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PLAN EJ 2014: FACT OR FICTION? A CRITIQUE OF THE OBAMA ADMINISTRATION’S EFFORTS ON ENVIRONMENTAL JUSTICE

JEANNE ZOKOVITCH PABEN*

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INTRODUCTION

As President Obama's tenure in office draws to a close, environmental injustices continue to proliferate in communities across this country. During the Obama Administration, there has been a strong government voice on combating these injustices, yet under their watch we see travesties like Flint, Michigan. Flint is the latest example of how our laws and government processes are not only inadequate in protecting overburdened communities, but also how they are complicit in perpetuating harm. This Article aims to answer how that happens, first, by cataloging the environmental justice efforts under the Obama Administration, most notably through Plan EJ 2014, then by taking an in-depth look at these efforts, identifying its successes and failures, and, finally, by proffering additional steps that the Obama Administration can and should take in its final hours to assure actual impacts on this issue.

I. THE OBAMA ADMINISTRATION'S ENVIRONMENTAL JUSTICE EFFORTS

During the 2008 Presidential Election, now President Obama, included environmental justice as one of his priorities.¹ This priority

¹ Jeanne Zokovitch Paben, *Green Power & Environmental Justice—Does Green Discriminate?*, 46 TEX. TECH L. REV. 1067, 1102 (2014).

manifested itself into his Presidency early on in a number of ways, including the selection of key officials with histories of working on environmental and health disparities.² Specifically, President Obama selected Lisa Jackson to lead the United States Environmental Protection Agency (“EPA”) and Nancy Sutley to lead the White House Council on Environmental Quality (“CEQ”).³ Relatively quickly, Sutley and Jackson undertook efforts to address environmental justice within their respective agencies.⁴

On January 10, 2010, Administrator Jackson issued a memo to all EPA employees, and in it she identified “seven key themes to focus the work of our agency.”⁵ Included in those seven themes was “Expanding the Conversation on Environmentalism and Working for Environmental Justice,” where Administrator Jackson encouraged “innovation and bold thinking” and called on EPA employees “to bring vision and creativity” to assure that environmental justice principles are included in “all of our [EPA] decisions.”⁶ Over the next six months, Administrator Jackson used similar themes in several public forums, including her February 23, 2010 statement to the Senate Committee on Environment and Public Works discussing the EPA’s FY 2011 budgetary needs.⁷ In July 2010, the EPA issued draft guidance for reviewing environmental justice in rulemaking, and released a draft of Plan EJ 2014.⁸ Plan EJ 2014, coined to reference the twentieth anniversary of President Clinton’s Executive Order on Environmental Justice, begins with a memo from Jackson and states: “Plan EJ 2014 builds on the solid foundation we have established at the EPA to expand the conversation on environmentalism.”⁹ The release of

² *Id.* at 1102–05.

³ Laura Walter, *EPA, NWF Comment on Obama’s Energy and Environment Team*, EHS TODAY, Dec. 18, 2008, at 1–2 http://ehstoday.com/environment/news/epa_nwf_obama_energy_1218 [<https://perma.cc/YFZ9-5U8S>].

⁴ Nancy Sutley, *A Promise of Environmental Justice for All Americans*, WHITE HOUSE: BLOG (Dec. 20, 2010, 7:55 PM), <https://www.whitehouse.gov/blog/2010/12/20/a-promise-environmental-justice-all-americans> [<https://perma.cc/6HLD-L26F>].

⁵ Memorandum from Lisa P. Jackson, Administrator, to All EPA Employees (Jan. 10, 2010), *available at* https://www3.epa.gov/storet/download/MEMORANDUM_Our_Top_Priorities.pdf [<https://perma.cc/K2LB-W9TK>].

⁶ *Id.*

⁷ *The President’s Proposed EPA Budget for FY 2011: Hearing Before the Comm. on Env’t. And Public Works*, 111th Cong. 2, Cong. Rec.—Daily Digest D127 (Feb. 23, 2010) (testimony of Lisa P. Jackson, Administrator, EPA), <http://www.epw.senate.gov/public/index.cfm/in-the-news?ID=FD264D19-802A-23AD-4E4A-E4C3A050311C> [<https://perma.cc/A6AH-QXRF>] (last visited Oct. 24, 2016).

⁸ See EPA, PLAN EJ 2014 1 (Sept. 2011) [hereinafter PLAN EJ 2014].

⁹ *Id.* (A Message from EPA Administrator Lisa P. Jackson).

this draft plan marked the beginning of the largest coordinated approach of the Obama Administration on environmental justice, which will be discussed in depth below.¹⁰

In addition to Plan EJ 2014, under the President's direction to re-establish a federal commitment to Executive Order 12898, Sutley and Jackson reconvened the Environmental Justice Interagency Working Group ("IWG") for the first time in ten years in September 2010.¹¹ Created by Executive Order 12898, the IWG was tasked with seven functions, such as providing guidance to federal agencies on identifying environmental justice conditions, coordinating research, data collection, and serving as a clearinghouse for federal agencies on environmental justice matters.¹² That September, the EPA issued its 2011–2015 Strategic Plan, which included goals and strategies aimed at achieving environmental justice.¹³ Then in December, the Obama Administration convened the first White House Forum on Environmental Justice, which CEQ Chair Sutley characterized as an opportunity to "give a national voice to under-represented American communities that shoulder a disproportionate amount of pollution."¹⁴ The Forum included six cabinet officials, who discussed their agencies' efforts to address disproportionate environmental burdens and increase environmental benefits to low-income communities and communities of color,¹⁵ and more than 100 environmental justice leaders from throughout the country were in attendance.¹⁶

These efforts continued in June of 2011, when Administrator Jackson established a workgroup to evaluate EPA's handling of civil rights issues.¹⁷ In August 2011, more than fifteen administrative agencies committed to annual progress plans on their respective agencies'

¹⁰ See *id.* at 18 ("A coordinated and holistic approach is essential to ensure that we address the full scope of adverse human health and environmental effects in overburdened communities, legacy pollution problems rooted in historical discrimination, and cumulative impacts; and to ensure that all communities participate in, and benefit from, the transition to a clean energy economy.").

¹¹ See *id.*

¹² Exec. Order No. 12,898, 3 C.F.R. § 859 (1995), *reprinted as amended in* 42 U.S.C. § 4321 (1994 & Supp. VI 1998).

¹³ EPA, FY 2011–2015 EPA STRATEGIC PLAN, 34–35 (Sept. 30, 2010), <http://nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=P1008YOS.txt> (last visited Oct. 24, 2016) [<https://perma.cc/C7AW-H4HL>].

¹⁴ Sutley, *supra* note 4.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ PLAN EJ 2014, *supra* note 8, at 28.

environmental justice efforts through a Memorandum of Understanding (“MOU”).¹⁸ Finally, after receiving public input, EPA issued Plan EJ 2014 in its final form in September 2011.¹⁹

A. *Plan EJ 2014*

When Plan EJ 2014 was first unveiled to the public as a draft in 2010, it was touted as a four-year plan to integrate environmental justice into its processes to continue the legacy set by President Clinton via his Executive Order 12898.²⁰ Although the draft Plan was open for public comment, the agency began developing implementation plans to address key areas the agency identified.²¹ In its final form, Plan EJ 2014 still seemed to be charting this course, described as “a roadmap to help EPA integrate environmental justice into its programs, policies, and activities.”²² Administrator Jackson continued to characterize the Plan as “focus[ing] on agencywide areas critical to advancing environmental justice, including rulemaking, permitting, compliance and enforcement, community-based programs and our work with other federal agencies.”²³ The EPA articulated its goals in Plan EJ 2014 as seeking to “[p]rotect the environment and health in overburdened communities. Empower communities to take action to improve their health and environment. Establish partnerships with local, state, tribal, and federal governments and organizations to achieve healthy and sustainable communities.”²⁴

The Plan set up three primary areas of action: Cross-Agency Focus Areas, Tools Development Areas, and Program Initiatives.²⁵ Under the first two categories, nine implementation plans were developed: 1) Incorporating Environmental Justice into Rulemaking; 2) Considering Environmental Justice in Permitting; 3) Advancing Environmental Justice through Compliance and Enforcement; 4) Supporting Community-Based

¹⁸ EPA, MEMORANDUM OF UNDERSTANDING ON ENVIRONMENTAL JUSTICE AND EXECUTIVE ORDER 12898 (2011), <https://www.epa.gov/sites/production/files/2015-02/documents/ej-mou-2011-08.pdf> [<https://perma.cc/DPL5-L968>] (last visited Oct. 24, 2016) [hereinafter MEMORANDUM OF UNDERSTANDING].

¹⁹ See PLAN EJ 2014, *supra* note 8.

²⁰ *Id.* (A Message from EPA Administrator Lisa P. Jackson).

²¹ *Id.* at 1.

²² *Id.* at 4.

²³ *Id.* (A Message from EPA Administrator Lisa P. Jackson).

²⁴ *Id.* at 2 (bulleted formatting omitted).

²⁵ See PLAN EJ 2014, *supra* note 8, at i.

Action Programs; 5) Fostering Administration-Wide Action on Environmental Justice; 6) Science; 7) Law; 8) Information; and 9) Resources.²⁶

The third key area of work, identified as “Program Initiatives,” defined areas where EPA already engages in “active purs[uit]” of “environmental justice goals or [those that] produce benefits for overburdened communities.”²⁷ For these Programs, the Plan commits to designating at least one initiative in each “appropriate” program to be included in the Plan.²⁸ Although there is no indication of what programs will be assigned an initiative, the Plan includes the following initiatives: the Office of Solid Waste and Emergency Response’s (“OSWER”) Community Engagement Initiative, the Office of Water’s Urban Waters program, the Office of Enforcement and Compliance Assurance’s (“OECA”) National Enforcement Initiatives (“NEI”), the Office of Air and Radiation’s (“OAR”) Air Toxics Rule, and the Office of International and Tribal Affairs’ U.S. Mexico Border Program.²⁹ In addition, the Plan sets forth a separate section on “Civil Rights,” and indicates that the EPA is already working on efforts to make this program more responsive.³⁰

Structurally, Plan EJ 2014 is divided into six sections.³¹ In addition to providing background on environmental justice and the EPA’s role, the Introduction identifies a conscious shift at EPA to not just focus on disproportionate burdens, but also disproportionate environmental benefits as well.³² Initially, the Plan also defines EPA’s organizational structure tasked with Plan development and implementation, outlines the Plan’s overarching structure, discusses community engagement and outreach, and sets forth a reporting structure for updating the public.³³

Under “Organizational Structure,” the Plan drives home the intent of a coordinated effort throughout all of EPA, noting that all Cross-Agency Focus Areas and Tool Development Areas are being led by at least one EPA program and one region.³⁴ Further, it indicates that EPA has committed both senior management and staff-level workgroups to lead and carry out the activities outlined in the implementation plans.³⁵

²⁶ *Id.* at i–v.

²⁷ *Id.* at vi.

²⁸ *Id.*

²⁹ *Id.*

³⁰ See PLAN EJ 2014, *supra* note 8.

³¹ *Id.* (Table of Contents).

³² *Id.* at 3.

³³ *Id.* at 4–7.

³⁴ *Id.* at 5.

³⁵ *Id.*

Fourth, the “Community Engagement” and “Stakeholder Outreach” section leads with Administrator Jackson’s “expanding the conversation on environmentalism”³⁶ theme and ties it to four goals in this area: understanding EJ needs, gaining stakeholder input in Plan development and implementation, communicating about Plan EJ 2014 in a consistent and dynamic way, and facilitating long-term partnerships to achieve Plan goals.³⁷ The Reporting section indicates that the EPA’s Office of Environmental Justice will provide annual progress reports and updates for the implementation plans to the public.³⁸

The fifth and sixth sections, “Cross-Agency Focus Areas” and “Tools Development Areas,” reiterate the goals and strategies for the nine areas of action within these two categories, while also adding “Activities” to this taxonomy as tasks to be performed under each “Strategy.”³⁹ Additionally, the EPA’s efforts on each of the nine areas during the development of the Plan is summarized, and also set the stage for completion under the Plan.⁴⁰

Following the main text for these actions are two separate sections on “Program Initiatives” and “Civil Rights.”⁴¹ While the “Program Initiatives” section reiterates language from the Executive Summary almost verbatim, the “Civil Rights” section provides additional detail.⁴² Specifically, in June 2011, Administrator Jackson tasked a “workgroup of senior management” to review EPA’s Office of Civil Rights (“OCR”) and other civil rights activities to develop recommendations of how the “advance[ment of] civil rights” could be improved, which included evaluating the OCR’s organizational structure changes, the timeliness and effectiveness of the complaint process, and the need for proactive compliance guidance.⁴³ Recommendations adopted by the workgroup were to be turned into implementation plans, which would be made available for public comment, and ultimately finalized as Plan EJ 2014 annual work plans.⁴⁴

³⁶ See PLAN EJ 2014, *supra* note 8, at 6–7.

³⁷ *Id.*

³⁸ *Id.* at 7.

³⁹ *Id.* at 8–27.

⁴⁰ *Id.* at 28.

⁴¹ *Id.*

⁴² See PLAN EJ 2014, *supra* note 8, at 28.

⁴³ *Id.* at 28.

⁴⁴ *Id.*

The Plan's Appendix, at 120 pages, is nearly four times as long as Plan EJ 2014. Although the goals, strategies, and activities for each of the nine implementation plans for "Cross-Agency" and "Tools Development" action areas are articulated within the Plan, the Appendix provides details of how EPA actually intends to carry out each implementation plan.⁴⁵

All of the implementation plans are included in the Appendix as both text and as a table. In addition to reiterating the goals, strategies, and activities from the Plan's text, the Appendix also 1) identifies the organizational structure utilized for each implementation plan; 2) defines specific activities to be performed under each strategy including some time frames for performance; and for some 3) identifies outreach efforts to be made.⁴⁶

The tables include these activities, but also add "Deliverables" and "Milestones" time frames for each of the deliverables to the taxonomy.⁴⁷ The "Implementation Plans" identify the same "Goals" as in the text of the Plan, and for the most part, the "Strategies" are the same as well. Further, the implementation plan tables list the same "Activities" as were identified in the text of the Plan, except the first, "Incorporating Environmental Justice into Rulemaking," which lists under the "Activities" column the "Goals" it outlined in the text, not the "Activities." Most of the implementation plans then establish "Deliverables" for the Activities, but the "Incorporating Environmental Justice into Rulemaking" table does this for the broader "Goals."⁴⁸

A review of the entire taxonomy reveals that the most meaningful level is the "Strategies," while the "Activities" and "Deliverables" are varying levels of tasks designed to achieve each "Strategy."⁴⁹ While each of these three levels are measurable, "Strategies" is the most meaningful, because it identifies tasks at a more impactful level. In determining if the "Strategies" section has been met, one can identify much of the successes and failures of the Plan. For this reason, the table below details the "Goals" and "Strategies" information for the nine implementation plans provided in the Plan.⁵⁰

⁴⁵ See *id.* at 29–179.

⁴⁶ *Id.* at 178–79.

⁴⁷ *Id.* at 39, 49, 71–76, 87–88, 101–05, 134–38, 157.

⁴⁸ See PLAN EJ 2014, *supra* note 8, at 33–40.

⁴⁹ *Id.* at 33–179.

⁵⁰ *Id.*

TABLE 1⁵¹

Area of Action	Implementation Plan	Goal	Strategies
Cross-Agency	Incorporating Environmental Justice into Rulemaking	Developing and implementing guidance on incorporating EJ into EPA's rulemaking process	Finalize the Interim Guidance on considering EJ during the development of an action. Facilitate & monitor implementation of guidance on incorporating EJ into rulemaking. Develop technical guidance on how to conduct EJ assessments of rulemaking activities.
Cross-Agency	Considering Environmental Justice in Permitting	To enable full & meaningful access to the permitting process and to develop permits that address EJ issues to the greatest extent practicable under existing laws	Develop tools that will enhance overburdened communities' participation in permitting processes. Develop tools to assist permitting authorities to meaningfully address EJ in permitting decisions. Implement the above tools at EPA and work with others to do so as well.
Cross-Agency	Advancing Environmental Justice through Compliance and Enforcement	Integrate EJ considerations into OECA ⁵² program strategies, and development of remedies	Select and implement Nat'l Enforcement Initiatives that advance EJ goals. Advance EJ goals through targeting and development of compliance and enforcement actions. Enhance use of enforcement & compliance tools to advance EJ goals in regional geographic initiatives.

⁵¹ *Id.*⁵² Office of Enforcement and Compliance Assurance.

Area of Action	Implementation Plan	Goal	Strategies
Cross-Agency (Continued)	Advancing Environmental Justice through Compliance and Enforcement (Continued)	Integrate EJ considerations into OECA program strategies, and development of remedies (Continued)	Seek appropriate remedies in enforcement actions to benefit overburdened communities & address EJ concerns. Enhance communication about EJ concerns and distribution & benefits of enforcement actions with affected communities & the public.
Cross-Agency	Supporting Community-Based Action Programs	Strengthen community-based programs to engage overburdened communities & build partnerships that promote healthy sustainable & green communities	Advance EJ principles by building state & tribal partnerships via NEPPS ⁵³ and NPM. ⁵⁴ Identify scalable & replicable elements of successful EPA community-based programs and align other EPA programs to further address needs of overburdened communities. Promote an integrated One EPA presence to better engage communities. Foster community-based programs modeled on CARE ⁵⁵ principles. Explore how EPA funding policies & programs can inform & help decision-makers max benefits and

⁵³ National Environmental Performance Partnership System.

⁵⁴ National Program Manager.

⁵⁵ Community Action for a Renewed Environment.

Area of Action	Implementation Plan	Goal	Strategies
Cross-Agency (Continued)	Supporting Community-Based Action Programs (Continued)	Strengthen community-based programs to engage overburdened communities & build partnerships that promote healthy sustainable & green communities (Cont.)	minimize adverse impacts from land use decision-making, planning, siting & permitting. Promote equitable development opportunities for all communities.
Cross-Agency	Fostering Administration-Wide Action on Environmental Justice; and under “Tools Development” areas	Facilitate active involvement of all fed agencies in implementing E.O. 12898 by minimizing and mitigating disproportionate negative impacts while fostering environmental, public health, and economic benefits for overburdened communities.	Assist other federal agencies in integrating EJ. Work with other fed agencies to strengthen use of interagency tools, i.e., NEPA ⁵⁶ and Title VI. ⁵⁷ Foster healthy and sustainable communities with an emphasis on equitable development and place-based initiatives. Strengthen community access to federal agencies.
Tools Development	Science	Substantially support and conduct research that employs participatory principles and integrates social & physical sciences aimed at solutions to environmental and health inequalities among overburdened populations & communities.	Apply integrated transdisciplinary and community-based participatory research with a focus on addressing multi-media, cumulative impacts and equity in environmental health and environmental conditions.

⁵⁶ National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (1969).

⁵⁷ Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1964).

Area of Action	Implementation Plan	Goal	Strategies
Tools Development (Continued)	Science (Continued)	Substantially support and conduct research that employs participatory principles and integrates social & physical sciences aimed at solutions to environmental and health inequalities among overburdened populations & communities. (Continued)	Incorporate community-based organizations (CBOs) and leaders' perspectives into EPA research agendas and engage in collaborative partnerships with them on science and research to address EJ. Leverage partnerships with other federal agencies on issues of research, policy and action to address health disparities. Build and strengthen technical capacity of CBOs and community EJ and health leaders to address environmental health disparities and environmental sustainability issues.
Tools Development	Law	Provide legal assistance to EPA policy makers and other agency decision makers to advance their EJ objectives.	Provide legal support to each Plan EJ 2014 cross-agency focus area workgroup.
Tools Development	Information	Develop a more integrated, comprehensive, efficient and nationally consistent approach for collecting, maintaining and using geo-spatial info relevant to potentially overburdened communities.	Develop EPA's GeoPlatform. Develop a nationally consistent EJ screening tool into the GeoPlatform.

Area of Action	Implementation Plan	Goal	Strategies
Tools Development	Resources	<p>Grants & Technical Assistance Goal: Develop an efficient and effective system for delivering financial & technical assistance to communities to empower them to improve their health and environment.</p> <p>Workforce Diversity Goal: Achieve an inclusive work environment by developing an efficient system for the outreach & recruitment of potential employees.</p>	<p>Increase transparency & efficiency in providing community-based grant opportunities. Improve delivery of technical assistance to communities. Strengthen grants training for communities. Improve community awareness of grant competition process. Revise grant policies that are unduly restrictive. Encourage legal and program offices to dialog on community-based grant opportunities. Improve timeliness of Brownfields Grant Awards.</p> <p>Increase the diverse pool of qualified applicants. Operate under an integrated One EPA approach for recruitment and outreach.</p>

As previously indicated, advancing EJ through Title VI of the Civil Rights Act was one of the Plan's original action areas, but at the time the Plan was produced, there was no implementation plan for this action area. In April 2012, EPA released a seven page supplemental implementation plan specifically addressing Title VI.⁵⁸ For the most part,

⁵⁸ EPA, PLAN EJ 2014 SUPPLEMENT: ADVANCING ENVIRONMENTAL JUSTICE THROUGH TITLE VI DRAFT 1 (Apr. 12, 2012), <https://www.epa.gov/sites/production/files/2015-02/documents>

the structure of this implementation plan is the same as that laid out in the original nine implementation plans, and includes both text and a table.⁵⁹

The Title VI implementation plan begins with an introduction, acknowledging that improved enforcement of Title VI of the Civil Rights Act and other nondiscrimination statutes is important to meet the Agency's environmental justice goals.⁶⁰ Following the Introduction are two overarching goals.⁶¹ The first goal is "to clearly identify and outline for recipients their Title VI responsibilities and to place a greater focus on prevention of discrimination and compliance with Title VI."⁶² The Agency's second goal is "to promote meaningful dialogue and seek input to improve efficiencies in Title VI compliance by engaging state associations, including participation in meetings on the National Environmental Performance Partnership System ("NEPPS") program, and by engaging individual states on performance partnership agreements and grants."⁶³

Different than the other implementation plans, however, the Title VI plan follows its goals with what are called "organizational functions," a term not included in the rest of the implementation plans' taxonomy.⁶⁴ The other implementation plans instead have a section coined "Organizational Structure," which identifies those tasked with leading and carrying out the implementation plan.⁶⁵ The Title VI Implementation Plan organizational functions does not describe these structural details but instead seems to expand upon the goals set forth.⁶⁶ The three Title VI organization functions are described as pre-award and post-award compliance monitoring of grant applicants and recipients, technical assistance and outreach to grant recipients, and case management and resolution of complaints.⁶⁷

Afterwards, the Title VI Implementation Plan then mirrors the rest of the taxonomy used in the other nine implementation plans in the Plan: "Strategies," "Activities," "Deliverables" and "Milestones."⁶⁸ The "Strategies" and "Activities" are outlined in text and then a table again identifies the

/plan-ej-civil-rights.pdf [hereinafter PLAN EJ 2014 SUPPLEMENT].

⁵⁹ *Id.*

⁶⁰ *Id.* at 1.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 1.

⁶⁴ PLAN EJ 2014 SUPPLEMENT, *supra* note 58, at 2.

⁶⁵ See PLAN EJ 2014, *supra* note 8, at 35 (incorporating Environmental Justice into Rule-making), 43 (considering Environmental Justice in Permitting), and 57 (advancing Environmental Justice through Compliance and Enforcement).

⁶⁶ PLAN EJ 2014 SUPPLEMENT, *supra* note 58, at 2.

⁶⁷ *Id.*

⁶⁸ *Id.* at 2.

“Activities” and ties to these “Deliverables” and “Milestones.”⁶⁹ The purpose of the organizational functions is unclear, as even though most of its content shows up somewhere later in “Deliverables,” there is no level of the taxonomy organized by these three subcategories.⁷⁰

Though not entirely clear, EPA’s time frame for the Plan appears to have ended with the 20th anniversary of the Executive Order on Environmental Justice. However, some of the Plan work continued beyond this, but a coordinated EJ approach did not appear again until June 15, 2015, when EPA revealed the Draft EJ 2020 Action Agenda Framework (“EJ 2020 AA”).⁷¹ The Draft EJ 2020 AA is a five page document that indicates EPA is seeking public input on how to “advance environmental justice through its program, policies and activities,” noting that it will “build upon the foundation established by EPA’s Plan EJ 2014, as well as decades of robust environmental justice practice by the agency, communities and our partners, and expand that work through commitments that will continue over the next five years.”⁷² The Draft Framework Outline (“the Outline”) identifies three goals: 1) “deepen environmental justice practice within EPA programs”; 2) “collaborate with partners to expand [EPA’s] impact”; and 3) “demonstrate progress on outcomes that matter to overburdened communities.”⁷³

The Outline then tracks these goals with what might be described as “Strategies” and “Activities.”⁷⁴ The Outline then has a final section, “Related efforts,” which identifies EPA’s climate change and Title VI efforts as part of this coordinated approach.⁷⁵ The 2015 Priorities can similarly be tracked back to Plan commitments and, at times, are redundant with the information in the table. Many of these “related efforts” merely seem to acknowledge that tasks begun under the Plan are continuing, either to actually finish the commitments under the Plan, or to make them ongoing practice at EPA.⁷⁶

Public comments on the Draft EJ 2020 Action Agenda framework were accepted until July 2015, with EPA releasing a compilation of

⁶⁹ *Id.* at 2–6.

⁷⁰ *Id.*

⁷¹ EPA, DRAFT EJ 2020 ACTION AGENDA FRAMEWORK (June 15, 2015), <https://www.epa.gov/sites/production/files/2015-12/documents/draft-framework.pdf> [<https://perma.cc/XP76-YBBD>].

⁷² *Id.* at 1.

⁷³ *Id.* at 2.

⁷⁴ *Id.* at 2–3.

⁷⁵ *Id.* at 3.

⁷⁶ *Id.* at 3–5.

received comments in a 377 page document.⁷⁷ In the compilation, EPA notes that its next steps are to 1) use the comments to shape the EJ 2020 Action Agenda, which will extend beyond the outline form, and 2) continue additional EJ efforts outside of the context of the EJ 2020 Action Agenda as well.⁷⁸ The remainder of the compilation also includes the Draft 2020 Action Agenda framework itself, as well as individual copies of public comments.⁷⁹ Since the compilation was released in September 2015, neither a final framework, an estimated timetable, nor 2016 Priorities have been released.

Additionally, it is worth noting that after the Interagency Working Group was reconvened and a number of federal administrative agencies executed the new MOU that several agencies have engaged in some level of environmental justice work.⁸⁰ Some of the interagency EJ work was completed as part of Plan EJ 2014's Administration-wide action area, but not all EJ work performed by the Obama Administration's other agencies is reported under the Plan.⁸¹ Most notably, as required under the MOU, fifteen agencies have developed their own environmental justice implementation plans.⁸² Also, required under the MOU are annual reports by these agencies on their progress under the implementation plans.⁸³ The non-EPA agency EJ response has been varied and was summarized in an article in *Grist Magazine*.⁸⁴ The author acknowledges that this work is an important part of the Obama Administration's Environmental Justice efforts, but the overarching critiques contained here of Plan EJ 2014 are also largely applicable to these other agency efforts.⁸⁵ Further, this Article does not have the space and time for a more thorough review of those efforts and therefore, instead focuses on the Obama Administration's primary vehicle to advance environmental justice, Plan EJ 2014.⁸⁶

⁷⁷ EPA, DRAFT EJ 2020 ACTION AGENDA FRAMEWORK COMPILATION OF PUBLIC COMMENTS (Sept. 2015) [hereinafter EJ 2020 Public Comments].

⁷⁸ *Id.* at 1.

⁷⁹ *Id.* at 3–373 (this is the last substantive communication available on the EPA website regarding the 2020 framework as of March 31, 2016).

⁸⁰ See MEMORANDUM OF UNDERSTANDING, *supra* note 18.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Brenton Mock, *We Graded the Feds on Their Environmental Justice Programs—Here's How They Fared*, GRIST (May 8, 2015), <http://grist.org/article/we-graded-the-feds-on-their-environmental-justice-programs-heres-how-they-fared/> [<https://perma.cc/PEH8-PRC7>].

⁸⁵ *Id.*

⁸⁶ *Id.*

II. A CRITIQUE OF THE OBAMA ADMINISTRATION’S ENVIRONMENTAL JUSTICE EFFORTS

A. *EPA’s Defined Success*

Most of the Obama Administration’s environmental justice successes resulted from the implementation of Plan EJ 2014. The EPA’s cataloging of its accomplishments under the Plan consists of two pages on its website, which is broken down into three sections—“Outcomes,” “Other Accomplishments,” and the below “Summary of Accomplishments.”⁸⁷

SUMMARY OF ACCOMPLISHMENTS⁸⁸

Element	Major Commitments/Accomplishments	Status
Incorporate EJ in Rulemaking	Finalize <i>Guidance on Considering EJ During the Development of a Regulatory Action</i>	Spring 2015
	Issue Draft EJ Technical Guidance for Public Comment/SAB Review	Complete
	Finalize <i>Draft Technical Guidance on Assessing EJ in Regulatory Analysis</i>	2015
	Develop EJ and Rulemaking Cross-Agency Team work products	Complete
Consider EJ in Permitting	Institute Regional Implementation Plans for enhanced community engagement	Complete
	Implement Regional Implementation Plans	Ongoing
	Issue recommended practices on community engagement for permit applicants	Complete
	Develop draft framework and tools for EJ analysis for permits for internal review	Complete
	Test, finalize and implement guidelines for EJ analysis for permits	2015–17
Advance EJ through Compliance and Enforcement	Issue multiple guidance and policies on consideration of EJ in enforcement life cycle	Complete
	Issue guidance requiring EJ review for all initiated enforcement cases, tracking cases in ICIS database and transitioning to EJSCREEN	Complete
	Incorporate ACS measure for EJ in OECA FY 2014 NPM Guidance	Complete
	Achieve and communicate results benefiting overburdened communities	Ongoing

⁸⁷ EPA, *Plan EJ 2014*, <https://www.epa.gov/environmentaljustice/plan-ej-2014> [<https://perma.cc/Z4B8-ZGXE>] (last visited Oct. 24, 2016) [hereinafter *EPA Plan EJ 2014*] (N.B.: web page has been updated; cited version of the page on file with author).

⁸⁸ *Id.*

Element	Major Commitments/Accomplishments	Status
Support Community-Based Programs	Implement Community KPI; lessons inform current priority on communities	Complete
	Identify promising community-based practices	Complete
	Develop land use and equitable development resources	Complete
Foster Administration-Wide Action	Reconvene Interagency Working Group on EJ (IWG) at cabinet level	Complete
	Conduct White House Forum and community listening sessions	Complete
	Issue Memorandum of Understanding on EO 12898 and IWG codifying structured and focus areas, signed by IWG secretaries	Complete
	Develop draft NEPA analytic methodologies	Complete
Science Tools	Develop assessment and mapping tools, including C-FERST/T-FERST	2015
	Implement community cumulative assessment grants and Centers of Excellence in Health Disparities	Complete
	Convene NEJAC research workgroup; respond to recommendations with commitment to develop EJ Research Roadmap	Complete
Legal Tools Information Tools	Issue EJ Legal Tools document	Complete
	Develop EJSCREEN V1.0 for internal use	Complete
	Issue public version of EJSCREEN	2015
Resources Tools	Establish one-stop "Resources for Communities" web portal	Complete
	Develop technical assistance contract (TASC) and training enhancements	Complete
Tribal Policy	Issue EPA Policy on EJ for Working with Federally Recognized Tribes and Indigenous Peoples	Complete
Training	Complete mandatory EJ training for all employees	Complete

The table shows what EPA identifies as "Major Commitments/Accomplishments" completed except for five, two of which are ongoing: "achiev[ing] and communicat[ing] results benefitting overburdened communities" through "Compliance" and "Enforcement" and, for "Science Tools," "respond[ing] to recommendations by initiating development of a cross-cutting EJ Research Roadmap."⁸⁹ By 2015, the EPA was to complete commitments to "finalize Technical Guidance for Assessing EJ in Regulatory Analysis" for EJ in Rulemaking and, for "Science Tools," to "develop assessment and mapping tools including C-FERST," the Community-Focused Exposure and Risk Screening Tool ("C-FERST") and "T-FERST,"

⁸⁹ *Id.*

the Tribal-Focused Environmental Risk and Sustainability Tool (“TFERST”).⁹⁰ In addition, at some point between 2015 and 2017, the EPA also anticipated it will “test, finalize and implement guidelines for EJ analysis for EPA permits” for EJ in “Permitting.”⁹¹ All of these undertakings were identified, in some form, as work under the Plan’s implementation goals.⁹² This same table appears again in EPA’s Draft EJ 2020 Action Agenda Framework. There, two additional commitments are identified as complete: finalize *Guidance on Considering EJ During the Development of a Regulatory Action* and issue the public version of EJSCREEN.⁹³

It is clear that EPA sees Plan EJ 2014 as a great success and, in fact, it has had significant success in integrating environmental justice considerations in the day-to-day work at EPA. It is also clear that some cross-agency progress on environmental justice was made. If the measurement of success is based on what the Clinton Executive Order set forth, then EPA largely accomplished that goal. Specifically, EPA identified both its major actions in which environmental justice issues are implicated as well as its major substantive programs where environmental justice considerations should be made. The selection of the Cross-Agency Focus Areas are tailored to address the major agency actions and within those, EPA also targets substantive programs where environmental justice issues exist.⁹⁴ For example, the Plan targets various actions performed pursuant to air, land, and water statutes and regulations, such as rulemaking, permitting, compliance, and enforcement action areas.⁹⁵ Further, the “Tools Development” areas are aimed at the development of resources to be used to identify and address environmental injustice across multiple agency programs and actions.⁹⁶ Additionally, the Plan’s “Program Initiatives” target some of these substantive program areas directly.⁹⁷

In a previous article on green energy and environmental justice the author identified seven themes of environmental justice.⁹⁸ The purpose of this categorization was to draw attention to the areas where environmental injustice occurs: 1) disproportionate siting of polluting facilities;

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ EPA, DRAFT EJ 2020 ACTION AGENDA FRAMEWORK, *supra* note 71, at 4.

⁹⁴ See EPA Plan EJ 2014, *supra* note 87.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ See Paben, *supra* note 1.

2) increased exposure to pollution based on both multiple siting and more lax compliance and enforcement at facilities; 3) disparate exposure risks to contaminated sites; 4) disproportionate risks from raw material development; 5) increased exposure risks to transportation of both hazardous waste and hazardous raw materials; and 6) disparate land use planning and transportation development based on historic segregation.⁹⁹ The purpose of categorizing those themes was to stop the willful blindness to how environmental justice issues are created and perpetuated, and to encourage decision-makers to find ways to, at a minimum, stop perpetuating the cycle of environmental injustice and, ideally, to find out ways to actually tackle these issues.

Every one of those themes is impacted by government decision-making, and every one of those decision-making points is an opportunity to evaluate EJ risks and impacts, and ideally identify, confront, and often, make decisions that avoid, mitigate, or alleviate those impacts. While not all are federal actions, some federal processes or federally delegated state or local government processes are required for every one of these themes. In many ways, Plan EJ 2014 is aimed at recognizing the federal administrative role in creating and perpetuating environmental injustice. It is refreshing to see that these beliefs resonated with President Obama, and that he supported Administrator Jackson and others' leadership on environmental justice issues in a way that has never before been prioritized within the government structure. Although the efforts to set an EJ stage were taken during the Clinton Administration with Executive Order 12898, its actual impact for environmental justice communities has been quite limited.¹⁰⁰ Nevertheless, it was essential to start the national conversation on environmental justice as President Clinton did, but to most, that was the full extent of the legacy.¹⁰¹ Further, what little success the Order achieved was stalled during the George W. Bush Administration.¹⁰²

The Obama Administration, mostly through Plan EJ 2014, finally began the work that the Executive Order set out to do: make environmental justice a part of every federal administrative conversation that has the potential to disproportionately impact low-income communities

⁹⁹ *Id.* at 1072.

¹⁰⁰ See Amanda K. Franzen, *Comment, The Time Is Now for Environmental Justice: Congress Must Take Action by Codifying Executive Order 12898*, 17 PENN. ST. ENVTL. L. REV. 379, 386–91 (2009).

¹⁰¹ *Id.* at 379–81.

¹⁰² Leslie Fields, *The 20th Anniversary of the Environmental Justice Executive Order*, SIERRA CLUB (Feb. 11, 2014), <http://www.sierraclub.org/compass/2014/02/20th-anniversary-environmental-justice-executive-order> [<https://perma.cc/TAC5-QBC2>].

and communities of color. This was largely accomplished by creating roadmaps for various government actors on how to consider EJ.¹⁰³ In addition to these roadmaps, the Plan also provided tools and processes for implementing EJ considerations, required EJ education and training for many EPA employees, and ingrained EJ practice at the highest levels of EPA with clear direction for it to trickle down.¹⁰⁴

As indicated above, Plan EJ 2014 first did this by identifying the areas of work at EPA, and to some degree, other agencies where environmental justice issues are likely to arise, and then, created action areas with concrete goals aimed at creating a meaningful dialogue on environmental justice in those fora.¹⁰⁵ Moreover, its success in these endeavors was furthered by 1) its thoroughness in its delivery, 2) its transparency in this mission, and 3) its inclusion of stakeholders in these processes.

1. Thoroughness

The level of detail that the Plan sets forth in its implementation plans and progress reports speaks to both its thoroughness and transparency, which will be discussed in the next section. Even more importantly, however, the Plan was thorough in its reach within the EPA. The Plan, in fact, affected every major program and area of action at EPA in some way. To a lesser extent, it also extended into programs of other federal agencies.

The breadth of the Plan's efforts is documented by looking at each of the action areas and what was accomplished under each implementation plan.

a. Incorporating EJ into Rulemaking

The "Activities" and "Deliverables" here focused largely on the development of two resource documents to be used by EPA staff engaged in rule-making activities, "Final EJ in Rulemaking Guidance" and "Final EJ Technical Guidance," and the implementation of the former.¹⁰⁶ As indicated in EPA's table above, both of these documents have been developed. The first was finalized in 2015, and the Technical Guidance was due to be finalized in 2015, but there has been no update on its status.¹⁰⁷ The

¹⁰³ See PLAN EJ 2014, *supra* note 8.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 9, 37–39.

¹⁰⁷ EJ 2020 Public Comments, *supra* note 77, at 4.

Plan EJ 2014 progress reports discussed what EPA sees as the measurable impact of these activities. The 2013 Progress Report for instance, indicates that EPA averaged twenty EJ analyses in rulemaking activities per year between 2010 and 2012, compared to the average of two annual analyses it averaged between 1995 and 2009.¹⁰⁸ The Report provides two rules as examples where EJ analyses were conducted, describing how such analyses shaped the rules.¹⁰⁹ For the Definition of Solid Waste Rule, EPA determined that populations affected by the rule would face increased environmental and health risks.¹¹⁰ For a National Emissions Standards for Hazardous Air Pollutants (“NESHAPs”) rule regarding power plant emissions, EPA included an environmental justice analysis under its Clean Air Act Section 112 review that determined there was a negative health risk for EJ communities relying on subsistence fisheries, which factored into reducing exposure to certain Hazardous Air Pollutants (“HAPs”).¹¹¹ The Report also discussed how the EJ guidance implementation impacted its community outreach on two actions: one regarding formaldehyde regulation under the Toxics Substances Control Act (“TSCA”) and a separate action regarding regulation of chemicals used in collision repair shops.¹¹²

b. Considering Environmental Justice in Permitting

The “Activities” here also centered on the development and implementation of guidance tools to tackle EJ in permitting.¹¹³ Here, the guidance targets two different audiences: assistance to EJ communities in understanding permitting processes and how to engage in these processes, and assistance to agency permit staff in how to integrate EJ concerns into their permitting processes and decisions.¹¹⁴ As the accomplishments table indicates, EPA ultimately performed these by developing and implementing Regional Implementation Plans aimed at enhancing community involvement in the permitting processes and developing guidance and tools for EPA permitting staff to use in conducting environmental justice analyses.¹¹⁵ However, there is no indication as to whether or not

¹⁰⁸ See EPA, PLAN EJ 2013 PROGRESS REPORT 3 (Feb. 2013) [hereinafter 2013 PROGRESS REPORT].

¹⁰⁹ *Id.* at 7–8.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 8.

¹¹² *Id.*

¹¹³ PLAN EJ 2014, *supra* note 8, at 11–12, 46–47, 49–50.

¹¹⁴ *Id.*

¹¹⁵ EJ 2020 PUBLIC COMMENTS, *supra* note 77, at 4–5.

the internal guidance for permitting staff has been finalized.¹¹⁶ Further, EPA reports that under this action area, they have also developed and issued guidance to permit applicants on how to perform strong community engagement and outreach efforts.¹¹⁷

At a broad level, EPA also discusses various other ways that the guidance documents can be incorporated into EPA's progress reports.¹¹⁸ There are also two case studies which assert that engaging EJ communities resulted in increased permit conditions related to emissions and monitoring.¹¹⁹ The Progress Report further discusses ongoing efforts of coordination with the "Tools Development" action areas teams, most notably EJSCREEN and, more generally, "Legal Tools."¹²⁰

c. EJ Through Compliance and Enforcement

For this action area, the activities included both systemic efforts and individual permitting efforts.¹²¹ With respect to the systemic activities, the focus was on including EJ concerns into the decision-making process for selecting National Enforcement Initiatives, and integrating EJ concerns into all EPA compliance and enforcement actions, specifically targeting those under the Clean Water Act and RCRA.¹²² The Progress Report notes "Key Accomplishments" for this action area as being the selection of NEI for 2011–2013 that impact EJ communities.¹²³ Specifically, the Report identifies enforcement actions against municipal sewer systems that are violating the Clean Water Act,¹²⁴ including discussing how settlements in these cases were used to bring benefits to EJ communities.¹²⁵ Additionally, the activities call on EPA compliance and enforcement staff to consider EJ issues when targeting individual facilities for compliance and enforcement, and in developing remedies for compliance and enforcement issues.¹²⁶ For the latter, there are specific activities

¹¹⁶ *Id.* at 5.

¹¹⁷ 2013 PROGRESS REPORT, *supra* note 108, at 10.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 11.

¹²⁰ *Id.* at 58.

¹²¹ PLAN EJ 2014, *supra* note 8, at 13–14, 59–76.

¹²² *Id.* at 13–14.

¹²³ *Id.*

¹²⁴ 2013 PROGRESS REPORT, *supra* note 108, at 12.

¹²⁵ *Id.*

¹²⁶ PLAN EJ 2014, *supra* note 8, at 12–13.

focusing on using injunctive relief, mitigation, and criminal penalties to leverage reduced burdens and increased benefits for communities affected by compliance and enforcement issues.¹²⁷ “Key Accomplishments” in the Progress Report identified twelve targeted civil and criminal enforcement actions that impacted EJ communities, including, in some instances, how settlements can provide benefits to the communities that would otherwise be unavailable.¹²⁸ Specifically, it notes that it finalized OECA guidance on EJ reviews in most EPA enforcement cases, incorporated EJSCREEN into its actions, and “incorporated EJ into its FY2014 National Program Guidance.”¹²⁹

d. Supporting EJ Through Community-Based Action Programs

The activities here focused on streamlining the effectiveness of EPA community-based programs by using these as models for other programs directed by EPA.¹³⁰ EPA proposed to meet the overall goal of improving community-based action programs largely by surveying existing programs, developing best practices, identifying lessons learned, and producing other guidance to streamline the delivery of services that can benefit EJ communities.¹³¹ The first progress report essentially documents that the cultivation of the documentation piece was completed, but implementation was to follow.¹³² Further, some of these same ideas have been incorporated into guidance provided to states and tribes that are tasked with administering some of EPA’s programs.¹³³ In the 2014 Progress Report, the focus becomes more on specific deliverables, many of which revolved around a Community Key Performance Indicator effort (“Community KPI”), which centered on ten regional pilot projects aimed at coordinating community services.¹³⁴ The accomplishments table indicates that this effort was implemented and that lessons learned from it are being utilized by the agency in conjunction with best practices it has

¹²⁷ *Id.* at 14.

¹²⁸ 2013 PROGRESS REPORT, *supra* note 108, at 12–14.

¹²⁹ See EPA, PLAN EJ 2014 PROGRESS REPORT (Feb. 2014), <https://www.epa.gov/sites/production/files/2015-02/documents/plan-ej-progress-report-2014.pdf> [<https://perma.cc/9RSX-YEND>] [hereinafter 2014 PROGRESS REPORT].

¹³⁰ PLAN EJ 2014, *supra* note 8, at 16–17, 81–88.

¹³¹ *Id.* at 16.

¹³² See 2013 PROGRESS REPORT, *supra* note 108, at 13.

¹³³ See 2013 PROGRESS REPORT, *supra* note 108, at 13.

¹³⁴ See 2014 PROGRESS REPORT, *supra* note 129, at 12.

developed.¹³⁵ Also, the Plan originally identified two foci for these activities as consideration of historical segregation in land use that led to EJ issues and promotion of equitable development in EJ communities.¹³⁶ EPA documents in its table of accomplishments that resources on both of these issues have been developed.¹³⁷

e. Administration-Wide Action

EPA's Accomplishments Table identifies EPA's initial outreach, such as the White House Forum and the reconvening of IWG and its subsequent Community Dialogues, as its primary accomplishments under this area of action.¹³⁸ The only other accomplishment it identifies is the "development of draft NEPA analytical guidance."¹³⁹ As will be discussed later, this action area was arguably the least successful and the one that deviated most from the Plan. However, although not mentioned in the Accomplishments Table, earlier progress reports did document some other accomplishments under this implementation plan, such as establishing resources like the EJ Federal Interagency Directory (identifying point persons and programs under agencies engaged on issues of concern to EJ communities), and the Community-Based Federal EJ Resource Guide.¹⁴⁰ Moreover, earlier progress reports identified a number of multi-agency programs through which multi-agency EJ efforts were conducted: the Partnership for Sustainable Communities,¹⁴¹ Asthma Action Plan,¹⁴² Radon Partnership,¹⁴³ Climate Adaptation,¹⁴⁴ and two IWG committees (one on the National Environmental Policy Act of 1969 ("NEPA")¹⁴⁵ and the other on Goods Movement).¹⁴⁶ The Progress Report also discussed the EJ Community Needs Inventory, where each EPA region selected three communities of concern, those communities' needs, and the federal agencies best-situated to address their needs.¹⁴⁷

¹³⁵ *EPA Plan EJ 2014*, *supra* note 87.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ 2013 PROGRESS REPORT, *supra* note 108, at 18.

¹⁴¹ *Id.* at 19.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ 2013 PROGRESS REPORT, *supra* note 108.

¹⁴⁷ *Id.* at 20.

f. Science Tools

The activities identified for the Science Tools action area focused on the inclusion of community-based participatory research in the implementation of EPA obligations, cross-agency coordination on health disparities science, and development capacity with both community-based research and with EPA.¹⁴⁸ Two primary areas of focus identified were air quality and asthma disparities.¹⁴⁹ Specifically, over the course of the Plan, this action area focused on “Tools Development” and, at times, overlapped with tools discussed in other action areas.¹⁵⁰ In its Accomplishments Table, EPA identifies the development of assessment and mapping tools, but there is no indication that these have been completed in final form.¹⁵¹ The other two accomplishments focus on the application of research grants focusing on community cumulative assessment and engagement with NEJAC, which resulted in an EPA commitment to develop an EJ Research Roadmap.¹⁵² Earlier progress reports identified activities aimed at developing Cumulative Risk Assessment guidelines and tasks regarding the development of a number of tools “to inform decision-making,” such as the screening tools C-FERST and T-FERST.¹⁵³ The latter includes developing a prototype of the Community Cumulative Assessment Tool (“CCAT”), a computerized guide of cumulative risk assessment, for which pilots were conducted with EPA grant recipients, and EnviroAtlas, a mapping tool which can be used to layer various data to identify ecosystem services disparities.¹⁵⁴ Other than C-FERST and T-FERST, it is unclear which of these activities have been completed.

g. Legal Tools

The Activities for the Legal Tools action area centered on the convening of meetings for EPA and other agency lawyers working on any of the Cross-Agency Action Areas, tasking high level attorneys with legal counsel on any activities undertaken in Plan EJ 2014, and assuring the integration of EJ into agency activities.¹⁵⁵ The Accomplishments Table

¹⁴⁸ PLAN EJ 2014, *supra* note 8, at 21–22, 113–38.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ EPA Plan EJ 2014, *supra* note 87.

¹⁵² *Id.*

¹⁵³ 2013 PROGRESS REPORT, *supra* note 108, at 25–26.

¹⁵⁴ *Id.*; 2014 PROGRESS REPORT, *supra* note 129, at 18.

¹⁵⁵ PLAN EJ 2014, *supra* note 8, at 23, 148.

only identifies the issuance of the “Legal Tools” document as the major accomplishment under this action area.¹⁵⁶ EJ “Legal Tools” was developed identifying existing EPA discretionary legal authorities that may be used to address EJ issues.¹⁵⁷ Earlier progress reports, however, indicate other accomplishments worth noting.¹⁵⁸ Specifically, progress reports indicate that EPA developed a repository of examples of the exercise of such discretionary authority, which is identified under Key Accomplishments for this action area.¹⁵⁹ In the 2014 Progress Report, the only remaining deliverable was to “collect 50 examples of use of EJ Legal Tools for the EJ Legal Tools Repository” for which there are six implementation steps identified to be conducted between August 2013 and June 2014.¹⁶⁰ As this is not addressed in the Major Accomplishments chart, its status is unclear.¹⁶¹ Additionally, the Progress Report highlights two such examples: the use of the Clean Water Act to address EJ concerns regarding water quality standards which impact EJ fish consumption concerns, and the use of an Environmental Impact Statement under NEPA underlying regulations on community involvement and mitigation to direct a marine terminal expansion with more monitoring requirements, as well as a number of community benefits.¹⁶²

h. Information Tools

The Activities for Information Tools Development action area focuses on developing EPA’s GeoPlatform, a geospatial tool, and an EJ screening tool designed to help identify EJ communities by mapping relevant demographic information, so that this information can be incorporated into various decision-making processes.¹⁶³ Ultimately, this screening tool becomes known as EJSCREEN.¹⁶⁴ GeoPlatform is a suite of tools, data, and services that can be used to consolidate mapping activities, applications, and data throughout EPA.¹⁶⁵ The Accomplishments Table does not discuss GeoPlatform, but earlier progress reports indicated

¹⁵⁶ *EPA Plan EJ 2014*, *supra* note 87.

¹⁵⁷ OFF. OF GEN. COUNS., EPA, PLAN EJ 2014: LEGAL TOOLS 1–3 (2014); *EPA Plan EJ 2014*, *supra* note 87; 2013 PROGRESS REPORT, *supra* note 108, at 147.

¹⁵⁸ 2013 PROGRESS REPORT, *supra* note 108, at 28.

¹⁵⁹ *Id.* at 27.

¹⁶⁰ 2014 PROGRESS REPORT, *supra* note 129, at 21.

¹⁶¹ *EPA Plan EJ 2014*, *supra* note 87.

¹⁶² 2013 PROGRESS REPORT, *supra* note 108, at 28.

¹⁶³ PLAN EJ 2014, *supra* note 8, at 24–25, 153–57.

¹⁶⁴ 2013 PROGRESS REPORT, *supra* note 108, at 29.

¹⁶⁵ *Id.*

a completion of deliverables related to this tool.¹⁶⁶ The Accomplishments Table does include both the development of EJSCREEN and release of a public version of this tool.¹⁶⁷

i. Resources Tools

Under the Resources Tools Development action area, there were two areas of work, with separate goals and strategies for each: “Grants” and “Workforce.”¹⁶⁸ For “Grants,” the “Activities” under this action area are aimed at streamlining EPA’s grant and technical assistance programs, with a focus on addressing impediments to community-based organizations’ access and success.¹⁶⁹ For “Workforce,” the “Activities” center on inclusive workforce hiring practices, specifically the development of both strategy and tools aimed at workforce diversity.¹⁷⁰ The Accomplishments Table indicates that a “one-stop Community Resources Portal” was developed, and earlier progress reports also document this and other resources, such as Community-Based Grants Policy, Flat Indirect Cost Rate Option for NonProfits, Umbrella Grants Tutorial, and Community Training Webinars.¹⁷¹ All of these were designed to improve access to grants and technical assistance for community-based organizations, including those that serve EJ communities.¹⁷²

j. Title VI

There is no mention of Title VI in the EPA Accomplishments Table.¹⁷³ Earlier progress reports did, however, highlight the reduction of the backlog of Title VI complaints, and improved timeliness of responses to new complaints.¹⁷⁴ Specifically, they noted that identifying efforts “to implement tangible changes to the Title VI program” resulted in a reduction of open investigations by 40% in the past fiscal year.¹⁷⁵ Further, the progress reports then discuss EPA outreach to both Title VI

¹⁶⁶ 2013 PROGRESS REPORT, *supra* note 108, at 73.

¹⁶⁷ *EPA Plan EJ 2014*, *supra* note 87.

¹⁶⁸ PLAN EJ 2014, *supra* note 8, at 26–27, 164–68, 178–79.

¹⁶⁹ *Id.* at 26.

¹⁷⁰ *Id.*

¹⁷¹ *EPA Plan EJ 2014*, *supra* note 87.

¹⁷² 2013 PROGRESS REPORT, *supra* note 108, at 30–31.

¹⁷³ *EPA Plan EJ 2014*, *supra* note 87.

¹⁷⁴ 2013 PROGRESS REPORT, *supra* note 108, at 41.

¹⁷⁵ *Id.*

state recipients and Title VI advocacy organizations for the purpose of improving enforcement of Title VI.¹⁷⁶ Then, in Key Initiatives, the reports identify five accomplishments: the first two are the production of policy papers aimed at the Title VI grievance process, and the remaining three are aimed more at compliance process improvements both for EPA and for other agencies.¹⁷⁷

In 2015, EPA issued a third progress report under Plan EJ 2014, but this report covered only the Title VI implementation plan.¹⁷⁸ Under an “Accomplishments” section, the report sets forth, for the first time, two different categories: 1) Case Management and Resolution and 2) Strategies and Activities.¹⁷⁹ Beginning with Case Management and Resolution, the Progress Report notes the OCR’s “renewed commitment” to creating a “model civil rights program” through strategic management of complaints, successful complaint resolution, and settlement of important Title VI issues.¹⁸⁰ The Progress Report then details three such settlements: the expansion of public participation at the Illinois Environmental Protection Agency, increased opportunities for meaningful public participation in the San Joaquin Valley United Air Pollution Control District, and migrant agriculture protection in Louisiana.¹⁸¹ The Case Management and Resolution section concludes by reiterating the OCR’s ongoing efforts through alternative dispute resolution, investigation tools, and additional methods.¹⁸² The Progress Report then describes OCR’s “record of accomplishments” in the Title VI Plan’s strategies and activities.¹⁸³ Little of it actually documents the completion of significant tasks, and certainly not those on the level of the accomplishments documented for the other implementation plans in the EPA Accomplishments Table.¹⁸⁴

k. Program Initiatives

There is no mention of the Program Initiatives in the Accomplishments Table.¹⁸⁵ Earlier progress reports did indicate that EPA program

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 41–42.

¹⁷⁸ See EPA, TITLE VI PROGRESS REPORT (May 2015).

¹⁷⁹ *Id.* at 2, 4.

¹⁸⁰ *Id.* at 2.

¹⁸¹ *Id.* at 3–4.

¹⁸² *Id.* at 4.

¹⁸³ *Id.* at 4–10.

¹⁸⁴ *Id.* at 10–13.

¹⁸⁵ *EPA Plan EJ 2014*, *supra* note 87.

offices have designated five programs that “can stand out as models”: Urban Waters, Pesticide Worker Safety Program, U.S.-Mexico Border 2020 Program, Community Engagement Initiative, and Implementation of Internal Technical Directive on Reviewing EPA Enforcement Cases for Potential EJ Concerns.¹⁸⁶ Then, the Progress Report identifies Key Initiatives under each of these, and in some instances, identifies further efforts to be taken under that Initiative.¹⁸⁷

1) Other

The Accomplishments Table includes two other areas of action: 1) Tribal Policy, and 2) Training.¹⁸⁸ There is one accomplishment identified for each as being completed under the Plan.¹⁸⁹ For Tribal Policy, it is the development of a policy on EJ for working with tribes and indigenous people.¹⁹⁰ For Training, it is mandatory training for all EPA employees.¹⁹¹

Consistent with the discussion above, there is obvious breadth in the implementation of Plan EJ 2014 at EPA. The reach of the Plan alone is a major accomplishment.

2) Transparency

EPA owned its mission to integrate environmental justice throughout the agency in its day-to-day work by being very public with the Plan from its inception. Likewise, the taxonomy it utilized under the Plan provided a level of detailed transparency on tasks it would undertake and achieve that rarely is seen in the modern era of the administrative state.¹⁹² The mere existence of Plan EJ 2014 demonstrated that EPA

¹⁸⁶ 2013 PROGRESS REPORT, *supra* note 108, at 35.

¹⁸⁷ *Id.* at 35–38.

¹⁸⁸ *EPA Plan EJ 2014*, *supra* note 87.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² See, e.g., Cary Coglianese *et. al.*, *Transparency and Public Participation in the Federal Rulemaking Process: Recommendations for the New Administration*, 77 GEO. WASH. L. REV. 924, 961–62 (2009). Many have questioned the Obama Administration’s commitment “to ensure the public trust and establish a system of transparency, public participation, and collaboration.” Office of the President, Memo. for the Heads of Exec. Dept’s and Agencies, Transparency and Open Government, 74 Fed. Reg. 4,685 (Jan. 21, 2009); see also *Obama Transparency*, THE HUFFINGTON POST, <http://www.huffingtonpost.com/news/obama-transparency/> [<https://perma.cc/6NYR-V8F7>] (last visited Oct. 24, 2016); Paul D. Thacker, *Where the Sun Don’t Shine: President Obama Promised Transparency and Open Government. He Failed Miserably . . .*, SLATE (Mar. 12, 2013 5:23 AM), <http://www.slate>

intended a coordinated strategy to tackle this issue, and this coordination was touted to the general public. Further, the detailed taxonomy that was created under the implementation plan's goals—strategies, activities, deliverables, and milestones—provided significant detail of both what EPA proposed to do as well as how. Additionally, EPA produced two progress reports that covered the entire Plan and an additional progress report for the Title VI implementation plan, and these too were made available to the public. While there were some reporting challenges in following the Plan, which will be discussed below, to a large degree the progress reports used this same taxonomy in reporting progress under the implementation plans, which provided the tools to the public to track the progress as it related back to the original plans.

Although EPA's successes under the Plan are most meaningfully measured at the strategy level, "Activities" and "Deliverables" are more task-level in nature, providing great detail on how the strategies were to be achieved. These include reducing a strategy, such as developing and implementing a guidance document, to incremental steps, from conception of the document, to various drafts and peer and public review steps, to finalization of a document.¹⁹³ The three progress reports issued for the Plan largely used this detailed taxonomy in their reporting.¹⁹⁴ Appendix A to the 2013 Progress Report, as previously indicated, includes a table for each of the original nine implementation plans.¹⁹⁵ The tables include information from the original Plan's implementation goals at the "Strategy," "Activities," "Deliverables," and "Milestones" levels to demonstrate what "Deliverables" have been completed and which remain, identifying new deadlines for most of those uncompleted "Deliverables."¹⁹⁶ Similarly, in the 2014 Progress Report there are updates on all ten implementation plans in a relatively common format that include a discussion of each

.com/articles/news_and_politics/politics/2013/03/barack_obama_promised_transparency_the_white_house_is_as_opaque_secretive.html [https://perma.cc/9FZB-785H]; Jennifer LaFleur, *Has Obama Kept His Open-Government Pledge?*, PROPUBLICA (Feb. 1, 2013 8:00 AM), <http://www.propublica.org/article/has-obama-kept-his-open-government-pledge> [https://perma.cc/YZ9M-LYTJ]; Josh Gerstein, *President Obama's Muddy Transparency Record*, POLITICO (Mar. 5, 2012 4:52 AM), <http://www.politico.com/news/stories/0312/73606.html> [https://perma.cc/3LGN-TTYR].

¹⁹³ See, e.g., PLAN EJ 2014, *supra* note 8, at 33–179 (showing that each strategy is broken into incremental steps).

¹⁹⁴ See, e.g., 2013 PROGRESS REPORT, *supra* note 108; 2014 PROGRESS REPORT, *supra* note 129; TITLE VI PROGRESS REPORT, *supra* note 178 (both progress reports utilize the same nomenclature and organizational structure as the Plan).

¹⁹⁵ 2013 PROGRESS REPORT, *supra* note 108, at 57–75.

¹⁹⁶ *Id.*

implementation plan's original goal, a description of efforts undertaken, and a discussion of remaining deliverables under that implementation plan.¹⁹⁷ Some of these include a table that shows deliverables and milestones, not for all implementation plan deliverables, but only for ones not yet accomplished, and the tables add a column titled "implementation steps."¹⁹⁸ Some implementation plans do not have a table, but similar information is included in the text.¹⁹⁹ By using this detailed taxonomy in its reports, EPA provided a very transparent process in not just what strategies it achieved, but in how it achieved them and when. Including this level of detail to the public increases the accountability of EPA in performing the Plan.

3) Inclusiveness

Additionally, throughout all of the work under the Plan, EPA made public outreach and engagement a priority.²⁰⁰ Plan EJ 2014 was coined to reference that 2014 would be the twentieth anniversary of President Clinton's Executive Order on Environmental Justice, and begins with a memo from Jackson which states, "Plan EJ 2014 builds on the solid foundation we have established at the EPA to expand the conversation on environmentalism."²⁰¹ This message sets the tone that this was meant to be a *dialogue* with those impacted by environmental justice issues, demonstrating the intent to talk *with*, not *at*, communities about their needs. Then, in December of that same year, the White House Forum on Environmental Justice was characterized as an opportunity to "give a national voice to under-represented American communities that shoulder a disproportionate amount of pollution."²⁰² Further, the draft Plan was released for public comment, and public comment was used to shape the implementation plans that were included in the final Plan.²⁰³ Also, the structure of the Plan and the implementation goals included sections on Community/Stakeholder Outreach and Engagement.²⁰⁴

¹⁹⁷ 2014 PROGRESS REPORT, *supra* note 129.

¹⁹⁸ *See id.* at 7, 9, 13, 15, 20, 22, 24.

¹⁹⁹ *Compare id.* (seven implementation plans with tables), *with id.* at 10–11, 25 (two implementation plans without tables).

²⁰⁰ PLAN EJ 2014, *supra* note 8, at i, 2, 6–7, 11, 38, 48, 51, 86, 100, 121, 124, 126, 133, 148 and 166.

²⁰¹ PLAN EJ 2014, *supra* note 8 (A Message from EPA Administrator Lisa P. Jackson).

²⁰² *Id.* at 1; *see also* Sutley, *supra* note 4, at 1.

²⁰³ PLAN EJ 2014, *supra* note 8, at i.

²⁰⁴ PLAN EJ 2014, *supra* note 8, at i, 2, 6–7, 11, 38, 48, 51, 86, 100, 121, 124, 126, 133, 148 and 166.

The importance of outreach and engagement continues to be a clear theme in the progress reports, both in reporting on the accomplishments of various levels of the taxonomy, but also in the general text of the reports as well.²⁰⁵ In the 2013 Progress Report, the Overview concludes with identifying four main areas of focus for the next year, two of which are aimed directly at stakeholder outreach and engagement: (1) building partnerships with local communities, state and local governments, tribal governments, and other federal agencies to expand the reach of EJ and foster health, environmental and economic benefits in EJ communities; and (2) work with CEQ, other agencies and all EJ stakeholders to commemorate the 20th Anniversary of EO 12898.²⁰⁶ Similarly, the 2014 Progress Report starts with a similar focus, this time from Administrator McCarthy.²⁰⁷ Her memo indicates that EPA has developed tools and guidance under the Plan, begun implementation of these tools and guidance, and accomplished additional Plan activities through partnerships with other agencies, state and local governments, tribes, and local communities.²⁰⁸

B. Plan Failures

Although the preceding discussion details the success of Plan EJ 2014, there were important EJ actions proposed in Plan EJ 2014 that were not undertaken, as well as some which, though started, were not completed. First, although the Plan and its progress reports were thorough and transparent, actually evaluating the detailed work performed requires significant time and effort. Although the underlying taxonomy remained relatively consistent, the reporting format of this detailed information was not consistent, and at times, the Plan's subsequent documents confused levels of its own taxonomy. Further, EPA did not acknowledge when parts of the implementation plans were changed or omitted, often deleting or changing "Activities" and "Deliverables" without any explanation.

Even at the outset, the Plan had inconsistencies in reporting structure and language. For instance, in both the text of the Plan and in the text of the implementation plan for EJ in Rulemaking, very specific tasks are identified as "Activities" under three broader but measurable strategies.²⁰⁹

²⁰⁵ 2013 PROGRESS REPORT, *supra* note 108, at 45–54; 2014 PROGRESS REPORT, *supra* note 129, at 8, 13, 25; TITLE VI PROGRESS REPORT, *supra* note 178, at 3, 4, 12.

²⁰⁶ 2013 PROGRESS REPORT, *supra* note 108, at 4.

²⁰⁷ 2014 PROGRESS REPORT, *supra* note 129, at i.

²⁰⁸ *Id.*

²⁰⁹ PLAN EJ 2014, *supra* note 8, at 36–38.

However, the table in the implementation plan uses the strategies language under the “Activities” column, and the more detailed tasks not under “Activities,” but as “Deliverables.”²¹⁰ This particular inconsistency appears to have no substantive impact, but its existence affects the transparency of the Plan. Further, it is difficult to discern why no common format is used throughout. There are a significant number of these inconsistencies, some of which are detailed below. Like the one discussed above, some seem substantively inconsequential, but others have substantive consequences.

All of the implementation plans’ tables list the same activities that were identified in their sections’ texts, except the first, “Incorporating Environmental Justice into Rulemaking,” which lists under the “Activities” column the “Goals” it outlined in the text, not the “Activities.”²¹¹ Most of the implementation plans then establish deliverables for the “Activities,” but the “Incorporating Environmental Justice into Rulemaking” DIP does this for the broader “Goals.”²¹² As will be discussed later, EPA’s lack of activities aimed at improving the Title VI complaint process is one of the biggest substantive criticisms, and it should be noted that some of these reporting inconsistencies seem to skirt this issue.

Inconsistencies can again be found in the progress reports. In the 2013 Progress Report, there are updates on all ten implementation plans as well as a report on the Program Initiatives and a report on regional community-based accomplishments.²¹³ Rather than using the format from the original Plan, however, the Progress Report itself follows a different format. However, the Progress Report’s format is essentially the same for all of the implementation plans except Title VI, a list of the strategies being employed with a summary of these efforts, and then a list of key accomplishments under that particular implementation plan.²¹⁴

As previously discussed, sometimes the Plan and its progress reports are inconsistent with the use of nomenclature from its taxonomy.²¹⁵ In the Progress Report on EJ in Rulemaking, EPA adds a “Strategies” level to the table for reporting Activities, Deliverables and Milestones met or revised, but defaults back to the Activities defined in the text of the Plan and not the original table, characterizing the Activities from the

²¹⁰ *Id.* at 39.

²¹¹ *Id.*

²¹² *Id.*

²¹³ 2013 PROGRESS REPORT, *supra* note 108.

²¹⁴ *Id.*

²¹⁵ *Id.* at 57–58.

original implementation plan's table as "Strategies."²¹⁶ Nonetheless, the difference is not substantive as these activities are simply specific tasks to achieve the strategies.²¹⁷ Further, the "Deliverables" remain the same, so for these it is easy to determine what has been completed, what remains to be done, and if there were any revisions to the projected milestones.

The problem with this reporting inconsistency, however, is that the individual tasks are less important than the broader strategies and activities, and true successes and failures of the Plan can only be discerned by whether these were achieved. For instance, for EJ in Rulemaking, the chart identifies Strategy 1 as "Finalizing the Interim Guidance on Considering EJ During the Development of an Action."²¹⁸ There are four activities underneath this Strategy: Activity 1.1 Conduct public comment period; Activity 1.2 Review internal and external comments; Activity 1.3 Interview and review documents produced by EPA rule-writing groups; and Activity 1.4 Revise and Release Final Environmental Justice Rulemaking Guidance.²¹⁹ The Deliverable for the first three activities is identified as a Report on Summarizing Internal and External Comments, Rule-Writing Documentation Assessment, and Experiences of EPA Rule-Writers in Implementing Interim Final Guidance. It is this deliverable that is given a milestone (timeline).²²⁰ Similarly, the deliverables for Activity 1.4 are Draft Final Guidance on Considering Environmental Justice During the Development of an Action, and Final Guidance on Considering Environmental Justice During the Development of an Action.²²¹ All of these deliverables were to be completed between October and December of 2011.²²² The Progress Report informs us that the first two deliverables are complete as of the compilation of the report, but that the third, the finalizing of the guidance document, had not met its milestone deadline of December 2011, and was not in fact completed even at the compilation of this report at the end of 2012. Its deadline has now been extended until March 2013.²²³ Although it is helpful to see a robust, transparent process to achieving the Development of the Final EJ in Rulemaking Guidance, the success here is not based on the incremental steps

²¹⁶ 2013 PROGRESS REPORT, *supra* note 108, at 57–58.

²¹⁷ *Id.*

²¹⁸ PLAN EJ 2014, *supra* note 8, at 37.

²¹⁹ *Id.*

²²⁰ *Id.* at 39.

²²¹ *Id.*

²²² *Id.*

²²³ 2013 PROGRESS REPORT, *supra* note 108, at 57.

outlined, but on whether or not a quality final guidance document is actually produced. The Progress Report then follows the same path with the same flaws for the other two “Strategies” and “Activities” for this implementation plan: Facilitating and Monitoring the Implementation of the EJ in Rulemaking Guidance and Development of Technical Guidance for Assessing EJ in Regulatory Analysis.²²⁴ For Strategy 2, it indicates that it has completed the deliverables identified as distributing model training to trainers and others, and initiating a continuous learning effort to identify effective practices and lessons learned in Agency rulemaking.²²⁵ The third deliverable, to develop and implement a process for monitoring if the guidance is being used, what resources are being allocated to its use, and its effect, is identified as ongoing with no deadline.²²⁶ Similarly to Strategy 1, each of these individual tasks are not as important as determining whether or not EPA has implemented the use of the guidance document in a way that is actually impacting decisions in EJ communities.

For EJ in Permitting, in the Plan there were three strategies and six activities, some which had subactivities totaling thirteen activities, and fourteen deliverables.²²⁷ Even at the production of the Plan, five deliverables were identified as completed, and one was identified as ongoing; the other eight were projected to be completed between June 2011 and 2012.²²⁸ In the Progress Report, significant changes were made to this structure, most of which were not substantive except to the extent that they further flushed out Activities 4–6 and added an Activity 7.²²⁹ Specifically, in the Progress Report there were still three strategies but now seven activities defined to be conducted under all of the strategies and some of these activities had sub-activities together totaling sixteen activities, and under these activities there were now thirty-seven deliverables.²³⁰ Some of the activities had a single deliverable and others had more.²³¹ Like many of the action areas, the focus of the Plan was to develop tools and implement them in a way that would promote EJ.²³² However, in the Plan, this action area was less developed than some of the others, as

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ PLAN EJ 2014, *supra* note 8, at 45–47, 49–50.

²²⁸ *Id.* at 49.

²²⁹ 2013 PROGRESS REPORT, *supra* note 108, at 59–60.

²³⁰ *Id.*

²³¹ *Id.* at 59.

²³² PLAN EJ 2014, *supra* note 8, at 45.

there were no existing tools identified.²³³ For this reason, the strategies, and even to some degree, the activities in the Plan were less concrete.

From a reporting perspective, the progress on EJ through Compliance and Enforcement is easiest thus far as both the Plan and the Progress Report are overwhelmingly in alignment with both the number and content of its strategies, activities and deliverables.²³⁴ All five strategies remain the same, 17 of the Plan's original 18 activities remain and a new one was added, and 34 out of 36 deliverables remain. There is, however, one new deliverable, which seems to be the addition of a new step to compile and share best practices and recommendations based on the work done pursuant to the Crime Victims' Rights Act as it relates to EJ.²³⁵ It is worth noting, however, that the lost activity and its corresponding deliverables are under the strategy to identify benefits for EJ communities that could be achieved through remedies which specifically focused on working with other federal agencies, state and local governments, and the business community to leverage community benefits.²³⁶ Nothing in the Progress Report explains why this was deleted.

The Progress Report's section on Community-Based Action Programs is also largely consistent in structure and substance to the Plan.²³⁷ There are the same six strategies and the same ten activities; however, there were a significant number of deliverables added and two deleted.²³⁸ For the most part the additional deliverables seem to be natural augmentations to the original deliverables, and where the two were deleted in Activity 8 of Strategy 4, most of the substance seems to have been absorbed in Activities 6 and 7.²³⁹

For Fostering Administration-Wide Action, the Progress Report indicates that the four strategies set forth in the Plan still remain, all but two of the activities identified in the Plan remain, and all of the deliverables from the Plan remain with the exception of those that corresponded to the two deleted activities.²⁴⁰ The two activities deleted specifically addressed EPA's Title VI grievance process.²⁴¹ There is no discussion in the

²³³ *Id.*

²³⁴ PLAN EJ 2014, *supra* note 8, at 60–76; 2013 PROGRESS REPORT, *supra* note 108, at 61–63.

²³⁵ 2013 PROGRESS REPORT, *supra* note 108, at 61–63.

²³⁶ *Id.* at 69.

²³⁷ PLAN EJ 2014, *supra* note 8, at 81–88; 2013 PROGRESS REPORT, *supra* note 108, at 64–66.

²³⁸ 2013 PROGRESS REPORT, *supra* note 108, at 64–66.

²³⁹ *Id.* at 65.

²⁴⁰ PLAN EJ 2014, *supra* note 8, at 94–105; 2013 PROGRESS REPORT, *supra* note 108, at 67–68.

²⁴¹ 2013 PROGRESS REPORT, *supra* note 108, at 67.

Progress Report as to why these were removed. Additionally, while a number of activities and deliverables in this action area involve the IWG, Activity 3.1 and its deliverable removed IWG, which was originally tasked with these.²⁴² The Report does not discuss why this was done.²⁴³

The Progress Report identifies the same five strategies for the Science Tools Development Area, the same fifteen activities, and the same thirty-four deliverables that were in the Plan.²⁴⁴ All of the milestones are also consistent with the original Plan, except one that was to be decided that is now identified as pending.²⁴⁵

The Progress Report notes the same strategy and four activities for the Legal Tools action area that are contained in the Plan.²⁴⁶ The Plan did not contain a table of the deliverables and milestones, and these were not identified in the text of the Plan either; however, the Progress Report does now lay out six deliverables with milestones for each.²⁴⁷

The Information Tools action area section of the Progress Report documents the same three strategies, twelve activities, and twelve deliverables from the Plan.²⁴⁸

The Resources Tool action area includes the seven strategies for its goal on community access to EPA grants and technical assistance that were outlined in the Plan in the Progress Report, but it does not report on the second goal regarding Workforce Diversity and its underlying activities.²⁴⁹ Further, the Plan and the Progress Report use a different table for documenting results under this action area than the other action areas.²⁵⁰ The text of the Progress Report does not list activities, deliverables or milestones, but the substance of the table includes most of what was identified as activities in the Plan, and provides information regarding milestones.²⁵¹

As previously discussed, an implementation plan for Advancing EJ through Title VI was not included in the Plan, but was developed as a supplement in 2012.²⁵² For the most part, the Implementation Plan's

²⁴² *Id.*

²⁴³ *Id.* at 68.

²⁴⁴ PLAN EJ 2014, *supra* note 8, at 109, 113–25; 2013 PROGRESS REPORT, *supra* note 108, at 69–71.

²⁴⁵ 2013 PROGRESS REPORT, *supra* note 108, at 71.

²⁴⁶ PLAN EJ 2014, *supra* note 8, at 148; 2013 PROGRESS REPORT, *supra* note 108, at 72.

²⁴⁷ 2013 PROGRESS REPORT, *supra* note 108, at 72.

²⁴⁸ PLAN EJ 2014, *supra* note 8, at 153–57; 2013 PROGRESS REPORT, *supra* note 108, at 73.

²⁴⁹ PLAN EJ 2014, *supra* note 8, at 164–65; 2013 PROGRESS REPORT, *supra* note 108, at 74–75.

²⁵⁰ PLAN EJ 2014, *supra* note 8, at 178–79; 2013 PROGRESS REPORT, *supra* note 108, at 74–75.

²⁵¹ 2013 PROGRESS REPORT, *supra* note 108, at 74–75.

²⁵² PLAN EJ 2014 SUPPLEMENT, *supra* note 58, at 1.

goals, strategies and activities are addressed in the 2013 Progress Report; however, at times there is substantive incongruity.²⁵³ Importantly, the Implementation Plan provided further detail which the Progress Report could address, but it does not. For instance, the Progress Report identifies four strategies for this action area, but does not identify activities, deliverables, or milestones.²⁵⁴

The next section of the Progress Report, the Program Initiatives, indicates that EPA would “designate at least one initiative per appropriate program for inclusion in Plan EJ 2014.”²⁵⁵ There are no implementation plans for these, and no goals, strategies, activities, deliverables or milestones are identified in the Plan.²⁵⁶ Further, the taxonomy used for the first two action area categories is not used for the Program Initiatives action areas in the Progress Report either.²⁵⁷ Instead, the Progress Report discusses what might be categorized as Program Initiative goals, such as identifying advancements that EPA programs have already made in integrating EJ, implementing specific programs or initiatives aimed at strengthening EJ integration, and evaluating these as potential models for integration into other EPA programs.²⁵⁸

There is no significant deviation in substance for EJ in Rulemaking,²⁵⁹ and the 2014 Progress Report reiterates the goals in the Plan and in the first Progress Report for EJ in Permitting.²⁶⁰ After that, it departs from much of the taxonomy language that has been a staple of the Plan and the first Progress Report, instead addressing the work under this Plan as being part of two phases.²⁶¹ This new terminology is unnecessarily confusing. In the first Progress Report EPA reported the development of two guidance documents, one aimed at EPA outreach efforts to community members wanting to be meaningfully involved in permitting processes, and the other directed at applicants on how to conduct their own enhanced community outreach. The EPA proposed these to be completed in final form by March 2013, and indicated that EPA was assisting regions in developing their own implementation plans for enhanced outreach to be released in May 2013, in conjunction with the first guidance

²⁵³ Compare *id.* at 61, with 2013 PROGRESS REPORT, *supra* note 108, at 41–42.

²⁵⁴ 2013 PROGRESS REPORT, *supra* note 108, at 41.

²⁵⁵ PLAN EJ 2014, *supra* note 8, at vi.

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ 2013 PROGRESS REPORT, *supra* note 108, at 35.

²⁵⁹ 2014 PROGRESS REPORT, *supra* note 129, at 6–7.

²⁶⁰ *Id.* at 8–9.

²⁶¹ *Id.*

document.²⁶² The guidance documents were to be the two defined remaining activities, as well as a more general reference to incorporating these ideas into other areas of EPA for implementation purposes.²⁶³ Phase I of the 2014 Progress Report seems to indicate that the two guidance documents were finalized and the regional plans produced, but it is actually hard to tell because rather than just say “finalized,” they say the first document was “released” and the second “developed,” but there is no indication as to whether or not these are in final form or even whether they have changed since they were released in the last progress report.²⁶⁴ Phase I also says the regional plans were developed and made publicly available, so it seems clear that they completed at least this one activity.²⁶⁵ Phase II seems to be fleshing out the more generic references to ways of incorporating EPA’s efforts into its permitting practices, but none of it reports on any of the activities, deliverables or milestones from the Plan or the first Progress Report, instead proposing future tasks.²⁶⁶ Specifically, the tasks were to develop two additional resources aimed at EPA staff to assist in conducting EJ analyses in permitting actions, and assist with crafting EPA permit outcomes.²⁶⁷ A table then follows that identifies these two new resources and check-ins on the regional implementation plans as the only remaining deliverables under this implementation plan.²⁶⁸ It again uses what it coins “Implementation Steps” to identify broad tasks to complete these resources, and milestones are assigned for each task anywhere between Fall 2013 and Winter 2014.²⁶⁹ Again, despite the additional nomenclature and the inconsistent dedication of specific tasks to different levels of the taxonomy, the Report does seem to cover all remaining deliverables from the Plan for this action area.²⁷⁰

For EJ through Compliance and Enforcement, the 2014 Progress Report reiterates the goals in the Plan and the first Progress Report.²⁷¹ Unlike the other implementation plans, there is no table included in the 2014 Progress Report: it is all text.²⁷² The text following the goals

²⁶² 2013 PROGRESS REPORT, *supra* note 108, at 10.

²⁶³ *Id.*

²⁶⁴ 2014 PROGRESS REPORT, *supra* note 129, at 8.

²⁶⁵ *Id.* at 8–9.

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.* at 9.

²⁷⁰ 2014 PROGRESS REPORT, *supra* note 129, at 8–9.

²⁷¹ *Id.* at 10–11.

²⁷² *Id.*

discussion is very similar to that in the first Progress Report, both in form and substance.²⁷³

The original Implementation Plan on Fostering Administration-Wide Action identified the IWG as the primary vehicle through which this work would be conducted and initially had two foci: NEPA and Title VI.²⁷⁴ By the time the first Progress Report was issued, IWG was still a part of this effort, but it at least appeared less prominently in many of the tasks; perhaps in part because of the advent of the Regional IWG.²⁷⁵ Potentially more notable was the marginalization of the Title VI piece, at least as it relates to this Implementation Plan, and the addition of the Goods Movement and Climate Change as additional, if not primary, priority issues.²⁷⁶ In the 2014 Progress Report, four remaining deliverables are identified, as well as Community Engagement and Regional IWG Committee.²⁷⁷ Only NEPA has a table with specific implementation steps and milestones, which are all directed at the deliverable “complete National Environmental Policy Act Analytic and Educational Resources.”²⁷⁸ The Regional IWG Committee, although not as detailed, also seems to track the deliverables outlined in the first Progress Report.²⁷⁹ For Title VI, it refers to the Title VI Committee and general language about its role consistent with the original Plan, even though the first Progress Report deleted many of the tasks assigned to this committee.²⁸⁰

For the Science Tools Development action area, the 2014 Progress Report starts with the Goal originally outlined in the Plan and the first Progress Report.²⁸¹ After a general summary of the work under this action area, the 2014 Progress Report details efforts under three areas: “Cumulative Risk Assessment Guidelines,” “Community Assessment Tools,” and “Extramural Grants on Cumulative Risk Assessment and Environmental Health Disparities.”²⁸² These overarching themes are consistent with the Plan and first Progress Report, but in the new Progress Report are identified in a table as the only remaining deliverables.²⁸³ These deliverables

²⁷³ *Id.*

²⁷⁴ *Id.* at 14.

²⁷⁵ 2013 PROGRESS REPORT, *supra* note 108, at 67–68.

²⁷⁶ *Id.*

²⁷⁷ 2014 PROGRESS REPORT, *supra* note 129, at 14–16.

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.* at 17–20.

²⁸² *Id.*

²⁸³ 2014 PROGRESS REPORT, *supra* note 129, at 20.

are then tied to implementation steps and milestones all to be completed between 2013–2015. These implementation steps look more like past deliverables, except that they lack the level of detail previously provided and it is difficult to assess whether the numerous deliverables no longer addressed as either deliverables or implementation steps have been conducted or not.²⁸⁴ Overall, it seems there is intent to complete a number of the guidance and tools originally outlined, such as CRA, CCAT, C-FERST, T-FERST and EnviroAtlas.²⁸⁵

As of the first Progress Report, the only remaining deliverables for the Information Tools action area were to 1) obtain peer review and public comment of EJSCREEN's prototype, 2) revise EJSCREEN based on those comments, and 3) revise GeoPlatform to be consistent with the revisions made to EJSCREEN.²⁸⁶ In the 2014 Progress Report, EJSCREEN is the focus, and there are now three implementation steps identified as remaining which are largely the same content as deliverables from the first Progress Report.²⁸⁷ Specifically, these were peer review, revisions (now called "enhancements") and issuance of a version to the public.²⁸⁸ Different than before, there is no simultaneous public review, and, in fact, there is no discussion of public review, only release of a version to the public after peer review and tweaks.²⁸⁹ All of these were to happen between May and October of 2014.²⁹⁰ Additionally, there is no reference to any corresponding GeoPlatform changes.²⁹¹

Both of the Progress Reports released for the main Plan have updates on the Title VI activities, but strangely EPA also released another Progress Report in 2015, which it says covers the Title VI work for fiscal years 2011–2014.²⁹² Interestingly, this includes time before the Title VI Implementation Plan existed, as well as time periods supposedly already covered in the other two Progress Reports, but there is no discussion of this incongruity in the Title VI Progress Report.²⁹³

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ 2013 PROGRESS REPORT, *supra* note 108, at 73.

²⁸⁷ 2014 PROGRESS REPORT, *supra* note 129, at 23–24.

²⁸⁸ *Id.*

²⁸⁹ 2013 PROGRESS REPORT, *supra* note 108, at 73; 2014 PROGRESS REPORT, *supra* note 129, at 23.

²⁹⁰ 2014 PROGRESS REPORT, *supra* note 129, at 24.

²⁹¹ *Id.*

²⁹² TITLE VI PROGRESS REPORT, *supra* note 178, at 2.

²⁹³ *Id.*

Like the main Plan, the Title VI Progress Report contains some inconsistencies from the Title VI Plan that make a full and true report of progress difficult. The most glaring inconsistency is the total omission of four deliverables: 1) development of a grant monitoring strategy, 2) development of a civil rights module in EPA's post-award advanced grant audits, 3) along with other agencies, review and assessment of Title VI guidance and analysis of Title VI complaints, and 4) finalization of EPA's Limited English Proficiency ("LEP") Implementation Plan to ensure compliance with Executive Order 13166.²⁹⁴ No explanation of these omissions is given in either the text or the chart, making the fate of these deliverables uncertain. The missing deliverables may have been absorbed into other deliverables under the same activity, or they may have been abandoned for some reason. By simply omitting the deliverables without further explanation or mention, the Progress Report leaves the ultimate outcome of these deliverables up to speculation. One possible explanation is that the nature of the omitted deliverables does not lead to a specific, concrete deliverable, but rather they serve as overarching guidance that overlaps into other deliverables. For example, many of the other deliverables can reasonably be seen as falling within the "develop grant monitoring strategy."²⁹⁵ Therefore, by completing the related deliverables, the omitted deliverable is actually completed as well. The omitted deliverables may have been superfluous and thus not addressed in the Progress Report. Nonetheless, if the omission of these four deliverables was in fact due to this sort of adjustment, the Progress Report could have easily explained these discrepancies.

However, four deliverables were omitted, but two were expanded unnecessarily into separate items for drafting or developing and then finalizing the compliance toolkit in Activity 1.3 and the Case Manager Manual in Activity 1.5.²⁹⁶ Again, no explanation for these changes is given in either the text or the table. It may be that the original single deliverable was more logically broken down, but a more cynical view leads to ideas of unnecessarily padding the Progress Report in an attempt to bolster the perceived level of progress.

Although minor consistencies exist throughout Strategies 1, 2, and 3, Strategy 4 is completely overhauled, with its original two activities and four deliverables ballooning to nine activities and ten deliverables.²⁹⁷

²⁹⁴ *Id.* at 7; PLAN EJ 2014 SUPPLEMENT, *supra* note 58, at 4.

²⁹⁵ PLAN EJ 2014 SUPPLEMENT, *supra* note 58, at 5.

²⁹⁶ TITLE VI PROGRESS REPORT, *supra* note 178, at 6, 11; PLAN EJ 2014 SUPPLEMENT, *supra* note 58, at 3, 5.

²⁹⁷ TITLE VI PROGRESS REPORT, *supra* note 178, at 7–10; PLAN EJ 2014 SUPPLEMENT, *supra* note 58, at 4.

Here, however, the substance of the expanded activities and deliverables seems to indicate that the intent is not to pad progress but rather to create a much more detailed and directed plan for advancing LEP initiatives. The Title VI Plan includes the broad activity and nearly identical deliverable to monitor the implementation of LEP Review Plans and revise when necessary. The Progress Report creates a set of specific and concrete steps to fulfill Strategy 4's directive of actually advancing LEP initiatives.²⁹⁸

This sort of change between the initial Title VI Plan and the Progress Report is the type of change that is both appropriate and expected. The process of executing the implementation plan will reveal changes and adjustments that are necessary, both in the form of further development of activities and deliverables, and also the possible abandonment of deliverables that prove to be ineffective, repetitive, or unnecessary. However, for a true and transparent report of the progress of the Title VI Plan, these changes should be fully detailed in the Progress Report. Failing to provide this transparency invites speculation by readers that both contradicts the purpose of a progress report and is easily avoidable.

The next logical step would be to discuss the final Progress Report on Plan EJ 2014 to determine if further reporting problems existed and whether or not, underneath these, there were also substantive deficiencies. Unfortunately, EPA issued no additional Progress Reports for Plan EJ 2014, nor did it produce any cumulative analysis of the outstanding tasks.

Further, while once upon a time one could easily find environmental justice on EPA's homepage, its latest organization does not mention EJ anywhere on the homepage, nor on any of the homepages links.²⁹⁹ On the EJ homepage there are quick links to Plan EJ 2014, various Plan documents, implementation plans, and some deliverables.³⁰⁰ Although again, here they are not organized or identified as part of a coordinated effort under the Plan, and therefore one has to know what they are looking for in order to yield a significant number of pieces, which can then be used to put together what the Plan was and what happened under it.³⁰¹

However, this organization on Plan EJ 2014's website is an indication that these are related to a coordinated approach.³⁰² It is here that

²⁹⁸ TITLE VI PROGRESS REPORT, *supra* note 178, at 7–10.

²⁹⁹ *United States Environmental Protection Agency*, EPA, <https://www3.epa.gov/> [<https://perma.cc/C9E4-4BFG>] (last visited Oct. 24, 2016).

³⁰⁰ *Environmental Justice*, EPA, <https://www.epa.gov/environmentaljustice> (last visited Oct. 24, 2016).

³⁰¹ *Id.*

³⁰² *Id.*

one can find EPA's Accomplishments Table.³⁰³ As discussed in the previous section detailing the success of Plan EJ 2014, this table is a high-level report of Major Commitments and Accomplishments under the Plan, which can be substantively tracked back to the original Plan's Strategies and, with effort and time, followed through the Progress Reports to verify their success.³⁰⁴ It also confirms the inconsistent reporting that leaves holes in understanding the Plan and requires undue effort to fully evaluate.³⁰⁵

Additionally, in determining whether the Plan was successful, one cannot just look at what it did and did not do. Its true impact can only be measured by determining, first, whether day-to-day integration of environmental justice actually occurred and, second, whether that resulted in the desired impact—a reduction of environmental injustice.

Much of what the Plan set out to do was accomplished, and that which it did not accomplish is detailed above. Throughout the four years of the Plan, EPA pointed to numerous actions where EJ guidance and training resulted in EPA conducting EJ analyses not previously considered. EPA reported ways in which these different processes then either reduced environmental justice burdens, or increased benefits for those suffering environmental injustice. Taken on its face, these seem to be significant impacts. However, EPA's reporting does not include any significant characterization or evaluation of these impacts from those affected, but a simple internet search yields numerous examples of disappointment with the Plan from environmental justice advocates.³⁰⁶

Additionally, the Plan reports evidence that the activities under the Administration-Wide Action Implementation Plan were significantly adjusted through the duration of the Plan and that its scope and impact were curtailed. In the Plan, the activities for this action area begin at a very foundational stage, with developing mechanisms to regularly engage leaders and staff at other agencies on EJ matters, and moving on to training and other activities aimed at assisting other agencies in integrating EJ issues into their processes.³⁰⁷ While there are some activities identified with a broad EJ focus, the primary two focal points in these activities began as other agencies' obligations under NEPA and Title VI

³⁰³ *EPA Plan EJ 2014*, *supra* note 87.

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ Note: This critique is not emphasized here for time and space reasons, but the author is interested in developing this for a subsequent article by surveying EJ community based organizations and advocates.

³⁰⁷ PLAN EJ 2014, *supra* note 8, at 18–20, 94–99, 101–05.

of the Civil Rights Act.³⁰⁸ Additionally, some activities in this area focus on having agencies integrate their programs in certain other areas where the potential for benefits to EJ communities exist.³⁰⁹ Also, early on the IWG appeared to be a primary vehicle for much of this work.³¹⁰ By the time the first Progress Report was issued, IWG was still a part of this effort, but it at least appeared less prominently in many of the tasks, perhaps in part because of the advent of the Regional IWG.³¹¹ Potentially more notable was the marginalization of the Title VI piece, at least as it relates to this implementation plan.³¹²

Then, under its Key Accomplishments for Fostering Administration-Wide Action, the Report outlines EPA's initial outreach, such as the White House Forum and IWG Community Dialogues, as the means through which the Implementation Plan was developed to be responsive to EJ community concerns.³¹³ This resulted in establishing resources such as the EJ Federal Interagency Directory identifying point persons and programs under agencies engaged on issues of concern to EJ communities, and the Community-Based Federal EJ Resource Guide.³¹⁴ In addition, it discussed the MOU created to recommit agencies to Executive Order 12898 and its requirements for the signed agencies.³¹⁵ It then identifies a number of multi-agency programs and how these programs, as stated above in Section II.A, incorporated The Partnership for Sustainable Communities,³¹⁶ Asthma Action Plan,³¹⁷ Radon Partnership,³¹⁸ Climate Adaptation,³¹⁹ and two IWG committees—one on NEPA³²⁰ and the other on Goods Movement.³²¹ The Progress Report also discussed the EJ Community Needs Inventory, where each EPA region selected three communities of concern and noted those communities' needs and the federal agencies best-situated

³⁰⁸ *Id.* at 94–97.

³⁰⁹ *Id.* at 96.

³¹⁰ *Id.* at 93, 101–05.

³¹¹ 2013 PROGRESS REPORT, *supra* note 108, at 67–68.

³¹² *Id.*

³¹³ *Id.* at 18–19.

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ *Id.* at 19–20; *see also supra* Section II.A.1.e.

³¹⁷ 2013 PROGRESS REPORT, *supra* note 108, at 20.

³¹⁸ *Id.*

³¹⁹ *Id.*

³²⁰ *Id.*

³²¹ *Id.*

to address their needs.³²² Despite prior references to Title VI in this action area, it has now become nonexistent here.

In the 2014 Progress Report, remaining deliverables are identified for all four of these programs, as well as community engagement and the Regional IWG Committee, but only NEPA has a table with specific implementation steps and milestones, which are all directed at the deliverable “Complete the [NEPA] Analytic and Educational Resources.”³²³ For the Regional IWG Committee, although not as detailed, it too seems to track the deliverables outlined in the 2013 Progress Report.³²⁴ For Title VI, it refers to the Committee and its general language about its role consistent with the original Plan, but this is unclear since the first Progress Report deleted much of the tasks assigned to this Committee.³²⁵

This continues in EPA’s Accomplishments Table as it identifies only the tasks of reconvening the IWG, conducting the White House Forum, issuing the MOU (which established other agencies’ commitment to environmental justice), and developing “draft” NEPA analysis methodologies as its only Major Accomplishments and Commitments.³²⁶ It seems clear that the Title VI piece was at best largely lost under this implementation plan and that even the NEPA piece resulted in few concrete results. Further, while the reconvening of the IWG is in and of itself a large success, and the recommitment and new commitments under the MOU are also large successes, the follow-through by other agencies on environmental justice has been somewhat varied.³²⁷

At this point, the environmental justice efforts of the Obama Administration are somewhat of a mixed bag. Many efforts and self-identified short-term impacts are aimed at achieving the original goal of the Executive Order. If that is all we want to measure the Obama Administration’s efforts against, it might look like a “B” or even “B+” for the short term, but an “Incomplete” regarding long-term changes. This is because all of this internal guidance work that has been integrated within EPA can only have long term success if it continues to be implemented, and remains complied with voluntarily.

The success depends on a continuation of leadership at EPA that cannot be guaranteed as the Obama Administration comes to an end.

³²² *Id.*

³²³ 2014 PROGRESS REPORT, *supra* note 129, at 15.

³²⁴ *Id.* at 16.

³²⁵ *Id.*

³²⁶ *EPA Plan EJ 2014*, *supra* note 87.

³²⁷ Brenton Mock, *supra* note 84.

Further, the leadership at agencies changes with new administrations, and even more so when a new administration includes a partisan shift. In its final months the Obama Administration must recognize the risks that a change in administration will bring and acknowledge the fact that it is a toss-up as to whether or not that leadership change will be even more marked by a partisan change. With this in mind, the Obama Administration should be evaluating what else it could do to assure the security of its EJ legacy, and in evaluating this one must look at what opportunities may have been missed.

III. WHAT ELSE CAN BE DONE BY PRESIDENT OBAMA AND HIS ADMINISTRATION

Whether it is because the environmental justice movement has always been a grassroots effort, or the shift to state and local governments to address EJ concerns during the George W. Bush Administration,³²⁸ the sense of accomplishment by having one of its own instituted as Director of the EPA in 2009, or the early confidence when Plan EJ 2014 was issued in 2011, President Obama and his administration's failure to remedy environmental inequities has not received much public attention. Of the nearly 2,400 Presidential Actions taken by Barack Obama, the Proclamation marking the 20th anniversary of EO 12898 is the only one that directly addresses environmental justice.³²⁹ Other than commemorating EO 12898, this Proclamation essentially declared that "effectively implementing environmental laws" would "improve quality of life and expand economic opportunity in overburdened communities," which it tied into climate change and clean energy priorities.³³⁰ There may be arguments for generally prioritizing climate change ahead of environmental justice issues, and a recognition that climate change policy has the ability to address environmental justice inequities still, but EJ advocates

³²⁸ See, e.g., CLIFFORD RECHTSCHAFFEN ET AL., ENVIRONMENTAL JUSTICE: LAW POLICY & REGULATION 338 (2d ed. 2009).

³²⁹ Proclamation No. 9082, 79 Fed. Reg. 8,819 (Feb. 13, 2014) [hereinafter Proclamation No. 9082]. See also *Executive Orders*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/data/orders.php> [<https://perma.cc/6RCE-GC79>] (last updated Feb. 20, 2016); *Proclamations*, THE WHITE HOUSE: PRESIDENT BARACK OBAMA, <https://www.whitehouse.gov/briefing-room/presidential-actions/proclamations> [<https://perma.cc/B9MN-W5B9>] (last visited Oct. 24, 2016); *Presidential Memoranda*, THE WHITE HOUSE: PRESIDENT BARRACK OBAMA, <https://www.whitehouse.gov/briefing-room/presidential-actions/presidential-memoranda> [<https://perma.cc/7FH2-LWKL>] (last visited Oct. 24, 2016).

³³⁰ Proclamation No. 9082, *supra* note 329.

may look back and see missed opportunities to obtain substantive gains in executive actions during the Obama Administration.

President Obama's Proclamation does recognize that "much work remains" in the progress on environmental justice issues, but the President could have made more of that progress by utilizing existing executive authorities and directing the EPA and other federal agencies to develop EJ regulations consistent with existing applicable law.³³¹ These gains could be made, for example, through an Executive Order amending and strengthening Order 12898, directing the CEQ to develop NEPA regulations incorporating environmental justice, and directing the EPA to integrate environmental justice principles into regulations implementing existing statutes. All of these actions would carry with them force of law unlike all of the activities performed under Plan EJ 2014.

A. *Executive Orders*

Although President Obama has received much attention for the use, or potential use, of executive power,³³² barring a last minute flurry of actions, President Obama will leave office issuing the fewest number of Executive Orders per year in office since Grover Cleveland's first term ended in 1889.³³³ Instead of regarding Executive Order 12898 as the ultimate presidential action on environmental justice, as President Obama seems to have done, the environmental justice Executive Order should be the basis upon which the President initiates substantive environmental justice gains that have proven difficult to gain from Congress.³³⁴

Presidents have the power to issue executive orders under authority either granted by Article II of the Constitution, or delegated by Congress

³³¹ The EPA's efforts to address climate change under the Clean Air Act sections 111(b) and 111(d), including the deadlines for proposed and final rules, were set forth by President Obama in a Memorandum implementing Executive Order 13647. Presidential Memorandum—Power Sector Carbon Pollution Standards, 78 Fed. Reg. 39,535 (July 1, 2013).

³³² See, e.g., *President Obama's Use of Executive Orders in Historical Terms*, NAT'L CONST. CTR. BLOG (Aug. 5, 2014), <http://blog.constitutioncenter.org/2014/08/president-obamas-use-of-executive-orders-in-historical-terms/>; John Hudak, *Obama's Executive Orders: A Reality Check*, BROOKINGS FIXGOV BLOG (Jan. 30, 2014 3:58 PM), <http://www.brookings.edu/blogs/fixgov/posts/2014/01/30-state-of-the-union-obama-executive-orders-hudak> [<https://perma.cc/URR6-39UK>].

³³³ See *Executive Orders*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/data/orders.php> [<https://perma.cc/2F9Y-KLAS>] (last updated Mar. 20, 2016).

³³⁴ See, e.g., Environmental Justice Act of 1992, H.R. 5326, 102nd Cong. (1992) (reintroduced as H.R. 2105, 103rd Cong. (1993), H.R. 4584, 105th Cong. (1998), H.R. 1510, 106th Cong. (1999), H.R. 4645, 114th Cong. (2016); Environmental Justice Act of 2007, H.R. 1103/S. 642, 110th Cong. (2007) (codifying Exec. Order 12898)).

in statute.³³⁵ Statutes vary in the nature of the authority provided to the President and can affect the strength of any rules or decisions made pursuant to that authority.³³⁶ In general, an executive order which is issued under statutory authority and is regulatory in nature is valid if it does not contravene direct statutory provisions, and is thus preempted by the authorizing statute or another statute.³³⁷ Thus, otherwise broad executive orders which restrain their scope "to the extent permitted by law" are likely to survive judicial scrutiny.³³⁸

Subsequent presidents, however, may retain, revoke, or replace the executive orders of previous presidents.³³⁹ EO 12898 made agencies recognize environmental justice issues for the first time, and having force of law itself provides authority to all covered agencies to promulgate regulations under the Executive Order as long as they are consistent with the substance of the Executive Order and the law which authorized it. Here, that would be the executive powers conferred on the President to manage the Executive branch of government. The language of the EO does just this, directing agencies to perform tasks and functions aimed at addressing environmental justice.

However, the President can also limit the legal effect of the Executive Order. Most executive orders issued since the Reagan Administration, in fact, have included disclaimer language to ensure no new private right of action is created.³⁴⁰ Such language is included in EO 12898, which makes clear that there is no private right to judicial review of any agency action taken under this law. Environmental justice advocates have long recognized the problems caused by not having any federally enforceable environmental justice law.³⁴¹ This critique has carried over to EO 12898

³³⁵ See generally U.S. CONST. art. II, §§ 1, 3; *Marshall Field & Co. v. Clark*, 143 U.S. 649, 693 (1892) (explaining that the President had power to act because Congress had delegated the power to him); *Mt. States Legal Found. v. Bush*, 306 F.3d 1132, 1136 (D.C. Cir. 2002).

³³⁶ *Mt. States Legal Found.*, 306 F.3d, 1136. At one end of the spectrum, where a statute does not place "discernible limits on the President's discretion," judicial review of such executive orders is typically unavailable. *Mt. States Legal Found.*, 306 F.3d, 1136 (citing *Dalton v. Specter*, 511 U.S. 462, 476 (1994)). See also *United States v. George S. Bush & Co.*, 310 U.S. 371, 380 (1940).

³³⁷ See, e.g., *Bldg. & Const. Trades Dep't, AFL-CIO v. Allbaugh*, 295 F.3d 28, 36 (D.C. Cir. 2002); *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1332, 1339 (D.C. Cir. 1996).

³³⁸ *Allbaugh*, 295 F.3d at 33.

³³⁹ *Id.*

³⁴⁰ Exec. Order No. 12291, 46 Fed. Reg. 13193 (Feb. 17, 1981).

³⁴¹ UNITED CHURCH OF CHRIST, COMM'N FOR RACIAL JUSTICE, TOXIC WASTES AND RACE IN THE U.S. (1987).

because of the lack of legal force behind it.³⁴² With the insertion of this language, even though the Executive Order has force of law there is no redress if an agency fails to perform under it.³⁴³

Since executive orders may, in fact, have the force of law, simply amending EO 12898 by rewriting—or deleting—Section 6-609 would provide a significant legal tool to those seeking to correct environmental injustices.³⁴⁴ Additionally, as indicated above, this tool would become more meaningful if agencies actually exercised rulemaking authority under the Executive Order. Relatedly, in amending the Executive Order, the President could make the rulemaking authority even more explicit by directing the promulgation of environmental justice regulations by all affected agencies as part of the policy EO 12898 already directs them to develop.

Another alternative is to task CEQ or EPA with the EJ rulemaking that would then affect all of the agencies covered under the EO. This would assure consistency and expedite the process.

B. Directing the Council on Environmental Quality to Promulgate NEPA Regulations Incorporating Environmental Justice

Another action that the Obama Administration could undertake is having CEQ exercise its authority under the National Environmental Policy Act of 1969 (“NEPA”) to include in its NEPA regulations rules aimed directly at applying environmental justice considerations.³⁴⁵ NEPA “is our basic national charter for protection of the environment.”³⁴⁶ NEPA requires federal agencies to prepare an environmental impact statement (“EIS”) for “major Federal actions”—those projects and programs conducted, funded, or regulated by federal agencies—which “significantly affect[] the quality of the human environment.”³⁴⁷ In addition, NEPA created the Council on Environmental Quality (“CEQ”) within the Executive Office of the President.³⁴⁸ The details and requirements federal agencies must follow when preparing an EIS are found in the CEQ’s regulations implementing NEPA.³⁴⁹ Although the CEQ is responsible for

³⁴² *Id.*

³⁴³ Exec. Order No. 12898, *supra* note 12.

³⁴⁴ *See id.*

³⁴⁵ *See* 42 U.S.C. §§ 4321–70 (2012).

³⁴⁶ *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1185 (9th Cir. 2008) (quoting 40 C.F.R. § 1500.1(a)).

³⁴⁷ 42 U.S.C. § 4332(2)(C)(2012); *see also* 40 C.F.R. §§ 1508.11, 1508.18 (2012).

³⁴⁸ *Id.* § 4342.

³⁴⁹ *See* 40 C.F.R. §§ 1500–1508 (2012).

overseeing federal efforts to comply with NEPA, the statute does not expressly grant rulemaking authority to the CEQ.³⁵⁰ Through Executive Order 11514, nonetheless, President Nixon directed the CEQ to “[i]ssue regulations to Federal agencies for the implementation of the procedural provisions of the Act,” including the requirements for EISs.³⁵¹ After the CEQ’s regulations were published in 1973, some agencies viewed the rules as advisory only and courts differed over how much weight to afford the guidelines.³⁵² To correct these and other problems with the CEQ regulations, President Carter issued Executive Order 11991, which amended President Nixon’s previous Order.³⁵³ Most importantly, EO 11991 modified the responsibilities of federal agencies by explicitly requiring agencies “comply with the regulations issued by the Council except where such compliance would be inconsistent with statutory requirements.”³⁵⁴ In addition to relying on NEPA for statutory support, President Carter’s Executive Order was issued in furtherance of the Environmental Quality Improvement Act of 1970 and Section 309 of the Clean Air Act.³⁵⁵

The CEQ has an ongoing responsibility to assure the various programs and activities of federal agencies are complying with NEPA.³⁵⁶ Following Executive Order 12898, for example, the CEQ developed “guidance” that agencies should follow to incorporate environmental justice into NEPA procedures.³⁵⁷ Rather than issuing new, binding regulations, however, the CEQ makes clear that this NEPA EJ guidance simply interprets the existing CEQ NEPA regulations “in light of Executive Order 12898.”³⁵⁸ Moreover, the CEQ states that this guidance does not have the force law.³⁵⁹ While federal agencies have made progress in incorporating environmental justice into the NEPA process through the use of guidance documents,³⁶⁰ presidential direction requiring CEQ promulgate this

³⁵⁰ 42 U.S.C. § 4344 (2012).

³⁵¹ Exec. Order No. 11,514 § 3(h), 3 C.F.R. § 902 (1966–1970), 35 Fed. Reg. 4247 (Mar. 7, 1970).

³⁵² National Environmental Policy Act—Regulations, 43 Fed. Reg. 55978 (Nov. 29, 1978).

³⁵³ *Id.*; Exec. Order No. 11,991, 42 Fed. Reg. 26967 (May 24, 1977).

³⁵⁴ Exec. Order No. 11,991 § 2 (amending Exec. Order 11,514 § 3(4)).

³⁵⁵ *Id.* (citing 42 U.S.C. § 4371 (1970), *reprinted as amended in* 42 U.S.C. § 1857(h-7)).

³⁵⁶ 42 U.S.C. § 4344.

³⁵⁷ COUNCIL ON ENVTL. QUALITY, EXEC. OFFICE OF THE PRESIDENT, ENVIRONMENTAL JUSTICE GUIDANCE UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT (1997).

³⁵⁸ *Id.* at 21.

³⁵⁹ *Id.*

³⁶⁰ *See, e.g.*, Nancy Sutley & Bob Perciasepe, *Real Progress on Environmental Justice*, THE WHITE HOUSE BLOG (Mar. 20, 2013, 12:49 PM), <https://www.whitehouse.gov/blog/2013/03/20/real-progress-environmental-justice-0> [<https://perma.cc/25GY-NY6U>].

guidance as mandatory regulations would provide an enforceable instrument in the environmental justice advocates' toolbox. Additionally, as long as it remains as guidance without force of law, the agencies are hamstrung should any entity push back on its application as the agency cannot force compliance.

C. Federal Agencies and Environmental Statutes

In addition to the CEQ, the President could direct other federal agencies to incorporate environmental justice into the implementing regulations for relevant statutes for which those agencies' have authority. Most notably, this would include the EPA, which has responsibility for many of the major federal environmental laws, but would include several agencies whose actions directly affect environmental justice communities, including the Departments of Energy, Housing and Urban Development, and Transportation. The EPA's efforts for regulating greenhouse gas emissions from the power sector, for example, began with President Obama's memorandum directing the EPA to do so, going as far as setting deadlines for a series of proposed and final rules.³⁶¹

Federal agencies, moreover, have existing authority to undertake efforts to incorporate environmental justice concepts into regulations without explicit direction from the President. If the statute an agency is implementing does not necessarily leave room to include environmental justice, then NEPA's broad authorization does. In NEPA, for example, Congress declared, amongst other things, that "it is the continuing responsibility of the Federal Government to . . . assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings."³⁶² While the statute does not override other statutory obligations, NEPA "authorizes and directs that, to the fullest extent possible . . . [that] policies, regulations, and public laws . . . shall be interpreted and administered in accordance with the policies set forth in [NEPA]."³⁶³

More specifically, however, many of the environmental statutes implemented by the EPA are intentionally broad to allow the agency discretion, for example, to set and revise standards. As part of Plan EJ 2014, in fact, the EPA prepared EJ Legal Tools,³⁶⁴ which examined many

³⁶¹ Memo. on Power Sector Carbon Pollution Standards for the Adm'r of the Env'tl. Prot. Agency, 78 Fed. Reg. 39,535, 39,536 (July 1, 2013).

³⁶² 42 U.S.C. § 4331(b)(2) (1970).

³⁶³ 42 U.S.C. § 4332 (1970).

³⁶⁴ OFF. OF GEN. COUNSEL, *supra* note 157.

of the most relevant statutes for legal authority to incorporate environmental justice into its permitting, programs, and regulation. Unfortunately, it stopped there, only identifying where EPA has discretionary authority to consider environmental justice in its decision-making. As long as it remains only in guidance, EPA must rely on voluntary compliance by those acting under the statutes. If EPA has the discretionary authority to include EJ considerations in these decisions anytime these decisions are accompanied by rulemaking or even adjudicatory authority, the agency also has the authority to use those powers to give force of law to these issues.

CONCLUSION

The above are just a few examples of how the Obama Administration can shore up its environmental justice legacy that it began under Plan EJ 2014. Without these actions, whether there will be any legacy remains to be seen. President Obama should not leave his legacy—on environmental justice—to chance. The time to do more is now before it is too late.