February 7, 2022

U.S. Environmental Protection Agency
Office of Land and Emergency Management
EJActionPlanOLEM21@epa.gov

Re: Feedback on Draft Environmental Justice Action Plan for EPA's Land Protection and Cleanup Programs

Dear Acting Assistant Administrator Breen,

The Center for Progressive Reform (CPR) is grateful for the opportunity to provide feedback on the Office of Land and Emergency Management's (OLEM) Draft Environmental Justice Action Plan. CPR is an organization with a network of more than 60 academic scholars from across the United States who work with a professional staff to harness the power of law and public policy to create a responsive government, a healthy environment, and a just society.

While the draft action plan is a necessary step to ensuring environmental justice impacts and benefits are proactively considered in OLEM's programs, we believe there are opportunities to strengthen existing strategies. We also urge EPA to consider additional strategies under OLEM's authority and with environmental justice implications that are currently missing from the draft plan.

With respect to existing strategies, we offer the following recommendations:

1.2 Strengthen RMP Prevention and Emergency Response Requirements in Communities with Environmental Justice Concerns

We wholeheartedly support the EPA's plan to prioritize environmental justice concerns in critically-needed reforms of the Risk Management Program (RMP). Over the last year, we have contributed to research and advocacy highlighting the need to restore the Chemical Disaster Rule and strengthen requirements under the RMP. We have had the opportunity to share our recommendations with OLEM staff, but would like to reiterate them for consideration in the action plan.

To alleviate the disproportionate burden of hazardous facility disasters on workers and communities, we urge the EPA to require:

- Assessment of natech risks and implementation of prevention and mitigation measures, like backup power and safer equipment and systems.
- Advance community notification and natech emergency response planning.
- Involvement of workers and their representatives in natech preparedness and response practices.
- Monitoring and collection of toxic air emissions data in real time.
- Expanded RMP coverage to more facilities in areas prone to natural disasters.
- Prompt implementation and compliance design "built in" to new rules.

For further information, see our detailed research findings and recommendations here.

2.3 EPA's National Recycling Strategy and Implementation Plan

We commend the EPA for pursuing efforts to improve municipal solid waste recycling systems and address the climate impacts of materials use and consumption. As the agency acknowledges in the action plan, waste management facilities can be harmful to nearby communities, and in efforts to alleviate these harms, it is critical that the agency meaningfully centers affected communities in implementation of the plan.

In particular, we urge the agency to consider cumulative impacts in its "environmental justice assessment" of non-hazardous solid waste management infrastructure. The plan states that these data will help "communities address environmental justice when siting new infrastructure" but it is also critical that the agency reconsider and/or abandon strategies that are found to cause additional harm to communities and the climate.

One area of concern–where meaningful community engagement and analysis is critical–is plastic incineration, or so-called advanced/chemical recycling. The plan includes plastic incineration, which is not only a significant contributor of greenhouse gas emissions, but also contributes to hazardous air pollution in communities.[1] Toxic waste from these facilities is also sent to other communities across the nation.[2] In implementation of the action plan, we urge the EPA to deprioritize investment in plastic incineration in its National Recycling Strategy and ensure that existing and new policies (such as the ongoing process to promulgate rules for pyrolysis and gasification processes) limit public health and climate harms from these facilities.

2.10 Documentation/White Paper of Current Practices Considering EJ in Risk Assessment Across EPA Programs

Historically, the risk assessment process has been used – in ways both intentional and unintentional – to diminish and mischaracterize the public health harms faced by

[1] Vallette, J. (2021), The New Coal: Plastics & Climate Change, https://www.beyondplastics.org/plastics-and-climate. *Beyond Plastics.*; Patel, D, et al. (2020), All Talk and No Recycling: An Investigation of the U.S. "Chemical Recycling" Industry, https://www.no-burn.org/wp-content/uploads/All-Talk-and-No-Recycling_July-28.pdf. *GAIA.*
[2] Singla, V. (2021), "Chemical Recycling": A Summer of Disillusionment, https://www.nrdc.org/experts/veena-singla/chemical-recycling-summer-disillusionment, *Natural Resources Defense Council.*

overburdened communities. Consequently, we enthusiastically support this element of the action plan. To ensure that it is executed as successfully as possible, we urge the EPA to pay special attention to how cumulative and synergistic effects of concurrent risks are accounted for in the assessment, given their unique prevalence in environmental justice communities.

We urge the EPA to design its risk assessment process to be grounded in a place-based focus. This will be especially critical to understanding cumulative and synergistic effects faced by certain communities. These effects should be concretely understood at the census tract, neighborhood, and even block group levels.

We also urge the EPA to establish a robust process with target communities to design and execute risk assessments. Members of these communities would obviously be best positioned to offer a grounds-eye view of the harms they face. They could also help agency assessors understand the unique confluence of stressors they face through their lived experience, such as inadequate access to healthy and affordable food or healthcare.

Finally, we urge the EPA to follow the precautionary principle in conducting assessments. Scientific uncertainty is an inescapable feature of risk assessment. When there are reasonable concerns of significant risk of harm to the public, the lack of scientific certainty should be used to justify ignoring or diminishing that risk. Instead, the EPA should adopt a rebuttable presumption of risk in such situations and shift the burden of proof of safety to those entities that economically benefit from conducting the risky activity or selling the risky product. This stance on uncertainty not only is essential to promoting environmental goals, it is also fully consonant with the "polluter pays" principles that undergird our bedrock environmental laws.

In addition to these high-level recommendations, we encourage the EPA to review the many recent excellent resources and best practices that are available with detailed recommendations on building equity into the risk assessment process:

- Racz, L. and Rish, W. (2022), Exposure monitoring toward environmental justice. *Integr Environ Assess Manag.*
- Odetola, L., Sills, S. & Morrison, S. (2021), A pilot study on the feasibility of testing residential tap water in North Carolina: implications for environmental justice and health. *J Expo Sci Environ Epidemiol*.
- Davis, L., Ramírez-Andreotta, M. (2021), Risk assessment of soil heavy metal contamination at the census tract level in the city of Santa Ana, CA: implications for health and environmental justice. *Environ. Sci.: Processes Impacts.*
- Flax-Hatch, J., Srabanti, S., et. al. (2021), Visualizing Environmental Justice Issues in Urban Areas with a Community-based Approach.
- Lee, C. (2021), Game Changer in the Making? Lessons From States Advancing Environmental Justice Through Mapping and Cumulative Impact Strategies. *Environmental Law Institute.*

We especially want to draw the EPA's attention to the report prepared by the Program on Reproductive Health and the Environment at the University of California San Francisco called "Recommendations to Strengthen EPA and its Mission to Protect Public Health." A copy of the report is available here.

3.1 Technical Support and Engagement with Communities

We agree that increased technical support and engagement with affected communities is critical for bringing OLEM's programs in line with environmental justice principles. Among the community-based organizations we have talked to, many have cited lack of technical support as one of the biggest barriers they face in meaningful participation in the regulatory system. We urge the EPA to ensure that it maintains a place-based focus in developing and executing its strategies to promote technical support and community engagement. Above all, that must mean listening to community members to understand their needs and providing appropriate counseling to help them understand how their needs might be best met.

We recommend that the EPA's strategies give special attention to the messenger it relies upon for community technical support and promoting engagement. Ideally, the EPA should strive to coordinate with trusted local leaders. Finally, we urge the EPA to incorporate into its strategies due attention to cultivating leadership within an affected community. The goal should not be merely to help a particular community navigate a particular issue or project, such as a brownfields development. Rather, the EPA should strive to help communities to develop their own internal capabilities to continue advocating on similar issues or projects in the future.

4.1 New Grant Solicitation: Supporting Anaerobic Digestion in Communities

A dearth of research shows that pollution from industrial agriculture disproportionately harms adjacent communities, especially poor people and people of color.[3] Anaerobic digestion of manure produces biogas, which is flammable and toxic, and digesters do not capture all of the methane they produce.[4] Furthermore, investments in anaerobic digestion technologies further entrench reliance on industrial agriculture and fossil fuel infrastructure.[5] We encourage the agency to review the cited research that details the public health and environmental harms of industrial agriculture and anaerobic digestion.

Grants that support expansion of these technologies will not benefit communities, and environmental justice criteria in the grant applications will not adequately account for these impacts and limit harms. To put it plainly, the EPA should not offer grants to expand anaerobic digestion when these practices and technologies are shown to harm communities already overburdened by agricultural and environmental pollution.[6] We urge the EPA to eliminate this strategy from the action plan as it serves to widen existing health and economic disparities.

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[3] Wilson, S., et al., (2002), Environmental Injustice and the Mississippi Hog Industry, *Environ Health Perspect*.; Wing, S. et al., (2000), Environmental Injustice in North Carolina's Hog Industry, *Environ Health Perspect*; Domingo, N. G. G. et al., (2021), Air quality-related health damages of food, https://www.pnas.org/content/118/20/e2013637118. *Proceedings of the National Academies of Sciences.*

[4] Gittelson G, et al., (2021), The False Promises of Biogas: Why Biogas is an Environmental Justice Issue, https://www.liebertpub.com/doi/10.1089/env.2021.0025. *Environ Justice.;* Li, Y, et al., (2019), Composition and Toxicity of Biogas Produced from Different Feedstocks in California, https://pubs.acs.org/doi/10.1021/acs.est.9b03003. *Environ Sci Technol.*

[5] Food & Water Watch, (2016), Hard to Digest: Greenwashing Manure into Renewable Energy, https://foodandwaterwatch.org/wp-content/uploads/2021/04/ib_1611_manure-digesters-web.pdf.

[6] Gittelson, 2021.

4.3 Analytical Needs Assessment

As it conducts its analytical needs assessment, we caution the EPA to be aware of and avoid theoretical and practical flaws of regulatory cost-benefit analysis, since these flaws have the perverse tendency of reinforcing or even exacerbating structural racism. What distinguishes regulatory cost-benefit analysis is its methodological commitment to translating all of the impacts it seeks to evaluate into dollars-and-cents terms. This raises significant concerns where the impacts in questions are not things that are readily bought and sold in the marketplace – such as a stable climate, the prevention of asthma attacks in children, and the dignity of not living in a community that has been relegated to a "sacrifice zone."

The methodologies employed for converting non-market goods into monetary terms are objectionable enough for their lack of scientific rigor. But they are especially egregious from an environmental justice perspective, because they uncritically accept status quo racism into the analytical baseline, from which racial injustice reverberates throughout the analytical results. To take one example, existing research suggests that protecting the lives of black people should be worth less money than protecting the lives white people. Among other things, this research, which is based on trends in employment wages, fails to account for how years of political and economic disenfranchisement have weakened the bargaining position of many black Americans in the labor marketplace.

Beyond this concern with cost-benefit analysis, we further urge the EPA to recognize and account for how historic racial injustice can affect even traditional economic analyses. For example, an analysis that uncritically incorporates the values of homes in majority-black communities would serve as implicit endorsement of the various forms of structural racism, such as redlining, that artificially depressed the value of those homes.

In short, money is often a bad proxy for understanding the beneficial impacts of environmental policies on overburdened communities. We urge the EPA to consider and adopt alternative approaches that rely on qualitative analysis instead.

With respect to additional strategies, we offer the following recommendations:

The Environmental Justice Action Plan Should Incorporate Objectives and Activities Related to the Agency's Pending Rulemaking and Other Authorities to Regulate Spills and Discharges from Aboveground Hazardous Substances Storage Facilities

Decades ago, Congress mandated that the EPA issue Clean Water Act regulations to prevent and mitigate the harm of discharges from onshore non-transportation-related hazardous substance storage facilities.[7] Indeed, today, OLEM is currently undertaking a rulemaking intended to require worst-case discharge (or spill) planning for these onshore hazardous substance storage facilities.[8] This rulemaking is required by a

[7] 3 Pub. L. No. 92-500, § 311(j)(1), 86 Stat. 816, 868 (1972) (codified at 33 U.S.C. § 1321(j)(1)(C)); Oil Pollution Act of 1990 – Public Law 101-380, 104 Stat. 484, 33 U.S.C. ch. 40 § 2701.
[8] Office of Information and Regulatory Affairs, Fall 2021 Unified Regulatory Agenda, Clean Water Act Hazardous Substance Worst Case Discharge Planning Regulations, RIN: 2050-AH17, White House

consent decree resulting from litigation by public interest groups: the Environmental Justice Health Alliance for Chemical Policy Reform, Clean Water Action, and the Natural Resources Defense Council.[9] In their complaint, the groups allege and describe certain incidents involving spills and other discharges from these unregulated hazardous substance storage facilities that have impacted overburdened low-income populations and communities of color.[10]

State and federal regulators have underestimated the quantity and extent of these facilities, generally, and the frequency and extent of spills, discharges, and incidents involving these facilities that have impacted water resources and communities.[11] Moreover, these facilities are sited in and releases from these facilities disproportionately harm overburdened communities, and EPA's failure to regulate these facilities has, therefore, perpetuated environmental injustices.[12] Today, these facilities are not subject to EPA regulations, in spite of Congress' mandates, and only ten states comprehensively regulate these facilities for the prevention of spills and other discharges of hazardous chemicals and substances.[13]

Yet, the draft action plan makes no mention of hazardous substance storage facilities, the pending worst-case discharge rulemaking, nor EPA's other and still as-of-yet unfulfilled Congressional mandate to issue spill prevention rules for such facilities. EPA should commit to, and the action plan should reflect, intensive and sustained engagement with environmental justice stakeholders throughout the worst-case discharge rulemaking process. The engagement of these stakeholders should include opportunities for input and review that meet the particular needs of impacted communities. Further, the action plan should include objectives and activities designed for the purpose of identifying and incorporating provisions in the proposed rule that are informed by and responsive to environmental justice considerations, including, minimally, those provisions that concern public disclosure and reporting of incidents. Lastly, the action plan should include objectives and activities that support–and the EPA, more broadly should commit to–additional and further rulemaking for spill prevention and, in doing so, allay the disproportionate burden spills from such facilities impose on overburdened communities and populations.[14]

Office of Management and Budget. Available at https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202110&RIN=2050-AH17.

[9] Consent Decree, Envtl. Justice Health All. for Chem. Policy Reform, et al. v. EPA, 19-cv-2516, (S.D.N.Y. entered Mar. 12, 2020) at 3-4.

[10] Complaint, Envtl. Justice Health All. for Chem. Policy Reform, et al. v. EPA, 19-cv-2516, (S.D.N.Y. entered Mar. 21, 2019) at ¶¶38-42.

[11] Flores, D., Minovi, D., and J. Clark (2021), Tanks for Nothing: The decades-long failure to protect the public from hazardous chemical spills, Center for Progressive Reform, at 18-25. Available at https://cpr-assets.s3.amazonaws.com/documents/tanks-for-nothing-ast-rpt.pdf; also, Comment of Envtl. Justice Health All. For Chem. Policy Reform, et al., Comments on Docket ID No. EPA-HQOLEM-2018-0024-001, Clean Water Act Hazardous Substance Spill Prevention – Proposed Action, August 24, 2018, at 5-9.

[12] Flores, D., Minovi, D., and J. Clark (2021), Tanks for Nothing: The decades-long failure to protect the public from hazardous chemical spills, Center for Progressive Reform, at 26-35; also, Comment of Envtl. Justice Health All. For Chem. Policy Reform, et al., Comments on Docket ID No. EPA-HQOLEM-2018-0024-001, Clean Water Act Hazardous Substance Spill Prevention – Proposed Action, August 24, 2018, at 11-13.

[13] Flores, D., Minovi, D., and J. Clark (2021), Tanks for Nothing: The decades-long failure to protect the public from hazardous chemical spills, Center for Progressive Reform, at 8-14.

[14] *Id.* at 39-41.

Thank you for your consideration,

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