



July 28, 2016

Mr. Charles Lee  
Deputy Associate Assistant Administrator for Environmental Justice  
U.S. Environmental Protection Agency  
Office of Environmental Justice (2201-A)  
1200 Pennsylvania Avenue, N.W.  
Washington DC, 20460  
*Submitted via email at [ejstrategy@epa.gov](mailto:ejstrategy@epa.gov)*

**Re: Public Comments on the U.S. Environmental Protection Agency’s Draft EJ 2020 Action Agenda**

Dear Mr. Lee:

On behalf of the National Coalition on the Human Rights to Water and Sanitation (“the coalition”) coordinated by the US Human Rights Network (“USHRN”), we would like to thank you for the opportunity to submit public comments on the U.S. Environmental Protection Agency’s Draft EJ 2020 Action Agenda (“EJ 2020”). We appreciate the federal government’s commitment to this critical issue and welcome its emphasis on collaboration. We hope that our comments will be useful in ensuring that EJ 2020 achieves its intended aims of identifying and addressing environmental impacts that have disproportionately high adverse health or environmental effects on low-income communities of color and indigenous (tribal) communities, as well as improving these communities’ access to funding and opportunities to participate in decision-making processes that affect their ability to build and sustain environmentally and economically sound communities. While we applaud the U.S. EPA’s commitment to environmental justice, we are troubled by some significant gaps in the current draft EJ 2020 Action Agenda. We appreciate that the EJ 2020 will look to burdened communities, but are concerned that the Agenda fails to include any affirmative statement concerning the need to address household affordability of water and sanitation services. Similarly, the EJ 2020 appears to ignore local communities as sources of valuable information concerning best practices for water affordability. As our comments demonstrate, all efforts to achieve these goals must recognize the critical linkages between equal access to water and sanitation and many of the programs, policies, and activities within the EPA’s purview. We write today to encourage the EPA to modify EJ 2020 to include a broader discussion of these linkages and their effects on low-income communities of color and indigenous communities.

These comments provide a brief description of the coalition’s expertise on these issues, an overview of the drinking water and sanitation crisis currently faced by low-income communities of color in the U.S., and our specific suggestions for transforming EJ 2020 into a more robust tool to make meaningful progress in resolving this crisis as a matter of urgency. Our suggestions fall into four broad categories: 1) the need for EJ 2020 to adopt a more community-driven approach to identifying problems and solutions to environmental justice problems, 2) the need for EJ 2020 to squarely address water affordability and shutoffs, 3) the need for EJ 2020 to commit to more robust standards for incorporating environmental justice concerns into

permitting decisions, and 4) the need for EJ 2020 to make a strong commitment to protecting the right of tribes and Indigenous Peoples to safe, affordable, and adequate water and sanitation.

### **Our Coalition Has Diverse Expertise Relevant to EJ 2020**

Our National Coalition on the Human Rights to Water and Sanitation (“the coalition”) is comprised of over 130 groups and individuals working for equal access to water and sanitation throughout the United States, including national, local, grassroots, and faith-based organizations, as well as educational institutions and law schools.<sup>1</sup> Coalition members represent urban, rural, and indigenous communities from across the country. The coalition includes grassroots activists and directly impacted people as well as lawyers, environmental science professionals, and experts on water policy, utilities, legislation, and human rights. The diversity of the coalition and our expertise makes us well situated to offer comments on the critical linkages between the U.S. EPA’s programs, policies, and activities and the worsening water and sanitation crisis our communities face. Our goal in submitting these comments is to support the U.S. EPA in undertaking urgent actions, developing better practices, and committing to a more robust agenda to ensure that everyone in the U.S. enjoys equal access to safe, affordable, and adequate water and sanitation, without discrimination or delay.

Some key accomplishments of coalition members include the following: Members helped organize the 2011 official visit of the UN Special Rapporteur on the human right to safe drinking water and sanitation to the United States, and the 2014 site visit of the Special Rapporteur to Detroit. They also worked for the passage of California’s Human Right to Water Bill.<sup>2</sup> More recently, members successfully advocated for UN Universal Periodic Review (UPR) recommendations on the right to water.<sup>3</sup> In January 2016, the coalition sent a letter to President Obama calling for the new U.S. National Action Plan on Responsible Business Conduct (NAP) to address the human rights to water and sanitation.<sup>4</sup> The coalition organized and took part in a UN Commission on the Status of Women (CSW) side event on World Water Day, March 22, 2016; a coalition representative also participated in the White House Water Summit on the same day. Additionally, we submitted a response to the UN Special Rapporteur on the human right to safe drinking water and sanitation’s questionnaire on gender equity. The coalition also presented information regarding the lack of equal access to water and sanitation in the U.S. before the Inter-American Commission on Human Rights at hearings in October 2015<sup>5</sup> and April 2016.<sup>6</sup>

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<sup>1</sup> US Human Rights Network (USHRN), National Coalition on the Human Rights to Water and Sanitation, <http://bit.ly/USHRNWaterSanitation>.

<sup>2</sup> CA. ASSEMB. BILL 685 *available at* [http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab\\_0651-0700/ab\\_685\\_bill\\_20120925\\_chaptered.pdf](http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0651-0700/ab_685_bill_20120925_chaptered.pdf).

<sup>3</sup> To view the UPR recommendations accepted by the U.S. government, see [www.ushrnetwork.org/resources-media/us-government-addendum-working-group-report-un-human-rights-council-universal](http://www.ushrnetwork.org/resources-media/us-government-addendum-working-group-report-un-human-rights-council-universal) and <https://geneva.usmission.gov/2015/09/01/addendum-of-the-united-states-of-america-to-the-report-of-the-working-group-on-its-universal-periodic-review>.

<sup>4</sup> To view the submission, see [www.ushrnetwork.org/sites/ushrnetwork.org/files/ushrn\\_human\\_rights\\_to\\_water\\_and\\_sanitation\\_coalition\\_nap\\_submission\\_1\\_15\\_16.pdf](http://www.ushrnetwork.org/sites/ushrnetwork.org/files/ushrn_human_rights_to_water_and_sanitation_coalition_nap_submission_1_15_16.pdf).

<sup>5</sup> To view a video recording of the hearing, see <https://www.youtube.com/watch?v=KJ9CoiyF6c4> (U.S. portion begins at 18:35).

<sup>6</sup> To view a video recording of the hearing, see <https://www.youtube.com/watch?v=uNqNhuNnFWE>.

**I. EJ 2020 Should Recognize that Low-Income Communities of Color and Tribal Communities Are Facing a Water and Sanitation Crisis and Prioritize Equal Access to Safe, Affordable, and Adequate Water and Sanitation as a Core Component of U.S. EPA’s Environmental Justice Agenda**

As an initial matter, the coalition supports the goals of EJ 2020 and applauds the U.S. EPA for its attention to the environmental justice concerns faced by low-income communities of color and indigenous communities. However, we submit the following comments to ensure that this important effort prioritizes equal access to water and sanitation as a core issue facing communities with environmental justice concerns and includes robust, urgent actions to address all aspects of this issue, including affordability.

Our comments reflect a threshold understanding that the United States is currently experiencing a crisis of unequal access to water and sanitation and that low-income communities of color and indigenous communities are at the center of that crisis. Across the U.S., low-income, indigenous, homeless, and communities of color lack equal access to safe, affordable, and adequate water and sanitation. Conservative estimates identify at least 1.8 million people who lack access to water and sanitation in the U.S. today,<sup>7</sup> and existing measures deprive groups who have historically suffered discrimination of equal access to these basic rights.<sup>8</sup> In many cases, communities lack access to safe drinking water despite paying high rates for water service. As the previous United Nations Special Rapporteur on the human right to safe drinking water and sanitation noted after a 2011 country visit to the United States, “those who are facing obstacles in the enjoyment of the rights to water and sanitation are disproportionately Black, Latino, American Indian, homeless, or otherwise disadvantaged.”<sup>9</sup> Just as lack of equal access to water and sanitation constitutes a human rights violation, so too does it raise serious concerns of environmental justice that fall squarely within the mandate of the U.S. EPA.

These communities lack access to water as a result of one or more of the following problems: they cannot **afford** a basic level of drinking water, available drinking water is **not safe** for human consumption, or they lack adequate water or sanitation **infrastructure**. Women and children face additional risks as a result of this situation, as demonstrated in cases like the current crisis in Flint, Michigan, where children continue to suffer irreversible health and developmental harms and women face risks to their reproductive health as a result of city-wide lead poisoning from contaminated drinking water caused by government negligence, deliberate indifference, and callous disregard. These facts illustrate the disparate impact of water access deficiencies on communities or groups who have historically suffered discrimination, as well as the particular challenges faced by women and children. This portrait of water injustice in the U.S. further

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<sup>7</sup> Unitarian Universalist Service Committee, “The Invisible Crisis: Water Unaffordability in the United States,” July 2016, available at [http://www.uusc.org/sites/default/files/water\\_report\\_july\\_2016\\_update.pdf](http://www.uusc.org/sites/default/files/water_report_july_2016_update.pdf). This is a conservative estimate; the preliminary findings of this study, which used official U.S. Census data, indicate that at least 1.8 million people in the U.S. lack basic water and sanitation services.

<sup>8</sup> International Human Rights Clinic, Berkeley Law, “United States Government Consultation on Environmental Issues Relating to the Universal Periodic Review: A Summary. October 7, 2014, UC Berkeley School of Law,” p. 8, available at [https://www.law.berkeley.edu/files/UPR\\_Enviro\\_Consultation\\_Outcome\\_Doc\\_141208.pdf](https://www.law.berkeley.edu/files/UPR_Enviro_Consultation_Outcome_Doc_141208.pdf).

<sup>9</sup> UN Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, Mission to the United States of America, ¶ 79, U.N. Doc. A/HRC/18/33/Add.4 (Aug. 2, 2011), available at [http://www2.ohchr.org/english/bodies/hrcouncil/docs/18session/A-HRC-18-33-Add4\\_en.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/18session/A-HRC-18-33-Add4_en.pdf).

underscores the necessity of including more robust actions to achieve equal access to water and sanitation in EJ 2020. The following examples within the categories of 1. **affordability**; 2. **quality**; and 3. **infrastructure and accessibility** briefly illustrate the various environmental justice concerns raised by lack of equal access to water and sanitation in the United States.

### **1. Affordability: Low-Income Communities of Color and Indigenous Communities Suffer Disproportionately When Water and Sanitation Services Are Unaffordable**

- a. Public utilities subject low-income communities, particularly those of color, to unaffordable water and sanitation rates to subsidize crumbling infrastructure and delinquent corporate and government accounts. In **Baltimore**, water rates have nearly tripled since 2000, and another 11% increase was approved in July 2015; rates in **Detroit** continue to climb as well, rising 125% in the last decade.<sup>10</sup>
- b. Rural communities face unaffordable water rate increases as well. For example, one of the poorest communities in the second poorest county in California, the community of **Lucerne in Lake County, CA**, has experienced a 50% water utility rate increase every year, since it was privatized by Cal Water – amounting to a 500% increase in 10 years.<sup>11</sup> It has reached a tipping point where, like Detroit, many owe more in water bills than their home is worth, so people are fleeing, leaving fewer people behind to pay more and more per household.<sup>12</sup>
- c. Rather than providing relief, public utilities in cities like **Detroit and Baltimore** are engaging in mass water shutoffs against thousands of low-income households, particularly those of color, without regard for those who cannot afford service or elders, children, the chronically ill, or other vulnerable groups. These mass shutoffs have devastating human and community impacts.
- d. In **Flint, Michigan**, even after officials acknowledged that the water contained toxic levels of lead, the utility continued to issue shutoff notices on past-due accounts, requiring residents to pay for contaminated water.<sup>13</sup>
- e. Shutoffs have been conducted without notice or due process opportunities to challenge the decision to shut off a household's water. Utilities in these cities have failed to collect or make publicly available data about the number of shut-offs and the demographics of affected households.
- f. Low-income communities of color are most affected and have been disproportionately targeted by utilities.
- g. UN experts found that the **Detroit** mass water shutoffs violate human rights and noted that shutoffs posed multiple harms to victims, including health problems, threatened

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<sup>10</sup> Blue Planet Project, *Water Crisis in Detroit: Putting Corporate Profit Ahead of Human Rights*. Submission to the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation (June 26, 2014), available at <http://www.globalresearch.ca/water-crisis-in-detroit-putting-corporate-profit-ahead-of-human-rights/5388726>.

<sup>11</sup> Glenda Anderson, *Tiny Lucerne faces huge water bills*, *The Press Democrat* (Sept. 25, 2012), available at <http://www.pressdemocrat.com/news/2307387-181/tiny-lucerne-faces-huge-water>.

<sup>12</sup> Elizabeth Larson, *Lucerne residents appeal to CPUC to deny Cal Water rate hike*, *Lake County News* (Apr. 13, 2013), available at [http://www.lakeconews.com/index.php?option=com\\_content&id=30695:lucerne-residents-appeal-to-cpuc-to-deny-cal-water-rate-hike&Itemid=197](http://www.lakeconews.com/index.php?option=com_content&id=30695:lucerne-residents-appeal-to-cpuc-to-deny-cal-water-rate-hike&Itemid=197).

<sup>13</sup> Gary Ridley, *Flint Restarts Water Shutoff Notices After Brief Holiday Reprieve*, *Mlive* (Jan. 15, 2016), at [www.mlive.com/news/flint/index.ssf/2016/01/city\\_to\\_restart\\_water\\_shutoff.html](http://www.mlive.com/news/flint/index.ssf/2016/01/city_to_restart_water_shutoff.html).

removal of children from homes, loss of housing through foreclosure, and other serious problems.<sup>14</sup>

- h.** In cities like **Detroit and Baltimore**, thousands of households have no water. It is estimated that dozens of Detroit area households have lived without residential water for over two years. Those who have reconnected themselves face criminal penalties.

## **2. Quality: Low-Income Communities of Color and Indigenous Communities Bear a Disproportionate Burden of the Harms Caused by Drinking Water Contamination**

- a.** Contaminated drinking water raises the cost of water and sanitation service, poses unacceptable risks to public health, and prompts displacement of urban, rural, and indigenous communities faced with this crisis. The current exodus from **Flint, Michigan** tragically illustrates this point. Living with unsafe drinking water compounds the disproportionate environmental health burdens already borne by communities with environmental justice concerns.
- b.** Millions of people in the U.S. lack safe drinking water due to contamination by agriculture, mining, and other activities.
- c.** In **Flint, Michigan**, this low-income community has a majority of residents of color who are facing a public health crisis as a result of lead contamination of public drinking water and a potential outbreak of Legionnaire's disease.<sup>15</sup> This crisis was caused by the Michigan state government's decision to save money by changing Flint's water supply to the contaminated Flint River in 2014.<sup>16</sup> State and federal officials failed to notify Flint residents until long after they had already been exposed to toxic levels of lead in their drinking water. Children and women have suffered the worst effects.
- d.** In 2015, testing revealed toxic lead levels in the bloodstreams of Flint's children in 2015, with drinking water contamination as the only plausible explanation.<sup>17</sup> On January 5th, 2016, the effects of the lead in Flint's public water system were finally acknowledged, after massive public pressure, when Michigan's governor declared a state of emergency.<sup>18</sup>

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<sup>14</sup> Office of the UN High Commissioner for Human Rights, Joint Press Statement by Special Rapporteur on adequate housing as a component of the right to an adequate standard of living and to right to non-discrimination in this context, and Special Rapporteur on the human right to safe drinking water and sanitation, Visit to city of Detroit (United States of America 18-20 October 2014) (October 20, 2014), available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15188>.

<sup>15</sup> Dylan Sevett, U.S. Uncut, People Are Dying in Flint and All Signs Point to the Water, Jan. 14, 2016, available at <http://usuncut.com/class-war/people-are-dying-in-flint-all-sings-point-to-water/>.

<sup>16</sup> Arthur Delaney and Philip Lewis, *How the Federal Government Botched Flint's Water Crisis*, HUFFPOST (Jan. 12, 2016), available at [http://www.huffingtonpost.com/entry/flint-lead-water-epa\\_us\\_569522a8e4b086bc1cd5373c](http://www.huffingtonpost.com/entry/flint-lead-water-epa_us_569522a8e4b086bc1cd5373c).

<sup>17</sup> Sarah Hulett, National Public Radio, High Lead Levels in Michigan Kids After City Switches Water Source (Oct. 5, 2015), available at <http://www.npr.org/2015/09/29/444497051/high-lead-levels-in-michigan-kids-after-city-switches-water-source>. For official Michigan state data on the lead poisoning, see Michigan State Government, Taking Action on Flint Water, available at <http://www.michigan.gov/flintwater>.

<sup>18</sup> Michigan State Governor's Office, Press Release, Gov. Snyder declares emergency for Genesee County, (Jan. 5, 2016), available at [http://www.michigan.gov/snyder/0,4668,7-277-57577\\_57657-372653--,00.html](http://www.michigan.gov/snyder/0,4668,7-277-57577_57657-372653--,00.html).

- e. Lead is a neurotoxin that can cause miscarriages and irreversible developmental damage to children’s brains.<sup>19</sup> Studies showed that after a similar incident in Washington, D.C. – which also has a majority of residents of color – the number of children with unsafe lead levels doubled<sup>20</sup> and pregnant women experienced a subsequent increase in miscarriages and stillbirths,<sup>21</sup> despite government attempts to claim that lead contamination of drinking water did not carry adverse health impacts.<sup>22</sup> Partial replacement of lead service lines increases contamination, placing a high financial burden on homeowners to replace lead-bearing fixtures to ensure their own safety.
- f. While Flint residents call for justice, more and more communities are coming forward with their own stories of water contamination and the deliberate indifference of government officials and other entities charged with protecting their safety.
- g. In **California**, approximately one million people must drink and bathe with water that fails to meet national quality standards, yet they must also pay high rates for this contaminated water. Contamination disproportionately affects rural, low-income communities of color.
- h. In **New Mexico**, government refusal to clean up uranium mine and mill contamination threatens displacement and forces **indigenous Navajo communities** to choose between exposure to radiation and access to safe drinking water. The Navajo Nation is home to more than 500 abandoned uranium mines and 1,100 individual uranium waste sites, the vast majority of them unremediated.<sup>23</sup> At least 15 to 20 percent of all drinking water sources on the Navajo Nation test for uranium concentrations above government-set safety limits.<sup>24</sup> Despite this ongoing crisis, in the Navajo Chapter of Churchrock, located in northwestern New Mexico, Federal and state regulators issued permits for a uranium mine to develop uranium in an underground source of drinking water. Federal regulatory agencies concede that if uranium mining occurs, the underground source of drinking water will be irrevocably contaminated. Although mining has not yet occurred, the threat is ever present because regulatory agencies have determined that mineral extraction should take precedence over every other use, including drinking water. The United Nations Committee on the Elimination of Racial Discrimination recently called upon the United States to redress the disparate impact of environmental pollution on indigenous

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<sup>19</sup> Sarah Hulett, National Public Radio, High Lead Levels in Michigan Kids After City Switches Water Source (Oct. 5, 2015), available at <http://www.npr.org/2015/09/29/444497051/high-lead-levels-in-michigan-kids-after-city-switches-water-source>.

<sup>20</sup> Carol D. Leonnig, High Lead Levels Found in D.C. Kids, Washington Post (Jan. 27, 2009), available at [www.washingtonpost.com/wp-dyn/content/article/2009/01/26/AR2009012602402.html?sid=ST2010120107897](http://www.washingtonpost.com/wp-dyn/content/article/2009/01/26/AR2009012602402.html?sid=ST2010120107897).

<sup>21</sup> Lead in Washington, D.C. Drinking Water May Have Caused More Stillbirths And Miscarriages, HUFFPOST (Jan. 23, 2014), available at [http://www.huffingtonpost.com/2013/12/27/lead-washington-dc-drinking-water\\_n\\_4508163.html](http://www.huffingtonpost.com/2013/12/27/lead-washington-dc-drinking-water_n_4508163.html).

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

<sup>23</sup> Chris Shuey, Preliminary Results of the Navajo Birth Cohort Study and Selected Case Studies of Exposures to Uranium in Mining Wastes and Drinking Water (Dec. 3, 2015), pp. 3-4 available at [http://www.sric.org/nbcs/docs/NDOH\\_CHR\\_conf\\_presentation\\_120315.pdf](http://www.sric.org/nbcs/docs/NDOH_CHR_conf_presentation_120315.pdf).

<sup>24</sup> Chris Shuey, Preliminary Results of the Navajo Birth Cohort Study and Selected Case Studies of Exposures to Uranium in Mining Wastes and Drinking Water (Dec. 3, 2015), pp. 3-4 available at [http://www.sric.org/nbcs/docs/NDOH\\_CHR\\_conf\\_presentation\\_120315.pdf](http://www.sric.org/nbcs/docs/NDOH_CHR_conf_presentation_120315.pdf).

peoples and specifically recommended that the U.S. clean up radioactive waste affecting indigenous peoples “as a matter of urgency.”<sup>25</sup>

- i. Indigenous Navajo farming communities in Shiprock, New Mexico also have dealt with the contamination of their water source – the San Juan River – from a toxic mining waste spill caused by a government contractor (the King Gold Mine disaster), with devastating effects on their cultural practices and subsistence agricultural activities. It is incumbent on the US to develop an alternative water source for the Navajo farming communities.
- j. In **Shell Bluff, Georgia**, a rural low-income community of color located between two nuclear facilities, radiological contaminants have been found in increasing levels in the community’s water supply,<sup>26</sup> and the community’s cancer rates have increased since the facilities began operations.<sup>27</sup> Additionally, the community sits next to what recent reports have identified as the nation’s third most contaminated river, the Savannah River, which 1.4 million people rely on for drinking water.<sup>28</sup> The U.S. Department of Energy has failed to monitor radiation in the community, leaving residents without necessary information to understand the linkages between high cancer rates and contamination caused by the nuclear facilities.<sup>29</sup>

### **3. Infrastructure and Accessibility: Low-Income Communities of Color and Indigenous Communities Lack Adequate and Reliable Infrastructure for Water and Sanitation**

- a. Lack of adequate water and sanitation infrastructure harms the health, safety, and dignity of those living under these circumstances. In the case of homeowners or renters without access to water and sanitation, this situation poses unacceptable health risks as well as collateral consequences such as criminal charges and the loss of custody of children, deepening the marginalization of low-income communities of color. For persons experiencing homelessness, lack of access to water and sanitation deepens all other barriers such individuals face to equal opportunity.
- b. In 2013, the American Society of Civil Engineers gave the U.S. a water infrastructure grade of “D+,” yet consumers bear more than 90% of the costs for infrastructure improvements.
- c. Many of the country’s 1.5 million miles of pipes—some of which are more than a century old—are approaching a desperate need for replacement.<sup>30</sup>

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<sup>25</sup> U.N. Committee on the Elimination of Racial Discrimination, Concluding observations on the combined seventh to ninth periodic reports of United States of America, CERD/C/USA/CO/7-9 (August 29, 2014), ¶10, available at [http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/CERD\\_C\\_USA\\_CO\\_7-9\\_18102\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/CERD_C_USA_CO_7-9_18102_E.pdf).

<sup>26</sup> Georgia Women’s Action for New Directions, “No New Nuclear Speak-Out!” (Dec. 4, 2015), available at <http://gawand.org/no-nukes-speak-out/> (citing to environmental monitoring results from the Georgia Environmental Protection Division).

<sup>27</sup> Bruce A. Dixon, The Grio, “Environmental racism: Is nuclear plant causing cancer for poor black residents of Shell Bluff, Ga.?” (Jan. 25, 2012), available at <http://thegrio.com/2012/01/25/nuclear-plants-and-cancer-epidemics-in-a-poor-black-georgia-town-environmental-racism-in-the-21st-ce/>.

<sup>28</sup> Dash Coleman, *Savannah River nation’s third most toxic, study shows*, Florida Times-Union, (June 27, 2014), <http://jacksonville.com/news/georgia/2014-06-27/story/savannah-river-nations-third-most-toxic-study-shows>.

<sup>29</sup> Bruce A. Dixon, The Grio, “Environmental racism: Is nuclear plant causing cancer for poor black residents of Shell Bluff, Ga.?” (Jan. 25, 2012), available at <http://thegrio.com/2012/01/25/nuclear-plants-and-cancer-epidemics-in-a-poor-black-georgia-town-environmental-racism-in-the-21st-ce/>.

<sup>30</sup> Laura Bliss, *Poor Customers Pay the Price for America’s Crumbling Water Infrastructure*, CITYLAB (July 13, 2015), available at

- d. In cities like **Flint, Michigan** and **Washington, D.C.**, low-income residents of the country's aging affordable housing stock live with the economic and health consequences of these infrastructure deficits, including higher water bills due to leaking pipes and contamination caused by lead or other toxic materials in old water distribution systems. Similarly, as wealthier residents leave cities like **Detroit and Baltimore**, the burden of paying for repairs to deteriorating water and sanitation infrastructure increasingly falls on the poor that remain. The mass water shutoffs against the poor described above are a result of this pattern.
- e. African-American communities in **Alabama's** poorest counties - the **Black Belt** region - have no access to public sanitation and are forced to pay the high cost for on-site septic systems. Within the Black Belt, the situation of Lowndes County illustrates the problem. In Lowndes County, one of the poorest counties in Alabama, 72.9%<sup>31</sup> of the population is African-American and over 26.7%<sup>32</sup> lives below the poverty line. According to the previous UN Special Rapporteur on the human right to safe drinking water and sanitation, over 80% of county households are not "served by conventional municipal sewer systems" and instead must finance their own "on-site wastewater systems, typically septic tanks and in-ground dispersal fields (trenches)."<sup>33</sup> By failing to provide a public sanitation system, the local government effectively pushes the cost of sanitation infrastructure onto the county's poorest residents. Because poor Lowndes County households cannot afford sanitation infrastructure, approximately "40 to 90% of households have either inadequate or no septic system,"<sup>34</sup> and half of the county's septic systems are failing or in poor condition.<sup>35</sup> In addition to being forced to live among raw sewage, those who cannot pay are subject to criminal penalties, risk losing custody of children, and are exposed to diseases formerly eradicated in the U.S. like hookworm. Children suffer the worst effects, particularly from diseases related to poor sanitation that cause developmental problems.
- f. Local governments deprive homeless individuals of access to public water and sanitation services and criminalize them for exercising basic human functions. After her visit to a homeless encampment in **Sacramento, California**, the former UN Special Rapporteur on the human right to safe drinking water and sanitation noted that the "denial of opportunities to [exercise basic bodily functions] in a lawful and

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[www.citylab.com/tech/2015/07/poor-customers-pay-the-price-for-americas-crumbling-water-infrastructure/398228](http://www.citylab.com/tech/2015/07/poor-customers-pay-the-price-for-americas-crumbling-water-infrastructure/398228).

<sup>31</sup> United States Census Bureau, Lowndes County, Alabama, State & County Quick Facts, available at <http://quickfacts.census.gov/qfd/states/01/01085.html>.

<sup>32</sup> United States Census Bureau, Lowndes County, Alabama, State & County Quick Facts, available at <http://quickfacts.census.gov/qfd/states/01/01085.html>.

<sup>33</sup> UN Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, Mission to the United States of America, ¶ 20, U.N. Doc. A/HRC/18/33/Add.4 (Aug. 2, 2011), available at [http://www2.ohchr.org/english/bodies/hrcouncil/docs/18session/A-HRC-18-33-Add4\\_en.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/18session/A-HRC-18-33-Add4_en.pdf) (by Catarina de Albuquerque); United States Census Bureau, Lowndes County, Alabama, State & County Quick Facts, 4 November 2010, available at <http://quickfacts.census.gov/qfd/states/01/01085.html>.

<sup>34</sup> Ashley Cleek, Filthy water and shoddy sewers plague poor Black Belt counties, Al Jazeera (June 3, 2015), available at <http://america.aljazeera.com/articles/2015/6/3/filthy-water-and-poor-sewers-plague-poor-black-belt-counties.html>.

<sup>35</sup> UN Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, Mission to the United States of America, ¶ 20, U.N. Doc. A/HRC/18/33/Add.4 (Aug. 2, 2011), available at [http://www2.ohchr.org/english/bodies/hrcouncil/docs/18session/A-HRC-18-33-Add4\\_en.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/18session/A-HRC-18-33-Add4_en.pdf) (by Catarina de Albuquerque).

dignified manner can both compromise human dignity and cause suffering,” even rising to the level of “cruel, inhumane or degrading treatment.”<sup>36</sup>

- g.** Homeless persons report that they spend much of their days seeking access to water and sanitation simply to be able to carry out basic bodily functions without fear of violence or arrest. Women who become homeless are also at increased risk of assault, sexual exploitation, and abuse. Additionally, homeless women who do not have access to bathrooms report experiencing urinary tract infections and bladder infections from not drinking enough water during the day so that they do not have to use the bathroom overnight and expose themselves to potential harm from sexual assault.
- h.** Indigenous communities disproportionately lack access to drinking water and sanitation infrastructure due to lack of funds for economic development activities and the high costs of constructing infrastructure in remote rural areas. It is an unacceptable breach of U.S. trust responsibilities towards indigenous peoples to allow this situation to continue.

## **II. EJ 2020 Should Undertake Concrete Commitments to Prioritize Equal Access to Safe, Affordable, and Adequate Water and Sanitation in all U.S. EPA Activities and Policies As a Matter of Urgency.**

As our general comments above indicate, EJ 2020 must include a commitment for the U.S. EPA to consider how its programs, policies, and regulatory activities are making measurable progress toward achieving equal access to safe, affordable, and adequate water and sanitation, including by preventing the contamination of water resources that environmental justice communities depend upon for drinking water and other essential uses, and preventing inequities in access to these basic rights from deepening existing inequality experienced by environmental justice communities. Most critically, EJ 2020 must incorporate commitments to address affordability and access to financing for water and sanitation infrastructure for low-income communities. By prioritizing these issues of equal access to water and sanitation in EJ 2020 and making concrete commitments to advance these goals as a matter of urgency, the U.S. EPA can ensure that EJ 2020 has a meaningful and positive impact on environmental justice communities that currently lack access to safe, affordable, and adequate water and sanitation.

The following six subsections provide our specific suggestions for transforming the current EJ 2020 into a more robust agenda to support such communities.

### ***1. EJ 2020 Needs to Adopt a Community-Driven Approach to Community Engagement and Integrate Community Input in All Environmental Justice Policies and Actions***

The EJ 2020 Action Agenda is structured around eight priority areas, intending to address three goals (deepening environmental justice practice within EPA programs, working with partners to expand the EPA’s impact within overburdened communities, and demonstrate progress on significant national environmental justice challenges). The structure proposed appears to effectively create “silos” of work led by various offices as “co-leads” with no clear coordination

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<sup>36</sup> UN Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, Mission to the United States of America, ¶ 56, U.N. Doc. A/HRC/18/33/Add.4 (Aug. 2, 2011), available at [http://www2.ohchr.org/english/bodies/hrcouncil/docs/18session/A-HRC-18-33-Add4\\_en.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/18session/A-HRC-18-33-Add4_en.pdf).

among them. This raises concerns about the extent to which, e.g., information from “on-the-ground partnerships” (“Community-Based Work” priority, OLEM, Region 3 and Region 10) could inform “partnership[s] with state and local co-regulators” (“States and Local Governments” priority, OW, Region 5). To be sure, in meeting the environmental justice needs of affected communities, the role of those community stakeholders should be sought out at every possible opportunity (it is, after all, the local communities who suffer the injustices sought to be remedied). Accordingly, these comments emphasize the need for EJ 2020 to adopt a bottom-up approach that prioritizes the knowledge of communities with environmental justice concerns, meaningfully partners with them to identify concerns and solutions, and builds local capacity.

EPA’s engagement with state and local governments should likewise reflect this commitment to set priorities in partnership with communities facing environmental justice burdens. With respect to regional coordination, in formulating PPAs, PPG Working Plans, or comparable plans with individual states, we suggest that EJ 2020 commit the EPA to create plans that both coordinate overarching regional priorities and incorporate environmental justice. EJ 2020 should include as a goal that the EPA will work to create PPAs or PPGs with all states that currently lack such plans to ensure that each region has a coherent plan that will allow those states to address best practices for achieving their particular regional priorities in overburdened communities. EJ 2020 should likewise include a commitment to incorporate community voices and local government in the development of PPAs, namely in helping to set priorities for the programs that will affect their overburdened communities. Accordingly, we recommend that EJ 2020 also include a commitment to develop and implement an Outreach Plan Requirement for all strategic agreements with coordinating state agencies. The development of a common standard for local citizen inclusion in strategic planning at the state level, namely that of a PPG working plan, PPA, or other comparable strategic document, should outline the techniques that the state agencies will utilize to provide community outreach and open a dialogue. Such techniques should be developed in coordination with overburdened communities.

## ***2. EJ 2020 Should Dedicate Resources to Support Community Mobilization and Community-Based Research into Lack of Access to Equal Water and Sanitation in Low-Income Communities***

In addition to the strategies outlined in Chapter 8 of EJ 2020 on developing the capacity of overburdened communities, we recommend that the Agenda commits resources and available tools to strengthen the capacity of communities of color and tribal communities to engage with local, state, and federal regulators on lack of equal access to safe, affordable, and adequate water and sanitation, including by funding locally-driven research into these deficits and proposed solutions. The EJ Legal Tools provide opportunities for research and funding for the empowerment of citizens through “[e]nvironmental justice training or education for [the] community.” Directing resources to support education, training, research and community organizing around equal access to safe, affordable, and adequate water and sanitation would stimulate community-driven initiatives in the areas most affected by current deficits. In furtherance of this goal, EJ 2020 should also include a commitment to develop best practices for using such research to facilitate action by affected communities and individuals in a way that genuinely meets community needs.

### ***3. EJ 2020 Should Include Robust Commitments to Address Water Affordability and Commit to Setting a National Water Affordability Standard***

An essential component of environmental injustice is simply not addressed in the EJ 2020 Action Agenda – the need for a national standard of household affordability of life-essential water and sanitation services. Water shut off rates and their corresponding adverse disparate impact on overburdened communities are obvious health burdens that must be addressed and minimized in any meaningful environmental justice strategy. On a fundamental level, the provision of safe drinking water and adequate sanitation services will continue to be thwarted if environmental justice stakeholders fail to address the inability of many low-income families to pay increasing water and sewer bills and maintain water service to their homes. The water utility industry, and its constituent organizations and associations, continue to advocate practices for customer assistance rooted in earlier times, when water and sewer bills imposed significantly lower economic burdens on the poor. In many communities, annualized water and sewer bills are comparable, if not in excess of, annualized home heating or electricity bills. Yet the best practices for electric and home heating affordability programs are light-years ahead of what the supposed best-practices are among water utilities.

Expertise in water affordability resides in the communities afflicted by poverty, is shared with their advocates, and understood by their experts. Yet the EJ 2020 appears to be looking for best practices among the state and local co-regulators, where innovation in water affordability is scarce. There is one, noteworthy, burgeoning exception in Philadelphia. Philadelphia is poised to implement the Income-Based Water Rate Assistance Program (IWRAP), which calculates low-income customer bills as a percentage of household income, between 2% and 3% monthly for families with income at or below 150% of the Federal Poverty Level (FPL). The same program must provide affordable monthly bills, for current service and repayment of accrued debts, to customers between 150% and 250% of FPL, under standards that have yet to be established. Philadelphia's IWRAP is based on the *household* economic analysis of affordability of Philadelphia's water bills, with the goal of ensuring that even the lowest income families are able to *afford* to maintain water and sewer service.

In contrast, the EPA's "Customer Assistance Program (CAP) Compendium" was assembled without any consultation or input from experts and advocates directly involved in representing the interests of low-income individuals and communities. Those experts and advocates would attest that the vast majority of existing water assistance programs are inadequate and self-defeating as they address water payment problems as short-term problems. Instead, best practices should be based upon water affordability programs targeting a (2%) *water/wastewater* burden for low income households. We submit that the EPA should ensure that standards for water affordability are a part of the EJ 2020 Action Agenda. Low-income and environmental justice advocates must be included in discussions bearing upon water affordability, as there is a wide gulf between the information available from water utilities and their membership organizations and coalitions, on the one hand, and the actual current needs and experiences of low-income families for affordable access to safe, life-essential water and sanitation service, on the other hand.

#### ***4. EJ 2020 Should Make a Stronger Commitment to Incorporate Environmental Justice Concerns into Its Permitting Practices by Setting Standards for Rejecting a Permit that Poses Unacceptable Environmental Justice Harms***

While the Coalition supports EPA's goal of incorporating environmental justice concerns into its permitting practices, which the EJ 2020 Action Agenda explains in Chapter 3, we have significant concerns with how EPA anticipates implementing its goal. Our comments on each of the strategies EPA outlines in Chapter 3 for incorporating environmental justice considerations into its permitting practices are as follow.

##### Action 1.1: Establish a framework and set of tools for considering environmental justice concerns in EPA permitting.

The Coalition is concerned that EPA's first strategy fails entirely to articulate any willingness on EPA's part to **deny** permit applications in appropriate circumstances and encourage state, local, and tribal governments to do likewise. Instead, EPA, in Action 1.1 of Chapter 3, indicates that EPA will establish a framework and tools for permit writers to determine when it might be appropriate to gather more information and conduct more analysis relevant to environmental justice concerns. Action Agenda at 11-12. This framework, EPA claims, will allow permit writers to impose permit conditions, refer issues to the appropriate agencies, or facilitate voluntary agreements between impacted communities and polluters. Notably, it does not mention a framework or tools for determining when a permit may not be appropriate at all because of its environmental justice impacts.

The authority to deny permit applications because of disproportionate impacts on minority and low-income communities is particularly important for protecting drinking water and drinking water sources. According to the EPA, there are over a half million permitted injection wells across the United States, which EPA has authorized to inject pollutants into the ground.<sup>37</sup> Further, although information is incomplete, EPA has exempted 4,679 underground sources of drinking water for industrial uses.<sup>38</sup> These aquifer exemptions encompass hundreds of millions, if not billions, of gallons of potential drinking water.

Because EPA has failed to articulate a willingness to deny permits based on environmental justice concerns, the Coalition urges EPA to 1) expressly state that it has the authority<sup>39</sup> and is willing to exercise the authority to deny a permit because it will have disparate impacts on minority and/or low income communities; and 2) outline a framework for determining how EJ concerns will impact permitting decisions. Only if EPA, state, local, and tribal governments are willing to determine that in some circumstances environmental justice concerns preclude issuing a permit to a polluting operation will EPA's goal be meaningful.

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<sup>37</sup> [https://www.epa.gov/sites/production/files/2015-10/documents/uicinventorybystate2013\\_508c\\_0.pdf](https://www.epa.gov/sites/production/files/2015-10/documents/uicinventorybystate2013_508c_0.pdf).

<sup>38</sup> *Natural Resources Defense Council, et. al., Citizen Petition to Repeal or Amend the EPA's Aquifer Exemption Regulations to Protect Underground Sources of Drinking Water* at 8-13 (March 23, 2016); available at: [https://www.nrdc.org/sites/default/files/wat\\_16032201a.pdf](https://www.nrdc.org/sites/default/files/wat_16032201a.pdf).

<sup>39</sup> The EPA Board of Appeals articulated this authority in *In re: Chemical Waste Management of Indiana, Inc.* 6 E.A.D. 66, 72 (1995).

Action 2.2: Develop tools that enable communities to participate more effectively in the permitting process.

While the Coalition supports efforts to improve government engagement with environmental justice communities, we are concerned that the EPA's proposed actions do not go far enough. EPA commits to making information resources, “especially web-based information” more available to community members. Action Agenda at 12-13.

However, any approach relying primarily on electronic media to communicate fundamentally misunderstands the everyday electronic infrastructure obstacles that many low-income and minority communities face. In New Mexico, for example, where most communities are rural, home internet use in low-income, rural households (less than \$35,000/year annual income) is just 57%.<sup>40</sup> That percentage falls to 39% in tribal communities. *Id.* In New Mexico, EPA's reliance on electronic communications further marginalizes many of the communities that would most benefit from EPA engagement.

Action 2.3: Develop tools for permit applicants.

EPA states that it intends to “engage with permit applicants to share information, tools and approaches for conducting enhanced outreach in communities with environmental justice concerns.” Action Agenda at 13. The goal of this “enhanced outreach appears to be to help industry “to build trust and promote better understanding” with environmental justice communities. Action Agenda at 11.

While perhaps well intentioned, the Coalition views this action item as a vehicle that could potentially undermine meaningful public participation in environmental justice communities. Polluting industries and governments routinely tell low-income and minority communities that projects seeking pollution permits have minimal risks of health impacts, accidents, or property destruction. This EPA action item could be construed as a way for EPA to assist industry in “selling” dirty projects to environmental justice communities, rather than a strategy for meaningfully engaging those communities as equals. This action item, in particular, relates to Action 1.1, because in order for communities to view their participation as meaningful, there must at least be the chance that the proposed polluting operation will not get a permit. Otherwise, communities view the permitting process as nothing more than theater.

***5. EJ 2020 Should Increase Resources for Science-Based Consideration of Cumulative Impacts But Emphasize Equitable Distribution of Environmental Harms***

The Coalition strongly supports the EPA's goal of increasing resources for science-based consideration of cumulative impacts of pollution in low-income and minority communities. This issue is covered in Chapter 5 of the Action Agenda.

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<sup>40</sup> University of New Mexico, Bureau of Business and Economic Research, *Broadband Subscription and Internet Use in New Mexico* at 20 (June 2013); available at [http://www.doit.state.nm.us/broadband/reports/NMBBP\\_bb\\_use\\_0613.pdf](http://www.doit.state.nm.us/broadband/reports/NMBBP_bb_use_0613.pdf).

Many minority and low-income communities face significant and disparate impacts from pollution concentrated in their neighborhoods.<sup>41</sup> For example, in New Mexico, indigenous Diné communities face significant environmental and health impacts from the impacts of uranium mining and milling on various media, i.e., water, land, and air.<sup>42</sup> These multiple impacts, combined with impacts on culture and socioeconomics, deserve additional scrutiny in the context of permitting and enforcement.

Despite our general support for EPA's efforts to increase resources available for identifying and analyzing cumulative impacts and risks, the Coalition cautions EPA against over-reliance on technological solutions to address cumulative impacts. In Action 3.2, EPA seeks to "develop and/or evaluate several technologies that target specific environmental problems in communities with EJ concerns." Action Agenda at 20. While technology can certainly play a role in mitigating health and environmental impacts, it should not be viewed as a substitute for equitable distribution of environmental burdens. Thus, EPA should not rely on technological fixes to the exclusion of creating a framework and tools to give EPA, state, local and tribal governments the wherewithal to deny permit applications, as recommended above.

### ***6. EJ 2020 Should Make Stronger Commitments to Protect the Right of Tribes and Indigenous Peoples to Safe, Affordable, and Adequate Water and Sanitation***

In Chapter 9, EPA appropriately acknowledges the right of indigenous peoples to self-determination and the United States' trust responsibility to tribes. The right of indigenous peoples to safe and affordable drinking water is inherent in the right to self-determination and in tribal sovereignty.

When confronted with environmental justice issues, and particular issues involving drinking water and drinking water sources, in and near Indian Country, the Coalition urges EPA to acknowledge and address two important concerns.

First, indigenous communities most immediately impacted by pollution do not always share the same interests with tribal governments. For example, the majority of Diné have opposed new uranium mining and processing within Navajo Indian Country since the 1970s when the full impact of uranium mining and milling on public health and natural resources was becoming clear. However, not until 2005 did the Navajo Nation government support the Navajo people by enacting the Diné Natural Resources Protection Act<sup>43</sup> which prohibits uranium mining and processing within Navajo Indian Country, primarily to protect the Navajo Nation's natural resources such as groundwater. In the interim, the Navajo Nation government squarely supported new uranium mining, contrary to the will of the people. EPA should acknowledge that there may be a distinction between impacted indigenous communities' interests and tribal government interests and develop tools for addressing situations when those interests diverge.

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<sup>41</sup> See, e.g., Morello-Frosch, Rachel, *et. al.*, *Understanding the Cumulative Impacts of Inequalities in Environmental Health: Implications for Policy*, 30 Health Affairs 879-887 (May 2011).

<sup>42</sup> Johnson, Jordon, *et. al.*, *Looking Within: A Health Impact Assessment of Uranium Mining* at 20-23 (April, 2015); available at: <https://www.nmlegis.gov/lcs/handouts/IAC%20093015%20Item%2010%20Looking%20Within%20-%20A%20Health%20Impact%20Assessment%20of%20Uranium%20Mining.pdf>.

<sup>43</sup> <http://www.navajocourts.org/Resolutions/CAP-18-05.pdf>.

Second, one of the fundamental aspects of sovereignty is control over resources.<sup>44</sup> This includes the right not only to develop tribal resources, but also to refuse to develop tribal resources. EPA should develop a framework for respecting tribal sovereignty where tribal government has not assumed primacy under a federal statute (and EPA is therefore the agency responsible for its implementation) and where the tribal government is opposed to the pollution permit.

For example, there may be instances where a tribe wants to protect groundwater sources from contamination under tribal land, but has not assumed primacy to implement and enforce a tribal UIC program. A company seeks an aquifer exemption for mineral development, which would destroy significant amounts of groundwater. In that case, the EPA should have a protocol in place which would ensure that EPA respect tribal priorities rather than treating the tribe as an obstacle.

### **Conclusion**

Again, we thank you for the opportunity to submit comments on this important Action Agenda. Please let us know if we can provide any further information that may be of use as EJ 2020 is finalized; please contact Britton Schwartz, UC Berkeley School of Law, at [bschwartz@clinical.law.berkeley.edu](mailto:bschwartz@clinical.law.berkeley.edu) and 510-664-7604 for further discussion. The coalition remains committed to policies that promote equal access to safe, affordable water and adequate sanitation as a fundamental component of achieving environmental justice, and we look forward to continuing to engage with the U.S. EPA on this critical issue.

In solidarity,



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<sup>44</sup> *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140, 146 (1982); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983).