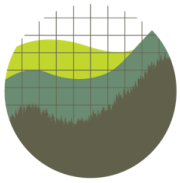

November 12, 2021

VIA ELECTRONIC SUBMISSION

To: Environmental Protection Agency

Re: Comments on "Draft Fiscal Year 2022–2026 Environmental Protection Agency Strategic Plan," 86 Fed. Reg. 54,448 (Oct. 1, 2021) (Docket No. EPA-HQ-OA-2021-0403)

I. Introduction

The Institute for Policy Integrity ("Policy Integrity") at New York University School of Law[1] respectfully submits the following comments to the Environmental Protection Agency ("EPA") regarding its Draft Fiscal Year 2022–2026 EPA Strategic Plan ("Draft Plan").[2] Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy.

Policy Integrity generally supports the sweep of EPA's strategic goals, collectively aimed at fulfilling EPA's statutory mandate to protect public health and the environment. In particular, we commend EPA for committing to take decisive action to advance environmental justice and civil rights, and for formalizing the advancement of justice and equity as a foundational principle.

However, EPA's strategic goal concerning environmental justice and civil rights misses a crucial opportunity to explicitly prioritize integrating meaningful environmental justice analysis into EPA's rulemaking process. One of EPA's most important functions is to produce regulations and the supporting regulatory impact analyses that advance its core mission to protect public health and the environment. Yet, historically, and despite several executive pronouncements to the contrary, EPA has consistently failed to seriously analyze the distributional consequences of its regulations. The Draft Plan's inattention to this problem is a significant oversight, as allowing this practice to persist will impede the agency's goal of embedding environmental justice into its core work.

One way EPA can better integrate its environmental justice goals into its rulemaking protocol is by conducting distributional analyses of regulatory alternatives. Absent proper distributional analysis of regulatory alternatives, it is impossible for EPA to know when the better distributional consequences of one alternative are sufficient to overcome another alternative's higher net benefits. Further, developing and implementing a standardized approach to distributional analysis will help EPA succeed where it and other agencies have previously fallen short.

[1] This document does not purport to present New York University School of Law's views, if any.
[2] U.S. ENV'T PROT. AGENCY, DRAFT FY 2022–2026 EPA STRATEGIC PLAN (Oct. 1, 2021) [hereinafter DRAFT PLAN].

Thus, to realize EPA's strategic goals to advance environmental justice and equity, EPA should integrate the following recommendations into its final strategic plan:

1. EPA should commit to consistently and meaningfully analyzing the distributional consequences of its proposed regulations and factor that analysis into its decisionmaking. This requires that EPA analyze the distributional consequences of regulatory alternatives.

2. EPA should develop guidance on a standardized approach for analyzing the distributional consequences of its economically significant rules. This approach should, among other things, entail robust stakeholder input and take the following considerations into account:

    - The unit of analysis should match the nature of the environmental problem being analyzed;

    - Race and ethnicity should be categorized and aggregated in ways that do not obscure distributional impacts on minority populations; and

    - The results of EPA's distributional analyses should be considered alongside the agency's traditional cost-benefit analysis.

3. Within the next year, EPA should conduct a distributional analysis of at least one economically significant regulation, incorporating the considerations outlined above.

4. EPA's final strategic plan should include an environmental justice objective specifically geared to how the agency will incorporate meaningful distributional analysis into its regulatory impact analyses going forward and recognizing the essential role of robust stakeholder engagement.

This comment provides an overview of several key points on improving distributional analysis in rulemaking, many of which are discussed in greater detail in a recent Institute for Policy Integrity report[3] and a forthcoming article by Richard Revesz and Samantha Yi.[4] These documents are attached to this comment for easy reference.

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[3] *See* JACK LIENKE ET AL., INST. FOR POL'Y INTEGRITY, MAKING REGULATIONS FAIR: HOW COST-BENEFIT ANALYSIS CAN PROMOTE EQUITY AND ADVANCE ENVIRONMENTAL JUSTICE (2021).

[4] *See* Richard L. Revesz & Samantha P. Yi, *Distributional Consequences and Regulatory Analysis*, 52 ENV'T L. (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3927277. Revesz and Yi offer recommendations for developing guidance to OMB, which was directed by President Biden's Memorandum on Modernizing Regulatory Review to "propose procedures that take into account the distributional consequences of regulations . . . to ensure that regulatory initiatives appropriately benefit and do not inappropriately burden disadvantaged, vulnerable, or marginalized communities." Memorandum from President Joseph Biden on Modernizing Regulatory Review to the Heads of Exec. Dep'ts & Agencies § 2(b)(ii), 86 Fed. Reg. 7223, 7223 (Jan. 26, 2021) [hereinafter Presidential Memo on Modernizing Regulatory Review]. As further explained below, the recommendations that Revesz and Yi offer would apply to EPA as well.

II. For EPA to Achieve Its Goal of Embedding Environmental Justice into Its Programs, Policies, and Activities, the Agency Must Conduct More Meaningful Distributional Analyses of Its Proposed Regulations

In the Draft Plan, EPA expresses its intent to prioritize progress on environmental justice by designating "Take Decisive Action to Advance Environmental Justice and Civil Rights" as one of its seven strategic goals.[5] This goal includes Objective 2.2: "Embed Environmental Justice and Civil Rights into EPA's Programs, Policies, and Activities."[6] Within this objective, EPA further affirms a commitment to "[i]ntegrate environmental justice and civil rights in all of the Agency's work to maximize benefits and minimize impacts to underserved and overburdened communities."[7] EPA explains that its "efforts [will] include . . . analyzing and addressing disproportionate impacts."[8] The agency also sets a long term performance goal that "[b]y September 30, 2026, XX% of all significant EPA actions with environmental justice implications will clearly demonstrate how the action is responsive to environmental justice concerns and addresses disproportionate impacts."[9] The Draft Plan underscores EPA's intention to integrate environmental justice considerations into its analysis, integrate that analysis into its decisionmaking, and set targets to define success.

This vision is consistent with EPA's long-standing legal obligation, set forth in various executive mandates and guidance documents, to consider environmental justice impacts in its regulatory decisionmaking. Executive Order 12,866, issued by President Clinton in 1994, directs agencies to incorporate equity considerations into their cost-benefit analysis and regulatory decisions.[10] It specifically recognizes that "distributive impacts" and "equity" are relevant to assessing net benefits.[11] In 2003, OMB issued *Circular A-4*,[12] its principal guidance on cost-benefits analysis. Though it provides a mere two paragraphs of instruction on conducting distributional analysis, *Circular A-4* does advise agencies to "provide a separate description of distributional effects (i.e., how both benefits and costs are distributed among sub-populations of particular concern) so that decision makers can properly consider them along with the effects on economic efficiency," and to describe distributional effects "quantitatively to the extent possible."[13] In 2011, President Obama issued Executive Order 13,563, which reaffirms Executive Order 12,866 and states that agencies conducting cost-benefit analysis "may consider (and discuss qualitatively) values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts."[14]

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[5] DRAFT PLAN, *supra* note 2, at 20.
[6] *Id.* at 25–28.
[7] *Id.* at 25.
[8] *Id.*
[9] *Id.*
[10] Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993).
[11] *Id.* § 1(b)(5).
[12] Office of Mgmt. & Budget, *Circular A-4* (2003).
[13] *Id.* at 14.
[14] Exec. Order No. 13,563 §1(c), 76 Fed. Reg. 3821, 3821 (Jan. 21, 2011).

Separate from these directives on cost-benefit analysis, EPA and other agencies have been further instructed to consider environmental justice considerations in agency decisionmaking. In 1994, President Clinton issued Executive Order 12,898 which requires agencies to identify and seek to address adverse environmental and human-health impacts of all federal administrative programs (including regulations) on minority and low-income populations.[15] The White House Council on Environmental Quality,[16] and later the Interagency Working Group on Environmental Justice,[17] provided subsequent guidance on identifying and assessing a broad range of potential disparate impacts in environmental justice analyses conducted under Executive Order 12,898. President Biden has affirmed that advancing environmental justice will continue to be a priority for his administration.[18] Indeed, on his first day in office, he directed OMB to propose procedures that take into account the distributional consequences of regulations and ensure that regulations benefit, and do not inappropriately burden, disadvantaged, vulnerable, or marginalized communities.[19]

Despite over 25 years of directives and documents, agencies, including EPA, have thus far fallen short on conducting a meaningful distributional analysis as part of their rulemaking procedures.[20] Revesz and Yi reviewed the regulatory impact assessments of what are arguably the three most important recent EPA environmental rules promulgated by the Obama administration: the Cross-State Air Pollution Rule, the Mercury and Air Toxics Standards, and the Clean Power Plan. They found that, for each of these rules, "EPA's distributional analysis is essentially based on the syllogism that disadvantaged communities are disproportionately affected by air pollution, that the rule in question will reduce such pollution, and that, therefore it must be advantageous to the disadvantaged communities."[21] They also found that EPA provided no analysis of whether the disparities that would remain even with the regulation were significant and harmful, whether a more stringent standard could reduce those disparities, and whether such an alternative could be a more desirable outcome.[22] Millions of Americans currently face cancer

[15] Exec. Order No. 12,898 § 1-101, 59 Fed. Reg. 7629, 7629 (Feb. 16, 1994) ("To the greatest extent practicable and permitted by law, . . . each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations . . . ."); *accord id.* § 3-302(a). Executive Order 12,898 does not define "minority populations" or "low-income populations."
[16] Council on Env't Quality, *Environmental Justice: Guidance Under the National Environmental Policy Act* (Dec. 10, 1997), https://www.epa.gov/sites/default/files/2015-02/documents/ej_guidance_nepa_ceq1297.pdf.
[17] Fed. Interagency Working Grp. on Env't Just., *Promising Practices for EJ Methodologies in NEPA Reviews* (2016), https://www.epa.gov/sites/default/files/2016-08/documents/nepa_promising_practices_document_2016.pdf.
[18] *See* Exec. Order No. 13,990 § 1, 86 Fed. Reg. 7037, 7037 (Jan. 25, 2021) (stating that it is the policy of the new administration to "prioritize . . . environmental justice"); Exec. Order No. 14,008 § 219, 86 Fed. Reg. 7,619, 7,629 (Feb. 1, 2021) (stating that it is the administration's policy to "secure environmental justice 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").
[19] Presidential Memo on Modernizing Regulatory Review § 2(b)(ii), *supra* note 4.
[20] Revesz & Yi, *supra* note 4 (manuscript at 8–13).
[21] *Id.* (manuscript at 11–12).
[22] *Id.* (manuscript at 10).

risk from pollution above EPA's acceptable levels[23] and studies have widely confirmed the pollution burden falls disproportionately on disadvantaged and minority communities, so it is likely that EPA regulations could achieve meaningful benefits from more robust distributional analysis. Revesz and Yi emphasize that "[t]his failure [to consider alternatives] is particularly serious because Circular A-4 identifies 'an examination of alternative approaches' as one of the three basic elements of 'a good regulatory analysis.'"[24]

Other surveys of agency regulations under the Obama and Clinton administrations have similarly found a paltry level of environmental justice analysis. In 2016, Lisa Robinson et al. reviewed 24 of President Obama's major regulations with quantified health benefits from Fiscal Years 2010 through 2013 and found a widespread failure to seriously consider distributional effects, [25] noting that "these analyses pay relatively little attention to distribution; often they merely address the extent to which the regulation protects the health of low-income and minority groups and children."[26] This problem existed prior to the Obama administration as well. A 2003 review of agency actions following the Clinton orders by Robert Hahn et al. found that, "[i]n practice, agencies have responded [to the orders] . . . by including a separate distributional impact analysis" in their regulatory analyses, but "only infrequently was quantitative analysis included" and "[i]n no case did the Administration's explicit concern for equity clearly alter proposed policies."[27] A 2018 article by Jerry Ellig confirmed that distributional analysis continues to be "rare,"[28] and a 2018 article by Richard Revesz also observed that most agencies did not take distributional concerns "into account at all, or at most gave them a cursory treatment."[29]

As the history of executive orders, reports, and strategic plans indicate, EPA has long had a commitment to advancing environmental justice and must now do something additional if it takes seriously the need to make progress. As illustrated by the language excerpted from the Draft Plan above, EPA does recognize the importance of conducting distributional analysis and integrating that analysis into its decisionmaking in order to achieve its environmental justice and equity goals, but it does not explain how it will move the needle past its past efforts to prioritize environmental justice considerations in rulemaking. If EPA hopes to succeed where it and other

[23] Recent analysis from ProPublica suggests that 74 million Americans—more than a fifth of the population—are exposed to pollution that increases their cancer risk above the 1 additional case in a million standard that EPA strives to achieve. ProPublica also found that an estimated 256,000 people are exposed to risks beyond EPA's upper limit of acceptable excess cancer risk of 1 in 10,000. Lylla Younes et al., *Poison in the Air*, PROPUBLICA (Nov. 2, 2021), https://www.propublica.org/article/toxmap-poison-in-the-air.
[24] Revesz & Yi, *supra* note 4 (manuscript at 10) (quoting *Circular A-4* at 2).
[25] *See* Lisa A. Robinson, James K. Hammitt & Richard J. Zeckhauser, *Attention to Distribution in U.S. Regulatory Analyses*, 10 REV. ENV'T ECON. & POL'Y 308, 316 (2016).
[26] *Id*. at 323.
[27] Robert W. Hahn, Sheila M. Olmstead & Robert N. Stavins, *Environmental Regulation in the 1990s: A Retrospective Analysis*, 27 HARV. ENV'T L. REV. 377, 405 (2003).
[28] Jerry Ellig, *Why and How Independent Agencies Should Conduct Regulatory Impact Analysis*, 28 CORNELL J.L. & PUB. POL'Y 1, 27 (2018).
[29] Richard L. Revesz, *Regulation and Distribution*, 93 N.Y.U. L. REV. 1489, 1542 (2018).

agencies have previously fallen short, it must take seriously the need to establish a consistent and robust practice of analyzing distributional impacts across alternatives during rulemaking.

Maximizing benefits and minimizing impacts to overburdened communities *requires* EPA to analyze the distributional consequences of regulatory alternatives.[30] Otherwise, it is impossible for EPA to determine when the better distributional consequences (i.e., relatively better impacts on environmental justice communities) of one alternative are sufficient to overcome another alternative's higher net benefits. Without a clear understanding of how the costs and benefits of different regulatory alternatives are distributed among different groups, agencies cannot reliably ensure that their programs do not "perpetuate systemic barriers to opportunities and benefits for people of color and other underserved groups,"[31] as identified as a priority of the Biden administration in Executive Order 13,985.[32]

Circular A-4 provides that "[w]here distributive effects are thought to be important, the effects of various regulatory alternatives should be described quantitatively to the extent possible, including the magnitude, likelihood, and severity of impacts on particular groups."[33] Without consideration of alternatives, it would be impossible to identify an outcome with the greatest net benefits under traditional cost-benefit analysis. For example, without the consideration of alternatives, the agency may consider an Alternative A that is net beneficial and simply stop there without considering whether a more stringent Alternative B or less stringent Alternative C would deliver greater net benefits. This comparison of alternatives is no less essential for distributional analysis. In fact, it will be more necessary in order to document how a superior distribution of benefits is preferable to another alternative with greater net benefits. Circular A-4 does not demand consideration of infinite alternatives, but it is customary to consider at least one alternative that is more stringent than the selected alternative and one that is less stringent.[34] This practice should extend to the consideration of distributional effects.

III. EPA Must Develop Guidance on a Standardized Approach for Analyzing the Distributional Impacts of Economically Significant Rules.

Despite the clear executive mandate to consider equity from Executive Orders 12,866 and 13,563 and further directions to guide these considerations under Circular A-4, none of these documents currently provide guidance on how to conduct a distributional analysis, how to describe such effects quantitatively, how to identify demographics subpopulations for

[30] *See* Revesz & Yi, *supra* note 4 (manuscript at 13) ("The important missing element in the analysis is the consideration of alternatives."); *see also id*. (manuscript at 33–35); LIENKE ET AL., *supra* note 3, at 1 (finding "agencies have not consistently incorporated distributional analysis into their regulatory cost-benefit analyses" and "largely faulting the lack of detailed guidance focused on the assessment of distributional impacts or the consideration of those impacts when weighing regulatory alternatives").
[31] Exec. Order No. 13,985 § 1, 86 Fed. Reg. 7009, 7009 (Jan. 25, 2021).
[32] *See* LIENKE ET AL., *supra* note 3, at i; Revesz & Yi, *supra* note 4 (manuscript at 13).
[33] *Circular A-4* at 14.
[34] *See, e.g.*, Michael A. Livermore & Richard L. Revesz, *Rethinking Health-Based Environmental Standards*, 89 N.Y.U. L. REV. 1184, 1239–46 (2014).

consideration, or how to use distributional analysis to weight alternative regulatory options.[35] Nor do Executive Order 12,898 or the associated White House guidance offer much direction on how environmental-justice analysis for rulemakings should interact, if at all, with regulatory cost-benefit analysis.

Previously, EPA has issued its own guidance documents on considering equity and environmental justice in cost-benefit analysis and plans for prioritizing advancing environmental justice, but these leave substantial room to now go further. EPA also identified environmental justice as a priority in its 2011–2015 plan and subsequently released "Plan EJ 2014" in recognition of the 20th anniversary of Executive Order 12,898 to act as its roadmap for integrating environmental justice into its programs, policies, and activities.[36] Among other strategies, the Plan sought to better incorporate environmental justice concerns into EPA permitting decisions[37] and rulemaking.[38] In 2016, EPA released technical guidance on "methods for analysts to use when assessing potential environmental-justice concerns in national rules."[39] The document presents "several descriptive analytic methods from which analysts are encouraged to choose the best way to describe distributive impacts . . . [b]ut it provides little guidance on how to empirically measure the full distribution of a regulatory action's costs and benefits."[40] Further, this guidance had been largely ignored during the Trump administration.[41]

As discussed above, operating under only this past framework, EPA has failed to undertake meaningful distributional analysis for even the most significant of Obama administration rules. While important for EPA to now reiterate its commitment to prioritizing environmental justice and equity, it must now build upon, and also go further, than its past commitments to help facilitate tangible progress. In addition to Policy Integrity's recent report on *Making Regulations Fair*,[42] both Robinson et al.[43] and Revesz and Yi[44] identified a lack of more detailed guidance as a key barrier to further progress.

While the Biden administration has specifically tasked OMB to update Circular A-4 to better address distributional consequences,[45] EPA need not wait for this update to begin developing its

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[35] *See* LIENKE ET AL., *supra* note 3, at 1–3; Revesz & Yi, *supra* note 4 (manuscript at 5–8).
[36] *See* U.S. ENV'T PROT. AGENCY, PLAN EJ 2014 (2011), https://nepis.epa.gov/Exe/ZyPDF.cgi/P100DFCQ.PDF?Dockey=P100DFCQ.PDF.
[37] *Id.* at 41–56.
[38] *Id.* at 33–40.
[39] U.S. Env't Prot. Agency, *Technical Guidance for Assessing Environmental Justice in Regulatory Analysis* (2016) [hereinafter *EPA Technical Guidance*], https://www.epa.gov/sites/production/files/2016-06/documents/ejtg_5_6_16_v5.1.pdf.
[40] Revesz & Yi, *supra* note 4 (manuscript at 7); *see also EPA Technical Guidance*, supra note 39, at 57–58 ("[E]ven in cases where the information would be relevant, data or methods may not exist for full examination of the distributional implications of costs across population groups of concern.").
[41] LIENKE ET AL., *supra* note 3, at 3.
[42] *Id.* at 3–4.
[43] Robinson et al., *supra* note 25, at 322.
[44] Revesz & Yi, *supra* note 4 (manuscript at 3–4).
[45] *Id.*

own guidance. EPA has already progressed beyond Circular A-4 in analyzing relevant analytic techniques to consider disparate impacts through developing its 2016 EPA Technical Guidance. EPA has a wealth of technical expertise and experience from assembling complex regulatory impact analyses demonstrating public health effects that allow it to advance progress on guidance that can help inform OMB's efforts to update Circular A-4 and help serve as a model for other agencies. EPA should move ahead in developing guidance on a standardized approach for distributional analysis in its regulatory processes.

Standardization would serve the important goal of "interoperability," enabling the comparison and aggregation of distributional impacts across EPA rulemakings and, viewing standardization on a broader scale, across agencies.[46] Moreover, interoperability is the only means by which EPA (and other agencies) can objectively determine when particular distributional consequences are cause for concern.[47] A standardized approach to distributional analysis would also reduce the risk that such analyses could be manipulated to reach a preferred result.[48]

Crucially, standardizing its approach to distributional analysis does not mean that EPA must conduct each analysis in precisely the same way. Rather, it means that there is a standardized set of guiding principles for choosing the methodological elements of the analysis and explaining those choices.[49] Similarly, EPA should provide guiding principles how to combine the findings of a distributional analysis with a traditional cost-benefit analysis. [50]

Below, we recommend three key areas for EPA to focus in developing these principles. First, EPA should ensure that the unit of analysis corresponds to the nature of the environmental or public health problem addressed by the regulation. Second, EPA should develop a list of racial/ethnic categories for the agency to consistently consider in its analyses and provide direction on how to avoid aggregating data in ways that obscure effects on particular affected subpopulations. Third, EPA should provide guidance on how to compare distributional consequences alongside traditional cost-benefit analysis by drawing on its well-accepted regulatory treatment of unquantified benefits as well as provide guidance on whether and how to use standardized quantitative tools.

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[46] *See* LIENKE ET AL., *supra* note 3, at i; JASON SCHWARTZ, INST. FOR POL'Y INTEGRITY, ENHANCING THE SOCIAL BENEFITS OF REGULATORY REVIEW 12 (2020).
[47] Revesz & Yi, *supra* note 4 (manuscript at 3–4).
[48] *Id.* (manuscript at 25) (contending that the lack of consensus on how to conduct distributional analysis and the failure to explain methodological choices creates a risk of manipulation).
[49] Revesz and Yi identify the following as a non-exhaustive list of the methodological elements of the analysis: selection of the unit of analysis, categorization of race and ethnicity, the measure of socioeconomic status, assessment of the level of civic engagement, determination of disproportionate impact, and gender. Revesz & Yi, *supra* note 4 (manuscript at 14 & n.94); *see also* SCHWARTZ, *supra* note 46, at 11–12.
[50] There currently exists little guidance on how this should be done. *See* LIENKE ET AL., *supra* note 3, at 3 (stating that "agency findings under Executive Order 12,898 are typically not integrated into agencies' broader assessments of rules' economic impacts" because of the lack of guidance on this point); *id.* at 13–22 (outlining approaches to factoring distributional consequences into regulatory decisionmaking).

1. Match the Unit of Analysis to the Nature of the Environmental Problem.

When conducting a distributional analysis, the unit of analysis should match or correspond to the nature of the environmental problem. Assessing distributional consequences will necessarily require EPA to analyze regulatory impacts at a granular and disaggregated level.[51] In general, EPA should prefer smaller units (e.g., census blocks) to larger units (e.g., census tracts).[52]

However, even using a granular analysis, mismatches between the unit of analysis and the nature of the problem can obscure or mask disparate impacts across communities. For example, if the toxic emissions from an industrial plant caused harmful effects only with a 1000-foot radius, using a 1-mile radius or other larger unit of analysis might mask an otherwise statistically significant disproportionate impact.[53] On the other hand, pollution harms may reach much more distant areas along very narrow paths because of wind patterns or water pathways. In such cases, a radial unit of analysis—no matter how granular—would be likely to aggregate affected areas with unaffected ones and would thus be unlikely to capture the disproportionate impact borne by communities along the route of pollution.[54] The solution in this case therefore would not necessarily be a smaller unit of analysis, but rather a unit of analysis that tracks the pollution plume or water pathway.[55]

As noted above, the appropriate and/or feasible level of granularity will likely differ depending on the rulemaking. EPA might therefore consider standardizing the set of factors it considers in deciding what level of granularity is appropriate. Such factors might include the cost of obtaining data at a given level of granularity, the consistency of a unit over time, the comparative value of a given unit, and the community's views of its own borders.[56] Whatever set

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[51] *See* LIENKE ET AL., *supra* note 3, at 6–7 ("Measuring impacts at aggregate scales can hinder [identification of who is being affected by a regulation and to what degree].").
[52] *Id.* at 7; *see also* Rachel Nuwer, *Study Shows How Cities Can Consider Race and Income in Household Energy Efficiency Programs*, PRINCETON SCHOOL OF ENGINEERING AND APPLIED SCIENCE (June 7, 2021), https://environment.princeton.edu/news/study-shows-how-cities-can-consider-race-and-income-in-household-energy-efficiency-programs/ (finding that energy use inequality is more visible in relatively smaller units of analysis).
[53] *See* Revesz & Yi, *supra* note 4 (manuscript at 28); *see also* LIENKE ET AL., *supra* note 3, at 6–7 (citing Janet Currie et al., *Environmental Health Risks and Housing Values: Evidence from 1,600 Toxic Plant Openings and Closings*, 105 AM. ECON. REV. 678 (2015)) (observing that, in this study, in which harmful were found to be confined to narrow areas around industrial plants, a relatively small unit of analysis such as a county would have nonetheless obscured the disproportionate impact found in the study).
[54] *See* LIENKE ET AL., *supra* note 3, at 7 ("[I]n the case diffuse pollutants, such as fine particulate matter or arsenic contamination of drinking water, . . . adverse effects can propagate through narrow paths across large spatial areas. . . . [L]imiting the exploration of environmental injustices to nearby, 'frontline' communities—even in cases of pollutants that are often considered 'local,' such as primary particulate matter—might [therefore] be overly simplistic in certain cases." (citing H. Spencer Banzhaf, *Regulatory Impact Analyses of Environmental Justice Effects*, 27 J. LAND USE & ENV'T L. 1, 13–14 (2011)); *see also* Revesz & Yi, *supra* note 4 (manuscript at 29).
[55] Revesz & Yi, *supra* note 4 (manuscript at 29).
[56] *See* Vicki Been & Francis Gupta, *Coming to the Nuisance or Going to the Barrios? A Longitudinal Analysis of Environmental Justice Claims*, 24 ECOLOGY L.Q. 1, 10–12 (1997).

of factors EPA ultimately uses, robust stakeholder engagement will be critical to any process for determining the appropriate unit of analysis.[57]

2. Carefully Consider How Categorization and Aggregation Choices With Respect to Race and Ethnicity Affect the Analysis.

Categorization choices with respect to race and ethnicity can similarly affect the visibility of distributional consequences (and are key to understanding how impacts are distributed).[58] As an initial matter, EPA should develop a list of racial/ethnic categories for the agency to consider in its analyses and should ensure their consistent use.[59] Public participation by environmental justice communities will also be crucial to understanding how affected communities self-identify.

Moreover, EPA should carefully consider whether and how to aggregate data from minority populations in its analysis, as an unsuitable choice may obscure inequity. For example, in a case where predominantly Black neighborhoods suffer from higher exposure to air pollution than predominantly White *or* Hispanic neighborhoods, aggregating data from the Black and (non-disproportionately-affected) Hispanic neighborhoods (for purposes of comparison with White neighborhoods) might dilute and thus mask the disproportionate harm faced by Black communities.[60]

3. EPA Should Consider the Results of a Distributional Analysis Alongside Its Traditional Cost-Benefit Analysis.[61]

EPA should consider its distributional analyses alongside its cost-benefit analyses using either a purely qualitative assessment or, on the other hand, with reliance on quantitative tools. Taking the former approach, EPA could treat the results of its distributional analysis the way the

[57] *See* LIENKE ET AL., *supra* note 3, at i–ii (recommending that the administration "undertake a robust stakeholder process to identify . . . what level of analytic granularity is needed"); *see also* Revesz & Yi, *supra* note 4 (manuscript at 29) ("Because one of the important considerations is how a community defines itself, robust stakeholder engagement is essential."); Been & Gupta, *supra* note 56, at 11–12 (noting importance of tying the unit of analysis to a community's own perception of itself).
[58] *See also* Revesz & Yi, *supra* note 4 (manuscript at 29–31).
[59] *See* LIENKE ET AL., *supra* note 3, at 12 (highlighting the importance of "identify[ing] a manageable list of subpopulations for agencies' analyses to consider"); Exec. Order No. 13,985 § 2(a) (identifying members of historically underserved groups such as "Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color"); *see also* Revesz & Yi, *supra* note 4 (manuscript at 30 & n.221) (noting that inconsistent classifications can lead to undesirable results).
[60] *See* Revesz & Yi, *supra* note 4 (manuscript at 30–31).
[61] In contrast, another approach would be for EPA to incorporate the results of its distributional analysis directly into its cost-benefit analysis using a social welfare function. However, there currently exists no accepted methodology for weighting race, gender, and other non-income classifications in a social welfare function. *See id.* (manuscript at 37). Thus, this approach carries with it significant practical hurdles and potentially legal risks depending on how it is undertaken. *See* LIENKE ET AL., *supra* note 3, at 21–22.

agency treats nonmonetized costs or benefits. EPA would qualitatively evaluate the significance and normative desirability of a given alternative's distributional outcomes, and then exercise its discretion and professional judgment as to whether those distributional effects justify choosing that alternative over an alternative with greater net benefits.[62] Here, EPA can draw upon its long-established and well-accepted practice of considering nonmonetized benefits, which is consistent with Circular A-4 and which courts have upheld. In the latter approach, EPA would use a standardized quantitative metric—such as an inequality metric, a break-even analysis, or other quantitative tool—to assess the results of its distributional analysis and then use the resulting information to determine how much weight to accord the various distributional outcomes in the overall policy decision.[63]

IV. As a First Step, EPA Should—Within the Next Year—Conduct a Distributional Analysis of One Economically Significant Regulation That Incorporates the Considerations Outlined Above.

EPA's path toward consistently performing meaningful, standardized distributional analyses of its rulemakings should begin with conducting at least one test case within the next year. With a test case, EPA could begin to develop a standard methodology for conducting distributional analyses going forward, drawing on the agency's findings in its 2016 Technical Guidance; grapple with practical hurdles and analytical challenges; and begin to glean best practices and lessons learned. Conducting the test case within the next year is not only a reasonable goal, but is also consistent with the urgency with which EPA seeks to incorporate environmental justice concerns into its mission.[64] Indeed, should EPA choose to reject the recommendation made in the section below, the agency should, at the very least, incorporate a commitment to a test case within the next year into the "[f]irst year activities of [Objective 2.2's] [long-term performance goals]."[65]

V. EPA's Final Strategic Plan Should Include an Environmental Justice Objective Specifically Geared to How the Agency Will Incorporate Meaningful Distributional Analyses into Its Regulatory Impact Analyses Going Forward.

Goal 2 of the Draft Plan states that EPA seeks to "embed environmental justice and civil rights into the Agency's core work."[66] As structured, however, the Draft Plan greatly underemphasizes how significant a component of that "core work" are the agency's rulemakings and regulatory impact analyses. The result is that the Draft Plan fails to adequately convey the impact these regulatory actions have on environmental justice and equity. Indeed, the only statement in the Draft Plan that explicitly connects the Agency's rulemaking function to

[62] LIENKE ET AL., *supra* note 3, at 14–15.
[63] *Id.* at 15–21.
[64] *See* DRAFT PLAN, *supra* note 2 at 20, 25 & nn.15–16.
[65] *See id.* at 25 n.16.
[66] *Id.* at 20.

environmental justice is Objective 2.2's long-term performance goal stating that, by September 30, 2026, a certain percentage "of all significant EPA actions with environmental justice implications will clearly demonstrate how the action is responsive to environmental justice concerns and addresses disproportionate impacts."[67] This is inadequate given the role EPA rulemakings will ultimately play in determining the success and impact of its renewed commitment to environmental justice and equity. To address this deficiency, EPA's final Strategic Plan should set forth an additional, separate objective that specifically addresses how, in light of the considerations outlined in this comment letter, EPA will incorporate meaningful distributional analyses into its rulemakings going forward. As discussed above, a key component of such an objective would be to develop more specific technical guidance on a standardized approach to conducting distributional analysis that incorporates the recommendations above.

As part of this separate objective, EPA should explicitly highlight that stakeholder engagement is an important component of embedding environmental justice into the agency's regulatory decisionmaking. Affected communities are experts on the real-world consequences of EPA's analytical choices (and consequent regulatory decisions) because of their personal experiences, including, for example, living downwind from a pollution source. Community members can thus provide information and a depth of understanding of these consequences that can only be gleaned from lived experience.[68] EPA should identify best practices from its previous technical work and experience to inform its stakeholder engagement. While stakeholder engagement must be tailored to the specific needs of a particular project, these common best practices could help guide this tailoring. These practices could include adjusting guidelines for participation by the type of regulatory action, engaging the public early in the regulatory process, employing targeted community outreach efforts, reducing logistical barriers to participation, providing public liaisons, and providing technical assistance.[69]

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In short, EPA's final Strategic Plan should include an objective explaining that EPA will leverage its expertise to develop and implement a standardized methodology to meaningfully analyze the distributional impacts of its regulations. In this way, EPA can deliver on its commitment to improve beyond its previous practice and deliver real substantive progress on its environmental justice goals.

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[67] *Id.* at 25.
[68] Cynthia R. Farina et al., *Knowledge in the People: Rethinking "Value" in Public Rulemaking Participation*, 47 WAKE FOREST L. REV. 1185, 1197 (2012) (explaining that these communities have "situated knowledge" of the "impacts, ambiguities and gaps, enforceability, contributory causes, and unintended consequences that are based on the lived experience in the complex reality into which the proposed regulation would be introduced"); Eileen Gauna, *The Environmental Justice Misfit: Public Participation and the Paradigm Paradox*, 17 STAN ENV'T L.J. 3, 72 (1998) ("[F]ormal expertise cannot capture the knowledge that exists within affected communities.").
[69] For a further discussion of these recommendations to improve stakeholder engagement, *see* Inst. for Pol'y Integrity, Comments on "Systematic Assessment for How the NRC Addresses Environmental Justice in Its Programs, Policies and Activities," 86 Fed. Reg. 36,307 (July 8, 2021), at 10-17 (Oct. 29, 2021), https://policyintegrity.org/documents/Policy_Integrity_Comments_on_NRC_EJ_Policy.pdf.

Institute *for*
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Respectfully,

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Attached:

1) JACK LIENKE ET AL., INST. FOR POL'Y INTEGRITY, MAKING REGULATIONS FAIR: HOW COST-BENEFIT ANALYSIS CAN PROMOTE EQUITY AND ADVANCE ENVIRONMENTAL JUSTICE (2021)

2) Richard L. Revesz & Samantha P. Yi, *Distributional Consequences and Regulatory Analysis*, 52 ENV'T L. (forthcoming 2022)