regional Administrators to require additional SO<sub>2</sub> monitoring stations above the minimum required number in certain situations, e.g., where an area has the potential to violate the NAAQS and in locations with susceptible and vulnerable populations.<sup>61</sup>

Second, EPA may advise air agencies during their siting of new monitors and development of the annual and 5-year network assessments required under 40 C.F.R. § 58.10, which can include consideration of the ability of monitoring networks to characterize exposures to susceptible and vulnerable populations in the relevant area as part of its evaluation of these monitoring networks for compliance with CAA requirements. EPA's regulation governing the network assessments due every 5 years specifically requires that air agencies "consider the ability of existing and proposed

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<sup>57</sup> This section focuses on ambient air networks for monitoring criteria pollutants. While attaining the NAAQS is a cornerstone of achieving the public health protections promised by the Clean Air Act, other pollutants, such as hazardous air pollutants, are also often of concern to communities with environmental justice concerns. EPA does support monitoring for these other pollutants but those networks are more limited and are not subject to the regulatory provisions discussed in this section.

<sup>58</sup> 75 Fed. Reg. 6474, 6503–04 (Feb. 9, 2010).

<sup>59</sup> 75 Fed. Reg. 6474, 6503–11 (Feb. 9, 2010). The EPA also amended 40 C.F.R. part 58 to require near-roadway monitoring of PM<sub>2.5</sub> as part of the 2012 revisions to the PM<sub>2.5</sub> NAAQS, 78 Fed. Reg. 3086 (Jan. 15, 2013), and subsequently revised the minimum monitoring requirements for near-road NO<sub>2</sub> monitoring in 2013 and 2016, 78 Fed. Reg. 16184 (Mar. 14, 2013); 81 Fed. Reg. 96381 (Dec. 30, 2016)); *see also* *NO<sub>2</sub> Monitoring—Susceptible and Vulnerable Populations*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/amtic/no2-monitoring-susceptible-and-vulnerable-populations>.

<sup>60</sup> 40 C.F.R. part 58, Appendix D, 4.3.4.

<sup>61</sup> 40 C.F.R. part 58, Appendix D, 4.4.3.



sites to support air quality characterization for areas with relatively high concentrations of susceptible individuals (e.g., children with asthma), and, for any sites that are being proposed for discontinuance, the effect on data users other than the agency itself, such as nearby states and tribes or health effects studies.”<sup>62</sup> Likewise, § 1(c) of Appendix D to part 58 notes that identifying where susceptible individuals are likely to spend time outdoors is relevant for siting an ozone monitor intended to characterize maximum concentrations. EPA may, under these existing regulations, apply greater scrutiny to the network assessments for areas where susceptible and vulnerable populations may be disproportionately affected by air pollution and may recommend network design changes and/or disapprove the submitted network assessments, as appropriate, to ensure that representative air quality data is available for use in air quality planning for such areas. EPA retains authority to disapprove the annual monitoring network plans if the requirements of 40 C.F.R. part 58 are not met. Additionally, EPA’s regulations at 40 C.F.R. § 58.10 require that states provide an opportunity for public comment on their draft annual monitoring network plans. EPA may encourage public participation in state/local development of monitoring programs by, for example, informing the public through EPA’s website of draft annual monitoring network plans on which state/local agencies are taking public comment.

EPA’s February 2007 [Ambient Air Monitoring Network Assessment Guidance](#) (AAMNA Guidance) provides guidance on EPA’s monitoring regulations to Federal, state, local, and tribal air agencies and the general public and includes recommended monitor siting criteria that take environmental justice factors into account.<sup>63</sup> EPA recommends in the AAMNA Guidance that current air monitoring networks be assessed in light of a number of factors, including changes in air quality, populations, and behavior.<sup>64</sup> The AAMNA Guidance identifies assessing a community with environmental justice concern’s exposures as one purpose for monitoring networks, and identifies different ways monitoring network sites can be evaluated on that basis.<sup>65</sup> These analysis techniques allow for consideration of air pollution impacts on susceptible populations, including communities with environmental justice concerns, in determining whether an air monitoring network satisfies EPA’s regulatory requirements. In recent years, there has been growing interest among state and local governments in conducting short-term projects using low-cost air sensors (particularly those measuring PM<sub>2.5</sub>) to help characterize air quality in areas where communities with environmental justice concerns reside and to identify potential sites for new reference monitors. EPA can provide technical guidance and advice to parties interested in conducting such air sensor projects.<sup>66</sup>

In addition to assisting the annual monitoring network plan process, EPA also has the opportunity to advise air agencies on monitoring programs during their development of the infrastructure SIPs required under CAA § 110(a) for each new or revised NAAQS. For purposes of

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<sup>62</sup> 40 C.F.R. § 58.10(d). The preamble to these regulations states EPA’s intent to give monitoring organizations significant latitude in determining the complexity and depth of their response, given potential challenges in obtaining information about the distribution of susceptible individuals in specific geographic areas. 71 FR 61236, 61248 (October 17, 2006).

<sup>63</sup> Ambient Air Monitoring Network Assessment Guidance: Analytical Techniques for Technical Assessments of Ambient Air Monitoring Networks, U.S. ENV’T PROT. AGENCY (hereinafter AAMNA Guidance).

<sup>64</sup> *Id.* at 1-2.

<sup>65</sup> *Id.* at 2-1 to 2-6 (tables 2-1, 2-2, and 2-3).

<sup>66</sup> *See, e.g.*, <https://www.epa.gov/air-sensor-toolbox>.

meeting the CAA § 110(a)(2)(B) requirement concerning air quality monitors, EPA has recommended that states include in their infrastructure SIPs the statutory or regulatory provisions that provide the air agency (or agencies) with the authority and responsibility to, among other things: (1) monitor air quality for the relevant NAAQS pollutant(s) at appropriate locations in accordance with EPA’s ambient air quality monitoring network requirements, (2) submit data to EPA’s Air Quality System (AQS) in a timely manner in accordance with 40 C.F.R. part 58, and (3) provide to EPA information regarding air quality monitoring activities.<sup>67</sup> EPA guidance also states that the infrastructure SIP submission should provide assurance that the state will comply with changes in monitoring requirements related to the new or revised NAAQS.<sup>68</sup> EPA’s actions on these infrastructure SIP submissions provide an opportunity for EPA to evaluate the state legal authorities governing the relevant agencies’ actions to comply with EPA’s monitoring regulations, and to ensure that the relevant agencies are in compliance with the applicable monitoring requirements for the NAAQS at issue, in accordance with CAA § 110(a)(2)(B). State compliance with these monitoring requirements promotes environmental justice by ensuring that ambient air quality data is recorded and made publicly available consistent with EPA requirements.

Finally, EPA can help ensure that the public is informed about actual ambient air conditions by providing additional information about ambient levels of NAAQS pollutants to the general public. EPA’s “AirNow” website ([www.airnow.gov](http://www.airnow.gov)) provides useful information about ambient levels of the NAAQS pollutants based on EPA’s air quality index, and EPA’s “air trends” website ([www.epa.gov/air-trends](http://www.epa.gov/air-trends)) provides more specific information about air quality trends and ambient concentrations of the NAAQS pollutants in each of the nonattainment areas nationwide. Additionally, EPA’s “air data” website<sup>69</sup> provides more detailed data files, maps of air quality monitors, and summary reports of recorded monitor values. EPA may reference one or more of these websites in each proposed rulemaking on a SIP for a nonattainment area so that the public has access to information about air quality data and trends beyond the information that EPA typically provides for regulatory purposes. Additionally, EPA is piloting the integration of non-regulatory, supplemental air quality data from purple air sensors with AirNow data to make additional data available to the public during wildfire-related air pollution events. Providing additional information about air quality data in a form that is more accessible to the general public promotes environmental justice by enabling the public, including communities with environmental justice concerns, to develop a better understanding of air quality trends and to comment meaningfully on EPA’s actions.

## **VII. AIR QUALITY MODELING FOR GENERAL AIR QUALITY ASSESSMENTS, AIR QUALITY DESIGNATIONS, AND CALLS FOR PLAN REVISIONS**

Section 110(a)(2)(K) of the CAA requires that each SIP submitted by a state provide for the performance of such air quality modeling as the Administrator may prescribe for the purpose of predicting the effect of NAAQS pollutant emissions on ambient air quality, and for the

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<sup>67</sup> Memorandum dated September 13, 2013, from Stephen D. Page, Director, Office of Air Quality Planning and Standards, to Regional Air Directors, Regions 1–10, Subject: “Guidance on Infrastructure State Implementation Plan (SIP) Elements under Clean Air Act §§ 110(a)(1) and 110(a)(2),” at 22, 23; 42 U.S.C. § 7412.

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

<sup>69</sup> *Air Sensor Toolbox*, U.S. ENV’T PROT. AGENCY, [www.epa.gov/outdoor-air-quality-data](http://www.epa.gov/outdoor-air-quality-data).

submission of data related to such air quality modeling to EPA upon request.<sup>70</sup> EPA has used this authority, for example, in a national rule to require states to choose to conduct either modeling or new monitoring of sources emitting SO<sub>2</sub> in amounts greater than 2,000 tons per year.<sup>71</sup> In the preamble to the “Data Requirements for Characterizing Air Quality for the Primary SO<sub>2</sub> NAAQS” (DRR), EPA noted that it could use modeling information it received from states to support EPA decisions on designations and re-designations under § 107 of the CAA, as well as determinations under § 110(k)(5) regarding whether SIPs are substantially inadequate to attain or maintain the NAAQS (SIP Calls). EPA promulgated this rule, in part, due to the historically insufficient scope of the national SO<sub>2</sub> monitoring network to assess air quality near major sources, and the absence of monitors in areas of maximum ambient concentrations.

Another historical example is the Billings, Montana SIP Call, SIP and FIP undertaken in the 1990s and 2000s, in which state-conducted modeling revealed SO<sub>2</sub> NAAQS violations that were not detected by poorly-sited local monitors. This led Region 8 to issue a § 110(k)(5) SIP Call to remedy the violations.<sup>72</sup> EPA’s use of modeling to support a SIP Call in this manner was affirmed by the Ninth Circuit Court of Appeals in *Montana Sulphur & Chemical Co. v. EPA*.<sup>73</sup>

In the near term, on case-by-case bases, EPA could follow the Billings model and, under § 110(a)(2)(K), require states to conduct ambient air quality modeling in areas where communities with environmental justice concerns may be disproportionately impacted by high ambient concentrations of NAAQS pollutants, and use responsive data to determine whether to issue SIP Calls under CAA § 110(k)(5) to remedy any demonstrated NAAQS violations or to require additional monitoring under § 110(a)(2)(B) to further evaluate potential NAAQS violations. In the longer term, EPA could promulgate a DRR-like regulation, of national scope, directing states to conduct such modeling in a comprehensively identified set of areas with impacted communities with environmental justice concerns, covering any, some, or all NAAQS, particularly those for which existing monitoring networks might not detect all occurring NAAQS violations.

EPA has authority under the CAA, when promulgating new or revised NAAQS, to simultaneously promulgate implementation regulations that include prescribed modeling regulations under § 110(a)(2)(K) to require focused air quality analyses of areas where communities with environmental justice concerns may be disproportionately impacted by the criteria pollutant emissions then under NAAQS review, and to thereby make such analyses required elements of the infrastructure SIPs for the relevant NAAQS.

## VIII. MODELED ATTAINMENT DEMONSTRATIONS AND UNMONITORED AREA ANALYSES

Under the CAA, EPA designates all geographic areas in the nation as “attainment,” “nonattainment,” or “unclassifiable” with the NAAQS, and states must satisfy prescriptive air quality planning requirements to bring nonattainment areas into attainment.<sup>74</sup> For certain ozone

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<sup>70</sup> States must demonstrate the adequacy of their nonattainment area control strategies “by means of applicable air quality models, data bases, and other requirements specified in [40 C.F.R. part 51, appendix W]” or appropriate substitute models approved by EPA. 40 C.F.R. § 51.112(a).

<sup>71</sup> 40 C.F.R. part 51, subpart BB, Data Requirements for Characterizing Air Quality for the Primary SO<sub>2</sub> NAAQS; 80 Fed. Reg. 51087 (Aug. 21, 2015) (hereinafter DRR).

<sup>72</sup> See 67 Fed. Reg. 22168 (May 2, 2002); 68 Fed. Reg. 27908 (May 22, 2003); 73 Fed. Reg. 21418 (April 21, 2008).

<sup>73</sup> *Montana Sulphur & Chemical Co. v. EPA*, 666 F.3d 1174 (9th Cir. 2012).

<sup>74</sup> CAA § 107(d) and title I, part D (“Plan Requirements for Nonattainment Areas”).

and PM<sub>2.5</sub> nonattainment area plans, the CAA requires the state to demonstrate that the plan will “provide for attainment” of the NAAQS by the applicable attainment deadline based on air quality modeling or equivalent analytical methods.<sup>75</sup> Although the modeled attainment demonstration is primarily based on evaluation of pollutant concentrations at ambient air monitors located in the nonattainment area, EPA has recommended that states also conduct “unmonitored area analyses” to consider air pollution impacts in areas that have no ambient air monitors, especially where the state or EPA has reason to believe that violations of the NAAQS may be occurring in unmonitored areas.<sup>76</sup>

The results of an unmonitored area analysis may be used during the SIP development period to evaluate potential disproportionate impacts of air pollution on vulnerable communities, to examine the need for potential additional pollution control measures, and to provide additional information to the public. EPA also has the authority to use such results to consider whether the ambient air monitoring network plan in the nonattainment area is adequate for regulatory purposes.<sup>77</sup> If EPA finds that communities with environmental justice concerns are located in unmonitored areas and that the state has not, as part of its development of the modeled attainment demonstration, adequately addressed the available information about potential exceedances of the NAAQS in these unmonitored areas, EPA may find that the plan is not sufficient to “provide for attainment” of the relevant NAAQS by the applicable attainment date and disapprove the modeled attainment demonstration.

## IX. NONATTAINMENT AREA CONTROL MEASURE ANALYSES

Section 172(c)(1) of the CAA generally requires that state implementation plans for nonattainment areas provide for the implementation of all “reasonably available control measures” (RACM), including “reasonably available control technology” (RACT) for existing stationary sources, that are necessary for attainment of the relevant NAAQS as expeditiously as practicable and no later than the prescribed attainment date in the CAA. For ozone, carbon monoxide, and particulate matter nonattainment areas with higher pollution levels or persistent violations (i.e., areas with higher nonattainment “classifications” for these NAAQS pollutants), the CAA establishes additional control requirements that apply independent of the area’s attainment needs. For example, nonattainment area plans for areas classified as Moderate or higher for an ozone NAAQS must require implementation of RACT for specific categories of existing stationary sources,<sup>78</sup> and nonattainment area plans for areas classified as Serious nonattainment for a PM<sub>10</sub> or PM<sub>2.5</sub> NAAQS must require implementation of the “best available control measures” (BACM),

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<sup>75</sup> See, e.g., CAA §§ 182(c)(2)(A), 189(a)(1)(B), and 189(b)(1)(A).

<sup>76</sup> See, e.g., 80 Fed. Reg. 12264, 12270 (Mar. 6, 2015) (preamble to final implementation rule for 2008 ozone NAAQS); 81 Fed. Reg. 58010, 58051–52 (Aug. 24, 2016) (preamble to final implementation rule for PM<sub>2.5</sub> NAAQS); see also Memorandum dated November 29, 2018, from Richard A. Wayland, Division Director, Air Quality Assessment Division, Office of Air Quality Planning and Standards, EPA to Regional Air Division Directors, Regions 1–10, “Modeling Guidance for Demonstrating Air Quality Goals for Ozone, PM<sub>2.5</sub> and Regional Haze,” section 4.7 (“Estimating design values at unmonitored locations”).

<sup>77</sup> 81 Fed. Reg. 58010, 58052 (Oct. 24, 2016).

<sup>78</sup> CAA § 182(b)(2) (requiring implementation of RACT for all VOC sources in the area covered by an EPA Control Techniques Guideline (CTG) document and all other major stationary sources of VOCs in the area); CAA § 182(f) (requiring that all plan provisions required for major stationary sources of VOCs also apply to major stationary sources of NO<sub>x</sub>, with limited exceptions); 42 U.S.C. § 7412.

including the “best available control technology” (BACT) for stationary sources.<sup>79</sup> In addition, a state seeking an extension of the attainment deadline for a Serious PM<sub>10</sub> or PM<sub>2.5</sub> nonattainment area must demonstrate, among other things, that the plan for the area includes the “most stringent measures” (MSM).<sup>80</sup> Over the last several decades, EPA has issued detailed guidance on the evaluation processes necessary to satisfy these nonattainment area control requirements.<sup>81</sup>

One important step in the RACM control measure evaluation process that allows for consideration of environmental justice is the state’s identification of the emission sources and source categories subject to control evaluation. Because the statutory and regulatory provisions addressing RACM do not specify the emission sources to which these control requirements apply,<sup>82</sup> states must identify the sources subject to control on a case-by-case basis, subject to EPA review and approval. Some states have referenced the CAA’s major stationary source thresholds for New Source Review permitting purposes (e.g., a 100 ton per year potential to emit threshold) as a minimum emission level for application of RACM. Where available information indicates that vulnerable populations may be disproportionately exposed to air pollution levels exceeding the NAAQS, EPA may recommend that the state subject a broader universe of emission sources to RACM (e.g., including sources that have a potential to emit below the major stationary source threshold and/or sources located outside the nonattainment area but within the state).<sup>83</sup> Following a state’s submission of the adopted RACM control strategy, if EPA finds that the state has failed to adequately consider and adopt “reasonably available” control measures for sources subject to control evaluation, EPA may find that the submitted RACM control strategy fails to satisfy CAA requirements. EPA may encourage states to give greater consideration to the level of control that is “reasonable” for the nonattainment area,<sup>84</sup> where vulnerable populations are disproportionately

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<sup>79</sup> CAA § 189(b)(1)(B) (requiring implementation of BACM no later than 4 years after the date the area is classified or reclassified as a Serious Area); 42 U.S.C. § 7412.

<sup>80</sup> CAA § 188(e) (requiring a state seeking an extension of the attainment date for a Serious nonattainment area to demonstrate, among other things, that the plan for the area includes “the most stringent measures that are included in the implementation plan of any State or are achieved in practice in any State, and can feasibly be implemented in the area”); 42 U.S.C. § 7412.

<sup>81</sup> *See, e.g.*, Memorandum from Roger Strelow, Assistant Administrator for Air and Waste Management, EPA, to Regional Administrators, Regions I–X, Subject: “Guidance for determining Acceptability of SIP Regulations in Nonattainment Areas” (Dec. 9, 1976); 57 Fed. Reg. 13498 (Apr. 16, 1992) (“General Preamble”); 57 Fed. Reg. 18070 (Apr. 28, 1992) (“General Preamble Supplement”); 81 Fed. Reg. 58010 (Aug. 24, 2016) (preamble to final implementation rule for PM<sub>2.5</sub> NAAQS).

<sup>82</sup> CAA § 172(c)(1) (requiring RACM for nonattainment areas generally); CAA § 189(a)(1)(C) (requiring RACM for Moderate PM<sub>2.5</sub> nonattainment areas); 42 U.S.C. § 7412.

<sup>83</sup> *See, e.g.*, 40 C.F.R. § 51.1312(c) (requiring, for purposes of meeting the RACM requirement, “other control measures on sources of emissions of ozone precursors located outside the nonattainment area, or portion thereof, located within the state if doing so is necessary or appropriate to provide for attainment of the applicable ozone NAAQS in such area by the applicable attainment date”); 83 Fed. Reg. 62998, 63015 (Dec. 6, 2018).

<sup>84</sup> Because the RACM provision in CAA § 172(c)(1) requires an analysis of available controls in light of the attainment needs of the particular nonattainment area, EPA has substantial discretion to determine, on a case-by-case basis, what level of control is “reasonable” for the area. *See, e.g.*, 70 Fed. Reg. 71612, 71660 (Nov. 29, 2005) (“The determination of whether a SIP contains all RACM requires an area-specific analysis that there are no additional economically and technologically feasible control measures (alone or in conjunction with others) that will advance the attainment date”). Moreover, for the PM<sub>10</sub> and PM<sub>2.5</sub> NAAQS, EPA has interpreted the RACM provision in CAA § 189(a)(1)(C) to require a more stringent level of control in areas that cannot demonstrate timely attainment. 40 C.F.R. § 51.1009(a)(4)(ii); 81 Fed. Reg. 58010, 58045 (Aug. 24, 2016) (providing that, for a Moderate PM<sub>2.5</sub> nonattainment area that cannot demonstrate timely attainment, the state must “adopt all technologically and economically feasible control measures identified” for the area, without regard to whether those measures would advance the attainment date); *see also* 57 Fed. Reg. 13498, 13544 (Apr. 16, 1992). Thus, EPA may disapprove a

affected by air pollution in the area.

Another important step in the control measure evaluation processes that allows for consideration of environmental justice is the evaluation of economic feasibility. The control standards for nonattainment area plans in part D of title I of the CAA generally allow for consideration of economic feasibility to varying degrees, in addition to technological feasibility, in determining what level of control constitutes a “reasonably available,” the “best available,” or the “most stringent” control measure. For example, in longstanding guidance, EPA has consistently defined RACT as “the lowest emission limitation that a particular source is capable of meeting by the application of control technology that is reasonably available considering technological and *economic feasibility*.”<sup>85</sup> Similarly, in the implementation rule for the PM<sub>2.5</sub> NAAQS, EPA has defined both RACM and BACM, in relevant part, as “any technologically and *economically feasible* measure that can be implemented” within specified timeframes and that meets other criteria.<sup>86</sup> EPA has also interpreted the MSM provision in CAA § 188(e) to “not require any measure that is infeasible on technological or economic grounds,”<sup>87</sup> and the Ninth Circuit Court of Appeals has upheld this interpretation.<sup>88</sup>

Although EPA has historically interpreted “economic feasibility” in these contexts to mean the costs to the sources to implement pollution control measures, the term “economic feasibility” is not explicitly limited to such costs, and EPA has suggested in longstanding RACT guidance that an economic feasibility analysis may include a broader analysis of local “economic characteristics.” EPA stated early on with respect to RACT economic feasibility that “EPA presumes that it is reasonable for similar sources to bear similar costs of emission reductions.”<sup>89</sup> EPA could clarify that “similar sources” relates not only to the type of facility and its configuration, but also to similarity in terms of demographic characteristics of the areas impacted, as well as temporal similarity.

Following a state’s submission of the adopted control strategy, if EPA finds that the state has failed to adequately consider potential control measures that may be technologically and economically feasible for implementation in the nonattainment area, EPA may find that the control strategy fails to satisfy CAA requirements.

Finally, EPA has long interpreted the BACM and MSM provisions for Serious PM<sub>10</sub> and PM<sub>2.5</sub> nonattainment areas to generally require adoption of control strategies more stringent than those developed for purposes of meeting the Moderate area control requirements (e.g., RACM and RACT) for the area.<sup>90</sup> If a state submits a BACM or MSM control strategy for a Serious PM<sub>10</sub> or

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submitted RACM demonstration for a Moderate PM<sub>10</sub> or PM<sub>2.5</sub> nonattainment area if the state has failed to adequately consider or adopt “all technologically and economically feasible control measures” for the area.

<sup>85</sup> 57 Fed. Reg. 13498, 13541 (Apr. 16, 1992) (emphasis added); 84 Fed. Reg. 20274, 20276, n.5 (May 9, 2019).

<sup>86</sup> 40 C.F.R. § 51.1000 (emphasis added); *see also* 40 C.F.R. §§ 51.1009–51.1010 (allowing states to eliminate potential measures from further consideration on the basis of technological or economic feasibility).

<sup>87</sup> 67 Fed. Reg. 48718, 48729 (July 25, 2002) (final rule approving Serious area PM<sub>10</sub> plan for Maricopa County, Arizona).

<sup>88</sup> *Vigil v. Leavitt*, 381 F.3d 826, 840 (9th Cir. 2004) (noting that § 188(e) of the CAA “specifically limits MSM to measures that ‘can feasibly be implemented in the area’ and specifically allows the Administrator to consider the ‘technological and economic feasibility’ of proposed measures”).

<sup>89</sup> General Preamble Supplement, 57 FR at 18074.

<sup>90</sup> 81 Fed. Reg. 58010, 58081 (Aug. 24, 2016) (noting that “as BACM and BACT are required to be implemented

PM<sub>2.5</sub> nonattainment area that is no more stringent than its RACM control strategy for the same area without having adequately considered all potential additional measures, and if EPA is aware of vulnerable communities in the nonattainment area who are disproportionately affected by air pollution, EPA may find that the submitted control strategy fails to satisfy CAA requirements.

EPA may provide national guidance to state, local, and federally recognized tribal agencies through an updated guidance document that addresses the general RACM and RACT requirement in CAA § 172(c)(1), the subpart 2 RACT requirement for ozone nonattainment areas classified as Moderate or higher, and the subpart 4 BACM, BACT, and MSM requirements for Serious PM<sub>10</sub> and PM<sub>2.5</sub> nonattainment areas. EPA may, in such updated guidance, recommend specific steps for evaluation of both the technological feasibility of available controls and the costs and other economic impacts associated with such controls. EPA may also recommend that states that use cost thresholds for determining economic feasibility of controls (often expressed as dollar per ton of pollutant reduced) ensure that costs are expressed, at least roughly, in current dollars. Robust implementation of these control requirements in all nonattainment areas would generally benefit public health and the environment, including communities with environmental justice concerns.

## X. PLAN REVISIONS

Section 110(l) of the CAA prohibits EPA from approving a SIP revision submitted by a state if the revision would interfere with “any applicable requirement concerning attainment, maintenance, and reasonable further progress . . . or *any other applicable requirement* of [the Act]” (emphasis added). EPA has issued draft guidance to implement § 110(l), which explains that non-interference can be demonstrated through substitute measures that achieve equivalent reductions to measures being removed from a SIP, or in certain other ways. Additionally, EPA has taken the position that § 110(l) does not prevent EPA from approving a SIP revision in a nonattainment area, even where the revision would remove provisions that achieve emissions reductions. However, § 110(l) is a very broadly written provision—it applies to all SIP revisions; requires demonstration of non-interference with *any* requirement concerning attainment, maintenance, or RFP; and requires demonstration of non-interference with *any* applicable requirement of the Act.

EPA has discretion to consider environmental justice interests when applying § 110(l). For example, if a SIP revision would remove or relax controls on sources that impact communities with environmental justice concerns, and EPA finds that the revision would interfere with the area’s progress towards attainment if the area is a nonattainment area, or with continued attainment if the area is an attainment area, § 110(l) prohibits EPA from approving the SIP revision. Similarly, if a SIP revision contains control measures that impact communities with environmental justice concerns, and EPA finds that approval of the SIP revision would interfere with the CAA’s RACM or BACM requirements, § 110(l) prohibits EPA from approving the SIP revision. Additionally, EPA could consider any other requirement of the Act that is an “applicable requirement” and determine whether the SIP revision would interfere with compliance with that requirement (e.g., Title V or New Source Review permit requirements). EPA could also consider issuing regulations

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when a Moderate nonattainment area is reclassified as Serious due to its actual or projected inability to attain the relevant NAAQS by the Moderate area attainment date through the implementation of ‘reasonable’ measures, it is logical that ‘best’ control measures should represent a more stringent and potentially more costly level of control”) and 58097 (stating general expectation that MSM result in additional controls beyond the set of measures adopted as BACM and BACT “[g]iven the strategy in the nonattainment provisions of the CAA to offset longer attainment timeframes with more stringent control requirements”).

under § 110(l) to codify its application, rather than continuing to implement it on a case-by-case basis through action on SIP submissions.

## XI. DISCRETIONARY ATTAINMENT DATE EXTENSIONS

When nonattainment areas fail to timely attain the NAAQS, the CAA prescribes certain consequences that flow from that failure to attain the standard by the maximum attainment date (see, e.g., additional attainment planning and controls under § 179(d)(1) and (2), reclassification for some NAAQS with more stringent requirements (e.g., § 181(b)(2)(A), § 188(b)(2)), and contingency measures that must take effect without further action by the state or EPA (e.g., § 172(c)(9)). However, for areas that meet certain qualifying criteria, EPA has discretionary authority under the CAA to grant a state's request for a limited extension of the attainment date.

Specifically, § 172(a)(2)(C) of the CAA provides that EPA may extend the attainment date for a nonattainment area by one year (referred to as the "Extension Year"), if the state "has complied with all requirements and commitments pertaining to the area in the applicable implementation plan" and if "no more than a minimal number of exceedances of the relevant [NAAQS] has occurred in the area in the year preceding the Extension Year." Section 172(a)(2)(C) provides that no more than two such extensions may be granted for a single nonattainment area. Subparts 2, 3, and 4 of part D, title I of the CAA contain similar extension provisions specific to ozone nonattainment areas (CAA § 181(a)(5)), carbon monoxide nonattainment areas (CAA § 186(a)(4)), and Moderate PM<sub>2.5</sub> and PM<sub>10</sub> nonattainment areas (CAA § 188(d)). For Serious PM<sub>2.5</sub> and PM<sub>10</sub> nonattainment areas, CAA § 188(e) grants EPA discretionary authority to grant a state's request for a single extension of the attainment date by up to 5 years, if the state "has complied with all requirements and commitments pertaining to that area in the implementation plan" and, among other conditions, "demonstrates to the satisfaction of the Administrator that the plan for the area includes the most stringent measures that are included in the implementation plan of any State or are achieved in practice in any State, and can feasibly be implemented in the area." Section 188(e) further provides that, in determining whether to grant an extension and the appropriate length of time for such an extension, EPA "may consider . . . the population exposed to concentrations in excess of the standard," among several other factors.

These provisions grant EPA discretion to determine whether an extension of the attainment date is appropriate for a given nonattainment area, provided the state has met all applicable statutory conditions for extension.<sup>91</sup> In some cases, even if the state has met the statutory conditions, other considerations, including equity and environmental justice considerations, may weigh in favor of not extending the attainment deadline. For example, a finding that a community with environmental justice concerns in an area is particularly impacted by pollution could support a denial of a state's request for an extension, particularly if combined with information suggesting that an area may not attain by the extended attainment date or qualify for a second extension. In such cases, the EPA may find that it is appropriate not to delay the regulatory consequences associated with a finding of failure to timely attain because those consequences may expedite progress toward attainment (e.g., additional attainment planning, new controls, contingency measures). The courts have generally upheld EPA's exercise of similar discretionary authorities in other parts of the CAA, provided EPA adequately explained the facts and policy concerns upon

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<sup>91</sup> Under the plain meaning of the terms of CAA §§ 172(a)(2)(C), 181(a)(5), 186(a)(4), 188(d) and 188(e), EPA "may" exercise its discretion to grant a state's request for an extended attainment date where the statutory conditions have been met but has no mandatory duty, in any case, to grant such a request.



which it relied.<sup>92</sup>

## XII. DISCRETIONARY AND MANDATORY SANCTIONS

If EPA finds that a state has not timely submitted a complete plan or has not implemented an approved plan, or if EPA disapproves a SIP submission, mandatory sanctions apply under § 179 of the CAA. These sanctions apply in the sequence established at 40 C.F.R. § 52.31: first the § 179(b)(2) “offset” sanction, 18 months after the finding triggering sanctions, and then the § 179(b)(1) “highway” sanction, six months later. Further, § 110(m) provides for “discretionary” sanctions, authorizing EPA to impose either offset or highway sanctions at any time after a triggering finding or disapproval, and EPA’s § 179(a) sanction authority provides that the Administrator “may withhold” § 105 grant funds to states in addition to any mandatory sanction that applies. Although to date the Agency has not imposed discretionary sanctions, application of mandatory or discretionary sanctions in appropriate circumstances may promote environmental justice by prompting timely corrective action by the state to satisfy CAA requirements.

In particular, to the extent the underlying CAA requirement that the state has failed to satisfy would affect the distribution of pollution burdens in the community, would affect public participation or engagement opportunities, or would otherwise bear on environmental justice concerns, the application of sanctions (whether mandatory or discretionary) to encourage prompt corrective action by the state to satisfy these statutory requirements may promote environmental justice. An example of this kind of intersection of the sanctions process with environmental justice occurred in connection with EPA’s disapproval of Virginia’s title V program because of its restrictions on the ability of the public to challenge permits, contrary to the requirements in CAA § 502(b)(6) for judicial review in state permit programs.<sup>93</sup> The 1994 EPA action involved in this effort did not explicitly discuss “environmental justice,” but in disapproving the state action that limited public involvement, EPA was in effect furthering environmental justice. Similarly, to the extent any SIP element at issue in a finding of failure to submit or implement, or in a disapproval action, involves environmental justice concerns—for instance, the CAA § 110(a)(1) “reasonable notice and public hearing” requirement—the use of sanctions to encourage appropriate state action could help address those concerns.

Both mandatory and discretionary sanctions may also promote environmental justice when applied as a result of EPA’s implementation of its oversight responsibilities. EPA has the authority to review existing SIP measures, and the state’s implementation of them, to ensure that they are consistent with CAA public participation and judicial review requirements. If an existing SIP fails to comply with CAA requirements, EPA can find the SIP deficient and issue a “SIP call” under CAA § 110(k)(5) requiring appropriate revisions within specified timeframes, and may in the SIP call rulemaking specify the order of any sanctions mandated under CAA § 179(a), in addition to

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<sup>92</sup> See, e.g., *New York v. EPA*, 921 F.3d 257, 261–62 (D.C. Cir. 2019) (upholding EPA denial of state petition to expand ozone transport region under CAA § 176A(a) where EPA had sufficient basis in the record for its conclusion and CAA provide[d] “only that EPA ‘may’ expand the region, not that it ‘shall’ or ‘must’ do so”).

<sup>93</sup> See 59 Fed. Reg. 62324 (Dec. 5, 1994) (final disapproval of state operating permit program); *Commonwealth of Virginia v. Browner*, 80 F.3d 869, 876 (4th Cir. 1996), cert. denied, 519 U.S. 1090 (1997) (upholding disapproval action and finding sanctions provision constitutional). As noted, the state program involved was the Title V permitting program, which was submitted under CAA § 502(d)(1), not a SIP submitted under § 110(a). But the sanctions authority evaluated by the Fourth Circuit was the same CAA § 179 authority that is invoked in response to a § 110 failure. See CAA § 502(d)(2)(A); 80 F.3d at 873–74; 42 U.S.C. § 7412.

the geographic scope of any such sanctions.<sup>94</sup> In addition, under CAA § 179(a)(4), mandatory sanctions apply if EPA finds that a state is not implementing an approved SIP for a nonattainment area.<sup>95</sup> Finally, EPA may impose discretionary sanctions consistent with CAA § 110(m) and 40 C.F.R. § 52.30, for the purpose of ensuring state compliance with the requirements of the CAA, following a finding, disapproval, or determination under CAA § 179(a).

### **XIII. NEW PLANNING AFTER FAILURE TO ATTAIN A STANDARD**

Under § 179(d) of the CAA, if EPA determines that a nonattainment area failed to attain the NAAQS by the applicable attainment date, EPA must require the state to submit a SIP revision including “such additional measures as the Administrator may reasonably prescribe, including all measures that can be feasibly implemented in the area in light of technological achievability, costs, and any non-air quality and other air quality-related health and environmental impacts.”

This provision grants EPA the authority to consider environmental justice factors in determining whether to require the state to adopt and submit additional measures or programs for purposes of bringing the area into attainment. For example, if EPA determines that an area has failed to attain the NAAQS and that communities with environmental justice concerns in the nonattainment area have borne disproportionate pollution burdens, EPA may, as part of its failure to attain determination, require the state to submit additional control measures more stringent than those previously required in the area (e.g., control requirements that go beyond the RACM, BACM, or MSM standards discussed above in § IV), or to submit new or revised control measures for specific source categories that contribute significantly to the nonattainment problem. § 179(d) also provides EPA with discretion to require additional measures other than specific emission control requirements, such as economic incentive programs or revised monitoring networks. EPA may determine, on a case-by-case basis, what additional measures the state must submit as part of the revised plan required under § 179(d), provided these measures “can be feasibly implemented in the area in light of technological achievability, costs, and any non-air quality and other air quality-related health and environmental impacts” and are “reasonably prescribed.” Alternatively, EPA may establish, through a national implementation rule for one or more NAAQS, specific additional requirements that apply under CAA § 179(d) following a failure to attain a NAAQS.

### **XIV. AIR QUALITY REDESIGNATIONS**

Within two years of EPA’s promulgation of a new or revised NAAQS, EPA is required to issue area designations for that NAAQS based on information available at the time of designation. Once promulgated, under CAA § 107(d)(1)(B)(iv), an area designation remains in effect until the area is redesignated. Area redesignations may be initiated by EPA under § 107(d)(3)(A)–(C) or by the Governor of any state under § 107(d)(3)(D). These provisions govern redesignations that change the air quality designation, or status, of areas (e.g., from attainment to nonattainment) and redesignations that change area boundaries.

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<sup>94</sup> See, e.g., 80 FR 33840, 33930 (June 12, 2015) (final SIP call establishing applicability of sanctions sequencing rule in 40 C.F.R. § 52.31 and case-by-case approach to geographic scope of applicable sanctions).

<sup>95</sup> 40 C.F.R. § 52.31(c).

The CAA provides that EPA may not promulgate a redesignation of a nonattainment area to attainment unless five criteria, listed in CAA § 107(d)(3)(E), are met.<sup>96</sup> Beyond this limitation, the redesignation provisions of the CAA grant EPA broad discretion to determine the timing and basis for initiating changes to promulgated designations. Under CAA § 107(d)(3)(A), EPA may initiate a redesignation by notifying the Governor of a state “at any time” that available information indicates that the designation of an area or portion of an area should be revised. That information can include air quality data,<sup>97</sup> planning and control considerations, or “any other air quality-related considerations the Administrator deems appropriate.” Considerations that EPA has historically relied upon to redesignate areas include climate and topography, meteorology, state and local jurisdictional boundaries, and contributions to air quality problems.<sup>98</sup> Even under the more restrictive provisions governing redesignations of nonattainment areas to attainment, which establish certain prerequisites to redesignation, the CAA still provides EPA with some discretion to determine whether redesignation is appropriate. Section 107(d)(3)(E) prohibits EPA from redesignating a nonattainment area to attainment unless the conditions listed in this section are met, but it does not mandate that EPA promulgate such redesignation if those conditions are met.

Section 107(d)(3)(A)’s expansive language suggests that EPA has the authority to consider disproportionate air quality impacts on communities with environmental justice concerns in determining whether and when to initiate a redesignation (e.g., a boundary change or redesignation of an attainment area to nonattainment). Additionally, although EPA’s general practice has been to approve state requests for redesignation of nonattainment areas to attainment where the five statutory criteria under CAA § 107(d)(3)(E) are met, the CAA appears to grant EPA some discretion to disapprove such requests where the record supports disapproval, even if the five statutory criteria are met.

## **XV. CONFORMITY OF FEDERAL ACTIVITIES TO THE STATE, TRIBAL, OR FEDERAL IMPLEMENTATION PLAN**

### **A. *TRANSPORTATION CONFORMITY DETERMINATIONS FOR FHWA AND FTA ACTIONS***

Transportation conformity is the requirement that federal agencies and metropolitan planning organizations (MPOs) engaging in, funding, approving, or supporting in any way highway

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<sup>96</sup> Section 107(d)(3)(E) provides:

The Administrator may not promulgate a redesignation of a nonattainment area (or portion thereof) to attainment unless-

- (i) the Administrator determines that the area has attained the national ambient air quality standard;
- (ii) the Administrator has fully approved the applicable implementation plan for the area under section 7410(k) of this title;
- (iii) the Administrator determines that the improvement in air quality is due to permanent and enforceable reductions in emissions resulting from implementation of the applicable implementation plan and applicable Federal air pollutant control regulations and other permanent and enforceable reductions;
- (iv) the Administrator has fully approved a maintenance plan for the area as meeting the requirements of section 7505a of this title; and
- (v) the State containing such area has met all requirements applicable to the area under section 7410 of this title and part D.

<sup>97</sup> Generally, EPA would not redesignate an area unless ambient air monitoring data or air quality modeling analyses support the redesignation.

<sup>98</sup> EPA boundary change actions under § 107(d)(3) have also considered reconciling boundaries for Federal and State Planning purposes. *See, e.g.*, 68 Fed. Reg. 48848, 48849–50 (Aug. 15, 2003).

and transit activities must “conform to” the SIP for the applicable area.<sup>99</sup> Conformity to the SIP is defined to include a requirement that the activity at issue not cause or contribute to new NAAQS violations, increase the frequency or severity of existing NAAQS violations, or delay timely attainment of a NAAQS or any interim milestones.<sup>100</sup> Transportation conformity requirements apply in ozone, PM<sub>2.5</sub>, PM<sub>10</sub>, carbon monoxide (CO), and NO<sub>2</sub> nonattainment and maintenance areas. Transportation conformity requirements are primarily managed by the Office of Transportation and Air Quality (OTAQ) and the EPA Regional Offices.

EPA has interpreted the transportation conformity requirement to apply to long-term term transportation plans, short-term transportation improvement programs (TIPs), and also to non-exempt Federal highway and transit projects (projects). For transportation plan and TIP conformity determinations, EPA’s regulations require that MPOs conduct a regional emissions analysis to conform to the SIP’s motor vehicle emissions budget(s) or other applicable test(s). In addition, project sponsors, such as state departments of transportation (DOTs), also need to conduct an air quality analysis of the localized area surrounding the project for any new projects in CO areas and large projects with significant diesel traffic in PM<sub>2.5</sub> and PM<sub>10</sub> nonattainment and maintenance areas.<sup>101</sup> The federal agencies that fund and/or approve MPO transportation planning documents, highway projects, and transit projects are typically the Federal Highway Administration (FHWA) and the Federal Transit Administration (FTA). Conformity determinations are approved by FHWA and FTA, and EPA has used its interagency consultation role to encourage documentation and consideration of impacts on communities with environmental justice concerns when determining whether a project conforms.

As part of transportation conformity for projects, a PM project-level (or “hot-spot”) analysis is required and must take into consideration air quality impacts from large transportation projects. These projects often impact communities with environmental justice concerns with emissions near adjacent local communities, neighborhoods, schools, and other places where people are located. Such projects include new interstate highway projects, expanded highways or intersections, or other intermodal freight or rail terminal projects that would be expected to significantly increase the number of diesel vehicles. In addition to the hot-spot analysis and the assessment of impacts with environmental justice concerns, the required interagency consultation process is an important tool for completing project-level conformity determinations. Interagency consultation must be used to develop a process to evaluate and choose models and associated methods and assumptions to be used in PM hot-spot analyses.<sup>102</sup> The conformity rule also requires agencies completing project-level conformity determinations to establish a proactive public involvement process that provides opportunity for public review and comment.<sup>103</sup>

Finally, EPA provides a significant number of national guidance documents for federal, state, local, and tribal agencies to implement the CAA transportation conformity requirements as well as mobile source SIP requirements. These guidance documents ensure that the latest local

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<sup>99</sup> CAA § 176(c); 42 U.S.C. § 7412 and EPA’s regulations at 40 C.F.R. §§ 51.390 and 93.

<sup>100</sup> CAA § 176(c)(1); 42 U.S.C. § 7412.

<sup>101</sup> 40 C.F.R. §§ 93.116 and 93.123. See also EPA’s *PM Hot-spot Guidance: Transportation Conformity Guidance for Quantitative Hot-spot Analyses in PM<sub>2.5</sub> and PM<sub>10</sub> Nonattainment and Maintenance Areas*, EPA-420-B-21-037, October 2021.

<sup>102</sup> 40 C.F.R. § 93.105(c)(1)(i).

<sup>103</sup> 40 C.F.R. § 93.105(e).

information and models (including EPA’s Motor Vehicle Emission Simulator (MOVES) model)<sup>104</sup> are being used to support state, local, and tribal government decisions, including those for near-source and communities with environmental justice concerns living in nonattainment and maintenance areas for the NAAQS. Among other topics, EPA’s guidance describes how to place air quality modeling receptors in local communities that are adjacent to where new or expanded highway or terminal projects could be located. EPA also provides methods to quantify the air quality benefits of new emissions control strategies that are implemented at the local level, such as replacing older diesel vehicles and equipment with cleaner technologies. EPA also provides guidance and tools for considering the air quality and climate benefits for expanded transit, increased pedestrian and bicycling projects, and other alternate ways for passenger travel, all of which are of interest to low income and challenged communities without lower levels of car ownership. EPA-OTAQ provides technical assistance to the EPA Regions so they can work with their MPOs, state DOTs, FHWA/FTA counterparts, transit agencies, and state/local air quality agencies in implementing conformity requirements and possibly other issues, such as considering environmental justice impacts and coordinating with impacted communities as part of the transportation planning process.

## ***B. GENERAL CONFORMITY DETERMINATIONS FOR OTHER FEDERAL AGENCY ACTIONS***

General conformity requires federal agencies to demonstrate that the emissions from a federal action will conform to the purposes of the appropriate state, tribal, or federal implementation plan for attaining clean air and will not otherwise cause or contribute to a violation of or interfere with the ability to attain and maintain the NAAQS. EPA has the authority to issue guidance to federal agencies recommending that environmental justice considerations such as impacts on communities with environmental justice concerns be addressed in completing their general conformity determinations, although § 176(c)(1) of the CAA does not provide explicit authority to rely specifically upon environmental justice factors to find that an activity does not conform. Such guidance could recommend that federal agencies address environmental justice factors regarding impacts on or participation by communities with environmental justice concerns both in the process of finalizing those determinations (such as by allowing for extended public comment periods or having specific public meetings with affected communities to discuss the activity under consideration) and in the substance of those determinations (such as considering protection of communities with environmental justice concerns when evaluating project mitigation options or selecting locations for acquiring offsets).

## **XVI. FEDERAL IMPLEMENTATION PLANS**

### ***A. FEDERAL IMPLEMENTATION PLANS IN AREAS OF STATE JURISDICTION***

Under § 110(c) of the CAA, EPA must promulgate a Federal Implementation Plan (FIP) for an area within two years of making a finding that a state has failed to submit a complete State Implementation Plan (SIP) or disapproving a submitted SIP. EPA has promulgated FIPs for purposes of implementing a number of programs that address the NAAQS, including rules such as the Cross-State Air Pollution Rule (CSAPR) to reduce interstate pollution transport under the “good neighbor” provision, CAA § 110(a)(2)(D)(i)(I) (40 C.F.R. §§ 52.38, 52.39), FIPs to implement the Prevention of Significant Deterioration permit program (40 C.F.R. § 52.21), and

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<sup>104</sup> Available at <https://www.epa.gov/moves>.

visibility programs to address regional haze under CAA §§ 169A and 169B (40 C.F.R. part 51, subpart P).

As an initial matter, EPA exercises broad discretion over the management of its workload and may prioritize its actions, including ensuring timely issuance of findings of failure to submit and prompt action on SIP submittals (including disapprovals when appropriate), to timely address those circumstances presenting the most significant environmental justice concerns. Further, while the statute provides EPA up to two years to promulgate a FIP, EPA may promulgate (and at times in the past, has promulgated) FIPs concurrent with or immediately following its disapproval of a SIP or finding of failure to submit.<sup>105</sup>

When EPA promulgates a FIP, courts have held that EPA “stands in the shoes of the defaulting state, and all of the rights and duties that would otherwise fall to the state accrue instead to EPA.”<sup>106</sup> In other words, EPA has the opportunity to exercise discretionary authority that would have been exercised by the state in determining how to meet the relevant CAA requirements. For example, courts have recognized that EPA has discretion to determine which upwind-state emissions may be considered to significantly contribute to nonattainment or interfere with maintenance of the NAAQS in other states in implementing the “good neighbor” provision.<sup>107</sup>

Where EPA promulgates a FIP to address NAAQS implementation requirements, EPA has the authority to consider environmental justice factors in determining which sources to regulate in order to meet the goal of attaining and maintaining the NAAQS and other CAA requirements. For example, EPA may find it appropriate to focus regulatory attention on a source or source sector whose air pollutant emissions have disproportionately affected communities with environmental justice concerns. The U.S. Supreme Court has held that in exercising FIP authority for purposes of implementing the CAA’s “good neighbor” provision, EPA should avoid both “over-control” and “under-control.”<sup>108</sup> Within those bounds, EPA has many opportunities to address environmental justice concerns, as they are described in Executive Order 12898 and in EPA’s *Guidance on Considering Environmental Justice During the Development of Regulatory Actions*, and *Technical Guidance for Assessing Environmental Justice in Regulatory Analysis*.<sup>109</sup> For example, EPA may:

- *Assess potential environmental justice concerns in the baseline and in the design of the FIP.* Gathering information on the state of the world before the regulatory action and considering the rule’s effects is not only a part of an in-depth approach to environmental justice in rulemaking, but is also related to evaluating measures that may be necessary or appropriate to protect air quality as required by 40 C.F.R. § 49.11. Such information may

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<sup>105</sup> See *Oklahoma v. EPA*, 723 F.3d 1201, 1223 (10th Cir. 2013) (upholding EPA’s disapproval of SIP and promulgation of FIP in a single action).

<sup>106</sup> *Central Arizona Water Conservation District v. EPA*, 990 F.2d 1531, 1541 (9th Cir. 1993).

<sup>107</sup> See, e.g., *Wisconsin v. EPA*, 938 F.3d 303, 320 (D.C. Cir. 2019).

<sup>108</sup> *EPA v. EME Homer City Generation*, 572 U.S. 489, 523 (2014); but see *id.* (“Required to balance the possibilities of under-control and over-control, EPA must have leeway in fulfilling its statutory mandate.”).

<sup>109</sup> See *Guidance on Considering Environmental Justice During the Development of Regulatory Actions*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/sites/default/files/2015-06/documents/considering-ej-in-rulemaking-guide-final.pdf>); *Technical Guidance for Assessing Environmental Justice in Regulatory Analysis*, U.S. ENV’T PROT. AGENCY, [https://www.epa.gov/sites/default/files/2016-06/documents/ejtg\\_5\\_6\\_16\\_v5.1.pdf](https://www.epa.gov/sites/default/files/2016-06/documents/ejtg_5_6_16_v5.1.pdf). See also 86 Fed. Reg. 23054, 23162–63 (Apr. 30, 2021) (discussing “framework for assessing potential environmental justice concerns for future rulemakings”).

come from a variety of existing tools and data sets—for instance, EPA’s EJSCREEN tool—as well as from public comment submissions in response to advanced notices of proposed rulemaking and notices of proposed rulemaking. EPA may also use CAA § 114’s information gathering authority to collect information relevant to FIP development.<sup>110</sup>

- *Conduct early and meaningful public engagement with communities with environmental justice concerns.* In developing a FIP, EPA has discretion to hold one or more public hearings or meetings in the area to be affected. EPA may also enhance public engagement in the rulemaking by providing ample notice of any public meetings and hearings and scheduling them at times and places convenient to the affected communities. Additionally, in preparing for public meetings EPA should gather information on the potential need for interpreters and offer translation of vital documents and interpretation services as needed for public hearings.<sup>111</sup> EPA may also consider outreach efforts beyond the standard internet-based methods, including informational meetings and direct solicitation of comments from affected communities through methods readily accessible to those communities (e.g., local radio stations, local newspapers, and/or posters at village or community centers).

*Maintain ongoing public engagement.* EPA may assess how the FIP action will affect the ability of communities with EJ concerns to meaningfully participate in subsequent environmental decision-making processes. EPA may also build effective public participation procedures into the provisions for implementing the rule.

The opportunities and tools described above are also generally available when EPA promulgates FIPs for Indian country areas under CAA § 301(d). Additional opportunities, as well as other considerations specific to the development and promulgation of Indian country FIPs, are described in the following section.

## ***B. FEDERAL IMPLEMENTATION PLANS IN INDIAN COUNTRY***

State implementation plans generally do not apply in Indian country. Instead, under § 301(d)(4) of the CAA and EPA’s Tribal Authority Rule (40 C.F.R. part 49, subpart A), tribes may seek “treatment as a state” status and have the opportunity, but are not mandated, to implement CAA requirements.<sup>112</sup> If tribal efforts do not result in adoption and approval of tribal plans or programs, EPA must “without unreasonable delay” promulgate FIPs as “necessary or

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<sup>110</sup> Information-gathering efforts are potentially subject to the requirements of the Paperwork Reduction Act.

<sup>111</sup> Under EO 13166, Improving Access to Services for Persons with Limited English Proficiency (Aug. 11, 2000), <https://www.justice.gov/crt/executive-order-13166>, federal agencies are required to improve access to federally conducted and assisted programs and activities for persons who, as a result of national origin, are limited in their English proficiency (LEP), by developing and implementing plans to ensure that eligible LEP persons can meaningfully access those programs and activities. Providing interpretation services as needed in connection with EPA-run public hearings (whether in the FIP context or otherwise) supports EPA’s implementation of EO 13166. *See also* EPA Order 1000.32, Compliance with Executive Order 13166: Improving Access to Services for Persons with Limited English Proficiency.

<sup>112</sup> *See infra*, at 60–61 for a general discussion of the Tribal Authority Rule.

appropriate to protect air quality.”<sup>113</sup> Acting under this authority, EPA has promulgated FIPs for Indian country at the national, regional, local and source-specific levels.<sup>114</sup>

Whenever EPA finds that it is necessary or appropriate within the meaning of 40 C.F.R. § 49.11(a) to promulgate a FIP for Indian country, outreach specifically geared toward obtaining input from communities with environmental justice concerns (to the extent such communities exist within the area for which the FIP is being developed) can help ensure that promulgation of the FIP would be consistent with and further EPA’s environmental justice goals and policies. EPA could also use other existing authorities to gather information and assess the need for additional air quality protections in Indian country across the nation.

Before deciding to undertake an Indian country FIP, EPA should consult with potentially affected tribes.<sup>115</sup> Once the decision to undertake an Indian country FIP is reached, EPA has considerable discretion to design the FIP,<sup>116</sup> though consultation should continue during its development. To fulfill the obligation established by 40 C.F.R. § 49.11(a), the rule must at the least “protect air quality” in Indian country. If the rule will not improve air quality or avert a potential air quality problem, then it may not be protective within the meaning of 40 C.F.R. § 49.11(a). And while protection against degradation of existing air quality will generally tend to promote environmental justice, if baseline air pollution levels disproportionately impact communities with environmental justice concerns then maintenance of existing air quality may not be sufficient to “protect air quality.”<sup>117</sup> Consistent with the Agency’s responsibility to protect air quality in Indian country and environmental justice policies, FIP writers should seek to assess the “baseline” of environmental justice issues affecting the community (i.e., conditions as they exist without the FIP) and the FIP’s anticipated effects on that baseline, and evaluate opportunities to address disproportionate impacts (whether existing or potential future impacts) on communities with environmental justice concerns, while enhancing public engagement

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<sup>113</sup> See 63 Fed. Reg. 7254, 7265 (Feb.12, 1998); 40 C.F.R. § 49.11(a).

<sup>114</sup> At the national level, EPA has established a regulatory framework for important elements of the New Source Review Program of the CAA in Indian country: permitting for minor sources, and for major stationary sources and major modifications in nonattainment areas. 76 Fed. Reg. 38748 (July 1, 2011) (codified at 49 C.F.R. §§ 49.151–49.161 and 49.166–49.173, and 40 C.F.R. part 51, Appendix S). For a regional example, see 70 Fed. Reg. 18074 (Apr. 8, 2005) (FIPs for Indian Reservations in Idaho, Oregon and Washington); for a source-specific example, see 75 Fed. Reg. 10174 (Mar. 5, 2010) (FIP for Navajo Generating Station, Navajo Nation).

<sup>115</sup> See *EPA Policy on Consultation and Coordination With Indian Tribes*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/sites/default/files/2013-08/documents/cons-and-coord-with-indian-tribes-policy.pdf>.

<sup>116</sup> See *Arizona Public Service Co. v. EPA*, 562 F.3d 1116, 1125 (10th Cir. 2009) (stating that § 49.11(a) “provides the EPA discretion to determine what rulemaking is necessary or appropriate to protect air quality and requires the EPA to promulgate such rulemaking”); *Safe Air For Everyone v. EPA*, No. 05-73383, 2006 WL 3697684, at \*1 (9th Cir., Dec. 15, 2006) (“The statutes and regulations that enable EPA to regulate air quality on Indian reservations provide EPA with broad discretion in setting the content of such regulations.”).

<sup>117</sup> In some past rulemakings EPA has concluded that FIP actions strengthening or maintaining environmental protections are sufficient to satisfy environmental justice concerns. See, e.g., 83 Fed. Reg. 55994, 55998 (Nov. 9, 2018) (Revisions to Source-specific FIP for Navajo Generating Station, Navajo Nation) (“Because the proposed revisions strengthen the NGS FIP, the EPA considers this action to be beneficial for human health and the environment, and to have no potential disproportionately high and adverse effects on minority, low-income, or indigenous populations.”); 84 Fed. Reg. 33715, 33719 (Jul. 25, 2019) (amendments to national Indian country NSR FIP) (to address environmental justice considerations, relying on conclusion that “[this rule] does not remove any of the prior rules’ environmental or procedural protections”). But as EPA has recognized, an “even change,” under which a new regulation produces “a constant reduction in environmental risk across the population . . . could perpetuate pre-existing or baseline differences across population groups.” *2016 Technical Guidance* at 44–45. Accordingly, to fully evaluate potential environmental justice concerns, we must consider whether there would be “remain[ing] differences in environmental outcomes after the regulatory action is in place.” *Id.* at 45.



throughout.

In addition to the opportunities to advance environmental justice in all FIPs that are described in the previous section, additional methods of advancing environmental justice may be available in Indian country FIPs. For example, EPA may:

- *Engage in tribal consultation.* As noted above, Indian country FIPs inherently involve significant tribal consultation responsibilities. Consultation offers opportunities for early and meaningful involvement from tribal governments.
- *Design the rule to address disproportionate impacts.* EPA promulgated the Indian country FIP provision at 40 C.F.R. § 49.11(a) as part of the Tribal Authority Rule (TAR), EPA's regulation establishing the air quality protection framework for Indian country. As the Ninth Circuit Court of Appeals has stated, "[t]he TAR grants the EPA wide discretion to determine what rulemaking is required to protect air quality on tribal lands."<sup>118</sup> That discretion and the air quality protection mandate of 40 C.F.R. § 49.11(a) provide EPA the opportunity in developing a FIP to address enhanced public input and to focus emission reduction strategies in communities with environmental justice concerns.

## STATE PLANNING UNDER THE VISIBILITY PROTECTION PROGRAM

Sections 169A and 169B of the CAA contain the visibility protection program, the goal of which is to prevent any future and remedy any existing anthropogenic visibility impairment in mandatory class I Federal areas.<sup>119</sup> The most basic and prevalent form of visibility impairment is regional haze, which is caused by emissions of air pollutants from numerous anthropogenic sources, including major and minor stationary sources, mobile sources, and area sources, located over a wide geographic area. The primary cause of regional haze is light scattering by particulate matter, the anthropogenic components of which include direct particulate matter emissions as well as secondary particulate matter formed from sulfur dioxide, nitrogen oxides, volatile organic compounds, and ammonia. The statute and EPA's Regional Haze Rule, 40 C.F.R. § 51.308, require states to submit periodic SIP revisions containing plans for making reasonable progress towards the goal of preventing future and remedying existing visibility impairment in mandatory class I Federal areas.<sup>120</sup> If a state fails to submit a required SIP revision or EPA disapproves the submission as failing to satisfy the applicable statutory and regulatory requirements, EPA must promulgate a FIP to satisfy those requirements.<sup>121</sup> As the regional haze program is implemented through CAA § 110's SIP/FIP framework, many opportunities available to consider environmental justice under that framework more generally, including via consultation with communities with environmental justice concerns and tribes as well as via rulemaking, also apply to regional haze SIPs and FIPs.<sup>122</sup>

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<sup>118</sup> *Yazzie v. EPA*, 851 F.3d 960, 971 (9th Cir. 2017).

<sup>119</sup> Mandatory Federal class I areas are listed in 40 C.F.R. part 81, subpart D. They include 156 national parks and wilderness areas.

<sup>120</sup> See CAA § 169A(b)(2), 169B(e); see generally 40 C.F.R. § 51.308.

<sup>121</sup> See *id.*; CAA § 110(c).

<sup>122</sup> While states satisfy the regional haze requirements via SIPs submitted under CAA § 110 and thus opportunities to consider environmental justice inherent to the structure of NAAQS implementation are also relevant for regional haze, there are specific aspects of NAAQS implementation that do not apply to regional haze, e.g., requirements related to attainment planning and mandatory sanctions for failure to submit a SIP or for a disapproved SIP.

The goal of the regional haze program is improving visibility in the country’s national parks and wilderness areas, as opposed to protection of human health. Many of the pollutants that contribute to visibility impairment (including particulate matter, sulfur dioxide, and nitrogen dioxide) also have human health impacts and are also subject to regulation under health-based programs, such as the NAAQS. While the statutory factors that govern regional haze decision making do not include human health or environmental justice, EPA has interpreted the relevant provisions as not precluding consideration of additional factors, so long as such factors and consideration do not undermine the statutory analysis. That is, although the CAA does not explicitly address consideration of environmental justice, this does not preclude states or EPA, in the case of a FIP, from incorporating environmental justice considerations into regional haze planning so long as doing so is not inconsistent with the statutory goal of remedying existing and preventing future anthropogenic visibility impairment in class I areas.

The requirements of 40 C.F.R. § 51.308(f), which are referred to as the “reasonable progress requirements,” do not prescribe specific sources or control options states must consider; the air quality goal is not a numerical target but an obligation to make reasonable progress towards the national goal of preventing any future and remedying any existing anthropogenic visibility impairment in mandatory class I Federal areas.<sup>123</sup> Under this framework, consideration of environmental justice could occur in a range of ways, including undertaking meaningful outreach to environmental justice communities and ensuring adequate opportunity for feedback on states’ proposed strategies for addressing regional haze. Additionally, for the SIP revisions that were due July 31, 2021, and that must satisfy the requirements of, *inter alia*, 40 C.F.R. § 51.308(f), there are several analyses in which states or EPA (in the case of a FIP) may consider environmental justice impacts, including the analyses used to select the sources that will be analyzed for potential controls, to define the range of control options to consider, and to decide what emission reductions for those sources are reasonable to require.<sup>124</sup> While regional haze decision making must ultimately be justified based on visibility, in some circumstances there will also be space under the applicable legal requirements to consider environmental justice, as long as such consideration is reasonable and not contrary to the Regional Haze Rule requirements.<sup>125</sup>

## PERMITTING

### I. NEW SOURCE REVIEW

New Source Review (NSR) is a preconstruction permitting program. If construction of a new stationary source of air pollution or a modification to an existing source will increase emissions by an amount large enough to trigger NSR requirements, then the source must obtain a permit before it can begin construction. The NSR provisions are set forth in §§ 110(a)(2)(C) (state programs and minor sources), 165(a) (major source Prevention of Significant Deterioration (PSD) permits), and 172(c)(5) and 173 (major source nonattainment NSR permits) of the Clean Air Act. CAA § 110(a)(2)(C) provides that each SIP must “include a program to provide for . . . the regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to ensure that [NAAQS] are achieved, including a permit program” as required by the PSD and nonattainment NSR provisions of the

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<sup>123</sup> CAA § 169A(b)(2)(B); 40 C.F.R. § 51.308(f)(2).

<sup>124</sup> See 40 C.F.R. §§ 51.308(f)(2)(i), (iii).

<sup>125</sup> See Memorandum dated July 8, 2021, from Peter Tsigiotis, Director, Office of Air Quality Planning and Standards, EPA to Regional Air Division Directors, Regions 1–10, “Clarifications Regarding Regional Haze State Implementation Plans for the Second Implementation Period.”

## Clean Air Act.

Under the CAA, states have primary responsibility for issuing permits, and they can customize their NSR programs within the limits of EPA regulations. EPA's primary role is to approve state programs and to review, comment on, and take any other necessary actions on draft and final permits to assure consistency with EPA's rules, the state's implementation plan, and the CAA. Citizens also play a role in the permitting decision and must be afforded an opportunity to comment on each construction permit before it is issued. In addition, EPA directly issues permits in certain situations (e.g., in states that have declined to fully implement an NSR program, in Indian country, and in Outer Continental Shelf areas) and, through the EPA Environmental Appeals Board (EAB), adjudicates appeals of EPA permits and permits issued by states and local districts with delegated federal programs.<sup>126</sup>

The NSR permit program for major sources has two different components. Major NSR permits regulating pollutants for which an area has been designated attainment with the NAAQS (or unclassifiable) are issued under the PSD program, and major NSR permits regulating pollutants for which an area has been designated nonattainment are issued under the nonattainment NSR program.

The requirements of these permit programs are somewhat distinct. One notable difference in the two programs is that the control technology requirement in nonattainment areas is called the Lowest Achievable Emission Rate (LAER), which is defined as the most stringent emission limitation required under a state implementation plan or achieved in practice for a class or category of sources. In PSD areas, a source must apply Best Available Control Technology (BACT), and the statute allows the consideration of cost and other factors in weighing BACT options. Also, in keeping with the goal of progress toward attaining the NAAQS, sources in nonattainment areas must always provide or purchase "offsets"—decreases in emissions that compensate for the increases from the new source or modification. In PSD areas, offsets are not required, but sources must demonstrate that they will not cause or contribute to a violation of the NAAQS or the PSD increments, the latter of which are margins of "significant" air quality deterioration above a baseline concentration that establish an air quality ceiling, typically below the NAAQS, for each PSD area. Sources can often make this demonstration based on the BACT level of control or by accepting more stringent air quality-based limitations. However, if these methods are insufficient to show that increased emissions from the source will not cause or contribute to a violation of air quality standards, applicants may undertake mitigation measures that are analogous to offsets in order to satisfy this PSD permitting criterion.

There is also an NSR preconstruction program for minor sources, which are smaller sources and modifications that do not emit or increase emissions in amounts greater than the applicability levels for the major source program. This program is implemented primarily by states, but EPA also issues preconstruction permits for minor sources in Indian Country. States have discretion to determine which sources must be subject to their minor NSR programs to prevent violations of the NAAQS.

EPA's opportunities to advance environmental justice on the basis of NSR permitting program authorities in the CAA and EPA regulations differ depending on whether EPA or the

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<sup>126</sup> See 40 C.F.R. §§ 52.21(u) and 124.19.

state is the permitting authority.<sup>127</sup> When EPA is the permitting authority, the Agency determines, consistent with applicable regulations, both the content of the permit and the permit review process. The latter gives EPA opportunities to enhance environmental justice by facilitating increased public participation in the formal permit consideration process (e.g., by granting requests to extend public comment periods, holding multiple public meetings, or providing translation services at hearings in areas with limited English proficiency). EPA can also take informal steps to enhance participation earlier in the process, such as inviting community groups to meet with EPA and express their concerns before a draft permit is issued. When making permitting decisions, the Agency has the legal authority described below to consider potential disproportionate environmental burdens on a case-by-case basis, without issuing or amending regulations or guidance documents. EPA has followed this case-by-case approach in issuing NSR permits for nearly 30 years, consistent with the legal authority under the CAA provisions and NSR regulations discussed below.

When a state is the permitting authority, EPA's role includes commenting on individual permits during the comment period. This presents an opportunity for EPA to advance environmental justice by focusing the state's consideration on potential disproportionate environmental burdens in determining that the permits comply with applicable requirements. EPA can offer comments to states regarding disproportionate burdens arising from permits. EPA routinely comments on proposed permits.

Another EPA role in state permitting is writing the regulations that establish the minimum criteria for NSR permitting programs implemented by state permitting authorities in accordance with CAA §§ 110(a)(2)(C), 165, 172(c)(5), and 173. EPA has promulgated the minimum requirements for an approvable state PSD permitting program in 40 C.F.R. § 51.166, and similar state program requirements for nonattainment NSR are contained in 40 C.F.R. § 51.165. The minor NSR program requirements for states are implemented through regulations at 40 C.F.R. § 51.160. At present, these rules do not explicitly discuss environmental justice considerations and thus do not directly require state permitting authorities to reflect these considerations in their permitting decisions. If EPA were to interpret the CAA to provide the Agency with the authority to require more direct consideration of these factors in permitting decisions by EPA and the states, the Agency could consider revising the criteria applicable to state permitting programs in order to make environmental justice considerations more explicit in one or more aspects of the permitting criteria.

### ***A. Federal PSD Program Permitting Authority and Implementation History***

Section 165(a)(2) of the CAA provides that a PSD permit may be issued only after “a public hearing has been held with opportunity for interested persons including representatives of the Administrator to appear and submit written or oral presentations on the air quality impact of [the proposed] source, alternatives thereto, control technology requirements, and other appropriate considerations.” Likewise, one purpose of the PSD

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<sup>127</sup> In addition to its authority under the CAA, EPA has a responsibility to ensure that recipients and subrecipients of federal financial assistance from EPA—including states, municipalities, and other public and private entities—comply with federal civil rights laws that prohibit discrimination on the basis of race, color, national origin (including limited English proficiency), disability, sex and age, including Title VI of the Civil Rights Act. Moreover, EPA's implementing regulation generally prohibits discrimination in any programs, activities and services receiving federal financial assistance. See Chapter 7 for a more in-depth discussion of civil rights authorities.

program is “to assure that any decision to permit increased air pollution in any area to which this section applies is made only after careful evaluation of all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decision-making process.”<sup>128</sup>

These PSD public participation requirements are implemented in EPA’s federal PSD program regulations in 40 C.F.R. § 52.21(q), which cross references EPA’s consolidated permitting procedures in 40 C.F.R. part 124. When EPA is the PSD permitting authority, the EPA Regional Administrator is required to follow the PSD requirements in 40 C.F.R. § 52.21 and the administrative procedures in 40 C.F.R. part 124. Section 124.10 of these regulations requires public notice and a minimum of 30 days for the public to comment on a draft PSD permit. Section 124.11 provides that “any interested person may submit written comments on the draft permit,” but does not identify specific subjects on which the public may comment. Nevertheless, EPA has traditionally implemented § 165(a)(2) of the Act through this provision and provided an opportunity to comment on the topics listed therein. Under § 124.10(a)(1), the duration of the public comment period for PSD permits must be “at least 30 days,” so EPA clearly has discretion to provide a longer public comment period where appropriate to provide meaningful input from any affected community, including environmental justice communities.

Section 124.12 identifies two avenues for the Regional Administrator to hold a public hearing on a PSD permit. A public hearing is required if the Regional Administrator “finds, on the basis of request, a significant degree of public interest in a draft permit.” 40 C.F.R. § 124.12(a)(1). The Regional Administrator may also “hold a public hearing at his or her discretion, whenever, for instance, such a hearing might clarify one or more issues involved in the permit decision.” 40 C.F.R. § 124.12(a)(2). Both these provisions readily support conducting a public hearing when an environmental justice community may be affected, both because such a permit application may engender a significant degree of public interest or the hearing would provide clarity regarding the impact of the source on the community. The Regional Administrator’s discretion under § 124.12(a)(2) is broad. The use of “for instance” in that provision indicates that the circumstances identified are merely illustrative and not a limitation. Section 124.10 states that notice of public hearing “shall be given at least 30 days before the hearing,” thus making clear that additional days of notice can be provided at EPA’s discretion.

The EAB has remanded a PSD permit and directed the Regional office to conduct a public hearing after the Region erroneously determined under § 124.12(a)(1) that there was not a significant degree of public interest in a permit decision. *In re Sierra Pacific Industries*, 16 E.A.D. 1 (EAB 2013). The EAB concluded that there was no bright-line test for defining this standard but that the requirement for a “significant degree” of public interest means that there must be a showing of more than just “any public interest.” The EAB examined the degree of public interest in this instance by considering the following factors: the materiality of the issues raised in commenters’ requests for a public hearing; the number of hearing requests and comments; the degree of public interest in related State or local proceedings; the amount of media coverage; the significance of the permit action; whether any substitute process was provided; and demographic information. 16 E.A.D. 27-29. The EAB did not agree with the Petitioner’s argument that the “significant degree of public interest” standard was lowered or otherwise

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<sup>128</sup> CAA § 160(5).

altered by the Executive Order on environmental justice or EPA policy statements. 16 E.A.D. 25-26. However, the EAB agreed that demographic and socioeconomic information are important factors to consider when determining whether to grant a hearing under 40 C.F.R. § 124.12(a)(1) and that “environmental justice considerations also are plainly relevant to a permit issuer’s decision as to whether to exercise its discretion to hold a public hearing under 40 C.F.R. § 124.12(a)(2).” *Id.* at 26, 40.

In addition to requiring an opportunity for public participation in permitting decisions, the “alternatives” and “other appropriate considerations” language in § 165(a)(2) can be interpreted to provide the Agency with discretion to incorporate environmental justice considerations when issuing PSD permits. EPA has recognized that this language provides a potential statutory foundation in the CAA for this discretion.<sup>129</sup> However, EPA has never explicitly based a PSD permit condition solely on such discretion or § 165(a)(2) alone, and the full contours of such discretion have not yet been defined.

Nevertheless, § 165(a)(2) could be construed to provide EPA with discretion (but not a mandatory obligation) to impose permit conditions on the basis of environmental justice considerations raised in public comments regarding the air quality impacts of a proposed source. EPA has argued that this provision authorizes the incorporation of plant siting considerations into PSD permitting decisions. The ability to condition a permit on environmental justice considerations would further the purpose of part C of title I of the CAA “to protect public health and welfare from any actual or potential adverse effect . . . from air pollution . . . notwithstanding the attainment and maintenance of all [NAAQS].”<sup>130</sup>

The EAB first addressed environmental justice considerations under the CAA in 1993.<sup>131</sup> In its initial Order Denying Review in Part and Remanding in Part in *Genesee Power*, the EAB stated that the CAA did not allow for consideration of environmental justice and siting issues in air permitting decisions. In response, EPA’s Office of General Counsel filed a Motion for Clarification on behalf of the Office of Air and Radiation and Region V. The Motion pointed out, among other things, that the CAA requirement to consider alternatives to the proposed source and the statutory definition of “best available control technology” provided opportunities for consideration of environmental justice in PSD permitting. The Motion also referenced legislative history that suggests Congress intended for the Clean Air Act to provide for examination of the air quality impact of particular site location decisions. In an amended opinion and order issued on October 22, 1993, the EAB deleted the controversial language but did not decide whether it is permissible to address environmental justice considerations under the PSD program.<sup>132</sup> Thus, EPA took a position in this motion that supports the authority to condition or deny PSD permits based on environmental justice, siting, or other considerations not explicitly addressed by other provisions in part C of title I of the Clean Air Act, but the Agency has never attempted to establish permit conditions based directly and exclusively on such authority.

Subsequently, based on EO 12898 on environmental justice, the EAB has held that environmental justice considerations must be considered in connection with the issuance of

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<sup>129</sup> See Memorandum from Gary S. Guzy, EPA General Counsel, entitled “EPA Statutory and Regulatory Authorities Under Which Environmental Justice Issues May Be Addressed in Permitting” (Dec. 1, 2000).

<sup>130</sup> CAA § 160(1).

<sup>131</sup> *In the Matter of Genesee Power Station*, PSD Appeal Nos. 93-1 through 93-7 (EAB Sept. 8, 1993).

<sup>132</sup> 4 E.A.D. 832, 833 n. 1 (EAB 1993).

federal PSD permits issued by EPA Regional Offices or states acting under delegations of federal authority.<sup>133</sup> In the *Knauf Fiber Glass* matter, the EAB remanded a PSD permit to the delegated permitting authority for failure to provide EPA’s environmental justice analysis in the administrative record in response to comments raising the issue.<sup>134</sup> In these cases, the EAB did not specifically cite § 165(a)(2) or any other provision of the CAA as the basis for EPA’s consideration of environmental justice. But the EAB has recognized that consideration of the need for a facility is within the scope of § 165(a)(2) when a commenter raises the issue.<sup>135</sup>

Based on these EAB decisions, EPA Regional Offices or their delegates in the States routinely conduct an environmental justice analysis in conjunction with the review of PSD permit applications. Indeed, the EAB “has held that environmental justice must be considered in connection with the issuance of PSD permits,” and “has . . . encouraged permit issuers to examine any ‘superficially plausible’ claim that a minority or low-income population may be disproportionately affected by a particular facility.”<sup>136</sup> EPA guidance and EAB decisions do not advise EPA Regional Offices or delegated PSD permitting authorities to integrate environmental justice considerations into any particular individual component of the PSD permitting review, such as the determination of BACT. Rather, the practice of EPA Regional Offices and delegated states has been to conduct a largely freestanding environmental justice analysis for PSD permits that can take into account case-specific factors germane to any individual permit decision.

EPA has not issued any formal guidelines for the scope and content of an environmental justice analysis on PSD permits, but has developed some general parameters through individual actions. Such an analysis has generally involved an assessment of the impacts a source may have on communities with environmental justice concerns, which is typically informed by the analysis of whether a source will cause or contribute to a violation of the health-based NAAQS in any area. Under § 165(a)(3) of the CAA, to obtain a permit, an applicant must demonstrate “that emissions from construction or operation of such facility will not cause, or contribute to, air pollution in excess of” the NAAQS. The EAB has often deferred to the judgments of EPA Regional Offices that the NAAQS provide a useful benchmark for assessing potential adverse impacts on the health of members of affected communities.<sup>137</sup>

However, in *In re Shell Gulf of Mexico, Inc.*, the EAB remanded an environmental justice analysis as inadequate when the record contained no document designated as an environmental justice analysis, and no “information or other evidence” that the analysis

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<sup>133</sup> *In re Prairie State Generating Company*, 13 E.A.D. 1, 123 (EAB 2006) (citing *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 174–75 (EAB 1999)); see also *In re AES Puerto Rico, L.P.*, 8 E.A.D. 324, 351 (EAB 1999) (order denying review based in part on the thorough environmental justice analysis), *aff’d sub nom Sur Contra La Contaminacion v. EPA*, 202 F.3d 443 (1<sup>st</sup> Cir. 2000); *In re EcoEléctrica, L.P.*, 7 E.A.D. 56, 67–69 (EAB 1997); *In re Puerto Rico Electric Power Authority*, 6 E.A.D. 253, 254–58 (EAB 1995) (citing *In re Chemical Waste Management of Indiana*, 6 E.A.D. 66 (EAB 1995) (examining for the first time the general policy directive set out in EO 12898 and the EAB’s role in implementing it in the context of a RCRA permit)).

<sup>134</sup> *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. at 174–75.

<sup>135</sup> See *In re Prairie State Generating Company*, 13 E.A.D. at 32.

<sup>136</sup> *In re Shell Gulf of Mexico, Inc.*, 15 E.A.D. 103, 149 and n. 71 (EAB 2010) (internal citations omitted).

<sup>137</sup> See generally *In re Knauf Fiber Glass, GmbH*, 9 E.A.D. 1, 15–17 (EAB 2000) (upholding Agency finding that facility “will not have disproportionately high and adverse human health or environmental effects on a minority or low-income population” based on finding of attainment of relevant NAAQS, citing 40 C.F.R. § 50.2(b) (NAAQS set at level to protect the public health and welfare)); *AES Puerto Rico, L.P.*, 8 E.A.D. at 351 (affirming environmental justice analysis based on reasoning that NAAQS are health-based and protect sensitive populations).

of environmental justice issues undertaken solely in response to public comments “considered anything beyond compliance with the NAAQS” in effect when the permit was issued.<sup>138</sup> The EAB considered this insufficient under the circumstances because, before the permit was issued, EPA had announced that it was revising the relevant NAAQS effective shortly after the permit was issued because the unrevised NAAQS was not adequately protective of public health.<sup>139</sup> In a later case, *In re Avenal Power Center, LLC*, the Board explained that its remand in the *Shell* case was because of “the region’s scant environmental justice analysis, which provided no examination or analysis of [specified environmental justice] impacts whatsoever.”<sup>140</sup>

In the *Avenal* case, the EAB rejected a challenge to a dedicated environmental justice analysis that “collected and analyzed demographic, health-related, and air quality data” regarding the impacts of emissions from a proposed facility.<sup>141</sup> The EAB noted that the Region made the environmental justice analysis available for public comment. The EAB recognized that “[t]he plain language of the Executive Order” allows agencies “considerable leeway . . . in determining how to comply with the letter and spirit of the Executive Order.”<sup>142</sup> Thus, a “substantive environmental justice analysis that endeavors to include and analyze data that is germane to the environmental justice issue raised during the comment period” may comply with the EO even if it does not reach a definitive conclusion if “the permit issuer demonstrates that it exercised its considered judgment when determining that it could not reach a determinative conclusion due to the insufficiency of available valid data.”<sup>143</sup> The EAB further noted that petitioners bear a “particularly heavy burden [in] demonstrating that the Agency clearly erred in making its technical judgments” regarding what data to consider in an environmental justice analysis.<sup>144</sup>

*In re Energy Answers Arecibo, LLC*<sup>145</sup> illustrates the leeway a permitting agency has in determining how to fulfill the objectives of the EO. In that case, EPA Region 2 encouraged the permit applicant, Energy Answers Arecibo, LLC (Energy Answers), to conduct a thorough environmental justice analysis that had “in many places gone above and beyond what statutes and regulations require.”<sup>146</sup> Specifically, after the initial study identifying the community of concern as a high-income area, Energy Answers expanded the focus area “to make sure that the broader region did not fall into the category of economically disadvantaged or underrepresented.”<sup>147</sup> In addition, Energy Answers modeled the proposed facility’s projected impact from lead, even though the area was classified as nonattainment for lead and this pollutant was therefore beyond the scope of the PSD permit.<sup>148</sup> Based on this expansive analysis, Energy Answers concluded, and the EPA Regional Office agreed, that the proposed facility “will not result in disproportionately high and adverse human health or environmental effects on minority and low-income populations.”<sup>149</sup> However, with respect to a claim that EPA failed to consider

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<sup>138</sup> *Shell*, 15 E.A.D. at 157–58 and n. 83.

<sup>139</sup> *Id.*

<sup>140</sup> *In re Avenal Power Center, LLC*, 15 E.A.D. 384, 401 (EAB 2011) (emphasis added).

<sup>141</sup> *Id.* at 398.

<sup>142</sup> *Id.* at 401.

<sup>143</sup> *Id.* at 402.

<sup>144</sup> *Id.* at 403.

<sup>145</sup> 16 E.A.D. 294 (EAB 2014) (“*Energy Answers*”).

<sup>146</sup> *Id.* at 336.

<sup>147</sup> *Id.* at 328 (citing *Energy Answers Arecibo, LLC, Environmental Justice Evaluation*, at 2 (Oct. 2011)).

<sup>148</sup> *Id.* at 331.

<sup>149</sup> *Id.* at 331–33.



alternatives to the proposed facility, the EAB appeared satisfied by an explanation from EPA that it had considered alternatives but found their development and implementation was best made by local and state government, and noted that that petitioner failed to acknowledge or confront EPA's response. In dismissing this claim, the Board observed that the EO "does not require any particular outcome in a permit decision but rather gives permitting authorities broad discretion to determine how best to implement its mandate within the confines of existing law."<sup>150</sup>

Notwithstanding the lack of formal rules or guidance on environmental justice under the PSD program, in the decisions discussed above that postdate issuance of EO 12898, the EAB acknowledged that EPA can address environmental justice considerations in PSD permit reviews, and evaluated the adequacy of EPA's environmental justice analyses as a matter of compliance with the EO. Notably, the EAB has recognized that EPA has authority to use its discretion under PSD program regulations to establish permit conditions on the basis of environmental justice considerations:

In support of environmental justice for this community, the Region took steps to require that many elements of the air quality analyses performed during the permit process be reconfirmed after the permit is issued. As conditions of the permit, [the permittee] is required to conduct ambient SO<sub>2</sub> monitoring and to perform a multi-source air quality analysis for SO<sub>2</sub>. These permit conditions are a testament to the role of public participation in the permit process. Because of the concerns raised during the public comment period, this permit contains additional conditions that are not mandated by the PSD regulations but are within the Region's discretion to require. The Region incorporated the conditions into the permit as a tangible response to the community's concerns about air quality and to fulfill the goals of the Executive Order.<sup>151</sup>

The additional conditions in this instance involved post-construction monitoring requirements (discussed further below) that are within the discretion of the permitting authority to impose under express authority in EPA regulations.<sup>152</sup>

Under § 165(a)(7) of the CAA, one requirement of a PSD permit review is that a permit applicant "conduct such monitoring as may be necessary to determine the effect which emissions from any such facility may have, or is having, on air quality in any area which may be affected by emissions from such source." This provision and § 165(e)(2) have been applied by permitting authorities to require collection of pre-construction monitoring data on ambient air quality conditions in the area to inform the air quality analysis needed to determine whether the permit may issue. In practice, most permit applicants have not been required to collect new site-specific monitoring data but have been allowed to use previously-collected data from another location that is shown to be representative of the area affected by the proposed construction. However, to support an environmental justice analysis, EPA could use this authority to gather site-specific data as appropriate to evaluate impacts on communities with environmental justice concerns.

Moreover, EPA has interpreted § 165(a)(7) to provide a permitting authority with the discretion to require post-construction monitoring to determine the effect a source is actually

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<sup>150</sup> *Id.* at 337 (citing *In re Pio Pico Energy Center*, 16 E.A.D. 56, 91, n.30 (EAB 2013) and *Avenal*, 15 E.A.D. at 402).

<sup>151</sup> *In re AES Puerto Rico, L.P.*, 8 E.A.D. at 351 (internal citations omitted).

<sup>152</sup> 40 C.F.R. § 52.21(m)(2).

having on air quality in any area.<sup>153</sup> Thus, a permitting authority has the discretion to require post-construction monitoring in a PSD permit if necessary and appropriate to provide assurance that there will not be a disproportionate impact on air quality to communities with environmental justice concerns. The EAB has affirmed the discretion of a permitting authority to establish post-construction monitoring requirements on the basis of environmental justice considerations.<sup>154</sup> Such monitoring can verify the source’s actual impact.

Enhanced consideration of impacts on communities with environmental justice concerns could extend to ambient air quality modeling, as well as monitoring requirements. Because NSR is a preconstruction permitting program, modeling plays an important role in predicting air quality impacts, and robust and transparent modeling helps to inform communities with environmental justice concerns about the likely impacts from a proposed source and promote more informed participation in decision-making. Section 165(e)(1) of the Act requires “an analysis in accordance with regulations of the Administrator, promulgated under this subsection . . . of the ambient air quality at the proposed site and in areas that may be affected by emissions from such facility”. 42 U.S.C. § 7475(e)(1). The regulations described in this provision “shall require such an analysis of the ambient air quality, climate and meteorology, terrain, soils and vegetation, and visibility at the site of the proposed major emitting facility and in the area potentially affected by the emissions from such facility.” *Id.* at § 7475(e)(3)(B). In addition, the statute specifies that the regulations “shall require the results of such analysis shall be available at the time of the public hearing on the application for such permit” and “shall specify with reasonable particularity each air quality model or models to be used under specified sets of conditions for purposes of this part.” *Id.* at § 7475(e)(3)(C) and (D). EPA has published an extensive Guideline on the use of air quality models and incorporated that *Guideline on Air Quality Models* in the federal PSD permitting regulations. 40 C.F.R. § 52.21(l); 40 C.F.R. part 51, Appendix W.

The analysis conducted to satisfy § 165(e) of the Act is used in PSD permitting to make the demonstration required under § 165(a)(3) that emission from construction will not cause or contribute to violation of the NAAQS or PSD increments. EPA’s *Guideline* recommends a two-stage approach for making this demonstration for each pollutant covered by a NAAQS or increment.<sup>155</sup> The first stage, called the “single-source impact analysis,” involves considering whether the increased emissions from the new or modifying source will, by itself, have the potential to cause or contribute to a violation of a specific NAAQS or PSD increment. If the ambient concentration increase of the pollutant in question that is estimated by this source impact analysis indicates that the source will not cause or contribute to any potential violation of a NAAQS or PSD increment, then the permitting authority may conclude that this analysis is sufficient to make the required demonstration. On the other hand, if the ambient concentration estimates at this stage indicate that the source's emissions have the potential to cause or contribute to a violation, then a broader second-stage impact analysis should be undertaken that incorporates background pollutant concentrations in the area, including the impact of other sources on the target pollutant. This second stage is called a “cumulative impact analysis” in the *Guideline* because it takes into account all sources affecting air quality in the area with the focus on one air pollutant at a time. This two-stage approach in the *Guideline* is framed as a recommendation, not a requirement. So even if the emissions from the source by itself does not suggest it will cause or contribute to a violation after the first stage of analysis, EPA retains the discretion to ask a permit applicant to complete the

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<sup>153</sup> 40 C.F.R. §§ 51.166(m)(2) and 52.21(m)(2).

<sup>154</sup> *In re AES Puerto Rico, L.P.*, 8 E.A.D. at 351.

<sup>155</sup> 40 C.F.R. part 51, Appendix W, § 9.2.3.

second-stage analysis to assess the existing air quality burden from the pollutant under examination, and this may include a community where there are environmental justice concerns.

With regard to assessing cumulative impacts on air quality, addressing hazardous air pollutant impacts in PSD permitting is not straightforward. In the 1990 CAA Amendments, Congress provided in § 112(b)(6) of the CAA that the PSD provisions do not apply to HAPs. Due to this provision, BACT limits are not required to be set for HAPs in PSD permits. However, the Administrator ruled prior to the 1990 Amendments that in establishing BACT for pollutants regulated under PSD, analysis of control technologies for PSD pollutants could also consider their relative ability to control emissions of pollutants that were not then subject to regulation under the CAA and thus not PSD pollutants.<sup>156</sup> The 1990 Amendments did not change this limited authority, and it could be viewed as a basis for addressing environmental justice considerations derived from collateral impacts of air toxics emissions. In addition, some HAPs are also PSD pollutants, such as volatile organic compounds. Thus, permitting authorities may be able to indirectly consider the effects of such a HAP in PSD, using authority to address PSD pollutant emissions. However, the focus should be on the effects of such a HAP on PSD pollutants, rather than the health and welfare impacts of HAPs that § 112 is intended to address.

### ***B. State PSD Permitting***

The PSD program provisions in the CAA contemplate that states will administer the PSD programs under state law. The CAA requires that states have a PSD program in their SIP, based primarily on §§ 110(a)(2)(C) and 110(a)(2)(J) of the CAA. The former provides that a SIP “shall . . . include a program to provide for the . . . regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that national ambient air quality standards are achieved, including a permit program as required in parts C and D of this subchapter.” 42 U.S.C. § 7410(a)(2)(C). The latter provides that a SIP “shall . . . meet the applicable requirements of . . . part C of this subchapter (relating to prevention of significant deterioration of air quality and visibility protection).” 42 U.S.C. § 7410(a)(2)(J). The primary PSD permitting provision, § 165, is in Part C of title I of the CAA, so these provisions together require a permit program “as required in” and “meet[ing] the applicable requirements of” § 165 of the CAA.

The minimum requirements for an approvable state PSD permitting program are codified in 40 C.F.R. § 51.166. These rules do not explicitly discuss environmental justice considerations and thus do not directly require state permitting authorities to reflect these considerations in their permitting decisions. However, the PSD regulations applicable to state programs have clear requirements for public participation in decision-making, which provide discretion for state permitting authorities to provide enhanced engagement for communities with environmental justice concerns. 40 C.F.R. § 51.161 includes a general requirement that all state NSR programs provide an opportunity for public comment on information submitted by a permit applicant for a minimum of 30 days. 40 C.F.R. § 51.161(a). Mirroring § 165(a)(2) of the CAA, EPA’s PSD program regulations more specifically require that a state permitting program “provide interested persons an opportunity to appear at a public hearing, and to submit written or oral comments on the air quality impact of the source, alternatives to it, the control technology required, and other appropriate considerations.” 40 C.F.R. § 51.166(q)(2)(v). The regulations also require procedures for making the permit application and supporting materials available for review and providing notification

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<sup>156</sup> *In re North County Resource Recovery Assoc.*, 2 E.A.D. 229, 230 (Adm’r 1986).

through newspaper publication of a preliminary determination to grant or deny the application and “the degree of increment consumption that is expected from the source or modification.” 40 C.F.R. §§ 51.166(q)(2)(ii)–(iii). The latter refers to the air quality impact of the source in relation to the maximum allowable increases above baseline concentrations that define “significant deterioration” under the PSD program. While these public participation requirements do not specifically address environmental justice considerations, they provide discretion for states to establish procedures for enhanced participation by members of environmental justice communities. States have discretion to provide comment periods longer than the minimum 30 days, to hold additional public hearings, and to provide notification through additional means (such as website postings or direct email and conventional mail).

In states with approved PSD programs, there is no delegation of federal authority, and EPA’s discretion under federal law does not “pass through” to the state. The extent of a state’s discretion and authority in implementing such a program is primarily a question of state law.<sup>157</sup>

Some states may have approved PSD-program regulations in place that incorporate the language from § 51.166(q)(2)(v) of EPA’s PSD program regulations. A state with such a provision in state law could read the “alternatives” and “other appropriate considerations” language in the regulation to encompass siting and environmental justice considerations in the same manner that EPA reads § 165(a)(2) of the CAA (discussed above).

Air quality monitoring requirements for state PSD programs is addressed in §§ 51.166(m) and (n) of EPA’s regulations. With regard to modeling air quality impacts, the regulations for states PSD program also incorporate EPA’s Guideline on the use of air quality models. 40 C.F.R. § 51.166(l); 40 C.F.R. part 51, Appendix W. State laws meeting these requirements should give state permitting authorities discretion to incorporate environmental justice considerations in the same manner as EPA when it is the permitting authority.

States also have the opportunity to adopt additional requirements that go beyond the minimum requirements in EPA’s NSR permitting regulations, and to apply those laws to the state’s permitting decisions. A notable example of this in the Commonwealth of Virginia, where the state statutes reflect a Commonwealth Energy Policy, which “[e]nsure[s] that development of new, or expansion of existing, energy resources or facilities does not have a disproportionate adverse impact on economically disadvantaged or minority communities.”<sup>158</sup> One of the “[e]nergy objectives” of this policy is to “[d]evelop[ ] energy resources and facilities in a manner that does not impose a disproportionate adverse impact on economically disadvantaged or minority communities.” *Id.* at § 67-101(12).

A federal appeals court recently applied this law in its review of minor source construction permit issued by Virginia, finding that the state had failed to conduct an adequate analysis of the potential impacts of a natural gas pipeline compressor station on a community of color where the

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<sup>157</sup> Some states have state environmental justice laws, which may be applicable to permitting under their approved CAA programs.

<sup>158</sup> [Va. Code Ann. § 67-102\(A\)\(11\)](#). *See also* NY Pub Serv, Ch. 48, Art.10 (Power NY Act of 2011 established a process for the siting of electric generating facilities and re-powering projects); CGS § 22a-20a (Connecticut environmental justice law increased public participation in decisions to site or expand facilities, such as power plants, waste treatment facilities, disposal facilities, or large air emission producers, in certain municipalities and communities).

facility was to be located.<sup>159</sup> The state board that approved this permit was required by state law to evaluate “facts and circumstances relevant to the reasonableness of the activity involved and the regulations proposed to control it, including: 1. The character and degree of injury to, or interference with, safety, health, or the reasonable use of property which is caused or threatened to be caused; ... [and] 3. The suitability of the activity to the area in which it is located.”<sup>160</sup> The court held that these factors and the Commonwealth Energy Policy required that the state agency consider environmental justice in the permit approval process for the compressor station.<sup>161</sup> The court concluded that the board did not meet its state law obligations because of the following errors: (1) failure to make any findings regarding the minority character of the local population; (2) failure to individually consider the potential degree of injury to the local population independent of compliance with NAAQS and state emission standards; and (3) relying on evidence in the record that was incomplete or discounted by subsequent evidence. *Id.* at 86.

EPA regulations also provide an option for states to assume delegated federal authority to implement the PSD permitting program requirements under 40 C.F.R. § 52.21(u). These states “stand in the shoes” of an EPA regional office and implement federal law in 40 C.F.R. § 52.21, which is largely identical to § 51.166 of EPA’s regulations. Although they have the power to implement federal law, such states are generally required to have state-law authority to apply § 52.21 of EPA’s regulations. But with that authority, these delegated states can incorporate environmental justice concern in their decision-making in the same manner as EPA.

### ***C. State Nonattainment NSR Permitting***

Implementation of the major source nonattainment NSR program is primarily a state responsibility. Under § 172(c)(5) of the CAA, state implementation plans must “require permits for the construction and operation of new and modified major stationary sources anywhere in the nonattainment area” in accordance with the requirements of § 173 of the CAA. In light of some differences in the statutory provisions applicable to the nonattainment NSR program and the PSD program, EPA has rarely assumed responsibility for issuing nonattainment NSR permits. EPA has established the minimum requirements for an approvable state nonattainment NSR program in 40 C.F.R. § 51.165, with certain additional requirements spelled out in the statute. However, since 2011, EPA has had the authority to administer a nonattainment NSR permitting program in Indian Country under regulations at 40 C.F.R. §§ 49.166–49.173.

In contrast to the PSD provisions, there is no direct requirement in the CAA for public participation for nonattainment NSR permitting. Section 51.165 of EPA’s regulations, governing state non-attainment NSR programs, does not contain additional specificity on public participation requirements. However, under the general regulation at 40 C.F.R. § 51.161 that applies to all NSR preconstruction permitting programs, state implementation plans must require that a state or local permitting agency provide an opportunity for public comment on information submitted by a

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<sup>159</sup> *Friends of Buckingham v. State Air Pollution Control Board*, 947 F.3d 68 (4th Cir. 2020). The review of NSR permits issued under approved state laws is ordinarily conducted by state courts, but in this case the Natural Gas Act applied to establish federal court jurisdiction. 947 F.3d at 80. This law says that the “United States Court of Appeals for the circuit in which a [natural gas] facility . . . is proposed to be constructed . . . or operated shall have original and exclusive jurisdiction over any civil action for the review of an order or action of a . . . State administrative agency acting pursuant to Federal law to issue . . . any permit . . . required under Federal law.” 15 U.S.C. § 717r(d)(1).

<sup>160</sup> Va. Code Ann. § 10.1–1307(E).

<sup>161</sup> 947 F.3d at 87.

source owner or operator who is seeking a nonattainment NSR permit. This opportunity must include the following, at minimum: (1) a 30-day public comment period; (2) public availability of the information provided by the permit applicant (and the permitting authority's analysis of the effects of the proposed source seeking the permit), in at least one location in the affected area; and (3) a prominent advertisement of the availability of the information.

The requirements that an applicant must meet to obtain a nonattainment NSR permit are reflected in § 173 of the CAA. Section 173(a)(5) requires a permitting authority reviewing a nonattainment NSR permit to determine whether “an analysis of alternative sites, sizes, production processes, and environmental control techniques for such proposed source demonstrates that benefits of the proposed source significantly outweigh the environmental and social costs imposed as a result of its location, construction, or modification.” Thus, this provision calls for consideration of siting issues. The term “social costs” is not defined in the CAA, but may be interpreted to cover a broad range of impacts on communities with environmental justice concerns.<sup>162</sup> EPA's regulations governing state nonattainment NSR programs do not establish criteria or procedures for conducting the analysis required by CAA § 173(a)(5).<sup>163</sup> EPA could advance environmental justice in the nonattainment NSR program by emphasizing the need to address this requirement and helping states understand the nature of this requirement and how it can be implemented, including the consideration of environmental justice concerns in the analysis as appropriate.

## II. TITLE V

All major stationary sources of air pollution and certain other sources are required to apply for CAA title V operating permits that include emission limitations and other conditions as necessary to assure sources' compliance with all applicable requirements of the CAA, including the requirements of the applicable implementation plan.<sup>164</sup> Unlike PSD/NSR permitting, the title V operating permit program does not generally impose new substantive air quality control requirements (which are referred to as “applicable requirements”), but does require permits to contain monitoring, recordkeeping, reporting, and other conditions to assure compliance by sources with applicable requirements.<sup>165</sup> One purpose of the title V program is to enable the source, EPA, states, and the public to better understand the applicable requirements to which the source is subject and whether the source is complying with those requirements. Thus, the title V operating permit program is a vehicle for ensuring that existing air quality control requirements are appropriately applied to facility emission units and that the units comply with these requirements.

Section 502(d)(1) of the CAA calls upon each state to develop and submit to EPA an operating permit program intended to meet the requirements of CAA title V. Under § 505(a) of the CAA and the relevant implementing regulations at 40 C.F.R. § 70.8(a), states and other permitting authorities are required to submit each proposed title V permit to EPA for review. Upon receipt of a proposed permit, EPA has 45 days to object to final issuance of the permit if it

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<sup>162</sup> See Richard J. Lazarus & Stephanie Tai, *Integrating Environmental Justice into EPA Permitting Authority*, 26 *ECOL. L.Q.* 617, 633–35 (1999).

<sup>163</sup> See 40 C.F.R. § 51.165 (this set of regulation does not expressly address the requirements in CAA § 173(a)(5)); 40 C.F.R. § 51, Appendix S, Section IV.A (Condition 5 requires a demonstration from the permit applicant in accordance with CAA § 173(a)(5)); 40 C.F.R. § 49.169(b)(5) (EPA nonattainment NSR regulation for tribal areas requiring same demonstration).

<sup>164</sup> CAA §§ 502(a), 504(a), and 504(c).

<sup>165</sup> 57 Fed. Reg. 32250, 32251 (July 21, 1992) (EPA final action promulgating Part 70 rules).

is determined not to be in compliance with applicable requirements or the requirements of title V.<sup>166</sup> If EPA does not object to a permit on its own initiative, § 505(b)(2) of the CAA provides that any person may petition the Administrator, within 60 days of the expiration of EPA’s 45-day review period, to object to the permit.<sup>167</sup> In response to such a petition, § 505(b)(2) of the CAA requires the Administrator to issue an objection if a petitioner demonstrates that a permit is not in compliance with the requirements of the CAA.

Because title V generally does not authorize the direct imposition of substantive emission control requirements, title V permitting does not appear to be an effective mechanism for establishing new, substantive control requirements to address environmental justice considerations regarding impacts on or participation by communities with environmental justice concerns. The title V process, however, can allow public participation to serve as a motivating factor for applying closer scrutiny to a title V source’s compliance with applicable CAA requirements. By providing significant public participation opportunities, title V can serve as a vehicle by which citizens can raise environmental justice considerations that arise under other provisions of the CAA. Communities can use the title V process to help ensure that each title V permit contains all of a source’s applicable requirements, and other conditions necessary to assure the source’s compliance with those requirements.

Under the 40 C.F.R. part 70/71 permitting process, EPA has exercised its CAA authority to require extensive opportunities for public participation in permitting actions. For example, 40 C.F.R. § 70.7(h) requires that all permit proceedings (except for modifications qualifying for minor permit modification procedures) “provide adequate procedures for public notice including an opportunity for public comment and a hearing on the draft permit.” This provision also specifies steps permitting authorities must take to allow for adequate public participation.

Under § 504(c) of the CAA, title V permits must contain provisions, including monitoring requirements, to assure compliance with permit terms and conditions. EPA has made clear in numerous title V orders responding to citizen petitions that permitting authorities need to evaluate monitoring requirements in title V permits, and must supplement monitoring in title V permits where necessary to assure compliance with permit terms and conditions. In the *CITGO* and *Premcor* Orders,<sup>168</sup> EPA first summarized the title V monitoring requirements. EPA explained that the Part 70 monitoring rules<sup>169</sup> are designed to satisfy the statutory requirement in § 504(c) of the CAA that “[e]ach permit issued under [title V] shall set forth . . . monitoring . . . requirements to assure compliance with the permit terms and conditions.”

As a general matter, permitting authorities must take three steps to satisfy the monitoring requirements in EPA’s Part 70 regulations. First, under 40 C.F.R. § 70.6(a)(3)(i)(A), permitting authorities must ensure that monitoring requirements contained in applicable requirements are properly incorporated into the title V permit. Second, if the applicable requirement contains no periodic monitoring, permitting authorities must add “periodic monitoring sufficient to yield

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<sup>166</sup> 40 C.F.R. § 70.8(c).

<sup>167</sup> See also 40 C.F.R. § 70.8(d).

<sup>168</sup> *In the Matter of CITGO Refining and Chemicals Company L.P.*, Petition VI-2007-01 (May 28, 2009) (*CITGO* Order); *In the Matter of Premcor Refining Group, Inc.*, Petition VI-2007-2 (May 28, 2009) (*Premcor* Order). EPA has maintained the framework summarized in these orders. See, e.g., *In re Northeast Maryland Waste Disposal Authority Montgomery Co. Resource Recovery Facility*, Order on Petition III-2019-2 at 8-12 (Dec. 11, 2020).

<sup>169</sup> 40 C.F.R. §§ 70.6(a)(3)(i)(A)–(B) and 70.6(c)(1).

reliable data from the relevant time period that are representative of the source’s compliance with the permit.”<sup>170</sup> Third, if there is some periodic monitoring in the applicable requirement, but that monitoring is not sufficient to assure compliance with permit terms and conditions, permitting authorities must require supplemental monitoring or perform such monitoring itself in order to assure such compliance.<sup>171</sup>

In addition, in all cases, the rationale for the selected monitoring requirements must be clear and documented in the permit record.<sup>172</sup> Further, permitting authorities have a responsibility to respond to significant comments.<sup>173</sup> This principle applies to significant comments on the adequacy of monitoring.<sup>174</sup>

Further, title V and EPA’s implementing regulations also contain requirements regarding other types of conditions necessary to ensure compliance, such as reporting requirements. Section 504(c) of the CAA requires that each permit set forth “inspection, entry, monitoring, compliance certification, and reporting requirements to assure compliance with the permit terms and conditions.” Further, 40 C.F.R. § 70.6(c)(1) requires that title V permits contain “compliance certification, testing, monitoring, reporting, and recordkeeping requirements sufficient to assure compliance with the permit terms and conditions.” There are also several specific provisions in Part 70 addressing these other types of requirements, such as 40 C.F.R. § 70.6(a)(3)(ii) on recordkeeping.<sup>175</sup>

As the *CITGO* and *Premcor* Orders illustrate, EPA can use its role in overseeing and implementing the title V permitting process to help ensure that a title V permit contains all of the source’s applicable requirements, and other conditions—including provisions for monitoring and recordkeeping—necessary to assure the source’s compliance with those requirements. The process for public petitions to the Administrator on state-issued permits under § 505(b)(2) of the CAA and 40 C.F.R. § 70.8(d) allows an opportunity for the public to raise to EPA concerns regarding particular title V permits. In addition, EPA has authority to comment on whether a title V permit assures compliance with requirements of the CAA. Further, under CAA § 505(b), EPA must object if the Agency determines a permit is not in compliance with the requirements of the CAA.

As stated above, title V requires permitting authorities to submit proposed permits to EPA for a 45-day review period before the title V permits may be issued. EPA Regional Offices review only some of the proposed title V permits that are submitted by the permitting authorities because the resources available for such review and the statutory time frame provided for review of proposed permits are not sufficient to allow review of all proposed title V permits. In some instances, Regional Offices have prioritized title V permit review based on factors related to environmental justice. One way that EPA could address environmental justice considerations under title V more systematically would be for the Agency to direct its resources available for review of proposed title V permits to the review of such permits where they impact

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<sup>170</sup> 40 C.F.R. § 70.6(a)(3)(i)(B).

<sup>171</sup> 40 C.F.R. § 70.6(c)(1).

<sup>172</sup> 40 C.F.R. § 70.7(a)(5).

<sup>173</sup> See, e.g., *In the Matter of Onyx Environmental Services*, Petition V-2005-1 (Feb. 1, 2006) (“[I]t is a general principle of administrative law that an inherent component of any meaningful notice and opportunity for comment is a response by the regulatory authority to significant comments[.]”).

<sup>174</sup> See, e.g., *Premcor Order* at 7.

<sup>175</sup> *Premcor Order* at 8.



communities with environmental justice concerns. Thorough EPA review would protect public health by potentially identifying any deficiencies with proposed permits and help ensure that the title V permits affecting these communities include all applicable requirements and adequate monitoring, recordkeeping, and reporting requirements to assure compliance with the applicable requirements.

After a permit has been issued by a permitting authority, EPA has authority under CAA § 505(e) to reopen the permit if the Administrator finds cause exists to terminate, modify, or revoke and reissue such permit. EPA may exercise this authority on its own initiative. EPA's regulation at 40 C.F.R. § 70.7(g) requires that the permitting authority be notified and given an opportunity to propose a determination within a specified time frame. Should the permitting authority fail to act, or otherwise fail to resolve any objection EPA has to the permit under this process, the Administrator would terminate, modify, or revoke and reissue the permit.

Where EPA has not approved a state or tribal title V program (e.g., in most of Indian country), EPA directly implements the title V permit program under 40 C.F.R. part 71. In reviewing and acting on permit applications under Part 71 in Indian country and other areas, EPA can exercise the legal authorities discussed above to promote meaningful public involvement and ensure that title V permits contain adequate provisions to assure compliance with applicable requirements.

## **FEDERALLY RECOGNIZED INDIAN TRIBES**

As discussed in more detail in Chapter Five, EO 12898 on environmental justice specifically addresses Indigenous communities and federally recognized Indian tribes by providing that “[e]ach Federal agency responsibility set forth under this order shall apply equally to Native American programs.”<sup>176</sup> In addition, the CAA provides opportunities for EPA to work with Indian tribes, and for EPA and tribes to consider and address impacts on communities in Indian country with environmental justice concerns.

In 1998, EPA promulgated the Tribal Authority Rule (TAR), 40 C.F.R. part 49, which implements the directive in § 301(d)(2) of the CAA that EPA promulgate regulations identifying the CAA provisions for which eligible tribes may be treated in the same manner as states. Under the TAR, an eligible tribe may be treated in the same manner as a state for all of the core CAA programs, including the establishment of implementation plans, the Prevention of Significant Deterioration program, and title V permitting programs. Many of these programs provide significant opportunities and responsibilities for tribes to work with affected communities in implementing the CAA. Tribes may also apply to EPA under CAA § 105 and the TAR for access to funds to implement tribal clean air programs for their areas. To date, 44 tribes have received treatment in a similar manner as a state (TAS) status for various CAA regulatory and non-regulatory provisions. Four of those tribes have EPA-approved tribal implementation plans (TIPs) to address air quality issues on their reservations, with several more TIPs under development. In addition, the Navajo Nation Environmental Protection Agency has been delegated authority to implement on EPA's behalf the federal title V operating permit program under 40 C.F.R. part 71 for its reservation, and EPA has approved the Southern Ute Indian Tribe's operating permit program under 40 C.F.R. part 70.

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<sup>176</sup> Executive Order 12898, Section 6-606.

Moreover, under § 164 of the CAA, states and Indian tribes have the authority to modify the classifications for their attainment areas, which will determine the level of significant deterioration allowable under the PSD increments. Several tribes have decided to provide their reservations the enhanced protection of air quality provided by Class I status and have obtained EPA approval to redesignate their reservations as Class I. Further, EPA generally has authority under CAA § 301(d)(4) to directly implement provisions of the CAA in Indian country in the absence of EPA-approved programs.<sup>177</sup> When EPA undertakes direct implementation of the CAA in Indian country, EPA generally consults and works closely with the relevant tribal governments. EPA tribal programs are discussed more fully in Chapter Five.

## **ADDRESSING OZONE-DEPLETING SUBSTANCES AND THEIR SUBSTITUTES**

Title VI of the CAA was enacted as part of the 1990 Amendments to the CAA, after the United States ratified the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol) in 1988. Title VI includes provisions to implement United States' obligations as a party to the Montreal Protocol, as well as containing several complementary measures. For example, both the Montreal Protocol and title VI of the CAA require phasing out the production and consumption of specified ozone-depleting substances (ODS), such as chlorofluorocarbons (CFCs) and hydrochlorofluorocarbons (HCFCs), establishing specific milestones for the phaseout. Accordingly, EPA administers a system to allocate production and consumption allowances for ODS, reducing the number of available allowances over time to ensure those milestones are met. Allocation of production and consumption allowances for certain types of ODS ended decades ago, such as the allowances for CFCs, which ended in 1996. The last remaining ODS allowances, for certain types of HCFCs, will be reduced to zero in 2030. Production and import of ODS without the appropriate allowances are generally prohibited; however, ODS continue to be produced for use as a feedstock and methyl bromide continues to be used under the Quarantine and Preshipment exemption. Thus, while the ODS phaseout in the United States is nearly complete, EPA could consider the appropriateness of further examination or regulation of remaining production and limited use of ODS, in light of potential EJ concerns.

The complementary programs under title VI of the CAA include the national recycling and emission reduction program under § 608 of the CAA, and the labeling requirements under § 611, among others. EPA's implementation of these programs may offer opportunities to address environmental justice concerns. For example, § 612 of the CAA directs EPA to promulgate certain regulations governing alternatives to ODS. Consistent with this direction, EPA has established the Significant New Alternatives Policy (SNAP) program. Section 612(a) describes the policy that to "the maximum extent practicable" regulated ODS "shall be replaced by chemicals, product substitutes, or alternative manufacturing processes that reduce overall risks to human health and the environment." Further, § 612(c) provides that "it shall be unlawful to replace" any regulated ODS "with any substitute substance which the Administrator determines may present adverse effects to human health or the environment" where other substitutes that reduce "overall risk to human health and the environment" are "currently or potentially available." EPA must publish

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<sup>177</sup> See also 40 C.F.R. part 49.

lists of substitutes prohibited for specific uses and substitutes that are safe alternatives for specific uses. Any person may petition EPA to amend the lists, and manufacturers must notify EPA before introducing potential alternatives into interstate commerce. The statutory focus on reducing overall risks to human health and the environment may allow for enhanced consideration of environmental justice concerns, for example where an alternative under consideration could pose disproportionate risks to communities with environmental justice concerns.

Additionally, in developing its lists of substitutes under SNAP, EPA uses a “comparative risk framework” to evaluate alternatives within specific end-uses. And based on this evaluation it restricts use of alternatives in each end-use that present relatively higher risks to human health or the environment, while listing safer alternatives as acceptable without restrictions. The comparative risk framework includes seven specific criteria for assessing potential alternatives: atmospheric effects and related health and environmental impacts; general population risks from ambient exposure to compounds with direct toxicity and to increased ground-level ozone; ecosystem risks; occupational risks; consumer risks; flammability; and cost and availability of the substitute. 40 C.F.R. § 82.180(a)(7). Several of these factors may provide an opportunity to consider the potential for disproportionate risks to communities with environmental justice concerns as appropriate, depending on the possible concerns associated with the particular substitute in the particular end use. For example, if an alternative under consideration in SNAP posed a greater risk of health effects to low-income workers compared to other substitutes that are listed as acceptable in that end-use under SNAP, that information could be relevant to the consideration of factors in the comparative risk screen, such as occupational risks and toxicity.

In addition to its authorities under title VI of the CAA, EPA also has authorities to address hydrofluorocarbons (HFCs)<sup>178</sup> under the American Innovation and Manufacturing (AIM) Act, which was enacted by Congress on December 27, 2020. See 42 U.S.C. 7675. HFCs are potent greenhouse gases (GHGs), which were intentionally developed as replacements for ODS in the refrigeration, air conditioning, aerosols, fire suppression, and foam blowing sectors, and they have global warming potentials<sup>179</sup> that can be hundreds to thousands of times greater than carbon dioxide. HFC use is growing worldwide due to the phaseout of ODS and increasing use of refrigeration and air-conditioning equipment globally.

In general terms, the AIM Act provides EPA newly enacted authorities to address HFCs, including to: (1) phase down HFC production and consumption; (2) establish requirements for the management of HFCs and HFC substitutes in equipment; and (3) facilitate transitions in technology through sector-based restrictions on use of HFCs. EPA is still in the early stages of implementing the AIM Act. In October of 2021, it published its first rule under the AIM Act to establish a regulatory regime to provide a framework for achieving the HFC phasedown requirements and to establish an allowance allocation program.<sup>180</sup> Under this program, producers and importers of HFCs must have sufficient production and consumption allowances for the HFCs they produce and import. In addition, the Act requires EPA to issue allowances for use in a calendar year by October 1 of the prior year. Accordingly, EPA has issued allowances to individual

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<sup>178</sup> The AIM Act focuses on the HFCs listed under the Act, which it refers to as “regulated substances.” See 42 U.S.C. 7675(b)(11), (c)(1), and (c)(3). However, for ease of reference, this discussion refers to those substances simply as HFCs, except in quotations.

<sup>179</sup> Global warming potential is a measure of the relative climate impact of a GHG.

<sup>180</sup> Phasedown of Hydrofluorocarbons: Establishing the Allowance Allocation and Trading Program Under the American Innovation and Manufacturing Act, 86 Fed. Reg. 55116 (Oct. 5, 2021).

producers and importers for the 2022 calendar year.<sup>181</sup>

These new authorities may also offer new opportunities to consider environmental justice concerns and potential approaches. EPA highlighted environmental justice in the rulemaking to establish the HFC allowance allocation program. For example, it discussed how the potential impacts of climate change may implicate environmental justice, observing that certain populations may be particularly vulnerable to the risks of climate change, such as low-income communities, some communities of color, and some Native American tribal communities.<sup>182</sup> Further, it noted the significant benefits that would be achieved by reducing production and consumption of HFCs, in light of their high global warming potentials, and that reductions in GHG emissions would benefit those populations that may be especially vulnerable to damages associated with climate change.

At the same time, EPA recognized that the phasedown in production of HFCs may cause significant changes in the location and quantity of production of both HFCs and their substitutes, and that these changes may in turn affect emissions of hazardous air pollutants at chemical production facilities. EPA requested information from the public and conducted an environmental justice analysis, as a tool for informing potential concerns, carefully evaluating the available information on HFC production facilities and the characteristics of nearby communities to evaluate such impacts.<sup>183</sup> EPA concluded that “[b]ased on this analysis and information gathered during the comment period, EPA finds evidence of environmental justice concerns near HFC production facilities from cumulative exposure to existing environmental hazards in these communities.”<sup>184</sup> However, given uncertainties about where and in what quantities HFC substitutes will be produced, EPA also concluded that it could not determine the extent to which the rule would exacerbate or reduce existing disproportionate adverse effects on communities of color and low-income people. Accordingly, the agency explained that it intends to continue to evaluate the impacts of this program on communities with environmental justice concerns and consider further action, as appropriate, to protect health in communities affected by HFC production as it moves forward with implementing the rule. EPA did, however, include elements in the rulemaking to address concerns raised by EJ communities, including provisions providing for increased transparency and data release.

As another example, subsection (i) of the AIM Act, 42 U.S.C. § 7675(i), which focuses on technology transitions, may also give EPA opportunities to consider environmental justice. Under this provision, “the Administrator may by rule restrict, fully, partially, or on a graduated schedule, the use of a regulated substance in the sector or subsector in which the regulated substance is used.” *Id.* at 7675(i)(1). In addition, a person may petition the Administrator to promulgate such a rule for the restriction on use of a HFC in a sector or subsector. *Id.* at 7675(i)(3). The Act identifies four factors for EPA to consider to the extent practicable when making a determination to grant or deny such a petition or in carrying out such a rulemaking. *Id.* at 7675(i)(4). Among

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<sup>181</sup> Phasedown of Hydrofluorocarbons: Notice of 2022 Allowance Allocations for Production and Consumption of Regulated Substances Under the American Innovation and Manufacturing Act of 2020, 86 Fed. Reg. 55841 (Oct. 7, 2021).

<sup>182</sup> See, e.g., 86 Fed. Reg. at 55126 (discussing conclusions of recent assessment reports).

<sup>183</sup> See, e.g., 86 Fed. Reg. at 55126–29 (discussing environmental justice analysis conducted for this rulemaking). See also the Regulatory Impact Analysis for this rulemaking, which contains additional information about the environmental justice analysis EPA conducted. Available at: <https://www.epa.gov/system/files/documents/2021-09/ria-w-works-cited-for-docket.pdf> (last visited Dec. 7, 2021).

<sup>184</sup> 86 Fed. Reg. at 55200.

these factors is “overall economic costs and environmental impacts, as compared to historical trends.” *Id.* at (i)(4)(C). As EPA begins to implement this portion of the AIM Act, it could consider incorporating environmental justice into its evaluation of this factor, for example by analyzing whether regulations to restrict HFC use could also reduce existing disproportionate adverse environmental impacts that affect communities with environmental justice concerns.

## MISCELLANEOUS

### I. ACCIDENT PREVENTION AUTHORITIES

The Chemical Accident Prevention Provisions, 40 C.F.R. part 68, commonly referred to as the “Risk Management Program” or “RMP” rules, implement CAA § 112(r)(7)(B). CAA § 112(r)(7)(B) required EPA to issue “reasonable regulations” applicable to stationary sources that provide for the prevention of, detection of, and response to catastrophic toxic airborne releases, fires, and explosions (accidental releases) of specified “regulated substances.” The rules require the preparation of risk management plans (Plans) that summarize a stationary source’s RMP. The Plans include an assessment and disclosure of potential areas and populations that may be affected by worst-case accidents and other more likely events, as well as an accident history and a summary of accident prevention measures and emergency response programs. Portions of the Plans could be made available to the public via an on-line database, although by statute EPA may not allow the general public access to certain off-site consequence information (e.g., worst-case scenarios and more likely release scenarios) and rankings of facilities by scenario. During the development of the first rule on accident prevention measures, commenters asked for opportunities for local input into source prevention programs, including public meetings with sources during program development and the right to trigger audits or inspections. While the final rule did not provide for local input, EPA has the authority amend its rules to create public input opportunities. Also, historically EPA has assessed the reasonableness of its regulations by balancing source or sector factors such as prevalence of accidents, cost to prevent accidents, and potential benefits of accident reduction generally without accounting for factors that could make impacts disproportionate in some areas or communities. EPA could explore whether it is reasonable for the regulations to provide more stringent requirements for stationary sources located in communities that are disproportionately exposed to the risk of a chemical accidental release (e.g., stationary sources located in communities with multiple sources).

EPA has rulemaking authority under CAA § 112(r)(7)(A) to require additional monitoring and recordkeeping related to accidental release prevention, and to distinguish among sources by location, although EPA has not exercised this authority. This authority applies to the same substance list as the rules under CAA § 112(r)(7)(B) discussed above and is similar to other CAA monitoring and recordkeeping authorities summarized in this document, except its focus is on accidental releases. Therefore, EPA has the authority to establish additional release monitoring requirements based on environmental justice considerations if needed to prevent and address accidental releases.

In addition to the regulatory authority in CAA § 112(r)(7), the statute directly establishes a “general duty” to assess hazards, design and maintain a safe facility, and respond to accidents. This authority in CAA § 112(r)(1) is not limited to a set list of chemicals. Instead, it applies to any stationary source handling substances that are extremely hazardous due to use and properties. EPA provided guidance on this duty more than 20 years ago. If the Agency were to update this

guidance, it could address issues of importance to communities with environmental justice concerns.

## **II. INDOOR AIR POLLUTION**

EPA has authority to do research and disseminate information concerning indoor air pollution pursuant to the Radon Gas and Indoor Air Quality Research Act of 1986.<sup>185</sup> EPA does not have regulatory authority to address indoor air pollution. In the past, EPA has addressed indoor air pollution such as second-hand smoke, otherwise known as “environmental tobacco smoke” (ETS), through means such as issuance of an ETS Risk Assessment and informational programs to advise the public about the risks of exposure to ETS. Such techniques could be brought to bear with other indoor air pollutants that have disproportionate impacts on at-risk communities, including communities with environmental justice concerns.

## **III. INFORMATION AUTHORITIES**

EPA has a range of information-gathering and dissemination authorities that it can use to promote environmental justice. These authorities relating to research, monitoring and reporting can be implemented to focus attention on, and enhance participation in decision-making by, communities with environmental justice concerns in ways that enable those communities to obtain information they can use to safeguard their health and environment.

For example, EPA has broad authority under CAA § 114 to gather information for purposes of implementing the requirements of the Clean Air Act. Under CAA § 114(a), EPA can require a broad range of persons with information related to implementing the statute to do a broad range of actions, including: maintain records; make reports; install use and maintain monitors; collect samples; keep records needed for parametric monitoring when direct monitoring is impractical; submit compliance certifications; and “provide such other information as the Administrator may reasonably require.” In addition, EPA has authority under CAA § 114(a)(2) to conduct inspections and to collect samples.

EPA can use this authority to gather information to make many types of assessments and decisions, such as whether or not to regulate a source, how to regulate a source better, or what impacts the source has on surrounding communities. For example, EPA has authority under CAA § 114 to create or expand requirements for monitoring sources at the fence line in order to assess impacts on surrounding communities when it evaluates emissions of NAAQS pollutants under CAA § 111 or HAP pollutants under CAA § 112. Significantly, information that EPA collects that meets the regulatory definition of “emissions data” must be available to the public, and thus members of the public can be better informed about emissions that affect their health and participate more meaningfully in regulatory decisions.

As discussed above, EPA and state permitting agencies can also impose monitoring requirements in individual permits. EPA has specific authority under CAA § 112(l)(3) to establish an air toxics clearinghouse to provide technical and other information about air toxics. EPA may also promulgate regulations under CAA § 112(r)(7) to impose monitoring, recordkeeping, reporting and other requirements in connection with the accidental release of regulated substances.

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<sup>185</sup> 42 U.S.C. § 7401 note (1986).

Further, under § 103 of the CAA, EPA has authority to conduct research relating to the causes, effects, extent, prevention, and control of air pollution. Clean Air Act § 112(l)(3) directs the Agency to use this authority to examine methods for preventing, measuring, and controlling emissions and evaluating associated health and ecological risks. Finally, CAA § 112(m) requires EPA to monitor the deposition of hazardous air pollutants onto the Great Lakes, the Chesapeake Bay, Lake Champlain, and coastal waters. EPA could focus that authority on collecting information relevant to the communities that depend on these water resources for fishing and other uses.



# **CHAPTER 2**

## **Water Programs**



## CHAPTER TWO: WATER PROGRAMS

This chapter addresses three statutes: the Clean Water Act,<sup>186</sup> the Safe Drinking Water Act,<sup>187</sup> and the Marine Protection, Research, and Sanctuaries Act.<sup>188</sup> The primary opportunities for advancing environmental justice exist under the Clean Water Act and Safe Drinking Water Act because they regulate a broad range of activities that affect communities with environmental justice concerns<sup>189</sup> that are or may be disproportionately impacted by environmental pollution. Under both statutes, EPA has numerous authorities that provide opportunities to advance environmental justice.<sup>190</sup>

### CLEAN WATER ACT

The primary goal of the Clean Water Act (CWA) is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”<sup>191</sup> To achieve this objective, the Act prohibits the discharge from a point source of any pollutant to a water of the United States unless that discharge complies with specific requirements of the CWA.<sup>192</sup> In addition, the Act directs states to adopt water quality standards for their waters identifying the desired uses and acceptable levels of pollution in their waters.<sup>193</sup> The CWA provides EPA broad authorities to establish regulations to implement the CWA’s programs and gives EPA oversight authority of state programs.<sup>194</sup> This chapter discusses the primary statutory and regulatory programs established under the CWA and identifies EPA’s discretionary authorities to advance environmental justice under the CWA’s various programs. The CWA’s grant-related authorities and the oil spill program under § 311 are discussed separately in Chapters Seven and Three, respectively.

#### I. WATER QUALITY CRITERIA GUIDANCE AND WATER QUALITY STANDARDS

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<sup>186</sup> 33 U.S.C. §§ 1251–1387.

<sup>187</sup> 42 U.S.C. §§ 300f–300j–26.

<sup>188</sup> 33 U.S.C. §§ 1401–1445.

<sup>189</sup> This document uses the term “communities with environmental justice concerns” to refer to communities overburdened by pollution as identified in EO 12898. Those communities include communities of color, low-income communities, and Indigenous communities. Generally, where EPA has authority to consider impacts to those communities, EPA is also likely to have authority to consider equitable treatment of underserved communities consistent with EO 13985. “Underserved communities” in EO 13985 refers to populations sharing a particular characteristic, as well as geographic communities, that have been systematically denied a full opportunity to participate in aspects of economic, social, and civic life, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality.

<sup>190</sup> In addition to its authority under the CWA, SDWA, and MPRSA, EPA has a responsibility to ensure that recipients and subrecipients of federal financial assistance from EPA—including states, municipalities, and other public and private entities—comply with federal civil rights laws that prohibit discrimination on the basis of race, color, national origin (including limited English proficiency), disability, sex and age, including Title VI of the Civil Rights Act. Moreover, EPA’s implementing regulation generally prohibits discrimination in any programs, activities and services receiving federal financial assistance. *See* Chapter 7 for a more in-depth discussion of civil rights authorities.

<sup>191</sup> 33 U.S.C. § 1251(a).

<sup>192</sup> 33 U.S.C. § 1311(a).

<sup>193</sup> *See* 33 U.S.C. § 1313.

<sup>194</sup> *See* 33 U.S.C. § 1361.

Water quality standards are the foundation of the water quality-based control programs mandated by the CWA. Water quality standards define the goals for a waterbody by designating uses, setting criteria to protect those uses, and establishing antidegradation protections to maintain existing uses and high quality waters.<sup>195</sup> Because water quality standards set the foundation for the level of water quality that must be met by other CWA programs, they provide particular opportunities for ensuring protection of water quality in areas used by communities with environmental justice concerns.

### ***A. Water Quality Criteria Guidance***

It is the national goal of the CWA that wherever attainable an interim goal of water quality that provides for the protection and propagation of fish, shellfish and wildlife and provides for recreation in and on the water be achieved.<sup>196</sup> Section 304(a)(1) of the CWA provides that EPA shall develop and publish criteria for water quality accurately reflecting the latest scientific knowledge on a variety of factors, including “the kind and extent of all identifiable effects on health and welfare” that may be expected from the presence of pollutants in any body of water, including ground water.<sup>197</sup> Pursuant to this authority, EPA has developed and published water quality criteria guidance for protection of human health from consumption of fish and drinking water as well as exposure to bacteria through recreation in and on the water.<sup>198</sup> States often adopt regulatory water quality standards pursuant to § 303(c) of the CWA based on EPA’s recommended § 304(a) criteria.

(1) *EPA Authorities to Issue Recommended Criteria Guidance for Protection of Communities Consuming High Levels of Fish and Shellfish*

EPA’s recommended water quality criteria generally are expressed as ambient numeric pollutant levels that EPA considers to be protective of the intended use of the water (e.g., consumption of fish). EPA currently has recommended water quality criteria for protection of human health for over 100 individual pollutants.<sup>199</sup> An important element of EPA’s criteria recommendations for protection of human health is that they reflect EPA’s assumptions regarding fish consumption.<sup>200</sup> EPA’s current recommended human health criteria reflect an assumption that the general population to be protected at the criteria level will consume 22 grams per day of fish (the national average value).<sup>201</sup> A relative source contribution term is included to account for exposure to a particular chemical that is not attributed to ambient water and fish consumption. This term can range from 20% to 80%.

EPA’s use of 22 grams per day represents the 90<sup>th</sup> percentile consumption rate of fish and shellfish from inland and nearshore waters for the adult US population.<sup>202</sup> This fish consumption rate was updated in 2015 to reflect more recent data than were used to derive the rate in EPA’s methodology for deriving water quality criteria to protect human health, which was published in

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<sup>195</sup> See 33 U.S.C. § 1313 and 40 C.F.R. part 131.

<sup>196</sup> 33 U.S.C. § 1251(a)(2).

<sup>197</sup> 33 U.S.C. § 1314(a)(1).

<sup>198</sup> See examples at <https://www.epa.gov/wqc/national-recommended-water-quality-criteria-tables>.

<sup>199</sup> See <https://www.epa.gov/wqc/national-recommended-water-quality-criteria-human-health-criteria-table>.

<sup>200</sup> See <https://www.epa.gov/sites/default/files/2018-12/documents/hh-criteria-calculation-matrix-2002.pdf>.

<sup>201</sup> See <https://www.epa.gov/sites/default/files/2015-10/documents/human-health-2015-update-factsheet.pdf>.

<sup>202</sup> See *id.*

2000.<sup>203</sup>

For the protection of communities with environmental justice concerns, EPA's methodology specifically considered "the States' and Tribes' need to provide adequate protection from adverse health effects to highly exposed populations such as recreational and subsistence fishers."<sup>204</sup> EPA has broad authority under CWA §§ 304(a)(1) and (2) to update existing guidance if EPA determines that it would help to protect communities consuming higher levels of fish and shellfish. Such an update could consider additional guidance on consumption levels for a broader range of highly exposed communities beyond the current recommendations for recreational and subsistence fishers and clarification that these communities must be protected at a minimum at the same risk level as the general population. In addition to providing updated guidance on consumption levels, the update could also reflect consideration of cumulative impacts to environmental justice communities from multiple pollution and non-pollution stressors, and that such communities may also be more susceptible to pollution.

Recognizing that the level of fish intake in highly exposed communities varies by geographical location, EPA's methodology also suggests a four-preference hierarchy for states and authorized tribes to follow when deriving consumption rates. The four-preference hierarchy, which encourages use of the best local, state, and regional data available, consists of: (1) use of local data; (2) use of data reflecting similar geography and population groups; (3) use of data from national surveys; and (4) use of EPA's default intake rates.<sup>205</sup>

EPA has the opportunity and statutory authority when reviewing new or revised state and tribal water quality standards to ensure that states and tribes are appropriately considering all relevant data in determining whether their water quality standards are providing adequate protection for highly exposed communities.<sup>206</sup> For example, when one state adopted revised human health criteria for toxic pollutants in 2011, EPA evaluated the revised criteria to ensure that the state considered all available and relevant local and regional data respecting fish consumption rates. EPA determined that the revised criteria – which were based on a ten-fold increase in fish consumption patterns among tribal communities in the state – were derived in a manner consistent with EPA's recommended methodology for the protection of highly exposed communities.<sup>207</sup> If the Agency determines that states and authorized tribes are not adequately considering available data or implementing EPA's four-preference hierarchy, EPA has broad statutory authority to issue additional guidance clarifying that the Agency expects them to address all fish consumption data in developing their water quality standards and to use default assumptions in the absence of local data. EPA could then use the guidance in its review of state and tribal water quality standards.

(2) *Authorities to Issue Guidance for Protection of Communities Swimming and Recreating in Waters of the United States, Including Urban Waters*

In 1986, EPA issued the original recommended water quality criteria guidance on the

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<sup>203</sup> U.S. Env'tl. Prot. Agency, Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health (2000) (EPA-822-B-00-004 (October 2000)) at 4–25.

<sup>204</sup> *Id.*

<sup>205</sup> U.S. Env'tl. Prot. Agency, *supra* note 203, at 4–25.

<sup>206</sup> See 33 U.S.C. § 1313 and 40 C.F.R. part 131.

<sup>207</sup> See <https://www.epa.gov/wqs-tech/water-quality-standards-regulations-oregon>.

acceptable levels of indicators of fecal contamination in waters designated for primary contact recreation (e.g., swimming).<sup>208</sup> The Beaches Environmental Assessment and Coastal Health Act of 2000 (BEACH Act) amended the CWA to direct EPA to publish revised water quality criteria recommendations (including a revised list of testing methods, as appropriate) for protection of all coastal and Great Lakes waters designated for primary contact recreation.<sup>209</sup> Although the BEACH Act amendments do not direct EPA to develop updated water quality criteria recommendations for waters other than coastal and Great Lakes waters, EPA has authority under CWA § 304(a) to update its recommendations for all inland waters.<sup>210</sup> EPA published updated recommended criteria for recreational waters in 2012 to protect all waters in the United States designated for primary contact recreation, including those in communities in urban areas whose primary opportunities for recreation may be in urban waters.<sup>211</sup> In 2019 EPA published criteria for two toxins associated with Harmful Algal Blooms in recreational waters based on children’s exposure.<sup>212</sup> EPA retains the authority under § 304(a) to update these recommendations as appropriate according to the latest scientific knowledge.<sup>213</sup> EPA is currently evaluating the adequacy of the 2012 recommended § 304(a) criteria in a 5-year review of those recommendations required under the BEACH Act. EPA could evaluate the BEACH Act grant program, including the EPA’s BEACH grant performance guidance, for opportunities to protect communities with environmental justice concerns.

### ***B. State or Tribal Water Quality Standards***

The CWA requires states and authorized tribes to review, and revise as appropriate, their water quality standards every three years and submit the results of their reviews to EPA.<sup>214</sup> EPA must approve or disapprove all new or revised state or tribal water quality standards pursuant to § 303(c)(3).<sup>215</sup> If EPA disapproves a state or tribal standard and the state or tribe does not revise its water quality standards as may be necessary to meet the requirements of the Clean Water Act, EPA is required to promulgate a revised standard.<sup>216</sup> The Administrator is also required to promulgate a new or revised standard for a state or tribe whenever she or he determines that such a standard is necessary to meet the requirements of the CWA and the state or tribe does not act to adopt an appropriate standard.<sup>217</sup>

#### *(3) EPA Authorities for Providing Protection from Adverse Effects from Fish Consumption on Communities with Environmental Justice Concerns*

EPA has issued guidance interpreting CWA § 101(a)(2) uses (protection and propagation of fish, shellfish, and wildlife and recreation in and on the water, sometimes referred to as

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<sup>208</sup> See U.S. EPA 1986. EPA’s Ambient Water Quality Criteria for Bacteria – 1986. U.S. Environmental Protection Agency: Washington, DC. EPA440/5-84-002. (51 FR 8012-02, 1986 WL 90674)

<sup>209</sup> 33 U.S.C. § 1314(a)(9).

<sup>210</sup> See 33 U.S.C. § 1314(a)(1) (“The Administrator . . . shall develop and publish . . . criteria for water quality accurately reflecting the latest scientific knowledge (A) on the kind and extent of all identifiable effects on health and welfare . . . from the presence of pollutants in any body of water . . . .”)

<sup>211</sup> See US EPA, 2012 Recreational Water Quality Criteria, 77 Fed. Reg. 71191 (Nov. 29, 2012).

<sup>212</sup> See US EPA, Recommended Human Health Recreational Ambient Water Quality Criteria or Swimming Advisories for Microcystins and Cylindrospermopsin, 84 Fed. Reg. 26413 (June 6, 2019).

<sup>213</sup> 33 U.S.C. § 1314(a).

<sup>214</sup> 33 U.S.C. § 1313(c)(1).

<sup>215</sup> 33 U.S.C. § 1313(c)(3).

<sup>216</sup> 33 U.S.C. § 1313(c)(4)(A).

<sup>217</sup> 33 U.S.C. § 1313(c)(4)(B).

“fishable/swimmable”) to include, at a minimum, uses providing for the protection of aquatic communities and human health related to consumption of fish and shellfish. In other words, EPA views “fishable” to mean not only that fish and shellfish can thrive in a water body, but also that, when caught, fish and shellfish can safely be eaten by humans.<sup>218</sup>

*(a) Designated Fishing Uses*

EPA regulations currently provide that all waters must be designated for the protection of aquatic life (which would include fishing), unless the state or tribe documents to EPA’s satisfaction that such uses are not attainable.<sup>219</sup> Designated fishing uses generally do not specify the level of fish consumption to be protected.<sup>220</sup> The level of fish consumption to be protected is generally identified by states and tribes in their adoption of water quality criteria. EPA has the authority to provide guidance to encourage states, tribes, and territories to specifically designate “subsistence” uses for waters with communities with high fish consumption rates.

*(b) Water Quality Criteria to Protect Fishing Uses*

As discussed above, EPA’s existing guidance recommends that states and tribes, when adopting designated uses to protect fish consumption, adjust the fish consumption levels or values used to develop criteria to protect the “fishable” use, so that it will protect fish consumption by recreational and subsistence fishers.<sup>221</sup> Protecting recreational and subsistence fishing can be an important element of advancing environmental justice where recreational and/or subsistence fishing is common among communities with environmental justice concerns. EO 12898 on environmental justice, Section 4–4, expressly addresses subsistence consumption of fish.<sup>222</sup>

Under EPA’s regulations, in reviewing state or tribal water quality standards, EPA has the authority to consider all available information to determine if the state or tribal standards are adequately protecting communities with environmental justice concerns.<sup>223</sup> For example, EPA Regional Offices could, in certain circumstances as described in EPA’s guidance referenced above, disapprove criteria adopted to protect designated fishing uses if EPA deemed the criteria insufficiently protective of highly exposed or otherwise vulnerable communities fishing, or expected to fish, in such waters. In the event EPA disapproves a state or tribal submission and the state or tribe does not revise its water quality standards as may be necessary to meet the requirements of the Clean Water Act, EPA is authorized, and directed, to promulgate a new or revised standard for the state or tribe.<sup>224</sup>

As early as 1995, EPA promulgated water quality criteria regulations for the Great Lakes based on protection of a community more highly exposed than the general population.<sup>225</sup> EPA based its human health criteria on protecting consumption that “represents the mean consumption

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<sup>218</sup> Letter from Geoffrey H. Grubbs, Director, EPA Office of Science and Technology, and Robert H. Wayland, III, Director, EPA Office of Wetlands, Oceans and Watersheds (Oct. 24, 2000).

<sup>219</sup> 40 C.F.R. § 131.10(j).

<sup>220</sup> U.S. ENVTL. PROT. AGENCY, PERFORMANCE APPRAISAL AND RECOGNITION SYSTEM (Feb. 27, 2020), available at <https://usepa.sharepoint.com/sites/EPAPerformanceManagement/SitePages/Compliance.aspx>

<sup>221</sup> See <https://www.epa.gov/wqc/human-health-water-quality-criteria-and-methods-toxics>.

<sup>222</sup> See Exec. Order No. 12,898, 32 Fed. Reg. § 4-4 (Feb. 16, 1994).

<sup>223</sup> See 40 C.F.R. part 131.

<sup>224</sup> 33 U.S.C. § 1313(c)(4)(A).

<sup>225</sup> See 40 C.F.R. part 132.

rate of regional fish caught and consumed by the Great Lakes sport fishing populations.”<sup>226</sup> While that rulemaking did not address impacts on communities with environmental justice concerns in depth, it is an example of EPA’s exercise of its authority to promulgate criteria to protect more highly exposed communities.

More recently, EPA has disapproved state water quality standards based, in part, on its determination that tribal members exercising their federally reserved fishing rights should be protected at the same levels as the general population, rather than getting a lesser level of protection as a highly exposed community. In 2015 and 2016, EPA disapproved human health criteria submitted by the states of Maine and Washington, respectively, as being insufficiently protective of tribal fish consumers exercising fishing rights reserved through federal statutes and treaties.<sup>227</sup> EPA followed those disapprovals with the promulgation of federal human health criteria utilizing fish consumption rates based on the best available data regarding tribal fish consumption.<sup>228</sup>

(4) *CWA Authorities for Upgrading Water Quality Standards to Reduce Pollution or Provide Protection for Communities Recreating in Urban Waters*

(a) *Upgrading Water Quality Standards*

Consistent with “the national goal [in § 101(a)(2) of the CWA] that whenever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983,”<sup>229</sup> EPA’s WQS regulations in 40 C.F.R. part 131 require (a) states to establish designated uses for their waters that provide for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water and criteria to protect those uses unless (b) a state demonstrates that it is not feasible to attain such uses for a specific water body, in which case the state can adopt less protective uses and criteria.<sup>230</sup> While states have adopted the designated uses specified in § 101(a)(2) and criteria to protect those uses for most of their water bodies, there are still WQS with waters that have less protective uses and criteria. WQS are the foundation for establishing NPDES permit water quality based effluent limitations and so adoption of less protective WQS can result in greater amounts of pollution being discharged than if the WQS included the uses specified in § 101(a)(2). Frequently, waters with less protective WQS are located in or near communities with environmental justice concerns, due to decisions made long ago based on data and assumptions regarding the feasibility of attaining the use specified in § 101(a)(2) that may no longer be valid.

States are required to “re-examine any waterbody segment with [WQS] that do not include the uses specified in section 101(a)(2) of the Act every 3 years to determine if any new information has become available. If such new information indicates that the uses specified in § 101(a)(2) of the Act are attainable, the State shall revise its standards accordingly.” EPA could

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<sup>226</sup> Final Water Quality Guidance for the Great Lakes System, 60 Fed. Reg. 15,366, 15,374 (Mar. 23, 1995) (codified at 40 C.F.R. pts. 9, 122, 123, 131, and 132).

<sup>227</sup> See <https://www.epa.gov/wqs-tech/water-quality-standards-regulations-maine>; see also <https://www.epa.gov/wqs-tech/water-quality-standards-regulations-washington>.

<sup>228</sup> See <https://www.epa.gov/wqs-tech/federal-water-quality-standards-applicable-maine>; see also <https://www.epa.gov/wqs-tech/federal-human-health-criteria-washington-state-waters>.

<sup>229</sup> 33 U.S.C. § 1251(a)(2).

<sup>230</sup> See 40 C.F.R. §§ 131.10 and 131.11.



emphasize to the states and the public the importance of these triennial review requirements with respect to waterbodies impacting communities with environmental justice concerns. Where states fail to upgrade their WQS to reflect new data for water bodies impacting communities with environmental justice concerns, EPA could exercise its authority under CWA § 303(c)(4)(B) to determine that more protective uses and associated criteria are necessary. This could result in more stringent NPDES permit effluent limitations for point source discharges, thereby reducing pollution into such water bodies. In 2009, EPA exercised its CWA statutory authority to safeguard primary contact recreation uses for the Mississippi River, including segments of the river that flow past St. Louis, Missouri.<sup>231</sup> EPA exercised its authority under CWA § 303(c)(4)(B) in determining that new or revised designated uses were necessary for those segments because the state had failed to demonstrate that the primary contact recreation uses were not attainable.<sup>232</sup> In May 2011, EPA exercised its CWA § 303(c)(4)(B) authority with respect to primary contact recreation uses for certain waters within the Chicago Area Waterway System in Illinois, which ultimately resulted in NPDES permit effluent limitations requiring disinfection of previously undisinfected sewage discharges from sewage treatment plants into waters that flow through many Chicago-area communities with environmental justice concerns.<sup>233</sup>

*(b) Temporal Use Changes or WQS Variances for CSO-Impacted Waters*

Untreated discharges of human sewage and stormwater from combined sewer systems, called “combined sewer overflows” (CSOs), can have a disproportionate impact on communities with environmental justice concerns. Communities with CSOs may seek temporal use changes or time-limited variances to water quality standards in accordance with 40 C.F.R. § 131.10 or 40 C.F.R. § 131.14, respectively, that would allow residual CSOs that may remain after the communities have implemented their CSO Long-Term Control Plans. WQS variances can only be allowed where, among other things, the state can demonstrate that it is not feasible to attain current water quality standards for one of seven reasons specified at 40 C.F.R. § 131.14(b)(2)(A), including that “[c]ontrols more stringent than those required by sections 301(b) and 306 of the Act would result in substantial and widespread economic and social impact.”<sup>234</sup> In addition to the CSO permitting-related steps described below under the “Wet Weather Programs and Requirements” section, EPA could issue or update guidance, indicating that, when evaluating whether additional controls “would result in substantial and widespread economic impact,” states should include evaluations of (1) the numbers, volumes, and frequency that CSOs are expected to occur in portions of communities with environmental justice concerns compared with other portions of the community, including any resulting disproportionate impacts on the basis of race, color, and national origin under Title VI; (2) any environmental and/or health impacts that residual CSOs will have on communities with environmental justice concerns; and (3) use of variable rate structures and other funding mechanisms to mitigate the economic impact that increased sewer rates necessary to fund CSO controls would have on low-income members of the community.

*(5) CWA Authorities for Establishing Water Quality Standards in Indian Country*

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<sup>231</sup> See [https://www.epa.gov/sites/default/files/2015-09/documents/mo\\_wqs\\_decision\\_letter102909.pdf](https://www.epa.gov/sites/default/files/2015-09/documents/mo_wqs_decision_letter102909.pdf).

<sup>232</sup> See *id.*

<sup>233</sup> See <https://www.epa.gov/sites/default/files/2015-09/documents/caws-determination-letter-20110511.pdf>.

<sup>234</sup> 40 C.F.R. § 131.10(g)(6).

When considering legal tools under the CWA authorities referenced in this document that may affect tribal interests, EPA would first consult with tribal governments before any decisions are made, consistent with the EPA Policy on Consultation and Coordination with Indian Tribes, which is discussed in Chapter Five.<sup>235</sup> EPA has considered opportunities for increasing protection of surface waters in Indian country in the context of establishing water quality standards under the CWA. To date, EPA and tribes primarily have used two CWA authorities to establish CWA water quality standards for Indian country surface waters: promulgation by EPA of federal standards for such waters, and approval by EPA of tribal standards submitted by authorized Indian tribes for reservation waters. For federal promulgation, EPA has authority under § 303(c)(4)(B) of the CWA to make a determination that Indian country waters need new or revised standards even in the absence of a tribal submission.<sup>236</sup>

In 2021, EPA began developing a proposed rule to establish CWA-effective water quality standards for waters on federally recognized tribes' reservations that do not have such standards. This effort builds on two prior efforts at promulgating federal WQS for Indian country waters that lack EPA-approved standards. Less than 20 percent of reservations have EPA-approved tribal water quality standards. Promulgating federal baseline water quality standards would address this longstanding gap and provide more scientific rigor and regulatory certainty for National Pollutant Discharge Elimination System (NPDES) permits for discharges to these waters. Consistent with EPA's regulations, the baseline standards would include designated uses, water quality criteria to protect those uses, and antidegradation policies to protect high quality waters.

EPA also believes that promising opportunities exist to enhance the ability of tribes to seek authorization to establish water quality standards under the CWA for reservation waters. As described below in Section IX.A of this Chapter and also in Section II.B of Chapter Five,<sup>237</sup> § 518(e) of the CWA authorizes EPA to treat eligible Indian tribes in a similar manner as states (TAS) for a variety of CWA programs, including establishing water quality standards.<sup>238</sup> To date, 76 federally recognized tribes have obtained TAS eligibility for water quality standards, and 45 of those tribes have adopted standards that EPA has approved for the tribes' reservation waters.<sup>239</sup> EPA believes that such direct tribal involvement is best suited to implementing tribal sovereign decision-making and most effectively ensures that tribal needs and uses of water are addressed in the CWA water quality standards program. Many tribes have told EPA, however, that the TAS process can be challenging and time-consuming.

To streamline the TAS process and reduce burdens for tribes seeking TAS for CWA regulatory programs, in 2016 EPA issued an interpretive rule in which the Agency concluded that § 518 of the CWA includes an express delegation of authority by Congress to Indian tribes to administer regulatory programs over their entire reservations.<sup>240</sup> This reinterpretation eliminated the need for applicant tribes to demonstrate inherent authority to regulate under the CWA. Previously, to demonstrate inherent authority, tribes often needed to present detailed factual showings relating to impacts of the regulated activities, including non-member activities on reservation land, on the applicant tribe. Under the delegation approach, tribes no longer need to make such showings or demonstrate inherent authority to obtain TAS status over their

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<sup>235</sup> See *infra*.

<sup>236</sup> 33 U.S.C. § 1313(c)(4)(B).

<sup>237</sup> See *infra*.

<sup>238</sup> 33 U.S.C. § 1377(e).

<sup>239</sup> See <https://www.epa.gov/wqs-tech/tribes-and-water-quality-standards>.

<sup>240</sup> See <https://www.epa.gov/wqs-tech/revised-interpretation-clean-water-act-tribal-provision>.



entire reservations.<sup>241</sup> To help incentivize the TAS process, in Section II.B of Chapter Five, EPA discusses several possible options to further streamline the process to enhance the ability of tribes to obtain TAS status for the water quality standards program.<sup>242</sup>

(6) *EPA Authorities to Promote Greater Public Participation*

Consistent with CWA § 101(e), EPA also has discretionary authority to encourage states (and tribes with TAS for WQS and EPA-approved WQS) to improve public participation processes in the development of state water quality standards through greater outreach, including to communities with environmental justice concerns, and by translating crucial public documents and notices for limited English-speaking communities consistent with Section 5-5(b) of EO 12898 on environmental justice.<sup>243</sup>

In addition, 40 C.F.R. part 25, which is entitled “Public Participation in Programs Under the Resource Conservation and Recovery Act, the Safe Drinking Water Act, and the Clean Water Act,” “sets forth minimum requirements and suggested program elements for public participation in activities under the [CWA, RCRA and SDWA].”<sup>244</sup> Under Part 25.2(a)(2), the public participation requirements in Part 25 apply to “State rulemaking under the Clean Water Act,” which would typically include the adoption or revision of State water quality standards, 40 C.F.R. § 131.3(i).<sup>245</sup> Additionally, EPA’s water quality standards regulations at 40 C.F.R. § 131.20(a) require states to “re-examine any waterbody segment with water quality standards that do not include the uses specified in section 101(a)(2) every 3 years to determine if any new information has become available” and 40 C.F.R. § 131.20(b) requires states to “hold one or more public hearings” when reviewing existing and considering revising standards, in accordance with 40 C.F.R. part 25, which would include the requirements in part 25.5 on public hearings.<sup>246</sup> The public participation requirements in 40 C.F.R. part 25 may also apply to a state’s water quality standards activities that do not constitute rulemaking if the state receives EPA financial assistance for that activity.<sup>247</sup> Finally, for states that implement non-rulemaking activities and do not have a financial assistance agreement with EPA to cover that action, the requirements in § 25.4 could still apply if the Assistant Administrator for Water or the appropriate Regional Administrator “deems [it] appropriate” to make those requirements applicable.<sup>248</sup>

Under 40 C.F.R. part 25, states “shall provide for, encourage, and assist the participation of the public.”<sup>249</sup> The regulations note that the “public” includes “identifiable ‘segments of the public’ which may have a particular interest in a given program or decision,”<sup>250</sup> broad language that could reasonably be interpreted to include potentially affected communities with environmental justice concerns. Further, states must affirmatively identify such “segments of the public likely to be affected by agency decisions;” develop and maintain a list of “persons and organizations who . . .

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<sup>241</sup> *See id.*

<sup>242</sup> *See infra.*

<sup>243</sup> 33 U.S.C. § 1251(e); EO 12,898, 32 Fed. Reg. § 5-5(b) (Feb. 11, 1994).

<sup>244</sup> 40 C.F.R. § 25.1(a).

<sup>245</sup> 40 C.F.R. § 25.2(a)(2).

<sup>246</sup> 40 C.F.R. § 131.20(a) and (b).

<sup>247</sup> 40 C.F.R. § 25.2(a)(5).

<sup>248</sup> *See* 40 C.F.R. § 25.2(a)(8).

<sup>249</sup> 40 C.F.R. § 25.3(a).

<sup>250</sup> *Id.*

by the nature of their purposes, activities or members, [may] be affected by or have an interest in any covered activity;” and must notify the “interested and affected parties” on that list in advance of public meetings, public hearings, and other major decisions.<sup>251</sup> In addition, implementing agencies are required to provide the public—which, again, includes “identifiable segments” such as these communities—with “continuing policy, program, and technical information and assistance beginning at the earliest practicable time.”<sup>252</sup>

EPA has the authority to interpret Part 25 to require states to take robust steps to identify, reach out to, and maintain a list of communities with environmental justice concerns that could be adversely impacted by existing or new and revised water quality standards (perhaps because of their proximity to polluted waters) and to timely notify that list of public hearings or significant agency decisions regarding triennial reviews and potential adoption of new and revised water quality standards, as such communities are likely to be “affected by” covered activities. Additionally, EPA could interpret the requirement to provide “technical information and assistance beginning at the earliest practicable time”<sup>253</sup> as requiring states to provide outreach to communities with environmental justice concerns at the earliest stages of water quality standards triennial review or revision processes in a way that explains complex technical documents in lay terms, including providing translated versions of materials.

When EPA is deciding whether to approve or disapprove a state’s new or revised water quality standards, it must determine whether the state complied with the requirement to hold a public hearing in accordance with 40 C.F.R. part 25; failure to properly notify interested and affected communities with environmental justice concerns could form a basis for disapproval.<sup>254</sup> Additionally, if a state receives federal financial assistance for activities related to water quality standards, EPA can enforce these part 25 public participation requirements by imposing more stringent requirements in the financial assistance agreement.<sup>255</sup> If a recipient fails to comply with the public participation requirements in the financial assistance award, EPA may take remedial action, including but not limited to, termination or suspension of part or all the financial assistance.<sup>256</sup> Finally, EPA could itself advance environmental justice by providing communities with environmental justice concerns with needed outreach and assistance.<sup>257</sup>

In 2019, EPA released “Modernizing Public Hearings for Water Quality Standard Decisions

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<sup>251</sup> See 40 C.F.R. §§ 25.4(b)(2), (b)(5), (c); *Id.* at § 25.5(b).

<sup>252</sup> 40 C.F.R. § 25.4(b)(2).

<sup>253</sup> *Id.*

<sup>254</sup> 40 C.F.R. § 131.5(a)(6) (EPA’s review of new and revised state water quality standards includes determining whether a state followed the “applicable legal procedures for revising or adopting standards,” which includes the public hearing requirements in 40 C.F.R. § 25.5, *see* 40 C.F.R. § 131.20(b)). *See also* 80 Fed. Reg. 52,020, 51,042 (Aug. 21, 2015) (“In particular, states and authorized tribes must comply with the requirement in 131.20(b) to hold a public hearing in accordance with 40 C.F.R. part 25 when reviewing or revising WQS. The purpose of the § 131.20(b) requirements is to implement the CWA and provide an opportunity for meaningful public input when states or authorized tribes develop WQS, which is an important step to ensure that adopted WQS reflect full consideration of the relevant issues raised by the public.”).

<sup>255</sup> See 40 C.F.R. § 25.12(a).

<sup>256</sup> See 40 C.F.R. §§ 25.12(a)(1), (a)(2)(ii) (describing actions EPA can take if it determines that assisted agency has not fully met public participation requirements).

<sup>257</sup> 40 C.F.R. § 25.12(a)(2)(ii) (“Whenever EPA determines that an assisted agency has not fully met public participation requirements, EPA shall take actions which it deems appropriate to mitigate the adverse effects of the failure”).

Consistent with 40 C.F.R. § 25.5”.<sup>258</sup> The purpose of this document is to identify opportunities and options for states and water quality standard authorized tribes to use technology consistent with the relevant public hearing requirements in 40 C.F.R. §§ 25.5 and 131. Two examples of ways to modernize public hearings outlined in the document include: (1) using the Internet as one means of providing public notice of an in-person public hearing; and (2) conducting a public hearing online. This document does not impose legally binding requirements on EPA, states, water quality standard authorized tribes, or the regulated community, nor does it confer legal rights or impose legal obligations upon any member of the public.

## II. IDENTIFYING IMPAIRED WATERS AND ESTABLISHING TMDLS

Section 303(d) of the CWA requires states to identify waters not meeting or threatening to not meet water quality standards after implementation of existing pollution control requirements and for which TMDLs are still required.<sup>259</sup> States must establish total maximum daily loads (TMDLs) for such waters on a priority basis.<sup>260</sup> EPA’s regulations direct states to submit their § 303(d) lists every two years (with a due date of April 1 on even years).<sup>261</sup> Additionally, § 305(b) of the CWA requires states to prepare and submit to EPA biennially a report on the water quality of all navigable waters in the state.<sup>262</sup> In guidance, EPA recommends that states integrate the reporting requirements of §§ 303(d) and 305(b) into a single reporting document, and in doing so classify water segments in the state into five categories based on water quality standards attainment status.<sup>263</sup> TMDLs calculate the total pollutant load that can be introduced to a water body consistent with attainment of water quality standards and allocate that load among known pollution sources. NPDES permits issued after TMDL development must include limitations consistent with the assumptions and requirements of a TMDL’s wasteload allocation for point sources.<sup>264</sup> EPA must approve or disapprove state lists and TMDLs and, if it disapproves, must establish lists and TMDLs for the states.<sup>265</sup> Some courts have held that EPA has a mandatory duty to establish TMDLs where states fail to act.<sup>266</sup>

EPA has an obligation to ensure that states: (1) identify waters on § 303(d) lists for which existing and readily available data indicate that they do not meet water quality standards and a TMDL is still required; and (2) establish TMDLs for those waters. Section 303(d)(1)(A) of the CWA requires states to establish priority rankings for TMDL development that consider the severity of the pollution and the uses to be made of the waters. States have broad discretion in

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<sup>258</sup> U.S. ENVTL. PROT. AGENCY, MODERNIZING PUBLIC HEARINGS FOR WATER QUALITY STANDARD DECISIONS CONSISTENT WITH 40 C.F.R. § 25.5 (June 2019), available at [https://www.epa.gov/sites/default/files/2019-05/documents/modernizing\\_public\\_hearings\\_for\\_wqs\\_decisions\\_consistent\\_with\\_40\\_cfr\\_25.5\\_.pdf](https://www.epa.gov/sites/default/files/2019-05/documents/modernizing_public_hearings_for_wqs_decisions_consistent_with_40_cfr_25.5_.pdf).

<sup>259</sup> EPA promulgated regulations in 2016 to establish a process for eligible tribes to seek TAS for the purposes of § 303(d). 40 C.F.R. § 130.16. To date, no tribes have obtained TAS under these provisions.

<sup>260</sup> See 33 U.S.C. § 1313(d)(1)(C).

<sup>261</sup> See 40 C.F.R. § 130.7(d)(1).

<sup>262</sup> 33 U.S.C. § 1315(b).

<sup>263</sup> See U.S. EPA, Guidance for 2006 Assessment, Listing and Reporting Requirements Pursuant to Sections 303(d), 305(b) and 314 of the Clean Water Act, available at <https://www.epa.gov/sites/default/files/2015-10/documents/2006irg-report.pdf>.

<sup>264</sup> 40 C.F.R. § 122.44(d)(1)(vii)(B).

<sup>265</sup> 40 C.F.R. § 130.7; see 33 U.S.C. § 1313(d).

<sup>266</sup> See, e.g., *Columbia Riverkeeper v. Wheeler*, 944 F.3d 1204 (9th Cir. 2019); *Scott v. City of Hammond, Ind.*, 741 F.2d 992 (7th Cir. 1984).

prioritizing waters.<sup>267</sup> Although EPA reviews state submissions to confirm that states have prioritized waters according to the statutory factors, the Agency does not approve the States' prioritizations.

EPA could examine opportunities to support improved public participation in the § 303(d) process (e.g., through greater outreach, including to communities with environmental justice concerns, and by translating crucial public documents and notices for limited English-speaking communities). EPA would have clear authority to carry out these actions when the Agency is providing for public participation in an EPA action (e.g., establishing a TMDL on behalf of a state). Additionally, in many cases, it appears that requirements in 40 C.F.R. part 25 could apply with respect to state development of § 303(d) lists and TMDLs under § 303(d).<sup>268</sup> Consequently, EPA could rely on 40 C.F.R. § 25.4, as discussed above in the context of water quality standards, to also require states to reach out to and maintain a list of communities with environmental justice concerns that could be impacted by § 303(d) listing and TMDL decisions for waters in their area, to timely notify that list of significant agency decisions, and to provide outreach and enhanced technical assistance (including providing translated materials) to these communities as appropriate throughout the § 303(d) listing and TMDL development processes.<sup>269</sup> If a state receives federal financial assistance for these activities, EPA can enforce these Part 25 public participation requirements by imposing more stringent requirements in the financial assistance agreement.<sup>270</sup> If a recipient fails to comply with the public participation requirements in the financial assistance agreement, EPA may take remedial action, including but not limited to, termination or suspension of part or all of the financial assistance.<sup>271</sup> Finally, EPA could itself provide communities with environmental justice concerns with the required outreach and assistance in collaboration with the state.

Section 303(d) requires that EPA disapprove TMDLs that are not established at levels necessary to implement WQS.<sup>272</sup> In reviewing state-established TMDLs, EPA could place particular emphasis on TMDLs for waterbodies affecting communities with environmental justice concerns and work with the state to assure that those community TMDLs attain and

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<sup>267</sup> See U.S. EPA, at 63, Guidance for 2006 Assessment, Listing and Reporting Requirements Pursuant to Sections 303(d), 305(b) and 314 of the Clean Water Act, available at <https://www.epa.gov/sites/default/files/2015-10/documents/2006irg-report.pdf>. (“States have considerable flexibility in deciding how best to apply the . . . [severity of the pollution and the uses to be made] in prioritizing their list of waters needing TMDLs.”); *Sierra Club v. McLerran*, No. 11-CV-1759-BJR, 2015 WL 1188522, at \*6 (W.D. Wash. Mar. 16, 2015) (“Unquestionably, state discretion is an important component of the CWA. Resource constraints compel difficult choices as to which TMDLs should be performed before others—a choice that states are often better situated to make. Perhaps in recognition of these constraints, the CWA provides no specific mechanism for reviewing this prioritization.”)

<sup>268</sup> The public participation requirements set forth in § 25.4 apply to the “development and implementation of plans, programs, standards, construction, and other activities supported with EPA financial assistance (grants and cooperative agreements) to State” or other substate agencies. 40 C.F.R. § 25.2(a)(5). See 40 C.F.R. § 25.11. For states that develop TMDLs and 303(d) lists without financial assistance from EPA, the requirements in § 25.4 could still apply if the Assistant Administrator for Water or the appropriate Regional Administrator “deems [it] appropriate” to make those requirements applicable. See 40 C.F.R. § 25.1(a)(8).

<sup>269</sup> 40 C.F.R. § 25.4 (“No financial assistance shall be awarded unless EPA is satisfied that the public participation policies and requirements of this part and, any applicable public participation requirements found elsewhere in this chapter, will be met.”)

<sup>270</sup> See 40 C.F.R. § 25.12(a).

<sup>271</sup> Nothing in CWA § 303(d) or 40 C.F.R. § 130.7 indicates that compliance with Part 25 requirements could be a condition of EPA approval or disapproval of a state’s list or TMDL. Nonetheless, EPA has authority to enforce Part 25 requirements through financial assistance agreements. 40 C.F.R. §§ 25.12(a)(1), (a)(2)(ii).

<sup>272</sup> 33 U.S.C. § 1313(d).

maintain WQS. If they do not, EPA would disapprove them and establish replacement TMDLs that are adequately protective of waterbodies in these communities.

In a similar vein, EPA could place particular emphasis on working with states to assure that TMDLs for waterbodies in communities with environmental justice concerns are accompanied by robust implementation plans (a discretionary TMDL element) and demonstrate “reasonable assurance” (a required TMDL element) that pollutant reductions called for by their load and waste load allocations will, in fact, occur.

States and EPA have the authority to also take environmental justice considerations (including cumulative impacts if related to surface water quality) into account in deciding how to allocate the waste load and load allocations when establishing TMDLs. States and EPA have broad discretion in deciding how to assign allocations when establishing TMDLs.<sup>273</sup> If pollutant loads would disproportionately impact these communities, possibly because of significant exposures to other pollutants, it would appear to be reasonable for states and EPA to exercise their discretion by reducing load allocations to sources that would directly impact those groups. EPA could also place particular emphasis on working with states to revise TMDLs for waterbodies in communities with environmental justice concerns that no longer attain and maintain WQS. Revising outdated TMDLs in these communities (due to new or revised WQS or initial TMDL loadings now judged inadequate to meet WQS) would help promote heightened water quality in communities with environmental justice concerns. It might also be possible for EPA to amend existing regulations to specifically require consideration of environmental justice considerations in allocating loads. Because EPA’s position has been that states and EPA have broad discretion in setting load allocations, promulgating regulations that would constrain such discretion and require consideration of impacts on such communities would be a new and untested requirement.

Section 303(e) requires that states establish and EPA approve and review “from time to time” a “continuing planning process” (CPP).<sup>274</sup> The CPP is the repository of the state’s water quality planning tools, e.g., effluent limitations, TMDLs, WQS.<sup>275</sup> EPA’s regulations at 40 C.F.R. § 130.6 establish requirements for state “water quality management plans” (WQMPs).<sup>276</sup> WQMPs are intended to direct coordinated implementation of the state’s various water quality planning tools designed to reduce pollution from both point and nonpoint sources.<sup>277</sup> EPA may require that state WQMPs be updated as necessary. EPA could place particular emphasis on working with states to assure that their CPPs and WQMPs are up-to-date, integrate environmental justice throughout the plans, and include sufficiently robust water quality planning tools to address water quality problems in watersheds with communities with environmental justice concerns.

### **III. NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMIT PROGRAM**

National Pollutant Discharge Elimination System (NPDES) permits are the primary way

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<sup>273</sup> See *American Farm Bureau Federation v. EPA*, 792 F.3d 281, 300 (3rd Cir. 2015) (“To be sure, the statute does not command the EPA’s final regulation to allocate explicitly parts of a load among different kinds of sources, but we agree with the EPA that it may do so.”).

<sup>274</sup> 33 U.S.C. § 1313(e).

<sup>275</sup> 33 U.S.C. §§ 303(e)(3)(A)–(H); 40 C.F.R. §§ 130.5(b)(1)–(9).

<sup>276</sup> 40 C.F.R. § 130.6.

<sup>277</sup> See *id.*

discharges of pollutants to waters of the United States are regulated. Currently, 47 states and the U.S. Virgin Islands are authorized to issue NPDES permits, while EPA remains the permitting authority in three states, the District of Columbia, and all other U.S. territories. EPA is also the permitting authority on most Indian countrylands and for federal facilities in many states.

NPDES permits must contain: (1) technology-based limitations that reflect the pollution reduction achieved through particular equipment or process changes, without reference to the effect on the receiving water; and (2) where necessary, more stringent limitations representing that level of control necessary to ensure that the receiving waters achieve water quality standards (water quality-based effluent limitations or WQBELs).<sup>278</sup> Permit writers must consider cumulative effects from any other discharges to surface waters when performing a reasonable potential analysis (to determine whether it is necessary to include a WQBEL) and developing the contents of any WQBEL (which must be sufficiently stringent to ensure that the proposed discharge will ensure compliance with WQS). In addition, the CWA authorizes the permit writer to impose monitoring, reporting, and recordkeeping requirements, as well as such other requirements as the Administrator deems appropriate, such as Best Management Practices, to assure compliance with those permit limitations.<sup>279</sup> Monitoring, reporting, and recordkeeping requirements, in particular, can be useful tools to promote public understanding of the pollutant loadings discharged by the facility.

Environmental justice considerations could be taken into account in setting permitting priorities and improving public participation in the permitting process. In addition, in implementing the NPDES statutory and regulatory authorities, EPA may take environmental justice considerations into account when exercising the following authorities:

- Provide technical assistance to Indian tribes on water pollution prevention programs, where appropriate.<sup>280</sup>
- Conduct investigations concerning pollution of any navigable waters and report on the results of such investigations.<sup>281</sup>
- Include permit requirements that require public notification.<sup>282</sup>
- Consider whether additional reporting might be appropriate to ensure compliance with requirements under §§ 301, 302, 306, 307, 308, and 403 of the Act, and whether such reporting could, in turn, help address environmental justice issues or focus attention on communities of concern.<sup>283</sup>
- Consider whether to require additional reports to be submitted EPA that simultaneously further the objectives of the CWA and also support environmental

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<sup>278</sup> 33 U.S.C. § 1301(b); 40 C.F.R. § 122.44.

<sup>279</sup> See 33 U.S.C. § 1342(a)(2); 40 C.F.R. § 122.44.

<sup>280</sup> 33 U.S.C. § 1254(a).

<sup>281</sup> 33 U.S.C. § 1254(a)(3).

<sup>282</sup> See, e.g., Public Notification Requirements for Combined Sewer Overflows to the Great Lakes Basin, 83 Fed. Reg. 712 (January 8, 2018) (addressing signage, notification of local public health departments and other potentially affected public entities, notification to the public, and annual notice)

<sup>283</sup> 33 U.S.C. § 1342(a).

justice issues or focus attention on communities of concern.<sup>284</sup>

- Provide technical support and guidance to Regional Offices on how to consider environmental justice when conducting oversight of state NPDES programs. For example, develop permit quality review (PQR) procedures for evaluating State procedures for considering and addressing environmental justice concerns in state-issued NPDES permits and identifying priorities for EPA review of state-issued permits where environmental justice is an issue in performance partnership grants.
- Consider cumulative impacts to receiving waters, focusing attention on waters affecting communities with environmental justice concerns when new permits are proposed.<sup>285</sup>
- Ensure concerns raised by communities with environmental justice concerns are appropriately evaluated when reviewing a state-issued permit.<sup>286</sup>
- Modify NPDES permits in accordance with 40 C.F.R. § 122.62(a)(2) where new information indicates that the permitted discharge is causing or contributing to exceedances of water quality standards, including exceedances that may impact communities with environmental justice concerns.<sup>287</sup>
- Focus attention on communities with environmental justice concerns when determining whether to designate discharges from an unregulated small municipal separate storm sewer system or other sources/sites for coverage under the NPDES stormwater discharge program.<sup>288</sup> Focus on the same when considering whether to designate animal feeding operation (AFO) as a “significant contributor of pollution to the waters of the United States” and therefore a concentrated animal feeding operation (CAFO).<sup>289</sup>
- Establish, under CWA § 302, effluent limitations for one or more point sources if the applicable technology-based requirements will not assure protection of public health and other concerns. This determination requires findings of a reasonable relationship between costs and benefits. The Agency has never used this authority but could evaluate whether this authority could be used with respect to pollutants of concern to communities with environmental justice concerns where applicable water quality standards do not require the level of protection specified in § 302. EPA could use its authority under CWA § 402(a)(1) to incorporate such limitations in specific NPDES permits issued by EPA.<sup>290</sup>

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<sup>284</sup> 33 U.S.C. § 1318.

<sup>285</sup> 33 U.S.C. §§ 1254 and 1342(a).

<sup>286</sup> 33 U.S.C. § 1342(d).

<sup>287</sup> 40 C.F.R. § 122.62(a)(2).

<sup>288</sup> 33 U.S.C. § 1342(p)(2)(E).

<sup>289</sup> 40 C.F.R. § 122.23(c).

<sup>290</sup> 33 U.S.C. § 1342(a)(1).

- Ensure that information regarding regulated facility compliance status is publicly available and easily accessible (e.g., improve EPA Environmental Compliance History Online, “ECHO”).

An example of how environmental justice factors could be considered in the NPDES permitting program is the memorandum entitled “Improving EPA Review of Appalachian Surface Coal Mining Operations under the Clean Water Act, National Environmental Policy Act, and the Environmental Justice Executive Order” (Surface Coal Mining Memorandum).<sup>291</sup> That memorandum, which was issued on July 21, 2011, provides guidance regarding how to apply the current regulatory and statutory requirements of the NPDES permitting program to surface coal mining projects in Appalachia. The guidance is intended to enhance the consideration of environmental justice when EPA Regional Offices are conducting oversight of the relevant authorized state NPDES programs. The guidance encourages States to evaluate whether an activity to be covered by a proposed NPDES permit would result in a disproportionate human health or environmental effect on low-income or minority populations and directs the Regions to ensure opportunities for meaningful engagement in the permitting process by nearby communities, including low-income and minority populations, by ensuring broad dissemination of permitting documents, EPA analyses and comment letters, and other materials.

#### **IV. SECONDARY TREATMENT -THE TECHNOLOGY-BASED STANDARD APPLICABLE TO POTWs**

If the Office of Water were to find that effluent from publicly owned treatment works, (POTWs) disproportionately affects communities of concern, EPA could consider revising the secondary treatment regulations applicable to POTWs. The CWA requires technology-based requirements as a minimum, and application of more stringent limits necessary to meet water quality standards.<sup>292</sup> For POTWs, under § 301(b)(1)(B), the Act requires effluent limitations “based on secondary treatment” as defined by the Administrator under § 304(d) of the Act.<sup>293</sup> Section 304(d) of the Act states that the Administrator, “after consultation with appropriate Federal and State agencies and other interested persons, shall publish within sixty days after October 18, 1972, (and from time to time thereafter) information, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, on the degree of effluent reduction attainable through application of secondary treatment.”<sup>294</sup> The current secondary treatment requirements contain limits on Biochemical Oxygen Demand (BOD), Suspended Solids (SS), and pH but contain no limits on nutrients or pathogens /pathogen indicators.

#### **V. ADDITIONAL REQUIREMENTS FOR CONCENTRATED ANIMAL FEEDING OPERATIONS**

A CAFO is a “point source” under § 502(14) of the CWA.<sup>295</sup> Large AFOs above a certain

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<sup>291</sup> [https://www.epa.gov/sites/default/files/2016-09/documents/final\\_mtm\\_guidance\\_-\\_signed.pdf](https://www.epa.gov/sites/default/files/2016-09/documents/final_mtm_guidance_-_signed.pdf).

<sup>292</sup> 33 U.S.C. § 1311(b).

<sup>293</sup> 33 U.S.C. § 1311(b)(1)(B).

<sup>294</sup> Congress considered but removed a provision under § 301(b)(2)(B) that would have created a level of control analogous to BAT for POTWs; 33 U.S.C. § 1314(d).

<sup>295</sup> 33 U.S.C. § 1362(14).



size threshold are automatically deemed CAFOs.<sup>296</sup> Many CAFOs are not regulated and continue to discharge without NPDES permits because successive court decisions have severely limited EPA's ability to require CAFOs to obtain an NPDES permit.<sup>297</sup> While many waters are affected by pollutants from CAFOs, many CAFOs often claim that they do not discharge, and EPA and state permitting agencies lack the resources to regularly inspect these facilities to assess these claims, particularly since discharges often only occur during certain weather conditions. In addition, the regulations contain definitions, thresholds and limitations that make it difficult to compel permit coverage, limit the discharge of pollutants under certain circumstances, and enforce requirements even when discharges have been established. EPA is aware of a growing body of literature suggesting that the communities disproportionately impacted by CAFOs are communities of color and economically disadvantaged communities.

EPA could explore its authority to improve the effectiveness of the CAFO regulations in a number of ways, including: redefining animal feeding operations and concentrated animal feeding operation to be more inclusive; limiting the agricultural stormwater exemption such that it applies only after water quality-based requirements have been implemented; requiring specific mandatory BMPs that include treatment requirements as appropriate, for both production and land application areas; and requiring discharge monitoring.

EPA could also work within the existing CAFO regulatory framework to designate more AFOs as CAFOs. EPA regulations at 40 C.F.R. § 122.23(c) authorize the State Director or Regional Administrator in some circumstances to designate an AFO below the definitional size threshold as a CAFO upon a determination that it is a significant contributor of pollutants to waters of the United States.<sup>298</sup> The regulations list factors to be considered in designating CAFOs, including “[o]ther relevant factors.”<sup>299</sup> Although EPA has not yet exercised its CAFO designation authority to a significant extent, EPA could focus its efforts to increase designations near communities with environmental justice concerns. Such designation currently requires an onsite inspection and, if the AFO contains fewer than a specified number of animals, a determination that pollutants are discharged to waters of the United States through a manmade ditch, flushing system, or other similar manmade device or that pollutants are discharged directly into waters of the United States that originate outside the facility and pass over, across or through the facility or otherwise come into contact with the animals confined in the operation.<sup>300</sup>

## VI. WET WEATHER PROGRAMS AND REQUIREMENTS

Heavy precipitation and wet weather can have a big impact on communities with environmental justice concerns, especially in urban centers and even more so due to the effects of climate change. Combined sewer overflows (CSOs) are discharges from combined sewer systems that are designed to collect rainwater runoff, domestic sewage, and industrial wastewater in the same pipes. They are subject to NPDES permit requirements, including both technology-based and water quality-based requirements of the CWA.<sup>301</sup> Sanitary Sewer Overflows (SSOs) are discharges from sanitary sewer systems that collect and transport sewage

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<sup>296</sup> 40 C.F.R. § 122.23(a)–(b).

<sup>297</sup> See, e.g., *National Pork Producers' Council v. EPA*, 635 F.3d 738, 751 (5th Cir. 2011) (holding that EPA could only require CAFOs to apply for a permit that would “actually discharge.”)

<sup>298</sup> 40 C.F.R. § 122.23(c).

<sup>299</sup> 40 C.F.R. § 122.23(c)(2)(v).

<sup>300</sup> 40 C.F.R. § 122.23(c)(3).

<sup>301</sup> 33 U.S.C. §§ 1311(b)(1)(A), (b)(2)(A); 33 U.S.C. §§ 1342(p), (q).

that flows into a publicly owned treatment works (POTW). Sanitary Sewer Systems (as well as Combined Sewer Systems) are part of the CWA definition of publicly owned treatment works and are therefore subject to secondary treatment requirements (discussed above) and more stringent limits as necessary to meet water quality standards.<sup>302</sup> Municipal separate storm sewer systems (MS4s), regulated under CWA § 402(p), are conveyances or systems of conveyances that are: owned by a state, city, town, village, or other public entity that discharges to waters of the United States; designed or used to collect or convey stormwater (including storm drains, pipes, ditches, etc.); and are neither a combined sewer nor part of a POTW.<sup>303</sup> MS4 permittees must reduce pollutants in stormwater discharges “to the maximum extent practicable” under CWA § 402(p)(3)(B)(iii), which also provides authority for MS4 permits to require additional pollutant controls as appropriate.<sup>304</sup> In addition, CWA § 402(p)(6) authorizes EPA to identify additional stormwater discharges and to designate (i.e., regulate) such discharges to protect water quality.<sup>305</sup>

Stormwater discharges from point sources are treated differently from other point source discharges under the CWA. In 1987, Congress amended the CWA to add CWA § 402(p). This provision, which is specific to point source stormwater discharges, requires implementation of a comprehensive approach to addressing stormwater.<sup>306</sup> Among other things, § 402(p)(1) created a temporary moratorium on NPDES permits for point source stormwater discharges, except for stormwater discharges listed in § 402(p)(2).<sup>307</sup> Section 402(p)(6) instructed EPA to subsequently designate additional point source stormwater discharges for regulation under the statute. EPA implemented §§ 402(p)(2) and (6) through what are known as the 1990 Phase I and 1999 Phase II stormwater regulations.<sup>308</sup> Once EPA identifies a discharge under those sections as requiring a permit, the discharge can be subject to applicable technology-based and water quality-based effluent limitations.<sup>309</sup>

EPA has authority under the CWA to establish new, more stringent stormwater requirements and standards for urban areas, which may result in substantial improvements for communities with environmental justice concerns, and could also address stronger, more frequent storms fueled by climate change. Such efforts could include controlling CSOs, infiltration and inflow into sanitary sewers, discharges from MS4s, and designation of stormwater discharges not yet designated for inclusion in the stormwater NPDES permitting program.

### ***A. Combined Sewer Overflows (CSOs)***

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<sup>302</sup> 33 U.S.C. § 1311(b)(1)(B).

<sup>303</sup> 40 C.F.R. § 122.26(b)(8).

<sup>304</sup> 33 U.S.C. § 1342(p)(3)(B)(iii).

<sup>305</sup> 33 U.S.C. § 1342(p)(6).

<sup>306</sup> 33 U.S.C. § 1342(p).

<sup>307</sup> 33 U.S.C. § 1342(p)(1)–(2).

<sup>308</sup> See National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47,990 (Nov. 16, 1990) (codified at 40 C.F.R. 122–24) (Phase 1 stormwater rule addressing stormwater discharges from large and medium MS4s plus industrial activity, including large construction sites); see also National Pollutant Discharge Elimination System—Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, 64 Fed. Reg. 68,722 (Dec. 8, 1999) (codified at 40 C.F.R. pts. 9, 122–24) (Phase 2 stormwater rule addressing stormwater discharges from small MS4s and small construction sites).

<sup>309</sup> See 33 U.S.C. § 1342(p)(3)(iii)(B).

During periods of rainfall or snowmelt, wastewater volume in a combined sewer system can exceed the capacity of the sewer system or treatment plant.<sup>310</sup> When this happens, the excess wastewater flows directly into nearby streams, rivers or other water bodies, potentially exceeding applicable water quality standards and exposing communities to raw sewage.<sup>311</sup> CSOs can contain stormwater, untreated human and industrial waste, toxic pollutants, and debris. CSOs have been a cause of water quality impairment as documented in CWA § 305(b) reports and may occur in streams or rivers frequented by the public, thus representing a potential hazard to human health and the environment.<sup>312</sup>

CSOs are subject to permitting under the CWA. EPA’s 1994 CSO Control Policy specifies the technology-based and water quality-based effluent limits that should be included in NPDES permits for CSOs.<sup>313</sup> Congress subsequently added § 402(q) to the CWA, which provides in part that “each permit, order or decree issued pursuant to this chapter after December 21, 2000 for a discharge from a municipal combined storm and sanitary sewer shall conform to the Combined Sewer Overflow Policy signed by the Administrator on April 11, 1994.”<sup>314</sup> That policy specified that NPDES permitting authorities issue or reissue permits to require compliance with the technology-based and water quality-based requirements of the CWA. Technology-based requirements for CSOs include, at a minimum, implementation of “nine minimum controls.”<sup>315</sup> In addition, permittees are required to develop “Long-Term Control Plans” to meet WQS. A permittee’s Long-Term Control Plan should give the highest priority to controlling overflows in sensitive areas.<sup>316</sup> Sensitive areas include outstanding national resource waters, national marine sanctuaries, waters with threatened or endangered species or their habitat, waters with primary contact recreation, public drinking water intakes or their designated protection areas, and shellfish beds.<sup>317</sup> For such areas, the CSO Long-Term Control Plan should prohibit new or significantly increased overflows, eliminate or relocate overflows wherever physically possible and economically achievable, and provide for treatment where necessary to meet applicable WQS.

There are approximately 735 permits in the United States for combined sewer systems. Affected communities are in 32 states (including the District of Columbia), primarily concentrated in the Northeast and Midwest, and serve approximately 46 million people. EPA can bring additional focus to CSO-related issues in communities with environmental justice concerns to advance environmental justice, as well as help combat climate change, which is fueling bigger and more frequent storms that can result in CSOs. In addition to issuing guidance and/or updating the financial capability assessment guidance as discussed above under “*Temporal Use Changes or WQS Variances for CSO-Impacted Waters*” steps discussed above, EPA could evaluate existing Long-Term Control Plans to see if they adequately address environmental justice considerations and seek modification of those Plans found to be lacking. Specifically, EPA could focus on whether the locations of overflows are causing water quality impairments that have a disproportionate impact on communities with environmental justice concerns. Further EPA could provide technical assistance where Long-Term Control Plans are still being developed

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<sup>310</sup> Combined Sewer Overflow (CSO) Control Policy, 59 Fed. Reg. 18,688 (Apr. 19, 1994).

<sup>311</sup> *Id.*

<sup>312</sup> *Id.*

<sup>313</sup> *Id.*

<sup>314</sup> 33 U.S.C. § 1342(q).

<sup>315</sup> Combined Sewer Overflow (CSO) Control Policy, 59 Fed. Reg. 18,688 (Apr. 19, 1994).

<sup>316</sup> *Id.*

<sup>317</sup> *Id.*

or revised, with an eye toward environmental justice, including providing information on funding sources available to address these concerns.

### ***B. Sanitary Sewer Overflows (SSOs)***

In 2004, EPA estimated that there are between 23,000 and 75,000 sanitary sewer overflow events per year.<sup>318</sup> Of these, EPA estimated that approximately 50% are caused by blockages and 25% are caused by wet weather infiltration or inflow into the pipes.<sup>319</sup> EPA estimated that these overflows accounted for a total volume of between three and ten billion gallons of sanitary sewerwastewater discharged per year.<sup>320</sup> They may overflow into areas that the public frequents, such as parks, beaches, backyards, city streets, and playgrounds.

Under the CWA, sanitary sewers are included within the term POTW.<sup>321</sup> Therefore, they are subject to secondary treatment requirements and more stringent ~~has~~ as necessary to meet applicable WQS.<sup>322</sup> As such, overflows are generally prohibited. EPA and state NPDES inspectors assess collection systems and treatment plants to evaluate compliance with permit conditions, including proper operation and maintenance practices. These permit conditions are based on 40 C.F.R. § 122.41(e), which provides: “The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of this permit.”<sup>323</sup>

Many municipal sanitary sewer collection systems are not entirely owned by a single entity. Collection systems owned or operated by a municipality other than the municipality providing wastewater treatment are referred to as “satellite systems.” Such systems are generally not covered by the same permit as the treatment plant. The unpermitted or separately permitted satellite systems may contribute large flows to treatment plants or may be improperly operated or maintained.<sup>324</sup> However, by not being regulated as co-permittees with the treatment plants, the satellite systems frequently do not bear a proportionate burden of the sewage treatment costs. EPA’s Environmental Appeal Board has held, however, that permitting authorities may require satellite communities to be controlled by a NPDES permit.<sup>325</sup> Based on this decision, permitting authorities can require satellite systems to take responsibility for controlling discharges. In January 2005, EPA issued a “Guide for Evaluating Capacity, Management, Operation, and Maintenance (CMOM) Programs at Sanitary Sewer Collection Systems,”<sup>326</sup> which recommends practices for permittees and EPA and state inspectors to consider in assessing permit compliance or in writing settlement agreements. The guidance advises that satellite communities should not

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<sup>318</sup> See UNITED STATES ENVTL. PROT. AGENCY, REPORT TO CONGRESS: IMPACTS AND CONTROL OF CSOS AND SSOs (EPA 833-R-04-001) (Aug. 2004) at 4–25, [https://www.epa.gov/sites/default/files/2015-10/documents/csosortc2004\\_full.pdf](https://www.epa.gov/sites/default/files/2015-10/documents/csosortc2004_full.pdf).

<sup>319</sup> *Id.* at 4–26, 4–27.

<sup>320</sup> *Id.* at 4–26.

<sup>321</sup> See 40 C.F.R. § 403.3(q) (defining Publicly Owned Treatment Works).

<sup>322</sup> 33 U.S.C. § 1311(b)(1)(B), (C).

<sup>323</sup> 40 C.F.R. § 122.41(e).

<sup>324</sup> See 75 Fed. Reg. 30395, 30400 (June 1, 2010) (discussing municipal satellite collection systems).

<sup>325</sup> *In re: Charles River Pollution Control District*, 16 EAD 623, (EAB 2015).

<sup>326</sup> UNITED STATES ENVTL. PROT. AGENCY, GUIDE FOR EVALUATING CAPACITY, MANAGEMENT, OPERATION, AND MAINTENANCE (CMOM) PROGRAMS AT SANITARY SEWER COLLECTION SYSTEMS (Jan. 2005), available at <http://nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=30006OW9.txt>.

be allowed to contribute excessive flow to wastewater treatment plants, which are often located in financially stressed urban areas that may have an impact on urban communities with environmental justice concerns.

### ***C. Municipal Separate Storm Sewer Systems (MS4s)***

Section 402(p)(2)(C) and (D) of the CWA requires EPA to issue NPDES permits for stormwater discharges from certain MS4s.<sup>327</sup> In plain terms, MS4s are discrete conveyances of stormwater to waters of the United States. “Municipal separate storm sewer system” means, among other things, “a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains) . . . [o]wned or operated by a . . . county . . . or other public body (created by or pursuant to State law) . . . [and] [d]esigned or used for collecting or conveying stormwater”.<sup>328</sup>

EPA or states issue permits to regulated MS4s to control their discharges.<sup>329</sup> Such permits “shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and systems, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.”<sup>330</sup>

Under § 402(p)(3)(B)(iii), EPA can focus attention on communities with environmental justice concerns in establishing more specific requirements for MS4 permits.<sup>331</sup> For example, where a community with environmental justice concerns uses a particular resource, such as engaging in subsistence fishing in urban waters, the permitting authority could impose requirements tailored to the need of that community. As another example, MS4 permits could include post-construction stormwater requirements for redevelopment or new development in urban communities with environmental justice concerns that incentivize certain types of green infrastructure, given the benefits that green infrastructure can bring to people’s mental and physical wellbeing. These actions would also have the benefit of addressing larger and more frequent storm events fueled by climate change.

### ***D. Industrial and Construction Stormwater Point Source Discharges***

Section 402(p)(2)(B) of the CWA requires NPDES permits for stormwater discharges from industrial activity and § 402(p)(3)(A) requires such permits to include limits to meet WQS.<sup>332</sup> In its 1990 Phase 1 Stormwater Rule, EPA promulgated a definition for “stormwater discharges from industrial activity” that includes numerous categories identified pursuant to their Standard Industrial Classification (SIC) codes (now often identified by their corresponding North American Industrial Classification System (NAICS) codes).<sup>333</sup> EPA has issued (and re-issued numerous times) a Multi-Sector General Permit (MSGP) offering NPDES permit coverage for operators of eligible stormwater discharges from industrial activity, or such operators may instead apply for an individual permit. Numerous states with NPDES authorization have done the same.

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<sup>327</sup> 33 U.S.C. §§ 1342(p)(2)(C), (D).

<sup>328</sup> 40 C.F.R. § 122.26(b)(8).

<sup>329</sup> See 33 U.S.C. § 1342(p)(2).

<sup>330</sup> 33 U.S.C. § 1342(p)(3)(B)(iii).

<sup>331</sup> *Id.*

<sup>332</sup> 33 U.S.C. §§ 1342(p)(2)(B), (p)(3)(A).

<sup>333</sup> 40 C.F.R. § 122.26(b)(14).

In defining “stormwater discharges from industrial activity” in its 1990 Phase 1 Stormwater Rule, EPA included stormwater discharges from construction activity that disturbs at least 5 acres of land.<sup>334</sup> Section 402(p)(6) of the CWA required EPA to promulgate a second stormwater rule, designating additional stormwater discharges for NPDES permitting “to protect water quality.”<sup>335</sup> In EPA’s 1999 Phase 2 Stormwater Rule, EPA designated for NPDES permitting stormwater discharges from construction activity that disturbs between 1 and 5 acres of land, including smaller sites that are part of a larger common plan of development.<sup>336</sup> EPA has issued (and re-issued numerous times) a Construction General Permit (CGP) offering NPDES permit coverage for operators of eligible stormwater discharges from construction sites disturbing at least 1 acre of land (or less but where part of a larger common plan of development). In the alternative, such operators may instead apply for an individual NPDES permit.<sup>337</sup>

While EPA’s MSGP and CGP apply equally in jurisdictions where EPA is the permitting authority, EPA could request comment on whether any discharges under those permits are disproportionately affecting environmental justice communities and if so, review and ensure those permits contain conditions sufficiently stringent conditions to meet CWA requirements and/or consider whether certain facilities and/or construction sites should be required to apply for an individual permit. Doing so might also help address larger and more frequent wet weather events caused by climate change.

### ***E. Other Stormwater Point Source Discharges Not Nationally Regulated***

EPA has the legal authority under the CWA to regulate discharges of stormwater from impervious surfaces or developed property (e.g., small MS4 not otherwise regulated by EPA’s 1999 Phase 2 Stormwater Rule) based on the findings described in CWA § 402(p)(6).<sup>338</sup>

Section 402(p)(6) provides:

Not later than October 1, 1993, the Administrator, in consultation with State and local officials, shall issue regulations (based on the results of studies conducted under paragraph (5)) which designate stormwater discharges, other than those discharges described in paragraph (2), to be regulated to protect water quality and shall establish a comprehensive program to regulate such designated sources. The program shall, at a minimum, (A) establish priorities, (B) establish requirements for State stormwater management programs, and (C) establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate.<sup>339</sup>

EPA has broad discretion to identify discharges of stormwater as requiring regulation under CWA § 402(p)(6). Under this provision, EPA can regulate stormwater discharges from development/impervious surfaces by making a finding that discharges from

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<sup>334</sup> 40 C.F.R. § 122.26(b)(14)(x).

<sup>335</sup> 33 U.S.C. § 1342(p)(6).

<sup>336</sup> 40 C.F.R. § 122.26(b)(15)(i).

<sup>337</sup> 40 C.F.R. § 122.28.

<sup>338</sup> 33 U.S.C. § 1342(p)(6).

<sup>339</sup> *Id.*

development/impervious surfaces warrant regulation in order “to protect water quality.”<sup>340</sup>

EPA also has broad discretion to determine how to control those designated discharges.<sup>341</sup> The last sentence of § 402(p)(6), which states that “[t]he program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate[,]” gives EPA discretion to determine what kinds of program elements to establish.<sup>342</sup> Thus, EPA could issue guidance or a rule that would be directly applicable to point source discharges rather than be implemented through NPDES permits. Also, the express reference to “establishing priorities” in § 402(p)(6) gives EPA a basis to decide which discharges are most important to regulate, and it may decide not to address all discharges at one time.<sup>343</sup> EPA could use the broad discretion that § 402(p)(6) provides to advance environmental justice in taking actions under § 402(p)(6).

Under CWA § 402(p)(2)(E), EPA has authority to designate through informal adjudication additional point sources of stormwater discharges to be regulated under the NPDES program.<sup>344</sup> EPA has implemented this “residual designation” authority in regulations at 40 C.F.R. §§ 122.26(a)(9)(C) and (D).<sup>345</sup> These regulations provide that the permitting authority or the Regional Administrator may designate and require operators of stormwater discharges or a category of discharges to obtain permit coverage if the authority determines that the discharge or category of discharges contributes to a WQS violation or is a significant contributor of pollutants to waters of the United States.<sup>346</sup> Alternatively, a residual designation may be based on finding that stormwater controls are needed for the discharge based on waste load allocations that are part of a TMDL that addresses the pollutants of concern.<sup>347</sup>

EPA could choose to make greater use of its residual designation authority in affected areas to advance environmental justice. For example, in a community with environmental justice concerns, EPA could designate currently unregulated sources of stormwater, e.g., parking lots or impervious surfaces over a certain size, for regulation under the NPDES permit program. This could result in such facilities needing to make changes to better control their stormwater. These controls could result in healthier urban streams, thereby providing benefits not only to the ecosystem itself, but also to the surrounding communities. Stormwater controls may also yield the additional benefit of transforming gray urban environments into more inviting green spaces, enhancing recreational opportunities and quality of life. They may also help to address bigger and more frequent storms caused by climate change.

Like the residual designation authority described in the preceding paragraphs, EPA has

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<sup>340</sup> *Id.*

<sup>341</sup> *See Env'tl. Defense Ctr. v. EPA*, 344 F.3d 832, 844 (9<sup>th</sup> Cir. 2003) (EPA is free to adopt any regulatory program, including a permitting program, for these discharges so long as it is based on the required studies, issued in consultation with state and local officials, and establishes priorities, requirements for state stormwater management programs, and expeditious deadlines in constituting a comprehensive program to protect water quality); *see also Conservation Law Found. v. Hannaford Bros. Co.*, 327 F.Supp.2d 325, 330–32 (D. Vt. 2004), *aff'd*, 2005 WL 1712899 (2d Cir. 2005) (same).

<sup>342</sup> 33 U.S.C. § 1342(p)(6).

<sup>343</sup> *Id.*

<sup>344</sup> 33 U.S.C. § 1342(p)(2)(E).

<sup>345</sup> 40 C.F.R. §§ 122.26(a)(9)(C), (D).

<sup>346</sup> *Id.*

<sup>347</sup> *Id.*

authority to designate an AFO as a CAFO requiring an NPDES permit.<sup>348</sup> See Chapter Two, VI, above, for a discussion of EPA’s authority to designate AFOs as CAFOs, as well as the limitations of that authority.

## VII. SECTION 404 WETLANDS PROGRAM

Section 404 permits authorize the discharge of “dredged or fill material” to waters of the United States.<sup>349</sup> The types of activities regulated under § 404 include filling of wetlands and streams to create dry land for development, construction of berms or dams to create water impoundments, and discharges of material dredged from waterways to maintain or improve navigation.<sup>350</sup> The U.S. Army Corps of Engineers (Corps) typically issues § 404 permits.<sup>351</sup>

However, a state or tribe may request authority to administer the § 404 program for certain waters within its boundaries, other than certain waters that can be used to transport interstate or foreign commerce, for which the Corps retains permitting authority.<sup>352</sup> EPA must approve a program if it determines that certain requirements are met, including ensuring that the state or tribe has the authority to issue permits in compliance with the CWA, and to assure adequate public participation in the permitting process.<sup>353</sup> EPA’s state program approval regulations at 40 C.F.R. part 233 lay out a detailed process for program approval.<sup>354</sup> EPA often closely coordinates with states and tribes to advise on their program requests, and may be able to address environmental justice concerns during the approval process particularly in the context of evaluating the state or tribe’s public participation procedures. For example, in addition to the required coordination procedures at § 233.31, EPA could encourage states to notify all interested tribes and/or communities with environmental justice concerns of permits that may affect waters of concern to these parties. Once a state program is approved by EPA, the authority of the Corps to issue § 404 permits is suspended, except for those waters exempted from the assumption.<sup>355</sup> However, a state administering a § 404 permit program must provide EPA with a copy of all permit applications and proposed permits.<sup>356</sup> If EPA objects to a proposed permit, the state may either issue a revised permit that resolves EPA’s objections; deny the permit application; or request a public hearing.<sup>357</sup> If the state takes none of these actions within 90 days, permitting authority transfers to the Corps.<sup>358</sup> Only three states—Michigan, New Jersey, and Florida—have assumed the § 404 permit to date, and no tribes have done so.<sup>359</sup>

Section 404 permits issued by the Corps or a state or tribe must satisfy the CWA § 404(b)(1) guidelines developed by EPA in conjunction with the Corps.<sup>360</sup> The § 404(b)(1) guidelines provide that no permit shall issue if: (1) there are practicable, environmentally less damaging alternatives; (2) the discharge would violate water quality standards or jeopardize

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<sup>348</sup> 40 C.F.R. § 122.23(c).

<sup>349</sup> 33 U.S.C. § 1344.

<sup>350</sup> See 40 C.F.R. § 232.2 (defining “[d]ischarge of fill material.”)

<sup>351</sup> 33 U.S.C. § 1344(a).

<sup>352</sup> 33 U.S.C. § 1344(g)(1).

<sup>353</sup> 33 U.S.C. § 1344(h)(2)(A).

<sup>354</sup> 40 C.F.R. part 233.

<sup>355</sup> 33 U.S.C. § 1344(h)(2)(A).

<sup>356</sup> *Id.* § 1344(j).

<sup>357</sup> 33 U.S.C. § 1344(j); 40 C.F.R. §§ 233.50(f), (g).

<sup>358</sup> 33 U.S.C. § 1344(j); 40 C.F.R. § 233.50(i).

<sup>359</sup> See <https://www.epa.gov/cwa404g>.

<sup>360</sup> 33 U.S.C. § 1344(b), (h)(1)(A); 40 C.F.R. §§ 230.2, 233.20(a).



threatened or endangered species; (3) the discharge would cause or contribute to significant degradation to the aquatic ecosystem; or (4) if all appropriate and practicable steps have not been taken to minimize potential adverse effects of the discharge.<sup>361</sup> The 2011 Surface Coal Mining Memorandum provides the following guidance to the relevant Regional Administrators:

[W]e recommend that Regions work collaboratively with the Corps to analyze the potential for disproportionately high and adverse human health or environmental effects on low-income and minority populations, including impacts to water supplies and fisheries, from issuance of a permit for surface coal mining activities in waters of the U.S.<sup>362</sup>

The § 404(b)(1) guidelines also require the Corps or state or tribal permitting authority to consider “Human Use” effects of the discharge that could implicate environmental justice concerns, including effects on recreational and commercial fisheries, water-related recreation, and aesthetics.<sup>363</sup>

Even broader potential authority to consider environmental justice in the CWA § 404 program rests with the U.S. Army Corps of Engineers, which conducts a broad “public interest review” in determining whether to issue a § 404 permit, in addition to determining whether a permit satisfies the requirements of the § 404(b)(1) guidelines.<sup>364</sup> The public interest review is a balancing test that requires the Corps to consider a number of factors, including economics, fish and wildlife values, safety, food and fiber production and, in general, the needs and welfare of the people, and, as such, could take into account the potential for disproportionate impacts on communities with environmental justice concerns (particularly those reliant on subsistence hunting and fishing).<sup>365</sup> In evaluating the “probable impacts of the proposed activity and its intended use on the public interest,” the Corps is authorized to consider, among other things, aesthetics, general environmental concerns, safety, and the needs and welfare of the people.<sup>366</sup> This public interest review could include environmental justice considerations.

EPA can use its oversight authority over state- and tribe-issued permits to comment on and encourage states and tribes to consider and address environmental justice concerns when ensuring that permits are issued in accordance with the § 404(b)(1) guidelines. For Corps-issued permits, EPA may comment on the U.S. Army Corps of Engineers’ public interest review, for which the regulations provide “[t]he decision whether to issue a permit will be based on an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest.” The Corps’ review involves consideration of “all factors which may be relevant to the proposal, “including the cumulative effects thereof “the needs and welfare of the people,” as well as cultural and historic values.<sup>367</sup>

EPA has discretionary oversight authority over the Corps’ administration of the § 404 program (i.e., EPA comments on public notices for permit applications, can elevate Corps

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<sup>361</sup> 40 C.F.R. § 230.10.

<sup>362</sup> U.S. ENVTL. PROT. AGENCY, MEMORANDA OF UNDERSTANDING SURFACE COAL MINING MEMORANDUM 39, available at <https://www.epa.gov/cwa-404/memoranda-understanding-surface-coal-mining>. See *supra*, Section IV of this Chapter.

<sup>363</sup> 40 C.F.R. § 230(f).

<sup>364</sup> 33 C.F.R. § 320.4(a).

<sup>365</sup> *Id.*

<sup>366</sup> *Id.*

<sup>367</sup> 33 C.F.R. § 320.4(a)(1), (e).

District permit decisions to Headquarters in Washington, D.C. under 404(q), and can prohibit or restrict the use of an area as a disposal site that will have “an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas.”<sup>368</sup>

EPA can use these authorities in response to potential degradation of these public aquatic resources (e.g., recreational or fishing areas that are important to at-risk communities) from impacts that may have an adverse health or environmental effect on communities with environmental justice concerns. Such impacts can be addressed when they result directly from a discharge of dredged or fill material (e.g., the filling of a water body), or are a secondary effect of the permitted activity (e.g., the fill will allow construction of an industrial facility that will cause water pollution due to runoff). EPA can raise these concerns when sending Agency comments during the Corps’ public comment period and can include consideration of these issues when exercising the discretion to elevate to Headquarters under 404(q) or prohibit or restrict the use of an area as a disposal site under § 404(c). EPA has issued thirteen final determinations under its 404(c) authority and some of these determinations have discussed environmental justice considerations.<sup>369</sup>

EPA also may consider environmental justice relating to aquatic ecosystem degradation when determining whether to object to state-issued CWA § 404 permits under CWA § 404(j).

## **VIII. AUTHORIZATION OF TRIBAL PROGRAMS**

### ***A. Treatment in the Same Manner as States***

Section 518 of the CWA and its implementing regulations provide that EPA may treat eligible Indian tribes in the same manner as states for purposes of many programs under the CWA, including for grants, adoption of water quality standards, issuance of water quality certifications, and issuance of CWA §§ 402 and 404 permits.<sup>370</sup> EPA has issued regulations implementing the treatment-as-a-state (TAS) provisions in § 518(e) and has granted applicant tribes TAS status for various programs under the CWA. Notably, a number of tribes have TAS status for purposes of CWA grants under §§ 106 and 319, and for water quality standards and certifications under §§ 303(c) and 401 of the CWA. Currently, 70 tribes have TAS status for the water quality standards program and 45 of those tribes have EPA-approved water quality standards for their reservation waters.<sup>371</sup>

EPA’s implementation of TAS statutory authority over the past 20 years and its support of the adoption of environmental protections in Indian country have allowed the Agency to advance environmental justice in Indian country. As discussed in Chapter Five, EPA is exploring other ways to encourage and support tribal applications for TAS and adoption of tribal water quality standards for reservation waters.<sup>372</sup>

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<sup>368</sup> 33 U.S.C. § 1344(c); 40 C.F.R. § 231.1(a).

<sup>369</sup> See, e.g., Final Determination of the Assistant Administrator for Water Pursuant to Section 404(c) of the Clean Water Act Concerning the Proposed Yazoo Backwater Area Pumps Project in Issaquena County, MS, 73 Fed. Reg. 54,398 (Sept. 19, 2008).

<sup>370</sup> 33 U.S.C. § 1377.

<sup>371</sup> See <https://www.epa.gov/tribal/tribes-approved-treatment-state-tas>.

<sup>372</sup> See *supra*, discussion above regarding EPA’s 2016 CWA § 518 interpretive rule.

## ***B. Grants to Alaska to Improve Sanitation in Rural and Native Villages***

CWA § 113 authorizes EPA to enter into agreements with the State of Alaska to carry out demonstration projects for the provision of safe water and elimination of pollution in native villages in Alaska.<sup>373</sup> EPA tribal programs are discussed more fully in Chapter Five and tribal grants programs are discussed in Chapter Seven.<sup>374</sup>

## **IX. TOXIC POLLUTANT EFFLUENT STANDARDS AND PROHIBITIONS**

Section 307(a)(2) of the CWA authorizes the Administrator to propose and promulgate an effluent standard or prohibition for a toxic pollutant applicable to a class or category of point sources taking into account a number of factors about the pollutant, including its toxicity, persistence, degradability, and potential presence in aquatic organisms.<sup>375</sup> The Agency last used this authority in 1979. Pursuant to CWA § 307(a)(4), EPA promulgated effluent standards and prohibitions following “formal” rulemaking on the record.<sup>376</sup> Promulgated effluent standards and prohibitions exist for six classes of toxic pollutants, including pesticides and polychlorinated biphenyls (PCBs).<sup>377</sup> For example, the effluent standards and prohibitions for pesticides generally apply to manufacturers and formulators of the named pesticides and set either stringent allowable effluent discharge standards or prohibitions on discharge.<sup>378</sup>

Section 307(a) of the CWA differs from the Agency’s technology-based effluent limitations guidelines because it does not require that the Agency consider technological feasibility, cost, or economic impact in setting effluent standards or prohibitions (although the Agency did consider such factors during the 1970’s hearings).<sup>379</sup> The onerous requirement that § 307(a) standards and prohibitions be promulgated through “formal” rulemaking (essentially a trial with cross-examination of expert witnesses) led the Agency to abandon the use of § 307(a) and instead simply promulgate effluent limitations guidelines pursuant to CWA §§ 301 and 304. The burdens associated with formal rulemaking would continue to exist if the Agency chose to pursue use of § 307(a). The Agency, however, could explore whether the discretionary authorities in § 307(a) might be uniquely appropriate for addressing concerns about environmental protection of communities with environmental justice concerns.

## **X. SEWAGE SLUDGE**

Section 405 of the CWA establishes the framework for sewage sludge (i.e., biosolids) management and disposal.<sup>380</sup> The regulations entitled, The Standards for the Use and Disposal of Sewage Sludge, are found at 40 C.F.R. part 503 and were promulgated in 1993.<sup>381</sup> They include five subparts: general provisions, and requirements for land application, surface disposal, pathogen and vector attraction reduction, and incineration. For each of the regulated use or disposal practices, a Part 503 standard includes general requirements, pollutant limits, management practices,

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<sup>373</sup> 33 U.S.C. § 1263.

<sup>374</sup> *See infra*.

<sup>375</sup> 33 U.S.C. § 1317(a)(2).

<sup>376</sup> 33 U.S.C. § 1317(a)(4).

<sup>377</sup> *See* 40 C.F.R. part 129.

<sup>378</sup> *See* 40 C.F.R. part 455.

<sup>379</sup> 33 U.S.C. § 1317(a).

<sup>380</sup> 33 U.S.C. § 1345.

<sup>381</sup> 40 C.F.R. part 503.

operational standards, and requirements for the frequency of monitoring, recordkeeping, and reporting.<sup>382</sup> The standards also specify requirements for biosolids land application, incineration, and surface disposal.<sup>383</sup>

EPA conducts biennial reviews of the standards, consistent with the CWA. EPA staff have identified additional work, including working on analytical methods for emerging contaminants found in biosolids, evaluating risks for contaminants found in biosolids and improving the Agency’s understanding of treatment effectiveness. EPA could consider whether the current risk assessment methodology sufficiently addresses all routes of exposure for members of communities with environmental justice concerns.

## XI. RESEARCH, INVESTIGATIONS, TRAINING, AND INFORMATION

The CWA provides broad authority for EPA to gather data, conduct research, and provide technical and grant assistance that could be used to advance environmental justice by focusing attention on, and promoting participation in, environmental decision-making by communities with environmental justice concerns.<sup>384</sup> Among these authorities are: (1) § 104(b)—collect and disseminate information on chemical, physical and biological effects of varying water quality and other information pertaining to pollution and the prevention, reduction and elimination thereof; (2) § 104(l)—collect and disseminate scientific knowledge on effects and control of pesticides in water; (3) § 104(p)—study and research methods of preventing, reducing, or eliminating pollution from agriculture; and (4) § 104(q)—research and investigation of methods of preventing, reducing, storing, collecting, treating or otherwise eliminating pollution from sewage in rural areas.<sup>385</sup>

As an example of using the authorities in CWA § 104(b), EPA collected information on pollutant levels in both surface water and fish tissue, and issued information regarding risks associated with consumption of certain fish species.<sup>386</sup> EPA has discretionary authority to consider environmental justice when providing guidance for state, tribal or territorial fish advisory programs on whether and what type of fish consumption advisories to issue in the future.<sup>387</sup> EPA could also reinstate its collection of state, tribal and territorial fish advisory information to better understand impacts to communities with environmental justice concerns.

## XII. CLEAN WATER STATE REVOLVING FUND (CWSRF) PROGRAM

The Water Resources Reform and Development Act (WRRDA) of 2014 amended Title VI of the CWA to authorize the CWSRF to provide additional subsidy to assistance recipients that meet state-defined affordability criteria.<sup>388</sup> EPA has collected information on each states’ affordability criteria as well as data on the historical distribution of CWSRF funds. By collaborating with states, EPA can effectively identify program barriers, amplify best practices

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<sup>382</sup> *Id.*

<sup>383</sup> *Id.*

<sup>384</sup> 33 U.S.C. § 1254.

<sup>385</sup> *Id.*

<sup>386</sup> See <https://www.epa.gov/choose-fish-and-shellfish-wisely/fish-and-shellfish-advisories-and-safe-eating-guidelines>.

<sup>387</sup> 33 U.S.C. § 1254(b).

<sup>388</sup> 33 U.S.C. § 603(i).

that ensure more equitable and environmental justice-friendly decisions, and assist the disadvantaged communities (DAC) that have long faced environmental justice and equity challenges to better compete and receive resources to fund their water infrastructure needs.

### **XIII. WATER INFRASTRUCTURE FINANCE AND INNOVATION ACT**

The Water Infrastructure Finance and Innovation Act (WIFIA), 33 U.S.C. §§ 3901–3914, creates a financing mechanism for water-related infrastructure projects of national or regional significance, in the form of loans or loan guarantees.<sup>389</sup> WIFIA directs the Administrator to establish criteria for the selection of projects that meet the eligibility requirements contained in the statute.<sup>390</sup> The Administrator has discretion to include additional criteria to address priorities;<sup>391</sup> these could include projects that advance environmental justice. Pursuant to regulations, each year for which budget authority is made available by Congress for WIFIA, the EPA shall publish a Federal Register notice to solicit letters of interest for credit assistance called a Notice of Funding Availability (NOFA).<sup>392</sup> Among other things, the NOFA can be used to specify Administrator priorities for WIFIA projects that advance environmental justice.

### **SAFE DRINKING WATER ACT**

The Safe Drinking Water Act (SDWA) includes two separate regulatory programs. The public water system (PWS) regulatory program establishes requirements for the quality of drinking water supplied by public water systems. This program establishes federal requirements that are directly implemented by EPA or approved states or tribes; there is no federal permit requirement.<sup>393</sup> The underground injection control (UIC) program establishes controls on the underground injection of fluids to protect underground sources of drinking water.<sup>394</sup> This program is implemented through permits (including permits by rule) issued by EPA or approved states or tribes.<sup>395</sup> The following section analyzes how EPA may address environmental justice considerations under both programs.

#### **I. PUBLIC WATER SYSTEM REGULATORY PROGRAM**

Under the SDWA PWS program, the Administrator is to establish national primary drinking water regulations that set either maximum levels or treatment requirements for contaminants that are known to occur or there is substantial likelihood that the contaminant will occur in public water systems with a frequency and at levels of public health concern; may have an adverse effect on the health of persons; and in the sole judgment of the Administrator, regulation of such contaminant presents a meaningful opportunity for health risk reduction for persons served by public water systems.<sup>396</sup> Early on, in the scoping and development of a rulemaking EPA has worked with stakeholders, which have included communities with

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<sup>389</sup> 33 U.S.C. §§ 3901–14.

<sup>390</sup> *Id.*

<sup>391</sup> *Id.*

<sup>392</sup> *Id.*

<sup>393</sup> 42 U.S.C. § 300g-1.

<sup>394</sup> 42 U.S.C. § 300h.

<sup>395</sup> Like the CWA, the SDWA allows federally recognized Indian tribes to assume responsibility for administering SDWA regulatory programs. Specifically, under § 300j–11 of the SDWA, eligible tribes may administer both the PWS and UIC programs, as discussed further in Chapter Five.

<sup>396</sup> 42 U.S.C. § 300g-1.

environmental justice concerns, to understand priorities and obtain their diverse perspectives with the agency. EPA gains valuable insights from these engagements that will inform the agency's actions going forward. The SDWA applies only to public water systems, defined in the SDWA as systems providing water through constructed conveyances to at least 15 service connections or regularly serving at least 25 individuals.<sup>397</sup> Upon application of states and eligible tribes, the Administrator may authorize them to administer the PWS program.<sup>398</sup> All states but one have authority (or "primacy") to administer the program. EPA administers the program in that state (Wyoming) and in the District of Columbia. In addition, one tribe has primacy. EPA administers the program in all other situations.

### ***A. Unregulated Contaminant Monitoring Rules (UCMR)***

The Agency issues a new unregulated contaminant monitoring rule every five years with a list of up to 30 contaminants.<sup>399</sup> This rulemaking provides crucial information for EPA's decision whether to regulate contaminants. EPA can use this authority to gather information that may help to identify possible environmental justice considerations associated with currently unregulated contaminants, including those that may pose a special risk to communities with environmental justice concerns. The SDWA was amended by the America's Water Infrastructure Act (AWIA) of 2018 to expand monitoring by all small systems serving more than 3,300 people, instead of the traditional, nationally stratified selection of small systems.<sup>400</sup> Per AWIA, expansion is subject to the availability of laboratory support and appropriations.<sup>401</sup> EPA funds the testing and shipping costs of small system sampling collected during the unregulated contaminant monitoring cycle. The expanded monitoring will improve EPA's ability to conduct state and local assessments of contamination. This will enable analyses of potential disproportionate impacts on disadvantaged communities. Moreover, this data will serve as a potential source of information of systems with infrastructure funding needs for emerging contaminant remediation.

The National Defense Authorization Act (NDAA) for FY 2020 further amended SDWA and requires EPA to include each PFAS in the fifth UCMR for which a drinking water method has been validated by the Administrator.<sup>402</sup> UCMR 5 identifies a new list of unregulated priority contaminants, including 29 Per- and Polyfluoroalkyl Substances (PFAS), for PWS monitoring.<sup>403</sup> PFAS are an urgent public health and environmental threat facing communities across the United States, with equity and environmental justice implications. The inclusion of collecting data on 29 PFAS in drinking water is critically needed to improve EPA's understanding of the frequency that PFAS are found in the nation's drinking water systems, where, and at what levels.

### ***B. Health Risk Reduction and Cost Analysis***

When proposing any National Primary Drinking Water Regulation that includes a maximum contaminant level (MCL) or treatment technique, EPA must analyze and seek public comment on (1) health risk reduction benefits likely to result of treatment to comply with each

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<sup>397</sup> 42 U.S.C. § 300g.

<sup>398</sup> 42 U.S.C. § 300g-2.

<sup>399</sup> See <https://www.epa.gov/dwucmr>.

<sup>400</sup> Pub. L. 115-270, S. 3021 (Oct. 10, 2018).

<sup>401</sup> *Id.*

<sup>402</sup> Pub. L. 116-92, 133 Stat. 1198 (Dec. 20, 2019).

<sup>403</sup> See <https://www.epa.gov/dwucmr/fifth-unregulated-contaminant-monitoring-rule>.

regulation; (2) health risk reduction benefits likely to occur from reductions in co-occurring contaminants; (3) costs likely to occur as a result of compliance with the regulation; (4) incremental costs and benefits associated with each alternative regulation considered; (5) the health effects of the contaminant on the general population and on sub-groups, such as infants, children, pregnant women, the elderly, individuals with a history of serious illness, “or other subpopulations that are identified as likely to be at greater risk of adverse health effects due to exposure to contaminants in drinking water than the general population;” (6) any increased health risk that may occur due to compliance (including from co-occurring contaminants); and (7) other relevant factors, such as the quality and extent of the information, the uncertainties in the analysis, and the degree and nature of the risk.<sup>404</sup> As emphasized above, EPA could use this authority to seek public comment on potential effects of any proposed MCL or treatment technique on communities with environmental justice concerns.

### ***C. Regulatory Determinations***

Every five years, EPA must publish a list of contaminants, known as the Contaminant Candidate List or CCL, that are known or anticipated to occur in public water systems and are not currently subject to EPA drinking water regulations.<sup>405</sup> SDWA directs EPA to select no fewer than five contaminants every five years from the current CCL and determine, after notice and comment, whether to regulate these contaminants using the Regulatory Determination (RegDet) Process.<sup>406</sup> To regulate, EPA must find that three criteria are met: the contaminant may have adverse health effects; the contaminant is found or there is a substantial likelihood that the contaminant will occur in public water systems with a frequency and at levels of public health concern; and in the sole judgment of the Administrator, there is a meaningful opportunity for health risk reduction through a national primary drinking water regulation.<sup>407</sup> EPA could consider environmental justice considerations under these factors, and especially in the sole judgment of the Administrator.

### ***D. Six-Year Review***

The SDWA requires EPA to review each National Primary Drinking Water Regulation at least once every six years and revise them, if appropriate.<sup>408</sup> As part of the "Six-Year Review," EPA evaluates current information for regulated contaminants to determine if there is new information on health effects, treatment technologies, analytical methods, occurrence and exposure, implementation and/or other factors that provides a health or technical basis to support a regulatory revision that will improve or strengthen public health protection.<sup>409</sup> In conducting the evaluation, EPA follows a protocol EPA established for the first Six-Year Review and modified in subsequent reviews; the primary goal of the Six-Year Review process is to identify and prioritize NPDWRs for possible regulatory revision.<sup>410</sup> Any revisions must maintain or strengthen public health protection. As part of the six-year review process, EPA could evaluate current information on health effects, including cumulative impacts, on communities with environmental justice concerns, as well as occurrence and exposure in such communities, how implementation of the regulations has impacted

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<sup>404</sup> 42 U.S.C. § 300g-1(b)(3)(C).

<sup>405</sup> 42 U.S.C. § 300g-1(b)(1)(B).

<sup>406</sup> 42 U.S.C. § 300g-1(b)(1)(C).

<sup>407</sup> *Id.*

<sup>408</sup> 42 U.S.C. § 300g-1(b)(9).

<sup>409</sup> See, e.g., 82 Fed. Reg. 3518 (Jan. 11, 2017).

<sup>410</sup> See, e.g., 82 Fed. Reg. 3518, 3522 (Jan. 11, 2017).

communities with environmental justice concerns, and consider changes or additional guidance accordingly. EPA could also revise its protocol for conducting the Six-Year Review to include explicit consideration of new information on health effects, occurrence, and exposure on and in communities with environmental justice concerns.

### ***E. Public Notification/Consumer Confidence Reports***

The Agency is implementing public notification regulations and other right-to-know provisions of the SDWA, which were amended to ensure greater public notice of noncompliance problems and which already require notices in plain English and other relevant languages. Pursuant to the America's Water Infrastructure Act of 2018, EPA is required to revise the Consumer Confidence Report (CCR) regulations to increase “the readability, clarity, and understandability of the information presented in consumer confidence reports” as well as “the accuracy of information presented, and risk communication.”<sup>411</sup> CCRs are a cornerstone of public “right-to-know” rules under the SDWA. The public transparency supported by CCRs is critical to advancing equity and enhancing consumers’ ability to engage with their water utilities to ensure public health protection. EPA established a CCR working group in July 2021 with representatives from NGOs, states, water systems, interest groups, tribes, the National Environmental Justice Advisory Council (NEJAC), and the Children's Health Protection Advisory Committee (CHPAC). The agency specifically charged the working group to make recommendations on how CCRs can be revised to better support vulnerable communities, and to also consider ways to ensure that reports are accessible, understandable, and accurate to all consumers.

### ***F. Lead Rules***

EPA promulgated a rule for controlling lead in drinking water in 1991, and promulgated revisions to the Lead and Copper Rule (LCR) in 2000, 2007, and 2021.<sup>412</sup> EPA is currently reviewing the 2021 Lead and Copper Rule Revisions (LCRR) to determine whether to withdraw, modify, or leave in place the 2021 revisions. As part of the review, EPA conducted a series of public engagements to obtain perspectives from a diverse set of stakeholders including low-income communities and communities of color that have been disproportionately impacted by lead in drinking water and have been underrepresented in past rulemaking efforts. In reviewing the LCRR, EPA is considering changes to the regulations to equitably improve public health protection, including in communities of color and low-income communities. EPA is also evaluating options to assist those who cannot afford to replace the customer-owned portions of lead service lines. In any revisions of the LCRR, EPA would develop environmental justice analyses as part of the regulatory development. These analyses would assess any disproportionate impacts of lead on communities with environmental justice concerns and assess the regulatory options to mitigate such disproportionate impacts.

### ***G. National Primary Drinking Water Regulation for PFOA and PFOS***

On February 22, 2021, EPA made final determinations to regulate two PFAS, perfluorooctanesulfonic acid (PFOS) and perfluorooctanoic acid (PFOA), in drinking water. EPA is currently moving forward to implement the national primary drinking water regulation development process for these two PFAS. EPA is developing environmental justice analyses as

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<sup>411</sup> 42 U.S.C. 300g-3(c)(4)(F).

<sup>412</sup> See <https://www.epa.gov/dwreginfo/lead-and-copper-rule>.



part of the PFOA and PFOS regulatory development. These analyses will assess if there is a disproportionate impact of PFOA and PFOS on communities with environmental justice concerns and assess the regulatory options to mitigate disproportionate impacts.

### ***H. Water System Restructuring Rule***

AWIA of 2018 requires that EPA issue a regulation that authorizes primacy agencies to mandate restructuring assessments for PWSs that frequently violate health-based standards, and which have unsuccessfully attempted, or which are unable to attempt, feasible and affordable actions to comply and must describe liability protection for a compliant PWS that is consolidating with an assessed PWS.<sup>413</sup>

### ***I. Amendments to the Emergency Planning and Community Right-to-Know Act***

AWIA of 2018 requires state and tribal emergency response commissions to notify the applicable State agency (i.e., the drinking water primacy agency) of any reportable releases and provide community water systems with hazardous chemical inventory data.<sup>414</sup>

### ***J. Risk and Resilience Assessments and Emergency Response Planning***

The AWIA of 2018 modifies the SDWA to require community water systems serving more than 3,300 people to develop or update risk and resilience assessments (RRAs) and emergency response plans (ERPs).<sup>415</sup> The law specifies the components that the RRAs and ERPs must address and establishes deadlines by which community water systems must certify to EPA completion of the RRAs and ERPs.<sup>416</sup> EPA has developed guidance for AWIA compliance that is specifically designed for small community water systems (e.g., RRA Checklist and ERP Template). Additionally, EPA's Creating Resilient Water Utilities (CRWU) Program Team convenes accessible workshops with tribes and disadvantaged communities, with a focus on EPA's Water System Partnerships Training Toolbox, which helps address unique challenges and technical, managerial, and financial capacity issues. Modules are tailored to the specific needs of communities and utilities and target those most in need.

### ***K. Asset Management and Capacity Development Strategies***

The AWIA of 2018 requires states to amend their state capacity development strategies to include a description of how the state will encourage the development of asset management plans that include best practices, training, technical assistance, and other activities to help with implementation of those plans.<sup>417</sup> States also must include an update of these activities to encourage asset management practices in the Governor's report. EPA must review and update, if appropriate, asset management documents and trainings every five years.<sup>418</sup> Technical assistance and capacity development could put some communities, including communities with EJ concerns, in a better position to finance infrastructure improvements or to run their own systems.

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<sup>413</sup> Pub. L. 115-270, S. 3021 (Oct. 10, 2018).

<sup>414</sup> *Id.*

<sup>415</sup> *Id.*

<sup>416</sup> *Id.*

<sup>417</sup> *Id.*

<sup>418</sup> *Id.*

### ***L. Drinking Water State Revolving Fund (DWSRF) Program***

The AWIA of 2018 amended the SDWA to authorize the DWSRF to allow extended infrastructure loan terms, requires the provision of additional subsidy to state-defined disadvantaged communities, and expands source water protection-related eligibilities under the Local Assistance set-aside.<sup>419</sup> EPA conducts a deep analysis of states' existing disadvantaged communities (DAC) programs and historical distribution of DWSRF funds. By collaborating with states, EPA can effectively identify program barriers, amplify best practices that ensure more equitable and environmental justice-friendly decisions, and maximize direct benefit to DAC. OW will use the results of the analysis to directly assist the DACs that have long faced environmental justice and equity challenges to better compete and receive resources to fund their water infrastructure needs.

### ***M. Water Infrastructure Improvement for the Nation (WIIN) Act Grant***

The 2016 WIIN Act and AWIA of 2018 amended SDWA to authorize EPA to provide new drinking water grants that promote public health and the protection of the environment.<sup>420</sup> The new grant programs provide funding to assist vulnerable, small, and disadvantaged communities to meet SDWA requirements, to reduce lead through corrosion control treatments or lead service line replacement in drinking water systems at disadvantaged communities, and to test for lead in drinking water in schools and childcare facilities.<sup>421</sup> EPA can evaluate the grant programs to assess their effectiveness and identify opportunities for improving implementation.

### ***N. Operator Certification and Capacity Development***

EPA has authority to revise operator certification guidelines.<sup>422</sup> Such revisions could be designed to enhance the development of better drinking water operator training programs for systems serving communities with environmental justice concerns. EPA could also review state capacity development strategies to focus additional attention<sup>423</sup> on improving the technical, managerial, and financial capacity of small water systems.

## **II. UNDERGROUND INJECTION CONTROL (UIC) PROGRAM**

Under the Underground Injection Control (UIC) program, there may be opportunities to protect drinking water for communities with environmental justice concerns through permit conditions, scrutiny of aquifer exemptions, and revisions to rules and guidance.

Under the UIC program, the Administrator must establish requirements for state UIC programs that will prevent the endangerment of drinking water sources by underground injection.<sup>424</sup> EPA has promulgated a series of such requirements beginning in 1980. The SDWA also provides that states, territories, and tribes may apply to EPA for primary enforcement responsibility ("primacy") to administer the UIC program.<sup>425</sup> EPA must establish a UIC program in states that do not seek this responsibility or fail to meet the minimum requirements

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<sup>419</sup> *Id.*; see also Pub. L. 114-322, S.612 (Dec. 16, 2016).

<sup>420</sup> *Id.*; see also Pub. L. 115-270, S. 3021 (Oct. 10, 2018).

<sup>421</sup> *Id.*; see also Pub. L. 114-322, S.612 (Dec. 16, 2016).

<sup>422</sup> 42 U.S.C. §§ 300g-8, 300g-9.

<sup>423</sup> *Id.*

<sup>424</sup> 42 U.S.C. § 300h(b)(1).

<sup>425</sup> 42 U.S.C. § 300h-1(b), (e).

established by EPA.<sup>426</sup> EPA also generally implements the program in Indian country since only two tribes currently have primacy for the program.

### ***A. Permitting***

Underground injection must be authorized by permit or rule.<sup>427</sup> Where EPA issues a permit, it may include conditions to protect drinking water for communities with environmental justice concerns.<sup>428</sup> Such permits must ensure that the injection will not “endanger” underground sources of drinking water.<sup>429</sup> “Endangerment”<sup>430</sup> is defined to include any injection that may result in the presence of a contaminant in a drinking water supply that “may . . . adversely affect the health of persons.”<sup>431</sup> As a result, in those states, territories, Indian country lands, and federal lands where EPA issues UIC permits, EPA may establish any necessary permit requirements under 40 C.F.R. § 144.52 when EPA finds that injection activity may result in drinking water supply contamination that may adversely affect the health of persons, including communities with environmental justice concerns.<sup>432,433</sup>

Based on its analysis of the effect of EO 12898, the Environmental Appeals Board (EAB) has considered the scope of EPA’s authority to address environmental justice in the UIC permitting program.<sup>434</sup> Notably, in the *Envotech, L.P.* decision, the EAB recognized that under the UIC permitting program EPA may consider environmental justice in two areas: (1) expanding public participation and (2) exercising its discretion under its UIC omnibus regulatory authority under 40 C.F.R. § 144.52(a)(9) to “impose, on a case-by-case basis, permit conditions ‘necessary to prevent the migration of fluids into underground sources of drinking water’” in order to protect underground sources of drinking water “upon which the minority or low-income community may rely.”<sup>435</sup> With respect to its omnibus authority, the EAB has held that permit issuers may add conditions necessary to ensure protection of the underground source of drinking water—but may

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<sup>426</sup> 42 U.S.C. § 300h-1(c).

<sup>427</sup> 42 U.S.C. § 300h(b)(1)(A); 40 C.F.R. § 144.1(g).

<sup>428</sup> See *In re Envotech, L.P.*, 6 E.A.D. 260 (EAB 1996)

<sup>429</sup> 42 U.S.C. § 300h(b)(1)(B)(i).

<sup>430</sup> 42 U.S.C. § 300h(d).

<sup>431</sup> 42 U.S.C. § 1421(d)(2)

<sup>432</sup> See 40 C.F.R. § 144.52(b)(1) (authorizing permit limits “to assure compliance with all applicable requirements of the SDWA,” which would include conditions to protect against “endangerment.”). See also 40 C.F.R. § 144.52(a)(9) (authorizing any additional conditions to prevent the migration of fluids into underground sources of drinking water).

<sup>433</sup> Note that 40 C.F.R. § 25, which was discussed above in the CWA section, also applies to EPA-issued UIC permits. 40 C.F.R. § 25.2(a)(2). It may also apply if a state receives financial assistance to support implementation of its UIC permitting program. 40 C.F.R. § 25.2(a)(5). Consequently, EPA could interpret the requirements of 40 C.F.R. part 25, as discussed above in the context of the CWA, to also require EPA and states to reach out to and maintain a list of vulnerable communities that potentially could be impacted by UIC permitting decisions and to provide outreach and enhanced technical assistance (including translated materials) to communities with environmental justice concerns at the earliest stages of the process of developing UIC permits. If a state receives federal financial assistance for implementation of its UIC permitting program, EPA could enforce these part 25 requirements by imposing more stringent requirements in the financial assistance agreement or terminate or suspend part of or all the financial assistance. Or, if EPA wishes to not use funding mechanisms to address these requirements, EPA could itself provide communities with environmental justice concerns with the required outreach and assistance for particular UIC permits.

<sup>434</sup> See generally *In re Envotech, L.P.*, 6 E.A.D. 260, 278–82 (EAB 1996) (citing *In re Chemical Waste Management of Indiana*, 6 E.A.D. 66 (EAB 1995) and the similar permitting processes in RCRA and the SDWA); *In re Jordan Dev. Co.*, 18 E.A.D. 1 (EAB 2019); *In re Muskegon Dev. Co.*, 18 E.A.D. 88 (EAB 2020).

<sup>435</sup> *Id.* at 281 (citing 40 C.F.R. § 144.52(a)(9)). It is unclear why the Board relied on this provision, rather than the seemingly broader omnibus authority provided under 40 C.F.R. § 144.52(b)(1).

not add conditions to address other types of impacts—such as negative economic impacts on the community, diminution in property values, or proliferation of undesirable land uses—that are not specifically related to the protection of the drinking water.<sup>436</sup>

The EAB has stated that EPA may and “should, as a matter of policy, exercise its discretion under 40 C.F.R. § 144.52(a)(9) to include within its assessment of the proposed well an analysis focusing particularly on the minority or low-income community whose drinking water is alleged to be threatened.”<sup>437</sup> Based on this analysis, EPA may impose permit conditions on a case-by-case basis under this omnibus authority to ensure that proposed injection wells will not result in migration of fluids to underground sources of drinking water used by communities with environmental justice concerns. EPA’s authority applies in all cases, “regardless of the composition of the community surrounding the proposed injection site.”<sup>438</sup> In addition, although the EAB decisions did not cite to this provision, 40 C.F.R. § 144.52(b)(1) may provide EPA with broader authority to consider factors specific to environmental justice communities (e.g., disproportionate reliance on groundwater, cumulative health impacts from multiple sources of toxicity) in assessing whether additional conditions are necessary to prevent injection that may “adversely impact the health of persons” within the meaning of “endangerment.”

EPA could explore opportunities to consider environmental justice concerns in deciding whether to exercise discretion to issue an area permit and in its evaluation of the cumulative impacts of area permits on the environment (where EPA is the permitting authority). For UIC area permits, the EPA could explore using its authority under 40 C.F.R. § 144.33(c)(3) (“the cumulative effects of drilling and operation of additional injection wells are considered by the Director during evaluation of the area permit application”) and 144.39 (a)(2) (“[f]or UIC area permits (§ 144.33), this cause [for modification – that is, receiving information] shall include any information indicating that cumulative effects on the environment are unacceptable”) to consider potential disproportionate and cumulative impacts on communities with environmental justice concerns.

In addition, the public participation requirements for UIC program approval could lend themselves to consideration of environmental justice factors, e.g., making sure that notification of permit actions and hearings effectively reaches communities with environmental justice concerns that could be impacted by the actions. For UIC, 40 C.F.R. § 145.11 lists the requirements for all state programs and incorporates by reference the public participation requirements under 40 C.F.R. part 124.

### ***B. Aquifer Exemptions***

EPA rules allow for the exclusion of certain aquifers from UIC protection, where the aquifer meets certain criteria (e.g., has no real potential to be used as a drinking water source because of the high level of solids content).<sup>439</sup> In evaluating aquifer exemption requests from states, territories, and tribes (where they have primacy) or permit applicants (where EPA has primacy), EPA may be able to consider environmental justice issues. Before EPA approves an

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<sup>436</sup> *Envotech*, 6 EAD at 281.

<sup>437</sup> *Id.*

<sup>438</sup> *Id.* at 282.

<sup>439</sup> 40 C.F.R. § 144.1(g).

aquifer exemption request, public notice must be provided (by the primacy agency and sometimes by both the primacy agency and EPA). 40 C.F.R. §§ 144.7(b)(3); 145.32(b)(2). EPA could consider the importance of promoting meaningful participation in decision-making by communities with environmental justice concerns in determining whether the public notice was adequate to reach them. In addition, EPA could consider environmental justice considerations when determining whether the aquifer exemption request meets the criteria for exempted aquifers in 40 C.F.R. § 146.4, e.g., whether there has been an adequate investigation as to whether the aquifer is currently serving as a source for drinking water for communities with environmental justice concerns.

No aquifer is an exempted aquifer until it has been designated as exempt under the procedures described in 40 C.F.R. § 144.7.<sup>440</sup> EPA's UIC regulations for aquifer exemptions (40 C.F.R. §§ 144.7 and 146.4) do not require EPA to approve an aquifer exemption that meets the criteria in § 144.6 and follows the procedures in § 144.7. EPA has discretion in acting upon such a request and could explore exercising such discretion to consider potential disproportionate impacts on communities with environmental justice concerns.<sup>441</sup> EPA has interpreted its regulations to allow EPA to disapprove an aquifer exemption in both primacy and non-primacy states even if the regulatory criteria are met. In the context of two UIC rulemakings, EPA articulated this interpretation.<sup>442</sup> The preamble to the 1984 rule states EPA's view: "If an aquifer is not currently being used for drinking water, and meets one of the specified criteria, EPA may exempt the aquifer. The use of the word 'may' reserves to the Agency the discretion to decline to exempt an aquifer, even if it meets one of the criteria, if the Agency believes that other considerations warrant maintaining the USDW classification."<sup>443</sup>

### ***C. Regulatory and Guidance Revisions***

EPA could revise the current regulations and guidance for all types of UIC wells and aquifer exemptions to ensure the protection of underground sources of drinking water from endangerment for communities with environmental justice concerns. Some stakeholders have raised concerns about health and safety issues related to Class VI wells, which are wells for injection for purposes of carbon sequestration. EPA could review its regulations to assess whether UIC wells, and particularly Class VI wells, may have or have had a disproportionate impact on these communities and propose changes to address those disproportionate impacts to the extent authorized by SDWA. EPA could also issue guidance to regions and primacy agencies on ways to ensure meaningful participation in decision-making on UIC permits, including Class VI permits, and aquifer exemptions based on environmental justice considerations. The guidance could direct regions to evaluate whether the public notice for aquifer exemptions provided by primacy agencies was adequate to reach these communities. EPA could also issue guidance to assist regions in exploring opportunities to exercise the discretion provided by the regulations described above.

## **III. SOLE SOURCE AQUIFER PROGRAMS**

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<sup>440</sup> 40 C.F.R. § 144.1(g). The procedures in § 144.7 require an exemption to be included in an initial primacy application or, for exemptions subsequent to program approval, a state or tribe must submit the exemption to EPA for review and approval. Some aquifer exemptions are deemed approved by regulation if EPA does not disapprove the exemption within 45 days of submission. See § 144.7(b)(3).

<sup>441</sup> 40 C.F.R. § 146.4.

<sup>442</sup> 47 Fed. Reg. 4992, 4993 (Feb. 3, 1982) and 49 Fed. Reg. 20138, 20141–142; and 20143 (May 11, 1984).

<sup>443</sup> 49 Fed. Reg. 20,138 at 20,141-142 (May 11, 1984).

Section 1424(e) of the SDWA allows EPA to determine that an area has an aquifer which is the sole or principal drinking water source for the area and would create a significant health hazard if contaminated.<sup>444</sup> Once EPA has made this determination and provided notice of it, no commitment for federal financial assistance may be entered into for any project EPA determines might contaminate the designated aquifer through a discharge zone so as to create a significant hazard to public health.<sup>445</sup> Under this authority, EPA could solicit participation in identification, designation, and protection of sole source aquifers. EPA could use this authority to identify and protect aquifers that serve communities with environmental justice concerns. A map of current designated sole source aquifers is available on the publicly available Drinking Water Mapping Application for Protecting Source Water (DWMAPS). EPA is also integrating EJSCREEN data layers (both demographic and environmental layers) into its DWMAPS to expand resource information to better support disadvantaged communities. With the integration, DWMAPS can be used by disadvantaged communities in assessing source water risks and developing protection plans. EPA also provides access to information and training to help tribes overcome barriers in implementing source water protection actions.

#### **IV. RESEARCH, REPORTING, INFORMATION GATHERING, TECHNICAL ASSISTANCE**

The SDWA gives EPA authority to perform activities in the following areas:

- Research (SDWA § 1442(a)): Research and investigate concerns for communities with environmental justice concerns.
- Technical assistance and grants (SDWA § 1442(b)): Technical assistance and grants to States, or publicly owned water systems to assist in responding to an emergency situation affecting public water systems (including sources of water for such systems) which the Administrator determines to present substantial danger to the public health. Grants provided are only to support those actions which (i) are necessary for preventing, limiting, or mitigating danger to public health and (ii) would not, in the judgment of the Administrator, be taken without such emergency assistance.<sup>446</sup>
- Research (SDWA § 1458): Conduct a continuing program of studies to identify groups “that may be at greater risk than the general population of adverse health effects from exposure to contaminants in drinking water,” focusing attention on communities with environmental justice concerns, where they face greater risks.<sup>447</sup>
- Monitoring (SDWA § 1445(g)): Establish and maintain a database of the occurrences of regulated and unregulated contaminants in public water systems in a manner that is widely accessible and easy to use by communities with

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<sup>444</sup> 42 U.S.C. § 300h-3(e)

<sup>445</sup> *Id.*

<sup>446</sup> *Id.* at (b)

<sup>447</sup> 42 U.S.C. § 300j-18.

environmental justice concerns.<sup>448</sup>

- Technical Assistance (SDWA § 1442(a)): Provide technical assistance to public water systems, including those serving communities with environmental justice concerns.<sup>449</sup>

## MARINE PROTECTION, RESEARCH, AND SANCTUARIES ACT

The Marine Protection, Research, and Sanctuaries Act (MPRSA), commonly known as the Ocean Dumping Act, establishes a permitting program that covers the dumping of material into ocean waters.<sup>450</sup> The ocean disposal of sewage sludge and industrial waste is expressly prohibited.<sup>451</sup>

EPA administers permits for the dumping of all material other than dredged material, which is permitted by the U.S. Army Corps of Engineers subject to EPA review and concurrence.<sup>452</sup> When issuing MPRSA permits, EPA is to determine whether the proposed dumping will “unreasonably degrade or endanger human health, welfare, or amenities, or the marine environment, ecological systems, or economic potentialities.”<sup>453</sup> EPA also is charged with designating sites at which permitted disposal may take place.<sup>454</sup>

In considering permit applications and designating ocean dumping sites, EPA is authorized to take into account a variety of factors, including “[t]he effect of such dumping on human health and welfare, including economic . . . values,” and, as such, could take into account the potential for disproportionate impacts on communities with environmental justice concerns (particularly those that include subsistence users of food from the sea) from the proposed dumping.<sup>455</sup> In addition, the MPRSA requires that EPA consider land-based alternatives to ocean dumping and the probable impact of requiring use of these alternatives “upon considerations affecting the public interest.”<sup>456</sup> EPA could take impacts on these communities into account in evaluating alternative locations and methods of disposal of the material that is proposed to be dumped at sea. Ocean dumping permits also designate and include “such other matters as the Administrator . . . deems appropriate,” which may include environmental justice considerations.<sup>457</sup>

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<sup>448</sup> 42 U.S.C. § 300j-4(g).

<sup>449</sup> 42 U.S.C. § 300j-1(a).

<sup>450</sup> 33 U.S.C. § 1401 et seq.

<sup>451</sup> 33 U.S.C. § 1414b.

<sup>452</sup> 3 U.S.C. §§ 1412 and 1413.

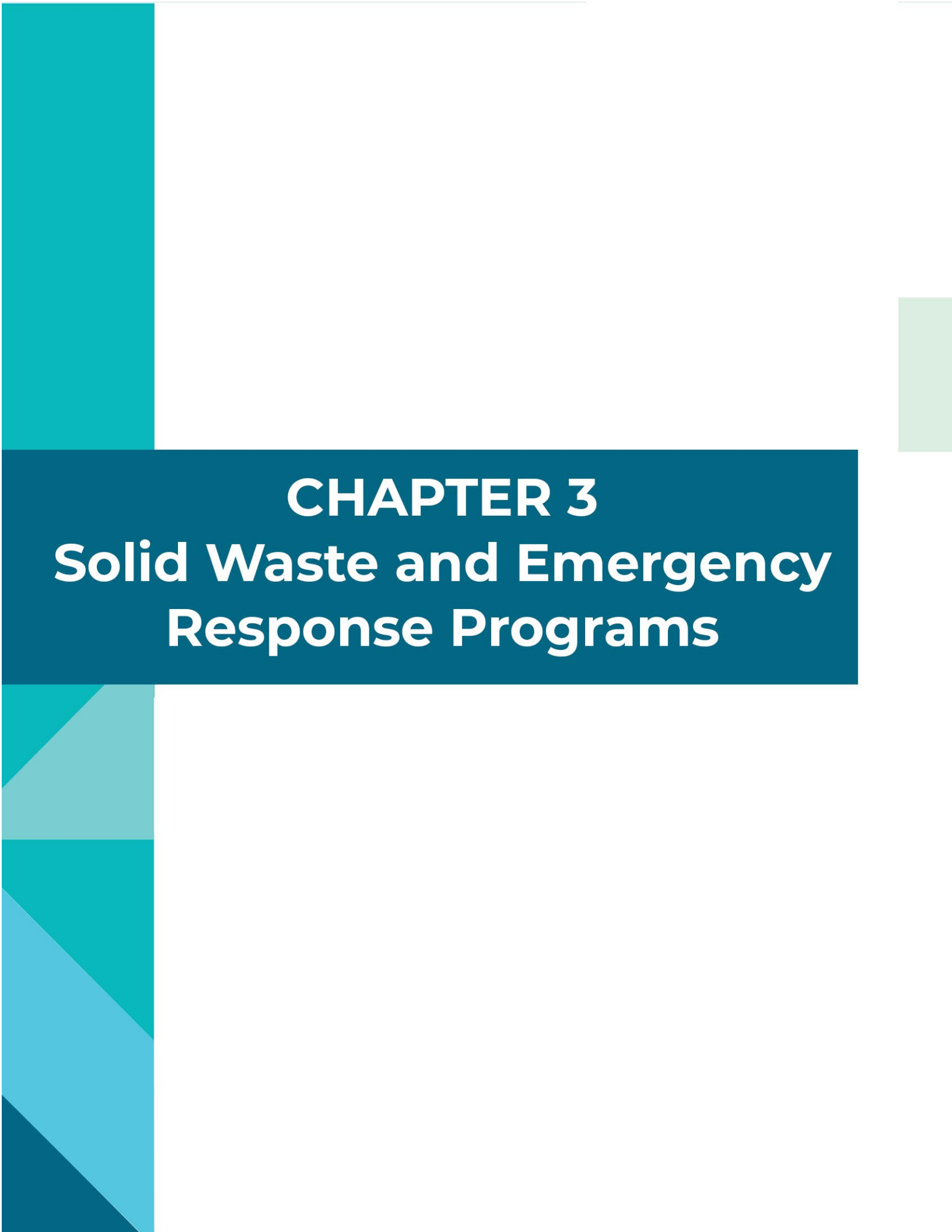
<sup>453</sup> 33 U.S.C. § 1412(a).

<sup>454</sup> 33 U.S.C. § 1412(c).

<sup>455</sup> 33 U.S.C. § 1412(a)(B).

<sup>456</sup> 33 U.S.C. § 1412(a)(G).

<sup>457</sup> 33 U.S.C. § 1414(a)(6).



# **CHAPTER 3**

## **Solid Waste and Emergency Response Programs**



# CHAPTER THREE: SOLID WASTE AND EMERGENCY RESPONSE PROGRAMS

This chapter discusses the Resource Conservation and Recovery Act,<sup>458</sup> the Emergency Planning and Community Right-to-Know Act,<sup>459</sup> and the Comprehensive Environmental Response, Compensation, and Liability Act.<sup>460</sup> As explained below, these statutes provide EPA various legal authorities<sup>461</sup> to address environmental justice and respond to the needs of communities with environmental justice concerns.<sup>462</sup>

## RESOURCE CONSERVATION AND RECOVERY ACT

### I. GENERAL AUTHORITY – HAZARDOUS WASTE MANAGEMENT

The Resource Conservation and Recovery Act (RCRA) authorizes EPA to regulate the generation, transportation, treatment, storage, and disposal of hazardous wastes. RCRA requires EPA to promulgate regulations establishing such standards, applicable to generators, transporters, and owners and operators of hazardous waste treatment, storage, and disposal facilities “as may be necessary to protect human health and the environment.”<sup>463</sup> RCRA § 7004(b) requires EPA to provide for “public participation in the development, revision, implementation, and enforcement of any regulation, guideline, information, or program.” EPA may use these authorities to advance the fair treatment and meaningful participation of communities with environmental justice concerns in the development of regulations, standards, and guidelines for hazardous waste management.

### II. PERMITTING OF HAZARDOUS WASTE TREATMENT, STORAGE AND DISPOSAL FACILITIES

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<sup>458</sup> 42 U.S.C. §§ 6901–92k.

<sup>459</sup> 42 U.S.C. §§ 11001–50.

<sup>460</sup> 42 U.S.C. §§ 9601–75.

<sup>461</sup> In addition to its authority under RCRA, EPCRA and CERCLA, EPA has a responsibility to ensure that recipients and subrecipients of federal financial assistance from EPA—including states, municipalities, and other public and private entities—comply with federal civil rights laws that prohibit discrimination on the basis of race, color, national origin (including limited English proficiency), disability, sex and age, including Title VI of the Civil Rights Act. Moreover, EPA’s implementing regulation generally prohibits discrimination in any programs, activities and services receiving federal financial assistance. *See* Chapter 7 for a more in-depth discussion of civil rights authorities.

<sup>462</sup> This document uses the term “communities with environmental justice concerns” to refer to communities overburdened by pollution as identified in EO 12898. Those communities include communities of color, low-income communities, and Indigenous communities. Generally, where EPA has authority to consider impacts to those communities, EPA is also likely to have authority to consider equitable treatment of underserved communities consistent with EO 13985. “Underserved communities” in EO 13985 refers to populations sharing a particular characteristic, as well as geographic communities, that have been systematically denied a full opportunity to participate in aspects of economic, social, and civic life, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality.

<sup>463</sup> *See* RCRA §§ 3002(a) (standards applicable to generators), 3003(a) (standards applicable to transporters), and 3004(a) (standards applicable to owners and operators of hazardous waste treatment, storage, and disposal facilities).

### ***A. Omnibus Authority – RCRA § 3005(c)(3)***

The primary area of RCRA where environmental justice considerations have surfaced is in the permitting of hazardous waste treatment, storage, and disposal facilities (e.g., incinerators, fuel blenders, and landfills). Pursuant to RCRA § 3005, EPA issues permits to such facilities if they demonstrate compliance with EPA regulations. Upon application by a state, EPA may authorize a state’s hazardous waste program to operate in lieu of the federal program,<sup>464</sup> and to issue permits. The “omnibus” authority in RCRA § 3005(c)(3) provides that “[e]ach permit issued under this section shall contain such terms and conditions as the Administrator (or the State) determines necessary to protect human health and the environment.”

The scope of EPA’s authority to address environmental justice issues in RCRA hazardous waste permits was directly addressed by the EAB in 1995.<sup>465</sup> In the *Chemical Waste Management* decision, the EAB found that within the RCRA permitting scheme EPA has significant discretion to implement the environmental justice mandates of EO 12898 through public participation mechanisms and the “omnibus” authority.<sup>466</sup> In the area of public participation, the EAB made three relevant findings. First, it recognized that public comments can affect a permitting decision if they relate to issues about compliance with RCRA’s statutory or regulatory requirements or otherwise relate to protection of human health and the environment.<sup>467</sup> Second, the EAB reaffirmed that EPA can provide opportunities for public involvement in the permitting process beyond those required by 40 C.F.R. part 124.<sup>468</sup> Third, it held “that when the Region has a basis to believe that operation of the facility may have a disproportionate impact on a minority or low-income segment of the affected community, the Region should, as a matter of policy, exercise its discretion to assure early and ongoing opportunities for public involvement in the permitting process.”<sup>469</sup>

The EAB also examined the breadth of EPA’s discretion to promote environmental justice under the “omnibus” authority. As stated by the EAB, the clause authorizes permit conditions or denial as follows:

Under the omnibus clause, if the operation of a facility would have an adverse impact on the health or environment of the surrounding community, the Agency would be required to include permit terms or conditions that would ensure that such impacts do not occur. Moreover, if the nature of the facility and its proximity to neighboring populations would make it impossible to craft a set of permit terms that would protect the health and environment of such populations, the Agency would have the authority to deny the permit. *See In re Marine Shale Processors, Inc.*, 5 E.A.D. 751, 796 n.64 (EAB 1995) (“[T]he Agency has traditionally read [§ 3005(c)(3)] as authorizing denials of permits where the Agency can craft no set of permit conditions or terms that will ensure protection of human health and the

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<sup>464</sup> The state’s program must be equivalent to the federal program to obtain and retain authorization. When EPA adopts more stringent RCRA regulations (including permit requirements), authorized states are required to revise their programs within one year after the change in the federal program or within two years if the change will necessitate a state statutory amendment. 40 C.F.R. § 271.21(e).

<sup>465</sup> *In re Chemical Waste Management*, 6 E.A.D. 66 (E.P.A.), 1995 WL 395962 (June 25, 1995).

<sup>466</sup> *Id.* at \*5–6.

<sup>467</sup> *Id.* at \*5.

<sup>468</sup> *Id.*

<sup>469</sup> *Id.*

environment.”). In that event, the facility would have to shut down entirely. Thus, under the omnibus clause, if the operation of a facility truly poses a threat to the health or environment of a low-income community or community of color, the omnibus clause would require the Region to include in the permit whatever terms and conditions are necessary to prevent such impacts. This would be true even without a finding of disparate impact.<sup>470</sup>

The EAB also found that RCRA allows the Agency to “tak[e] a more refined look at its health and environmental impacts assessment, in light of allegations that operation of the facility would have a disproportionately adverse effect on the health or environment of low-income or minority populations.”<sup>471</sup> The EAB noted that “a broad analysis might mask the effects of the facility on a disparately affected minority or low-income segment of the community” whereas a close evaluation could, in turn, justify permit conditions or denials based on disproportionately high and adverse human health or environmental effects.<sup>472</sup> However, while acknowledging the relevance of disparities in health and environmental impacts, the EAB also cautioned that “there is no legal basis for rejecting a RCRA permit application based solely upon alleged social or economic impacts upon the community.”<sup>473</sup>

Thus, the “omnibus” authority of RCRA § 3005(c)(3) may allow EPA to address cumulative impacts and risks due to exposure from pollution sources beyond the applicant facility in areas that may be disproportionately burdened. EPA may also use the “omnibus” authority where appropriate to craft permit conditions addressing unique exposure pathways and scenarios (e.g., subsistence fishers or farming communities) or sensitive populations with pre-existing vulnerabilities at a particular hazardous waste management facility. EPA could also consider factors such as cumulative risk, unique exposure pathways, or sensitive populations in establishing priorities for the permit and corrective action programs.<sup>474</sup>

### ***B. Contingency Plans***

RCRA-permitted facilities are required under RCRA § 3004(a) to maintain “contingency plans for effective action to minimize unanticipated damage from any treatment, storage or disposal of . . . hazardous waste.” Under this provision, EPA has the authority to require facilities to prepare and/or modify their contingency plans to reflect the needs of proximate communities with environmental justice concerns that have limited resources to prepare for or respond to emergency situations. For example, contingency plans may need to account for the cumulative impacts of multiple facilities on local communities or pre-existing vulnerabilities in specific communities, and hazards created by climate change such as flooding, heat island effect, and wildfires.

### ***C. Public Participation***

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<sup>470</sup> *Id.* at \*6.

<sup>471</sup> *Id.*

<sup>472</sup> *Id.* at 74–75.

<sup>473</sup> *Id.* at 73 (citation omitted).

<sup>474</sup> The statutory authority for EPA’s corrective action programs is found in RCRA §§ 3004(u), 3004(v), and 3008(h).

RCRA § 7004(b)(2) established public participation requirements for RCRA permitting. In 1995, EPA promulgated the “RCRA Expanded Public Participation” rule.<sup>475</sup> As a part of this rule, certain facilities “must hold at least one meeting with the public in order to solicit questions from the community and inform the community of proposed hazardous waste management activities.”<sup>476</sup> RCRA is sufficiently flexible to allow for further exploration of whether the public participation process for RCRA permits could be expanded to allow for more meaningful participation by communities with environmental justice concerns, including at hazardous waste management facilities to be located in or near their communities. In this regard, EPA also would have authority under RCRA to expand the application of those procedures to the permitting of: (a) publicly owned treatment works, which are regulated under the Clean Water Act; (b) underground injection wells, which are regulated under the Safe Drinking Water Act; and (c) ocean disposal barges or vessels, which are regulated under the Marine Protection, Research, and Sanctuaries Act, discussed more fully in Chapter Two. These facilities are subject to RCRA’s permit-by-rule regulations<sup>477</sup> and are deemed to have a RCRA permit if they meet certain conditions set out in those regulations. In addition, when also accounting for the authority of RCRA § 7004(b)(1), the public participation process allows for consideration of language interpretation and translation services.

#### ***D. Review of State Permits***

EPA’s authority to review state-issued RCRA permits may also provide opportunities for consideration of environmental justice factors. EPA could provide comments on these factors (in appropriate cases) during the comment period on the state’s proposed permit on a facility-by-facility basis, particularly where state law includes an analog to the RCRA “omnibus” authority.<sup>478</sup> If a state does not have “omnibus” authority analogous to RCRA § 3005(c)(3), EPA may address any necessary additional conditions under the “omnibus” authority in any federal portion of the RCRA permit. These conditions become part of the facility’s RCRA permit.

#### ***E. Monitoring, Analysis, and Testing***

EPA may require a permittee or an applicant to submit information in order to establish permit conditions necessary to protect human health and the environment.<sup>479</sup> RCRA § 3013(a) provides that if the Administrator determines that “the presence of any hazardous waste at a facility or site at which hazardous waste is, or has been, stored, treated, or disposed of, or the release of any such waste from such facility or site may present a substantial hazard to human health or the environment,” EPA may order a facility owner or operator to conduct reasonable monitoring, testing, analysis, and reporting to ascertain the nature and extent of such hazard. In addition, for purposes of developing regulations or RCRA enforcement, EPA may conduct inspections of establishments where hazardous waste is managed and compel the submission of information by persons managing hazardous waste. RCRA § 3007(a). EPA has issued guidance as to the implementation of RCRA § 3007(a).<sup>480</sup>

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<sup>475</sup> 60 Fed. Reg. 63417 (Dec. 11, 1995); 40 C.F.R. part 124, subpart B.

<sup>476</sup> 40 C.F.R. § 124.31(b).

<sup>477</sup> 40 C.F.R. § 270.60.

<sup>478</sup> 40 C.F.R. § 271.19(a).

<sup>479</sup> 40 C.F.R. § 270.10(k).

<sup>480</sup> <https://www.epa.gov/sites/default/files/documents/auths3007rcra-mem.pdf>.

In appropriate circumstances, EPA could use its authority under § 3013, § 3007 or 40 C.F.R. § 270.10(k) to compel a facility owner or operator to carry out necessary studies or risk assessments, or to submit information or allow inspections, so that, pursuant to the “omnibus” authority, EPA can establish permit terms or conditions as part of the permit application process as necessary to protect human health and the environment and reduce the potential for disproportionate impacts on communities with environmental justice concerns.

RCRA § 3019 provides EPA with authority to require applicants for land disposal permits to provide exposure information and to request that the Agency for Toxic Substances and Disease Registry conduct health assessments at such land disposal facilities. This authority could be used to enhance the availability of information relating to communities with environmental justice concerns.

### **F. Facility Siting Standards**

Another example of where EPA might incorporate environmental justice considerations is under RCRA § 3004(o)(7). This section provides EPA with authority to issue location standards for hazardous waste treatment, storage, and disposal facilities as necessary to protect human health and the environment. Using this authority, EPA could, for example, revise the location standards to establish minimum buffer zones around hazardous waste management facilities to minimize clustering of schools, residential areas, and other community activities around such facilities.<sup>481</sup> Facilities would need to comply with these requirements to receive a permit.

## **III. HAZARDOUS WASTE REGULATION**

RCRA authorizes EPA to promulgate regulations applicable to facilities that manage hazardous waste “as may be necessary to protect human health and the environment.”<sup>482</sup> Consistent with the EAB’s decision in *Chemical Waste Management*, RCRA’s regulatory standard allows EPA to take a “refined look” at the risks posed by the management of hazardous waste to ensure that RCRA regulations are fashioned in a manner that does not “have a disproportionately adverse effect on the health or environment of low-income or minority populations.”<sup>483</sup>

This regulatory latitude may have meaning not only with respect to permitting regulations, but also to regulations that determine whether materials are hazardous wastes. For example, in determining whether materials are solid wastes and, therefore, subject to regulation, EPA needs to determine whether materials are “discarded.”<sup>484</sup> EPA issued a Definition of Solid Waste rule on October 28, 2008,<sup>485</sup> in which it established a number of conditions under which material would not be considered discarded and, therefore, not a solid waste.

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<sup>481</sup> Local zoning and planning regulations may also be a significant factor in facility siting decisions.

<sup>482</sup> RCRA §§ 3002(a), 3003(a), and 3004(a).

<sup>483</sup> *In re Chemical Waste Management of Indiana, Inc.*, 6 E.A.D. at 74.

<sup>484</sup> RCRA defines the term “solid waste” to mean “any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities . . . .” RCRA § 1004(27). Courts have held that under this definition the ordinary plain-English meaning of the term “discard” controls. See *American Mining Congress v. EPA*, 824 F.2d 1177 (D.C. Cir. 1987). The ordinary plain-English meaning of the term “discarded” means “disposed of,” “thrown away,” or “abandoned.”

<sup>485</sup> 73 Fed. Reg. 64668 (Oct. 28, 2008).

On July 22, 2011, in response to an administrative petition to amend or repeal this rule,<sup>486</sup> EPA proposed further revisions to the definition of solid waste. This proposal included an expanded environmental justice analysis, which identified gaps in the 2008 Definition of Solid Waste final rule that could result in risk to human health and the environment from discarded material, including the potential for disproportionate impacts to communities with environmental justice concerns. The July 2011 proposal requested comment on revisions to the 2008 final rule that could increase environmental protection, including in communities with environmental justice concerns, while still appropriately defining when a hazardous secondary material being reclaimed is a solid waste and subject to hazardous waste regulation. EPA finalized the rule in 2015, and updated the environmental justice analysis to reflect the final rule requirements, which included preventative and mitigative steps to address potential adverse impacts to communities with environmental justice concerns. In 2017 and 2018, a pair of court decisions upheld most of the 2015 rule, although it vacated two aspects of the rule.<sup>487</sup>

#### **IV. INDIAN COUNTRY**

The environmental laws administered by EPA generally apply nationwide. Therefore, where there is no EPA-approved program in Indian country, EPA is authorized to implement the relevant environmental program there. States generally lack authority to implement federal environmental laws in Indian country. Although other environmental statutes provide for Indian tribes to implement their provisions in a manner similar to states, RCRA lacks such a provision.<sup>488</sup> Thus, EPA implements the RCRA Subtitle C and I programs in Indian country, and can make use of the tools identified above to address disproportionate impacts on communities in Indian country with environmental justice concerns.

#### **V. UNDERGROUND STORAGE TANKS**

Subtitle I of RCRA provides EPA with authority to regulate underground storage tanks (USTs) containing regulated substances, as defined in RCRA § 9001(2). RCRA § 9003 authorizes UST regulations “necessary to protect human health and the environment.” It also allows the use of the Leaking Underground Storage Tank Trust Fund (the LUST Trust Fund) to undertake certain corrective actions with respect to releases of petroleum from USTs. There are three corrective action programs in this area. First, there is a regulatory program (including corrective action) in 40 C.F.R. part 280 that applies to both petroleum and hazardous substance USTs. States can be approved to operate a program that is no less stringent than the federal program. Second, the LUST Trust Fund can be used for some cleanups for releases from petroleum USTs.<sup>489</sup> Third, corrective action orders can be issued pursuant to RCRA § 9003(h)(4) covering USTs containing regulated substances. States operating pursuant to a cooperative agreement can utilize the federal authorities for the latter two categories.<sup>490</sup> EPA, and states operating pursuant to cooperative agreements, “shall give priority in undertaking corrective actions . . . and in issuing orders requiring owners or

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<sup>486</sup> Fed. Reg. 44094 (July 22, 2011).

<sup>487</sup> The Agency did not conduct an environmental justice analysis of the court-ordered changes.

<sup>488</sup> *Backcountry Against Dumps v. EPA*, 100 F.3d 147 (D.C. Cir. 1996).

<sup>489</sup> RCRA § 9003(h)(2).

<sup>490</sup> RCRA § 9003(h)(7).

operators to undertake such actions, to releases of petroleum from underground storage tanks which pose the greatest threat to human health and the environment.”<sup>491</sup>

In evaluating releases from USTs in disproportionately impacted communities with environmental justice concerns for possible response actions, EPA or the state can take into account such things as cumulative impacts and risks, unique exposure pathways and scenarios, and sensitive communities in determining whether the release in question is among those which pose the greatest threat to human health and the environment.

## **VI. GENERAL AUTHORITY FOR ADDRESSING ENVIRONMENTAL JUSTICE – STATE SOLID WASTE MANAGEMENT PLANS**

Under RCRA Subtitle D,<sup>492</sup> states are the primary implementing authority for managing nonhazardous solid waste. EPA issues guidelines and recommendations to state solid waste permitting programs under RCRA §§ 1008(a), 4002, and 4004. RCRA § 1008(a) expressly provides that solid waste management guidelines shall describe levels of performance that provide “protection of public health and welfare” and shall include, where appropriate, consideration of “demographic” factors. Guidelines for state solid waste management plans developed under RCRA § 4002(c) may include consideration of factors such as “population density, distribution, and projected growth” and the “political, economic, organizational, financial, and management problems affecting comprehensive solid waste management.” These provisions give EPA the legal authority to address environmental justice considerations in the development of regulations, standards, and guidelines for solid waste management. EPA could, for example, develop guidelines that encourage states to consider demographic and socio-economic factors such as the density and distribution of people of color, low-income communities, and Indigenous communities, as well as disproportionate burdens on communities with environmental justice concerns, and cumulative impacts on and risks to communities when siting new solid waste management facilities.<sup>493</sup>

RCRA § 7004(b) requires EPA and the States to provide for, encourage and assist in “public participation in the development, revision, implementation, and enforcement of any regulation, guideline, information, or program.” EPA promulgated the “RCRA Expanded Public Participation” rule on December 11, 1995.<sup>494</sup> While these regulations describe the public participation process for RCRA permitting, EPA has the authority to promulgate similar regulations or issue guidelines for states to provide meaningful participation by communities with environmental justice concerns in the development of solid waste management guidelines and plans and in the implementation of state solid waste programs.

## **EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW ACT**

Section 303 of the Emergency Planning and Community Right-to-Know Act (EPCRA) requires local emergency planning committees to prepare emergency response plans for facilities

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<sup>491</sup> RCRA § 9003(h)(3).

<sup>492</sup> RCRA § 4001–4010.

<sup>493</sup> See Chapter 7 for a discussion of EPA’s civil rights regulations, which include the authority to require the collection and provision of data on the basis of race, color or national origin by recipients of federal funds.

<sup>494</sup> 60 Fed. Reg. 63417 (Dec. 11, 1995); 40 C.F.R. part 124, subpart B.

that contain certain amounts of designated extremely hazardous substances. The national response team could publish guidance under § 303(f) on considering environmental justice issues in preparing and implementing emergency plans.

For a discussion of EPCRA § 313 and of the role of Indian tribes under EPCRA, see Chapters Four and Five, respectively.

## **CLEAN WATER ACT SECTION 311**

Clean Water Act § 311(c), as delegated, provides EPA with removal authority to address discharges and substantial threats of discharges of oil and CWA listed hazardous substances in the inland zone. Section 311(c)(1) provides EPA with authority to remove, and to direct or monitor all Federal, State, and private actions to remove discharges and substantial threats of discharge in the inland zone. Section 311(c)(2) provides that EPA shall direct all Federal, State, and private actions to remove discharges and substantial threats of discharge that are of a size or character as to be a substantial threat to the public health or welfare of the United States. The broad discretionary authority in § 311(c)(1) and the public health provisions of § 311(c)(2) could allow EPA to seek to ensure fair treatment and meaningful participation and address any disproportionate impacts on communities with environmental concerns when determining whether to exercise discretionary authority to direct or monitor certain removals, and also to consider such communities when determining whether a discharge or substantial threat of discharge is of such size or character as to be a substantial threat to the public health or welfare of the United States. However, all removal activities must generally be consistent with the NCP. EPA regulations addressing facility response plans for significant and substantial harm facilities already allow the Regional Administrator to consider “local impacts on public health” when determining facility classification.<sup>495</sup>

## **SUPERFUND**

### **I. GENERAL AUTHORITY FOR ADDRESSING ENVIRONMENTAL JUSTICE**

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), commonly referred to as Superfund, authorizes the federal government to respond to releases and threats of releases into the environment of hazardous substances or pollutants or contaminants. EPA does so by taking response measures, generally consistent with the National Oil and Hazardous Substances Pollution Contingency Plan (NCP),<sup>496</sup> deemed “necessary to protect the public health or welfare or the environment.”<sup>497</sup> EPA’s authority to take actions “necessary to protect the public health or welfare or the environment” authorizes EPA to ensure fair treatment and meaningful participation in environmental decision-making for communities with environmental justice concerns that are disproportionately impacted. For instance, EPA’s authority to consider “public health or welfare or the environment” could be the basis for considering

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<sup>495</sup> 40 C.F.R. § 112.20(f)(3)(iv).

<sup>496</sup> 40 C.F.R. part 300.

<sup>497</sup> CERCLA § 104(a)(1).



cumulative impacts, including accumulated or aggregate impacts on human health, in taking response actions.<sup>498</sup> However, all response activities must generally be consistent with the NCP.

Environmental justice considerations could be considered in setting clean-up priorities among non-National Priorities List (NPL) sites. EPA could implement a policy to prioritize sites where communities have disproportionate environmental burdens. This can be done at non-NPL sites without rulemaking, as there is currently no defined system of “priorities” for non-NPL sites. EPA may simply choose to study and/or clean up any contaminated non-NPL sites, focusing on environmental justice considerations to the extent it finds appropriate.

Finding this same flexibility would be very difficult for NPL sites. NPL sites are listed mainly by application of the hazard ranking system (HRS), which uses exclusively numerical inputs to rank sites. The challenge is to quantify environmental justice considerations in a manner that is usable under the existing HRS ranking scheme. For example, to date EPA has not been able to quantify tribal considerations so as to use them under the HRS. Nonetheless, to the extent environmental justice issues and cumulative impacts and risks can be quantified, such matters may be taken into account in potential revisions to the HRS with respect to “the population at risk” and “other appropriate factors” under CERCLA § 105(a)(8).

However, in assessing remedial alternatives, EPA considers nine factors, many of which (including “overall protectiveness of human health and the environment” and “community acceptance”) can accommodate environmental justice considerations relating to impacts on, and participation by communities with environmental justice concerns.<sup>499</sup> Addressing such environmental justice considerations through application of the nine factors set out in the NCP could, in turn, influence the final remedy selection decision.

## **II. PUBLIC PARTICIPATION**

CERCLA § 117(a) provides for public participation before EPA’s adoption of any plan for remedial action. This is consistent with the environmental justice goal of ensuring meaningful participation by communities in decisions that affect them. CERCLA § 117(e)(1) also provides EPA the authority to provide technical assistance grants (TAGs) to affected groups or individuals to help them interpret information about Superfund sites.

EPA has the legal ability to revise its guidance on public participation to enhance opportunities for participation of communities with environmental justice concerns in remedy selection. For example, existing Superfund guidance could be updated to address the provision of translation services to ensure meaningful opportunities for public participation by all interested stakeholders in the remedy selection process, consistent with the statute and NCP. EPA could also examine the regulations governing TAGs to determine whether they can be revised to enhance participation and better address the concerns of underrepresented communities, with appropriate revisions where it appears that improvements could be made. This could be done for public participation, and to some extent also for TAGs, without rulemaking.

## **III. TRIBES**

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<sup>498</sup> See definitions of the terms “response,” “removal,” and “remedial action” at CERCLA §§ 101(25), 101(23), and 101(24), respectively.

<sup>499</sup> See 40 C.F.R. § 300.430(e)(9)(iii).

CERCLA § 126(a) provides for a tribal role in Superfund actions for certain purposes. It specifies that “[t]he governing body of an Indian tribe shall be afforded substantially the same treatment as a State” with respect to various provisions of CERCLA, including provisions relating to notification of releases, consultation on remedial actions, access to information, and roles and responsibilities of states under the NCP.”<sup>500</sup>

CERCLA also contains other provisions that provide for a tribal role. CERCLA authorizes tribes to enter into cooperative agreements and receive financial assistance to carry out response actions pursuant to § 104(d). For cleanups on land held by a tribe, land held in trust for Indians, land held by an Indian if subject to a trust restriction on alienation, or land otherwise within an Indian reservation, CERCLA exempts tribes from the requirements that apply to states to pay a share of response costs and to give certain assurances regarding hazardous waste disposal capacity pursuant to § 104(c)(3). Further, CERCLA authorizes tribes to recover costs incurred in carrying out response actions from persons responsible for releases and to act as trustees for tribal natural resources and seek recovery for damages to such resources. Thus, CERCLA provides many mechanisms for tribal participation in the Superfund process. And tribes are eligible for various types of EPA grants to assist in such participation.

Moreover, EPA has adopted regulations that define “State” to generally include tribes under the NCP, which governs most CERCLA response activities.<sup>501</sup> This enables tribes to carry out many of the functions of states and participate meaningfully in the decision-making and clean-up process.<sup>502</sup> Consistent with the NCP, tribal standards are potential “applicable or relevant and appropriate requirements” (ARARs) for CERCLA response actions taken in Indian country. Tribal standards can be treated in the same manner as state requirements provided they qualify as ARARs.

Participation of tribes in the Superfund process is generally governed by the text of CERCLA as well as EPA regulations found at 40 C.F.R. part 35, subpart O and part 300, subparts F and G. Tribes can enter into cooperative agreements with EPA and receive financial assistance to participate in cleanups as the lead or support agency. Tribes also may receive core program cooperative agreements that fund non-site-specific activities that support a tribe’s involvement in CERCLA responses and help develop tribal infrastructure. Further, like states, CERCLA directs EPA to consult with tribes when they are “affected” by a CERCLA response action.<sup>503</sup>

Additionally, in 2007, EPA amended subpart O to reduce obstacles to tribal involvement in CERCLA and “to fulfill CERCLA’s mandate in sections 121 and 126” to provide tribes with substantial and meaningful involvement in Superfund.<sup>504</sup> The amended regulations authorize grants to intertribal consortia, as well as individual tribes, thereby reducing burdens on smaller tribes. The amendments also eliminate potentially burdensome requirements for tribes to show jurisdiction as a prerequisite to receiving financial assistance under core program cooperative agreements and most agreements to participate in response activities as support (rather than lead) agency. Finally,

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<sup>500</sup> CERCLA §§ 103(a), 104(c)(2), 104(e), and 105, respectively.

<sup>501</sup> 40 C.F.R. § 300.5 (also defining the term “Indian tribe,” which is defined in CERCLA § 101(36)).

<sup>502</sup> 40 C.F.R. § 300.500(a).

<sup>503</sup> CERCLA §§ 104(c)(2) and 126(a).

<sup>504</sup> 72 Fed. Reg. 24496 (May 2, 2007).

the amendments removed requirements for tribes to provide a cost share for core or support agency agreements and eliminated requirements for tribes relating to property acquisition.

EPA could examine ways to better promote tribal participation in the Superfund process. EPA could enhance tribal outreach and communication with measures to ensure that tribes have an opportunity to participate in all stages of cleanups carried out in Indian country. Furthermore, EPA could interpret CERCLA to facilitate broader participation by federally recognized Indian tribes.

#### **IV. COOPERATIVE WORK WITH THE AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY**

Pursuant to CERCLA § 104(i), the Agency for Toxic Substances and Disease Registry (ATSDR) has responsibility to implement certain health-related authorities of CERCLA in cooperation with EPA and other federal agencies. EPA could explore with ATSDR the idea of giving priority to health concerns in areas where communities may be experiencing disproportionate health impacts. For instance, CERCLA requires ATSDR to consult with EPA on health issues related to exposure to hazardous or toxic substances and to prioritize health assessments in consultation with EPA, taking into consideration NPL schedules and the needs of EPA.<sup>505</sup> Health assessments conducted by ATSDR may be used to determine if a site should be listed on the NPL or to increase a site's priority upon the recommendation of the Administrator of ATSDR.<sup>506</sup> In addition, an ATSDR health advisory that recommends protecting people from a release may be the basis for listing a release on the NPL.<sup>507</sup>

#### **V. COOPERATIVE AGREEMENTS**

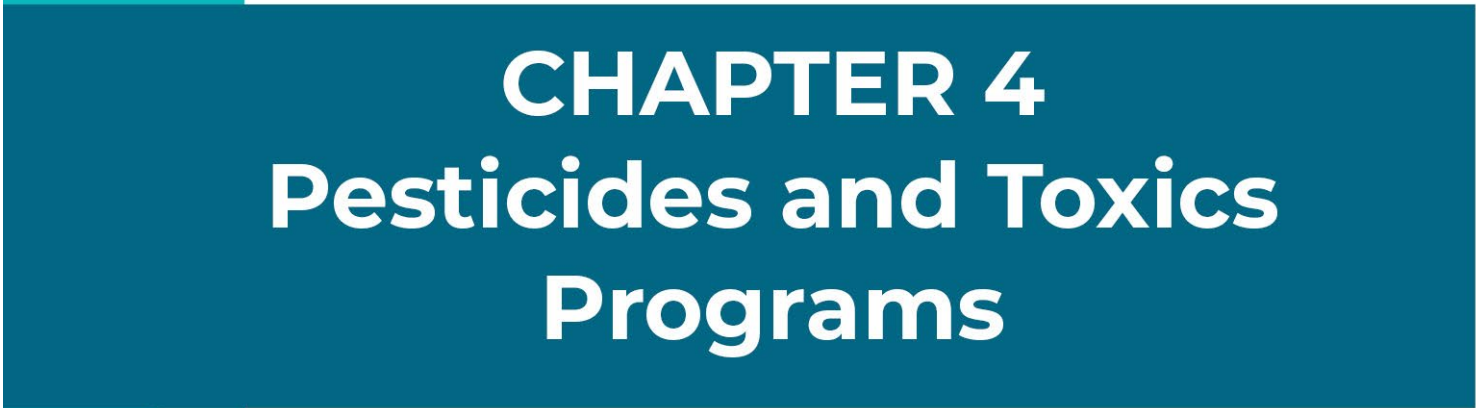
Pursuant to § 104(d) of CERCLA, EPA may enter into cooperative agreements or contracts authorizing states, political subdivisions, and Indian tribes to carry out activities authorized under § 104 of CERCLA, and may provide funding to states and tribes for program support and implementation (e.g., core grants). EPA has the legal latitude to impose grant limitations or conditions to address environmental justice considerations relating to fair treatment and meaningful participation in environmental decision-making by communities with environmental justice concerns. In addition, the Agency could explore the extent to which Environmental Justice considerations could be incorporated into the grant selection process within the existing statutory and regulatory structure.

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<sup>505</sup> CERCLA § 104(i)(6)(c).

<sup>506</sup> CERCLA § 104(i)(6)(H).

<sup>507</sup> 40 C.F.R. § 300.425(c)(3)(i).

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# **CHAPTER 4**

## **Pesticides and Toxics Programs**

## CHAPTER FOUR: PESTICIDES AND TOXICS PROGRAMS

This chapter discusses the Federal Insecticide, Fungicide, and Rodenticide Act,<sup>508</sup> the Federal Food, Drug, and Cosmetic Act,<sup>509</sup> the Toxic Substances Control Act,<sup>510</sup> and § 313 of the Emergency Planning and Community Right-To-Know Act (EPCRA).<sup>511</sup><sup>512</sup> Section 303 of EPCRA is discussed in Chapter Three. As discussed below, these statutes and their implementing regulations provide various opportunities to address environmental justice considerations by focusing attention on communities with environmental justice concerns<sup>513</sup> (e.g., identifiable subgroups with unique diets). While most of the opportunities described herein are available under current law, *Legal Tools* is not intended to prescribe when and how the Agency should undertake specific actions. While many of EPA’s legal authorities are clear, others may involve interpretive issues or consideration of legal risk calling for further analysis. Without the context of specific applications, this document does not attempt to characterize any such legal risks.

### FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT

The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) provides a broad framework for the regulation of pesticides. Generally, FIFRA requires that all pesticides that are sold or distributed in the United States be “registered” by EPA. EPA may only register a pesticide if, among other things, the pesticide “will perform its intended function without unreasonable adverse effects on the environment,” and if, “in accordance with widespread and commonly recognized practice[,] it will not generally cause unreasonable adverse effects on the environment.”<sup>514</sup> In making a determination as to whether a pesticide causes unreasonable adverse effects on the environment, EPA is required to consider the economic, social, and environmental costs and benefits associated with the use of a pesticide. The burden of providing EPA with the necessary information to determine whether the standard for registration is met rests at all times with the registrant or applicant for registration. FIFRA is structured to provide for risk/benefit

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<sup>508</sup> 7 U.S.C. §§ 136–136y.

<sup>509</sup> 21 U.S.C. §§ 301–399a.

<sup>510</sup> 15 U.S.C. §§ 2601–2695d.

<sup>511</sup> 42 U.S.C. §§ 11001–11050.

<sup>512</sup> In addition to its authority under the FIFRA, FFDCA, TSCA and EPCRA, EPA has a responsibility to ensure that recipients and subrecipients of federal financial assistance from EPA—including states, municipalities, and other public and private entities—comply with federal civil rights laws that prohibit discrimination on the basis of race, color, national origin (including limited English proficiency), disability, sex and age, including Title VI of the Civil Rights Act. Moreover, EPA’s implementing regulation generally prohibits discrimination in any programs, activities and services receiving federal financial assistance. *See* Chapter 7 for a more in-depth discussion of civil rights in federal assistance programs.

<sup>513</sup> This document uses the term “communities with environmental justice concerns” to refer to communities overburdened by pollution as identified in EO 12898. Those communities include communities of color, low-income communities, and Indigenous communities. Generally, where EPA has authority to consider impacts to those communities, EPA is also likely to have authority to consider equitable treatment of underserved communities consistent with EO 13985. “Underserved communities” in E.O 13985 refers to populations sharing a particular characteristic, as well as geographic communities, that have been systematically denied a full opportunity to participate in aspects of economic, social, and civic life, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality.

<sup>514</sup> FIFRA § 3(c)(5).

balancing. In making the risk/benefit determination, EPA relies on the authority under FIFRA and its implementing regulations to mitigate risks through various restrictions on labeling, conditioning registrations, and cancelling or suspending registrations. Additionally, there are regulations to protect agricultural workers and prescribe requirements for training and certification of pesticide applicators.

## I. ACTIONS UNDER FIFRA SECTIONS 2, 3, 4 AND 6

The Agency's authority to register pesticides is found in § 3 of FIFRA. The standard for registration under § 3, i.e., that a pesticide will perform its function without causing unreasonable adverse effects on the environment, is defined as "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide."<sup>515</sup> The statute does not restrict the scope of economic, social and environmental factors to be weighed in the cost/benefit analysis beyond the requirement that the cost or benefit be tied to the pesticide use.<sup>516</sup> To make the finding that a pesticide does or does not cause unreasonable adverse effects requires a full consideration of the risks and benefits of its use.<sup>517</sup>

Section 2(bb) of FIFRA provides that *any* unreasonable risk from pesticide use warrants consideration. This has been interpreted broadly to allow EPA to factor economic, social and environmental considerations into the cost/benefit analysis.<sup>518</sup> The Fifth Circuit Court of Appeals, for instance, has found that "a significant risk of bird kills, *even if birds are actually killed infrequently*, may justify the Administrator's decision to ban or restrict diazinon use."<sup>519</sup>

Given the Congressional mandate to consider a wide range of factors in balancing costs against benefits, it is reasonable for the Agency to consider environmental justice considerations in

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<sup>515</sup> FIFRA § 2(bb).

<sup>516</sup> *In re Lethelin Products Co., Inc.*, FIFRA Docket No. 392, 5 (1977); *In re Chapman Chemical Co.*, FIFRA Docket No. 246, 7 (1976).

<sup>517</sup> FIFRA § 3(c)(5); *accord Love v. Thomas*, 858 F.2d 1347 (9th Cir. 1988); *In re Chapman Chemical Co.*, FIFRA Docket No. 246, 7 (1976).

The legislative history of § 3(c)(5) directly supports reading the statute expansively. The Senate Committee on Agriculture and Forestry, in commenting on the amendments to § 2(bb) proposed by the Senate Committee on Commerce, noted that:

[T]he balancing of benefit against risk is supposed to take every relevant factor that the Administrator can conceive of into account. The question he must decide is "Is it better for man and the environment to register this pesticide or is it better that this pesticide be banned?" He must consider hazards to farm workers, hazards to birds and animals and children yet unborn. He must consider the need for food and clothing and forest products, forest and grassland cover to keep the rain where it falls, prevent floods, provide clear water. He must consider aesthetic values, the beauty and inspiration of nature, the comfort and health of man. All these factors he must consider, giving each its due.

S. Comm. on Agriculture and Forestry, 92d Cong., Supp. Rep. (to accompany H.R. 10724) 10 (1972). The Conference Committee subsequently adopted the Senate's version of § 2(bb) in the final bill. *See* H.R. Rep. No. 92-1540, at 10, 30 (1972).

<sup>518</sup> *E.g.*, *Ciba-Geigy Corp. v. EPA*, 874 F.2d 277 (5th Cir. 1989); *In re Chapman Chemical Co.*, FIFRA Docket No. 246, 7.

<sup>519</sup> 874 F.2d at 279–80 (emphasis added); *accord In re Chapman Chemical Co.*, FIFRA Docket No. 246, 7 (a finding of *any* risk from the use of a particular pesticide, if the risk is "unreasonable" in relation to the benefits of its continued use, is sufficient to warrant cancellation. The standards for canceling and registering a pesticide are mirror images – both depend upon whether the pesticide causes unreasonable adverse effects).

its decision whether to register, retain, modify, or cancel a pesticide. If there is a particular community that the Agency believes is disproportionately affected by, or exposed to, a pesticide, the Agency may take this into account in its assessment of social or human health costs associated with a given pesticide. EPA could also consider whether the people bearing the risks from the use of a pesticide are receiving any of the benefits from the use of the pesticide. In the past, EPA has considered similar issues in its risk assessments and regulatory decisions for lindane, endosulfan, soil fumigants, and rodenticides.

### ***A. Public Notice Prior to Registration of New Active Ingredient***

Prior to registration, FIFRA requires public notice of the receipt of applications for registration of pesticides containing a new active ingredient or pesticides that would entail a changed use pattern.<sup>520</sup> The information required to be in the notice is relatively nominal and no risk assessment information is required to be provided.

Starting in October 2009, the Agency initiated an enhanced public participation process to provide information and an opportunity to comment on certain pesticide applications before they are registered. For new active ingredients, first food uses, first residential uses, first outdoor uses and any others that may have significant public interest, the Agency will post a risk assessment and a proposed decision for 30 days of public comment before making a decision on the registration. This timeframe is 15 days for low-risk pesticides or biopesticides. Generally, the Agency does not expect any of the information to be posted to be subject to claims of confidentiality. Nonetheless, posting is done in accordance with appropriate confidential business information procedures. Should there be environmental justice considerations regarding a particular pesticide application, the public has the opportunity to raise them through this process.

### ***B. Regulatory Process After Registration***

Once registered, pesticides must continue to meet the standard for registration. If they do not, the Agency may pursue cancellation or suspension under FIFRA § 6, making it unlawful to sell and, possibly, use the pesticide. In 1996, Congress amended FIFRA to add § 3(g), which set forth the goal of periodically reviewing all pesticides on a 15-year cycle. To accomplish this, in 2006, EPA initiated a new program called “registration review.” The program’s goal is to review each pesticide active ingredient every 15 years to make sure that as the ability to assess risks to human health and the environment evolves and as policies and practices change, all pesticide products in the marketplace can still be used safely. In 2007, Congress again amended FIFRA § 3(g) to mandate the 15-year time period for subsequent pesticide registration review.

The same unreasonable adverse effects standard used for registering pesticides, which allows for consideration of environmental justice considerations, applies to FIFRA § 4 reregistration decisions, § 6 actions, and § 3(g) registration review actions. And, in suspension, cancellation, reregistration, and registration review, the public is provided with opportunities to participate in the process.

### ***C. Information Available to the Public after Registration***

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<sup>520</sup> FIFRA § 3(c)(4).

Under FIFRA § 3(c)(2)(A), information is to be made available to the public once a pesticide is registered. Because of trade secret and related restrictions in FIFRA § 10, requests for such information must be made in accordance with the FOIA regulations at 40 C.F.R. part 2.

#### ***D. Labeling of Pesticide Products***

FIFRA and its implementing regulations at 40 C.F.R. part 156 provide EPA authority to require labeling restrictions on pesticide products. Labeling restrictions can be imposed to mitigate risks to specific populations or areas, by requiring, for instance, that affected populations be made aware of the risks. Text on labels could include communicating risk reduction measures in ways appropriate to the circumstances of communities with environmental justice concerns, including those with limited English proficiency (LEP) or low general literacy rates.<sup>521</sup> The Agency has the authority to require that more extensive information about particular risks be shared with specific groups or communities, including factors that may reduce or increase risk of harm from exposure, and measures people can take to protect themselves.

According to 40 C.F.R. § 156.10(a)(3), EPA may require, or accept an applicant’s proposal for, additional text in other languages as is considered necessary to protect the public. When additional text in another language is necessary, all labeling requirements will be applied equally to both the English and other-language versions of the labeling. The Agency currently considers, and in appropriate circumstances imposes, certain locale-specific restrictions on pesticide uses. Such restrictions are often due to a pesticide’s expected impacts when used in a particular climate or geographic area. Risk factors associated with communities with environmental justice concerns can be considered, where appropriate, in FIFRA § 3, 4, or 6 actions. In fact, in certain actions, EPA takes into consideration major identifiable subpopulations, as discussed more fully below.

#### ***E. Adverse Effects Reporting***

In 1997, EPA promulgated a rule codifying EPA’s interpretation regarding FIFRA § 6(a)(2), which requires pesticide registrants to report information concerning unreasonable adverse effects of their products to EPA.<sup>522</sup> The purpose of the rule is to clarify what information to submit and how and when to submit it. In addition, in situations when a pesticide registrant fails to report information or delays reporting that information, the rule specifies which failures will be regarded by EPA as violations of FIFRA § 6(a)(2), and subject to action under FIFRA §§ 12(a)(2)(B)(ii) and 12(a)(2)(N). These reports are considered by EPA in its registration decisions and subsequent periodic review of registrations to determine if further regulatory action is necessary. These reports sometimes—albeit rarely—include information on specific subpopulations that could inform future regulatory actions to mitigate adverse effects and could be used to implement other strategies identified in paragraph D above.

#### ***F. Requests for Additional Data***

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<sup>521</sup> For example, 40 C.F.R. § 156.206(e) requires certain warning statements be in Spanish, as well as English.

<sup>522</sup> 40 C.F.R. part 159. *See also* 62 Fed. Reg. 49370 (Sept. 19, 1997).



The Agency has broad authority to require data generation and submission by registrants after a pesticide is registered. Under FIFRA § 3(c)(2)(B), EPA can require registrants to submit data that it determines are “required to maintain in effect an existing registration.” The data could include focused information about the adverse effects on communities with environmental justice concerns. The data could also include more focused information on exposure to pesticides of farm workers and their children; communities with environmental justice concerns; or animals, water, land and other resources that are of special importance to particular populations.

Should the Agency determine that registrants need to develop and submit data relating to exposure of (including take-home exposure), or adverse effects on, communities with environmental justice concerns to maintain an existing pesticide registration, § 3(c)(2)(B) of FIFRA can be used to impose the data requirement. The Agency can then use the data in its regulatory decision-making.

### ***G. Improvements to Human Health Risk Assessment Procedures***

In February 2010, EPA announced its intent to use risk assessment techniques developed in the implementation of the Food Quality Protection Act of 1996 (FQPA) in all pesticide risk assessments. The FQPA, which rewrote § 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA) (see discussion below), required EPA to aggregate pesticide exposures from all sources – from food, from drinking water, and from use of pesticides resulting in non-occupational exposures – and also mandated that EPA take into account the cumulative effects from exposures to multiple pesticides that have a common mechanism of toxicity. Further, the FQPA amendments directed that an additional safety factor be used to protect infants and children to take account of potential pre- and post-natal toxicity and completeness of data concerning infants and children. Risk assessment techniques developed in implementing the FQPA have progressed from cutting-edge procedures to well-established scientific practice.

As announced in 2010, EPA now applies the risk assessment techniques developed in implementing the FQPA to any pesticide risk assessment, whether it falls under FQPA or not. While this type of risk assessment approach is not required under FIFRA, in assessing risk, EPA believes it should use the best scientific techniques available. Using the FQPA risk assessment approaches for all pesticides is consistent with good science. Moreover, taking this step has important environmental justice ramifications. For instance, implementing this approach increases protections, especially for agricultural workers and children of workers in agricultural fields.

## **II. FIFRA WORKER PROTECTION STANDARD IN 40 C.F.R. PART 170 and APPLICATOR CERTIFICATION IN 40 C.F.R. PART 171**

### ***A. Overview***

All agricultural employers are required to comply with the Agricultural Worker Protection Standard (WPS) when using agricultural pesticides on an agricultural establishment. The WPS aims to reduce pesticide poisonings and injuries among agricultural workers and pesticide handlers, but some requirements also protect workers’ families from take-home exposures, bystanders, and other persons.

The regulation includes numerous safeguards ranging from protective clothing and precautionary field reentry limits to minimum age requirements, warnings on areas where pesticides have been used and annual worker and pesticide handler training. Because workers of color, low-income workers, and Indigenous workers are disproportionately represented in the agricultural workforce, the WPS safeguards promote environmental justice by reducing and mitigating the risks of exposure to agricultural pesticides. In 2015, EPA completed comprehensive revisions to the WPS regulations, improving protections for agricultural workers, including workers from communities with environmental justice concerns.<sup>523</sup>

While the WPS requires training of handlers on agricultural establishments, the Certification of Pesticide Applicators (CPA) regulation, which was revised in 2017, requires certification of applicators who use RUPs and supervise persons (non-certified applicators) who use RUPs under the direct supervision of certified applicators. Applicators (certified and non-certified) use RUPs in agriculture but also in rural and urban areas on lawns, waterways, rights-of-way, in schools, for public health programs such as mosquito control, around livestock, on structures and in food handling and processing establishments and more. The CPA requires detailed requirements of the supervisory certified applicator and training of the noncertified applicator.

### ***B. Examples of How EPA Implements FIFRA Authorities to Advance Environmental Justice***

Over the past couple of decades, OPP has engaged in a number of activities to enhance the protections provided by the WPS and CPA regulations. For example, EPA provides several competitive funding opportunities for regulatory implementation. These include: national farmworker WPS-required training to farm workers and education on preventing exposure to farm worker families, education of health care providers on recognizing and treating pesticide poisonings, education and training of pesticide applicators and handlers on pesticide use, and more.

Occupational pesticide-related illness and injury is a concern. EPA relies on state enforcement, voluntary public and registrant-required reports of incidents and accidents related to pesticide use. The National Institute for Occupational Safety and Health (NIOSH) Sentinel Event Notification System for Occupational Risk (SENSOR)-Pesticides program (“SENSOR”) builds the capacity of state health departments to conduct surveillance of acute occupational pesticide-related illness and injury cases. Over the years, EPA has contributed funds to support the SENSOR-Pesticides program directly or states participating in the program. EPA used SENSOR data to identify incidents potentially preventable through regulation changes in the 2015 WPS and 2017 CPA rules. Incident data are useful not only to EPA, but to state regulatory partners.

## **III. TREATMENT OF TRIBES AND INDIAN COUNTRY UNDER FIFRA**

With the notable exception of FIFRA § 23, FIFRA does not explicitly reference federally recognized Indian tribes or implementation in Indian country. FIFRA does not define “Indian tribe” and does not expressly mention tribes or Indian country in the definition of “State” in FIFRA § 2(aa). As with other programs under EPA’s statutes, states are generally not approved by EPA to

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<sup>523</sup> See 80 Fed. Reg. 67,496 (Nov. 2, 2015).

administer programs under FIFRA in Indian country. Although, as described below, tribes can seek approval for certain functions under the statute, few tribes have done so. It thus generally falls to EPA to directly implement FIFRA in Indian country (including in areas of Indian country with communities with environmental justice concerns).

To date, EPA has taken certain steps to implement FIFRA provisions in Indian country. For instance, the pesticide registration program is generally national in scope. However, FIFRA § 18 authorizes states and federal agencies to request that EPA grant exemptions from the requirements of FIFRA to allow use of pesticides that would otherwise not be authorized under that statute in order to respond to a pest-related emergency in the state. States also have the authority under FIFRA § 24(c) to register additional uses of pesticides to respond to special local needs. Because tribes are not explicitly referenced in either of these sections, they have not generally had the benefits of these provisions of FIFRA even in situations where they, like their non-tribal neighbors, may have special local pest-related needs or emergencies.

On November 28, 2008, the Administrator approved a three-year pilot program under the auspices of FIFRA § 2(ee)(6) that allowed the use of registered pesticides in Indian country consistent with the use allowed under an emergency exemption or special local-needs registration where such exemption or § 24(c) registration is in effect in the same state as the areas of Indian country (or, if the exemption or registration is limited to particular counties within a state, in the same county as the areas of Indian country).<sup>524</sup> On May 6, 2013, EPA made this pilot program permanent, issuing a final finding under FIFRA § 2(ee)(6). Historically, EPA has not distinguished tribal interests from state interests when deciding whether to approve state emergency exemption requests under FIFRA § 18 or special local needs registrations under FIFRA § 24(c). However, EPA is not statutorily prohibited from interpreting its regulations and the statute to require a showing of how such exemptions and registrations might impact tribal communities.

Also, as noted above, FIFRA § 23 contains the only explicit reference to tribes in the statute. This provision authorizes EPA to enter into cooperative agreements with tribes for specified purposes to carry out FIFRA. EPA has entered into such cooperative agreements with tribes regarding pesticide education and outreach, as well as to conducting inspections. EPA also interprets FIFRA §§ 11 and 23 to authorize EPA to approve tribal plans for the certification and training of applicators of restricted use pesticides in Indian country. In January 2017, the Agency revised 40 C.F.R. part 171 to improve options for certifying applicators in Indian country and to clarify the geographic scope of approved plans for the certification of pesticide applicators. To date, only a small number of tribes have obtained approval of such plans. To help ensure that training and certification is available throughout Indian country, in 2014, EPA began offering federal certifications under an EPA Plan that applies in Indian country where there is no other EPA-approved plan in place.<sup>525</sup>

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<sup>524</sup> Section 2(ee)(6) of FIFRA allows the Administrator to determine that certain uses of a registered pesticide should not be considered violative of FIFRA notwithstanding the fact that the uses are not specifically authorized by the labeling of the registered pesticide. In this particular instance, the Administrator used this authority to determine that use in areas of Indian country that is similar to use authorized under § 18 or 24(c) on neighboring lands is not inconsistent with the purposes of FIFRA and will thus no longer be considered unlawful under FIFRA (unless a tribe declines to be included in the pilot program).

<sup>525</sup> See *EPA Plan for the Federal Certification of Applicators of Restricted Use Pesticides within Indian Country*, <https://www.epa.gov/pesticide-applicator-certification-indian-country/proposed-epa-plan-certify-applicators-indian>.

#### **IV. INTEGRATED PEST MANAGEMENT**

Under 7 U.S.C. § 136r-1, EPA, in coordination with the U.S. Department of Agriculture (USDA), “shall implement research, demonstration, and education programs to support adoption of Integrated Pest Management.” Additionally, the two agencies “shall make information on Integrated Pest Management widely available to pesticide users, including Federal agencies. Federal agencies shall use Integrated Pest Management techniques in carrying out pest management activities and shall promote Integrated Pest Management through procurement and regulatory policies, and other activities.” Integrated Pest Management (IPM) encompasses many combinations of common-sense practices with modern, data-driven pesticide selection and use techniques, resulting in effective and environmentally sensitive pest management. IPM programs use current, comprehensive information on the life cycles of pests and their interaction with the environment. This information, in combination with a comprehensive consideration of available pest control methods, is used to manage pest damage by the most economical means, and with the least possible hazard to people, property, and the environment. Where IPM techniques are feasible alternatives to traditional pesticide use, EPA could consider IPM in its analysis of pesticide risks to communities with environmental justice concerns. Further, EPA recommends that schools use IPM to reduce pesticide risk and exposure to children and is advancing national implementation. EPA also supports IPM use in public housing.

#### **V. INFORMATION AND TRAINING**

FIFRA § 23(c) authorizes EPA, in cooperation with the USDA, to use the services of cooperative state extension services to inform and educate pesticide users. EPA provides limited funds to Pesticide Safety Education Programs (PSEPs) generally at Land Grant Universities for education and training of pesticide applicators of restricted use pesticides (RUPs). EPA and pesticide state lead agencies rely mostly on PSEPs for education and training of applicators and other users (agricultural and non-agricultural handlers) so that they may be used safely without unreasonable risk to people and the environment in rural and urban settings. The PSEPs play an integral role in the development of new training, manuals, examination materials, and continuing education courses for the state in which the PSEP supports. EPA could expand funds to certifying authorities and PSEPs each year to expand and report on activities relative to environmental justice. When registering new products or reviewing already-registered products, EPA can encourage registrants to place training and information requirements on a registration and labeling to help ensure that there are no unreasonable adverse effects on the environment or disproportionate impacts on communities with environmental justice concerns. Non-labeling approaches to training are also available and may be more feasible to implement in many situations.

#### **VI. PACKAGING STANDARDS**

Under FIFRA § 25(c)(3), EPA has the authority to establish standards for packaging, containers, or wrapping to protect children and adults from serious injury or illness due to accidental ingestion or contact with the pesticide. Under this authority, EPA requires that pesticide products that are permitted for residential use and meet certain hazard criteria be in child-resistant packaging to reduce the potential exposure of children to the pesticide.

#### **VII. IDENTIFICATION OF PUBLIC HEALTH PESTS**

FIFRA § 28(d) provides EPA with the authority to identify pests of significant public health importance and develop and implement programs to improve and facilitate the safe and necessary use of pesticides to control such pests. Public health pests—such as insects that carry vector-borne diseases, rodents, and microbes—can cause serious risks to public health. Because such pests may be prevalent in communities with environmental justice concerns, addressing such prevalence would advance environmental justice. EPA provides information to the public about the safe use of such pesticides in homes and schools. Providing the information discussed above to communities with environmental justice concerns will further advance environmental justice.

## **FEDERAL FOOD, DRUG, AND COSMETIC ACT (FFDCA)**

In addition to the general licensing and registration scheme in FIFRA, EPA also exercises statutory authority over pesticides under the FFDCA. The FFDCA contains provisions addressing pesticide residues in foods. EPA is authorized to set tolerances (maximum residue regulations) for pesticides in food under the FFDCA. The Food and Drug Administration and the U.S. Department of Agriculture monitor the food supply to enforce compliance with EPA-established tolerances.

EPA sets tolerances for pesticide residues in food under § 408 of the FFDCA. Its provisions require EPA to determine that the tolerances will be safe. “Safe” means there is a reasonable certainty of no harm. Unlike FIFRA, which balances risks and benefits, this is a risk-only standard. Importantly, the FFDCA’s risk-only standard has been written into FIFRA for pesticides used on food.

In implementing the reasonable certainty of no harm standards in the setting of tolerances, as well as in the FIFRA registration process, EPA considers consumption patterns of major identified subpopulations to determine the degree of risk posed by pesticide residues. If certain groups have a common diet, that factor can be accounted for in pesticide tolerance and registration actions. More specifically, if the data are available, EPA can account for different exposures or dietary consumption patterns for an identifiable community of color, low-income community, or Indigenous community (e.g., Inuit dietary consumption patterns). EPA’s ability to consider the diets of particular communities can be limited by data availability. EPA relies on surveys done every decade or so for consumption information. To further the use of its ability to consider dietary consumption patterns, EPA could seek to ensure that future consumption surveys adequately sample individuals from communities with environmental justice concerns. Also, EPA could solicit additional information on this subject in notices it publishes in allowing for public comment in FFDCA proceedings.

Under FFDCA § 408(b)(2)(C), EPA must specifically consider the exposure of infants and children when determining if the pesticide residue is safe. Dietary consumption patterns of children and infants are considered in the tolerance setting process.

Under FFDCA §§ 408(d) and (e), the public may participate in the establishment, modification, suspension or revocation of a pesticide tolerance. Under 408(d), EPA publishes a notice in the Federal Register of receipt of a petition, which references the petition summary. Under the unique rulemaking requirements of the FFDCA, EPA may issue a final rule acting on the petition without issuing a proposed rule or making other information available prior to issuance of the final rule. Final rules are subject to an administrative objection and hearing process. Under

408(e) EPA may initiate a rulemaking by publishing a proposed rule, followed by a public comment period, and then finalize that rule. Final rules concerning the establishment, modification, or revocation of tolerances issued under 408(d) and (e) are subject to an administrative objection and hearing process.

## **EPCRA SECTION 313 AND RELATED AUTHORITIES**

The Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA) was enacted in response to incidents involving major chemical releases, including the 1984 release of methyl isocyanate in Bhopal, India, and an incident in 1985 at a facility in Institute, West Virginia. The statute provides for emergency planning and emergency release notification at the state and local level (See Chapter Three for a discussion of EPCRA § 303). The Toxics Release Inventory (TRI) was established pursuant to EPCRA § 313, which provides for reporting requirements for facilities within certain industry groups that manufacture, process or use toxic chemicals. Under EPCRA § 313 and its implementing regulations at 40 C.F.R. part 372, covered facilities must report releases to all environmental media. The Pollution Prevention Act of 1990 (PPA)<sup>526</sup> significantly expanded the information required to be reported by facilities that are subject to EPCRA § 313 reporting requirements.

### **I. EPCRA**

Under § 313 of EPCRA, specified facilities must report annually to EPA and the states on releases of listed toxic chemicals. The reporting requirements apply to owners and operators of facilities that have ten or more full-time employees and that are in a covered Standard Industrial Classification (SIC) Code or North American Industry Classification System (NAICS) Code as listed in 40 C.F.R. § 372.23. These facilities must report if they manufacture, process or otherwise use a listed toxic chemical in quantities that exceed specified thresholds. The required information, typically submitted on EPA “Form R,” includes whether the chemical is manufactured, processed or used; the maximum amounts of toxic chemical present at the facility in the preceding year; waste treatment and disposal methods used; and the annual quantity of chemical released to the environment.

Section 313(h) states that the annual release report forms required under EPCRA “are intended to provide information to the Federal, State, and local governments and the public, including citizens of communities surrounding covered facilities.” Section 313(j) provides that EPA must make these annual release reports publicly accessible in a computer data base, which EPA has established as the TRI, which can be accessed through web tools such as TRI Explorer.<sup>527</sup> EPA also annually compiles, analyzes, and publishes the data.

The various tools the TRI program uses to communicate TRI data to the public provide opportunities to communicate valuable information about releases in communities with environmental justice concerns. Because data can be sorted on a facility-by-facility basis, release

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<sup>526</sup> 42 U.S.C. §§ 13101–09.

<sup>527</sup> Fulfilling this requirement of EPCRA § 313(j) is consistent with the directive in the Presidential memorandum accompanying EO 12898 that provides for agencies to “ensure that the public, including minority communities and low-income communities, has adequate access to public information relating to human health . . . when required . . . under [EPCRA].” 30 Weekly Comp. Pres. Doc. at 280.

information can be organized around socio-economic factors such as race or income. Information about potential exposure to toxic chemicals in communities with environmental justice concerns may be useful to EPA, other regulatory agencies and members of the community. The TRI program could, and has, focused on education and outreach activities for communities with environmental justice concerns. Future efforts to make data available to communities could consider the particular needs of these communities in decisions regarding how to present the information.<sup>528</sup> Moreover, EPA might bring greater focus to environmental justice considerations as it prioritizes chemicals or industry sectors to be added to TRI. For example, if certain chemicals or chemical-intensive industries are disproportionately present in communities with environmental justice concerns, the Agency may consider adding those chemicals or industries through rulemaking under EPCRA §§ 313(d) and 313(b)(1)(B), respectively.

In addition, EPA has discretionary authority under EPCRA § 313(b)(2) to add individual facilities to those that must report their releases of toxic chemicals:

The Administrator, on his own motion or at the request of a Governor of a State (with regard to facilities located in that State), may apply the requirements of this section to the owners and operators of any particular facility that manufactures, processes, or otherwise uses a toxic chemical listed under subsection (c) of this section if the Administrator determines that such action is warranted on the basis of toxicity of the toxic chemical, proximity to other facilities that release the toxic chemical or to population centers, the history of releases of such chemical at such facility, or such other factors as the Administrator deems appropriate.

One potential consideration in identifying additional facilities for reporting could be location in or in proximity to communities with environmental justice concerns. The TRI program has exercised this authority for the first time in 2021, identifying certain facilities that release specific chemicals.

EPA may also set different (lower or higher) thresholds for reporting from certain facilities under EPCRA § 313(f)(2). At the Administrator's discretion, these thresholds may apply to classes of chemicals or to categories of facilities. Presumably, a category of facilities could be characterized based on proximity to communities with environmental justice concerns.

## **II. POLLUTION PREVENTION ACT OF 1990**

Under § 6607(a) of the PPA, each owner or operator of a facility is required to annually file a toxic chemical release form under EPCRA § 313. They must include with the annual report a toxic chemical source reduction and recycling report for the preceding calendar year. Section 6607(b) of the PPA details the information that is required to be included in the toxic chemical source reduction and recycling report. As a result of these PPA provisions, there are seven additional categories of pollution prevention and recycling data that must be reported annually under EPCRA § 313.

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<sup>528</sup> However, data users should also be made aware that the TRI data has several important limitations. For example, it does not provide a comprehensive data set of all toxic chemical releases, nor does it provide actual exposure information.

### III. EXECUTIVE ORDER 14008

Starting with EO 12856 in the Clinton Administration, five consecutive administrations have required all federal facilities to adhere to the same planning and reporting provisions of federal right-to-know and pollution prevention laws that cover the private sector.<sup>529</sup> This requirement goes beyond the requirements explicitly in EPCRA and is intended to ensure that federal facilities adhere to right-to-know principles and a pollution prevention ethic. Most recently, the Biden Administration affirmed that this requirement continues to be in effect under EO 14008.<sup>530</sup>

## TOXIC SUBSTANCES CONTROL ACT (TSCA)

### I. FINDINGS AND INTENT

The TSCA gives EPA broad authority to gather information about, to evaluate risks of new and existing chemicals, and to regulate any part of the life cycle of chemical substances and mixtures to protect human health and the environment from unreasonable risks of injury. When Congress enacted TSCA in 1976, it set out its findings, policy, and intent in § 2 of subchapter I. This section expresses a broad concern over potential risks to human health and the environment, and a desire to vest in EPA “adequate authority” to regulate chemical substances and mixtures that present an “unreasonable risk of injury to health or the environment.” In addition, TSCA § 2(c) clearly states that Congress intended EPA to “consider the environmental, economic, and social impact of any action” taken under TSCA. This explicit statement of intent could provide the opportunity for EPA to consider and apply environmental justice considerations, as appropriate, to actions under TSCA.

### II. TSCA SUBCHAPTER I

In 2016, Congress significantly amended TSCA, specifically subchapter I, with The Frank R. Lautenberg Chemical Safety Act for the 21st Century. These amendments strengthened EPA’s authority to regulate chemicals. This document presents TSCA authorities that the Agency could potentially use to consider and address environmental justice impacts, taking into account relevant

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<sup>529</sup> The Bush Administration revoked EO 12856 with EO 13148, but in section 501 preserved the requirement that federal facilities comply with EPCRA § 313 and PPA § 6607. The Obama Administration subsequently revoked EO 13148 with EO 13423, and seemingly eliminated the requirement that federal facilities comply with EPCRA § 313 and PPA § 6607. However, the administration clarified that sections 2(e)(i) and 3(a)(vi) implicitly retained the requirement in the March 29, 2009, implementing instructions. Instructions for Implementing Executive Order 13423, at 21 (Mar. 29, 2007). The Obama Administration revoked EO 13148 with EO 13693, adding a more explicit reference to the federal facilities ECPRA requirements in section 3(j)(i) but again relying on the instructions for implementation to fully clarify that federal facilities were still subject to both EPCRA § 313 and PPA § 6607. Council on Environmental Quality, Implementing Instructions for Executive Order 13693, at 60–61 (June 10, 2015). The Trump Administration revoked EO 13693 with EO 13834 and again virtually eliminated reference to EPCRA in the executive order itself while making clear through the implementing instructions that section 2(f) preserved the requirement that federal facilities comply with EPCRA § 313 and PPA § 6607. CEQ Implementing Instructions for Executive Order 13834, at 21–22 (Apr. 2019). The Biden Administration revoked EO 13834 with EO 13990 and was silent about the continued applicability of EPCRA § 313 and PPA § 6607 to federal facilities. However, the administration subsequently issued EO 14008 and guidance by CEQ indicating that the administration will likely clarify that sections 211 and 219 of that order continue to retain the same legacy requirements. *See* CEQ, Memorandum for Agency Chief Sustainability Officers (Apr. 7, 2021).

<sup>530</sup> CEQ Memorandum for Agency Chief Sustainability Officers (Apr. 7, 2021).



considerations affecting the exercise of the authorities described herein, such as data availability and statutory time constraints.<sup>531</sup> The core of TSCA is principally designed to regulate through three basic themes: (1) information-gathering authorities (including authority to require testing of chemicals and mixtures); (2) substantive evaluation and regulation of chemicals already in commerce (e.g., existing chemicals) at any or all stages of a chemical's or mixture's life cycle; and (3) a program of federal evaluation and regulation of new chemicals before they are manufactured, processed, distributed in commerce, used or disposed of. TSCA also contains provisions relevant to communities with environmental justice concerns regarding categories, potentially exposed or susceptible subpopulations, transparency and scientific standards, which are discussed below.

### ***A. Administration of TSCA***

In carrying out TSCA §§ 4 (information gathering), 5 (regulation of new chemicals), and 6 (regulation of existing chemicals), EPA must consider reasonably available information<sup>532</sup> and make decisions consistent with the best available science<sup>533</sup> that are based on the weight of the scientific evidence.<sup>534</sup> These terms are not defined in the statute and therefore afford the Agency broad discretion to implement these in a manner that advances environmental justice, as discussed in greater detail in the sections below.

For example, where appropriate, EPA may determine that information from sources such as the Toxics Release Inventory,<sup>535</sup> EJSCREEN,<sup>536</sup> the National Emissions Inventory,<sup>537</sup> EnviroAtlas,<sup>538</sup> or other sources of information that are relevant to environmental justice analyses is reasonably available. EPA must consider the information from those sources where relevant and

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<sup>531</sup> This document is not intended to focus on specific actions that EPA has or has not taken under the TSCA authorities described herein. Rather, the document is intended to describe authorities that EPA may have to take certain actions to consider and address EJ impacts. Nonetheless, this document may describe actions that EPA has in fact taken under TSCA in some cases.

<sup>532</sup> “In carrying out §§ 4, 5, and 6, the Administrator shall take into consideration information relating to a chemical substance or mixture, including hazard and exposure information, under the conditions of use, that is reasonably available to the Administrator.” 15 U.S.C. § 2625(k).

<sup>533</sup> “In carrying out §§ 4, 5, and 6, to the extent that the Administrator makes a decision based on science, the Administrator shall use scientific information, technical procedures, measures, methods, protocols, methodologies, or models, employed in a manner consistent with the best available science, and shall consider as applicable—

- (1) the extent to which the scientific information, technical procedures, measures, methods, protocols, methodologies, or models employed to generate the information are reasonable for and consistent with the intended use of the information;
- (2) the extent to which the information is relevant for the Administrator's use in making a decision about a chemical substance or mixture;
- (3) the degree of clarity and completeness with which the data, assumptions, methods, quality assurance, and analyses employed to generate the information are documented;
- (4) the extent to which the variability and uncertainty in the information, or in the procedures, measures, methods, protocols, methodologies, or models, are evaluated and characterized; and
- (5) the extent of independent verification or peer review of the information or of the procedures, measures, methods, protocols, methodologies, or models.” 15 U.S.C. § 2625(h).

<sup>534</sup> “The Administrator shall make decisions under §§ 4, 5, and 6 based on the weight of the scientific evidence.” 15 U.S.C. § 2625(i).

<sup>535</sup> EPA, Toxics Release Inventory (TRI) Program, available at: <https://www.epa.gov/toxics-release-inventory-tri-program>.

<sup>536</sup> EPA, EJSCREEN, available at: <https://www.epa.gov/ejscreen>.

<sup>537</sup> EPA, Air Emissions Inventories, available at: <https://www.epa.gov/air-emissions-inventories>.

<sup>538</sup> EPA, EnviroAtlas, available at: <https://www.epa.gov/enviroatlas>.

appropriate, consistent with the best available science and weight of the scientific evidence standards, which could improve environmental justice analyses.

Under § 26(c), the Administrator also has broad discretion to take *any* action under TSCA with respect to a category of chemical substances or mixtures. A category of chemical substances is broadly defined to include “a group of chemical substances the members of which are similar in molecular structure, physical, chemical, or biological properties, use, or mode of entrance into the human body or into the environment, or the members of which are in some other way suitable for classification [as a category].” 15 U.S.C. § 2625(c)(2)(A). The Administrator has the authority to take action on a category that could be of significance to an environmental justice community. For example, EPA could identify a category of chemical substances for which testing could be required under § 4, or for which a determination could be made under § 5, or such category could be prioritized, evaluated, and regulated under § 6.

The 2016 amendments to TSCA also provided EPA with expanded authority to collect fees from chemical manufacturers and processors to help defray up to 25% of the costs of administering §§ 4, 5, and 6, and collecting, processing, reviewing, and providing access to and protecting from disclosure as appropriate under § 14 information on chemical substances, including contractor costs incurred by EPA.<sup>539</sup> The initial Senate Report on the TSCA amendments stated that: “All stakeholders \*\*\* indicated an interest in ensuring that EPA has the resources necessary to implement a robust chemical regulatory system, including prioritization screening, safety assessments and determinations, and regulation of new and existing chemical substances where required to manage risks to health and the environment.” S. Rep. 114-67, at 6 (June 18, 2015). Consistent with this initial intent, the bill gave EPA broad authority to “ensure that funds sufficient to defray a substantial portion of EPA expenses in information collection and processing, prioritization, safety assessment and determination, and regulation under the Act are provided [to EPA].” S. Rep. 114-67, at 29 (June 18, 2015). In estimating the agency’s costs under these sections, the Agency could incorporate relevant environmental justice work, such as characterizing fenceline communities for TSCA § 6 risk evaluations, into those underlying costs.

In setting a fee, the Administrator must take into account the ability to pay of the person required to pay such fee and the cost to the Administrator of carrying out the activities, as explained above. Such rules may provide for sharing such a fee in any case in which the expenses of testing are shared under §§ 4 or 5. EPA’s fees rule,<sup>540</sup> promulgated under TSCA § 26(b), prescribed standards for determining those persons who qualify as small businesses. EPA could consider whether TSCA fees present a barrier for entry into the chemicals market for businesses from disadvantaged communities.

### ***B. Potentially Exposed or Susceptible Subpopulations***

The 2016 Amendments to TSCA also introduced and defined a new term, “potentially exposed or susceptible subpopulations” (PESS), which the Agency must consider in implementing multiple sections of the statute. PESS is defined as “a group of individuals within the general population identified by the Administrator who, due to *either* greater susceptibility *or* greater

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<sup>539</sup> The fees EPA collects are to be used to defray the costs of “carrying out sections 4, 5, and 6, and of collecting, processing, reviewing, and providing access to and protect from disclosure as appropriate under section 14 information on chemical substances under this title.” 15 U.S.C. § 2625(b)(4)(B)(i)(I).

<sup>540</sup> *Fees for Administration of Toxic Substances Control Act*, 83 Fed. Reg. 52694 (Oct. 17, 2018).

exposure, may be at greater risk than the general population of adverse health effects from exposure to a chemical substance or mixture, *such as* infants, children, pregnant women, workers, or the elderly.” 15 U.S.C. § 2602(12) (emphasis added). Congress’ inclusion of “such as” allows EPA, where TSCA instructs EPA to consider PESS, to potentially identify communities who “may be at greater risk than the general population.”

TSCA does not define “greater susceptibility,” and the Agency has discretion to adopt a broad reading of the term. For example, the Agency could consider the recommendation of the National Environmental Justice Advisory Council (NEJAC), a federal advisory committee to the EPA, that “a subpopulation may be susceptible or sensitive to a stressor if it faces an increased likelihood of sustaining an adverse effect due to a life state (e.g., pregnant, young, old), an impaired immune system, or a pre-existing condition, such as asthma. A subpopulation could have been previously sensitized to a compound or have prior disease or damage. In some cases, susceptibility also could arise because of genetic polymorphisms, which are genetic differences in a portion of a population.”<sup>541</sup>

There is similarly no definition of “greater exposure,” and the Agency could also adopt a broad interpretation of this term. Communities situated close to the fence line of a facility that is emitting air pollutants, or living near effluent releases to water, may fall into this subpopulation. Due to contaminated fish or wildlife, subpopulations, such as Indigenous communities, that are dependent on subsistence consumption may also face greater exposure. The NEJAC has also advised on ways to identify such subpopulations and suggested that as part of that identification “it is important to take into consideration what is sometimes referred to as background exposure or historical exposure. \*\*\* In some cases, community members were exposed to pollutants for many years in the past from facilities that are no longer functioning or in business.”<sup>542</sup>

To identify such communities relevant to the particular action taken under TSCA, EPA may use available screening tools, such as EJSCREEN<sup>543</sup> or EnviroAtlas,<sup>544</sup> to capture greater susceptibility or greater exposure using the filters for socioeconomic factors (e.g., income/poverty, education) or location (e.g., housing, employment, geography), and for environmental indicators (e.g., air toxics cancer risk, respiratory hazard index, particulate matter levels, ozone, Superfund proximity, hazardous waste proximity).

### ***C. Information Gathering***

The Agency has broad data gathering authority under TSCA §§ 4, 8, and 11. The Agency could explore whether these authorities might be appropriate for acquiring information that could be used, for example, to inform risks from chemical substances, mixtures, or categories to communities with environmental justice concerns.

Generally, EPA’s first resort for collecting information under TSCA lies in § 8, which contains several provisions that the Agency could use to collect existing information to assist with environmental justice initiatives.

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<sup>541</sup> NEJAC, *Ensuring Risk Reduction in Communities with Multiple Stressors: Environmental Justice and Cumulative Risks/Impacts*, 23 (Dec. 2004).

<sup>542</sup> *Id.* at 24.

<sup>543</sup> EPA, EJSCREEN, available at: <https://www.epa.gov/ejscreen>.

<sup>544</sup> EPA, EnviroAtlas, available at: <https://www.epa.gov/enviroatlas>.

- Under TSCA § 8(a)(1), EPA could request in a reporting rule a variety of information from manufacturers and processors, such as manufacturing, environmental and health effects, use, and worker exposure information. The TSCA § 8(a)(2) categories of information that can be requested are not exhaustive of the TSCA § 8(a)(1) authority; therefore, EPA has the flexibility to determine whether the expressly listed or additional information could be collected to better inform environmental justice analyses. This is limited, however, to existing information that is known to or reasonably ascertainable by the manufacturer or processor subject to the reporting rule.
- Under TSCA § 8(c), EPA may by rule require certain persons to maintain records of allegations of significant adverse reactions to health or the environment caused by the chemical substance or mixture.<sup>545</sup> Taking the retention period into consideration, EPA may collect such records at any time, and EPA could do so on a regular basis to determine whether there have been allegations of significant adverse reactions in communities with environmental justice concerns.<sup>546</sup>
- Under TSCA § 8(d), EPA can issue rules to collect unpublished health and safety studies or lists of studies. These studies may be of interest to environmental justice communities and may be relevant to the Agency’s assessment and regulation of risks to communities with environmental justice concerns.
- Under TSCA § 8(e), manufacturers, processors, and distributors that obtain information that “reasonably supports” the conclusion that such substance or mixture presents a “substantial risk of injury to health or the environment” are required to immediately inform the Administrator of such information. EPA has previously established that it considers not just hazard, but also information on the release of chemical substances to, and the detection of chemical substances in, environmental media for reporting under § 8(e). As such, if a community has substantial exposure to a substance known to cause serious health or environmental effects, then the facility is required to report under TSCA § 8(e). EPA’s existing TSCA § 8(e) guidance<sup>547</sup> sets forth a broad scope for information subject to TSCA § 8(e), but examples specific to environmental justice communities could be incorporated.

TSCA § 4(a) allows EPA to require testing to collect necessary information that does not already exist. For example, under TSCA § 4(a)(1), such testing could occur if the Administrator finds that a chemical substance or mixture may present an unreasonable risk<sup>548</sup> or there is or may be significant or substantial human exposure to such substance or mixture;<sup>549</sup> there is insufficient information; and the testing of such substance or mixture with respect to such effects is necessary to develop such information. EPA may require such testing by rule, order, or consent agreement, subject to other considerations (e.g. reduction of vertebrate animal testing and tiered testing). A

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<sup>545</sup> See 40 C.F.R. § 717.

<sup>546</sup> See 40 C.F.R. § 717.17(b).

<sup>547</sup> See EPA, TSCA Section 8(e); Notification of Substantial Risk; Policy Clarification and Reporting Guidance (2003) available at: <https://www.govinfo.gov/content/pkg/FR-2003-06-03/pdf/03-13888.pdf>; EPA, TSCA Section 8(e) Reporting Guide (June 1991) available at: <https://www.epa.gov/sites/default/files/2015-09/documents/1991guidance.pdf>

<sup>548</sup> 15 U.S.C. § 2603(a)(1)(A)(i).

<sup>549</sup> 15 U.S.C. § 2603(a)(1)(A)(ii).

chemical substance may present an unreasonable risk “when there is a more-than-theoretical basis for suspecting that some amount of exposure occurs and that the substance is sufficiently toxic at that exposure level to present an ‘unreasonable risk of injury to health.’”<sup>550</sup> EPA could consider whether a release or exposure of a chemical substance to communities with environmental justice concerns meets this standard (e.g., as a result of leaching from a disposal site). EPA also has discretion in determining whether testing is “necessary” to develop information to fill any data or experience gaps.

TSCA § 4(a)(2) provides additional authority to require the development of new information pertaining to chemical substances or mixtures. This includes information:

- Necessary to review a notice under TSCA § 5 or to perform a risk evaluation under TSCA § 6(b)
- At the request of a Federal implementing authority under another Federal law, to meet the regulatory testing needs of that authority with regard to toxicity and exposure.

If EPA determines that it needs the new information, EPA has the authority to require the development of such information. Such information could be used to improve consideration of an environmental justice concern.

TSCA § 4(b)(2)(A) offers examples of the types of studies that the Agency could require to be developed under § 4. The list is not exclusive, so if there are tests that could, for example, address a potential environmental justice concern, then the Agency could require such testing. Under TSCA § 4, the Agency has explicit authority to require the development of information on:

- Cumulative or synergistic effects;
- Any other effect that may present an unreasonable risk of injury to health or the environment;
- Epidemiologic studies; and
- Studies of exposure.

If EPA issues a rule or order under TSCA § 4, EPA must identify the protocols and methodologies for the development of the information.<sup>551</sup> Depending on the type of information requested, the Agency could consider whether it would be appropriate to incorporate consultation with communities with environmental justice concerns as a part of the methodologies.

TSCA § 4(e) created an Interagency Testing Committee, chaired by EPA, which creates a priority list of chemical substances for future testing under § 4. EPA must either initiate testing for the chemical substances on the list or explain why it is not doing so. EPA, as a member of the committee that develops the list, could consider the addition of chemical substances that are of particular interest or concern to environmental justice communities for inclusion on the list.

Under TSCA § 11(c), the Administrator may require the production of reports, papers, documents, answers to questions, and other information that the Administrator deems necessary in carrying out TSCA. The Administrator could use this subpoena authority to compel the

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<sup>550</sup> *Chem. Mfrs. Ass’n v. U.S. EPA*, 859 F.2d 977, 988 (D.C. Cir. 1988).

<sup>551</sup> 15 U.S.C. § 2603(b)(1)(B).

submission of information from facilities that are known or suspected to impact environmental justice communities.

#### ***D. Prioritization, Risk Evaluation, and Regulation of Chemical Substances***

The 2016 amendments to TSCA create a new framework under TSCA § 6 to evaluate and regulate chemical substances through a multi-staged process of prioritization, risk evaluation, and risk management. Throughout each stage, EPA must operate in a manner that is consistent with the best available science and make decisions based on the weight of the scientific evidence.<sup>552</sup> EPA must also consider relevant reasonably available information.<sup>553</sup>

##### **i. Prioritization**

Before prioritization commences, EPA may use its data gathering authority discussed in Section C to support environmental justice analyses that would be part of the prioritization and risk evaluation processes. TSCA also gives EPA discretion to choose which chemical substances, or “candidate” chemicals, to prioritize. Prior to initiating prioritization for any candidate chemical, EPA could engage with communities with environmental justice concerns to identify potential chemicals for prioritization, subject to certain statutory preferences.<sup>554</sup>

Prioritization is a nine- to twelve-month public process during which a chemical substance or category of chemicals<sup>555</sup> is designated as either a high-priority or low-priority substance.<sup>556</sup> TSCA § 6(b)(1)(A) directs EPA to issue a rule, within one year after the 2016 amendments to TSCA, “to establish, by rule, a risk-based screening process, including criteria for designating chemical substances as high-priority substances for risk evaluations or low-priority substances for which risk evaluations are not warranted at the time.”<sup>557</sup> Pursuant to the Prioritization Rule, the Agency has significant flexibility to incorporate environmental justice considerations into the prioritization process. EPA generally uses the reasonably available information to screen the candidate chemical substance against the following criteria and considerations: (1) The chemical substance’s hazard and exposure potential; (2) The chemical substance’s persistence and bioaccumulation; (3) Potentially exposed or susceptible subpopulations; (4) Storage of the chemical substance near significant sources of drinking water; (5) The chemical substance’s conditions of use or significant changes in conditions of use; (6) The chemical substance’s production volume or significant changes in production volume; and (7) Other risk-based criteria that EPA determines to be relevant to the designation of the chemical substance’s priority.<sup>558</sup>

TSCA § 6(b)(1)(B)(i) defines “high-priority substance” as “a chemical substance that the

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<sup>552</sup> 15 U.S.C. § 2625(h) and (i).

<sup>553</sup> 15 U.S.C. § 2625(k).

<sup>554</sup> Congress specified in TSCA § 6(b)(2)(D) that, when designating substances as high-priority for risk evaluation, EPA should give preference to “chemical substances that are listed in the 2014 update of the TSCA Work Plan for Chemical Assessments as having a Persistence and Bioaccumulation Score of 3; and (ii) chemical substances that are listed in the 2014 update of the TSCA Work Plan for Chemical Assessments that are known human carcinogens and have high acute and chronic toxicity.”

<sup>555</sup> See discussion *supra* Section A.

<sup>556</sup> See TSCA § 6(b)(1)(C).

<sup>557</sup> 15 U.S.C. § 2605(b)(1)(A); see also *Procedures for Prioritization of Chemicals for Risk Evaluation Under the Toxic Substances Control Act* (“Prioritization Rule”), 82 Fed. Reg. 33,753 (July 20, 2017).

<sup>558</sup> See TSCA § 6(b)(1)(A); 40 C.F.R. § 702.9.

Administrator concludes, without consideration of costs or other non-risk factors, *may present an unreasonable risk* of injury to health or the environment because of a potential hazard and a potential route of exposure under the conditions of use, *including an unreasonable risk to potentially exposed or susceptible subpopulations identified as relevant by the Administrator.*<sup>559</sup> The statute refers to “a” potential hazard and “a” potential route of exposure, so EPA need only identify one potential hazard and exposure under the conditions of use to trigger a high-priority designation. As part of the screening-level analysis of potentially exposed or susceptible subpopulations, EPA could identify relevant communities with environmental justice concerns, which could impact whether the chemical meets the required “may present an unreasonable risk” threshold finding such that it warrants a high-priority substance designation. The Agency could also use its authority under TSCA § 26(c) to prioritize a category of chemical substances based on relevance to environmental justice considerations and, if designated as high-priority, conduct a risk evaluation on that category of chemical substances.

Early in the prioritization process, EPA identifies the “conditions of use” that are the “circumstances, as determined by the Administrator, under which a *chemical substance* is intended, known, or reasonably foreseen to be manufactured, processed, distributed in commerce, used, or disposed of.”<sup>560</sup> Although TSCA does not define “reasonably foreseen,” EPA may interpret this term to broadly include circumstances that could impact communities with environmental justice concerns. For example, the Agency could consider whether a source of drinking water is in proximity to a disposal site where leaks or spills may be considered reasonably foreseen, when there is reasonably available information, per the definition of “condition of use.”

Additionally, certain activities are excluded from TSCA § 3(2)’s definition of “chemical substance” and are considered non-TSCA uses.<sup>561</sup> Allowing for identification of non-TSCA uses of a chemical substance during prioritization would allow the Agency to explain why EPA does not intend to evaluate the activity as a “condition of use” because the activity does not fall under TSCA jurisdiction. This would provide better transparency for the general public, including communities with environmental justice concerns.

The 2016 Amendments to TSCA require EPA to initially designate “at least” 20 low-priority<sup>562</sup> and 20 high-priority chemical substances.<sup>563</sup> EPA could also designate more high-priority substances than the minimum number required by statute, resources permitting, which

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<sup>559</sup> 15 U.S.C. § 2605(b)(1)(B)(i) (emphasis added).

<sup>560</sup> 15 U.S.C. § 2602(4) (emphasis added).

<sup>561</sup> TSCA § 3(2) defines “chemical substance” as “any organic or inorganic substance of a particular molecular identity, including— (i) any combination of such substances occurring in whole or in part as a result of a chemical reaction or occurring in nature, and (ii) any element or uncombined radical.” TSCA § 3(2)(B) excludes some products from this definition, such as pesticides, tobacco, nuclear materials, firearms and ammunition, and food, food additives, drugs, cosmetics, and medical devices.

<sup>562</sup> A low-priority substance is one that “if the Administrator concludes, based on information sufficient to establish, without consideration of costs or other nonrisk factors, that such substance does not meet the [High-Priority] standard.” TSCA § 6(b)(1)(B)(ii). A low-priority designation is a final agency action subject to judicial review. EPA explained in the Prioritization Rule that when a chemical substance meets the low-priority standard, this “. . . gives the public notice of chemical substances for which the hazard and/or exposure potential is anticipated to be low or nonexistent, and provides some insight into which chemical substances are likely not to need additional evaluation and risk management under TSCA.” 82 Fed. Reg. 33,753 at 33,755. Although TSCA only required that EPA designate twenty chemical substance as low-priority, EPA stated: “As a policy matter, EPA is committed to making Low-Priority designations on an ongoing basis beyond the statutory minimum.” *Id.*

<sup>563</sup> See TSCA § 6(b)(2)(B).

could more quickly address any potential unreasonable risks for communities with environmental justice concerns.

TSCA § 6(b)(2)(D) directs EPA to give preference to chemical substances listed in the 2014 update of the TSCA Work Plan for Chemical Assessments that have a Persistence and Bioaccumulation Score of 3 and that are known human carcinogens and have high acute and chronic toxicity.<sup>564</sup> Consistent with this statutory provision, EPA explained in the Prioritization Rule that “it is EPA’s general objective to select those chemical substances with the greatest hazard and exposure potential first, considering reasonably available information on the relative hazard and exposure of potential candidates.”<sup>565</sup> However, the statute mandates that EPA designate “*at least one high-priority substance upon the completion of each risk evaluation*” (other than manufacturer-requested risk evaluations), so additional high-priority substance designations would also permanently raise the number of ongoing risk evaluations, accordingly.<sup>566</sup> Further, TSCA § 6(b)(2)(C) instructs: “The Administrator shall continue to designate priority substances and conduct risk evaluations in accordance with this subsection at a pace *consistent with the ability* of the Administrator to complete risk evaluations in accordance with the deadlines under paragraph (4)(G).”<sup>567</sup> Therefore, while the Administrator can initiate additional high-priority designations for chemical substances that are of importance to environmental justice communities, this should be balanced with the Agency’s ability to conduct the risk evaluations within the timeframes mandated by the statute. The final designation of a chemical or category of chemicals as “high-priority” immediately begins the risk evaluation process.<sup>568</sup>

ii. EPA-Conducted Risk Evaluation<sup>569</sup>

Risk evaluation is the second step, after prioritization, in the process of existing chemical substance review and risk management established under the 2016 amendments to TSCA. TSCA requires that the risk evaluation process last no longer than three years, with a possible additional six-month extension.<sup>570</sup> The statute and implementing regulations include opportunities for public comment at the draft scope and the draft risk evaluation stages. EPA could conduct outreach to communities with environmental justice concerns to raise awareness of upcoming comment periods.

TSCA § 6(b)(4)(B) required EPA to issue a rule, within one year after the 2016 amendments to TSCA, to establish a process for conducting risk evaluations to determine, per TSCA § 6(b)(4)(A), “whether a chemical substance presents an unreasonable risk of injury to health or the environment, without consideration of costs or other non-risk factors, including an unreasonable risk to a potentially exposed or susceptible subpopulation identified as relevant to the risk evaluation by the Administrator, under the conditions of use.” 15 U.S.C. § 2605(b)(4); see also Procedures for Chemical Risk Evaluation Under the Amended Toxic Substances Control Act (“Risk Evaluation Rule”), 82 Fed. Reg. 33,726, 33,735 (July 20, 2017). Much of the process for

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<sup>564</sup> 15 U.S.C. § 2605(b)(2)(D).

<sup>565</sup> 40 C.F.R. § 702.5(a).

<sup>566</sup> 15 U.S.C. § 2605(b)(3)(C) (emphasis added).

<sup>567</sup> 15 U.S.C. § 2605(b)(2)(C) (emphasis added).

<sup>568</sup> See 40 C.F.R. § 702.17.

<sup>569</sup> EPA plans to conduct manufacturer requested risk evaluations in the same manner as other risk evaluations conducted under TSCA § 6(b)(4)(A). See *Procedures for Chemical Risk Evaluation Under the Amended Toxic Substances Control Act*, 82 Fed. Reg. 33726, 33736 (July 20, 2017).

<sup>570</sup> 15 U.S.C. § 2605(b)(4)(G).



conducting a risk evaluation was left to the discretion of the Agency, which means the Agency has some flexibility to incorporate environmental justice considerations into the risk evaluation process. In addition, the Agency could add such process considerations into the risk evaluation rule. EPA may consider incorporating environmental justice consultations directly into the process, such as through consultations with environmental justice communities and collection and consideration of data.

The statute identifies the minimum components EPA must include in all chemical substance risk evaluations. 15 U.S.C. § 2605(b)(4)(F). Each risk evaluation must:

- (i) Integrate and assess available information on hazards and exposure for the conditions of use of the chemical substance, including information on specific risks of injury to health or the environment and information on potentially exposed or susceptible subpopulations;
- (ii) describe whether aggregate or sentinel exposures were considered and the basis for that consideration;
- (iii) take into account, where relevant, the likely duration, intensity, frequency, and number of exposures under the conditions of use; and
- (iv) describe the weight of the scientific evidence for the identified hazards and exposure. 15 U.S.C. § 2605(b)(4)(F)(i)-(ii), and (iv)–(v).

Although not defined in the statute, EPA has broadly interpreted reasonably available information, which is defined in the Risk Evaluation Rule as “information that EPA possesses or can reasonably generate, obtain, and synthesize for use in risk evaluations, considering the deadlines specified in TSCA § 6(b)(4)(G) for completing such evaluation. Information that meets the terms of the preceding sentence is reasonably available information whether or not the information is confidential business information, that is protected from public disclosure under TSCA section 14.” 40 C.F.R. § 702.33. EPA may take steps early in the risk evaluation process to “reasonably generate, obtain, and synthesize” information regarding environmental justice communities. EPA could also screen for information on potential effects with emphasis on PESS and environmental justice communities. For example, EPA could increase consideration of environmental justice issues by evaluating reasonably available information on factors that may make population groups of concern more vulnerable to adverse effects (e.g., unique pathways; cumulative exposure from multiple stressors; and behavioral, biological, or environmental factors that increase susceptibility); identifying unique considerations for subsistence populations when relevant; and following best practices from EPA’s Technical Guidance for Assessing Environmental Justice in Regulatory Analysis.<sup>571</sup> EPA could also include analyses where appropriate to screen for potential effects with emphasis on PESS and environmental justice communities, followed by more in-depth analysis where warranted.

To satisfy TSCA § 6(b)(4)(F)(i), EPA, using reasonably available information, identifies the hazards to health or the environment posed by the chemical substance under the conditions of use within the scope of the risk evaluation. Included in this evaluation is the relationship between the exposure to the chemical substance and the occurrence of adverse health and environmental effects or outcomes. Therefore, EPA may elevate consideration of environmental justice communities in risk evaluations through the selection of critical endpoints, points of departure,

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<sup>571</sup> [https://www.epa.gov/sites/default/files/2016-06/documents/ejtg\\_5\\_6\\_16\\_v5.1.pdf](https://www.epa.gov/sites/default/files/2016-06/documents/ejtg_5_6_16_v5.1.pdf)

determination of uncertainty factors, and/or margins of exposure. For example, the Agency has the flexibility to select a more protective margin of exposure for occupational users (e.g.  $1 \times 10^{-6}$  rather than  $1 \times 10^{-4}$ ), since workers are a PESS and may also be a part of an environmental justice community. These considerations are tied to the science standards in TSCA §§ 26(h) and (i).

The requirement in TSCA § 6(b)(4)(F)(ii) to “describe whether aggregate or sentinel exposures to a chemical substance under the conditions of use were considered, and the basis for that consideration” may be of particular relevance to environmental justice communities. While there is no mandate to conduct aggregate exposure analyses, EPA has the discretion to conduct aggregate exposure analyses. Under 40 C.F.R. § 702.33, EPA defined aggregate exposure as “the combined exposures to an individual from a single chemical substance across multiple routes and across multiple pathways.” Therefore, if a community is exposed to a chemical substance from multiple pathways (e.g., air, land, and water) and from multiple sources (e.g., multiple facilities from different conditions of use), the Agency has the authority to aggregate those exposures, subject to the best available science standard, per TSCA § 26(h). In addition, EPA’s framework rule, the Risk Evaluation Rule, explains that “EPA may consider potential risk from non-TSCA uses in evaluating whether a chemical substance presents an unreasonable risk, although these uses would not be within the scope of the risk evaluation. The potential risks of non-TSCA uses may help inform the Agency’s [unreasonable] risk determination for the exposures from [conditions of use under the authority of] TSCA (e.g., as background exposures that would be accounted for, should EPA decide to evaluate aggregate exposures).” Risk Evaluation Rule, 82 Fed. Reg. 33,726, 33,735 (July 20, 2017). Therefore, EPA could also consider the disproportionate impacts that background exposures may have on communities with environmental justice concerns to inform the final unreasonable risk determination.

With this discretion, EPA may also conduct sentinel exposure analyses for vulnerable and highly exposed groups. EPA defined sentinel exposure as “the exposure from a single chemical substance that represents the plausible upper bound of exposure relative to all other exposures within a broad category of similar or related exposures.” 40 C.F.R. § 702.33. Much like the authority to consider risk to potentially exposed or susceptible subpopulations, the discretion to consider sentinel exposure gives the Agency further authority to consider, where appropriate, the most highly exposed population in its risk evaluation compared with average exposures across the general population.

TSCA §§ 6(b)(4)(F)(i) and (iii) rely on EPA’s identification of the conditions of use, which may include known, intended, or reasonably foreseen activities that specifically impact or may be of particular interest to communities with environmental justice concerns. For example, the Agency may consider leaching from disposal sites as a known, intended, or reasonably foreseen disposal. The Ninth Circuit, in *Safer Chemicals, Healthy Families vs. U.S. EPA*, noted that:

“we see no reason why “spills, leaks, and other uncontrolled discharges”—or even “actions related to containing . . . or confining” substances as also referenced in 40 C.F.R. § 761.3—would not be considered independent disposals. They would thus qualify as “disposals” (and therefore conditions of use) for substances that are currently manufactured for their pre-disposal use, or “associated disposals” for substances that are no longer manufactured for their pre-disposal use. If, under the applicable definition of “disposal,” something is in fact again disposed of—even if it was disposed of previously—or when a disposal is in fact ongoing, we see no

reason why that use is not captured as a prospective disposal.” 943 F.3d 397, 426 (9th Cir. 2019) (dicta).

TSCA § 6(b)(4)(F)(iv) requires EPA to describe the weight of the scientific evidence with respect to the identified hazards and exposures. EPA has defined weight of the scientific evidence in the Risk Evaluation Rule as “a systematic review method, applied in a manner suited to the nature of the evidence or decision, that uses a preestablished protocol to comprehensively, objectively, transparently, and consistently, identify and evaluate each stream of evidence, including strengths, limitations, and relevance of each study and to integrate evidence as necessary and appropriate based upon strengths, limitations, and relevance.” 40 C.F.R. § 702.33. Ensuring a transparent process for systematic review facilitates community engagement on the risk evaluation and the resulting unreasonable risk determinations.

Finally, EPA synthesizes the components required by TSCA § 6(b)(4)(F) by characterizing the risk and determining whether the chemical substance presents an unreasonable risk. EPA’s determination of unreasonable risk must be done: (1) without consideration of costs or other non-risk factors; (2) with consideration of risk to potentially exposed or susceptible subpopulations; and (3) under the conditions of use. As noted in Section B, identification of potentially exposed or susceptible subpopulations provides the Agency with broad discretion to identify and consider risks specific to environmental justice communities in its risk evaluations. A no unreasonable risk determination is a final agency action subject to judicial review. 15 U.S.C. § 2605(i)(1). An unreasonable risk determination initiates risk management. 40 C.F.R. § 702.49(c)

### iii. Risk Management

After the risk evaluation is complete, if EPA determines that “the manufacture, processing, distribution in commerce, use, or disposal of a chemical substance or mixture, or that any combination of such activities, presents an unreasonable risk of injury to health or the environment,” then EPA must within two years (subject to limited extension) issue a final TSCA § 6(a) rule so that the chemical no longer presents an unreasonable risk. 15 U.S.C. § 2605(a). However, EPA may not in a risk management rule under TSCA § 6(a) directly regulate non-TSCA uses, per TSCA § 3(2).

Finally, TSCA § 6(a) states: “Any requirement (or combination of requirements) imposed under this subsection may be limited in application to specified geographic areas.” This provision appears to authorize, in appropriate cases, geographically targeted restrictions to address localized unreasonable risks to specific communities from industrial/commercial facilities in the area. EPA may explore avenues for consultation and receiving public input on environmental justice considerations in risk management.

Under TSCA § 9(b), the Administrator shall coordinate actions taken under TSCA, including risk management, with actions taken under other Federal laws administered in whole or in part by the Administrator. If the Administrator determines that a risk to health or the environment associated with a chemical substance could be eliminated or reduced to a sufficient extent by actions taken under the authorities contained in such other Federal laws, then the Administrator shall use such authorities to protect against such risk unless the Administrator determines, in the Administrator’s discretion, that it is in the public interest to protect against such risk by actions taken under TSCA. As part of the public interest consideration, the Administrator

could take into account which statute better address risks to environmental justice communities.

iv. Persistent, Bioaccumulative, and Toxic (PBT) Chemicals

The 2016 Amendments to TSCA direct EPA to take expedited action on chemical substances identified in the 2014 update of the TSCA Work Plan that EPA concludes, among other things, are persistent, bioaccumulative, and toxic and “exposure to which under the conditions of use is likely to the general population or to a potentially exposed or susceptible subpopulation identified by the Administrator, or the environment, on the basis of an exposure and use assessment.” 15 U.S.C. § 2605(h)(1). If EPA makes the requisite findings in TSCA § 6(h)(1), TSCA § 6(h)(4) requires EPA, when selecting among prohibitions and other restrictions for a TSCA § 6(a) rule, to “address the risks of injury to health or the environment that the Administrator determines are presented by the chemical substance and [to] reduce exposure to the substance to the extent practicable.”

Although EPA is not required to conduct a risk evaluation pursuant to TSCA § 6(h)(2) and did not make a risk determination under this TSCA § 6(h)(4) standard as part of the final rules promulgated in January 2021, EPA found that it could “reduce exposure to the extent practicable” by generally prohibiting activities involving the PBT chemicals, unless information indicated that a general prohibition or restriction would not be practicable.<sup>572</sup> In that case, EPA adopted exclusions from the general prohibition or restriction, or allowed alternative compliance dates so that a prohibition or restriction could take effect “as soon as practicable,” but with a “reasonable transition period” as contemplated under TSCA § 6(d). EPA recently announced its intent to revisit some of those decisions, and in that regard, could assess the potential for further practicable exposure reductions and alternative compliance deadlines based on environmental justice considerations.

v. Polychlorinated Biphenyls (PCBs)

As mentioned above, TSCA directly addresses the manufacture, processing, distribution in commerce, use and disposal of PCBs under § 6(e). TSCA § 6(e) generally prohibits the manufacture, processing, distribution in commerce, and use of PCBs, but provides EPA authority to conduct rulemaking by which the Agency could provide for such activities to occur. As part of such rulemaking, EPA must find that the activity will pose no unreasonable risk of injury to health or the environment. TSCA § 6(e) also instructs EPA to prescribe methods for the disposal of PCBs. The implementing regulations<sup>573</sup> for TSCA § 6(e) establish disposal requirements for PCBs and regulatory conditions for continuing to use remaining PCB-containing equipment to ensure its safe operation. Under these rules, EPA reviews applications for approval of PCB disposal facilities, applying the “no unreasonable risk” standard. EPA could consider the interests of communities with environmental justice concerns in the “no

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<sup>572</sup> See *Decabromodiphenyl Ether (DecaBDE)*; *Regulation of Persistent, Bioaccumulative, and Toxic Chemicals Under TSCA Section 6(h)*, 86 Fed. Reg. 880 (Jan. 6, 2021); *Phenol, Isopropylated Phosphate (3:1) (PIP 3:1)*; *Regulation of Persistent, Bioaccumulative, and Toxic Chemicals Under TSCA Section 6(h)*, 86 Fed. Reg. 894 (Jan. 6, 2021); *2,4,6-tris(tert-butyl)phenol (2,4,6-TTBP)*; *Regulation of Persistent, Bioaccumulative, and Toxic Chemicals Under TSCA Section 6(h)*, 86 Fed. Reg. 866 (Jan. 6, 2021); *Hexachlorobutadiene (HCBd)*; *Regulation of Persistent, Bioaccumulative, and Toxic Chemicals Under TSCA Section 6(h)*, 86 Fed. Reg. 922 (Jan. 6, 2021); *Pentachlorothiophenol (PCTP)*; *Regulation of Persistent, Bioaccumulative, and Toxic Chemicals Under TSCA Section 6(h)*, 86 Fed. Reg. 911 (Jan. 6, 2021).

<sup>573</sup> 40 C.F.R. part 761.

unreasonable risk” analysis for such facility-specific approvals.

### ***E. Review and Management of New Chemicals***

TSCA § 5 prevents the manufacture of any new chemical substance in the United States until EPA is notified of the intended manufacture and EPA makes an affirmative determination on such notice and takes any action required in association with that determination. EPA can also, by rule, require similar notification from manufacturers and processors of significant new uses of existing chemical substances. During the notification period, EPA reviews information in the notice and must make one of five determinations available in TSCA:

- The chemical substance or significant new use presents an unreasonable risk of injury to health or the environment, including an unreasonable risk to a potentially exposed or susceptible subpopulation identified as relevant under the conditions of use;
- Available information is insufficient to allow the Agency to make a reasoned evaluation of the health and environmental effects of the chemical substance or significant new use;
- In the absence of sufficient information, the chemical substance or significant new use may present an unreasonable risk of injury to health or the environment;
- The chemical substance is or will be produced in substantial quantities and either enters or may enter the environment in substantial quantities or there is or may be significant or substantial human exposure to the chemical substance; or
- The chemical substance or significant new use is not likely to present an unreasonable risk of injury to health or the environment, including an unreasonable risk to a potentially exposed or susceptible subpopulation identified as relevant under the conditions of use.

In addition to the health and environmental effects that may be caused by the chemical substance generally, EPA’s broad pre-market entry review includes consideration of relevant potentially exposed or susceptible subpopulations and the conditions of use of the chemical substance. As discussed above, the Agency’s consideration of potentially exposed or susceptible subpopulations may include consideration of communities with greater exposure to the chemical substance, or communities that may be more susceptible to health risks based on social or economic factors.

The Agency may also consider the submitting company’s circumstances, such as a manufacturing plant’s location, thus presenting a possible opportunity for considering impacts on communities with environmental justice concerns in the vicinity of the facility or facilities identified in the premanufacture notice. For example, if the Agency is looking at releases to water for a new chemical substance, the Agency may consider whether the receiving waterbody is a source of drinking water for nearby communities. The Agency might also consider demographic or other indicators of susceptibility for workers at the facility who are likely to have occupational exposures to the chemical substance.

The notice submitted for Agency review under TSCA § 5 must also include “a description of any other information concerning the environmental and health effects of such substance, insofar as known to the person making the notice or insofar as reasonably ascertainable.” 15 U.S.C. § 2604(d)(1)(C). The Agency could potentially use this provision as an opportunity to collect information on communities around the facility where the new chemical is going to be manufactured or processed, if those communities are likely to be exposed to the new chemical

substance from environmental releases or by working in the facility, and such information were considered relevant to informing EPA's assessment of the health effects of the substance.

Once EPA determines that a new chemical substance or significant new use presents unreasonable risk, may present unreasonable risk, or there is insufficient information, EPA must impose restrictions on the manufacture, processing, distribution in commerce, use, or disposal of the substance, potentially including requirements to develop information on the substance, to the extent necessary to protect against unreasonable risk. If, for example, the Agency lacks information to identify or evaluate effects on potentially exposed or susceptible subpopulations in the vicinity of the facility, the Agency could use its authority under TSCA § 5(e) to require the manufacturer to develop and submit such information, and could impose restrictions to the extent necessary to protect against an unreasonable risk pending the development of that information.

After imposing any such restrictions (typically by order), EPA must also consider whether to promulgate a rule identifying as a "significant new use"—with respect to which notification and Agency review is required—any manufacturing, processing, use, distribution in commerce, or disposal of the chemical substance that does not conform to the restrictions imposed by the Agency. Relevant factors for significant new use designations include "the extent to which a use changes the type or form of exposure of human beings or the environment to a chemical substance," and "the extent to which a use increases the magnitude and duration of exposure of human beings or the environment to a chemical substance." 15 U.S.C. § 2604(a)(2). When considering whether to designate a use as a significant new use, the Agency could consider potential environmental justice impacts, such as the extent to which a use may increase exposure to the substance by communities with environmental justice concerns.

There are certain exemptions from the requirement to file a premanufacture notice with the Agency, one of which exempts a manufacturer "if the Administrator determines that the manufacture, processing, distribution in commerce, use, or disposal of such chemical substance, or that any combination of such activities, will not present an unreasonable risk of injury to health or the environment, including an unreasonable risk to a potentially exposed or susceptible subpopulation identified by the Administrator under the conditions of use." 15 U.S.C. § 2604(h)(4). Congress added "potentially exposed or susceptible subpopulation[s]" to this provision in 2016, and although EPA is not obligated to modify any of the existing exemptions, see 15 U.S.C. § 2625(p)(1), EPA could consider whether to revisit existing regulatory exemptions in light of the requirement to consider potentially exposed or susceptible subpopulations.

### ***F. Imminent Hazard***

TSCA § 7(a)(1) provides authority to the Administrator to address imminently hazardous chemical substances, mixtures, or articles containing such substance or mixture ("the hazard"). TSCA § 7(a)(2) creates a non-discretionary duty to address the hazard under certain circumstances. Under this provision, the Administrator must commence a civil action if the Administrator has not made a TSCA § 6(a) rule immediately effective (as authorized by § 6(d)(3)(A)(i), which provides for EPA to declare a proposed § 6(a) rule on the hazard to be immediately effective if necessary to protect the public health). TSCA § 6(d)(3)(A)(i) requires a court to have granted relief in an imminent hazard action under TSCA § 7 in order for EPA to issue an immediately effective rule that prohibits the manufacture, processing, or distribution of the hazard. See also H.R. Rep. No. 94-

1679, at 76 (1976) (Conf. Rep.). Finally, TSCA § 7(d) requires, where appropriate, the initiation of a TSCA § 6(a) rulemaking proceeding concurrently with the filing of a civil action under TSCA § 7(a), or as soon thereafter as practicable.

TSCA § 7(f) defines “imminently hazardous chemical substance or mixture” as: “a chemical substance or mixture which presents an imminent and unreasonable risk of serious or widespread injury to health or the environment, without consideration of costs or other non-risk factors. Such a risk to health or the environment shall be considered imminent if it is shown that the manufacture, processing, distribution in commerce, use, or disposal of the chemical substance or mixture, or that any combination of such activities, is likely to result in such injury to health or the environment before a final rule under section 6 can protect against such risk.” 15 U.S.C. § 2606(f). The legislative history explains the meaning of both (1) imminent and (2) unreasonable risk of serious or widespread injury. “An imminent hazard may be found at any point in the chain of events that may ultimately result in injury to health or the environment. The observance of actual injury is not essential to establish that an imminent hazard exists. The conferees intend that action under the imminent hazard section be able to occur early enough to prevent the final injury from materializing.” H.R. Rep. No. 94-1679, at 76 (1976) (Conf. Rep.). “Widespread injury” can mean geographically widespread harm or an unreasonable risk of harm affecting a substantial number of people. *Id.* “Of course, if the risk of injury to health or environment is serious, it need not be widespread.” *Id.* Although the final bill predominantly adopted the House definition, the Senate version defined an imminent hazard as substances or mixtures that present an unreasonable risk of serious personal injury or serious environmental harm “prior to the completion of an administrative hearing or other proceeding authorized under the bill.” S. Rep. No. 94-698, at 8 (1976).

EPA has the authority to make an imminent hazard finding for a chemical substance, mixture, or an article containing the chemical substance or mixture, the exercise of which could help to rapidly address imminent and unreasonable risks to communities with environmental justice concerns.

### ***G. Transparency***

TSCA also provides several avenues for increasing transparency regarding chemical substances and mixtures. Information on chemical substances may often be treated as confidential business information, or CBI, but there are still opportunities for the Agency to provide enhanced access to information that may be of interest to environmental justice communities.

For example, under TSCA § 4(d), the Administrator is required to publish a notice of receipt of any information collected pursuant to TSCA § 4(a). The notice must include, subject to TSCA § 14, the identity of the chemical substance, the uses or intended uses of the substance, and the nature of the information developed. The Agency has discretion in determining how detailed of a description is provided on the information received. As part of the requirement to identify the uses of the substance, the notice could also include the location of the intended uses in order for communities with environmental justice concerns to more easily identify human health studies that may be of interest to them.

TSCA does not protect from disclosure health and safety studies under TSCA § 14(b)(2), subject to certain exceptions. TSCA § 3(8) defines the term “health and safety study” as “any study of any effect of a chemical substance or mixture on health or the environment or on both,

including underlying information and epidemiological studies, studies of occupational exposure to a chemical substance or mixture, toxicological, clinical, and ecological studies of a chemical substance or mixture, and any test performed pursuant to this Act.” TSCA § 14(b)(2) also does not protect from disclosure “any information” reported to or otherwise obtained from a health and safety study. EPA could consider whether it is possible to broadly interpret this provision to cover health and environmental effects information that may be of interest to environmental justice communities. The Administrator could also choose to proactively disclose such health and safety studies and information from health and safety studies upon receipt, following procedures in § 14 and Agency regulations, to give companies an opportunity to contest disclosure in the courts.

The Agency is also required to disclose information claimed confidential under certain circumstances, to states, emergency personnel, and other specified entities who may be requesting the information for purposes such as enforcement or administration of a law that concerns or benefits communities with environmental justice concerns, provided the requirements in TSCA § 14(d) for requesting and continuing to protect such information are met. EPA has developed guidance that explains how the information may be requested, but EPA could also offer webinars and other community outreach to educate states, communities, and others about this tool. EPA could also support access to such information for entities authorized to receive such information by developing a request and notification system that, in a format and language that is readily accessible and understandable, allows for expedient and swift access to information disclosed pursuant to paragraphs (5) and (6) of subsection (d). 15 U.S.C. § 2613(g)(3).

TSCA § 14(d)(3) also requires EPA to disclose information where the Agency determines “that disclosure is necessary to protect health or the environment against an unreasonable risk of injury to health or the environment, without consideration of costs or other non-risk factors, including an unreasonable risk to a potentially exposed or susceptible subpopulation identified as relevant by the Administrator under the conditions of use.” In determining whether the disclosure of information is “necessary” to protect health or the environment against unreasonable risk to PESS, the Agency could consider risks to communities with environmental justice concerns.

EPA also has an obligation to review and make a determination on certain claims of confidentiality received under TSCA. 15 U.S.C. § 2613(g)(1). Where EPA denies claims, EPA could disclose such information to the public once the period for appeal has elapsed. *See* 15 U.S.C. § 2613(g)(2)(D)(ii). *See* 15 U.S.C. § 2613(g)(2)(D)(ii).

To further transparency, the Agency also has discretion under TSCA § 14(f) to require entities to reassert and substantiate or resubstantiate confidentiality claims after a substance is designated a high-priority substance or to assist with a risk evaluation. If companies are unable to substantiate or maintain confidentiality claims, and EPA subsequently discloses the information, this process could aid greater transparency and greater involvement in the risk evaluation process for communities with environmental justice concerns.

TSCA § 26(j) requires the Administrator to make certain information available to the public (see, e.g., § 26(j)(2) information required under § 4). Although there is no timeline for making such information available to the public, the Agency could commit to making information available to the public as expeditiously as possible. This includes “notices, determinations, findings, rules, consent agreements, and orders of the Administrator under this subchapter.”



## ***H. Citizen Petitions***

Under TSCA § 21, any person can petition EPA to initiate a proceeding for the issuance, amendment, or repeal of a rule under TSCA §§ 4, 6, or 8, or to issue an order under TSCA §§ 4, 5(e), or 5(f). During the Agency’s review of the petition, “[t]he Administrator may hold a public hearing or may conduct such investigation or proceeding as the Administrator deems appropriate in order to determine whether or not such petition should be granted.” 15 U.S.C. § 2620(b)(2). The Agency could take this opportunity to solicit additional information that could help inform environmental justice considerations that potentially are relevant to the petition.

A TSCA § 21 petition must set forth the facts which it is claimed establish that it is necessary to initiate the action requested. EPA is required to grant or deny the petition within 90 days of its filing. If EPA grants the petition, the Agency must promptly commence an appropriate proceeding. EPA has some discretion to determine what an “appropriate proceeding” may be in the context of a particular petition. The Agency could use this flexibility to take into consideration environmental justice concerns. If EPA denies the petition, the Agency must publish its reasons for the denial in the *Federal Register*.

## **III. TSCA SUBCHAPTER II: ASBESTOS**

Subchapter II of TSCA, the Asbestos Hazard Emergency Response Act (AHERA),<sup>574</sup> was enacted to establish a uniform program for addressing the presence of asbestos in school buildings. TSCA § 208 essentially provides the EPA with Imminent and Substantial Endangerment authority for asbestos in schools. Under TSCA § 208(a), the EPA may act to protect human health or the environment whenever airborne asbestos or friable asbestos-containing material in a school building governed by a local educational agency poses an imminent and substantial endangerment to human health or the environment and the local educational agency is not responding sufficiently. Under TSCA § 208(b), EPA may also request that the Attorney General bring suit to seek injunctive relief to respond to the hazard upon receipt of evidence that airborne asbestos or friable asbestos-containing material in a school building governed by a local educational agency poses an imminent and substantial endangerment to human health or the environment. Under this authority, EPA could directly assist environmental justice communities where the local educational agency’s response to the presence of asbestos in schools is not sufficient.

In addition, pursuant to TSCA § 212, EPA has appointed an Asbestos Ombudsman who is tasked with receiving “complaints, grievances, and requests for information submitted by any person with respect to any aspect of [AHERA]” and with rendering “assistance with respect to the complaints, grievances, and requests received.” The Asbestos Ombudsman also is responsible for making any recommendations to the Administrator that he or she feels are appropriate. Owing to this defined role, the Asbestos Ombudsman can serve as a useful interface between the Agency and any community dealing with environmental justice considerations that relate to or fall within the scope of AHERA. In addition, the Asbestos Ombudsman is uniquely situated to recommend and promote actions on the part of EPA that might address any such concerns.

## **IV. TSCA SUBCHAPTER III: INDOOR RADON**

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<sup>574</sup> 15 U.S.C. §§ 2641–56.

Subchapter III of TSCA established cooperative relationships between EPA, the U.S. Department of Housing and Urban Development, and states to develop and implement programs to assess and reduce indoor exposure to radon.<sup>575</sup> There are two separate provisions concerning federal assistance to state radon programs that explicitly call for application of a criterion that could be implemented to advance environmental justice. First, TSCA § 305 describes technical assistance that EPA must provide to state radon programs. Both §§ 305(a)(5) and 305(a)(6) include statements that, to the maximum extent practicable, “homes of low-income persons” should be selected for projects that evaluate homes and demonstrate radon mitigation methods. Second, TSCA § 306(i)(2) establishes a limitation on financial assistance (grants) that a recipient state “should make every effort, consistent with the goals and successful operation of the State radon program, to give a preference to low-income persons.”

## V. TSCA SUBCHAPTER IV: LEAD-BASED PAINT HAZARDS

Subchapter IV was added to TSCA in October 1992. This Subchapter deals with hazards from lead-based paint. The TSCA Subchapter IV lead-based paint hazard rules are important to advancing environmental justice when the risk reduction to be achieved affects, for example, public or inner-city housing. To the extent that lead-based paint hazards disproportionately affect communities with environmental justice concerns, EPA can argue that there is authority under TSCA § 2(c) (discussed above) to factor environmental justice considerations into the implementation of TSCA Subchapter IV authorities.

EPA has, in fact, considered environmental justice factors in a title IV rulemaking. In 2008, EPA promulgated a rule governing renovation activities in pre-1978 housing and child-occupied facilities (mostly pre-schools and day-care centers) pursuant to TSCA § 402(c)(3).<sup>576</sup> Subsequently, in July of 2010, EPA amended the 2008 rule by eliminating the “opt-out” provision that excused contractors from the lead-safe work practice requirements if the homeowner provided the contractor with a signed statement having to do with the presence of children or pregnant women.<sup>577</sup> In extending the rule requirements to all pre-1978 housing and child-occupied facilities regardless of current occupancy, EPA explicitly cited environmental justice considerations as one of the reasons for making the change.

EPA may have additional opportunities to factor in environmental justice considerations. For example, in reconsidering the current lead hazard standards under TSCA § 403, EPA may have the opportunity to account for heightened risk factors that may affect vulnerable communities. Under TSCA § 405(d) EPA is to engage in public education and outreach activities to increase public awareness of a variety of health issues related to lead exposure and poison prevention. Specifically, TSCA § 405(d)(2) provides that public education and outreach activities shall be designed to provide educational and information to: health professionals; the general public, with emphasis on parents of young children; homeowners, landlords, and tenants; consumers of home improvement products; the residential real estate industry; and the home renovation industry. There may be opportunities to target such education and outreach to high-risk communities.

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<sup>575</sup> See [https://www.epa.gov/sites/production/files/2014-08/documents/guidance\\_and\\_handbook.pdf](https://www.epa.gov/sites/production/files/2014-08/documents/guidance_and_handbook.pdf) for additional discussion regarding financial assistance and low-income housing.

<sup>576</sup> See 73 Fed. Reg. 21692 (April 22, 2008) (codified at 40 C.F.R. part 745, subparts E and Q).

<sup>577</sup> See 75 Fed. Reg. 24802 (May 6, 2010) (codified at 40 C.F.R. part 745, subpart E).

## **VI. TSCA SUBCHAPTER V: HEALTHY HIGH-PERFORMANCE SCHOOLS**

Pursuant to TSCA § 502, EPA, in consultation with the U.S. Departments of Education and Health and Human Services (HHS), issued voluntary school site selection guidelines that account for, among other things, the special vulnerability of children to hazardous substances or pollution exposures. These guidelines are available on the EPA website and are accompanied by “related links and resources” that provide a variety information on environmental justice.<sup>578</sup>

Pursuant to TSCA § 504, EPA, in consultation with the U.S. Departments of Education and HHS, issued voluntary guidelines for use by states in developing and implementing environmental health programs for schools.<sup>579</sup> The guidelines take into account the special vulnerability of children in low-income communities and communities of color to exposures from contaminants, hazardous substances, and pollution emissions, and the impact of school facility environments on student and staff disabilities and special needs.

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<sup>578</sup> See “School Siting Guidelines” available at: <https://www.epa.gov/schools/view-download-or-print-school-siting-guidelines>.

<sup>579</sup> <https://www.epa.gov/schools/read-state-school-environmental-health-guidelines>



# **CHAPTER 5**

## **Tribal Programs**

## CHAPTER FIVE: TRIBAL PROGRAMS

### EPA'S INDIAN POLICY AND TRIBAL CONSULTATION

Federally recognized Indian tribes<sup>580</sup> are sovereign governments that retain important powers over their members and territory. EPA advances environmental justice<sup>581</sup> in Indian country by, among other things, assisting tribes in developing their own programs to protect the health of tribal members and their environment and by directly implementing federal programs in Indian country. Accordingly, this chapter focuses on ways to enhance the exercise of tribal sovereignty to protect human health and the environment in Indian country under EPA's statutes.

EPA has a long-standing commitment to work directly with federally recognized tribes as partners on a government-to-government basis to protect tribal health and environments, as illustrated by the *EPA Policy for the Administration of Environmental Programs on Indian Reservations*<sup>582</sup> (EPA Indian Policy) and related Headquarters and Regional policy statements and guidance documents. In 1984, EPA became the first federal agency to adopt an Indian Policy. In that Policy, which has been reaffirmed by each EPA Administrator since its adoption, EPA recognized the importance of ensuring close involvement of federally recognized tribal governments in making decisions and managing environmental programs affecting their areas and members. Among other things, the Agency committed to look directly to tribal governments to play an important role in setting standards, making environmental policy decisions, and managing programs in their areas. For a number of programs, one aspect of EPA's implementation of this approach is to treat eligible tribes in a similar manner as states for purposes of receiving grants and administering approved environmental regulatory programs and other functions under EPA statutes. This approach enables tribes to perform essentially the same role in Indian country that states play outside of Indian country in regulating the environment under EPA statutes. In other cases, EPA can advance environmental justice in Indian country by directly implementing EPA programs there.

Consistent with EPA's 1984 Indian Policy and other federal policies, EPA is committed to consulting with tribal governments on matters that affect their communities and environments. In November 2009, President Obama issued a memorandum reiterating a commitment to regular and meaningful consultation and collaboration with tribal governments on federal decisions that affect

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<sup>580</sup> The EPA recognizes the right of the tribes as sovereign governments to self-determination and acknowledges the federal government's trust responsibility to tribes. The elected officials for the federally recognized tribe and the government structure they administer are referred to as the federally recognized tribal government.

<sup>581</sup> This document uses the term "communities with environmental justice concerns" to refer to communities overburdened by pollution as identified in EO 12898. Those communities include communities of color, low-income communities, and Indigenous communities. Generally, where EPA has authority to consider impacts to those communities, EPA is also likely to have authority to consider equitable treatment of underserved communities consistent with EO 13985. "Underserved communities" in EO 13985 refers to populations sharing a particular characteristic, as well as geographic communities, that have been systematically denied a full opportunity to participate in aspects of economic, social, and civic life, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality.

<sup>582</sup> *EPA Policy for the Administration of Environmental Programs on Indian Reservations* (Nov. 8, 1984). The Policy was issued by then-Administrator William D. Ruckelshaus and is available at <https://www.epa.gov/sites/default/files/2015-04/documents/indian-policy-84.pdf>.

them; this memorandum was recently reaffirmed by President Biden.<sup>583</sup> The memorandum also directed federal agencies to develop a detailed plan of actions to implement the policies and directives of EO 13175,<sup>584</sup> which relates to coordination and consultation with tribal governments on federal actions with tribal implications.

On May 4, 2011, the Agency released its *EPA Policy on Consultation and Coordination with Indian Tribes*,<sup>585</sup> to further implement EO 13175 and EPA's 1984 Indian Policy. The policy set a broad standard for when EPA should consider consulting on a government-to-government basis with federally recognized tribal governments. Notably, the scope of EPA's consultation policy is broader than that found in EO 13175. EPA's consultation policy establishes clear standards for the Agency's consultation process, as well as a management oversight and reporting structure to ensure accountability and transparency. When considering legal tools that may affect tribal interests, including those described in this document to enhance tribal governmental involvement in the protection of human health and the environment in Indian country, EPA will continue to first consult with tribal governments before any decisions are made to use the tools.

In 2016, EPA supplemented its consultation policy with a *Guidance for Discussing Tribal Treaty Rights* ("Treaty Rights Guidance"). EPA's Treaty Rights Guidance complements the EPA consultation policy by providing affirmative steps for the Agency to take during tribal consultations when an EPA action occurs in a specific geographic location and a resource-based treaty right, or an environmental condition necessary to support the resource, may be affected by EPA's action. It is an initial step in EPA's efforts to improve the methods and processes in place to meet the commitment to honor and respect tribal treaty rights and resources protected by treaties. The Guidance was the first of its kind for any federal agency.

In addition to the Treaty Rights Guidance, in 2016 EPA drafted and joined numerous other federal agencies in signing on to an inter-Agency Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Tribal Treaty Rights to advance protection of tribal treaty and similar rights related to natural resources affected by federal decisions. In 2021, EPA along with 11 other federal agencies signed an updated MOU which strengthens the original MOU's foundation and action items and integrates the priorities of the Biden-Harris Administration, including specifically calling for the integration of tribal treaty and reserved rights in agencies' ongoing work to address the climate crisis.

In addition, through its Indian Policy and other Agency-wide efforts, EPA continues to recognize the importance of tribal involvement in Agency decision-making. Several EPA Regions

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<sup>583</sup> Presidential Memorandum on Tribal Consultation (Nov. 5, 2009). This memorandum is available at 74 Fed. Reg. 57881 (Nov. 9, 2009) and <https://www.epa.gov/sites/default/files/2013-08/documents/tribal-consultation-memorandum-09.pdf>. The policies announced in that memorandum were reaffirmed on January 26, 2021, by President Biden. See Presidential Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships (Jan. 26, 2021), 86 Fed. Reg. 7491 (Jan. 29, 2021). This memorandum is also available at <https://www.govinfo.gov/content/pkg/FR-2021-01-29/pdf/2021-02075.pdf>.

<sup>584</sup> EO 13175, entitled "Consultation and Coordination With Indian Tribal Governments," 65 Fed. Reg. 67249 (Nov. 9, 2000), available at <https://www.federalregister.gov/documents/2000/11/09/00-29003/consultation-and-coordination-with-indian-tribal-governments>. Importantly, EPA's responsibilities under EO 13175 are separate from the responsibilities under EO 12898. The Agency's consideration of tribal interests and consultation with tribes under EO 13175 stems from the federal government's special relationship with federally recognized tribes.

<sup>585</sup> The policy is available at: <https://www.epa.gov/sites/default/files/2013-08/documents/cons-and-coord-with-indian-tribes-policy.pdf>.

and programs also have developed specific procedures and plans describing EPA’s expectations for tribal consultation and providing guidance designed to promote effective and efficient outreach to, and consultation with, tribal governments in appropriate situations. Such consultation is highly significant in helping to ensure appropriate tribal input in relevant EPA decision-making, and ultimately in the protection of human health and the environment in tribal communities.

## **TREATMENT IN A MANNER SIMILAR TO A STATE**

### **I. EPA’S TAS PROCESS**

As noted in Chapters One and Two, the CCA, the CWA, and the SDWA all expressly provide for Indian tribes to play a role in protecting human health and the environment. These statutes allow, but do not require, tribes to seek to administer EPA environmental programs. Specifically, the statutes authorize EPA to approve tribal applications for eligibility to receive grants and carry out environmental programs. Such treatment enables tribes to protect human health and the environment in Indian country in generally the same way that states do for areas outside of Indian country. In addition, EPA has interpreted the Toxic Substances Control Act (TSCA) and the Emergency Planning and Community Right-to-Know Act (EPCRA)—both of which are silent as to tribes—to authorize tribal roles within their areas. See Chapter Four. EPA also interprets the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) to authorize approval of certain tribal programs for the certification and training of applicators of restricted use pesticides. See Chapter Four. Moreover, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) provides that tribes shall be afforded substantially the same treatment as states for various specified provisions of the statute, including the provisions regarding notification of releases and consultation on remedial actions affecting a tribe or tribes. *See*, Chapter Three.

Generally, EPA’s statutes and regulations that authorize EPA to treat an Indian tribe as a state (TAS)<sup>586</sup> do so for eligible Indian tribes (i.e., those that are federally recognized, have a governing body carrying out substantial duties and powers over a specific area, and are capable of carrying out the functions in a manner consistent with EPA’s statutes and regulations). In addition, the statutes or regulations generally call for a jurisdictional showing for the relevant geographic area over which the tribe seeks to administer an environmental regulatory program.

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<sup>586</sup> TAS terminology originates from existing language in the tribal provisions of certain EPA statutes and implementing regulations establishing the authority for EPA to approve tribal applications for eligibility to receive funding and administer environmental programs under federal laws. In 1994, EPA adopted and implemented a policy to discontinue the use of the term “treatment as a state” to the extent possible because the term is disfavored by federally recognized tribes and does not accurately reflect their unique legal status or relationship with the federal government, which is significantly different than that of states. 59 Fed. Reg. 64339 (Dec. 14, 1994), *available at* <https://www.govinfo.gov/content/pkg/FR-1994-12-14/pdf/FR-1994-12-14.pdf> (commonly known as the TAS Simplification Rule). EPA believes that Congress did not intend to alter the unique federal/tribal relationship when it authorized treatment of tribes “as states;” rather, the purpose was to reflect an intent that tribes should assume a role in implementing EPA statutes on tribal land comparable to the role states play on state land. *Id.* EPA continues to support discontinuation of the term “treatment as a state.” When its use is needed for clarity and consistency due to the term’s statutory origin, EPA prefers to use the more accurate term “treatment in a manner similar to a state,” which is also abbreviated “TAS.” EPA continues to evaluate this terminology and to seek ways to better reflect the unique status of federally recognized tribes and the federal/tribal relationship by avoiding unnecessary comparisons to states.

There are, however, significant differences among the various TAS authorities. For instance, in some cases, the statutes differ in how they address the geographic extent of potential tribal programs. The CWA authorizes EPA to approve eligible tribal programs over reservation areas. Other statutes allow approval of programs over broader areas, including non-reservation areas of Indian country. EPA also interprets the statutes differently regarding demonstrations of tribal authority to carry out environmental regulatory functions. For example, EPA interprets the CAA and CWA TAS provisions to constitute a delegation of authority by Congress to eligible tribes to manage programs throughout their reservations. By contrast, EPA currently interprets the SDWA TAS provision to require a demonstration of inherent tribal authority to regulate the relevant activities.

In addition, the statutes include some differences in the scope of available programs that tribes may apply to administer. For instance, the CWA identifies various statutory provisions for which EPA may treat eligible tribes similarly to states. They include: grants under CWA § 106, water quality standards under § 303, clean lakes under § 314, nonpoint source management under § 319, water quality certifications under § 401, the National Pollutant Discharge Elimination System (NPDES) program under § 402, and regulating the discharge of dredged or fill material into waters of the United States under § 404.<sup>587</sup> Similarly, the SDWA authorizes TAS for eligible tribes to exercise “primary enforcement responsibility for public water systems and for underground injection control,” and to receive financial assistance to carry out those functions.<sup>588</sup> By contrast, the CAA authorizes TAS more generally and directs EPA to promulgate regulations specifying “those provisions of [the CAA] for which it is appropriate to treat Indian tribes as States.”<sup>589</sup> EPA has promulgated such regulations at 40 C.F.R. part 49; these regulations generally authorize eligible tribes to “be treated in the same manner as States with respect to all provisions of the Clean Air Act” with the exception of a few enumerated provisions largely relating to program submission or other requirements that EPA determined were not appropriate to impose on tribes.<sup>590</sup> *See* Chapter One.

EPA has promulgated regulations under its various statutes governing the process by which tribes may apply for TAS status as well as the procedures EPA will follow in taking action on tribal applications.<sup>591</sup> These regulations provide substantial detail to interested tribes regarding the information they should submit in their applications and generally call for EPA to process the applications in a timely manner. Generally, as discussed below, EPA may have the capacity to streamline the TAS process for environmental regulatory programs, and efforts to this end are currently under way.

## II. STEPS TO ENHANCE TAS

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<sup>587</sup> CWA § 518(e).

<sup>588</sup> SDWA § 1451(a)(2)–(3).

<sup>589</sup> CAA § 301(d)(2).

<sup>590</sup> 40 C.F.R. §§ 49.3 and 49.4.

<sup>591</sup> *See, e.g.*, 40 C.F.R. §§ 49.1–49.9 (CAA programs); 40 C.F.R. § 131.8 (CWA water quality standards program); 40 C.F.R. §§ 123.31–123.34 (CWA NPDES permitting program); 40 C.F.R. §§ 233.60–233.62 (CWA wetlands permitting program); 40 C.F.R. §§ 501.22–501.25 (CWA sewage sludge management program); 40 C.F.R. §§ 130.6(d), 35.583, and 35.633 (CWA grants); 40 C.F.R. §§ 142.72, 142.76, and 142.78 (SDWA public drinking water system supervision program); 40 C.F.R. §§ 145.52, 145.56, and 145.58 (SDWA underground injection control program); 40 C.F.R. §§ 35.676 and 35.686 (SDWA grants); 40 C.F.R. § 300.515(b) (CERCLA response actions); 40 C.F.R. § 745.324 (TSCA lead-based paint program); and 40 C.F.R. §§ 35.693, 35.703, and 35.713 (TSCA grants).



The statutory TAS provisions allow EPA some flexibility in determining how best to implement its authority to authorize tribes to administer federal programs. Thus, since EPA adopted its first TAS regulations, it has taken various steps to try to improve the process, both by simplifying the way it is administered under various programs and by revising its TAS regulations.

### ***A. What EPA has Already Done***

EPA has taken several steps to make the TAS process more robust, efficient, and effective. First, EPA has worked continuously to improve the TAS process since issuing its first TAS regulations in 1988. For instance, EPA’s experience processing TAS applications led the Agency to issue a regulation revising and simplifying all of its then-existing TAS regulations in 1994. Under the simplified TAS process, EPA streamlined various procedures to eliminate duplicative requirements both in the preparation of tribal applications and also in the processing of those applications by EPA. EPA again refined the TAS process in 1998 and 2008 after convening workgroups to examine the Agency’s continuing experience with tribal TAS applications and to identify potential additional efficiencies and areas where additional guidance would be useful. The latter process, which included significant consultation with tribal officials, culminated with the issuance of a formal TAS Strategy<sup>592</sup> designed to promote more efficient and transparent review of tribal TAS applications. The TAS Strategy provides important guidance regarding the information tribes should submit in their applications, describes practical and efficient procedures and timelines EPA intends to use to process the applications, and includes measures to help ensure accountability and appropriate sharing of information with applicant tribes.

In addition, EPA has generally attempted to interpret its statutory authority broadly to allow for tribal involvement in a wide variety of programs. For instance, as noted above, the CAA provided EPA with discretion to determine which provisions of the statute were appropriate for TAS. In implementing the CAA TAS regulations, EPA determined that all provisions of the statute were appropriate for TAS, with certain limited enumerated exceptions largely relating to provisions that would have inappropriately imposed requirements on, rather than affording opportunities to, tribal governments. Similarly, EPA has interpreted TSCA and EPCRA – which include no explicit reference to tribal roles – to authorize TAS for tribes to implement various roles under those statutes in their areas, including managing lead-based paint residential abatement programs under TSCA.<sup>593</sup>

Moreover, in addition to § 126 of CERCLA, which specifies certain provisions of the statute for which tribes shall be afforded TAS, EPA’s NCP regulations under CERCLA define “State” to include Indian tribes “except where specifically noted” to the contrary<sup>594</sup> and establish eligibility criteria for tribes that want to carry out response actions under CERCLA § 104.<sup>595</sup> Further, as discussed in Chapter Four, the only explicit reference to tribes in FIFRA is in § 23 of the statute, which authorizes EPA to enter into agreements with tribes under the statute and to assist tribes with

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<sup>592</sup> Memorandum from Marcus Peacock, EPA Deputy Administrator, entitled “Strategy for Reviewing Tribal Eligibility Applications to Administer EPA Regulatory Programs” (Jan. 23, 2008). This memorandum, which refers to the TAS guidance memorandum issued on March 19, 1998, is available at [https://www.epa.gov/sites/default/files/2015-10/documents/strategy-for-reviewing-applications-for-tas\\_0.pdf](https://www.epa.gov/sites/default/files/2015-10/documents/strategy-for-reviewing-applications-for-tas_0.pdf).

<sup>593</sup> See, e.g., 40 C.F.R. § 745.324.

<sup>594</sup> 40 C.F.R. § 300.5.

<sup>595</sup> 40 C.F.R. § 300.515(b).

training and certification of applicators of certain pesticides. EPA has interpreted its authorities under FIFRA to allow tribes to submit their own plans to train and certify applicators of restricted use pesticides. Chapter Four also describes how EPA has implemented its authorities under FIFRA to take several steps to ensure that the statute's benefits are available to communities in Indian country. These include steps by EPA to directly implement programs in areas of Indian country to address emergencies and special local needs.

EPA has taken steps to enable tribes to seek TAS and implement approved programs without the need to demonstrate certain criminal enforcement authorities. The only statute that expressly provides that tribes do not need to exercise criminal enforcement authority to obtain TAS is SDWA § 1451(b)(2). The other statutes are silent on this issue, and EPA has used its discretion to issue regulations that enable the Agency to approve tribes for TAS notwithstanding limitations on tribal criminal enforcement authority.<sup>596</sup> In these cases, EPA's regulations generally call for the federal government to retain primary criminal enforcement authority and for the tribes to enter into agreements with EPA to provide investigative leads and otherwise assist in the development of criminal enforcement actions.

Further, in an effort to streamline TAS applications in situations where jurisdictional or land status issues may exist for only part of a particular tribe's application, EPA's regulations generally allow the Agency to approve an applicant tribe's TAS status for those areas where the jurisdictional scope of the tribe's application is undisputed.<sup>597</sup> Although the resulting TAS approval may be limited in geographic extent and may not address all areas covered by the tribe's application, this approach enables the tribe to assume a role for the approved area without the delays and uncertainties that may accompany resolution of jurisdictional or land status disputes. In any such situation, EPA would consult with the applicant tribe regarding the scope of the application and any EPA approval.

EPA's ability to approve tribal roles for certain programs faces statutory barriers. Notably, EPA was unsuccessful in defending a regulation authorizing TAS for tribes under RCRA. Although RCRA does not contain an explicit TAS provision, EPA attempted to exercise its discretion to provide a role for tribes similar to that of states for certain RCRA programs. Following a challenge to EPA's rule, the D.C. Circuit, relying on certain definitional language addressing tribes in RCRA, held that EPA lacked authority to treat tribes as states under the current language of that statute.<sup>598</sup> The Court did recognize, however, EPA's authority to regulate under RCRA within Indian country.<sup>599</sup>

### ***B. Further Steps to Enhance TAS***

EPA believes that direct tribal involvement through the TAS process is an effective means of ensuring that the needs of tribal communities, and the uses those communities make of their environmental resources, are addressed during implementation of programs under EPA's statutes. Enhancing tribes' ability to obtain eligibility to administer these programs promotes environmental

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<sup>596</sup> See, e.g., 40 C.F.R. §§ 49.7(a)(6) and 49.8 (CAA regulations); 40 C.F.R. §§ 123.34, 233.41(f), and 501.25 (CWA regulations for, respectively, NPDES, § 404, and sewage sludge programs).

<sup>597</sup> See, e.g., 40 C.F.R. § 49.9(e).

<sup>598</sup> See *Backcountry Against Dumps v. EPA*, 100 F.3d 147 (D.C. Cir. 1996), which also is referenced in Chapter Three.

<sup>599</sup> *Id.* at 152.

protection in Indian country, with significant emphasis on tribal sovereign decision-making and control of Indian country health and environments by the communities living there. EPA is, therefore, interested in additional steps the Agency may take to streamline the TAS process and thereby promote enhanced tribal involvement. EPA can, for instance, continue to review its TAS procedures on a national level as the Agency gains additional experience processing TAS applications in the context of the goals and expectations of the TAS Strategy described above.

EPA could also clarify its interpretation of some existing regulations to further the role of tribes. For example, CERCLA § 126(a) specifies that “[t]he governing body of an Indian tribe shall be afforded substantially the same treatment as a State” with respect to certain provisions of the statute, including consultation on remedial actions under CERCLA § 104(c)(2). As noted above, in Subpart F of the NCP regulations, EPA established criteria for TAS under CERCLA § 104, including the need for the tribe to have jurisdiction over a site at which a Fund-financed response is contemplated.<sup>600</sup> In view of the language in § 126(a) and the scope of § 300.515(a) of the NCP regulations, EPA could clarify whether this jurisdictional criterion is relevant for purposes of tribal consultation on remedial actions that affect them, as opposed to situations in which the tribe has the lead for conducting the response action. Similarly, EPA could clarify whether the jurisdictional criterion is relevant for purposes of entering into an EPA/Stat Superfund Memorandum of Agreement under 40 C.F.R. § 300.505 when the tribe is not the lead for the response action.

## ALTERNATIVES TO TAS

As EPA has gained experience with its tribal programs, it has increasingly recognized that not all tribes are interested in assuming, or are able to assume, TAS. Indeed, EPA recognizes that there are other ways tribes can participate in the protection of their communities and environments. For example, EPA can provide financial assistance to tribes to develop their capacity for environmental management without the need to seek TAS for any particular program. The Tribal General Assistance Grant Program, which is discussed further in Chapter Eight, is one example. But EPA also recognizes that tribes can use program development grants under specific media statutes, like the CWA, to help them manage their environments without seeking TAS status for any regulatory program. Consistent with that approach, EPA developed a guidance document – “Final Guidance on Awards of Grants to Indian Tribes under Section 106 of the Clean Water Act” – that discusses measures tribes can take, using CWA development grant funds, to participate in managing reservation environments separate from the TAS process for regulatory programs.<sup>601</sup> The Guidance discusses both regulatory measures under tribal (rather than federal) law, and measures not involving the exercise of any regulatory authority that nevertheless enhance environmental protection.

Moreover, as an alternative to TAS under the CWA, tribes may seek to manage and protect reservation waters, including water bodies they share in common with states, by working cooperatively with states under CWA § 518(d). That provision authorizes tribes and states to enter into cooperative agreements, subject to EPA review and approval, to jointly plan and administer CWA programs. Its legislative history indicates that it was intended to create an alternative to TAS

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<sup>600</sup> 40 C.F.R. § 300.515(b).

<sup>601</sup> The guidance is available at: <https://www.epa.gov/sites/default/files/2014-09/documents/final-tribal-guidance.pdf>.

to protect reservation environments under the CWA.<sup>602</sup> Use of this authority has been very limited; there may be room for expanding use of this authority.

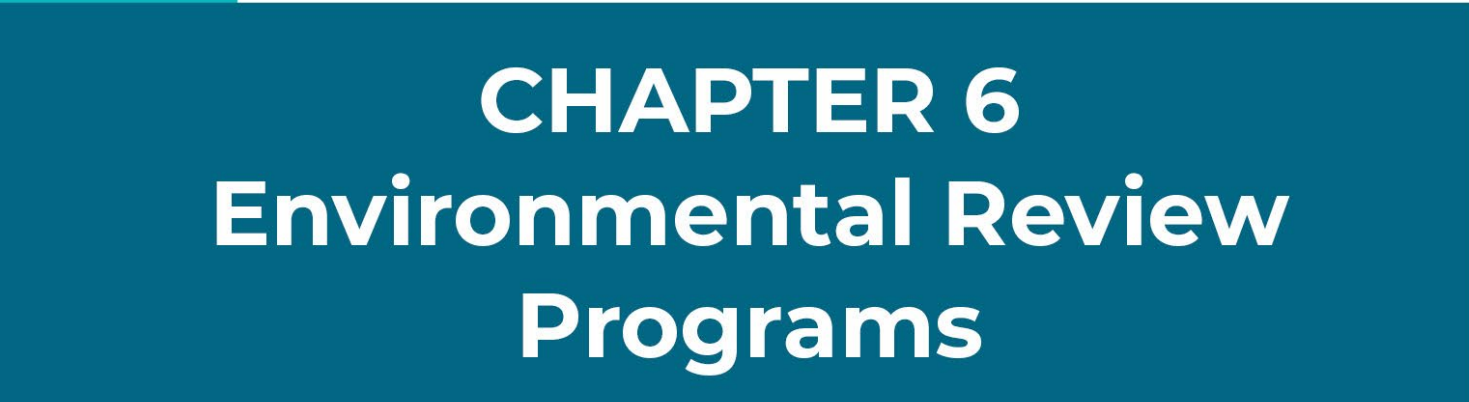
## **DIRECT IMPLEMENTATION**

As discussed in other chapters, EPA can undertake direct implementation of human health and environmental programs in Indian country and currently implements a wide variety of environmental programs in Indian country. In some cases, EPA may undertake implementation activities directly using Agency resources. In other situations, the Agency may work in conjunction with tribes under direct implementation cooperative agreements, which are described more fully in Chapter Seven. EPA continues to explore additional opportunities to implement programs in Indian country, including through rulemaking and other activities.



Because relatively few tribes have as yet sought and been approved to administer environmental regulatory programs under EPA's statutes, the majority of environmental regulatory activity under federal laws in Indian country involves direct implementation by EPA. In most cases, therefore, EPA is the entity with relevant authority to implement the various legal tools described in this document in Indian country. However, as described elsewhere, Indian tribes are sovereign governments exercising important powers over their members and areas, and those areas may include communities with environmental justice concerns. In making decisions identifying and addressing disproportionate impacts on communities in Indian country with environmental justice concerns, EPA remains respectful of tribal governmental roles by, among other things, consulting with the relevant tribal governments on matters that affect them.

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<sup>602</sup> See 132:22 Cong. Rec. 32380, 32403 (1986), available at <https://www.govinfo.gov/content/pkg/GPO-CRECB-1986-pt22/pdf/GPO-CRECB-1986-pt22-2-2.pdf>.



**CHAPTER 6**  
**Environmental Review**  
**Programs**



## CHAPTER SIX: ENVIRONMENTAL REVIEW PROGRAMS

The National Environmental Policy Act<sup>603</sup> (NEPA) applies broadly to federal actions that may significantly affect the environment, and readily encompasses concerns raised by environmental justice, including impacts on the natural or physical environment and interrelated health, social, cultural, and economic effects.<sup>604</sup> Because of statutory and judicially created exemptions, NEPA generally applies to only a limited number of EPA actions, such as the WIFIA program, EPA issuance of new source NPDES permits under the CWA, and construction of publicly owned treatment works pursuant to a special appropriation.<sup>605</sup> Nonetheless, EPA may voluntarily prepare detailed environmental impact statements (EISs) or brief environmental assessments (EAs), as appropriate, for its NEPA-exempt actions under its “Statement of Policy for Voluntary Preparation of National Environmental Policy Act Documents.” The criteria for doing so include “the potential for using an EA or an EIS to facilitate analysis of environmental justice issues . . . and to expand public involvement.”<sup>606</sup>

EPA plays several additional important roles in the NEPA process. EPA may serve as a “cooperating agency” assisting other federal agencies preparing draft and final EISs or EAs, based upon EPA’s relevant jurisdiction or special expertise.<sup>607</sup> Under the White House Council on Environmental Quality (CEQ) regulations, federal agencies should also be routinely involving EPA in the preparation of EAs, to the extent practicable, whether EPA is a cooperating agency or not.<sup>608</sup> Most notably, EPA has a broad duty under CAA § 309 to review and publicly comment on other federal agencies’ proposed actions subject to NEPA’s EIS requirement (i.e., actions that may significantly affect the environment), and regulations proposed by federal agencies.<sup>609</sup> Further, under § 309, if the EPA Administrator determines a proposed federal action is unsatisfactory from the standpoint of public health or welfare or environmental quality, the Administrator shall refer the matter to CEQ.<sup>610</sup>

The Presidential memorandum accompanying EO 12898 emphasizes the importance of using the NEPA and CAA § 309 review processes to advance environmental justice. It explicitly directs EPA, in its § 309 reviews, to ensure that federal agencies have “fully analyzed” environmental effects, including human health, economic and social effects, on communities of

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<sup>603</sup> 42 U.S.C. §§ 4321–4370h.

<sup>604</sup> The CEQ regulations implementing NEPA define the term “effects” or “impacts” to include “ecological . . . , aesthetic, historic, cultural, economic . . . , social, or health effects.” 40 C.F.R. 1508.1(g)(1).

<sup>605</sup> See 40 C.F.R. § 6.101.

<sup>606</sup> See 63 Fed. Reg. 58045, 58046 (Oct. 29, 1998), available at <https://www.govinfo.gov/content/pkg/FR-1998-10-29/pdf/98-29019.pdf>.

<sup>607</sup> 40 C.F.R. § 1501.8.

<sup>608</sup> 40 C.F.R. § 1501.5(e).

<sup>609</sup> CAA § 309(a) (applying broadly to matters “relating to duties and responsibilities” granted to the Administrator). Note that this discussion omits EPA’s authority to review legislation proposed by federal agencies, given its rarity.

<sup>610</sup> CAA § 309(b).

color and low-income communities.<sup>611</sup> Accordingly, NEPA and CAA § 309 are powerful, broad tools to advance environmental justice.<sup>612</sup>

## EPA COMPLIANCE WITH NEPA

NEPA and CEQ's implementing regulations,<sup>613</sup> require federal agencies to consider the environmental effects of their proposed actions subject to NEPA. When proposing a major federal action that could significantly affect the quality of the human environment, § 102(2)(C) of NEPA requires an agency to prepare a detailed EIS. An agency can prepare a brief EA to determine whether the effects of the action are potentially significant, or can move directly to preparing an EIS. If in an EA an agency determines the proposal's effects will not be significant, the agency may complete its NEPA review with a "[f]inding of no significant impact."<sup>614</sup>

In preparing EISs, NEPA and CEQ's implementing regulations direct federal agencies, including EPA, to establish a pre-EIS public scoping process;<sup>615</sup> analyze the environmental effects of the proposed action in a draft and final EIS; discuss all reasonable alternatives and the alternative of no action; identify practicable mitigation<sup>616</sup> not covered in the alternatives discussion; and provide for meaningful public participation. Because of statutory and judicially created exemptions, as discussed above, NEPA generally applies only to a limited number of EPA program activities, most commonly WIFIA<sup>617</sup> and EPA issuance of new source NPDES permits. In 1998

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<sup>611</sup> Memorandum on Environmental Justice, February 11, 1994, *available at* <https://www.govinfo.gov/content/pkg/WCPD-1994-02-14/pdf/WCPD-1994-02-14-Pg279.pdf>. The memorandum also indicates that, "[m]itigation measures outlined or analyzed in an environmental assessment, environmental impact statement, or record of decision, whenever feasible, should address significant and adverse environmental effects of proposed Federal actions on minority communities and low-income communities."

<sup>612</sup> This document uses the term "communities with environmental justice concerns" to refer to communities overburdened by pollution as identified in E.O. 12898. Those communities include communities of color, low-income communities, and Indigenous communities. Generally, where EPA has authority to consider impacts to those communities, EPA is also likely to have authority to consider equitable treatment of underserved communities consistent with E.O. 13985. "Underserved communities" in E.O. 13985 refers to populations sharing a particular characteristic, as well as geographic communities, that have been systematically denied a full opportunity to participate in aspects of economic, social, and civic life, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality.

<sup>613</sup> 40 C.F.R. parts 1500–1508.

<sup>614</sup> 40 C.F.R. § 1501.6.

<sup>615</sup> CEQ and EPA guidance emphasizes the importance of public participation in the scoping process. *See* CEQ's *Environmental Justice: Guidance Under the National Environmental Policy Act* (Dec. 10, 1997) at 10-13 and EPA's *Guidance for Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analyses* (Apr. 1998) at 4.0–4.1. *See also* 40 C.F.R. §§ 1501.9 and 6.203(a)(2).

<sup>616</sup> Pursuant to 40 C.F.R. § 1508.1(s), the term "mitigation" includes:

- (a) Avoiding the impact altogether by not taking a certain action or parts of an action.
- (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.
- (c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.
- (d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.
- (e) Compensating for the impact by replacing or providing substitute resources or environments.

<sup>617</sup> The WIFIA program prepared a Programmatic Environmental Assessment (PEA) analyzing the reasonably

EPA issued its *Guidance for Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analyses* to help ensure EPA fully considers and addresses environmental justice in its own NEPA reviews.<sup>618</sup> The guidance provides that if mitigation measures are determined to be necessary to reduce disproportionately high and adverse impacts, then the measures should be committed to in the FONSI or ROD.<sup>619</sup> In addition, it states that EPA's decision record should explain all alternatives and mitigation options that were analyzed. EPA also follows CEQ's 1997 guidance, *Environmental Justice: Guidance Under the National Environmental Policy Act*.<sup>620</sup>

In March 2016, the NEPA Committee of the Federal Interagency Working Group on Environmental Justice produced a report entitled *Promising Practices for EJ Methodologies in NEPA Reviews*.<sup>621</sup> While the report is not intended to be guidance, it provides a useful compilation of methodologies gleaned from current agency practices concerning environmental justice throughout the NEPA process.

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foreseeable environmental impacts related to the issuance of credit assistance under WIFIA. The PEA provides a streamlined NEPA compliance path for water and wastewater infrastructure projects through the use of an environmental questionnaire determining whether projects qualify for coverage under the PEA. The questionnaires and an EPA memorandum to the record include consideration of the potential for disproportionate impacts and reduction measures, if so. See, e.g., <https://www.epa.gov/wifia/wifia-programmatic-environmental-assessment-questionnaires>.

<sup>618</sup> The guidance is available at

[https://www.epa.gov/sites/default/files/2015-02/documents/ej\\_guidance\\_nepa\\_epa0498.pdf](https://www.epa.gov/sites/default/files/2015-02/documents/ej_guidance_nepa_epa0498.pdf).

<sup>619</sup> The guidance at 3.2.7 Mitigation Measures also describes the following possible steps to ensure mitigation is implemented and effective: establishing the mitigation as a requirement of the permit or authorizing document, requiring financing of the mitigation and clearly defined effectiveness monitoring, monitoring reporting (made available to the public), and clear consequences and penalties for failure to implement effective mitigation.

<sup>620</sup> The CEQ guidance at pp. 8–9 includes the following general principles for considering environmental justice under NEPA:

- Consider the composition of the affected area to determine whether minority, low-income, or tribal populations are present, and if so whether there may be disproportionately high and adverse human health or environmental effects on these populations.
- Consider relevant public health and industry data concerning the potential for multiple exposures or cumulative exposure to human health or environmental hazards in the affected population, as well as historical patterns of exposure to environmental hazards.
- Recognize the interrelated cultural, social, occupational, historical, or economic factors that may amplify the natural and physical environmental effects of the proposed action.
- Develop effective public participation strategies.
- Assure meaningful community representation in the process, beginning at the earliest possible time.
- Seek tribal representation in the process that is consistent with the government-to-government relationship between the United States and tribal governments, the federal government's trust responsibility, and any treaty rights.

The guidance also indicates that disproportionate impacts should be among the factors discussed in the ROD, and should also be addressed in any discussion of whether all practicable means to avoid or minimize adverse effects were adopted, and any monitoring and enforcement program. It adds that mitigation measures identified in an EIS or developed as part of a FONSI should reflect the needs and preferences of communities with environmental justice concerns, to the extent practicable. Pp. 15–16. The CEQ guidance is available at

[https://www.epa.gov/sites/default/files/2015-02/documents/ej\\_guidance\\_nepa\\_ceq1297.pdf](https://www.epa.gov/sites/default/files/2015-02/documents/ej_guidance_nepa_ceq1297.pdf).

<sup>621</sup> The report is available at: [https://www.epa.gov/sites/default/files/2016-08/documents/nepa\\_promising\\_practices\\_document\\_2016.pdf](https://www.epa.gov/sites/default/files/2016-08/documents/nepa_promising_practices_document_2016.pdf).



For purposes of environmental justice, when NEPA applies and the Agency prepares an EA or EIS, EPA NEPA regulations,<sup>622</sup> policy, and guidance call for EPA to, as applicable: (1) examine the direct and indirect effects of the EPA action on communities with environmental justice concerns, including health impacts and socio-economic impacts interrelated with effects on the physical environment; (2) analyze, from an environmental justice perspective, the cumulative impact of the action when added to other past, present, and reasonably foreseeable future activities (federal and non-federal);<sup>623</sup> (3) analyze reasonable alternatives that address any disproportionate impacts; (4) consider mitigation to address disproportionate impacts not included in the proposed action or alternatives;<sup>624</sup> and (5) provide for meaningful public review and comment on the draft EIS or EA, including the discussion of environmental justice.<sup>625</sup>

Under NEPA, EPA may consider in an EA or EIS environmental factors that are not expressly set forth in its organic statutes, regulations, or guidance. In addition, environmental justice analysis under NEPA can identify other EPA authorities or other federal authorities that may be relevant to addressing environmental justice concerns. While courts have held that NEPA is a procedural statute and does not expand the scope of an agency's regulatory jurisdiction, EPA can use the NEPA process to ensure broad consideration of environmental justice concerns and measures to address them, which can inform how EPA exercises its discretion -- including through preparation of voluntary EAs or EISs where NEPA does not apply. For example, where EPA's organic authority allows for two (or more) possible approaches to an issue, a NEPA environmental justice analysis may inform the choice of which approach to take. Similarly, an environmental justice analysis may help EPA identify an approach under the full range of its organic authorities that it might not otherwise have considered.

## **REVIEW OF FEDERAL ACTIONS UNDER SECTION 309**

Under § 309(a) of the CAA, EPA is required to review and comment on the environmental impacts of the actions of other federal agencies, including proposed regulations and projects subject to the EIS requirement in § 102(2)(C) of NEPA. In addition, pursuant to CAA § 309(b), if the Administrator determines, as a result of EPA's review, that a federal action is unsatisfactory from the standpoint of public health, welfare, or environmental quality, the Administrator must publish the determination and refer the matter to CEQ for resolution.<sup>626</sup> EPA's review under CAA § 309 is broad; it is not limited to environmental problems within EPA's jurisdiction, but instead to "the environmental impact of any matter relating to duties and responsibilities granted" to EPA. Consistent with the President's memorandum accompanying EO 12898, and because of the clear linkage between environmental justice and the broad criteria for an EPA referral to CEQ, EPA may

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<sup>622</sup> 40 C.F.R. part 6.

<sup>623</sup> This may include climate-related cumulative impacts that disproportionately impact communities with EJ concerns.

<sup>624</sup> Alternatives and mitigation may also include consideration of climate justice, i.e., reducing GHG emissions and promoting resilience and adaption in communities with EJ concerns.

<sup>625</sup> In its 2020 amendments to the NEPA regulations, CEQ eliminated the explicit regulatory requirement to assess indirect effects and cumulative impacts in CEQ's NEPA regulations, but recently proposed to restore them. The notice of the proposed rulemaking is available at <https://www.govinfo.gov/content/pkg/FR-2021-10-07/pdf/2021-21867.pdf>.

<sup>626</sup> See CEQ's regulations at 40 C.F.R. part 1504 for the procedures on referrals.

readily use the CAA § 309 review process not only to ensure other federal agencies “fully analyze” environmental justice concerns, but also fully *address* those concerns, as appropriate.

To help advance environmental justice through this review process, EPA issued its *Guidance for Consideration of Environmental Justice in Clean Air Act Section 309 Reviews* (July 1999).<sup>627</sup> This guidance document covers considering environmental justice at each stage of the CAA § 309 review process. It addresses pre-environmental-review activities, identifying communities of color and low-income communities, potential impacts, review of draft EISs, public participation, alternatives, mitigation,<sup>628</sup> and review of final EISs. Under the § 309 review process, EPA reviews and comments on a wide variety of federal projects with potentially significant environmental impacts. In its comment letters to sister agencies, EPA’s HQ and Regional programs routinely raise environmental justice issues, including the potential for disproportionate impacts on communities with environmental justice concerns, reasonable alternatives or practicable mitigation available to address the impacts, and agency commitments to alternatives or mitigation, as appropriate.<sup>629</sup>

EPA’s environmental review policy includes: 1) participating in interagency coordination early in the planning process to identify significant issues that should be addressed in completed documents, 2) conducting follow-up coordination where EPA identifies significant impacts to ensure a full understanding of issues and implementation of corrective actions, and 3) identifying environmentally unsatisfactory proposals and consulting with the relevant agencies, including CEQ, to achieve timely resolution of major issues.<sup>630</sup> EPA’s guidance notes that EPA’s involvement at scoping should be commensurate with the degree of environmental justice concerns, and that scoping letters may be supplemented with further detailed information, including mitigation measures. Independently, prior to completion of a draft EIS, EPA can assist with preparation of the public draft where EPA is a cooperating agency, either at the federal agency’s or EPA’s request.<sup>631</sup> This up-front work provides EPA an opportunity to encourage action agencies to commit to any necessary measures to address environmental justice concerns at the draft EIS stage. This would avoid the need for EPA to comment at the draft EIS stage -- consistent with EPA policy that if mitigation measures are determined to be necessary to reduce disproportionate impacts, “the measures should be committed to in the ROD.”<sup>632</sup> Up-front work can also afford communities with environmental justice concerns a more meaningful opportunity to comment on specific proposed protections at the draft EIS stage, rather than just an analysis of the issues and possible protections.

Should the action agency inadequately identify and address disproportionate impacts in the draft EIS, EPA comments may call for further analysis or commitments to substantive protective

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<sup>627</sup> The guidance is available at [https://www.epa.gov/sites/default/files/2014-08/documents/enviro\\_justice\\_309review.pdf](https://www.epa.gov/sites/default/files/2014-08/documents/enviro_justice_309review.pdf).

<sup>628</sup> *Id.* at § 2.3.5 Mitigation, stating that mitigation measures should be developed specifically to address potential disproportionately high and adverse effects to communities with environmental justice concerns, and providing detailed options for doing so.

<sup>629</sup> This includes climate justice concerns, i.e., reducing GHG emissions and promoting resilience.

<sup>630</sup> See Policy and Procedures For The Review of Federal Actions Impacting the Environment (1984), available at [https://www.epa.gov/sites/default/files/2014-08/documents/policy\\_and\\_procedures\\_for\\_the\\_review\\_of\\_federal\\_actions\\_impacting\\_the\\_environment.pdf](https://www.epa.gov/sites/default/files/2014-08/documents/policy_and_procedures_for_the_review_of_federal_actions_impacting_the_environment.pdf).

<sup>631</sup> See 40 C.F.R. § 1501.8(a).

<sup>632</sup> EPA 1999 Guidance, at § 2.3.5 Mitigation.

steps to address the concerns. Significant concerns may warrant an EPA recommendation to prepare a supplemental EIS for analytic deficiencies, or alerting the federal agency that the proposal may be a candidate for referral to CEQ, or both. A supplemental EIS involves revising the relevant portions of a draft EIS and taking additional public comment.<sup>633</sup> EPA guidance establishes criteria relevant to an EPA determination whether a proposal is unsatisfactory at the draft EIS stage, including whether significant impacts have been identified that should be avoided, and whether they are of national importance because of a threat to environmental policies.<sup>634</sup> Unaddressed disproportionately high and adverse impacts on a community with environmental justice concerns appear to readily meet those criteria. CEQ's referral regulations provide that lead agencies be notified at the earliest possible time of a potential referral (i.e., whenever practicable in comments on the EA or draft EIS).

At the FEIS stage, if EPA continues to have significant concerns and the Administrator determines the action is unsatisfactory, under the CEQ regulations addressing pre-decisional referrals, the referral must be made within 25 days unless an extension is granted from the action agency. Although the Administrator's discretion under § 309 is not time-limited and is substantively very broad, the CEQ regulations include impact criteria for referrals. In relevant part they include possible violations of national policies, severity, importance as precedent, and the availability of preferable alternatives. Should the Administrator refer a matter, the action agency is allowed 25 days to respond, and CEQ's recommended resolution is provided within 25 days, unless the action agency agrees to a longer time.<sup>635</sup>

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<sup>633</sup> See Policy and Procedures (1984), Chapter Four, sec. 4.b.(3); 40 C.F.R. § 1502.9(b).

<sup>634</sup> Policy and Procedures (1984), Chapter Four, sec. 4.a.(4).

<sup>635</sup> See 40 C.F.R. part 1504.



# **CHAPTER 7**

## **Civil Rights in Federal Assistance Programs**

## CHAPTER SEVEN: CIVIL RIGHTS IN FEDERAL ASSISTANCE PROGRAMS

Federal civil rights laws create independent obligations for recipients of EPA financial assistance, and EPA enforcement of these laws serves to advance equity and environmental justice. The presidential *Memorandum on Environmental Justice* accompanying EO 12898 recognized that both environmental and civil rights statutes provide opportunities to address environmental hazards in communities with environmental justice concerns.<sup>636</sup>

EPA enforces several federal civil rights laws that, together, prohibit discrimination on the bases of race, color, national origin (including limited-English proficiency (LEP)), disability, sex, age, and retaliation/intimidation in programs or activities that receive federal financial assistance from the EPA.<sup>637</sup> As implemented by EPA's nondiscrimination regulations, 40 C.F.R. parts 5 and 7, these laws create affirmative legal obligations and prohibit intentional discrimination as well as practices that have a discriminatory effect. The exercise of EPA's authority to enforce civil rights laws advances environmental justice and equity.

Federal civil rights laws and regulations require that recipients of federal assistance ensure their actions and inactions do not have unjustified adverse disparate impacts, taking into account cumulative impacts, and that persons not be treated differently or receive different benefits on the basis of race, color, national origin (including LEP), sex, disability and age with respect to environmental, health and quality of life benefits. The civil rights laws also require meaningful participation and equal access to the decision-making processes of recipients of EPA financial assistance, including for persons who are LEP and persons with disabilities.<sup>638</sup>

All applicants for and recipients of EPA financial assistance have an affirmative, ongoing obligation to comply with federal civil rights laws. This obligation applies to applicants and recipients of EPA funding, including state governments, local government agencies, and private corporations or organizations.<sup>639</sup> Recipients are on notice of these requirements—they are included as a term and condition of all EPA financial assistance.<sup>640</sup>

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<sup>636</sup> <https://www.govinfo.gov/content/pkg/WCPD-1994-02-14/pdf/WCPD-1994-02-14-Pg279.pdf>

<sup>637</sup> See 40 C.F.R. Part 7; Title VI of the Civil Rights Act of 1964 (42 United States Code §§ 2000d to 2000d-7); Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794); Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681 *et seq.*); Section 13 of the Federal Water Pollution Control Act Amendments of 1972 Pub. L. 92-500 § 13, 86 Stat. 903 (codified as amended at 33 U.S.C. § 1251); Age Discrimination Act of 1975 (42 U.S.C. § 6101 *et seq.*); 40 C.F.R. parts 5 and 7.

<sup>638</sup> See Title VI, 42 U.S.C. 2000(d); *Lau v. Nichols*, 414 U.S. 563, 568–69 (1974) (finding that the government properly required language services to be provided under a recipient's Title VI obligations not to discriminate based on national origin), 40 C.F.R. § 7.35(a). See also U.S. EPA, Guidance to Environmental Protection Agency Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons. 69 FR 35602 (June 25, 2004) ([https://www.epa.gov/sites/production/files/2020-02/documents/title\\_vi\\_lep\\_guidance\\_for\\_epa\\_recipients\\_2004.06.25.pdf](https://www.epa.gov/sites/production/files/2020-02/documents/title_vi_lep_guidance_for_epa_recipients_2004.06.25.pdf)). See also Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) (prohibiting discrimination based on disability).

<sup>639</sup> See 42 U.S.C. § 2000d-4a.

<sup>640</sup> See EPA General Terms and Conditions Effective October 1, 2021 at 25–26, available at [https://www.epa.gov/system/files/documents/2021-09/fy\\_2022\\_epa\\_general\\_terms\\_and\\_conditions\\_effective\\_october\\_1\\_2021.pdf](https://www.epa.gov/system/files/documents/2021-09/fy_2022_epa_general_terms_and_conditions_effective_october_1_2021.pdf).

Promoting civil rights compliance is an Agency-wide responsibility. The EPA External Civil Rights Compliance Office (ECRCO) conducts complaint investigations, compliance reviews, and pre-award reviews, and provides technical assistance to achieve external civil rights compliance.<sup>641</sup> ECRCO publishes guidance documents and conducts strategic planning to advance civil rights compliance.<sup>642</sup> Federal agencies have a legal mandate to terminate federal assistance or use “any other means authorized by law” to achieve compliance by EPA recipients.<sup>643</sup> Accordingly, EPA has a broad mandate to leverage all available legal tools – including environmental laws – to prevent discrimination in the programs or activities of applicants and recipients of federal financial assistance.

Each office has a role to play. For example, EPA programs and regions can alert and remind recipients of their civil rights obligations by including civil rights compliance in guidance. EPA programs and regions can also assist by coordinating with ECRCO and referring concerns to ECRCO for further review. They may seek civil rights information when engaging with recipients on environmental matters (e.g., commenting on SIPs or permits), and collaborate with ECRCO on how to respond to such information. Indeed, every touch point with an applicant for or recipient of EPA financial assistance presents an opportunity for the Agency to ensure civil rights compliance.

The discussion below highlights specific prohibitions and obligations under EPA’s nondiscrimination regulation, 40 C.F.R. parts 5 and 7.

## ***I. Specific Prohibitions and Obligations for Recipients***

Recipients of EPA financial assistance have an ongoing duty to ensure nondiscrimination in their programs and activities. This is not merely a negative duty (i.e., to refrain from discriminating). Rather, it is an affirmative obligation to comply with civil rights laws. This general duty applies to every aspect of the recipient’s programs and activities, as well as to the programs and activities of subrecipients of EPA funding.

- A. EPA’s nondiscrimination regulation contains specific prohibitions and obligations. As discussed in further detail below, recipients may not deny or limit services, aids and benefits in a discriminatory manner; take actions that have a discriminatory impact or effect; or site facilities in a manner that has a discriminatory purpose or effect. Additionally, recipients must collect, maintain, and provide data upon request of EPA. EPA’s nondiscrimination regulation at 40 C.F.R. parts 5 and 7 contains important baseline elements (referred to below as “procedural safeguards”)

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<sup>641</sup> EPA’s External Civil Rights Compliance Office (ECRCO) serves as the lead enforcement office and exercises the Agency’s broad authority to ensure nondiscrimination through pre-award review, compliance reviews, data collection, and complaint investigations. The Civil Rights and Finance Law Office (CRFLO) specializes in civil rights law and provides legal counsel to ECRCO and to programs throughout the Agency. Each Region designates a Deputy Civil Rights Official (DCRO) and an Office of Regional Counsel point of contact for external civil rights. Program offices throughout EPA support civil rights by reviewing grant applications, assisting with complaint investigations, and other activities.

<sup>642</sup> For a current list of ECRCO policy and guidance documents, see <https://www.epa.gov/ogc/ecrco-guidance-and-policies> (last visited November 15, 2021).

<sup>643</sup> See Section 602 of Title VI, 42 U.S.C.A. § 2000d-1; see also 28 C.F.R. § 42.401 *et seq.* (Department of Justice Title VI coordinating regulations).

that are legally required of recipients of EPA financial assistance. Prohibition against denial or limitation of services, aids and benefits

Many specific prohibitions concern discriminatory actions that deny or provide different services, aids and benefits based on a protected status (race, color, national origin (including limited English proficiency), disability, sex and age.<sup>644</sup> Under 40 C.F.R. § 7.35(a), recipients cannot on the basis of race, color, national origin or other prohibited classification:

- a) Deny a person any service, aid or other benefit of the program or activity;
- b) Provide a person any service, aid or other benefit that is different, or is provided differently from that provided to others under the program or activity;
- c) Restrict a person in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, aid, or benefit provided by the program or activity;
- d) Subject a person to segregation in any manner or separate treatment in any way related to receiving services or benefits under the program or activity;
- e) Deny a person or any group of persons the opportunity to participate as members of any planning or advisory body which is an integral part of the program or activity, such as a local sanitation board or sewer authority;
- f) Discriminate in employment on the basis of sex in any program or activity subject to § 13, or on the basis of race, color, or national origin in any program or activity whose purpose is to create employment; or, by means of employment discrimination, deny intended beneficiaries the benefits of EPA assistance, or subject the beneficiaries to prohibited discrimination.

In addition, in administering a program or activity receiving Federal financial assistance in which the recipient has previously discriminated on the basis of race, color, sex, or national origin, the recipient shall take affirmative action to provide remedies to those who have been injured by the discrimination. EPA's external civil rights regulation also provides similar specific prohibitions against discrimination based on disability and age.<sup>645</sup>

#### B. Prohibition against disparate impact or effect

Another important specific prohibition concerns actions that result in a disparate impact or discriminatory effect. 40 C.F.R. § 7.35(b) provides:

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<sup>644</sup> Published in 1984, EPA's nondiscrimination regulation uses the outdated term "handicapped." This document uses the term "disability" interchangeably with "handicapped" to reflect modern usage.

<sup>645</sup> See 40 C.F.R. §§ 7.50, 7.145.

A recipient shall not use criteria or methods of administering its program or activity which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program or activity with respect to individuals of a particular race, color, national origin, or sex.

The specific prohibition against taking actions with an unjustified disparate impact on the basis of race, color, or national origin provides a claim independent of any intent.<sup>646</sup> EPA thus may look beyond the intentional treatment of individuals and consider whether the *effects* of facially neutral actions result in subjecting individuals to discrimination. For example, if EPA has been asked to approve a siting decision, EPA could ask recipients to identify the demographics of the communities impacted by the decision and if the siting has a disparate impact on the basis of race color, or national origin, provide a justification for the decision and explain why alternate sites would not be as effective in meeting recipient's objective.

### C. Prohibition against discriminatory siting

EPA has authority under 40 C.F.R. part 7 to ensure that recipients' siting decisions do not have a discriminatory effect based on a protected status. EPA's nondiscrimination regulation specifically prohibits recipients from "choos[ing] a site or location of a facility that has the purpose or effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination under any program or activity to which this part applies on the grounds of race, color, or national origin or sex; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of this subpart."<sup>647</sup> This prohibition provides authority for EPA to address impacts on communities that are disproportionately impacted due to the siting of multiple polluting sources as well as the impacts of non-chemical stressors in the same area.

### D. Recipients' obligation to perform self-evaluation of disability and age discrimination

EPA has the authority to require most<sup>648</sup> recipients to perform a "self-evaluation" of their administrative policies and procedures with respect to disability and age discrimination.<sup>649</sup> The regulation does not limit the scope of the self-evaluation, and EPA has discretion to provide guidelines and technical assistance.

Requiring periodic self-evaluations of disability and age discrimination from recipients may serve as a powerful tool to ensure environmental justice principles like meaningful access to decision-making (e.g., digital accessibility, facilities accessibility). It may also be used to ensure that recipients consider disability and age when planning for extreme weather events and other disasters.<sup>650</sup> Consulting with "interested and involved" individuals with disabilities, and the

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<sup>646</sup> See Department of Justice *Title VI Legal Manual*, Section VII, available at <https://www.justice.gov/crt/fcs/T6Manual7#A> (last visited Nov. 15, 2021).

<sup>647</sup> 40 C.F.R. § 7.35(c).

<sup>648</sup> 40 C.F.R. § 7.85(c)(2) exempts recipients with fewer than 15 employees from performing the age self-evaluation; no such limit exists for the disability self-evaluation.

<sup>649</sup> 40 C.F.R. § 7.85(c).

<sup>650</sup> See Executive Order 14008 of Jan. 27, 2021, *Tackling the Climate Crisis at Home and Abroad*, 86 FR 7619 (directing federal agencies to promote environmental justice while addressing climate change).



organizations that represent the interests of individuals with disabilities,<sup>651</sup> as part of the disability self-evaluation may lead to important adjustments to the recipients' programs and activities.

EPA programs and regions can assist in these efforts by coordinating with ECRCO and referring concerns to ECRCO for further review.

#### E. Recipients' obligation to implement procedural safeguards

EPA's nondiscrimination regulation contains specific requirements to ensure environmental justice principles like fair access and meaningful involvement. These requirements, known as "procedural safeguards," require that recipients are equipped to respond appropriately to nondiscrimination matters, and that all persons are able to access the services, aids, and benefits of the recipient's program or activity. EPA periodically updates its technical assistance documents to help recipients comply with these requirements and best practices.<sup>652</sup> ECRCO has made available a checklist that contains six categories of requirements:

- (a) *Nondiscrimination notice.* All recipients must prominently post a notice of nondiscrimination.<sup>653</sup> The notice must be accessible to individuals with disabilities. Where appropriate, recipients must translate the notice in languages other than English.
- (b) *Grievance procedures.* Recipients with fifteen (15) or greater full-time employees must have grievance procedures that assure the prompt and fair resolution of complaints alleging violations of federal nondiscrimination laws and 40 C.F.R. parts 5 and 7.<sup>654</sup> EPA may periodically request a log of complaints filed under a recipient's grievance procedures.<sup>655</sup>
- (c) *Nondiscrimination coordinator.* Recipients with fifteen (15) or greater full-time employees must designate at least one person who coordinates efforts to comply with EPA's nondiscrimination regulation.
- (d) *Public participation.* To ensure that recipients comply with the specific prohibition against denying, restricting or otherwise providing different access to services, aids, and benefits of the recipient's program or activity based on a protected status, EPA requires that recipients ensure that their public involvement processes are available to all persons. EPA's public participation guidance provides recommendations for meeting this requirement.<sup>656</sup>

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<sup>651</sup> This consultation is required under 40 C.F.R. § 7.85(c)(1).

<sup>652</sup> See *Procedural Safeguards Checklist for Recipients* (revised Jan. 2020), available at [https://www.epa.gov/sites/default/files/2020-02/documents/procedural\\_safeguards\\_checklist\\_for\\_recipients\\_2020.01.pdf](https://www.epa.gov/sites/default/files/2020-02/documents/procedural_safeguards_checklist_for_recipients_2020.01.pdf)

<sup>653</sup> 40 C.F.R. § 7.95(a).

<sup>654</sup> 40 C.F.R. § 7.90(b) (providing that recipients with fewer than 15 employees are exempt, unless ECRCO finds a violation of 40 C.F.R. parts 5 and 7 or otherwise determines that grievance procedures "will not significantly impair the recipient's ability to provide benefits or services").

<sup>655</sup> 40 C.F.R. § 7.85(a).

<sup>656</sup> 71 FR 14207, 14210 (Mar. 21, 2006).

- (e) *Meaningful access for individuals with limited English proficiency (LEP).* The prohibition against national origin discrimination includes denying, restricting or otherwise providing different access to services, aids, and benefits of the recipient’s program or activity to individuals with LEP. Specific issues include providing free interpretation to allow for meaningful participation and translation of vital documents. EPA’s LEP guidance provides recommendations to recipients for meeting their nondiscrimination obligations with respect to language access.<sup>657</sup>
- (f) *Meaningful access for individuals with disabilities.* The prohibition against disability discrimination includes denying, restricting or otherwise providing different access to services, aids, and benefits of the recipient’s program or activity to individuals with disabilities. Specific issues include providing free interpretation services, auxiliary aids and services, and reasonable accommodations. Recipients’ facilities must be accessible for individuals with disabilities. Additionally, as described above, EPA has the authority to require most<sup>658</sup> recipients to perform a “self-evaluation of its administrative policies and procedures” with respect to disability discrimination.<sup>659</sup>

## ***II. Methods of Achieving Civil Rights Compliance to Promote Environmental Justice***

EPA ensures that recipients of federal financial assistance comply with civil rights laws by conducting complaint investigations and resolutions; initiating compliance reviews and providing proactive technical assistance; assessing the pre-award review form submitted by applicants (SF4700-4); and conducting other technical assistance and outreach activities.

Civil rights enforcement is an agency-wide responsibility. Among other things, EPA programs and regions can support external civil rights enforcement by reminding recipients of their affirmative obligation to prevent discriminatory treatment and impacts, considering ways to incorporate the requirements under 40 C.F.R. parts 5 and 7 into their review and decision-making processes, and by coordinating compliance efforts with ECRCO.

### A. Complaint Investigations

External civil rights complaints provide a mechanism for the voices of communities with environmental justice concerns to be heard and addressed.

Any person who believes that they or a specific class of persons has been discriminated against in violation of Part 7 may file a complaint with any EPA office.<sup>660</sup> For claims of disparate impact under EPA’s Title VI regulations, the administrative complaint process is the only available

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<sup>657</sup> 69 FR 35602 (June 25, 2004).

<sup>658</sup> 40 C.F.R. § 7.85(c)(2) exempts recipients with fewer than 15 employees from performing the age self-evaluation; no such limit exists for the disability self-evaluation.

<sup>659</sup> 40 C.F.R. § 7.85(c).

<sup>660</sup> For more information about EPA’s criteria for accepting complaints for investigation and enforcement procedures, see ECRCO Case Resolution Manual (January 2021) at 5, , available at [https://www.epa.gov/sites/default/files/2021-01/documents/2021.1.5\\_final\\_case\\_resolution\\_manual.pdf](https://www.epa.gov/sites/default/files/2021-01/documents/2021.1.5_final_case_resolution_manual.pdf).

forum for relief because Title VI complaints filed in federal courts are limited to claims of intentional discrimination.<sup>661</sup>

The Agency’s complaint investigation regulations present opportunities for the Agency to include communities with environmental justice concerns in the investigation and resolution processes. For example, complainants may produce information in the form of witness statements and relevant documentation. Additionally, EPA could involve complainants and affected environmental justice community members in the informal resolution or alternative dispute processes to ensure that all perspectives are considered.

Informal resolution with the recipient of EPA funding also presents an opportunity for creative solutions and problem-solving. Communities’ environmental justice concerns are varied, and so too must be the measures taken to address those concerns. Recipients can commit through the informal resolution process to take any number of actions, even if not expressly required under environmental regulations. For example, recipients may specifically commit to improve communication with communities, to provide public outreach and education in plain language, to report data not expressly required under environmental regulations, to plant trees, to install additional pollution monitors, and other measures. EPA can ensure that members of communities with environmental justice concerns play a meaningful role in crafting these solutions.

#### B. Post-award Compliance Reviews and Data Collection

Compliance reviews entail proactive Agency enforcement of external civil rights. The Agency has the authority to conduct periodic compliance reviews of any recipient’s programs or activities.<sup>662</sup> These compliance reviews may include information and data requests.<sup>663</sup> Under the current terms and conditions of EPA grants, a recipient acknowledges its affirmative obligation to ensure that its actions do not have discriminatory effects, and “must be prepared to . . . demonstrate how it is meeting its Title VI obligations.”<sup>664</sup>

Additionally, EPA has the authority to request “additional compliance information” where “necessary” to investigate a complaint alleging discrimination, or if there otherwise “is reason to believe that discrimination may exist in a program or activity” of a recipient.<sup>665</sup> EPA may also conduct on-site reviews when EPA has reason to believe that discrimination may be occurring in a recipient’s programs or activities.<sup>666</sup> The scope of this inquiry is broad and allows the Agency to collect any information needed to determine compliance.<sup>667</sup>

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<sup>661</sup> *Alexander v. Sandoval*, 532 U.S. 275 (2001).

<sup>662</sup> 40 C.F.R. § 7.115(a).

<sup>663</sup> 40 C.F.R. § 7.85(a); EPA Form 4700-4.

<sup>664</sup> See EPA General Terms and Conditions Effective October 1, 2021 at Section 39(c)(iii), available at [https://www.epa.gov/system/files/documents/2021-09/fy\\_2022\\_epa\\_general\\_terms\\_and\\_conditions\\_effective\\_october\\_1\\_2021.pdf](https://www.epa.gov/system/files/documents/2021-09/fy_2022_epa_general_terms_and_conditions_effective_october_1_2021.pdf).

<sup>665</sup> 40 C.F.R. § 7.85.

<sup>666</sup> 40 C.F.R. § 7.115.

<sup>667</sup> Under 40 C.F.R. § 7.85(b), additional compliance data and information should be (1) specific to certain programs or activities (2) limited to data and information which is relevant to determining compliance; and (3) accompanied by a written statement summarizing the complaint or setting forth the basis for the belief that discrimination may exist.

### C. Pre-Award Compliance

EPA has broad authority to ensure civil rights compliance before awarding EPA financial assistance. *Pre-award review* is intended to ensure that applicants' policies and practices comply with civil rights laws and ensure equal access to decision-making processes.

EPA's General Terms and Conditions applicable to applicants for EPA financial assistance include detailed requirements for complying with federal civil rights laws and EPA's nondiscrimination regulation. All applicants for EPA assistance must submit with their applications an assurance stating that they will comply with the requirements under 40 C.F.R. parts 5 and 7 and not discriminate on the basis of race, color, national origin, sex, age and disability.<sup>668</sup>

All applicants for EPA assistance must submit information via EPA Form 4700-4.<sup>669</sup> The information includes:

- a) a list of discrimination lawsuits and administrative complaints pending against or decided against the applicant;
- b) a list of civil rights compliance reviews conducted by any other agencies; information about the recipient's nondiscrimination notice (i.e., whether the notice has been published and "posted in a prominent place" and accessible to individuals with disabilities);
- c) information about the applicant's nondiscrimination coordinator; information about grievance procedures;
- d) an assurance that newly constructed facilities will be accessible for individuals with disabilities; and
- e) information about the recipient's policy/procedure for providing access to services for persons with LEP.

This list is not exhaustive and is the floor, not the ceiling. 40 C.F.R. § 7.80(a)(1) provides that applicants must submit "any other information that [ECRCO] determines is necessary for preaward review." This regulatory language provides authority to seek additional information where "necessary" to ensure, among other things, that applicants have resolved any pending nondiscrimination complaints, and that they have sufficient procedural safeguards (i.e., grievance procedures, nondiscrimination statement, policy that ensures accessibility for individuals with disabilities and limited English proficiency).

### D. Fund Termination and Other Actions

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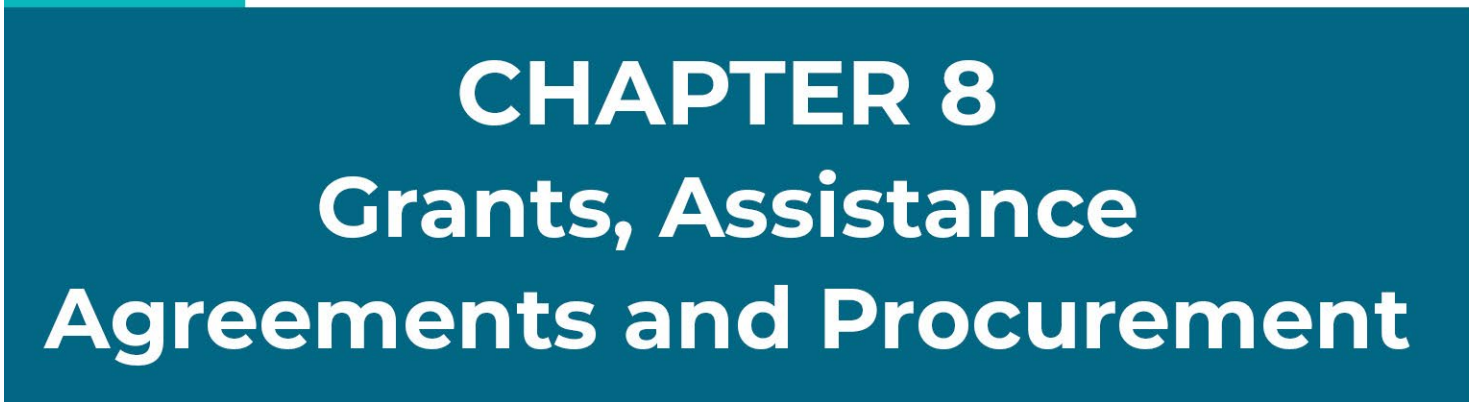
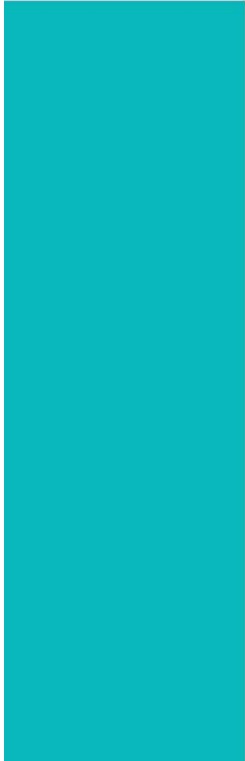
<sup>668</sup> 40 C.F.R. § 7.80(a)(1).

<sup>669</sup> The current EPA Form 4700-4 is available at [https://www.epa.gov/sites/default/files/2014-09/documents/epa\\_form\\_4700\\_4.pdf?VersionId=p592AfB5VNxDfSkzr5x8E159m2.KxTF3](https://www.epa.gov/sites/default/files/2014-09/documents/epa_form_4700_4.pdf?VersionId=p592AfB5VNxDfSkzr5x8E159m2.KxTF3).

If informal resolution efforts fail, after investigation EPA will notify the recipient of its preliminary findings and make recommendations for achieving voluntary compliance. Where a preliminary determination of noncompliance does not result in voluntary compliance, EPA shall issue a formal determination of noncompliance with a requirement that the recipient come into voluntary compliance.

EPA may also choose to begin proceedings to annul, terminate, refuse to award, or refuse to continue assistance. The proceedings may, at the request of the applicant or recipient, include a hearing before an administrative law judge (ALJ). The ALJ's determination becomes the Administrator's final decision in the event the applicant or recipient does not file exceptions to the ALJ's determination. In cases of review by the Administrator, all parties may submit written statements. If the Administrator's decision is to deny an application, or annul, suspend or terminate assistance, the decision does not become final until 30 days after she submits a full written report of the circumstances and grounds for the action to the House and Senate committees having legislative jurisdiction over the EPA program involved. The Administrator's decision is not subject to review under the general grant regulations.

The Agency may use any other means authorized by law to obtain compliance, including referral of the matter for enforcement to the U.S. Department of Justice. If EPA pursues litigation, the objective would likely be to obtain injunctive relief to end or mitigate the discrimination.



# **CHAPTER 8**

## **Grants, Assistance Agreements and Procurement**

# CHAPTER EIGHT: GRANTS, ASSISTANCE AGREEMENTS AND PROCUREMENT

## I. GRANTS FOR ENVIRONMENTAL JUSTICE PROJECTS

EPA manages an environmental justice grants program<sup>670</sup> that provides financial assistance to eligible organizations working on or planning to work on projects to address local environmental and/or public health issues in their communities.<sup>671</sup> The program also provides financial assistance to eligible organizations to build collaborative partnerships, to identify the local environmental and/or public health issues, and to support communities with environmental justice concerns<sup>672</sup> as they envision solutions and empower themselves.<sup>673</sup> The Agency's statutes authorize these grants, which provide assistance for demonstrations, research, surveys, and training. Eligible environmental justice activities include:

- (1) Demonstrations or analysis of environmental justice conditions and problems (for example, socio-economic impact studies);
- (2) Projects to research specific local environmental justice issues; and
- (3) Environmental justice training or education for community residents, teachers, or related personnel.

## II. RESEARCH, DEVELOPMENT, AND TRAINING GRANTS UNDER ENVIRONMENTAL STATUTES

The Environmental Justice Grant Program implements statutes that give EPA broad authority to support activities including research, development, training, surveys, investigations, and demonstrations related to pollution of particular environmental media.<sup>674</sup> For example, Clean Water Act § 104(b)(3) authorizes EPA to make grants for activities related to water pollution to

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<sup>670</sup> The term “grants” as used in this chapter includes cooperative agreements as well as grants. Both are assistance agreements; they differ only in the extent of Agency involvement in the project.

<sup>671</sup> See Environmental Justice Collaborative Problem-Solving Cooperative Agreement Program at <https://www.epa.gov/environmental-justice/environmental-justice-collaborative-problem-solving-cooperative-agreement-0>.

<sup>672</sup> This document uses the term “communities with environmental justice concerns” to refer to communities overburdened by pollution as identified in EO 12898. Those communities include communities of color, low-income communities, and Indigenous communities. Generally, where EPA has authority to consider impacts to those communities, EPA is also likely to have authority to consider equitable treatment of underserved communities consistent with EO 13985. “Underserved communities” in EO 13985 refers to populations sharing a particular characteristic, as well as geographic communities, that have been systematically denied a full opportunity to participate in aspects of economic, social, and civic life, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality.

<sup>673</sup> See Environmental Justice Small Grants Program at <https://www.epa.gov/environmentaljustice/environmental-justice-small-grants-program>.

<sup>674</sup> The authorities under which these environmental justice grants will be awarded are: CWA § 104(b)(3), SDWA § 1442(c)(3), SWDA § 8001(a), CAA § 103(b)(3), TSCA § 10(a), FIFRA § 20(a), CERCLA § 311(c), and MPRSA § 203.

state agencies, other public or nonprofit private organizations, and individuals. Similarly, consistent with EPA's competition policy, EPA could make a grant under Solid Waste Disposal Act § 8001(a) to a community association for a survey of health and welfare effects of a local landfill. The authority to fund these "research and demonstration" activities is well established. Projects funded under these authorities and other EPA authorities have the potential to make a significant impact in identifying issues of environmental justice concern and establishing a foundation for developing corrective actions. The Agency must comply with the Office of Management and Budget (OMB) regulations implementing the Paperwork Reduction Act when funding any information-gathering activities under such a grant.

### **III. SUPERFUND TECHNICAL ASSISTANCE GRANTS**

CERCLA § 117(e) authorizes EPA to make Technical Assistance Grants (TAGs) of up to \$50,000 to groups of individuals affected by Superfund sites. TAGs help communities obtain technical assistance from independent experts who can interpret site information to promote better understanding of a site and more meaningful public participation in the clean-up decision-making process. TAGs are subject to most Agency-wide general grant regulations, but often with less formal requirements. TAGs are based on an established legal mechanism for providing assistance to communities impacted by Superfund sites. TAGs awarded to eligible communities with environmental justice concerns advance environmental justice by providing those groups with information that would enable them to participate in the environmental decision-making process.

### **IV. NATIONAL AND COMMUNITY SERVICE ACT**

Under the 1993 amendments to the National and Community Service Act,<sup>675</sup> EPA and other federal agencies may enter into interagency agreements with the Corporation for National and Community Service (the Corporation) for service programs that address established priorities: the environment, public safety, human needs, and education. Agencies may use these funds to implement their own programs or to enter into contracts or cooperative agreements with entities that are carrying out national service programs in the States. EPA can consult with the Corporation about the availability of funding under this authority, and, if available, seek to enter into interagency agreements for projects that advance environmental justice.

### **V. NATIONAL ENVIRONMENTAL EDUCATION ACT**

Section 6 of the National Environmental Education Act<sup>676</sup> authorizes EPA to award grants for projects to design, demonstrate, or disseminate practices, methods, or techniques related to environmental education and training. EPA is authorized to support projects that address environmental issues which, in the judgment of the Administrator, are of high priority; these could include projects that advance environmental justice. EPA annually solicits applications for § 6 grants from local education agencies, colleges and universities, state education and environmental agencies, nonprofit organizations, and noncommercial educational broadcasting entities. Each recipient must meet a 25 percent cost-sharing requirement. No grant awarded under § 6 may exceed \$250,000, and 25 percent of the funds awarded under this provision each year must be for grants of not more than \$5,000.

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<sup>675</sup> 42 U.S.C. § 12571.

<sup>676</sup> 20 U.S.C. § 5505.



## **VI. ASSISTANCE AGREEMENTS WITH TRIBAL GOVERNMENTS**

As discussed in Chapter Five, enhancing tribes' ability to manage their lands and to participate and assist in the implementation of environmental programs typically will advance environmental justice and help them address concerns they may have.

### ***A. Assistance Available to Tribes***

Some of EPA's organic statutes that authorize EPA to provide assistance to states also authorize the Agency to award assistance to federally recognized tribal governments. EPA awards environmental program grants to tribes under CAA § 105 (air pollution control), CWA §§ 106 and 108 (water pollution control), CWA § 104(b)(3) (water quality cooperative agreements; wetlands development grants), CWA §§ 319(h) and 518(f) (nonpoint source management grants), FIFRA § 23(a)(1) and (2) (pesticide cooperative enforcement; pesticide program implementation; and pesticide applicator certification and training), PPA § 6605 (pollution prevention grants), SDWA §§ 1433(a), (b) and 1451 (public water system supervision; underground water source protection), TSCA § 404(g) (lead-based paint program), TSCA § 306 (indoor radon grants), TSCA § 28 (toxic substances compliance monitoring), Public Law 105-276 (hazardous waste management program grants; underground storage tank program grants), and CERCLA § 128(a) (tribal response program grants). Regulations governing these assistance agreements may be found in 40 C.F.R. part 35, subpart B. In addition to these grant programs, tribes are also eligible for Superfund Cooperative Agreements under CERCLA § 104(d) that are awarded and administered in accordance with 40 C.F.R. part 35, subpart O (EPA's Superfund response action grant regulations applicable to state, local, and tribal governments).

### ***B. Indian Environmental General Assistance Program Act***

The Indian Environmental General Assistance Program Act of 1992 (IEGAPA)<sup>677</sup> authorizes EPA to make grants to Indian tribes and intertribal consortia to build capacity to administer environmental protection programs and to implement solid and hazardous waste programs in Indian country. In accordance with the Consolidated Appropriations Act, 2018 (Public Law No: 115-141), GAP may also fund solid waste and recovered materials collection, transportation, backhaul, and disposal services. General Assistance Program (GAP) grants under the IEGAPA must be for at least \$75,000 and the term of an award may not exceed four years. GAP grants are awarded non-competitively.

### ***C. Direct Implementation Tribal Cooperative Agreements***

EPA's annual appropriations act typically authorizes EPA to enter into Direct Implementation Tribal Cooperative Agreements (DITCAs) with federally recognized Indian tribes or intertribal consortia to assist EPA in implementing federal environmental programs required or

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<sup>677</sup> 42 U.S.C. § 4368b.

authorized by law in the absence of an acceptable tribal program. EPA works closely with tribes to identify DITCA-eligible activities and to determine those direct implementation activities where there is a joint tribal and EPA priority for program implementation. DITCAs are awarded non-competitively.

### ***C. Indian Self-determination Act Preference***

The Indian Self-Determination Act requires, to the greatest extent feasible, tribal grantees to give preference and opportunities in the award of contracts, subcontracts, and subgrants to Indians.<sup>678</sup>

## **VII. BROWNFIELDS REVITALIZATION FUNDING**

The Brownfields revitalization funding authority under CERCLA § 104(k) authorizes EPA to, among other things, make grants for site characterization, assessment, and cleanup, as well as for the capitalization of revolving loan funds for remediation of Brownfield sites. The statute also authorizes EPA to provide, or support with financial assistance, Brownfields-related research, training, and technical assistance. Eligibility for grants for site characterization, assessment, and capitalization of revolving loan funds is limited to governmental entities or certain types of quasi-governmental organizations that are connected to governments.

In authorizing the Agency to make grants under this authority, CERCLA directs the Administrator to establish a system for ranking grant applications. The statute contains twelve ranking criteria, including the extent to which a grant would address or facilitate the identification and reduction of threats to the health or welfare of children, pregnant women, people of color, low-income communities, or other sensitive populations, which could include cumulative impacts; the extent to which a grant would address or facilitate the identification and reduction of threats to human health and the environment, including threats in areas in which there is a greater-than-normal incidence of disease or conditions that may be associated with exposure, which could include cumulative exposures, to hazardous substances, pollutants, or contaminants; and the extent to which a grant would meet the needs of a community that is unable – because of the small population or low income of the community – to draw on other sources of funding for environmental remediation and subsequent redevelopment of the area in which a Brownfield site is located.<sup>679</sup>

## **VIII. GRANT CONDITIONS**

### ***A. Conditions Related to Goals of the Statute***

EPA may place conditions on any grant award if the conditions are directly related to the goals of the statute authorizing the award.<sup>680</sup> In *Shanty Town Associates Ltd. Partnership v. EPA*, the court held that EPA acted within its CWA authority in conditioning a Title II grant to a municipality for construction of a sewage collection system. EPA's environmental impact statement found that the new sewage system would induce development and therefore increase nonpoint source pollution from the area served. The Agency inserted in the grant to the city a

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<sup>678</sup> See 25 U.S.C. § 5307(b) and 2 C.F.R. § 200.101(d).

<sup>679</sup> 42 U.S.C. § 9604(k)(6)(C)(i)-(xii).

<sup>680</sup> *Shanty Town Assocs Ltd. P'ship v. EPA*, 843 F.2d 782 (4th Cir. 1988).

condition limiting the use of the new system to existing development. A developer challenged the condition on the ground that it was not related to the purpose of the grant, which was sewage treatment works construction, not land use control or nonpoint source management. The court held that, although CWA Title II does not mention use limitations, EPA had authority to impose them as a condition because they were directly related to the goals of the CWA.

EPA may consider including in appropriate grants special conditions aimed at advancing environmental justice. Grants that might be appropriate for such a condition include, but are not limited to, National Estuary Program grants under CWA § 320(g), state/tribal cooperative agreements under CERCLA § 104, and state continuing environmental program grants.<sup>681</sup> However, any condition should be written in terms of implementing a goal of the act authorizing the grant. Indeed, the more closely aligned the grant condition is to the statutory goals the more legally defensible the condition will be. For example, a condition requiring the grantee to consider cumulative impacts, unique exposure scenarios, or sensitive populations would arguably be directly related to a statute's goal of protecting human health.

One avenue EPA could use to ensure that environmental justice considerations are considered in determining the activities to be funded under state and tribal environmental program grants is to include environmental justice in the national goals, objectives, and priorities of each program as expressed through the National Program Guidance. Including environmental justice in the National Program Guidance for each program would provide EPA with a basis for negotiating activities into recipient work plan commitments. National Program Guidance is an appropriate means to provide a framework for addressing environmental justice considerations in each program and each award because work plans should reflect program priorities outlined in the National Program Guidance.<sup>682</sup> And, by signing the grant documents, the grant recipient will have expressly accepted the conditions imposed by the terms of the grant.

In addition to civil rights enforcement described in Chapter 7, EPA also enforces the terms and conditions of grants through the remedies and disputes process under the general grant regulations.<sup>683</sup>

### ***B. Environmental Justice in Evaluation Criteria***

Each Request for Proposals (RFP) issued in competitive grant programs contains an explanation of the evaluation criteria the Agency uses to evaluate the merits of each applicant's grant proposal. Where appropriate, EPA could incorporate environmental justice considerations into its stated evaluation criteria. Any evaluation criteria included in an RFP must be consistent with the goals of the act authorizing the grant and must be consistent with any evaluation criteria stated in that act.<sup>684</sup>

The Agency's current sample evaluation criteria that EPA grant programs may use for

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<sup>681</sup> Continuing environmental program grants are awarded under CWA §§ 106 and 319, SDWA § 1443, SWDA § 3011, CAA § 105, TSCA § 28, and FIFRA § 23.

<sup>682</sup> 40 C.F.R. §§ 35.107, 35.507.

<sup>683</sup> 2 C.F.R. part 200.

<sup>684</sup> *See, e.g., Ill. Env't Prot. Agency v. EPA*, 947 F.2d. 283 (7th Cir. 1991).

competitive grants to advance environmental justice and underserved communities is as follows:<sup>685</sup>

#### Environmental Justice and Underserved Communities (xx points)

Applications will be evaluated based on the extent to which they demonstrate how the project will address the disproportionate and adverse (see below) human health, environmental, climate-related and other cumulative impacts, as well as the accompanying economic challenges of such impacts, resulting from industrial, governmental, commercial and/or other actions that have affected and/or currently affect the underserved communities described in Section I of the solicitation. As part of this evaluation, applications will be evaluated based on: how the project benefits the underserved communities including those that have experienced a lack of resources or other impediments to addressing the impacts identified above that affect their community and; the extent to which the project addresses engagement with these communities, especially local residents in these communities who will be affected by the project, to ensure their meaningful participation with respect to the design, project planning, and performance of the project.

Disproportionate and adverse environmental, human health, climate-related and other cumulative impacts, as well the accompanying economic challenges of such impacts, may result when greater pollution burdens and/or consequences, and the impact of them, are more likely to affect or have affected the underserved communities described in this solicitation. The impacts may result from various factors including but not limited to being a function of historical trends and policy decisions.

Factors that may indicate disproportionate and adverse impacts as referenced above include: differential proximity and exposure to adverse environmental hazards; greater susceptibility to adverse effects from environmental hazards (due to causes such as age, chronic medical conditions, lack of health care access, or limited access to quality nutrition); unique environmental exposures because of practices linked to cultural background or socioeconomic status (for example, subsistence fishing or farming); cumulative effects from multiple stressors; reduced ability to effectively participate in decision-making processes (due to causes such as lack of or ineffective language access programs, lack of programs to make processes accessible to persons with disabilities, inability to access traditional communication channels, or limited capacity to access technical and legal resources); and degraded physical infrastructure, such as poor housing, poorly maintained public buildings (e.g., schools), or lack of access to transportation.

Environmental justice considerations incorporated into evaluation criteria may be reflected in the terms and conditions of the grant award, as appropriate.

### ***C. Specific Conditions for Grantees***

EPA is responsible for ensuring civil rights compliance by applicants and recipients of federal funds. The general grant regulations at 2 C.F.R. § 200.208 allow EPA to impose certain

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<sup>685</sup> For the current sample grant evaluation criteria for EPA grant programs, *see* [https://intranet.epa.gov/ogd/competition/compet/developing\\_evaluation\\_criteria\\_ranking.pdf](https://intranet.epa.gov/ogd/competition/compet/developing_evaluation_criteria_ranking.pdf).

conditions or restrictions on a recipient based, among other things, on a risk evaluation during the pre-award stage of the grants process. A recipient or subgrantee may be considered for specific conditions if EPA determines, for example, that it has a history of unsatisfactory performance, has not conformed to terms and conditions of previous awards, or is otherwise not responsible. Specific conditions or restrictions may include withholding authority for advance payments, or withholding authority to proceed to the next phase before receipt of evidence of acceptable performance within a given funding period; additional project monitoring; or requiring the recipient or subgrantee to obtain technical or management assistance. As a short-term measure the Agency could consider adding specific conditions for recipients when there is evidence of current or past practices that are inconsistent with grant requirements related to civil rights and non-discrimination, e.g., those reflected in the Title VI regulations. The Agency would need to make a determination of whether a specific condition is appropriate through information gathered in a pre-award review, an audit of the recipient's past performance, or using other available information.

#### ***D. Disadvantaged Business Enterprises***

EPA promotes nondiscrimination in the award of contracts under EPA financial assistance agreements through its regulations at 40 C.F.R. part 33. Financial assistance recipients are required to make good faith efforts to meet negotiated fair share objectives for disadvantaged-business-enterprise participation in procurement under financial assistance agreements. Each procurement contract signed by an EPA financial assistance agreement recipient must include a term and condition that incorporates the requirements of part 33.

### **IX. REMEDIES FOR NON-COMPLIANCE WITH GRANT CONDITIONS**

#### ***A. Remedies***

EPA's regulations establishing administrative requirements for grants to states, local governments, Indian tribes and other recipients are found at 2 C.F.R. parts 200 and 1500. Under the regulations, if a recipient fails to comply with any term or condition of a grant agreement, EPA may take one or more of the following actions:<sup>686</sup>

- (1) issue a stop-work order;
- (2) withhold payments;
- (3) suspend or terminate the agreement;
- (4) annul the agreement, wholly or partly, and recover all awarded funds (Part 200 sets forth grounds for annulment); (5) withhold further awards for the program; and
- (6) seek other remedies legally available.

#### ***B. Disputes***

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<sup>686</sup> See 2 C.F.R. §§ 1500.13, 200.339, as applicable.

Grant recipients and applicants that wish to dispute an Agency action, including a decision to take one of the remedial actions listed above, may pursue the administrative dispute resolution process set forth in the regulations at 2 C.F.R. part 1500, subpart E.<sup>687</sup> Persons other than a grant applicant or recipient may not bring a dispute challenging a grant action under these regulations, although they may informally petition the Agency. The dispute resolution process seeks to resolve matters through a relatively simple and informal EPA management review.

## **PROCUREMENT TOOLS FOR ADDRESSING ENVIRONMENTAL JUSTICE**

There are various statutory and regulatory procurement authorities that EPA could utilize to advance environmental justice. There are several existing government-wide policies designed to provide “maximum practicable opportunities” in the award of contracts and subcontracts to small business concerns owned by “socially and economically disadvantaged” groups as well as businesses located in areas of high unemployment. These existing government policies are included in the Federal Acquisition Regulation (FAR),<sup>688</sup> which regulates agencies’ procurement of supplies and services.

EPA could use these existing policies to help provide economic empowerment to communities that have traditionally had environmental justice issues.

EPA could also seek to advance environmental justice in its procurements through the incorporation of environmental justice tasks in procurement statements of work and environmental justice considerations in evaluation criteria.

### **I. EXISTING PROCUREMENT MECHANISMS THAT COULD BE USED TO PROMOTE ENVIRONMENTAL JUSTICE**

FAR 19.201 expresses the policy that “maximum practicable opportunities” be directed towards small-disadvantaged business concerns and small business concerns located in Historically Underutilized Business Zones.

#### ***A. The “8(a)” Program***

Section 8(a) of the Small Business Act authorizes the Small Business Administration (SBA) to enter into contracts with other federal agencies and to perform those contracts by subcontracting to “socially and economically disadvantaged small business concerns.”<sup>689</sup> Such entities are small businesses if: (1) they are at least 51 percent owned by one or more socially and economically disadvantaged individuals; and (2) management and daily business operations are controlled by one or more of such individuals.<sup>690</sup>

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<sup>687</sup> The dispute resolution procedures in 2 C.F.R. part 1500, subpart E apply to all applicants and recipients.

<sup>688</sup> 48 C.F.R. parts 1–53.

<sup>689</sup> 15 U.S.C. § 637(a).

<sup>690</sup> 15 U.S.C. § 637(a)(4).

Participants in the 8(a) program must satisfy both the social and economic disadvantage requirements. For purposes of the 8(a) program, the following definitions apply:

- “Socially disadvantaged individuals” are “those who have been subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups without regard to their individual qualities.”<sup>691</sup>

They presumptively include African Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and Subcontinent Asian Americans.<sup>692</sup>

- “Economically disadvantaged individuals” are “socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to [non-socially disadvantaged individuals] in the same or similar line of business” In determining whether an individual is “economically disadvantaged,” SBA specifically considers: (i) the personal financial condition of the individual claiming disadvantaged status; and (ii) the individual’s ability to obtain access to credit and capital needed to operate a competitive business enterprise.<sup>693</sup>

Under the 8(a) program, SBA assists disadvantaged small businesses in the making and performance of contracts by helping procuring agencies identify potential 8(a) contracts, matching the needs of 8(a) firms with available contracts, and promoting continuity of awards. SBA also establishes the fair market value price the procuring agency would pay for the contracted goods and services. Under the 8(a) program, awards may be made on either a sole source or competitive basis.

The policies for assisting small and disadvantaged businesses in government procurements are similar to the tenets underlying environmental justice. Many of the groups defined as “socially and economically disadvantaged” for procurement purposes are those that have been subject to the types of disproportionate environmental burdens that environmental justice is designed to address. In order to promote environmental justice, EPA could more aggressively award contracts under the small and disadvantaged business programs.

### ***B. Policies Favoring Small Business Entities Located in Historically Underutilized Business Zones (HUBZones)***

The Historically Underutilized Business Zone (HUBZone) Act of 1997 created the HUBZone program whereby the federal government provides contracting help for qualified small business entities located in historically underutilized business zones “to increase employment opportunities, investment, and economic development in those areas.”<sup>694</sup> Under the HUBZone program, there can be a HUBZone set-aside for acquisitions exceeding the micropurchase threshold (currently \$10,000) if the contracting officer has a reasonable expectation that offers will be received from two or more HUBZone small business entities and the award will be made at a fair market price. Further, a contracting officer may make a sole-source award to a HUBZone entity without considering small business set-asides only if one HUBZone small business entity can

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<sup>691</sup> 13 C.F.R. § 124.103(a).

<sup>692</sup> 13 C.F.R. § 124.103(b).

<sup>693</sup> 13 C.F.R. § 124.104.

<sup>694</sup> See 15 U.S.C. § 631 and FAR Subpart 19.13.

satisfy the applicable requirements and if certain dollar thresholds are exceeded.<sup>695</sup> Also, a price evaluation preference can be used for HUBZone small business concerns in acquisitions conducted using full and open competition.<sup>270</sup>

These policies favoring HUBZone concerns can promote economic empowerment within “urban or rural areas with high proportions of unemployed or low-income individuals.”<sup>696</sup>

### ***C. Indian Incentive Program***

In addition to the above, FAR 26.100 implements 25 U.S.C. § 1544, which provides an incentive to prime contractors that use Indian organizations and Indian-owned economic enterprises as subcontractors. In short, the Indian Incentive Program allows an incentive payment equal to five percent (5%) of the amount paid to a subcontractor in performing the contract, if the contract so authorizes and the subcontractor is an Indian organization or Indian-owned economic enterprise.<sup>697</sup>

## **II. OTHER POTENTIAL PROCUREMENT TOOLS TO ADVANCE ENVIRONMENTAL JUSTICE**

### ***A. Environmental Justice as Part of Statements of Work and Evaluation Criteria***

The Agency could immediately specify environmental justice tasks in its procurement statements of work so long as those tasks state the Agency’s minimum needs and further the Agency’s mission.<sup>698</sup> Environmental justice considerations could be incorporated into evaluation criteria as long as the criteria represent the key areas of importance and emphasis to be considered in the source selection decision.<sup>699</sup> For example, under the appropriate circumstances, the quality of an offeror’s past performance on environmental justice work could be considered by the Agency as a factor in the award selection process.

### ***B. Require Successful Contractors to Incorporate Environmental Justice (By Sub-contractor or Employment) in Performing the Contract Work***

EPA could potentially require its contractors to promote environmental justice in performing EPA contracts through subcontracting targeted based on environmental justice considerations. Such a requirement would have to be promulgated as an EPA Acquisition Regulation and go through notice and comment rulemaking in accordance with the Office of Federal Procurement Policy Act<sup>700</sup> before it could be utilized by the Agency.

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<sup>695</sup> See FAR 19.1306-19.307.

<sup>696</sup> See 15 U.S.C. § 631(d)(1).

<sup>697</sup> See FAR 26.102.

<sup>698</sup> See 41 U.S.C. § 3304 (formerly cited as 41 U.S.C. § 253).

<sup>699</sup> FAR 15.304(b).

<sup>700</sup> 41 U.S.C. § 1707 (formerly cited as 41 U.S.C. § 418b).





# **CHAPTER 9**

## **Freedom of Information Act**



## CHAPTER NINE: FREEDOM OF INFORMATION ACT

Access to public information about human health and the environment is a key element of advancing environmental justice under EO 12898 and its accompanying Presidential memorandum. Section 5–5(c) of EO 12898 provides for federal agencies to “work to ensure that public documents, notices, and hearings relating to human health or the environment are concise, understandable, and readily accessible to the public.”<sup>701</sup> In addition, the Presidential memorandum specifically directs agencies to “ensure that the public, including minority communities and low-income communities, has adequate access to public information relating to human health or environmental planning, regulations, and enforcement when required under the Freedom of Information Act.”<sup>702</sup>

This chapter discusses well-established legal authorities under the Freedom of Information Act (FOIA).<sup>703</sup> The process identified below has the potential for a high level of impact in advancing environmental justice. In summary, EPA could consider proposing modifications to EPA’s FOIA regulations to advance environmental justice, as well as update EPA’s internal FOIA policy and procedures. Either separately or in combination, regulatory changes, complementary updates to the internal policy and procedures, increased outreach and training for communities with environmental justice concerns<sup>704</sup> and interested groups, and improved attention to accessibility of information for communities with environmental justice concerns could advance EPA’s commitment to environmental justice in a number of ways.

### I. BACKGROUND REGARDING FOIA PROCESSES

FOIA provides the public with access to information about the activities of federal executive agencies. It also contains important exemptions that protect certain classes or types of information. A FOIA request is generally a request to a federal agency for access to records concerning another person (as opposed to the requester), an organization within the agency, or a particular topic of interest. In 2009, the Obama Administration issued two memoranda to the heads of agencies, committing to a new level of openness in government and stressing the importance of FOIA in that pursuit.

Over the past few years, the Agency has moved in the direction of more FOIA accountability and reduction of its FOIA backlog. Proactive disclosure of information as a means of eliminating the need for the public to file a FOIA request provides broader access to

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<sup>701</sup> The Presidential memorandum is available at <https://www.ncbi.nlm.nih.gov/books/NBK100855/>.

<sup>702</sup> *Id.* (note that this quote is from the *Memorandum for the Heads of All Departments and Agencies* regarding the Presidential memorandum).

<sup>703</sup> 5 U.S.C. § 552.

<sup>704</sup> This document uses the term “communities with environmental justice concerns” to refer to communities overburdened by pollution as identified in EO 12898. Those communities include communities of color, low-income communities, and Indigenous communities. Generally, where EPA has authority to consider impacts to those communities, EPA is also likely to have authority to consider equitable treatment of underserved communities consistent with EO 13985. “Underserved communities” in EO 13985 refers to populations sharing a particular characteristic, as well as geographic communities, that have been systematically denied a full opportunity to participate in aspects of economic, social, and civic life, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality.

environmental information. Proactive disclosure of information facilitates several strategy objectives to promote environmental justice. These include, at a minimum, increased public participation in numerous aspects of EPA’s work, improved knowledge base on environmental justice issues, increased information and data collection relating to the health and environment of communities with environmental justice concerns, and related goals.

## **II. FOIA PROCESSES—REGULATORY CHANGES AND NEW POLICY/PROCEDURES**

In 2007, for the first time in over a decade, Congress amended FOIA by passing the OPEN Government Act of 2007. The new law addresses how FOIA is administered and codifies provisions of EO 13392, entitled “Improving Agency Disclosure of Information.”<sup>705</sup> Further, on June 30, 2016, President Obama signed into law the FOIA Improvement Act of 2016. The Act addresses a range of procedural issues, including requirements that agencies establish a minimum of 90 days for requesters to file an administrative appeal and that they provide dispute resolution services at various times throughout the FOIA process. The Act also codifies the “foreseeable harm” standard, amends Exemption 5, creates a new “FOIA Council,” and adds two new elements to agency Annual FOIA Reports. The 2016 Act required all federal agencies to update their regulations by the end of 2016.

EPA updated its FOIA regulations<sup>706</sup> in June 2019 to make the nondiscretionary changes required to bring EPA’s regulations into compliance with the FOIA. This update stated that EPA is considering a ‘second rulemaking phase’ for certain discretionary and modernizing changes. In considering further revisions to the FOIA regulations, EPA could identify opportunities to advance environmental justice by enhancing access to information by members of communities with environmental justice concerns. EPA’s statutory and regulatory authorities provide a broad, discretionary basis for protecting human health and the environment. Enhancing access to information would recognize the heightened public health concerns often present in communities with environmental justice concerns.

Improving the effectiveness of FOIA for communities with environmental justice concerns could be considered in a number of ways.

First, and not insignificantly, the following approaches are dependent on defining and identifying a given FOIA request as one raising an environmental justice issue. Various authorities emphasize the unique nature of communities with environmental justice concerns, but no unique identifier or approach currently exists to identify that a given request bears upon environmental justice issues. Thus, EPA would need to develop metrics to clearly, easily, and quickly identify those requests in the Agency’s initial review. An efficient way to identify those request that bear upon environmental justice issues would be needed because the statute only allows the Agency 20 days to complete all of its processing activities and issue a final response, unless certain statutorily defined unusual circumstances exist.

Second, EPA could enhance its current discretionary disclosure authority under FOIA to specifically consider ways to help address the information needs of communities with

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<sup>705</sup> 70 Fed. Reg. 75373 (Dec. 19, 2005), *available at* <https://www.federalregister.gov/documents/2005/12/19/05-24255/improving-agency-disclosure-of-information>.

<sup>706</sup> 40 C.F.R. part 2.

environmental justice concerns. In March 2009, the U.S. Attorney General encouraged the use of discretionary FOIA disclosures by instituting a series of new principles: (1) an agency should not withhold information simply because it may do so legally; (2) if full disclosure is not possible, an agency should consider partial disclosure; (3) an agency should proactively and promptly handle FOIA requests; and (4) an agency should as a matter of course post information online using modern technology – even in advance of any public request. These principles are useful guideposts to support the use of discretionary disclosure to advancing environmental justice and facilitate information access to communities with environmental justice concerns.

Generally, EPA may make discretionary disclosures of exempt information where the Agency is not otherwise prohibited by law from doing so. For example, EPA may choose to release certain deliberative information that might otherwise be withheld under Exemption 5's deliberative process privilege. However, in other circumstances EPA may be prohibited from releasing information exempt under Exemption 1 (national security), Exemption 3 (disclosure prohibited by another statute), Exemption 4 (confidential business information), and Exemptions 6 and 7(C) (both related to personal privacy).

Third, through a new or its existing repositories for information released under FOIA (for example, FOIAonline.gov, epa.gov/foia, and EPA's FOIA webpage libraries), EPA could add a feature to allow an environmental justice "tag" for records and projects that may be of interest to communities with environmental justice concerns. Database design enhancements should emphasize accessibility in format, comprehension, ease of use, and cost effectiveness in use.

Fourth, EPA could consider how the information needs of communities with environmental justice concerns interface with EPA's existing technology and procedures to identify ways to enhance information accessibility. For example, where electronic access may be limited, and the number of responsive records makes it practical to do so, the information can be provided in hard copy. Additionally, where information is of a highly technical nature, explanatory or background information may be included with the response. These opportunities are highlighted further under Section IV below.

### **III. FOIA ENVIRONMENTAL JUSTICE TRAINING**

Training could be provided to EPA offices to enhance awareness to environmental justice considerations through the FOIA process, consistent with the reforms discussed above. In addition, training to all EPA staff could, among other things, alert staff to look for opportunities to make proactive, public disclosures at an earlier stage in the ordinary course of their work, even prior to an actual FOIA request. Informed staff may be able to identify environmental data, information, research, and activities of importance to communities with environmental justice concerns, and these could be provided on EPA's website.

Similarly, outreach and training efforts could be increased in interested communities. Training could enhance community awareness of FOIA as an information-gathering tool to advance environmental justice.

### **IV. FOIA PROCESSES: INFORMATION COMPREHENSIBILITY AND ACCESSIBILITY**

Information of value to communities with environmental justice concerns could be created,

formatted, and provided to these communities in a way that advances the goals of comprehensibility and accessibility.

The Agency could choose to put information that is highly technical, scientific, medical, or complex in nature into plain language synopses in the ordinary course of the Agency’s work to serve wide range of educational backgrounds. A commitment to transparency and accessibility of information in this way can help the public obtain the information when needed and without the delay and burden of needing to file a request for records under the FOIA.

Second, the Agency may increase accessibility to information by translating portions of its FOIA website into languages other than English, and/or making every effort to translate correspondence with requesters (including requests for clarification, final determination letters, and appeal rights) into a language the requester understands. Further, the Agency may choose to translate documents it produces in response to FOIA requests in circumstances involving limited English proficiency. Third, financial challenges of low-income communities could be taken into account as well—with an eye toward reducing the costs associated with making FOIA requests. Under EPA’s FOIA regulations, EPA's Chief FOIA Officer or EPA's Chief FOIA Officer's delegates are authorized to grant FOIA request fee waivers in certain circumstances. 40 C.F.R. § 2.103(c). Specifically, EPA’s FOIA regulations allow either no charge or reduced charge if “disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 40 C.F.R. § 2.107(1). Thus, upon consideration of the factors in 40 C.F.R. §§ 2.107(1)(2)–(3), the Agency determines whether certain FOIA requests related to environmental justice issues qualify for reduced or waived fees. There are certain limitations on the granting of fee waivers, however – the requester must make a fee waiver request and address all relevant factors in that request, and if only certain records meet the requirements for a fee waiver, the Agency may grant a fee waiver only for those records. 40 C.F.R. §§ 2.107(1)(4)–(5).

Fourth, the Agency may prioritize certain FOIA requests or appeals depending on the subject-matter of the request to ensure that certain communities receive a response as soon as possible. In certain circumstances, EPA's Chief FOIA Officer or EPA's Chief FOIA Officer's delegates are also authorized to grant requests for expedited processing. EPA’s regulations provide that EPA will take requests or appeals out of order for expedited treatment whenever EPA determines either 1) “the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual” or 2) the requester is primarily engaged in disseminating information to the public and there is an urgency to inform the public about an actual or alleged government activity. 40 C.F.R. § 2.104(f)(1). EPA could consider proposing changes to this regulation to enhance the opportunities for expedited treatment for records of interest to communities with environmental justice concerns.

Lastly, the Agency may also consider shifting to pre-request electronic disclosures on EPA’s website in the ordinary course of the Agency’s work. Limited income may also be associated with reduced access to the Internet, which may prevent some communities from accessing public information. Cooperation, training, and outreach to interested groups and public information entities such as libraries may also help address these concerns.

## V. CONCLUSION

The FOIA process provides a vehicle that could advance environmental justice. Much of

what could be accomplished in this area is accessible under current law and can be implemented at the Agency through policy changes. Where regulatory change is indicated, it could be accomplished in the course of a previously announced plan for a proposed rulemaking.



# GLOSSARY OF SELECTED ABBREVIATIONS AND ACRONYMS

## A

AA	Assistant Administrator
AAMNA	Ambient Air Monitoring Network Assessment
AQS	Air Quality System
ADR	Alternative Dispute Resolution
AFO	Animal Feeding Operation
AHERA	Asbestos Hazard Emergency Response Act
ALJ	Administrative Law Judge
ARARs	Applicable or Relevant and Appropriate Requirements
ATSDR	Agency for Toxic Substances and Disease Registry
AWIA	America's Water Infrastructure Act of 2018

## B

BACM	Best Available Control Measures
BACT	Best Available Control Technology
BEACH Act	Beaches Environmental Assessment and Coastal Health Act
BOD	Biochemical Oxygen Demand

## C

CAA	Clean Air Act
CAFO	Concentrated Animal Feeding Operation
CCL	Contaminant Candidate List
CCR	Consumer Confidence Report
CEQ	Council on Environmental Quality
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act
CFR	Code of Federal Regulations
CGP	Construction General Permit
CHPAC	Children's Health Protection Advisory Committee
CMOM	Capacity, Maintenance, Operation and Management
CPP	Continuing Planning Process
CRWU	Creating Resilient Water Utilities
CSAPR	Cross-State Air Pollution Rule
CSO	Combined Sewer Overflows
CWA	Clean Water Act
CWSRF	Clean Water State Revolving Fund

## D

DAC	Disadvantaged Communities
DDO	Dispute Decision Official
DITCA	Direct Implementation Tribal Cooperative Agreements
DWMAPS	Drinking Water Mapping Application for Protecting Source
DWSRF	Drinking Water State Revolving Fund

## E



EA	Environmental Assessment
EAB	Environmental Appeals Board
ECRCO	External Civil Rights Compliance Office
EIS	Environmental Impact Statement
EJ	Environmental Justice
EO	Executive Order
EPA	U.S. Environmental Protection Agency
EPCRA	Emergency Planning and Community Right-to-Know Act
ERPs	Emergency Response Plans
ETS	Environmental Tobacco Smoke

## F

FFDCA	Federal Food, Drug, and Cosmetic Act
FHWA	Federal Highway Administration
FIFRA	Federal Insecticide, Fungicide, and Rodenticide Act
FIP	Federal Implementation Plan
FOIA	Freedom of Information Act
FONSI	Finding of No Significant Impact
FQPA	Food Quality Protection Act
FTA	Federal Transit Administration

## G

GACT	Generally Available Control Technology
GAP	General Assistance Program

## H

HAP	Hazardous Air Pollutants
HRS	Hazard Ranking System
HUBZone	Historically Underutilized Business Zone

## I

IEGAPA	Indian Environmental General Assistance Program Act of 1992
IPM	Integrated Pest Management

## L

LAER	Lowest Achievable Emission Rate
LCCR	Lead and Copper Rule Revisions
LEP	Limited English Proficiency
LUST	Leaking Underground Storage Tank

## M

MACT	Maximum Achievable Control Technology
MCL	Maximum Contaminant Level
MPOs	Metropolitan Planning Organizations
MPRSA	Marine Protection, Research, and Sanctuaries Act
MS4	Municipal Separate Storm Sewer System
MSGP	Multi-Sector General Permit
MSM	Most Stringent Measures

**N**

NAAQS	National Ambient Air Quality Standards
NAICS	North American Industry Classification System
NCP	National [Oil and Hazardous Substances Pollution] Contingency Plan
NDAA	National Defense Authorization Act
NEJAC	National Environmental Justice Advisory Council
NEPA	National Environmental Policy Act
NOFA	Notice of Funding Available
NPDES	National Pollutant Discharge Elimination System
NPL	National Priorities List
NSR	New Source Review

**O**

OCR	Office of Civil Rights
OGC	Office of General Counsel
OMB	Office of Management and Budget
ORC	Office of Regional Counsel

**P**

PCBs	Polychlorinated Biphenyls
PESS	Potentially Exposed or Susceptible Subpopulations
PFAS	Polyfluoroalkyl Substances
POTW	Publicly Owned Treatment Works
PPA	Pollution Prevention Act of 1990
PQR	Permit Quality Review
PSD	Prevention of Significant Deterioration
PWS	Public Water Supply

**R**

RA	Regional Administrator
RACM	Reasonably Available Control Measures
RACT	Reasonably Available Control Technology
RCRA	Resource Conservation and Recovery Act
RFP	Request for Proposals
RMPs	Risk Management Plans
ROD	Record of Decision
RRAs	Risk and Resilience Assessments

**S**

SBA	Small Business Administration
SDB	Small Disadvantaged Business
SDWA	Safe Drinking Water Act
SIC	Standards Industrial Classification
SIPs	State Implementation Plans
SLAMS	State and Local Air Monitoring Stations
SS	Suspended Solids
SSOs	Sanitary Sewer Overflows

**T**

TAGs	Technical Assistance Grants
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TAR	Tribal Authority Rule
TAS	Treatment as a State
TIPs	Tribal Implementation Plans
TMDLs	Total Maximum Daily Loads
TRI	Toxics Release Inventory
TSCA	Toxic Substances Control Act
<b>U</b>	
UCMR	Unregulated Contaminant Monitoring Rules
UIC	Underground Injection Control
UST	Underground Storage Tank
<b>W</b>	
WIFIA	Water Infrastructure Finance and Innovation Act
WPS	Worker Protection Standards
WQMPs	Water Quality Management Plans
WQS	Water Quality Standards
WRRDA	Water Resources Reform and Development Act
WIIN	Water Infrastructure Improvements for the Nation

