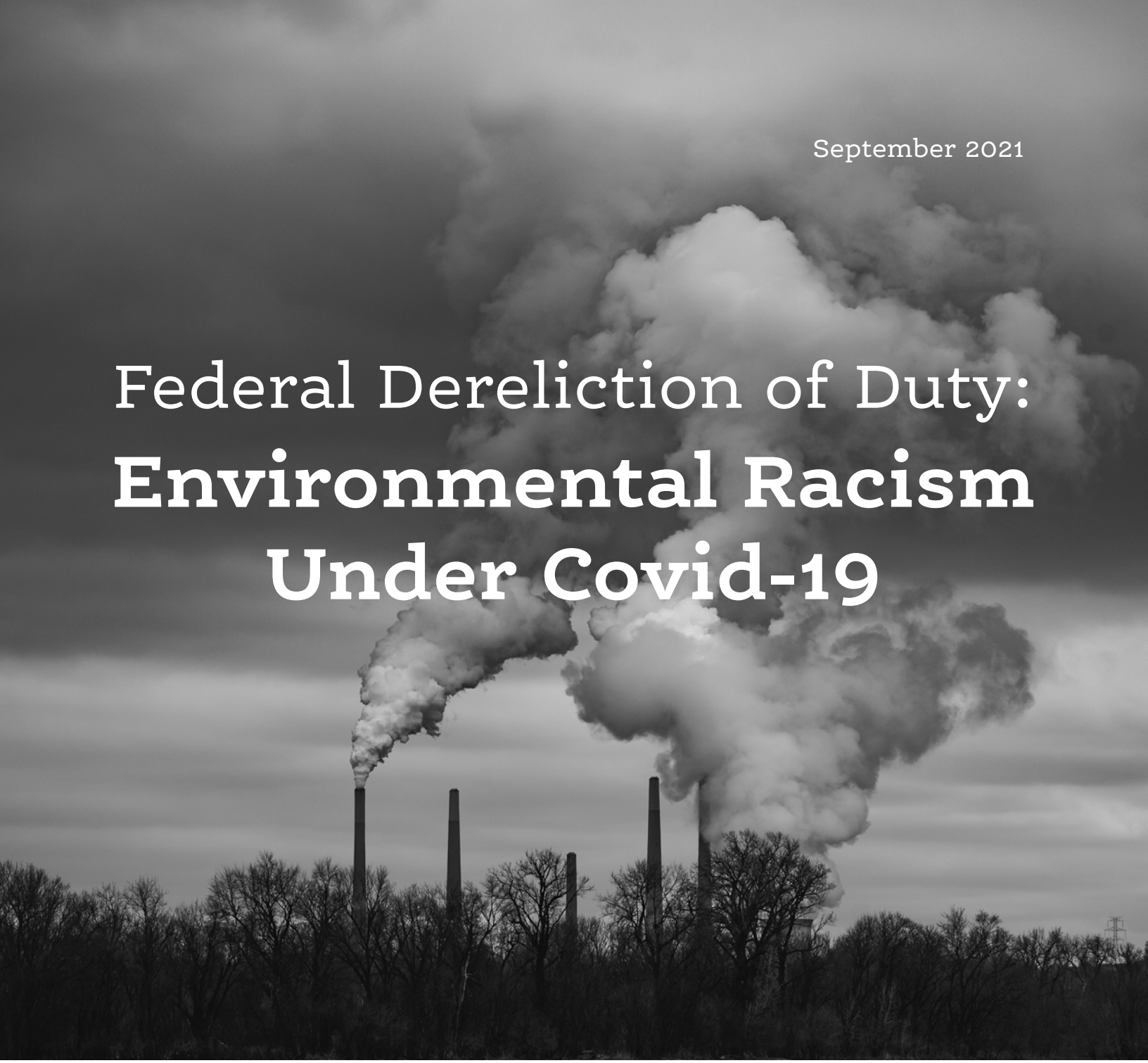

September 2021

Federal Dereliction of Duty: **Environmental Racism Under Covid-19**

Just Transition Alliance, The Farmworker Association of Florida, WE ACT for Environmental Justice, Indigenous Environmental Network, and Los Jardines Institute in partnership with the Vermont Law School Environmental Justice Clinic

EXECUTIVE SUMMARY

On March 26, 2020, just as COVID-19 was spreading rapidly in the United States, the Environmental Protection Agency (EPA) announced a dramatic deregulation of federal environmental laws. This occurred just three days after the American Petroleum Institute, representing 600 oil and gas companies, requested by letter that EPA provide industry with relief from federal environmental monitoring and reporting requirements. EPA acquiesced, issuing a policy allowing industry to self-regulate, and making clear that noncompliance could occur without consequence for every federally regulated source of pollution, including chemical manufacturing, coal-fired power plants, sewage and waste facilities, and factory farms. By June, EPA had further eased regulations intended to protect farmworkers against pesticide exposure.

EPA's own Office of Inspector General has since found an overall decline in enforcement by EPA in fiscal year 2020. As the deregulation policy severely limited data collection and transparency during this period and given insufficiencies in EPA's aging national ambient air quality monitoring system, we cannot know the full extent of the policy's contribution to that decline or the harm caused. However, existing data shows that EPA's policy created the greatest danger to public health for People of Color, Indigenous Peoples, and low-income communities where these industries are concentrated and COVID-19 poses heightened risk.

During the five-and-a-half months this policy remained in effect, COVID-19 cases in the U.S. skyrocketed to a cumulative 6,163,027 cases. Research showed disproportionate rates of infection, hospitalization, and deaths amongst Black, Latino/a, and Indigenous people. By fall 2020, the Navajo Nation faced a higher per capita death rate than any state in the U.S. To date, COVID-19 has infected at least 561,000 farmworkers, though that number is likely an underestimate.

Early studies linked severe COVID-19 illness and death to air pollution exposure. A recently published peer reviewed study shows communities with the highest concentrations of toxic sites saw COVID death rates shoot up within six days of EPA's rollback. The result: a 10-15% increase in daily mortality rate and an estimated 7,046 additional deaths. Counties with higher numbers of Black residents felt these impacts most severely.

Environmental justice organizations including the Just Transition Alliance, Indigenous Environmental Network, The Farmworker Association of Florida, Los Jardines Institute, and WE ACT for Environmental Justice challenged EPA's policy through advocacy and litigation. However, the lack of monitoring and reporting obscured the data needed to show clearly how EPA exacerbated the cumulative risks of COVID-19 and air pollution. Moreover, our communities still lack adequate legal tools to defend against environmental racism.

These environmental justice groups, along with the Vermont Law School Environmental Justice Clinic, are releasing this report as this country works to turn the page on the Trump era and set a new course for environmental justice, and as COVID-19 rates are again surging. We need a full examination of EPA's actions and—for the first time—strong, enforceable environmental justice and civil rights laws to ensure no federal agency violates its core responsibilities in the future.

Increased pollution stemming from EPA deregulation created a perfect storm.

Early in the pandemic, multiple studies demonstrated links between air pollution and risk of COVID-19 exposure and death—notably exposure to PM2.5. A new peer reviewed study shows that EPA's rollback led to specific and significant air pollution increases, with greater impacts in areas with higher concentrations of industrial sites. These conditions, the COVID-19 pandemic, and increased toxic air pollution created a perfect storm, resulting in increased COVID-19 severity and deaths within days of EPA's announcement.

Even before COVID-19, race was the greatest predictor of toxic waste sites across the nation.

- Black Americans are exposed to more pollution from all major emission sources.
- Black and Latino/a residents are more likely to live near high risk chemical facilities.
- Indigenous nations contend with a proliferation of toxic contamination, mining, and fossil-fuel infrastructure on and near Tribal land.
- At every stage of its life cycle, oil and gas production disproportionately harms People of Color, Indigenous Peoples, and low-income communities.
- People of Color are five times more likely to live near industrial-scale farms, contending with noxious odors and drinking water pollution.
- Farmworkers, who are 75% Latino/a immigrants and often lack legal status, are disproportionately impacted by air and water pollution from industrial agriculture and exposure to harmful pesticides.
- People of Color, Indigenous Peoples, and low-income communities are disproportionately exposed to the air pollutants like ozone and fine particulate matter (PM2.5) linked to increased COVID risks.

Polluters took advantage of EPA's policy to violate environmental laws.

By waiving reporting requirements, EPA created a black hole of information that hid much of the harm caused by its policy. But state-collected data makes clear that polluters took advantage of the rollback. By July 2020, an estimated 3,000 waivers had been granted, including to 55 facilities with a history of egregious noncompliance. For example,

- According to the Associated Press, regulators eased up enforcement for "smokestacks, medical waste shipments, sewage plants, oilfields and chemical plants."
- In Texas, regulated entities requested at least 248 waivers. The most frequent waiver request by major oil and gas companies was for monitoring chemical leaks.
- Over 100 sewage and wastewater treatment plants requested waivers.
- Around the country, farms and feedlots requested waivers for manure and livestock disposal and sediment and erosion control.

EPA rescinded its policy, without recourse.

Nine states sued EPA for abusing its discretion by issuing a broad, open-ended policy and delegating responsibility to polluting industries without public participation. A coalition of public interest groups, including environmental justice advocates, filed a petition for emergency rulemaking and a lawsuit asking EPA to notify state authorities of noncompliance and to publish information online.

The U.S. House of Representatives and the Senate hosted a bipartisan briefing, raising questions about the legality of the policy, calling for transparency, and asking the agency "to clarify how it will operate in order to further safeguard public health." EPA's own Office of Inspector General found that EPA's policy "threaten[ed] the Agency's overall mission to protect human health and the environment."

EPA voluntarily withdrew its policy on August 31, 2020, citing "the goal of returning to normal operations." One year later, EPA has not been held accountable, and communities still have no way of knowing which laws were violated, and by whom.

EPA's unprecedented expansion of its enforcement discretion was a dereliction of the agency's duties.

Long standing environmental justice policy requires EPA to identify and address the impacts of its decisions on People of Color, Indigenous Peoples, and low-income communities—and to include these communities in decision-making. Since 1994, Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, has directed EPA—and all federal agencies—to identify and address any disproportionately high and adverse health or environmental effects of their actions on People of Color, Indigenous Peoples, and low-income communities. The EO also mandates that agencies take "proactive steps" to facilitate public participation, meaningful involvement, and access to information in decisions affecting their health and livelihoods.

By initiating deregulation, EPA ignored environmental justice policy and principles. The resulting deficiency in pollution and monitoring data disempowered individuals and communities from protecting themselves even under existing environmental laws. Absent federal monitoring and reporting, many states and Tribes expended limited resources in the midst of the pandemic in an attempt to fill the enforcement void. That EPA, or any federal agency, can disregard environmental justice mandates without consequence speaks to the frightening gap in legal recourse for those most affected.

EPA's dereliction of duty and the potential for reoccurrence must be addressed.

EPA's decision to succumb to corporate pressure instead of protecting those most at risk from a public health crisis cannot happen again. We need systemic changes to ensure all federal agencies safeguard our communities and that we have the tools to protect ourselves. We call on the Biden-Harris Administration and Congress to take the following actions:

- Investigate the impacts of EPA's rollback on environmental justice, public health, and racial inequality through Congressional Hearings and auditing by the Office of Inspector General.
- With COVID-19 rates rising, mandate that all federal agencies prioritize mitigation of harm to at-risk communities in decisions regarding monitoring, compliance, and enforcement.
- Provide communities with the most protective monitoring tools to assess baseline cumulative environmental risks and harms, building on new EPA efforts to address health disparities.
- Bolster EPA enforcement of all environmental and civil rights laws and compliance with EO 12898, dedicating resources, setting benchmarks, and consulting with People of Color, Indigenous Peoples, and low-income communities to ensure effective action.
- Pass the Environmental Justice for All and Environmental Justice Acts to establish enforceable environmental justice and civil rights protections for People of Color, Indigenous Peoples, and low-income communities that cannot be ignored by future administrations.

During the height of the COVID-19 pandemic, EPA appointed polluters to be their own watchdogs.

On March 23, 2020, ten days after COVID-19 was declared a national emergency, a Senior Vice President of the American Petroleum Institute (API) sent a letter to Trump EPA Administrator Andrew Wheeler "requesting assistance in temporarily waiving non-essential compliance obligations [and] seeking temporary relief through enforcement discretion[.]"[1] Three days later, EPA Assistant Administrator Susan Parker Bodine issued a memo entitled *COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program*, echoing the language of API's request for enforcement discretion, abdicating the agency's enforcement responsibilities, and authorizing polluters to violate federal environmental laws.[2] EPA relaxed enforcement over "every industry in the country: chemical manufacturing, oil and gas extraction, coal-fired power plants, refineries, mining and smelting, factory farms, and every other federally regulated source of pollution."[3]

EPA's policy delegated the decision whether to observe "routine compliance monitoring, integrity testing, sampling, laboratory analysis, training, reporting, and certification" requirements to industry.[4] This delegation included crucial monitoring requirements under the Clean Air Act, such as stack testing, continuous emission monitoring systems, leak detection and repair, fenceline monitoring, and Toxics Release Inventory reporting.[5] As rationale, EPA cited pandemic constraints on regulated industries that "may affect facility operations and the availability of key staff and contractors and the ability of laboratories to timely analyze samples and provide results[,]"without referencing any evidence of such conditions.[6] EPA noted that regulated "[e]ntities should make every effort to comply with their environmental compliance obligations[,]"[7] and "if compliance is not reasonably practicable," the facility owners "should . . . [a]ct responsibly under the circumstances."[8] This included guidance to document noncompliance and "[r]eturn to compliance as soon as possible." However, EPA's reliance on permissive

language throughout the policy indicated noncompliance could occur without consequence, making even reporting of incidents of noncompliance optional.

EPA's dereliction of its enforcement duties additionally extended to facilities operations by deregulating mandatory pollution limits, including "exceedances of enforceable limitations on emissions to air or discharges to water, or land disposal, or other unauthorized releases[.]"[9] EPA's policy advised regulated entities that they "should" operate in a manner "that is safe and that protects the public and the environment" and "should" contact federal, state, or Tribal regulators if COVID-related noncompliance resulted in "an acute risk or an imminent threat to human health or the environment."[10] However, such requirements were permissive, not mandatory, and the agency undermined its ability—and that of states, Tribes, and local communities—to hold regulated entities accountable by eliminating regular monitoring and reporting requirements. Moreover, EPA made no commitment to enforcement in the event it became aware of an imminent threat, stating the agency would simply "consider the circumstances, including the COVID-19 pandemic, when determining whether an enforcement response is appropriate."[11]

In June 2020, the agency followed up on its general relaxation of environmental laws by introducing additional enforcement discretion for requirements for the safe handling toxic pesticides, such as the Agricultural Worker Protection Standards and pesticide product label requirements.[12] EPA issued guidance allowing employers to direct farmworkers who mix, load, and apply pesticides to use disposable masks expired beyond their recommended service life or masks obtained from other countries that had not been certified in accordance with U.S. standards.[13]

Overall, the EPA's sweeping deregulation of federal environmental laws circumvented regulatory structures intended to promote transparency, environmental protection, and public health. The policy had retroactive effect,[14] with no end date to its implementation. The agency offered no prior notice, nor did it evaluate the health impacts of deregulation for the People of Color, Indigenous Peoples, and low-income communities living closest to the facilities most likely to take advantage of the permission to pollute.

Increased pollution stemming from EPA deregulation created a perfect storm.

One of the "unbearable human costs of systemic racism" is a pattern of sacrifice zones throughout the nation that have caused communities to bear disproportionate environmental harms and have the least access to environmental benefits.[15] Thirty years after the First National People of Color Environmental Leadership Summit and twenty-seven years after President Clinton issued Executive Order 12898 (EO 12898), *Federal Actions to Address Environmental Justice in Minority Populations*[16] and Low-Income Populations, race remains the strongest predictor of hazardous waste siting across the United States[17] and residential zip code remains the strongest predictor of life expectancy overall.[18]

Early in the pandemic, multiple studies demonstrated links between air pollution and risk of COVID-19 exposure and death—notably exposure to fine particulate matter (PM2.5) which is the largest environmental cause of human mortality.[19] A new peer reviewed study shows that EPA's rollback led to specific and significant air pollution increases, with greater impacts in areas with higher concentrations of industrial sites.[20] Persistent racial disparities in exposure to pollution and health risks, the COVID-19 pandemic, and increased toxic air pollution created a perfect storm, resulting in increased COVID-19 severity and deaths within days of EPA's announcement of its non-enforcement policy.

Pollution and Health are Inequitably Distributed in the U.S.

The distribution of pollution in the United States is unequal. This is not a coincidence. Black communities "live with the severe, enduring effects of *de jure* segregation" caused by racially explicit local, state, and federal laws and policies defining where People of Color live.[21] Since long before the pandemic highlighted these disparities, race was the greatest predictor of toxic waste sites across the nation.[22] People of Color are 1.54 times more likely than white people to live with one mile of a major polluting facility, and Black and Latino/a residents are 40 percent more likely to live near high-risk chemical facilities than other residents.[23] Indigenous nations contend with a proliferation of toxic contamination, mining, and fossil-fuel infrastructure on and near Tribal land.[24]

- At every stage of its life cycle, oil and gas production disproportionately harms People of Color, Indigenous Peoples, and low-income communities[25] and more than 1 million Black people live within one half-mile radius of natural gas facilities.[26]
- A 2021 report from Diné C.A.R.E. and the Environmental Defense Fund, found that waste emissions of roughly 1.5 billion cubic feet of natural gas from fossil fuel extraction on Navajo Nation lands extraction results in massive emissions of hazardous air pollutants.[27]
- A 2020 Environmental Integrity Project report on benzene pollution at refineries found Black and Latino/a people make up nearly two thirds of those living within three miles of the dirtiest refineries.[28]
- A 2017 study by the NAACP and the Clean Air Task Force found that Black people are 75% more likely than white people to live near industrial facilities that expose communities to increased noise, odor, traffic, and pollution.[29]
- People of Color, Indigenous Peoples, and low-income communities are five times more likely to live near industrial-scale farms and CAFOs which expose them to acrid odors from hog manure; emissions of hydrogen sulfide and ammonia; and pathogens, heavy metals, and bacteria that pollute drinking water sources.[30]
- Farmworkers, who are 75% Latino/a immigrants and often lack legal status, are disproportionately impacted by pollution and exposure to toxic pesticides.[31]

As a result of their proximity to industry, People of Color, Indigenous Peoples, and low-income communities are disproportionately exposed to the air pollutants, like ozone and PM2.5.[32] Black Americans are exposed to more pollution from all major emission sources, including industry, agriculture, vehicles, and construction.[33] These disparities existed nationally and across states, urban and rural areas, and all income levels.[34]

Exposure to toxic air pollution from these polluters aggravates respiratory diseases, increases cancer risk, and worsens the symptoms of asthma.[35] Long-term exposure to high concentrations of air pollutants such as sulfur dioxide can lead to respiratory illness, weakening of the lungs' defenses, and aggravation of existing cardiovascular disease.[36] A 2017 study sponsored by EPA found that even low levels of air pollution raise mortality rates for older adults—an effect most pronounced in Black men and people with lower incomes.[37] PM 2.5 is responsible for 85,000 to 200,000 excess deaths per year in the United States.[38] Ground-level ozone, caused by volatile organic compounds (VOCs) and nitrogen oxides, damages lung tissue and makes it difficult to breathe.[39]

Significant racial disparities in access to health coverage and health outcomes make these communities more at risk of adverse impacts from pollution. Black people are 40% more likely to have asthma than white people and three times more likely to die from asthma.[40] The asthma death rate for Black children is eight times higher than for white children.[41] Native Americans and Alaska Natives experience mortality disparities across many illnesses, accompanied by a life expectancy

5.5 years less than the average U.S. population.[42] Black, Latino/a and Asian people all have more unstable insurance coverage than whites, with Latino/a people 35% more likely to be uninsured than the general population.[43] Even with healthcare access, health outcomes are lower for People of Color and Indigenous Peoples with race and ethnicity as significant predictors of the quality of health care received.[44]

The Cumulative Impacts of Systemic Racism, Industrial Pollution, and COVID-19.

The COVID-19 pandemic laid bare "how profoundly the energy and environmental policy decisions of the past have failed communities of color."[45] Racial disparities of COVID-19 infection, hospitalization, and deaths and the correlation between these high death rates and exposure to air pollution emerged very early in the pandemic. The Centers for Disease Control and Prevention has collected demographic data on COVID-19 cases and deaths since January 2020,[46] despite gaps in data and transparency.[47] As early as April 9, 2020, *USA Today* reported Black people dying at higher rates,[48] while by July 5, 2020, the *New York Times* reported that Black and Latino/a people were at least three times more likely to become infected and twice as likely to die from COVID-19 as white people.[49] Age-adjusted racial disparities in COVID-19 mortality are likley much higher,[50] pointing to the impacts of structural racism.[51] Workplace conditions for essential and other in person jobs has been a significant driver of racial and ethnic disparities.[52]

Native communities have some of the highest per capita rates of COVID-19 and the highest mortality rate nationwide.[53] A Cherokee Nation citizen was the first person to die in Oklahoma.[54] In the Navajo Nation, the largest Indian reservation in the United States, the death rate from COVID-19 eclipsed states with much larger populations.[55] Despite this high death rate, the Trump Administration held up $40 million in emergency aid from Congress, leading to shortages in medical care.[56] The mortality data for Indigenous, Native Hawaiian, and Pacific Islanders has been undercounted because states either fail to report this data or report deaths in these populations in the "other" category.[57]

To date, COVID-19 has infected at least 561,000 farmworkers, though that number is also likely an underestimate.[58] The National Center for Farmworker Health has documented multiple COVID-19 outbreaks among agricultural workers in 18 different states.[59] In California, farmworkers in Monterey County were three times more likely to contract COVID-19 than non-agricultural workers.[60] The CDC found that Latino/a workers made up 37% of the food processing and agriculture industries across the country, but 73% of confirmed COVID-19 cases.[61]

Early research also demonstrated that COVID-19 can be made more serious and deadly by exposure to air pollution—making immune systems more vulnerable to infection and increasing severity of the illness.[62] Harvard published a widely-publicized study on April 7, 2020 finding that a small increase in long-term exposure to PM2.5 leads to an increase in the COVID-19 death rate which is 20 times the one estimated for death from any cause.[63] Another study published in April 2020 found that long-term exposure to nitrogen dioxide may be one of the most important contributors to fatality caused by the COVID-19 virus.[64]

In September 2020, ProPublica and the State University of New York College of Environmental Science and Forestry published research demonstrating correlation between levels of hazardous air pollutants from industrial emissions and per-capita death rate from COVID-19.[65] Since that time, a voluminous body of research has emerged linking exposure to air pollution with risk from COVID-19 infection, hospitalization, and death[66]—and calling attention to environmental injustice of these disproportionate cumulative risks borne by People of Color, Indigenous Peoples, and low-income communities.[67]

EPA Rollback Exacerbated Pollution, COVID Rates, and Environmental Racism.

A new peer reviewed study shows the link between EPA deregulation, increased pollution, risk from COVID-19, and environmental racism. The study, entitled *The effects of increased pollution on COVID-19 cases and deaths* and published by Claudia Persico and Kathryn Johnson in the May 2021 issue of the *Journal of Environmental Economics and Management*, found that pollution resulting from the decline in EPA enforcement following initiation of the deregulation policy led to increases in COVID-19 cases and deaths,[68] disproportionately impacting areas with higher pollution concentrations—notably People of Color communities.

Working from the premise that counties with higher concentrations of industrial facilities would likely see greater increases in air pollution, the Persico and Johnson study compared counties with six or more facilities listed on EPA's Toxic Release Inventory (TRI) database to counties with fewer than six facilities. The TRI database includes 22,000 major polluters including oil, gas, and chemical manufacturing facilities, operating in the United States near an estimated 221.5 million people.[69] While EPA's policy relaxed reporting for sites listed in the TRI database, the study relied upon aggregated pollution data from EPA's Air Quality System (AQS), which "contains ambient air pollution data collected by EPA, state, local, and tribal air pollution

control agencies from over thousands of monitors."[70] The study calculated "a large, sustained, and statistically significant increase after the rollback of environmental regulations."[71] Counties with more Toxic Release Inventory sites saw an 11.8% increase in PM 2.5 and a 5% increase in ozone—on average.[72]

The study found that these increases in air pollution in areas with higher concentrations of industry resulted in "large and statistically significant increases in COVID-19 cases and deaths[,]"[73] within six days following EPA deregulation.[74] Counties with six or more TRI sites experienced between a 10.6 and 15.3 percent increase in daily COVID-19 deaths and a 53.0 percent increase in daily confirmed COVID-19 cases after EPA instituted deregulation.[75] Because many people with COVID-19 do not show symptoms,[76] the rate of daily new cases likely represents more severe cases, indicating that pollution might cause COVID-19 cases to become worse.[77] The study estimated a total 7046 additional deaths in areas with higher pollution concentrations as a result of EPA deregulation.[78]

The study further identified counties with greater numbers of Black residents as experiencing "much worse outcomes," including higher death rates, resulting from pollution exposure following deregulation.[79] While not explicit in the study, the results also held in communities with higher numbers of Latino/a residents.[80] Moreover, while the study did not account for concentrations of Indigenous peoples, the results likely hold for any populations exposed to the cumulative impacts of concentrated pollution. The study highlights two phenomena of environmental racism: (1) higher concentrations of industrial facilities in communities with higher numbers of People of Color and Indigenous Peoples and (2) greater risk of infection and death from COVID-19 for People of Color and Indigenous Peoples.[81]

The Persico and Johnson study strongly suggests that industry took advantage of EPA deregulation with devastating impacts to People of Color and Indigenous Peoples. The study points to the necessity of evaluating public health impacts prior to implementing environmental policy decisions, as well as the critical nature of data and transparency to ensure policymakers and the public have the information needed to protect their communities, particularly during a pandemic.

EPA stripped away bedrock environmental protections necessary to protect communities.

EPA's decision to waive compliance requirements mandated by federal environmental laws violated the agency's duty to enforce those laws and undermined the means used by EPA, states, and Tribes to assess compliance.

These compliance requirements—including inspections, investigations, integrity testing, sampling, laboratory analysis, training, reporting, certification—were all waived by EPA at the height of the pandemic.[82] Deregulation of these requirements contravened EPA's long standing recognition that monitoring and reporting are essential to protect public health and the environment[83] and the agency's acknowledgement that the primary way to address environmental injustice is through the enforcement of existing environmental laws.[84]

EPA removed critical protections and opened the doors for industry to increase pollution.

EPA's policy waived foundational requirements for all federal environmental laws, risking public health when those critical protections were most needed. Without monitoring and reporting requirements, EPA eliminated tools to identify environmental violations or deter facilities from illegally polluting.

States were left to spend scarce resources to fill the enforcement void created by EPA and the public was left in the dark about the impacts of this increased pollution. resources to fill the enforcement void created by EPA and the public was left in the dark about the impacts of this increased pollution.

EPA's waiver of monitoring and reporting requirements hindered enforcement of the Clean Air Act, the principal law protecting public health and welfare from air pollution. The Act relies on stack testing, continuous

- Stack tests and continuous emissions monitoring systems are essential to determine a facility's compliance with pollution limits as the measure of the amount of specific regulated pollutants emitted from a facility.[86]
- Fenceline monitoring is one of the only ways that communities near industrial sites are alerted of elevated levels of hazardous air pollutants or accidental chemical releases.[87]
- Leak detection and repair is critical for monitoring whether equipment at oil and gas facilities, such as pipelines and storage tanks, leak volatile organic compounds (VOCs), methane, and hazardous air pollutants.[88]

emission monitoring systems, leak detection and repair, and fenceline monitoring to implement its most important programs, including acid rain, air toxics, and ozone protection; prevention of accidental chemical releases; and the Title V operating permit program.[85]

EPA itself has acknowledged that leaking equipment is the largest source of VOCs and volatile hazardous air pollutants from oil refineries and chemical manufacturing facilities.[89] Even under a robust monitoring program, past EPA's audits have found over 70,000 tons of VOCs emitted annually from undetected leaks, and 40,000 tons of those emissions from oil refineries.[90]

Legal and political backlash shined a light on the harms of EPA deregulation.

Within weeks of EPA's announcement, two lawsuits were filed against the Trump EPA, Administrator Wheeler, and Assistant Administrator Bodine, one on behalf of a coalition of environmental justice, public health, and public interest organizations and the other representing nine state governments. Before filing, the nongovernmental organizations (NGOs), including Just Transition Alliance, Indigenous Environmental Network, Los Jardines Institute, and WE ACT for Environmental Justice, petitioned EPA to mandate reporting of COVID-related noncompliance and for EPA to make public that information, describing "the enormous health consequences at stake,"[91] but the agency took no action.

The states' suit alleged that EPA abused its discretion by issuing a broad, open-ended policy without public participation and giving regulated entities free rein to decide when compliance with federal environmental laws is not practicable.[92] The state plaintiffs also explained that "[t]he nonenforcement policy place[d] States between a rock and hard place: either incur increased burdens and attempt to fill EPA's enforcement shoes at a time when they are increasingly strapped for resources, or risk the health of our residents based on the unfounded assumption that the policy will not cause harm."[93] The state plaintiffs were especially concerned about impact of deregulation on the Clean Air Act's chemical accident safety program, which the EPA has the sole authority to enforce. Noncompliance by facilities handling extremely hazardous substances could result in serious chemical disasters and result in greater response costs to states.[94]

The suit reflects the experience of many regulatory bodies impacted by EPA's policy: EPA, states, and Tribes all rely on information generated by mandatory reporting to determine when polluting facilities violate pollution limits.[95] Many states were left to expend limited resources to fill the enforcement void left by EPA, resources that should have been spent to respond to the pandemic crisis.

Both lawsuits called out EPA for exposing the public to potentially catastrophic risks from carcinogenic air pollutants, drinking water contamination, and industrial and hazardous waste disasters, while eliminating critical information needed to respond when emergencies occur. They also highlighted the disproportionate risk borne by People of Color and low-income communities, explaining that "[c]ommunities

burdened by greater air pollution are more vulnerable to"[96] and "suffering disproportionate mortality and other adverse outcomes from COVID-19[.]"[97]

The U.S. House of Representatives and Senate also raised concerns about the legality of EPA's policy. The House Committees on Energy and Commerce, Transportation and Infrastructure, and Appropriations hosted a bipartisan briefing and sent letters asking the agency to modify the guidance "to clarify how it will operate in order to further safeguard public health and to provide any "analysis EPA performed to evaluate the effects[including] any analysis specific to environmental justice communities."[98] Congressional leaders emphasized that EPA's policy "fail[ed] to achieve EPA's stated objectives while unnecessarily undermining ongoing compliance" and creating a "license for companies to violate our environmental laws."[99] Senators Elizabeth Warren and Edward Markey condemned EPA for issuing a "free pass" to polluters that exacerbated environmental injustices.[100] They noted that "trusting companies to effectively determine their own compliance with environmental laws, even if the companies claim that the pandemic led them to increase their pollution, is still highly dangerous."[101]

In June 2020, EPA's own Office of Inspector General published a report warning that EPA's policy placed the agency's overall mission at risk.[102] The Office of Inspector General had issued a report in March 2020 that stressed that the EPA "must maintain a robust enforcement program to address environmental violations and promote deterrence."[103] The Office of Inspector General cited EPA's own enforcement data which shows that activities and resources for conducting routine regulatory enforcement work declined in recent years.[104] The Office of Inspector General warned that additional reduction in enforcement activity "threaten[ed] the Agency's overall mission of protecting human health and the environment at greater risk."[105] EPA's deregulation policies was consistent with ongoing failures to protect public health through regulation,[106] and enforcement, having already reached record lows in inspections, civil and criminal cases, and funds spent by polluters on pollution controls and cleanup.[107]

Polluters took advantage of EPA's policy to violate environmental laws.

EPA deregulation undermined the deterrent effect of environmental laws and resulted in increased noncompliance by industry and increased air pollution.[108] Because EPA did not require facilities to notify the agency of noncompliance, EPA's policy created a black hole of information that hid much of the harm. But available data based on documented waivers sought from state and federal regulators, shows that polluters clearly took advantage of EPA's policy. By July 2020, an estimated 3,000 waivers had been granted, including 55 facilities with a history of noncompliance.[109] Major polluting industries, and some states, took advantage of EPA's policy:

- According to the Associated Press, regulators eased up enforcement for "smokestacks, medical waste shipments, sewage plants, oilfields and chemical plants."[110]
- In Texas, regulated entities requested at least 248 waivers, most frequently oil and gas companies for monitoring chemical leaks.[111]
- Arkansas[112] granted a blanket waiver for oil and gas companies for safety testing of temporarily abandoned wells and other activities.
- Over 100 sewage and wastewater treatment plants requested waivers.[113]
- Around the country, farms and feedlots requested waivers for manure and livestock disposal and sediment and erosion control.[114]
- New Mexico state officials stopped in-person investigations of citizen air-quality complaints from March to May 2020.[115]
- Public records requests revealed that North Carolina stopped all inspections of farms for several months and then decreased inspections by nearly 50 percent compared to previous years.[116]

EPA's deregulation policy, in combination with the agency's relaxation of requirements for the safe handling of toxic pesticides,[117] increased exposure to air pollution and pesticides for the U.S.'s nearly 2.5 million farmworkers. In relaxing pesticide safety requirements, EPA cited demand for respirators due to the public health crisis, supply chain issues, and unavailability of fit-testing services needed to ensure workers tight-fitting, effective, and safe respirators.[118] Yet, the agency failed to adequately account for the compounded risks that have contributed to an explosion of COVID-19 cases among farmworkers, including regular exposure to respiratory hazards and air pollution, substandard and crowded working and housing conditions,[119] limited access to healthcare and benefits,[120] and lack of language access,[121] all exacerbated by a lack of resources and legal protections as a result of immigration status. EPA's relaxation in protections from pesticide exposure remained in place until August 18, 2021,[122] all the while this country has relied on farmworker labor as part of the "Essential Critical Infrastructure Workforce."[123]

EPA voluntarily withdrew the deregulation policy on August 31, 2020, citing "the goal of returning to normal operations" while reserving EPA's right "to exercise enforcement discretion on a case-by-case basis[.]"[124] EPA's termination of the policy rendered the states' lawsuit moot, while the court in the NGO lawsuit found that the organizations lacked standing because they were neither "legally entitled to the information they sought," nor able to establish that their "members [were] harmed, or imminently [would] be harmed, by environmental pollution that is traceable to [EPA's] Policy."[125]

EPA's deregulation policy was a dereliction of EPA's duties to environmental justice.

"Environmental justice is not merely a box to be checked." In 2020, the Fourth Circuit Court of Appeals made this statement in reversing a decision by the Commonwealth of Virginia, after the state failed in their statutory duty to analyze the potential for disproportionate health impacts of a compressor station connected to the proposed Atlantic Coast Pipeline on the predominantly Black community of Union Hill in compliance with state environmental justice and energy law and policy.[126] In issuing its deregulation policy, EPA refused to even attempt to check the box.

Long standing federal environmental justice policy requires EPA to identify and address the impacts of its decisions on People of Color, Indigenous Peoples, and low-income communities--and to include these communities in decision-making. The Trump EPA, Administrator Wheeler, and Assistant Administrator Bodine chose to ignore EPA's duties under both the EO 12989 and the agency's own guidance on consideration on environmental justice in decision making.[127]

The Principles of Environmental Justice (EJ Principles) drafted at the First People of Color Environmental Leadership Summit in 1991, respond directly to and set out to mitigate the conditions of environmental racism described above.[128] According to the Principles, "environmental justice demands that public policy be based on mutual respect and justice for all peoples, free from any form of discrimination or bias."[129] Environmental justice further demands the right for People of Color, Indigenous Peoples, and low-income communities "to participate as equal partners at every level of decision-making, including needs assessment, planning, implementation, enforcement and evaluation."[130] The EJ Principles affirm "the fundamental right to political, economic, cultural and environmental self-determination of all peoples" and "the right of all workers to a safe and healthy work environment without being forced to choose between an unsafe livelihood and unemployment."[131]

In 1994, President Clinton signed EO 12898 in recognition of the disproportionate health and environmental impacts routinely faced by People of Color, Indigenous Peoples, and low-income communities, affirming "every American's right to breathe freely, drink clean water, and live on uncontaminated land"[132] and mandating all federal agencies to "make achieving environmental justice part of its mission.[133] EO 12898 directs federal agencies to "identif[y] and address[...] disproportinately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations...to the greatest extent practicable and permitted by law."[134] The EO and subsequent EPA guidance further instruct decision makers to give opportunities for public participation, meaningful involvement, and access to information relating to human health and the environment to "minority populations, low-income populations, tribes, and indigenous peoples."[135] Meaningful involvement involves "proactive steps" to provide opportunities for impacted communities to participate in decisions affecting their health and livelihoods.[136]

EPA initiated deregulation without ever evaluating the potential adverse and disproportionate impacts of increased pollution or providing opportunities for meaningful participation. The opportunity for abuse of enforcement discretion by regulated entities and the resultant adverse impacts of increased pollution on public health should have been obvious to EPA when it initiated its policy. EPA's ambient air quality monitoring system suffers from aging infrastructure and underfunding, leading to gaps in data needed to "understand and address the health risks from air pollution," and as found by the Government Accountability Office (GAO) in late 2020.[137]

Yet, when weakening a regulation on carbon pollution from coal-fired power plants in 2018, EPA acknowledged that the measure was likely to result in

about 1,400 additional premature deaths a year because of more pollution.[138] EPA conducted a similar analysis during the Obama Administration, calculating those existing protections would prevent between 1,500 and 3,600 premature deaths per year by 2030, and would reduce the number of school days missed by 180,000 annually.[139]

Based on these analyses alone, EPA could have drawn conclusions regarding correlations between deregulation of monitoring and enforcement, increased air pollution, and impacts on respiratory health. EPA could have further factored in the extensive body of research documenting racial and economic disparities in the distribution of polluting industries and their impact on People of Color, Indigenous Peoples, and low-income communities. EPA had the data available early enough in the pandemic to factor into its decision the disproportionate and *rising* rates of COVID-19 in People of Color, Indigenous Peoples, and low-income communities, with farmworkers at particular risk, as well as emerging evidence linking high incidence of COVID-19 infection, hospitalization, and deaths in the very communities who contend with disproportionate pollution burdens due to systemic racism.

The full extent of the air pollution increases from EPA's policy may not be understood until 2023 when EPA completes the 2020 National Emissions Inventory and further research is completed.[140] The Biden-Harris EPA Office of the Inspector General took an important step in March 2021 by announcing its intention to audit and evaluate the impact of the pandemic and the policy on EPA's programs and operations, "from emergency responses to releases of hazardous substances to air quality enforcement to potential misconduct and criminal activity."[141] This includes an evaluation of "how COVID-19 impacts air compliance monitoring by EPA-delegated state and local agencies" initiated in December 2020. The Office of the Inspector General has also announced its intention to audit and evaluate the impact of the pandemic and the policy on EPA's programs and operations, "from emergency responses to releases of hazardous substances to air quality enforcement to potential misconduct and criminal activity."[142] And, as recently as July 7, 2021, EPA announced $50 million in American Rescue Plan (ARP) funding to improve air quality monitoring in communities across the United States "to address health outcome disparities from pollution and the COVID–19 pandemic."[143] Yet, EPA has kept some of its relaxed requirements in place, extending flexibility for on-site inspections necessary to ensure compliance through September 2021.[144] Moreover, it is now one year since the Trump EPA officially terminated its deregulation policy and communities still have no way of knowing which laws were violated, and by whom.[145]

EPA's dereliction of duty and the potential for reoccurrence must be addressed.

The Trump EPA jeopardized its own mission to protect public health and the environment and enforce our nation's environmental laws, stripping away critical protections and increasing pollution and risk of COVID-19 illness and death for People of Color, Indigenous Peoples, and low-income communities. EPA's decision to succumb to corporate pressure and ignore long standing environmental justice policy, instead of protecting those most at risk from a public health crisis cannot happen again. We need systemic changes to ensure federal agencies safeguard our communities and honor their commitments to public participation--and that we have the tools to protect ourselves when that does not occur.

President Biden has called for a "Whole-of-Government Approach" to environmental justice, and racial equity, through Executive Order 13985 on Advancing Racial Equity and Support for Underserved Communities,[146] Executive Order 13990 on *Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis*[147] and Executive Order 14008 on *Tackling the Climate Crisis at Home and Abroad*.[148] As EO 13985 emphasizes, racial disparities are deeply entrenched in U.S. laws, public policies, and public and private institutions; correcting them will require fundamental changes at every stage of government.[149] These orders and subsequent actions taken by EPA under the direction of Director Michael Regan signal that redress of environmental racism is of highest priority to the Biden-Harris Administration and will require holistic and transformative solutions effectuated by all agencies.

Recent proposed legislation will go even further to ensure long-term accountability that does not depend on the leadership of one administration, nor is subject to the whims or corporate interests of another. The Environmental Justice for All Act would make enforcable the duties the Trump EPA ignored, codifying the EO 12898 mandates for identifying and addressing disporportionate adverse impacts of federal actions on People of Color, Indigenous Peoples, and low-income communities. The EJ for All Act would also amend federal environmental laws to require cumulative analyses of environmental health effects and consideration of disparate impacts on People of Color, Indigenous Peoples, and low-income communities; bolster public participation and resources; and empower communities to seek redress for racial discrimination under Title VI of the Civil Rights Act of 1964. The EJ for All Act, developed in close partnerwhip with and leadership from People of Color, Indigenous Peoples, and low-income communities in accordance with the EJ Principles, is now one of several key environmental justice proposals in Congress.

This country needs strong, enforceable environmental justice and civil rights protections to fulfill the long overdue promise of environmental justice. To reach this goal, we call on the Biden-Harris Administration and Congress to take the following actions:

Pass legislation to establish enforceable environmental justice and civil rights protections for People of Color, Indigenous Peoples, and low-income communities that cannot be ignored by future administrations, including

- the Environmental Justice for All Act (S.872/H.R.2021),[150]
- the Environmental Justice Legacy Pollution Cleanup Act of 2021,[151]
- the Environmental Justice Act of 2021 (S.2630/H.R.2434),[152]
- the Environmental Justice Mapping and Data Collection Act of 2021 (S.101/ H.R.516)[153] and
- the Protect America's Children from Toxic Pesticides Act of 2020 (S.4406/ H.R.7940).[154]

Investigate the impacts of EPA's rollback on environmental justice, public health, and racial inequality through Congressional Hearings and a comprehensive audit by the Office of Inspector General.

- Evaluate the role of corporate interests in EPA's decisions regarding enforcement discretion during the COVID-19 pandemic and in enforcement rates throughout the Trump Administration.
- Document EPA's failures to comply with E.O. 12898 and all federal environmental justice policies in conjunction with adoption of the deregulation policy.
- Evaluate the environmental justice, public health, and civil rights impacts of EPA deregulation, including analysis of possible violations of Title VI by federal funding recipients due to enforcement discretion.
- Consult with the National and White House Environmental Justice Advisory Councils (NEJAC and WHEJAC) regarding the scope of and findings from any investigatory actions and involve both advisory bodies in determining policy recommendations as a result.

Prioritize mitigation of harm to at-risk communities in decisions regarding monitoring, compliance, and enforcement, especially as COVID-19 rates surge.

- Direct resources toward research to document the cumulative impacts of air pollution and COVID-19 on People of Color, Indigenous Peoples, and low-income communities and other communities identified as underserved under E.O. 13985 and determine mitigation measures to prevent further environmental and health disparities.
- Conduct immediate and targeted assessments of violations of the PM 2.5 Standard in communities that have, concomitantly, experienced elevated levels of cases and death from COVID-19 and conduct enforcement actions to bring these areas into compliance.

Give communities access to the most protective monitoring tools to assess baseline cumulative environmental risks and harms, building on emerging EPA efforts to address health disparities from pollution and the COVID-19 pandemic.

- Conduct immediate and targeted assessments of stationary and mobile source violations of PM 2.5 emission limits in nonattainment areas that are also People of Color, Indigenous peoples, and low-income communities or are otherwise identified as underserved communities under E.O. 13985.
- Institute an overhaul of the national ambient air quality monitoring system in accordance with EJ Priciples to accomplish the following:

    - Facilitate data collection, reporting, and awareness of risk from toxic air contaminants and criteria pollutants--including black carbon, fine, and ultrafine particulate matter.

    - Evaluate efficacy of existing fence-line monitoring maintained by state agencies.

    - Develop mechanisms to assess, evaluate, and communicate information to communities about cumulative exposures to multiple environmental and health risks and burdens.

    - Ensure input from residents of People of Color, Indigenous peoples, and low-income communities and communities identified as underserved under E.O. 13985 to ensure monitoring responds to existing needs and on-the-ground conditions, with guidance from the NEJAC and WHEJAC and through local and regional multi-stakeholder consultation.

- Develop and adopt procedures that allow for the swift collection, analysis, verification, and reporting of monitoring data, including through investment in resources for on-going community-based monitoring systems, consistent with recommendations advanced by the NEJAC and GAO.[155]
- Develop and launch a platform to aggregate and disseminate exposure data supplied by federal and state regulators, facilities-based monitoring and reporting, and community-based monitoring.
- Communicate real-time environmental and public health risks, ensuring timely communication of exposure data, providing real-time data to communities as often as practicable, ensuting that technical information is supplied in formats and language accessible to lay audiences and people with limited English proficiency.[156]
- Fund nationwide research to determine health outcomes, including morbidity and mortality, related to exposure to ultrafine particul ate matter.[157]

Bolster enforcement of all environmental and civil rights laws and compliance with EO 12898, dedicating resources, setting benchmarks, and consulting with People of Color, Indigenous Peoples, and low-income communities to ensure effective action.

- Enforce all environmental and civil rights laws and regulations, dedicating resources to and developing benchmarks for enforcement in People of Color, Indigenous Peoples, and low-income communities, communities identified as underserved under E.O. 13985, and communities identified through environmental monitoring to be experiencing high cumulative exposure burdens.
- Institute detailed reporting on enforcement measures, consistent with OIG recommendations[158], to ensure that Congress and the public have the tools to understand the scope and effectiveness of the EPA's compliance monitoring activities, particularly in addressing environmental justice.
- Require all federal agencies to develop robust policy and enforcement strategies for the implementation of environmental justice.
- Require all federal agencies prevent discrimination and prohibit disproportionate impact in federal programs affecting human health and the environment by strengthening enforcement of Title VI of the Civil Rights Act of 1964.
- Ensure that all communities have meaningful access to public information and meaningful public participation opportunities to inform enforcement and compliance.

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92. Complaint at 13-14, *State of New York, et al. v. U.S. EPA, et al.*, Case No. 20-cv-3714 (2020) [hereinafter States' Complaint].

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96. NGO Complaint, *supra* note 3, at 8.

97. States' Complaint, *supra* note 92, at 13-14

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