Northwestern
PRITZKER SCHOOL OF LAW

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Submitted via email and www.regulations.gov

Re: Comments of the Southeast Environmental Taskforce on *USEPA's Interim Framework for Advancing Consideration of Cumulative Impacts*, Docket ID No.USEPA-HQ-OLEM-2024-0360

Dear Mr. Lee

I. Introduction:

These comments are submitted on behalf of the Southeast Environmental Taskforce ("SETF"). SETF is a community-based environmental advocacy group, which works to protect the health and well-being of the residents of Chicago's Southeast Side by protecting and promoting a safe natural environment in their community. SETF has years of experience in pushing back against the cumulative and disproportionate environmental threats from industrial and transportation pollution with which Southeast Side community members are faced on a daily basis.

Please accept this letter as SETF's comments on the United States Environmental Protection Agency's ("USEPA") Interim Framework for Advancing Consideration of Cumulative Impacts (the "Framework"). Overall, while the Framework as written gives an excellent overview of *what* cumulative impacts are and *why* their consideration is important in an abstract sense, SETF believes that the Framework would benefit from further explanations as to *how* cumulative impacts should be considered by individual actors when making on-the-ground decisions, whether those actors are working at the federal, state, or local level. Additionally, the

Framework is at times vague and does not define some of its key terms (e.g. a "fit-for-purpose analysis").[1] SETF takes this opportunity to share some of its experience relevant to assessing cumulative impacts in government decision-making in ways that center community experiences and to provide some specific suggestions for improving the utility of the Framework. It is hoped that SETF's story and its suggestions will further illustrate the importance of considering cumulative impacts, and to do so particularly from the vantage point of the people most impacted, and aid USEPA in crafting a Framework that provides actionable guidance to decision-makers to take concrete steps to avoid cumulative harms on already disproportionately burdened communities.

II. SETF's Experience:

In the Framework, USEPA briefly mentions its recommendation in 2021 that the City of Chicago (the "City") perform a Health Impact Assessment ("HIA") as part of its review of a permit application for a proposed industrial facility on Chicago's Southeast Side.[2] The City performed the HIA and ultimately denied the permit in 2022 because, after collecting information about the cumulative impacts, among other things, the City found that approving the permit would not protect public health and welfare.[3] USEPA understandably touts this as a success story, in which the consideration of cumulative impacts helped protect the residents of a vulnerable environmental justice community. However, the framework does not tell the whole story. The City's permit denial is currently being attacked on appeal, and core to the challenge is the allegation that the City's use of the HIA was beyond its authority. Additionally, when the Framework begins its discussion of the General Irons story with the dialogue between USEPA and the City, it glosses over many crucial events in the years leading up to the HIA. As an organization that was deeply involved in both the events leading up to the HIA and those that have since transpired, SETF offers these comments to ensure the Framework reflects the

[1] U.S. Environmental Protection Agency, *Interim Framework for Advancing Consideration of Cumulative Impacts*, 16 (2024) (hereinafter "Framework").
[2] Framework at 54.
[3] *Id*.

full story, a story which started not with a USEPA recommendation, but with a community standing up for itself and demanding that those in power recognize the dire need for cumulative impacts analysis.

In 2016, residents of the affluent, predominantly white Chicago neighborhood of Lincoln Park began lobbying the City to relocate a large metal shredding facility, owned by General Iron Industries Incorporated ("General Iron"). Residents of Lincoln Park, including Alderman Brian Hopkins, described the facility as "not compatible with the neighborhood," and demanded that it be moved to a new location "appropriate for industry."[4] During its time in Lincoln Park, the General Iron facility had committed "numerous violations" related to environmental pollution, so it is not surprising that the people of the neighborhood did not want General Iron to continue to operate near their homes, businesses, and public spaces.[5] They expressed their concerns through "hundreds of complaints" to the City, insisting that General Iron be moved somewhere else.[6]

In response to these complaints, the City took an "unusually active role in facilitating the relocation."[7] In consultation with City officials, in 2019, General Iron decided that it would move to a new location at the intersection of three neighborhoods in the southeast part of Chicago (the "Southeast Side").[8]

The history of the Southeast Side neighborhoods which would be forced to host General Iron's new facility presents a clear example of the threat posed by government entities ignoring cumulative impacts. At the time the relocation was announced, the Southeast Side, which has a population that is collectively 83% Black or Hispanic, had already long been subject to disproportionate amounts of toxic sites, toxic substance releases, and facilities permitted to produce significant emissions.[9] The Illinois Environmental Protection Agency ("Illinois EPA") has recognized the Southeast Side as "an area of environmental justice concern."[10] In

[4] U.S. Department of Housing and Urban Development, *Letter of Findings of Noncompliance with Title VI and Section 109 Southeast Environmental Task Force, et al. v. City of Chicago*, 5 (2022), https://www.hud.gov/sites/dfiles/Main/documents/Letter_of_Finding_05-20-0419_City_of_Chicago.pdf (hereinafter "HUD LoF").
[5] *Id.* at 9.
[6] *Id.*
[7] *Id.* at 7.
[8] *Id.* at 8.
[9] *Id.* at 5.
[10] *Id.*

a 2021 letter to then mayor of Chicago Lori Lightfoot, former USEPA Administrator Michael Regan stated that conditions on the Southeast Side "epitomize the problem of environmental injustice."[11]

Despite these threats to the health and safety of Southeast Side residents, General Iron received a construction permit from Illinois EPA in 2019 and began building its newly located facility under the auspices of its agreement with the City.[12] Not only did this permit approval ignore the well-known background of injustice which Illinois EPA itself had already recognized elsewhere, it also flew in the face of obvious and ongoing community opposition to the project. Though SETF and other community advocacy groups repeatedly alerted Illinois EPA of its responsibility to consider impacts on nearby residents in connection with existing air quality burdens, the state agency refused to acknowledge these concerns, instead focusing all its efforts on air modeling a limited number of pollutants from the proposed facility.[13] The agency also ignored numerous complaints about its permit review procedures, which placed significant obstacles in the way of meaningful public participation in the process.[14] For example, Illinois EPA conducted a public hearing virtually during the pandemic and held a written comment period during a time of civil unrest in Chicago.[15] It also failed to provide meaningful language access for the high proportion of Southeast Side residents who are Spanish speakers.[16]

SETF and its allies did not limit their advocacy to commenting on and protesting the actions of Illinois EPA. From the moment that the City publicly announced the relocation in 2018 (after two years of negotiations between the City and General Iron conducted without public knowledge), and even as General Iron received the approval it needed to begin construction, community groups and Southeast Side community members voiced their opposition to the project at every opportunity presented to them. This opposition came

[11] Letter from U.S. Environmental Protection Agency Administrator Michael Regan to Mayor of Chicago Lori Lightfoot, 1, May 7, 2021.
[12] HUD LoF at 3.
[13] U.S. Environmental Protection Agency, *Title VI Complaint Southeast Environmental Task Force, et al. v. Illinois Environmental Protection Agency*, 4 (2020), (hereinafter "IEPA Complaint").
[14] *Id.* at 10-13.
[15] *Id.* at 10.
[16] *Id.* at 12.

to a head when SETF and other community groups filed a civil rights complaint with the Department of Housing and Urban Development ("HUD") in August 2020, seeking relief from the City's discriminatory policies.[17] A few months later, SETF filed an additional complaint, this one with USEPA, centered on Illinois EPA's approval of General Iron's construction permit in the face of severe environmental justice concerns and a lack of meaningful opportunities for community engagement in the permit review process.[18]

In filing these complaints, and in leading broader community organizing and protests, SETF and its fellow advocacy groups played a critical role in bringing the actions of both the City and Illinois EPA to the attention of the federal government. USEPA Administrator Michael Regan's letter to Lori Lightfoot —where the Framework begins the story— came two months after Southeast Side community members engaged in a month-long hunger strike.[19] In that letter, Administrator Regan encouraged the city to perform an HIA and explicitly referenced SETF's complaint to HUD.[20] Additionally, he stated that USEPA would encourage state agencies to engage in robust analyses of the impact of siting facilities in already overburdened communities, thus echoing the agency-rejected requests of SETF and other organizations all throughout the Illinois EPA permit review process.[21]

The Framework is therefore correct when it says that USEPA suggested that the City conduct an HIA as part of its review of General Iron's final operating permit. However, the Framework neglects to mention the role that SETF and its community partners played in first bringing the General Iron situation to USEPA's attention. Nor does the Framework discuss the community groups and individuals who continued to actively participate in discussions during this time, including submitting comments to the City regarding its proposal to conduct a Human Health Risk Assessment as part of the HIA process. The meaningful role played by

[17] *See generally* U.S. Department of Housing and Urban Development, *Housing Discrimination Complaint Southeast Environmental Task Force, et al. v. City of Chicago*, (2020), (hereinafter "HUD Complaint").
[18] *See generally* IEPA Complaint.
[19] Brett Chase, *Why Biden'sUSEPA chief stepped into a Chicago permit controversy*, Chi. Sun Times, (May 27, 2021, 8:04pm), https://chicago.suntimes.com/2021/5/27/22457693/joe-biden-environmental-protection-agency-michael-regan-general-iron-environmental-justice.
[20] Letter from Regan to Lightfoot at 1.
[21] *Id.* at 2.

community advocacy in the fight against cumulative impacts can be seen all throughout Administrator Regan's letter, both in its content, and in the context in which it was sent, but is absent in the Framework.

In early 2022, the City ultimately rejected General Iron's final operating permit.[22] This decision was based, in large part, on the fact that the City's HIA concluded that the facility would "contribut[e] to the cumulative burden experienced by the surrounding neighborhoods."[23] The City's HIA included numerous references to the input of community members and community advocacy groups and also emphasized the importance of consulting these groups in performing impact assessments.[24] The Framework would benefit from following the HIA's example and incorporating community groups directly into the screening and scoping which both documents include as part of the cumulative impacts assessment process.[25]

Later that year, the investigation phase of the HUD complaint process concluded, with HUD making a finding that the City was in noncompliance with Title VI of the Civil Rights Act as well as Section 109 of the Housing and Community Development Act.[26] In May 2023, the City, HUD, and SETF entered into a voluntary compliance agreement, under which the City agreed to perform Chicago's first baseline cumulative impact assessment.[27] Another key requirement of the VCA is that the City propose a new ordinance for addressing cumulative impacts based on the result of the assessment.[28] This ordinance has yet to be issued, though SETF hopes that it will soon be forthcoming. SETF continues to work with the City and other

[22] Brett Chase, *Lightfoot Rejects Southeast Side Metal Shredder's Plan to Open*, Chi. Sun Times (Feb. 18, 2022, 3:40pm), *https://chicago.suntimes.com/2022/2/18/22940770/southeast-side-metal-shredder-chicago-rejects-plan-open-general-iron-relocation.*
[23] Chicago Department of Public Health, *Health Impacts Assessment*, 29 (2022), (hereinafter "HIA").
[24] *See e.g. Id.* at 7.
[25] HIA at 7; Framework at 13.
[26] HUD LoF at 18.
[27] U.S. Department of Housing and Urban Development, *Voluntary Compliance Agreement Between U.S. Department of Housing and Urban Development and The City of Chicago, et al.*, 5 (2023), https://www.hud.gov/sites/dfiles/Main/documents/Signed_VCA_Chicago.pdf (hereinafter "VCA").
[28] *Id.* at 6.

interested parties to ensure that the City meets its ongoing obligations to comply with the VCA and further environmental justice in the Southeast Side and throughout the greater Chicago area.[29]

In late 2024, USEPA and Illinois EPA entered into an Informal Resolution Agreement ("IRA") to resolve the civil rights complaint brought by SETF, under which Illinois EPA agreed to revise its permit review processes and ensure greater opportunities for public participation in its activities.[30] For example, when reviewing air construction permits, the IRA commits Illinois EPA to "conduct further analysis, as needed, to inform its permit decision," including functionally cumulative impacts and "[i]nformation relating to other sources permitted by [Illinois EPA] or [USEPA, including Region V]."[31] As part of its enhanced public participation plan, Illinois EPA agreed to ensure that its processes "are accessible to all persons regardless of... limited English proficiency."[32] Through these policy changes, the IRA should do much to address the problems which led to a civil rights complaint against Illinois EPA in the first place. Unfortunately, despite requests from SETF, the IRA is limited to the specific type of Clean Air Act permit at issue and did not require Illinois EPA to revoke the construction permit it granted to General Iron that triggered the civil rights complaint. This means that if General Iron is successful in its currently ongoing appeal to reverse the City's denial of its final operating permit, General Iron will have everything it needs to begin operations on the Southeast Side, despite the fact that cumulative impacts analysis revealed that it presents stark, inequitable, and detrimental health and safety concerns.[33]

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[29] Brett Chase, *Johnson Blasted for Failing to Deliver on Environmental Promises*, Chi. Sun Times (Jan. 15, 2025, 10:47am), https://chicago.suntimes.com/environment/2025/01/15/brandon-johnson-fails-environmental-hud-agreement-general-iron-civil-rights.

[30] United States Environmental Protection Agency, *Informal Resolution Agreement between the Illinois Environmental Protection Agency and United States Environmental Protection Agency*, (February 23, 2024), https://epa.illinois.gov/content/dam/soi/en/web/epa/topics/environmental-justice/documents/grievance/021424%20Informal%20Resolution%20Letter%20and%20Agreement_EPA%20Complaint%20No.%2001RNO-21-R5.pdf. (hereinafter "IRA").

[31] *Id.* at 11.

[32] *Id.* at 14.

[33] City of Chicago, *Department of Public Health v. City of Chicago, Department of Administrative Hearings and General III, LLC*, No. 24-1683 (Appellate Court of Illinois, First Judicial District).

III. SETF's Suggestions/Recommendations:

As a community advocacy organization with years of experience in dealing with municipal governments, private corporations, state agencies, and federal agencies to fight against the harms caused by cumulative impacts on vulnerable populations, SETF has several recommendations for improving the Framework:

1. The key role of community groups and advocacy by community members in combatting cumulative impacts must be emphasized.

The Framework rightly emphasizes the importance of responding to "the needs and priorities of affected communities or vulnerable population groups."[34] However, nowhere does the Framework mention the crucial role of community-based organizations as the voice of these vulnerable populations. This is a serious oversight. As the General Iron story demonstrates, advocacy groups and community members are often the ones who push back against threatened cumulative injustice. Indeed, it was community group protests and formal comments that first raised the need for cumulative impact analysis of the proposed facility within the relevant permitting process.[35] Additionally, these groups are often the ones who bring the need for change to the attention of rule makers and supervising agencies, as SETF did when it brought complaints against the City and Illinois EPA to HUD and USEPA. This function is critical to keeping communities healthy.

Though agencies have many powers which allow them to address cumulative impacts (to be discussed below in subsection 2), there are structural factors which sometimes make it difficult for agency actors to utilize those powers or even to recognize the need to assess cumulative impacts to begin with. One example of this is agencies shifting responsibility to one another in situations where multiple decision-makers review a proposed project or action, which sometimes leads to key processes falling through the gaps. For example,

[34] Framework at 11.
[35] *See* HUD LoF at 10.

when Illinois EPA granted General Iron a construction permit, it justified its decision by claiming that its authority to deny a permit was very narrow, and encouraged the City to determine whether the facility would be operated in a manner that would protect public health, safety, and the environment.[36]

Siloed expertise within agencies also presents a real challenge in ensuring that cumulative impacts are appropriately addressed. The oftentimes isolated nature of agency units charged with permit reviewing, or regulation writing, or grant funding, can make it difficult for government decision-makers to see how their individual decisions may be contributing to cumulative impacts out in the world. Indeed, even within a single agency unit, a permit writer working under the Clean Air Act might not be aware that another agent is simultaneously working on a permit under the Clean Water Act for the same facility. It is all too easy for agencies to miss the fact that an upcoming decision raises potential cumulative impact concerns, absent an external safeguard. One option is presented by the IRA, which requires Illinois EPA to take significant additional steps in assessing whether approving a permit would contribute to cumulative impacts.[37] The VCA provides another possible example. It requires the City to convene an inter-agency working group, ensuring that those municipal agencies "with authority to address environmental impacts" work together on environmental issues, thus preventing a great deal of expertise siloing.[38]

But agencies certainly do not need to have such explicit procedural requirements to ensure that they are properly informed. Giving community groups and members of the public the opportunity to voice their concerns early and often will go a long way towards bridging the information gap which often makes it difficult for agencies to account for cumulative impacts in their decision-making. The IRA provides an imperfect, though instructive example of what this might look like. It requires Illinois EPA to send notification letters, where appropriate, to "elected officials... community groups and individuals who have requested to be notified" within 14 days of receiving a permit application for a project in an area of

[36] *Id.* at 12.
[37] *See* IRA, at 10-12.
[38] VCA at 5.

environmental justice concern.[39] This allows members of the impacted community to raise cumulative impact concerns early in the permit process, even if in a less than perfectly clear or broadly accessible way.

In describing the events leading to the denial of General Iron's permit in 2022, the Framework briefly notes that "[t]he Southeast Side community was largely opposed to the facility," but otherwise completely omits any information regarding the role played by community advocates and advocacy groups in bringing the plight of the Southeast Side to USEPA's attention in the first place.[40] This is a practice which has unfortunately been repeated in other USEPA documents referencing the Southeast Side story.[41] If the Framework is to help ensure that the priorities of affected communities are actually considered, the document should highlight the need for government decision-makers at every level to meaningfully engage with and acknowledge the importance of community advocacy groups.

SETF is not the only community group whose contributions are not mentioned in the Framework. The current Framework notably omits information about community groups integral to the examples highlighted to showcase the success of cumulative impacts analyses.[42] In the Community Action Roadmap Region 5 example in the Framework, there is no discussion of any specific community advocates or organizations that worked to create the "holistic view of disproportionate impacts included."[43] Indeed, this Community Action Roadmap is not well-known among environmental advocates even in Region 5's home city of Chicago. Groups like the Cleveland Lead Advocates, who are still working to ensure the City of Cleveland enforces and addresses lead issues highlighted through the Community Action Roadmap work are not mentioned in the

[39] IRA at 5.
[40] Framework at 54.
[41] U.S. Environmental Protection Agency, USEPA *Legal Tools to Advance Environmental Justice*, 3 (2022) (hereinafter "EPA Legal Tools").
[42] *See* Framework, 25-26.
[43] Framework at 25.

Framework.[44] The Framework exemplifies the Southwest Rockford Revitalization Rapid HIA work on Brownfields redevelopment as a "fit for purpose" community project.[45]

However, in discussing the Rockford example, there is not an acknowledgement of the community groups consulted, or what community-based work was done with advocates to display how the public would be included going forward. It appears that the community consultation in Rockford involved working through the municipal government; It can be harmful, when discussing the importance of including community members and advocacy organizations, to focus solely on the role of municipal governments and agencies, especially where those municipalities contributed to the cumulative impacts problems in the first place—as the General Iron story starkly illustrates below.[46]

SETF's role in identifying cumulative impacts issues for both state and city decisionmakers in the General Iron story demonstrates the necessity to empower communities to identify cumulative impacts issues through providing access to robust and dynamic data such groups can use in exercising their rights to meaningful public participation. The Voluntary Compliance Agreement, resolving the HUD civil rights complaint, required the City to perform a Cumulative Impacts Assessment, which contained an "Environmental Justice Index" that created a "score" to analyze impacts. This "Environmental Justice Index" as well as tools like the USEPA's own "EJScreen" are essential for communities trying to understand and articulate the cumulative environmental impacts they experience. It is therefore crucial for these tools to remain available for public use even if they are not formally integrated into an agency's own decision-making processes. These mapping strategies of both environmental data, data of historical de jure residential segregation, and qualitative data from community advocates can be one strategy to attempt to create a baseline understanding of vulnerable communities that could guide beginning stages of permitting. It is imperative to

[44] "Cleveland lead safety advocates call on city hall for greater lead soil testing efforts," News 5 Cleveland, https://www.news5cleveland.com/news/local-news/we-follow-through/cleveland-lead-safety-advocates-call-on-city-hall-for-greater-lead-soil-testing-efforts.
[45] Framework at 26.
[46] HUD LoF at 19 (explaining the history of residential segregation in the General Iron Permitting as it relates to environmental inequity and civil rights).

include qualitative data from community members. Without public participation there is a potential for burden shifting to the public and community members to prove cumulative impacts when governmental agencies should be shouldering this burden and resource usage. The public deserves an opportunity to add to discussions of permitting decisions but should not bear the responsibility to prove the importance of cumulative impacts in their community when there are new permitting decisions. Government actors should be leading efforts to include cumulative impacts but ensuring qualitative public input to add to the discussion of permitting decisions. Using tools like Environmental Justice Indexes can assist in providing necessary transparency to vulnerable communities and empower meaningful participation by community members in cumulative impacts assessments.

As the General Iron story exemplifies, local governments can be complicit in causing the issues with cumulative impacts or even be responsible for the concentration of pollution in certain communities through the exercise of their zoning and permitting authorities. The exclusion or diminution of the role that community groups play compared to municipalities further places the burden on community groups to shoulder the initial hardship of bringing cumulative impact issues to light and does not highlight the necessity of community access to robust data and public participation in permitting decisions to accurately access cumulative impacts.

2. **The Framework should highlight how cumulative impact assessments fit into the existing legal and regulatory framework.**

If the Framework is to be of practical value, it must go beyond explaining the importance of cumulative impact analysis in the abstract. As it stands, even those decision-makers who are most committed to minimizing the threat of cumulative impacts can glean little insight on how to do so by reading the Framework. To be of maximum benefit to the USEPA staff and decision-makers it identifies as its audience, the Framework should emphasize which government actors have power to consider cumulative impacts in the context of specific decisions, what those actors are empowered to do, and during which points in government

decision-making processes those powers can be exercised.[47] When they finish reading the Framework, individual agency actors should know the role that they play in mitigating cumulative impacts, including what they are obligated to do, and what they have the discretion to do. An excellent place to start is showing where the consideration of cumulative impacts already appears in our laws and regulations.

a. Federal Law:

The Framework should emphasize the numerous places where federal law mandates consideration of cumulative impacts. In addition, it should acknowledge some of the many places in federal statutes and regulations where cumulative impacts are not mentioned explicitly, but where USEPA and other bodies have discretionary authority which could be used to consider cumulative impacts.[48] The Framework could be improved by specific references to these authorities, which would aid decision-makers looking to consider cumulative impacts in their day-to-day work.

Federal law is replete with provisions which mandate the consideration of cumulative impacts by USEPA and other government actors. One example of this is the Clean Water Act ("CWA"), which says that the Secretary of the Army cannot issue general dredge or fill permits unless they have determined that the category of activities allowed under the permit would have "only [a] minimal cumulative adverse effect on the environment."[49] In its regulations, the Department of the Army further states that the decision whether to issue a permit "will be based on an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest."[50] Further, "[a]ll factors which may be relevant to the proposal must be considered including the cumulative effects."[51]

[47] Framework at 2.
[48] SETF finds it noteworthy that USEPA itself has made similar findings regarding its own legal authority in past studies, for example in its May 2022USEPA Legal Tools report.
[49] Clean Water Act, 33 U.S.C. § 1344(e)(1).
[50] 33 CFR § 320.4(a)(1) (2024).
[51] 33 CFR § 320.4(a)(1) (2024).

While the National Environmental Policy Act ("NEPA") does not mandate any specific outcome for the government actions to which it applies, it serves as a powerful tool in establishing procedural consideration of environmental impacts. There are numerous places where cumulative impact analysis can be integrated into the broader NEPA assessment process and where agency-specific NEPA regulations contemplate consideration of cumulative impacts.[52]

For example, in its NEPA regulations, the Department of the Army states that "NEPA analyses must assess cumulative effects, which are the impact on the environment resulting from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions."[53] Under USEPA's NEPA regulations, a project being "likely to produce significant cumulative impacts" is one of the factors which will normally mean that an Environmental Impact Statement ("EIS") must be prepared.[54] When USEPA is evaluating a proposed State Environmental Review Process, the state equivalent of NEPA, one of the criteria it will consider is the "extent to which [the state process] will adequately consider" cumulative impacts.[55]

Further examples of cumulative impact consideration can be found in federal laws concerning toxic chemical exposure. The Food Quality Protection Act ("FQPA") requires consideration of the "cumulative effects of [pesticides] that have a common mechanism of toxicity" when deciding whether a tolerance will be issued for a particular pesticide.[56] The FQPA also requires all throughout its text that USEPA consider

[52] The D.C. Circuit Court recently held that the Council on Environmental Quality ("CEQ") does not have rulemaking authority, thus rendering invalid many regulations which CEQ had purported to promulgate and invalidating the understanding of NEPA regulation which had been in place for many years. *Marin Audubon Society v. Federal Aviation Administration*, 121 F.4th 902, 912 (D.C. Cir. 2024). However, the court did not reach the issue of whether an agency permissibly exercises its own rulemaking authority in adopting or incorporating by reference CEQ's rules in its own NEPA regulations. Additionally, regulations which are written by agencies without reference to CEQ are well outside the scope of the court's holding, given that these agencies are not only vested with rulemaking authority, but affirmatively required by NEPA to "develop methods and procedures" to enforce the statute. National Environmental Policy Act, 42 U.S.C. § 4332(2)(B). This means that many agency-implemented regulations referring to cumulative impacts are still good law.
[53] 32 CFR § 651.16(a) (2024).
[54] 40 CFR § 6.207(a)(3)(x) (2024).
[55] 40 CFR Appendix-A-to-Subpart-L-of-Part-35(E)(7) (2024).
[56] Food Quality Protection Act, 21 U.S.C. § 346a(b)(2)(D)(v).

aggregate exposures to pesticides from various sources.[57] The FQPA states that if, after considering factors including cumulative effects, the Administrator (of USEPA) determines that a pesticide chemical residue would not be safe in or on food, they cannot issue a tolerance for that pesticide.[58] This law provides an important addition to the cumulative impacts conversation, as it is likely to apply most often to rural populations living near fields with high pesticide use, as opposed to the urban populations which are often the focus of cumulative impacts analysis. The FQPA therefore helps demonstrate that cumulative impacts are a widespread health problem of general concern to the people of the United States.

Under the Toxic Substances Control Act ("TSCA"), one of the factors USEPA may consider in ordering that a chemical be tested is whether the chemical threatens "cumulative or synergistic effects" which might harm health or the environment.[59] If USEPA receives information from an environmentally overburdened community, this provision empowers it to consider the actual impact that a chemical could have on people out in the world and to order testing which provides it with information that will accurately reflect the experiences of the people most likely to be affected.

When considering permits under the Clean Air Act ("CAA"), USEPA's *Guideline on Air Quality Models* recommends that a two-step framework be adopted. First, the permitting agency (either USEPA or a state acting under delegated permitting authority), should consider whether the proposed new or modified source would, on its own, cause or contribute to a violation of a National Ambient Air Quality Standard or Prevention of Significant Deterioration increment.[60] If the agency finds that the source would, on its own, cause or contribute to such a violation, the second stage of the framework would have the agency perform a "cumulative impacts analysis," "tak[ing] into account all sources affecting the air quality in an area."[61]

[57] *See e.g.* 21 U.S.C. § 346a(c)(2)(A)(ii).
[58] 21 U.S.C. § 346a(b)(2)(A)(i).
[59] Toxic Substances Control Act, 15 U.S.C. § 2603(b)(2)(A).
[60] 40 CFR Appendix-W-to-Part-51 9.09.2.3a.i. (2024).
[61] 40 CFR Appendix-W-to-Part-51 9.09.2.3a.ii. (2024).

Additionally, agencies retain discretion to perform the second step cumulative impacts analysis even where they did not find a likely violation in step one.

The Resource Conservation and Recovery Act ("RCRA"), provides USEPA and state agencies with numerous opportunities to incorporate consideration of cumulative impacts into their decision-making. Perhaps most significantly, § 3005(c)(3) states that every permit for the treatment, storage, or disposal of hazardous waste issued by either USEPA or a state "shall contain such terms and conditions" as are "necessary to protect human health and the environment."[62] This provision requires permitting agencies to condition permit approval on the avoidance of adverse health impacts.[63] Because cumulative impacts certainly pose a threat to human health, permitting agencies would be well within their authority to consider such impacts when reviewing a permit, and even to deny a permit if they determined that no set of conditions could remove the threat.[64]

Section 1008(a) of RCRA instructs USEPA to develop and publish guidelines for solid waste management which "provide for the protection of public health and the environment."[65] These guidelines, where appropriate, "shall include minimum information for use in deciding the adequate location, design, and construction of facilities," including consideration of "geographic" and "demographic" factors.[66] This provision helps USEPA provide key technical and regulatory oversight to the "Federal, State, municipal, and intermunicipal agencies" the guidelines are written for.[67] When writing these guidelines, USEPA can take advantage of its broad viewpoint to help address some of the blind spots which agencies with a narrower focus may be suffering from. At the same time, the provision, in encouraging USEPA to develop the guidelines "in cooperation with" other entities, provides an important reminder that USEPA can gain much

[62] Resource Conservation and Recovery Act, 42 U.S.C. 6925(c)(3).
[63] *See In re Chemical Waste Management,* 6 E.A.D. 66 (E.P.A.), 1995 WL 395962 (June 25, 1995).
[64] *See Id.*
[65] 42 U.S.C. § 6907(a)(1).
[66] 42 U.S.C. § 6907(a).
[67] *Id*.

insight from the advanced knowledge that local government agencies will have of the geographic and demographic factors within their jurisdiction.[68]

The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), lists several criteria to be considered when prioritizing sites for remedial or removal actions. These include the "relative risk or danger to public health or welfare or the environment... taking into account to the extent possible the population at risk, the hazard potential of the hazardous substances at such facilities... the potential for direct human contact... the contamination or potential contamination of the ambient air which is associated with the release or threatened release... and other appropriate factors."[69] A site posing cumulative impacts concerns will have a higher risk of nearly all of these factors, strongly indicating that such sites should be given high priority when determining responses under CERCLA. This same language also means that when cumulative impacts are quantifiable, they are a valid factor when proposing revisions to CERCLA's Hazard Response System, further helping to ensure that those communities most in need of cleanup efforts are helped first.

Historically, USEPA has used its discretion to impose special conditions when awarding grants under certain statutes. USEPA has the authority to require grantees to consider cumulative impacts in their grant-related activities, particularly under statutes which have the goal of protecting human health.

As so many of these examples show, considering cumulative impacts is not something which should be viewed as controversial. Instead, it is a practice which makes basic scientific sense. To understand the effect that a given exposure will have, one needs to look at the population that will be exposed, which includes considering the effects that population is already exposed to. Cumulative impact analyses serve a core purpose of some of the nation's most important environmental laws, protecting the health of its people.[70]

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[68] *Id*.
[69] 42 U.S.C. § 9605(a)(8)(A).
[70] *See e.g.* 42 U.S.C. § 7401(b)(1); 42 U.S.C. § 6902(a).

b. State Law:

The Framework should highlight to its readers how cumulative impacts are grounded in state law authority and how state legal and regulatory frameworks can help implement cumulative impact analyses. State law can be a powerful tool in both mandating cumulative impact assessments and in enforcement. The Framework should advise USEPA decisionmakers to look to state laws being implemented in parallel to federal requirements as a potential source of authority to engage in cumulative impacts assessments.

Using SETF's experience with state regulatory authorities as an example, in Illinois, the environmental protection statute contains grounds for cumulative impacts assessments beyond the Clean Air Act.[71] The Illinois Environmental Protection Act states that "[n]o person shall cause or threaten to allow the discharge or emission of any contaminant into the environment in any State so as to cause or tend to cause air pollution in Illinois, either alone or in combination with contaminants from other sources, or so as to violate regulations or standards adopted by the Board under this Act."[72] That language in the Act also requires consideration of "contaminants in combination," in line with cumulative impacts assessments. Further, in Illinois, the Pollution Control Board has the discretion to adopt regulations more stringent than federal regulations.[73] State law provisions are a necessary tool the Framework should identify as a means to implement cumulative impact analyses because they may include more expansive mandates to support cumulative impacts when compared to federal law. USEPA decision-makers should look to such state law authority when reviewing state implementation plans or permits issued by state agencies under delegated federal authority, for example.

Moreover, USEPA officials need to be mindful of interstate differences and to ensure that communities are not targeted to host pollution because they live in states with weaker state laws, or because they live near such states. The Framework should highlight the necessity to engage with cumulative impacts

[71] "Fixing what ain't broke II: Clean Air Act requirements survive with limited damage," Natural Resources Defense Council, 2015, https://www.nrdc.org/bio/ann-alexander/fixing-what-aint-broke-ii-clean-air-act-requirements-survive-limited-damage
[72] 415 ILCS 5/8.
[73] *Id*.

when discussing projects between neighboring states. For example, SETF's community sits on the border of Illinois and Indiana, which have different standards in their Clean Air Act State Implementation Plans and have different approaches to permitting and enforcement. In overseeing each state's environmental programs, USEPA is in a position to ensure that cumulative impacts are analyzed in ways that account for state law differences to ensure all communities are protected with the most information possible as to cumulative impacts. This stands as an example of the necessity to investigate individual State legal and regulatory authority to have a more robust cumulative impacts framework and to utilize these when working to achieve the most comprehensive approach to assessing environmental harm and impacts on communities. Ensuring that state laws are analyzed to see how cumulative impacts can be included is vital both to prevent weak laws in one state from harming communities in a neighboring state and to prevent communities in states with weak laws from becoming "sacrifice zones."

Additionally, state agencies may have an obligation or broader authority to consider public health and welfare in their environmental statutory and regulatory framework. State laws outside of the environmental law context can also compel consideration of cumulative impacts in the implementation of environmental statutes through the direct application of civil rights requirements, in line with robust cumulative impact assessments and implementation. The Illinois Civil Rights Act of 2003, for example, "prohibits excluding participation in, denying the benefits of, or subjecting a person to discrimination under any program or activity based on that person's race, color, national origin, or gender; or using criteria or methods of administration that result in disparate impact or adverse effect."[74] If USEPA is overseeing permitting, enforcement or planning conducted by states under delegated authority, USEPA decisionmakers should be pointed toward the state's Civil Rights Laws as a potential mandate to consider cumulative impacts and their disparate impact in compliance. The Framework should highlight these ways in in which States can offer opportunities or requirements to engage in cumulative impact analyses.

[74] Illinois Environmental Protection Agency, Notice of Nondiscrimination, https://epa.illinois.gov/topics/environmental-justice/notice-of-nondiscrimination.html.

3. Specific suggestions when considering permits:

If the Framework is to successfully inform decisionmakers on how to address cumulative impacts assessments and create a comprehensive scheme to ensure that the goals of the Framework[75] are satisfied, it must describe how to structure permitting schemes that evaluate cumulative impacts at all permitting stages. Using the SETF Informal Resolution Agreement as an example of helpful standards to engage to address cumulative impacts for permitting could be helpful. The IRA includes additional permitting requirements from Illinois EPA for air construction permits in areas of environmental justice concern.[76] Among these requirements is the an initial evaluation of whether the proposed source location is in an area of EJ concern, a "review request" submitted to the EJ tracking system, and a notification letter that contains details of the application sent to elected officials (federal, state, local), community groups, and individuals who have requested to be notified.[77] Additionally, the IRA includes provisions related to analyzing data that both relates to other air pollution sources and "bearing upon appropriate factors identified as environmental, health, or socioeconomic indicators in EJ screen."[78] Cumulative impacts analysis now have a formal place in the Illinois EPA permit process.

It is important to note here that the right to revoke a permit where cumulative impacts review suggests it should not have been issued in the first place would be a powerful tool given the longstanding failure to consider cumulative impacts in environmental permitting. In the General Iron case, the Illinois EPA Clean Air Act Construction permit for the facility remains in place even though the IRA was entered into specifically to address shortcomings in that permit process. Identifying for enforcers and permitting authorities how and under what circumstances permits can be revoked is necessary to fulfill the Framework's goals of "focusing

[75] Framework at 4.
[76] IRA at 4.
[77] *Id*.
[78] *Id* at 11.

on the disproportionate and adverse burden of cumulative impacts" and "operationalizing and integrating ways to consider and address cumulative impacts."[79]

Additionally, there needs to be a concerted effort and acknowledgement of the danger of the creation of "sacrifice zones," and a discussion of how cumulative impact analyses can aid in preventing the creation or perpetuation of sacrifice zones. The term "sacrifice zones" refers to the concentration of polluting sources in communities already disproportionately impacted by environmental harms, which are often "fence line communities" of low-income and people of color, or "hot spots" of chemical pollution that residents live immediately adjacent to.[80] The HUD Settlement in Chicago contained a commitment that the Department of Planning and Development would "submit plans that will propose updating zoning regulations, such as the alteration or elimination of permitted-by-right or special use status" and "aims to create guidelines for inspections and enforcement to prioritize areas facing environmental justice concerns."[81] When addressing cumulative impacts concerns that arise in permitting decisions, past noncompliance should also be considered to ensure "sacrifice zones" are not created as a result of multiple recalcitrant polluting actors in vulnerable communities. The Framework should also direct enforcement decision-makers to consider deploying resources based on cumulative impacts analyses to ensure vulnerable communities do not become "sacrifice zones" due to underenforcement compounding across multiple proximate facilities.

4. **Government decision-makers have a responsibility to check the potentially unjust impact of political pressure, which the Framework should explicitly acknowledge.**

It is important to remember that environmental burdens rarely accumulate in one place by pure chance. Far more often, cumulative impacts are the result of deliberate decisions to or unexamined practices that

[79] Framework at 11-12.
[80] Bullard, Sacrifice Zones: The Front Lines of Toxic Chemical Exposure in the United States, Environ Health Perspect, 2011 Jun https://pmc.ncbi.nlm.nih.gov/articles/PMC3114843/#:~:text=Sacrifice%20zones%20are%20often%20%E2%80%9Cfenceline,polluted%20industries%20or%20military%20bases.
[81] Chicago's Historic Environmental Justice HUD Settlement, Natural Resources Defense Council, August 2023, https://www.nrdc.org/bio/gina-ramirez/chicagos-historic-environmental-justice-hud-settlement.

concentrate polluting facilities in a single area. Sometimes, as in the case of General Iron, this desire to concentrate harms in one area is accompanied by an equally strong push to move those harms away from the politically powerful and resourced communities where they were previously located. In initially working with General Iron to move a heavily polluting metal shredding facility to the Southeast Side, the City was continuing a decades-long strategy of concentrating industry in Planned Manufacturing Districts and industrial corridors, with little consideration of the potential impacts on those living near these areas.[82] However, the City did more than merely retain its permissive and harmful land use policies, it took the further step of actively working with General Iron to move to the Southeast Side. In its letter of findings, HUD found that the City had engaged in both disparate impact discrimination and intentional discrimination.[83] The Supreme Court has affirmed, as recently as 2023, that "the government can plainly remedy a race-based injury that it has inflicted."[84] This means that it remains permissible for a municipal, state, or federal entity to take into account race-based factors, including those which inform cumulative impacts analysis, when redressing its own past discriminatory actions.

This pressure from the City did not itself arise in a vacuum. As discussed in Section II, it was the result of heavy lobbying by the residents and Alderman of Lincoln Park.[85] In its zeal to respond to calls for General Iron to be moved to "a neighborhood appropriate for industry," the City failed to take steps to prevent the same harms then being inflicted on Lincoln Park residents from falling to those living near the new proposed site.[86]

Political bodies like the City of Chicago play an important role in determining which communities will be afforded safe and healthy environments, and which ones will face disproportionate burdens. While these bodies can therefore be powerful allies in fighting against cumulative impacts, they also, by their very nature,

[82] *See* HUD Complaint at 10-15.
[83] HUD LoF at 19.
[84] *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181, 249 (2023).
[85] HUD LoF at 4.
[86] *Id.* at 5.

respond to pressures from constituents, sometimes to ill effect. Local governments have an obligation to ensure that they do not merely move problems from one group of citizens to another to avoid uncomfortable political pressure. However, officials who are positioned to oversee government activities also have an obligation to remain vigilant for undue political pressure, and to check its influence when it appears. This is true whether the decision-maker in question is employed at USEPA, a state agency equivalent, or even a municipal office, for instance the Chicago Department of Public Health. Using cumulative impacts assessments can help both identify those instances where "sacrifice zones" are being created by local decisions and can help local officials undo that damage.

The Framework should recognize that political motivations can drive permit and siting decisions just as much as laws and regulations. To help prevent worsening cumulative impacts, USEPA should encourage decision-makers at every level of government to consider whether the plan or proposal crossing their desk is the result of broader political forces which might be unfairly exposing certain communities to harm. In such cases, the Framework should encourage these decision-makers to use their mandatory and discretionary authorities to remind political bodies of their obligation to serve all citizens and, when appropriate, to deny those plans and proposals which threaten to contribute to cumulative impacts. The Framework could also instruct USEPA officials to work with willing local government officials to perform effective cumulative impacts analysis in the context of zoning and permitting decisions. An example of this would be the Southwest Rockford Revitalization Rapid HIA project, where USEPA worked alongside Rockford's municipal government to perform a rapid HIA and minimize the adverse effects of cumulative impacts.[87] While, as discussed above in subsection 1, SETF regrets USEPA's failure to mention the role of community advocates in this endeavor, it otherwise provides a demonstration of how USEPA can oversee and guide a local government in assessing cumulative impacts.

Further, USEPA is uniquely positioned to lead by example in this realm, as the agency's letter to Chicago in 2022 plainly shows. As a widely recognized and respected authority on environmental issues,

[87] Framework at 26.

USEPA can use its technical expertise to ensure that both the permitters under its review and the state and local agencies it works with have the tools and knowledge they need to handle environmental threats in an objective, scientific manner, which necessarily includes an examination of the health risks posed by cumulative impacts.

IV. Conclusion:

While SETF commends USEPA for acknowledging that cumulative impacts analysis is a crucial component of its legal and regulatory work, there are a number of ways that the Framework could be improved. As it stands, the Framework is largely silent as to the important work being done by community advocacy groups. This is a mistake, because, as SETF's story shows, community advocacy plays a key role in challenging, motivating, and informing government actors, giving meaning to the public participation requirements featured in so many statutes. Community groups, by virtue of their on-the-ground perspective among the people actually affected by decisions, can help make up for some of the structural blind spots of government entities.

Next, the Framework would benefit from further explaining how cumulative impact analysis can actually be implemented in day-to-day government work. References to both federal and state law can help show decision-makers at every level how they personally might be vested with authority to address cumulative impacts. There is also room for the Framework to remind federal workers, including USEPA's own employees at both the national and regional levels, that their work will need to be adjusted according to the state and local contexts they find themselves in. Different states have different laws, which will require different work from federal actors, both on their own and in conjunction with state and local agencies. This recognition would blend nicely with the concept of fit-for-purpose analyses which the Framework already recognizes as being of paramount importance. The Framework can empower state agencies to incorporate cumulative impacts where their laws permit or require it and expand engagement with local community groups. Additionally, addressing cumulative impacts in permitting decisions with the right to revoke permits and analyzing prior permitting decisions to protect communities from becoming sacrifice zones are vital.

Finally, the Framework should take the time to explicitly recognize the presence of political influence in local decision-making processes. USEPA should emphasize its own role in providing technical oversight to help curb the potentially destructive impact of undue political motivation. Further, the Framework should encourage state and local actors to perform similar oversight and moderation when they have the power to do so in their work. In this way, the science of cumulative impacts and human health will be able to overcome the obstacles placed by entrenched discriminatory policies and the pressure for elected officials to respond to constituent concerns as quickly as possible, before fully considering the consequences of such actions.

SETF appreciates USEPA's attention to the issue of cumulative impacts and hopes that the final version of the Framework reflects the improvements SETF has suggested above in light of its extensive experience dealing with cumulative impact issues.

Sincerely,

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