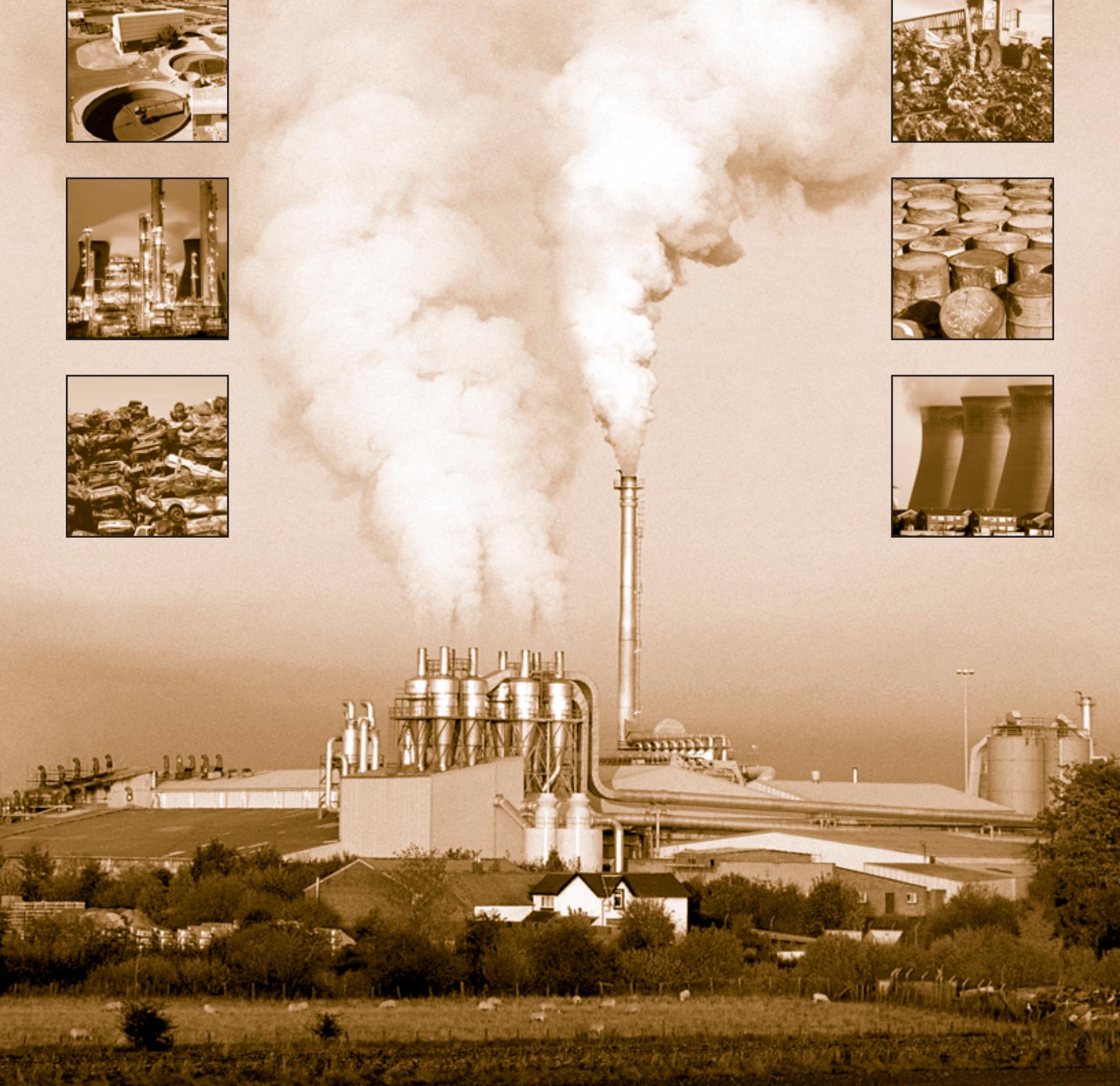


# Not in My Backyard:

Executive Order 12,898 and Title VI as  
Tools for Achieving Environmental Justice



## **U.S. Commission on Civil Rights**

The U.S. Commission on Civil Rights is an independent, bipartisan agency established by Congress in 1957. It is directed to:

- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, disability, or national origin, or by reason of fraudulent practices.
- Study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
- Appraise federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin.
- Submit reports, findings, and recommendations to the President and Congress.
- Issue public service announcements to discourage discrimination or denial of equal protection of the laws.

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## Letter of Transmittal

The President

The President of the Senate

The Speaker of the House of Representatives

Sirs:

The United States Commission on Civil Rights transmits this report, *Not in My Backyard: Executive Order 12,898 and Title VI as Tools for Achieving Environmental Justice*, pursuant to Public Law 103-419. This report examines how well four federal agencies—the Environmental Protection Agency, the U.S. Department of the Interior, the U.S. Department of Housing and Urban Development, and the U.S. Department of Transportation—have implemented Executive Order 12,898 and Title VI. Executive Order 12,898 requires federal agencies to collect data on the health and environmental impact of their activities on communities of color and low-income populations, and develop policies incorporating the principles of environmental justice into their programs and activities. In this report the Commission assesses the efforts of these agencies to adopt, promote, and execute policies ensuring that environmental justice is incorporated into their core missions, whether affected communities are provided meaningful participation in environmental decision-making processes, and to what extent these communities have access to scientific data and effective Title VI enforcement procedures.

This report, based on Commission hearings, interviews, research, and a review of relevant literature, reveals that while there has been some limited success in implementing Executive Order 12,898 and the principles of environmental justice, significant problems and shortcomings remain. Federal agencies still have neither fully incorporated environmental justice into their core missions nor established accountability and performance outcomes for programs and activities. Moreover, a commitment to environmental justice is often lacking in agency leadership, communities are not yet full participants in environmental decision-making, and there is still inadequate scientific and technical literature on the relationship between environmental pollutants and human health status. Although poor communities and communities of color are becoming more skilled at using Title VI administrative processes to seek recourse and remedies, agencies seldom, if ever, revoke a permit or withhold money from the recipients of federal funding for violating Title VI. Strong administrative enforcement of Title VI is required in light of court decisions limiting access to judicial recourse and remedies under Title VI. Uncertainty about the use and effectiveness of Title VI in protecting the poor and communities of color is created by the absence of final investigative and recipient guidance by EPA. The agency was moving toward finalizing its Title VI guidance at the time the Commission report was drafted, and we look forward to its release. The other agencies, unlike EPA, lacked any comprehensive Title VI investigation and recipient guidance.

As a result, the Commission report makes many recommendations; some of the recommendations are directed toward federal agencies while others require congressional action. The report recommends, for example, that federal agencies coordinate and promulgate clear regulations, guidelines, and procedures for investigating, reviewing, and deciding without unnecessary delay Title VI claims, and that federal agencies implement formal Title VI compliance review programs to ensure nondiscrimination in programs and activities receiving federal funding. In addition, Congress should pass a Civil Rights Restoration Act to provide for a private right of action for disparate impact claims under Title VI, as well as § 1983.

Although Executive Order 12,898 realizes the importance of gathering scientific and technical data, there is inadequate literature on the relationship between environmental pollutants and human health. The Commission report recommends that federal agencies conduct and fund more research on human health and the environment and make data more readily available to affected communities. Additionally, federal agencies conducting or funding research on human health and the environment should consider race, ethnicity, national origin, age, gender, and income when examining the environmental and human health effects of environmental decisions.

The report finds that the input of communities of color and low-income communities is integral to decision-making, planning, monitoring, problem-solving, and implementation and evaluation of environmental policies and practices. Low-income and minority communities, however, still do not fully participate in the process because of language and cultural barriers and lack of access to information. Federal agencies must make early and meaningful public participation in siting and permitting decisions a reality for overburdened communities of color and poor communities. This may be facilitated by making resources available to communities for outreach workers and translation services when English is not the primary language in the affected communities, and by federal agencies and their funding recipients conducting assessments to determine to what extent their programs and initiatives result in increased public participation. Stringent enforcement of public participation should be guaranteed in legislation with requirements ensuring that all affected parties are at the table with adequate public support.

Federal agencies must more fully integrate environmental justice into their core missions and put in place evaluation criteria and accountability measures to assess policies and programs. Without more concerted effort on the part of federal agencies to promote and ensure environmental justice, and appropriate congressional action, minority and low-income communities all across this nation will continue to bear the unfair risk of exposure to environmental hazards.

For the Commissioners,

Mary Frances Berry  
*Chairperson*

## **Acknowledgements**

The Commission hearings were organized and the report written under the supervision of Deputy General Counsel Debra A. Carr. Pre-hearing research, planning, and investigation were conducted by attorney-advisors Peter Reilly,\* Jenny Park, Deborah Reid, and Kim Norris,\* with assistance from Emma Monroig. Office of General Counsel secretary Pam Moye provided clerical support for the hearings.

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The Commission acknowledges with gratitude the tremendous contributions of the hearing panelists and others who provided their expertise to this important project.

\* No longer with the Commission

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## Chapter 1

# Introduction

The U.S. Commission on Civil Rights (Commission) conducted environmental justice hearings in January and February 2002, which included advocates, researchers and scientists, community representatives, business and industry representatives, policy analysts, academics, and officials from four federal agencies, the Environmental Protection Agency and the Departments of Interior, Housing and Urban Development, and Transportation.<sup>1</sup> The Commission held the hearings to learn what progress, if any, the federal government has made in identifying and appropriately addressing the role of race in environmental decision-making and to what extent agencies are implementing Executive Order 12,898. Fortunately, the Commission is pleased to learn that there has been much progress since its June 1971 hearing during which EPA Administrator William D. Ruckelshaus saw no connection between the agency's regulatory role and nondiscrimination aims.<sup>2</sup>

During the two days of testimony in 2002, the Commission observed that there have been successes. Additional challenges, however, were also revealed. The successes, though somewhat limited, are discussed first. The signing of Executive Order 12,898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," in 1994 by President Clinton, incorporating environmental justice principles into the work of all federal agencies, is generally viewed as a positive step toward involving communities in environmental decision-making and protecting the health of minority and low-income communities.<sup>3</sup> Other successes include growing community activism on environmental justice issues; greater community awareness of environmental hazards and adverse human health risks; and increased skill at using available judicial and administrative avenues to challenge siting, permitting, and other decisions resulting in a disproportionate and adverse environmental and human health impact. A "siting" decision is a decision to locate a facility in a particular place or community, while a "permitting" decision governs under what environmental restrictions or regulations a facility must operate.<sup>4</sup> State and local authorities make the majority of the siting and permitting decisions challenged in the environmental justice context, and the decision-making procedures vary from state to state. The procedures also vary depending on the type of facility or project being constructed.

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<sup>1</sup> As a part of its hearing process, the Commission issued subpoenas for documents, submitted written interrogatories to four federal agencies, received public comments, and conducted interviews and research.

This report makes reference to activities of the U.S. Coast Guard as a part of the Department of Transportation. The Commission notes that since its hearing the U.S. Coast Guard has been incorporated into the Department of Homeland Security.

<sup>2</sup> William D. Ruckelshaus, administrator, U.S. Environmental Protection Agency, testimony before the U.S. Commission on Civil Rights, hearing, Washington DC, June 14–17, 1971, transcript, pp. 146–57.

<sup>3</sup> See generally Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, Exec. Order No. 12,898, 3 C.F.R. 859 (1995), *reprinted as amended in* 42 U.S.C. § 4321 (1994 & Supp. VI 1998) (hereafter cited as Exec. Order No. 12,898).

<sup>4</sup> Michael B. Gerrard, ed., *The Law of Environmental Justice: Theories and Procedures to Address Disproportionate Risks*, "Stopping and Building New Facilities," by Michael B. Gerrard (Chicago: ABA Publishing, 1999), pp. 469–77.

Claims of discrimination by state and local authorities are often handled administratively under federal agency Title VI regulations prohibiting discrimination in federally funded programs and activities.<sup>5</sup> In fact, much of the increased community activism noted above, and many of the current tools available to communities, is related to agency Title VI enforcement and the implementation of Executive Order 12,898.

The Executive Order, the first significant success in the area of federal implementation of environmental justice principles, requires federal agencies to collect data on the health and environmental impact of their programs and activities on “minority populations” and “low-income populations” and to develop policies to achieve environmental justice.<sup>6</sup> Federal agencies are also required to ensure that their funding recipients comply with Title VI of the Civil Rights Act of 1964 by conducting their programs and implementing policies in a nondiscriminatory manner.<sup>7</sup> Unlike Title VI, Executive Order 12,898 does not create legally enforceable rights or obligations.<sup>8</sup> The order specifically requires that federal agencies, including the Environmental Protection Agency, and departments, including Housing and Urban Development, Interior, and Transportation, make achieving environmental justice part of their missions by evaluating the effects of their programs, policies, and activities on minority and low-income populations.<sup>9</sup>

Under the Executive Order, each federal agency is required to develop an agencywide environmental justice strategy “that identifies and addresses disproportionately high and adverse human health or environmental effects of its programs, policies, or activities on minority populations and low-income populations.”<sup>10</sup> Agencies are also required to target programs and policies for revision in order to promote health, improve research and data collection, ensure public participation, and track environmental resources consumption patterns.<sup>11</sup> The last mandate is especially useful to populations engaging in subsistence hunting and fishing.

The Executive Order also establishes the Interagency Working Group on Environmental Justice (IWG) composed of agency representatives.<sup>12</sup> The IWG is convened by the EPA administrator and

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<sup>5</sup> Civil Rights Act of 1964, §§ 2000d–2000d-7 (1994).

<sup>6</sup> Exec. Order No. 12,898, §§ 1-101, 3-3. The Council on Environmental Quality defines low-income populations based on the annual statistical poverty thresholds from the Census Bureau’s Current Population Reports. “Minority” is defined as anyone who is American Indian or Alaska Native, Asian or Pacific Islander, black (non-Hispanic origin), or Hispanic. “Minority populations” are identified where “the minority population of an affected area exceeds 50 percent or the minority population percentage of the affected area is meaningfully greater than the minority population percentage in the general population.” Council on Environmental Quality, *Guidance Under the National Environmental Policy Act*, December 1997, Appendix A, “Guidance for Federal Agencies on Key Terms in Executive Order 12898,” p. 25. *See, e.g.*, U.S. Environmental Protection Agency, Response to the Commission’s Interrogatory Question 43, April 2002 (hereafter cited as EPA, Response to Interrogatory Question); U.S. Department of Transportation, Response to the Commission’s Interrogatory Question 33, April 2002; and U.S. Department of Housing and Urban Development, Response to the Commission’s Interrogatory Question 43, April 2002 (hereafter cited as HUD, Response to Interrogatory Question). The Commission was specifically interested in the U.S. Department of the Interior’s (DOI) relationship and consultation with Native American tribes on environmental issues. Accordingly, DOI was not requested to define “minority populations” or “low-income populations.” In this report, the terms “minority,” “minority populations,” and “communities of color” are synonymous and used interchangeably.

<sup>7</sup> Civil Rights Act of 1964, 42 U.S.C. §§ 2000d–2000d-7.

<sup>8</sup> *See generally* Exec. Order No. 12,898.

<sup>9</sup> *Id.* §§ 1-101, 1-104, 2-2.

<sup>10</sup> *Id.* § 1-103.

<sup>11</sup> *Id.* § 4-401.

<sup>12</sup> *Id.* § 1-102.

includes the heads of 11 departments/agencies and several White House offices. These include EPA; the Departments of Justice, Defense, Energy, Labor, Interior, Transportation, Agriculture, Housing and Urban Development, Commerce, and Health and Human Services; the Council on Environmental Quality; the Office of Management and Budget; the Office of Science and Technology Policy; the Domestic Policy Council; and the Council of Economic Advisors.

The IWG established eight task forces to concentrate on areas that required the most interagency coordination. These areas include research and health, outreach, data, enforcement and compliance, implementation, Native Americans, guidance, and interagency projects. Each task force is chaired by two agencies with representation from each of the participating agencies.<sup>13</sup> The work of the IWG is discussed later in this report.

Under the Executive Order, former Clinton administration EPA Administrator Carol Browner created interagency working groups, established demonstration projects, and issued the *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits*, and federal agencies became increasingly accountable to communities through the Title VI administrative process and public participation in the environmental decision-making process.

In August 2001, former EPA Administrator Christine Todd Whitman in the Bush administration, who resigned as administrator in June 2003, affirmed the administration's commitment to ensuring environmental justice and the importance of Executive Order 12,898.<sup>14</sup> Administrator Whitman continued efforts to investigate and dispose of a backlog of Title VI complaints, and oversaw the issuance of *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Draft Revised Investigation Guidance)* and *Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Draft Recipient Guidance)*.<sup>15</sup> Current EPA Administrator Mike Leavitt, like former EPA Administrators Browner and Whitman, should reaffirm the federal government's commitment to environmental policies that ensure communities of color and poor communities are not disproportionately burdened with toxic facilities, waste sites, landfills, noise,<sup>16</sup> lead paint, diesel emissions, noxious odors, and other environmental hazards. This commitment could be reflected in several ways, including:

- Creating a formal policy on cumulative risk that considers social, economic, and behavioral factors.
- Creating a presumption that exposure to multiple hazards has an adverse health impact.

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<sup>13</sup> *Id.* § 1-103.

<sup>14</sup> Christine Todd Whitman, administrator, U.S. Environmental Protection Agency, memorandum to Assistant Administrators et al., "EPA's Commitment to Environmental Justice," Aug. 9, 2001; Linda Fisher, deputy administrator, U.S. Environmental Protection Agency, testimony before the U.S. Commission on Civil Rights, hearing, Washington, DC, Feb. 8, 2002, official transcript, p. 46 (hereafter cited as February Hearing Transcript).

<sup>15</sup> Linda Fisher, deputy administrator, U.S. Environmental Protection Agency, Testimony, February Hearing Transcript, pp. 45–46; Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Draft Recipient Guidance) and Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Draft Revised Investigation Guidance), 65 Fed. Reg. 39,650 (June 27, 2000).

<sup>16</sup> Briggitta Berglund et al., eds., "Guidelines for Community Noise" (World Health Organization, 1999), pp. 39–54 (noise is an increasing public health problem related to adverse health effects such as hearing loss; decreased speech comprehension; sleep disturbances; cardiovascular and psycho-physiologic problems; mental health problems, including irritability, anxiety, and neurosis; performance reduction; annoyance responses; and adverse social behavior); Briggitta Berglund and Thomas Lindvall, eds., "Community Noise" (World Health Organization, 1995), <<http://www.who.int/peh/noise/Noiseold.html>> (last accessed July 16, 2003); Centers for Disease Control and Prevention, "Environmental Health Studies: Noise," <<http://www.cdc.gov/nceh/hsb/noise/>> (last accessed July 16, 2003).

- Establishing measurable goals and outcomes for environmental justice programs and activities to ensure that enforcement efforts under Title VI and Executive Order 12,898 are effective.

The Commission notes that, while the Executive Order is considered a success by communities and environmental advocates, business and industry contend that environmental justice and Title VI ultimately work to the economic disadvantage of communities of color and poor communities. Critics assert that environmental justice makes industry reluctant to locate in these communities. The bulk of the data, however, is contrary to this claim.

Critics also argue that environmental justice is not an appropriate or effective way to address health and quality of life issues in minority and poor communities.<sup>17</sup> They propose that traditional environmental enforcement is a better vehicle for these concerns.<sup>18</sup> Specifically, critics assert that environmental justice cannot address health concerns in minority and poor communities because market forces, not racism, drive siting and permitting decisions. As will be discussed in the next chapter, the “market dynamics” theory has not been proved and the evidence is that few jobs are actually created or provided to the neighborhoods surrounding these facilities.

The second environmental justice success noted by the Commission, that communities are becoming more proactive in defending their quality of life and health against hazardous waste and other pollutants, is tempered by the fact that these communities often lack ready access to scientific and technical data. As a result, environmental groups are advocating for more detailed studies analyzing the varieties and levels of exposure to environmental hazards and more technical assistance grants. These groups are making effective use of scientific and technical data, when it is made available. When discussing studies on health risks and outcomes, the Commission emphasizes to federal agencies that these studies must include diverse segments of the population as required by the Executive Order.<sup>19</sup> The traditional middle-aged, white male, of average weight model should not be the only model for these studies.

Just as diverse population groups should be included in scientific studies, the goal of protecting human health is more effectively reached when communities are involved in research and data collection. Depending on the environmental issues involved, there are advocates who are as familiar with the issues and scientific data as anyone in the public.<sup>20</sup> For example, on the Eastern Shore of Maryland, where communities are adversely affected by Shore’s poultry industry, advocates collected applicable and useful data on the types and levels of environmental exposures experienced by the community.<sup>21</sup>

While research and data collection are central to fully implementing the Executive Order and ensuring that public health is protected, it has been asserted that the research that exists on exposures and health impact is tainted by politics and may be unreliable. This argument cannot be supported by the facts. Any scientific study that withstands an appropriate peer review process is inherently shielded

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<sup>17</sup> Christopher H. Foreman, professor, University of Maryland, testimony before the U.S. Commission on Civil Rights, hearing, Washington, DC, Jan. 11, 2002, official transcript, pp. 68, 70 (hereafter cited as January Hearing Transcript).

<sup>18</sup> *Ibid.*, p. 69.

<sup>19</sup> Exec. Order No. 12,898, § 3-302(a).

<sup>20</sup> Dr. John Groopman, program director and chairman of the Department of Environmental Health Sciences Toxicological Sciences at Johns Hopkins University, telephone interview, Apr. 11, 2002 (hereafter cited as Groopman interview).

<sup>21</sup> *Ibid.*

from the effects of bias.<sup>22</sup> Politics, however, taints how individuals use data. In the 1970s, research on the effect of lead exposure on children's intelligence became controversial only as a result of how some individuals with political agendas interpreted the findings. Nonetheless, the data linking lead to retarded mental development was scientifically sound and unbiased.<sup>23</sup>

The Commission identified a third success, that communities are becoming increasingly skilled at using the legal and administrative processes to seek recourse and remedies. This is even more astounding since it comes despite obstacles such as the lack of appropriate scientific data, pockets of resistance by business and industry, and increasingly limited access to the courts. The Supreme Court's decision in *Alexander v. Sandoval* prohibits private individuals or organizations from filing suits alleging "disparate impact" discrimination under § 602 of Title VI. Disparate impact discrimination is unintentional discrimination that adversely affects racial groups or members of other protected classes.<sup>24</sup> The Court's decision in *Sandoval* effectively requires communities to establish intentional discrimination.<sup>25</sup> *Sandoval* has forced more communities to look to agency regulations under Title VI for recourse and remedy for this type of environmental justice complaint.<sup>26</sup>

Because of this increased emphasis on administrative remedies, the Commission heard a great deal about EPA's Title VI guidance and process during its hearings. EPA issued its *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Interim Guidance)* in 1998 to provide a mechanism for processing Title VI complaints and guidance for analyzing environmental disparate impact allegations.<sup>27</sup> Issuing the *Interim Guidance* was also consistent with goals of Executive Order 12,898.<sup>28</sup> On June 27, 2000, the agency's Office of Civil Rights (OCR) published the *Draft Revised Investigating Title VI Administrative Complaints Challenging Permits (Draft Revised Investigation Guidance)* and the *Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Draft Recipient Guidance)* to further refine its *Interim Guidance*.<sup>29</sup>

In 2002, the National Environmental Justice Advisory Council (NEJAC) and many other environmental groups, advocates, and policy organizations submitted comments on the *Draft Revised Investigation Guidance*. Some of the most common comments submitted include the following:

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<sup>22</sup> Ibid. H. Patricia Hynes, professor, Department of Environmental Health, Boston University School of Public Health, telephone interview, Apr. 4, 2002.

<sup>23</sup> Groopman interview.

<sup>24</sup> A disparate impact discrimination theory allows a practice or policy that is race neutral on its face to be found to be discriminatory in practice, even in the absence of proof of intent to discriminate. *Lau v. Nichols*, 414 U.S. 563, 568 (1974).

<sup>25</sup> *Alexander v. Sandoval*, 532 U.S. 275 (2001) (no private right of action to enforce disparate impact regulations under Title VI).

<sup>26</sup> Michael B. Gerrard, ed., *The Law of Environmental Justice: Theories and Procedures to Address Disproportionate Risks*, "Title VI," by Bradford C. Mank (Chicago: ABA Publishing, 1999), p. 25 (hereafter cited as Mank, "Title VI").

<sup>27</sup> Karen Higginbotham, director, Office of Civil Rights, U.S. Environmental Protection Agency, Testimony, February Hearing Transcript, p. 66.

<sup>28</sup> U.S. Environmental Protection Agency, *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits*, February 1998, <<http://www.epa.gov/civilrights/docs/interim.pdf>> (last accessed Sept. 3, 2003) (hereafter cited as EPA, *Interim Guidance*); June M. Lyle, *Reactions to EPA's Interim Guidance: The Growing Battle for Control over Environmental Justice Decisionmaking*, 75 IND. L.J. 687, 696 (2000) (hereafter cited as Lyle, *Reactions to EPA's Interim Guidance*).

<sup>29</sup> 65 Fed. Reg. 39,650 (June 27, 2000); Karen Higginbotham, director, Office of Civil Rights, U.S. Environmental Protection Agency, Testimony, February Hearing Transcript, pp. 66–67.

- The guidance is “discretionary” and, therefore, does not create any rights or enforceable obligations.
- The guidance unnecessarily limits the determination of Title VI and EPA violations to those matters “within the recipients’ authority.” (However, recipients, though not the direct cause of a pollutant/hazard, may be the proximate cause.)
- It provides that Title VI is inapplicable to EPA actions, including EPA’s issuance of permits, because it only applies to the programs and activities of recipients of federal financial assistance.
- Informal resolution, through alternative dispute resolution (ADR), is weighted in favor of permitting and undermines Title VI enforcement because, once granted, permits are seldom revoked.
- OCR can rely on a recipient’s analysis even if that analysis concludes “no adverse disparate analysis exists . . . in a finding that the recipient is in compliance with Title VI and EPA’s regulations.” Only if the analysis contains “significant deficiencies” will OCR not rely on it.
- Compliance with the National Ambient Air Quality standards creates a presumption of no adverse impact.
- The guidance encourages “area-specific agreements” through which recipients identify geographic areas where adverse disparate impacts may exist and enter into agreements with affected residents and stakeholders “to eliminate or reduce, to the extent required by Title VI, adverse disparate impacts.” If a complaint is filed relating to the area-specific agreement, OCR may rely upon the agreement, unless the allegation is that the agreement was not properly implemented. An independent investigation is not mandated.
- The complaint processing timeline is not realistic.
- Complainants have no right to appeal.<sup>30</sup>

Comments by industry reflect a view that Executive Order 12,898 and Title VI impose unnecessary restrictions on industry, especially in the permitting process.<sup>31</sup> Industry comments also reflect the views that industry is disadvantaged by the length of the Title VI complaint process, and what can be described as the federal government’s second-guessing of state permitting decisions.<sup>32</sup>

Industry also describes a “mismatch” between the efforts and timetables needed to resolve community environmental justice concerns and the needs of business.<sup>33</sup> Business needs involve competition,

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<sup>30</sup> See, e.g., U.S. Environmental Protection Agency, “Comments Received on the Title VI Draft Guidance Documents”: Lawyers’ Committee for Civil Rights Under Law, letter, Aug. 28, 2000; Center on Race, Poverty, & the Environment, letter, Aug. 26, 2000; Institute for Public Representation, letter, Aug. 28, 2000; National Environmental Justice Advisory Council, letter, Aug. 26, 2000; Sierra Club–Committee on Environmental Justice, letter, Aug. 28, 2000; Arizona Center for Law in the Public Interest, letter, Aug. 28, 2000, <<http://www.epa.gov/civilrights/t6guidcom.htm>> (last accessed July 1, 2003).

<sup>31</sup> Sue Briggum, director of environmental affairs, Waste Management, Inc., “Business Perspective on Environmental Justice,” written statement delivered to the U.S. Commission on Civil Rights, Washington, DC, Feb. 8, 2002, p. 2 (hereafter cited as Briggum, written statement).

<sup>32</sup> See, e.g., U.S. Environmental Protection Agency, “Comments Received on the Title VI Draft Guidance Documents”: Louisiana Mid-Continental Oil and Gas Association, letter, Aug. 28, 2000; American Petroleum Institute, letter, Aug. 28, 2000; Shintech, Inc., letter, Aug. 25, 2000; Associated Builders and Contractors, letter (undated); American Road and Transportation Builders Association, letter, Aug. 28, 2000, <<http://www.epa.gov/civilrights/t6guidcom.htm>> (last accessed July 1, 2003).

<sup>33</sup> Sue Briggum, director of environmental affairs, Waste Management, Inc., Testimony, January Hearing Transcript, p. 170.

budget cycles, shareholder profit expectations, and “sufficient certainty to secure financing.”<sup>34</sup> Industry claims that the Title VI process does not accommodate these time-sensitive events.

With this input from its stakeholders, EPA is currently working on changes to its *Draft Revised Investigation Guidance*, and information learned by the agency’s Title VI Task Force and Office of Civil Rights from the processing of EPA’s backlog of complaints should be useful in this effort. It is observed, however, that EPA has yet to sustain a single Title VI complaint. EPA expects to complete this guidance by early FY 2004.

EPA is also revising its *Draft Recipient Guidance*, and community and advocacy groups have commented that the guidance:

- Provides few recommendations for making public participation in environmental decision-making meaningful, interactive, and inclusive.
- Reflects a lack of recognition that public participation, alone, does not guarantee a fair or nondiscriminatory outcome.
- Does not address and eliminate disparities in legal and technical expertise between recipients and members of affected communities.
- Does not acknowledge and address cultural and social barriers that hinder communities from participating in the process.

EPA should incorporate these comments into the revisions to its *Draft Recipient Guidance*, which is expected to be released in early FY 2004.

Receiving a remedy under agency Title VI regulations is far from certain. In fact, agencies seldom, if ever, revoke a permit or withhold money from the recipients of federal funding for violating Title VI.<sup>35</sup> Advocates see additional obstacles to successfully challenging environmental decisions administratively; specifically, federal agency regulations and guidance that fail to consider the totality of a community’s exposure risks and the fact that damages cannot be awarded.<sup>36</sup> Agency regulations that fail to use cumulative risk assessments that consider all environmental and social factors, and the absence of a presumption that multiple exposures have an adverse health impact are serious shortcomings in the administrative process.<sup>37</sup>

While there has been some success in moving toward achieving environmental justice, the Commission also recognizes ongoing challenges, specifically that:

- Federal agencies have failed to incorporate environmental justice into their core missions.

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<sup>34</sup> Briggum, written statement, p. 2; Michael Steinberg, counsel, Morgan, Lewis & Bockius, Testimony, January Hearing Transcript, pp. 27–28.

<sup>35</sup> Richard Lazarus, John Carrol Research Professor of Law, Georgetown University Law Center, Testimony, February Hearing Transcript, pp. 35–36; Michael B. Gerrard, Esq., Arnold & Porter, Testimony, January Hearing Transcript, p. 72; Mank, “Title VI,” pp. 26, 28; 40 C.F.R. § 7.130 (2002) (denial, annulment, suspension, or termination of assistance to noncompliant funding recipients allowed by EPA). *See also* EPA, Response to Interrogatory Question 31 (agency allowed to deny, annul, suspend or terminate assistance to noncompliant funding recipients).

<sup>36</sup> 40 C.F.R. § 7.130(a).

<sup>37</sup> Dr. Robert Bullard, director, Environmental Justice Resource Center, telephone interview, Apr. 10, 2002 (hereafter cited as Bullard interview).

- Federal agencies have not established accountability and performance outcomes for programs and activities.
- A commitment to environmental justice issues is often lacking from agency leadership.

These challenges are briefly discussed here. First, how federal agencies incorporate environmental justice into their programs and other activities varies, as does the extent to which the agencies have incorporated Executive Order 12,898 into their core missions. The Commission finds that to make real and lasting changes, agencies must integrate environmental justice into the core design of their programs, and rigorously evaluate the success of these programs in meeting their aims. Federal agencies must increase and improve public participation in information gathering and dissemination, and especially in the decision-making process.<sup>38</sup> Current efforts by HUD and EPA include, for example, publishing materials in languages other than English.<sup>39</sup> While all four agencies appearing before the Commission have Web pages that address environmental justice, navigating to these pages is difficult.

Second, the Commission finds that while agencies are implementing environmental justice programs, there is a lack of critical assessment of those programs.<sup>40</sup> Most significantly for purposes of this report, none of these agencies report any comprehensive assessments of their environmental justice activities. This appears to be particularly true for the Department of Housing and Urban Development. HUD has not established outcome expectations or goals for its environmental justice activities and no central mechanism for communicating goals and expectations to staff and managers other than its public Web site.<sup>41</sup> The Department of the Interior, like HUD, also lacks program goals and expectations. EPA has yet to implement accountability measures following the 2001 National Academy of Public Administration (NAPA) report recommending such measures as a way of improving agency implementation of environmental justice.<sup>42</sup> In January 2002, however, EPA did create an Accountability Workgroup to explore this, and other, environmental justice recommendations by NAPA.<sup>43</sup>

Without assessments, it is difficult to determine how well agencies are incorporating the Executive Order into their missions<sup>44</sup> and the effectiveness of their environmental justice initiatives in reducing health and environmental concerns for affected communities. Agencies should also identify disproportionately and adversely affected communities and create explicit goals for reducing risks in these communities.<sup>45</sup> These communities should be given priority attention.<sup>46</sup>

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<sup>38</sup> Ibid.

<sup>39</sup> Ibid.

<sup>40</sup> Denis Binder et al., *A Survey of Federal Agency Response to President Clinton's Executive Order No. 12898 on Environmental Justice*, 31 ENVTL. L. REP. 11139 (2001) (hereafter cited as Binder et al., *Federal Agency Response to President Clinton's Executive Order No. 12898*).

<sup>41</sup> HUD, Responses to Interrogatory Questions 17–19.

<sup>42</sup> EPA, Response to Interrogatory Question 15.

<sup>43</sup> Ibid.

<sup>44</sup> Binder et al., *A Survey of Federal Agency Response to Executive Order 12898*, p. 11135. For example, while EPA has evaluated grant programs, GAO recently criticized EPA for failing to require grant recipients to report adequate information about the success of Brownfields projects. See U.S. Environmental Protection Agency, Office of Environmental Justice (OEJ), *Environmental Justice Small Grants Program: Emerging Tools for Local Problem Solving*, 1999. See also U.S. General Accounting Office, *Brownfields: Information on the Programs of EPA and Selected Sites*, 2001.

<sup>45</sup> National Academy of Public Administration, *Environmental Justice in EPA Permitting: Reducing Pollution in High-Risk Communities Is Integral to the Agency's Mission*, December 2001, pp. 28, 56 (hereafter cited as NAPA, *Environmental Justice in EPA Permitting*).

<sup>46</sup> Ibid., p. 45.

Third, the Commission believes that when assessing accountability, clear leadership and direction from agency heads are important in dispelling an agency culture that could be perceived as a barrier to environmental justice. Attention at the highest levels is important in implementing the goals, and measuring the effectiveness, of the Executive Order.<sup>47</sup> While EPA has support from its top leadership, it has been difficult for the agency to change its culture and attitudes about environmental justice. EPA has been described as change-resistant; therefore, top-down leadership is even more important to integrating environmental justice into the agency's work.<sup>48</sup> The top leadership at the Departments of Interior, Housing and Urban Development, and Transportation has not made the same visible commitment to environmental justice that EPA has demonstrated.

The failure of the four agencies reviewed by the Commission to fully incorporate environmental justice into agency core missions, the absence of accountability and critical assessments for environmental justice programs and activities, and the lack of top-down leadership on environmental justice issues result in the Commission finding that federal agencies have not yet fully implemented Executive Order 12,898 and Title VI in the environmental decision-making context.

### **Environmental Justice Actions Since Executive Order 12,898**

Because of the difficulties communities have in obtaining legal and agency administrative relief, environmental advocates are seeking to codify the principles of environmental justice and to ensure that sufficient funding exists for environmental programs that benefit communities of color and low-income communities. Consequently, communities and environmental advocates have put forth the following proposals:

- The passage of a Civil Rights Restoration Act.
- The passage of an Environmental Justice Act.
- The restoration of the “polluter pays” tax for environmental cleanup under Superfund.<sup>49</sup>

Advocates have called for a Civil Rights Restoration Act to codify their ability to pursue disparate impact discrimination cases under Title VI; however, there has been no legislative action on a restoration bill.

The passage of an Environmental Justice Act that would allow communities to more easily demonstrate that they are overburdened by environmental exposures and hazards would provide specific remedies or relief not created by Executive Order 12,898, and would ensure that the protections made possible by the Executive Order could not be easily undone by future administrations.<sup>50</sup> There has been some interest in this approach. In May 2003, Representatives Mark Udall of Colorado and Hilda Solis of California introduced the Environmental Justice Act of 2003 (H.R. 2200) to codify and ex-

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<sup>47</sup> Binder et al., *A Survey of Federal Agency Response to Executive Order 12898*, p. 11135. See also NAPA, *Environmental Justice in EPA Permitting*, pp. 17, 26–27.

<sup>48</sup> NAPA, *Environmental Justice in EPA Permitting*, pp. 26–27.

<sup>49</sup> Superfund is a hazardous waste site cleanup program that requires the responsible polluting parties to assume responsibility for cleaning up contaminated areas. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601–9675 (1994).

<sup>50</sup> Bullard interview.

pand Executive Order 12,898.<sup>51</sup> Much of the proposed legislation is identical to the Executive Order. Generally, the bill provides the following:

- Requires federal agencies to include achieving environmental justice in their missions through identifying and addressing any disproportionately high and adverse human health or environmental effects of their activities on minority and low-income communities.
- Establishes a new Interagency Working Group on Environmental Justice.
- Directs that each federal agency develop an agencywide environmental justice strategy.
- Establishes the Federal Environmental Justice Advisory Committee.
- Requires that the administrator of EPA collect and analyze data assessing environmental and human health risks borne by population identified by race, national origin, and income.

Like the Executive Order, the bill requires that agencies develop an agencywide environmental justice strategy. The proposed legislation, however, does not mandate a strict timeline for producing these strategies and their revisions, as required by the Executive Order.

A Federal Environmental Justice Advisory Committee, essentially codifying the current National Environmental Justice Advisory Council, is proposed.<sup>52</sup> The advisory committee is to provide advice and recommendations to EPA and the Working Group on a range of environmental justice issues, including:

- Developing a framework for integrating socioeconomic programs into EPA's strategic planning on environmental justice.
- Measuring and evaluating agencies' progress in developing and implementing environmental justice strategies.
- Carrying out agencies' existing and future data collection efforts and the conduct of analyses that support environmental justice programs.
- Developing, facilitating, and conducting reviews of federal agencies' scientific research and demonstration projects.
- Improving how EPA communicates with other agencies, state and local governments, tribes, environmental justice leaders, interest groups, and the public.
- Advising on EPA's administration of grant programs relating to environmental justice assistance.
- Conducting environmental justice outreach activities.

The advisory committee shall be composed of 25 members appointed by the President, with representatives from the community, industry, academia, state and local governments, federally recognized tribes, indigenous groups, and nongovernmental and environmental groups.

The bill does, however, go beyond the Executive Order in a few instances:

- It expands reporting and public participation requirements by mandating that each analysis of the environmental effects of federal actions required by the National Environmental Policy

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<sup>51</sup> This bill was introduced in October 2002 as H.R. 5637, 107th Cong. (2002) and reintroduced on May 21, 2003, as H.R. 2200, 108th Cong. (2003).

<sup>52</sup> Environmental Justice Act of 2003, H.R. 2200, 108th Cong. § 6(b)(1)–(7) (2003).

Act (NEPA) include an analysis of the effects of those actions on human health, as well as any economic and social effects.<sup>53</sup>

- It requires agencies to provide opportunities for affected communities in the NEPA process.<sup>54</sup>
- It abolishes the current Interagency Working Group and constitutes an Interagency Working Group on Environmental Justice that would provide guidance to federal agencies on criteria for identifying disproportionately high and adverse health and environmental effects on minority and low-income communities, and Native American populations; assist in coordinating research being conducted by various federal agencies; assist in coordinating data collection, maintenance, and analyses; examine existing data and studies on environmental justice; develop interagency model projects on environmental justice; hold public meetings and actively seek meaningful public participation; and coordinate environmental justice efforts involving federally recognized tribes.<sup>55</sup>
- It authorizes the new working group to receive and, in appropriate instances, conduct inquiries into complaints regarding environmental justice and implementation of the act by the federal agencies.<sup>56</sup>

It is worth noting that the Executive Order does not have a provision dealing with investigating “complaints.” It is, therefore, unclear, what is contemplated by this new responsibility concerning complaints and what power the working group would have to remedy environmental justice complaints.

Finally, it appears that inadequate funding prevents many agencies from meeting their environmental justice obligations. The agencies have few resources committed full time to environmental justice issues.<sup>57</sup> Low staffing levels could indicate a lack of funding for environmental justice issues, or equally important, the failure of the agencies to make these issues a priority. At the Department of the Interior, for example, environmental justice is viewed by most components as “collateral duty” with little full-time staff and no devoted funding for environmental justice activities.<sup>58</sup>

## Conclusion

This report reviews how well four federal agencies are implementing Executive Order 12,898 and their Title VI responsibilities in the context of environmental decision-making. Generally, agencies can successfully implement the order through three steps: first, ensuring that their programs which substantially affect human health and the environment do not discriminate and that their state and local funding recipients do not discriminate; second, providing minority and low-income communities access to information on, and an opportunity for public participation in, matters relating to hu-

<sup>53</sup> *Id.* § 3(c)(1).

<sup>54</sup> *Id.* § 3(c)(3).

<sup>55</sup> *Id.* § 4(b)(1)–(8).

<sup>56</sup> *Id.* § 4(c)(2).

<sup>57</sup> For example, while every region of EPA has its own office of environmental justice or a primary contact for environmental justice activities, at HUD, one person spends approximately 20 percent of his time on environmental justice policy, training, and public affairs in the Office of Community Viability, part of the Community Planning and Development Office. Binder et al., *A Survey of Federal Agency Response to President Clinton’s Executive Order No. 12898*, p. 11139. In addition, as part of the NEPA process, HUD has approximately 20 staff members responsible for completing the environmental reviews, who devote about 5 percent of their time on the environmental justice concerns of the projects under review. In the Office of Fair Housing and Equal Opportunity, five to six staff members spend 20 percent of their time on environmental justice working on complaints brought under Title VI or VIII. *Ibid.*

<sup>58</sup> U.S. Department of the Interior, Responses to the Commission’s Interrogatory Questions 7 and 8, May 2002.

man health or the environment, regulations, and enforcement; and third, collecting and analyzing research and data on the environmental, human health, economic, and social effects of their actions on minority and low-income communities.<sup>59</sup>

This report, therefore, examines to what extent EPA and the Departments of Interior, Housing and Urban Development, and Transportation have addressed these three goals through:

- Using Title VI nondiscrimination regulations to enforce the principles of environmental justice.
- Creating opportunities for meaningful public participation in the environmental decision-making process and the use of alternative dispute resolution.
- Conducting scientific research and collecting data on human health impacts and the distribution of environmental risks and hazards, and disseminating scientific information and data to the public and affected communities.
- Creating evaluation criteria, establishing accountability and performance measures for environmental justice programs, and providing top-down agency leadership on environmental justice issues.

Chapter 2 defines environmental justice and identifies key issues such as the role of race and poverty in environmental decision-making, provides examples of several minority and poor communities adversely affected by environmental decision-making, and reviews the health issues related to the disproportionate placement of facilities in these communities. Chapter 2 also discusses whether environmental justice inhibits economic opportunity in communities of color and low-income communities, and the impact of recent changes in the Superfund program that may hinder environmental cleanup efforts in these communities.

Chapter 3 covers the use of Title VI nondiscrimination regulations as an environmental justice tool and how agencies can improve their Title VI programs. Chapter 4 gives an overview of the impact of *Alexander v. Sandoval*, a Supreme Court decision prohibiting private rights of action for disparate impact claims under Title VI. The decision has already placed greater importance on federal administrative Title VI regulations and enforcement, as well as brought more attention to the role state and local authorities play in environmental decision-making and what steps can be taken at these levels to bring about environmental fairness.

Chapter 5 assesses public participation in environmental decision-making and the use of alternative dispute resolution to resolve conflicts and complaints. Chapter 6 discusses the need for federal agencies to collect data and conduct scientific research to more specifically identify human health and environmental risks created by concentrating waste and other facilities in communities of color and low-income communities, and how agencies' technical assistance grants are used by communities and advocates.

Chapter 7 reviews whether there is sufficient agency accountability and evaluation of environmental justice programs and activities. Without accountability and program evaluation, little progress will be made toward achieving environmental justice.

At the end of each chapter are specific recommendations for action. Chapter 8 is a compilation of the recommendations made by the Commission throughout the report.

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<sup>59</sup> Presidential Memorandum Accompanying Executive Order 12,898, 30 WEEKLY COMP. PRES. DOC. 279, 280 (Feb. 11, 1994).

## Chapter 2

# What Is Environmental Justice?

Environmental justice is the “fair treatment of people of all races, income, and cultures with respect to the development, implementation and enforcement of environmental laws, regulations, and policies, and their meaningful involvement in the decision-making processes of the government.”<sup>1</sup> The first environmental justice cases were brought in 1979 in Texas and in 1982 in North Carolina. In 1979, residents of Northwood Manor in East Houston alleged that the decision to place a garbage dump in their neighborhood was racially motivated in violation of their civil rights under § 1983 of the Civil Rights Act.<sup>2</sup> The district court in *Bean v. Southwestern Waste Management Corporation* found that the placement of the dump would irreparably harm the community. The court specifically found that the landfill would “affect the entire nature of the community, its land values, its tax base, its aesthetics, the health and safety of its inhabitants, and the operation of Smiley High School, located only 1700 feet from the site.”<sup>3</sup> Unable to establish intentional discrimination with sufficiently particularized statistical data showing a pattern or practice of placing waste facilities in communities of color, and unable to provide the court sufficiently detailed factual information on the siting decision, the residents were not granted relief and the plant was built.<sup>4</sup> The case, however, launched the use of the courts as a tool for the new movement and highlighted the need for data collection and access to information by communities challenging environmental decisions.

In 1982, African Americans in Afton, Warren County, North Carolina, protested a decision to place a highly toxic polychlorinated biphenyls (PCBs) landfill in their community and captured national attention.<sup>5</sup> Those protesting the landfill argued that the mostly African American community was selected because it was minority and poor. At the time, Afton was 84 percent African American and

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<sup>1</sup> Christine Todd Whitman, administrator, U.S. Environmental Protection Agency, memorandum to Assistant Administrators et al., “EPA’s Commitment to Environmental Justice,” Aug. 9, 2001. See also Linda J. Fisher, deputy administrator, U.S. Environmental Protection Agency, testimony before the U.S. Commission on Civil Rights, hearing, Washington, DC, Feb. 8, 2002, official transcript, p. 46 (hereafter cited as February Hearing Transcript) (environmental justice goes beyond Title VI and includes how agencies interact with all communities to ensure that no community becomes an “environmental dumping ground” due to lack of resources to defend its environmental health); Barry Hill, director, Office of Environmental Justice, U.S. Environmental Protection Agency, Testimony, February Hearing Transcript, pp. 54–55 (involves ensuring the fair treatment of all people, including minority populations and low-income populations); National Environmental Policy Commission, *Report to the Congressional Black Caucus and Congressional Black Caucus Foundation Environmental Braintrust*, Sept. 28, 2001, p. 11; Louisiana Advisory Committee to the U.S. Commission on Civil Rights, *The Battle for Environmental Justice in Louisiana: Government, Industry, and the People*, September 1993, pp. 1, 3 (environmental justice is the “attainment of environmental rights for all and the end of environmental racism” or racial discrimination in environmental policy-making and unequal enforcement of environmental laws and regulations).

<sup>2</sup> See *Bean v. Southwestern Waste Mgmt. Corp.*, 482 F. Supp. 673 (S.D. Tex. 1979), *aff’d*, 782 F.2d 1038 (5th Cir. 1986).

<sup>3</sup> 482 F. Supp. at 677.

<sup>4</sup> *Id.* The court noted that census tract information, historical information on the placement of facilities, the number of permits granted and denied, the reasons for granting or denying permits, demographics shifts, and other information are important in establishing environmental justice violations. Much of this information was unavailable to the residents in *Bean*. *Id.* at 680.

<sup>5</sup> Robert D. Bullard, *Dumping in Dixie: Race, Class and Environmental Quality* (Westview Press, 1990), pp. 35–38.

Warren County was one of the poorest in North Carolina.<sup>6</sup> In fact, as reported by Dr. Robert Bullard in *Dumping in Dixie*, the Afton PCB landfill site was not “scientifically the most suitable” site, because the water table was a mere 5–10 feet below the surface and the risk of groundwater contamination was high.<sup>7</sup>

It was during this time in the late 1970s and early 1980s that many low-income communities and communities of color across the country, including Latinos, African Americans, Asian Americans, and Native Americans, concluded that unequal social, economic, and political power relationships made them more vulnerable to health and environmental threats than the society at large. More than 10 years after these early efforts in Texas and North Carolina, race continues to play a significant role in decisions concerning the location of polluting facilities such as landfills and toxic dumps. EPA points to at least “76–80 studies that have consistently said that minorities and low-income communities are disproportionately exposed to environmental harms and risks.”<sup>8</sup> A 1983 General Accounting Office (GAO) study, *Siting Hazardous Waste Landfills and Their Correlation with Racial and Economic Status of Surrounding Communities*, was one of the first studies to focus on the distribution of environmental risks. This study confirmed what environmental justice advocates believed, that racial minorities are burdened with a disproportionate amount of environmental risks. The report also confirmed that income was a factor in siting hazardous and toxic facilities.<sup>9</sup> In other studies exploring the roles of both race and income, race was determined to be the stronger predictor of exposure to environmental hazards.<sup>10</sup>

Four years after the GAO report, a more comprehensive national study by the Commission for Racial Justice of the United Church of Christ, *Toxic Wastes and Race in the United States: A National Report on the Racial and Socioeconomic Characteristics of Communities with Hazardous Waste Sites*, confirmed that race and ethnicity were the most significant factors in deciding where to place waste facilities, landfills, and other environmental hazards.<sup>11</sup> In 1994, the follow-up report, *Toxic Wastes and Race Revisited*, found that the disproportionate environmental burden placed on communities of color had, in fact, grown since the 1987 report. The 1994 report found that “people of color were 47 percent more likely than whites to live near a commercial hazardous waste facility” and that between 1980 and 1993 the concentration of people of color living in areas with commercial hazardous waste facilities increased 6 percent, from 25 to 31 percent.<sup>12</sup> A study by Evan Ringquist, *Equity and Distribution of Environmental Risk: The Case of TRI Facilities*, concluded that racial bias exists in the dis-

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<sup>6</sup> *Ibid.*, p. 36.

<sup>7</sup> *Ibid.*, pp. 36–37 (citing Ken Geiser and Gerry Waneck, “PCBs and Warren County,” *Science for the People*, July/August 1983, p. 15).

<sup>8</sup> Barry Hill, director, Office of Environmental Justice, U.S. Environmental Protection Agency, Testimony, February Hearing Transcript, p. 48.

<sup>9</sup> U.S. General Accounting Office, *Siting Hazardous Waste Landfills and Their Correlation with Racial and Economic Status of Surrounding Communities*, June 1983.

<sup>10</sup> Luke Cole, director, California Rural Legal Assistance Foundation, Testimony, February Hearing Transcript, p. 16; Luke W. Cole and Shelia R. Foster, *From the Ground Up: Environmental Racism and the Rise of the Environmental Justice Movement* (New York University Press, 2001), pp. 54–55, 167–83 (hereafter cited as Cole and Foster, *From the Ground Up*).

<sup>11</sup> United Church of Christ, Commission for Racial Justice, *Toxic Wastes and Race in the United States: A National Report on the Racial and Socioeconomic Characteristics of Communities with Hazardous Waste Sites*, 1987, pp. xiii, xiv, 13–21.

<sup>12</sup> Benjamin A. Goldman and Laura Fitton, *Toxic Wastes and Race Revisited: An Update of the 1987 Report on the Racial and Socioeconomic Characteristics of Communities with Hazardous Waste Sites* (Center for Policy Alternatives and the United Church of Christ, Commission for Racial Justice, 1994), pp. 2–4.

tribution and density of Toxic Release Inventory (TRI) facilities,<sup>13</sup> with African Americans and Hispanics exposed to the highest levels of risk.<sup>14</sup> In 2001, Manuel Pastor, Jr., and Jim Sadd concluded that “the bulk of the research does seem to point to disproportionate exposure to hazards in minority communities.”<sup>15</sup>

Housing segregation, the influence of race in local zoning practices, and infrastructure development all contribute to this disparity. Federal agencies, notably the Federal Housing Authority and the Veterans Administration, had practices that supported or fostered housing segregation. These practices included subsidizing suburban growth at the expense of urban areas, supporting racial covenants by denying African Americans mortgage insurance in integrated communities, providing mortgage insurance in segregated residential areas, and redlining.<sup>16</sup>

Zoning practices and decisions that, on their face are race neutral, routinely allow communities of color and poor communities to be zoned “industrial” and significantly contribute to the disproportionate placement of hazardous and toxic industries in these neighborhoods.<sup>17</sup> It has been established that areas zoned industrial have greater environmental burdens and health risks than areas only zoned for residential use.<sup>18</sup> Therefore, zoning practices allowing heavy industry in minority and low-income communities contribute to the overall decline of these communities. As the presence of industry increases, property values decrease, community members are slowly displaced, and these areas become increasingly undesirable.<sup>19</sup> The spiraling decline in property values makes locating industry in these areas increasingly attractive. The remaining residents, usually the poor and people of color, have no other housing alternatives and little political clout. Without political influence, these communities are not able to prevent siting and permitting decisions that have adverse environmental

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<sup>13</sup> Under § 313 of the Emergency Planning and Community Right-to-Know Act of 1986, industrial facilities in specific sectors are required to report their environmental releases and waste management practices annually to EPA. 42 U.S.C. § 11023 (1994). Beginning in 1988, the Toxics Release Inventory (TRI) collected information on releases of nearly 650 chemicals and chemical categories from industries, including manufacturing, metal and coal mining, electric utilities, and commercial hazardous waste treatment, among others. U.S. Environmental Protection Agency, “Toxics Release Inventory (TRI) Community Right to Know,” fact sheet, <[http://www.epa.gov/tri/tri\\_program\\_fact\\_sheet.htm](http://www.epa.gov/tri/tri_program_fact_sheet.htm)> (last accessed June 29, 2003).

<sup>14</sup> Evan J. Ringquist, “Equity and the Distribution of Environmental Risk: The Case of TRI Facilities,” *Social Science Quarterly*, vol. 78, no. 4, December 1997, pp. 811–29. See also J. Tom Boer et al., “Is There Environmental Racism? The Demographics of Hazardous Waste in Los Angeles County,” *Social Science Quarterly*, vol. 78, no. 4, December 1997, pp. 793–810.

<sup>15</sup> Manuel Pastor, Jr., Jim Sadd, and John Hipp, “Which Came First? Toxic Facilities, Minority Move-In, and Environmental Justice,” *Journal of Urban Affairs*, vol. 23, no. 1, 2001, p. 3 (hereafter cited as Pastor et al., “Which Came First?”). See also Daniel R. Faber and Eric J. Krieg, *Unequal Exposure to Ecological Hazards: Environmental Injustices in the Commonwealth of Massachusetts* (the Philanthropy and Environmental Justice Research Project, Northeastern University, Jan. 9, 2001).

<sup>16</sup> National Academy of Public Administration, *Addressing Community Concerns: How Environmental Justice Relates to Land Use Planning and Zoning*, 2003, p. 26 (hereafter cited as NAPA, *Addressing Community Concerns*).

<sup>17</sup> Cole and Foster, *From the Ground Up*, pp. 69–73; Dr. Robert Bullard, director, Environmental Justice Resource Center, testimony before the U.S. Commission on Civil Rights, hearing, Washington, DC, Jan. 11, 2002, official transcript, pp. 43–44 (hereafter cited as January Hearing Transcript) (siting decisions are not race neutral).

<sup>18</sup> Juliana Maantay, “Zoning Law, Health, and Environmental Justice: What’s the Connection?” *The Journal of Law and Ethics*, vol. 30, no. 4, Winter 2002, p. 573 (hereafter cited as Maantay, “Zoning Law, Health, and Environmental Justice”).

<sup>19</sup> *Ibid.*, pp. 577–78.

and health consequences. In short, these communities are not able to mount the “NIMBY” or “not in my backyard” defense.<sup>20</sup>

A July 2003 report by the National Academy of Public Administration, *Addressing Community Concerns: How Environmental Justice Relates to Land Use Planning and Zoning*, citing the work of Juliana Maantay, reported that historical and current local land-use and zoning policies are “a root enabling cause of disproportionate burdens [and] environmental injustice.”<sup>21</sup> The NAPA report also concurred with the conclusion put forth by Yale Rabin, that zoning and land-use decisions are often based on considerations of race and are powerful legal weapons “deployed in the cause of racism”<sup>22</sup> by allowing certain undesirables to be excluded from areas.<sup>23</sup> As a result, immigrant groups, the poor, African Americans and other people of color, and industry are often excluded from white and affluent communities.<sup>24</sup> Local zoning and land-use decisions, however, need not only be a tool for racism or the creation of disparate impact. An awareness and careful consideration of the distributional issues, or disparities in the distribution of environmental benefits and burdens, during the local zoning and land-use process would help address the disparate environmental and health impact on minority and low-income communities. Including representatives from affected communities on local planning and zoning boards and commissions may facilitate this awareness. NAPA reported that the most recent survey on the composition of planning commissions found that:

- Most planning and zoning board members are men.
- More than nine out of 10 members are white.
- Most members are 40 years old or older.
- Boards contain mostly professionals and few, if any, nonprofessional or community representatives.<sup>25</sup>

While zoning and planning are state and local concerns, federal agencies could assist in reducing the disparities resulting from zoning and land-use policies by requiring local land-use authorities to incorporate and implement the concept of environmental justice in the zoning and land-use policies as a prerequisite for receiving federal funding. NAPA supports this approach.<sup>26</sup>

While many point to racial segregation in housing and race-conscious land-use and zoning policies as factors contributing to disparities in the distribution of environmental burdens, others explain the disparities by examining market forces. A “market dynamics” interpretation seeks to account for the disproportionate number of hazardous and toxic facilities in communities of color and poor commu-

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<sup>20</sup> See, e.g., Dr. Robert Bullard, director, Environmental Justice Resource Center, “Testimony of Robert D. Bullard, Ph.D.,” written statement delivered to the U.S. Commission on Civil Rights, Washington, DC, Jan. 11, 2002, pp. 3–4 (hereafter cited as Bullard, written statement).

<sup>21</sup> Maantay, “Zoning Law, Health, and Environmental Justice,” p. 572; NAPA, *Addressing Community Concerns*, p. 25.

<sup>22</sup> Charles M. Haar and Jerold S. Kayden, eds., *Zoning and the American Dream: Promises Still to Keep*, “Expulsive Zoning: The Inequitable Legacy of Euclid,” by Yale Rabin (Chicago: APA Press, 1999), p. 107 (hereafter cited as Rabin, “Expulsive Zoning”); NAPA, *Addressing Community Concerns*, p. 25.

<sup>23</sup> Rabin, “Expulsive Zoning,” pp. 106–08. Zoning laws are ideally suited for racial segregation and black disenfranchisement. “Expulsive zoning” occurs when areas in residential use are zoned to allow industrial or commercial uses to encourage the displacement of the existing residents. *Ibid.*, pp. 107–08. NAPA, *Addressing Community Concerns*, p. 27.

<sup>24</sup> NAPA, *Addressing Community Concerns*, pp. 27–30.

<sup>25</sup> *Ibid.*, p. 50.

<sup>26</sup> *Ibid.*, p. 52; Michael H. Gerrard, Esq., Arnold & Porter, Testimony, January Hearing Transcript, p. 73 (state laws lack environmental justice requirements).

nities by establishing that these communities developed after the hazardous and toxic industrial facilities were established.<sup>27</sup> According to the theory, these populations intentionally decide to live near hazardous and toxic sites as a result of market forces, specifically, cheap housing and the possibility of jobs.<sup>28</sup> A study by Manuel Pastor on disproportionate siting versus “minority move-in” in Los Angeles County, however, linked siting dates with addresses of toxic storage and disposal facilities to a database tracking changes in socioeconomic variables from 1970 to 1990. The study determined that areas scheduled to receive these facilities were mostly low-income, minority, and disproportionately composed of renters; after the facilities arrived, there was no significant increase in the minority population.<sup>29</sup> It appears, therefore, that minorities attract toxic storage and disposal facilities, but these facilities do not attract minorities.<sup>30</sup>

Luke Cole and Shelia Foster, in *From the Ground Up: Environmental Racism and the Rise of the Environmental Justice Movement*, found “inconclusive empirical support to date for the ‘market dynamics’ explanation for racial or economic disparities in the distribution of hazardous facilities.”<sup>31</sup> As also noted by Cole, proponents of the market dynamics explanation acknowledge that racial discrimination influences market forces by limiting housing options for African Americans and other people of color through discrimination in renting, redlining, zoning practices, and the discriminatory enforcement of environmental laws and regulations.<sup>32</sup>

## COMMUNITIES AFFECTED BY ENVIRONMENTAL DECISION-MAKING

Whether based solely on race or on market dynamics influenced by race, minority communities in Cuyahoga County, Ohio; Jefferson County, Texas; Chester, Pennsylvania; and Macon, Bibb County, Georgia, live in some of the most polluted communities in the United States.<sup>33</sup> In Ohio, for example, the top four polluters in Cleveland are all located in or adjacent to minority communities.<sup>34</sup> Cleveland Laminating Corporation is located in a predominately minority community in Cuyahoga County; within one mile of the plant 90 percent of the population is minority. This plant is the third worst air polluter in the county and is in the top 10 percent in the country for releasing carcinogens into the air.<sup>35</sup>

Jefferson County, Texas, ranks in the top 10 percent for the worst air quality in the country.<sup>36</sup> The 240,000 people in Jefferson County face a cancer risk more than 100 times the goal set by the Clean Air Act.<sup>37</sup> Seventy-two percent of the air cancer risk is from mobile sources such as cars and other

<sup>27</sup> Cole and Foster, *From the Ground Up*, pp. 60–61.

<sup>28</sup> *Ibid.*

<sup>29</sup> Pastor et al., “Which Came First?” pp. 1–21.

<sup>30</sup> *Ibid.*, p. 18.

<sup>31</sup> Cole and Foster, *From the Ground Up*, pp. 60–61. See Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?* 103 *YALE L.J.* 1383, 1389 (1994).

<sup>32</sup> Cole and Foster, *From the Ground Up*, pp. 61–63.

<sup>33</sup> Deanne M. Ottaviano et al., “Environmental Justice: New Clean Air Act Regulations & The Anticipated Impact on Minority Communities” (paper delivered at the Lawyers’ Committee for Civil Rights Under Law Conference, Washington, DC, June 2003), pp. 6–19 (hereafter cited as Ottaviano et al., “Environmental Justice: New Clean Air Act Regulations”).

<sup>34</sup> *Ibid.*, p. 7.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*, p. 9.

<sup>37</sup> Scorecard, <<http://www.scorecard.org>> (last accessed June 23, 2003).

vehicles, and 24 percent is from major industrial facilities such as chemical plants, steel mills, oil refineries, power plants, and hazardous waste incinerators.<sup>38</sup>

In 2000, based on toxic chemical releases from manufacturing facilities, this county ranked among the “dirtiest/worst 10% of all counties in the U.S. in terms of air releases of recognized reproductive toxicants.”<sup>39</sup> Chemicals with “reproductive toxicity” are chemicals resulting in adverse effects on the male or female reproductive systems. Reproductive toxicity may include changes in sexual behavior, decreased fertility, or increased miscarriages. Potential sources of land contamination in the county include three Superfund sites, and in 2000, this county ranked among the “dirtiest/worst 20%” of all counties in the United States in underground injection.<sup>40</sup> Underground injection is a method of land disposal in which liquid wastes are injected into known geological formations. The two major cities in Jefferson County, Beaumont and Port Arthur, are predominately minority and suffer most from these hazardous exposures.<sup>41</sup> Beaumont, with a population of slightly more than 113,000, is 45.8 percent African American and 7.9 percent Hispanic; while Port Arthur, with 57,755 residents, is 43.7 percent African American and 17.5 percent Hispanic.<sup>42</sup> Clark Refining and Marketing, Inc., in Port Arthur, and Mobile Oil Corporation, in Beaumont, each ranked in the worst 10 percent in the country for criteria air pollutant emissions in 1999.<sup>43</sup> In addition to these two facilities, 19 other chemical plants and refineries and related industries operate in just these two cities. In the two mostly white communities in the same area of Jefferson County, Port Neches and Winnie, there are only three facilities.<sup>44</sup>

Chester, in Delaware County, Pennsylvania, is home to approximately 36,000 residents and one of the largest collections of waste facilities in the country.<sup>45</sup> Seventy-five percent of Chester residents are African American as are 95 percent of residents in neighborhoods closest to the facilities.<sup>46</sup> The poverty rate is 27.2 percent, three times the national average.<sup>47</sup>

Bibb County, Georgia, has a population of 153,887; 47.3 percent of the population is African American, 50.1 percent white, 1.1 percent Asian, 1.3 percent Hispanic, and 0.2 percent Native American.<sup>48</sup> The city of Macon in Bibb County, however, has a population that is 62 percent African American. Only 32 percent of the city’s residents have a high school diploma or GED, and 25 percent live be-

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<sup>38</sup> Ibid.

<sup>39</sup> Ibid.

<sup>40</sup> Ibid.

<sup>41</sup> Ottaviano et al., “Environmental Justice: New Clean Air Act Regulations,” p. 8.

<sup>42</sup> U.S. Census Bureau, 2000 Census Data, <<http://factfinder.census.gov>> (last accessed June 25, 2003).

<sup>43</sup> Scorecard, <<http://www.scorecard.org>> (last accessed June 30, 2003). See U.S. Environmental Protection Agency, “What Are the Six Common Air Pollutants?” <<http://www.epa.gov/air/urbanair/6poll.html>> (last accessed June 30, 2003) (six criteria air pollutants: carbon monoxide, lead, nitrogen dioxide, ozone, particulate matter, and sulfur dioxide; EPA uses National Ambient Air Quality Standards for each criteria pollutant that define maximum legal allowable levels for each pollutant); U.S. Environmental Protection Agency, Office of Research and Development, “Draft Report on the Environment Technical Documents,” EPA 600-R-03-050, June 2003, Appendix D, p. D-4.

<sup>44</sup> Port Neches is 94.8 percent white, 0.9 percent African American, and 1.6 percent Asian; Winnie is 87.3 percent white and 5.3 percent African American. U.S. Census Bureau, 2002 Census Data, <<http://www.factfinder.census.gov>> (last accessed June 30, 2003). Huntsman Corporation, Duke Energy, and Ameripol Synpol Corporation operate in Port Neches and Winnie. See <<http://www.scorecard.org>> (last accessed June 30, 2003).

<sup>45</sup> U.S. Census Bureau, 2002 Census Data, <<http://factfinder.census.gov>> (last accessed June 25, 2003); see Cole and Foster, *From the Ground Up*, pp. 34–35.

<sup>46</sup> Cole and Foster, *From the Ground Up*, pp. 34–35.

<sup>47</sup> U.S. Census Bureau, <<http://factfinder.census.gov>> (last accessed June 25, 2003).

<sup>48</sup> U.S. Census Bureau, <<http://quickfacts.census.gov>> (last accessed June 30, 2003) (based on 2000 census data).

low the poverty level.<sup>49</sup> Air quality problems are related to the operation of two Georgia Power Company coal-fired power plants, Plant Scherer and Plant Bowen, near Macon. Another plant, Plant Arkwright, in Macon, contributes to the poor air quality. In 2000, it ranked in the worst 20 percent in the country for total environmental releases of major chemicals and wastes.<sup>50</sup> In 1999, the Arkwright plant was among the worst 10 percent in the country for nitrogen oxide emissions and in the worst 20 percent for sulfur dioxide emissions.<sup>51</sup>

Also in Macon are Riverwood International and Brown & Williamson Tobacco. A 1999 criteria air pollutant emissions report of Riverwood International found that the plant was among the worst 10 percent in the country for carbon monoxide, nitrogen oxides, particulate matter, and volatile organic compounds.<sup>52</sup> Volatile organic compounds are defined as chemicals that participate in the formation of ground ozone;<sup>53</sup> ozone is a respiratory toxicant and a significant contributor to smog.<sup>54</sup> The 2000 rankings of major chemical releases or wastes placed Riverwood International in the worst 10 percent in the country in total environmental releases and in air releases of recognized carcinogens.

A 1999 criteria air pollutant emissions report ranked Brown & Williamson better than Riverwood International and Plant Arkwright in air pollutant emissions in Macon for the same period. Brown & Williamson, however, did have higher than average carbon monoxide, nitrogen oxide, and sulfur dioxide emissions.<sup>55</sup> The 2000 rankings for major chemical releases or waste at this facility placed it in the worst 20 percent in the country for total environmental releases and air releases of recognized developmental toxicants.<sup>56</sup>

There are other examples. In 2002, it was disclosed that for nearly 40 years, in the rural, poor, and minority community of Anniston, Alabama, the Monsanto Corporation, while producing the now-banned industrial coolants known as PCBs at a local factory, routinely discharged toxic waste into a west Anniston creek and dumped millions of pounds of PCBs into open-pit landfills.<sup>57</sup> EPA and the World Health Organization classify PCBs as “probable carcinogens.” It was reported that “thousands of pages of Monsanto documents—many emblazoned with warnings such as ‘Confidential: Read and Destroy’”—proved that the company intentionally concealed what it was doing and what it knew about the illegal dumping.<sup>58</sup>

Increasingly throughout the nation, low-income residents and people of color are disproportionately exposed to a variety of environmental toxins in their respective neighborhoods, schools, homes, or

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<sup>49</sup> U.S. Census Bureau, <<http://factfinder.census.gov>> (last accessed June 29, 2003) (poverty percentages based on 1999 income for all ages).

<sup>50</sup> Scorecard, <<http://scorecard.org>> (last accessed June 29, 2003).

<sup>51</sup> Ibid.

<sup>52</sup> Ibid.

<sup>53</sup> U.S. Environmental Protection Agency, *Draft Report on the Environment 2003*, pp. 1-5, D-15, <<http://www.epa.gov/indicators>> (last accessed July 12, 2003) (ozone formed when VOCs and other chemical compounds react to heat and sunlight).

<sup>54</sup> Ibid., pp. 1-8 (ozone associated with respiratory-related problems such as asthma). Ozone is a “very reactive form of oxygen” that forms through a chemical reaction in the atmosphere. In the lower atmosphere, ozone is considered an air pollutant. Ibid., p. D-10.

<sup>55</sup> Scorecard, <<http://scorecard.org>> (last accessed June 29, 2003).

<sup>56</sup> Ibid.

<sup>57</sup> Michael Grunwald, “Monsanto Hid Decades of Pollution: PCBs Drenched Alabama Town, But No One Was Ever Told,” *Washington Post*, Jan. 1, 2002.

<sup>58</sup> Ibid.

workplaces.<sup>59</sup> For example, a 1995 Washington State health survey indicated that in South Seattle, communities of color and those neighborhoods with a significant number of low-income residents house more industrial and waste facilities than other parts of the state.<sup>60</sup> The report found that in several South Seattle neighborhoods, industrial facilities are next door to homes. In South Park, one Seattle neighborhood, “more than 40 industrial and waste facilities are situated within a one to five-mile radius of residential homes.”<sup>61</sup>

Native American reservations have been consistently exposed to hazardous chemicals. Reservations have also become prime locations for solid waste landfills, military weapons testing, and nuclear storage facilities. In fact, “more than 35 Indian reservations were targeted for landfills, incinerators and radioactive waste facilities in the early 1990s.”<sup>62</sup>

This may explain why Native Americans experience some of the worst pollution in the United States. Exposure to the waste facilities, landfills, lead-based paint, and other pollutants has an adverse impact on human health. Communities housing these facilities report increased rates of asthma, cancer, delayed cognitive development, and other illnesses.

## ADVERSE HEALTH IMPACT

Due in significant part to substandard air quality, asthma is emerging as an epidemic among people of color in the United States. A Centers for Disease Control report on asthma rates in 2000–2001 found that African Americans were 4 percent more likely to have been diagnosed with asthma than whites and that African Americans have an asthma death rate 200 percent higher than whites.<sup>63</sup> The CDC reports in its *National Asthma Control Program: Improving Quality of Life and Reducing Costs 2003* that “rates of severe asthma continue to disproportionately affect poor, minority, inner-city populations.”<sup>64</sup>

Lead-based paint exposure and poisoning is a particular problem for poor children and families.<sup>65</sup> For example, 35 percent of families with incomes of less than \$30,000 live in housing with lead haz-

<sup>59</sup> See generally Gary Polakovic, “Poor and Minority Enclaves Are Cutting Through the Haze,” *Los Angeles Times*, Dec. 11, 2001, p. 2 (hereafter cited as Polakovic, “Poor and Minority Enclaves”).

<sup>60</sup> Larry Lange, “Environmental Justice Sought As Part of State’s Pollution Rules,” *Seattle Post-Intelligencer*, June 14, 2001, p. B-5.

<sup>61</sup> Ibid. See also Denis Cuff, “Pollution Suspected in Ailments,” *Contra Costa Times*, Dec. 3, 2001, p. A-3 (stating that “at least one child has asthma or allergies in half of the families in the Bayo Vista housing project south of the Phillips 66 refinery recently acquired from Tosco Refining, according to the survey overseen by Communities for a Better Environment, a pollution watchdog group”). An October 2001 study by the University of California at Los Angeles found that Latino communities are primarily affected by toxic industrial facilities, since they are three times more likely to live near a toxic industrial facility. In fact, six in 10 toxic industrial facilities are surrounded by neighborhoods with high minority populations. Polakovic, “Poor and Minority Enclaves,” p. 1.

<sup>62</sup> Dr. Robert Bullard, “It’s Not Just Pollution,” *Our Planet*, vol. 12, no. 2, 2001.

<sup>63</sup> Centers for Disease Control and Prevention, “Asthma Prevalence, Health Care Use and Mortality 2000–2001,” <<http://www.cdc.gov/nchs/products/pubs/pubd/hestats/asthma/asthma.htm>> (last accessed July 16, 2003).

<sup>64</sup> Centers for Disease Control and Prevention, “National Asthma Control Program: Improving Quality of Life and Reducing Costs 2003,” June 2003, p. 2, <<http://www.cdc.gov/nceh/airpollution/asthma/ataglance/asthmaAAG.pdf>> (last accessed July 16, 2003).

<sup>65</sup> Institute of Medicine, *Improving Health in the Community: Role of Performance Monitoring* (National Academies Press, 1997), pp. 242–44.

ards.<sup>66</sup> Compare this figure to that for families with incomes above \$30,000; only 19 percent of these families live in housing with lead hazards.<sup>67</sup> According to the CDC:

Childhood lead poisoning remains a major preventable environmental health problem in the United States. About half a million children younger than 6 years of age in the United States have blood lead levels of at least 10 micrograms per deciliter ( $\mu\text{g}/\text{dL}$ ), a level high enough to adversely affect their intelligence, behavior and development. Minority and poor children are disproportionately affected.<sup>68</sup>

African American children suffer from lead poisoning at rates twice that of white children at every income level, but for low-income African American children the rate is 28.4 percent compared with 9.8 percent for low-income whites.<sup>69</sup> According to researchers, this disparity is directly related to African Americans' disproportionately residing in older homes because of racial segregation in housing.<sup>70</sup>

The lead abatement programs of EPA and HUD are central to combating lead poisoning, which is often found in older housing and low-income housing units. Housing built before 1960 is five to eight times more likely to have lead hazards than housing built between 1960 and 1978.<sup>71</sup> Lead is also found in soil and is related to the deterioration of exterior paints containing lead.<sup>72</sup> The economic and age factors discussed in relation to lead-based paint prevalence in housing also hold true for bare soil lead hazards.<sup>73</sup> The CDC supports consideration of health issues in decisions about housing and the environment.<sup>74</sup> Such considerations are imperative if severe adverse health issues related to excessive lead-based paint exposure are to be eliminated. As noted previously, reduced intelligence, impaired hearing, reduced stature, and many other adverse health effects are linked to lead exposure.<sup>75</sup>

Many communities are exposed to multiple pollutants and toxins.<sup>76</sup> Federal agencies, however, have not adopted formal cumulative impact standards to assess the risk to human health from exposures to multiple chemicals from multiple sources, even though Executive Order 12,898 requires consideration of multiple and cumulative exposures.<sup>77</sup> Additionally, there is no presumption that multiple ex-

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<sup>66</sup> David E. Jacobs, Dr. Robert P. Clickner, et al., "The Prevalence of Lead-Based Paint Hazards in U.S. Housing," *Environmental Health Perspectives*, vol. 110, no. 10, October 2002, pp. A599–A606 (hereafter cited as Jacobs et al., "Lead-Based Paint Hazards in U.S. Housing").

<sup>67</sup> *Ibid.*, p. A599.

<sup>68</sup> Centers for Disease Control and Prevention, "CDC Lead Fact Sheet," <<http://www.cdc.gov/nceh/lead/about/about.htm>> (last accessed July 16, 2003) (hereafter cited as CDC, "Lead Fact Sheet").

<sup>69</sup> Bullard, written statement, p. 2.

<sup>70</sup> H. Patricia Hynes, professor, Department of Environmental Health, Boston University School of Public Health, Testimony, January Hearing Transcript, pp. 77–79 (housing segregation caused African Americans to live in older housing, which increased lead exposure); Dr. Robert P. Clickner et al., *National Survey of Lead and Allergens in Housing: Final Report, Volume I: Analysis of Lead Hazards* (U.S. Department of Housing and Urban Development, Apr. 18, 2001), p. 4-1 (older housing more likely to have lead-based paint); Dr. Robert Bullard, director, Environmental Justice Resource Center, Testimony, January Hearing Transcript, pp. 31–32.

<sup>71</sup> Jacobs et al., "Lead-Based Paint Hazards in U.S. Housing," pp. A599, A601–02.

<sup>72</sup> *Ibid.*, p. A603.

<sup>73</sup> *Ibid.*

<sup>74</sup> CDC, "Lead Fact Sheet."

<sup>75</sup> Jacobs et al., "Lead-Based Paint Hazards in U.S. Housing," pp. A599–A606.

<sup>76</sup> Peggy Shepard, executive director, West Harlem Environmental Action, Inc., Testimony, January Hearing Transcript, p. 123.

<sup>77</sup> U.S. Environmental Protection Agency, Response to the Commission's Interrogatory Question 38, April 2002 (hereafter cited as EPA, Response to Interrogatory Question); Federal Actions to Address Environmental Justice in Minority Popula-

posures, in any amount, constitute an adverse health impact.<sup>78</sup> EPA released its *Framework for Cumulative Risk Assessment* in May 2003, calling it a “basis for future guidance” on cumulative risk assessments.<sup>79</sup> The report does not create a protocol for assessing the health impact of multiple exposures. This “piling-on” of exposures should be given great weight when assessing the health risk associated with placing yet another facility in a neighborhood.<sup>80</sup> Also a concern is the absence of a methodology or formal framework for conducting a cumulative risk assessment that considers social, economic, cultural, and behavioral factors that increase health risks.<sup>81</sup>

The Executive Order requires that “human health research, whenever practicable and appropriate, shall include diverse segments of the population in epidemiological and clinical studies, including segments at high risk from environmental hazards, such as minority populations [and] low-income populations.”<sup>82</sup> According to community groups and advocates, agencies have been slow in incorporating these groups into studies and research.<sup>83</sup>

Finally, § 3-302 of the order requires federal agencies to collect, analyze, and maintain data assessing whether programs and activities have resulted in a disproportionately high and adverse health impact on minority and low-income communities.<sup>84</sup> This requires agencies to collect data on environmental and human health risks borne by populations identified by race, national origin, and income.

## ENVIRONMENTAL JUSTICE AND ECONOMIC OPPORTUNITY

Despite the demonstrated health risks, locating waste and toxic facilities in minority and low-income neighborhoods is viewed, by some, as a welcome means of providing these communities economic opportunities.<sup>85</sup> Supporters of the economic benefit theory point to the experiences of Select Steel and Shintech, Inc., as examples. Both facilities relocated from minority communities after environmental justice challenges were raised.

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tions and Low-Income Populations, Exec. Order No. 12,898, 3 C.F.R. 859 (1995), *reprinted as amended in* 42 U.S.C. § 4321 at 73, § 3-301(b) (1994 & Supp. VI 1998) (“whenever practicable and appropriate, shall identify multiple and cumulative exposures”) (hereafter cited as Exec. Order No. 12,898).

<sup>78</sup> EPA, Response to Interrogatory Question 39.

<sup>79</sup> U.S. Environmental Protection Agency, Office of Research and Development, National Center for Environmental Assessment, *Framework for Cumulative Risk Assessment*, EPA/630/P-02/001F, May 2003, p. xvii (hereafter cited as EPA, *Framework for Cumulative Risk Assessment*) (defines cumulative risks assessment as “an analysis, characterization, and possible quantification of the combined risks to human health or the environment from multiple agents or stressors”).

<sup>80</sup> Richard Lazarus, “Environmental Justice and Law: An Environmental Law Professor’s Perspective,” written statement delivered to the U.S. Commission on Civil Rights, Feb. 8, 2002, Washington, DC, p. 17.

<sup>81</sup> EPA, *Framework for Cumulative Risk Assessment*, pp. 67–69. See National Academy of Public Administration, *Environmental Justice in EPA Permitting: Reducing Pollution in High-Risk Communities Is Integral to Agency’s Mission*, December 2001, p. 46 (hereafter cited as NAPA, *Environmental Justice in EPA Permitting*); Peggy Shepard, executive director, West Harlem Environmental Action, Inc., Testimony, January Hearing Transcript, p. 123 (environmental justice communities lack adequate information on environmental risks).

<sup>82</sup> Exec. Order No. 12,898, § 3-301(a).

<sup>83</sup> Peggy Shepard, executive director, West Harlem Environmental Action, Inc., Testimony, January Hearing Transcript, p. 123 (environmental justice communities lack adequate information on environmental risks).

<sup>84</sup> Exec. Order No. 12,898, § 3-302.

<sup>85</sup> John K. Carlisle, *Economic Opportunity and Social Issues Trump Environment as Top Concerns for Poor and Minorities* (National Center for Public Policy Research, September 2000); Edmund Peterson, *What Earth Day Means to Minority Citizens* (National Center for Public Policy Research, April 1998).

Select Steel promised to provide jobs in the economically disadvantaged community of Genesee County, Michigan. Community members, however, were concerned about the adverse health effects created by the Select Steel facility. Their protests, and challenges to the granting of a permit to Select Steel, forced the facility to relocate.

Similar events occurred in Louisiana involving Shintech's proposal to locate a plastics plant near Convent. Company officials estimated that the facility would generate 2,000 temporary construction jobs and 165 permanent jobs in the predominately African American community with high unemployment. Convent is heavily industrial and located in a part of Louisiana referred to as "Cancer Alley," an 80-mile area along the Mississippi River between Baton Rouge and New Orleans with a heavy concentration of oil refineries and petrochemical plants.<sup>86</sup> This area accounts for approximately one-fourth of the country's petrochemical pollution. Because of health concerns, the community protested the presence of the Shintech plant and, eventually, the plant located elsewhere.

Many community and environmental advocates disagree that jobs are being created for the communities exposed to the greatest health risks.<sup>87</sup> Chemical plants and other facilities, they note, do not hire local residents. The St. Lawrence Cement Plant, in South Camden, New Jersey, occupied 12 acres of waterfront property and cost \$50 million to build. However, it created only 16 jobs, eight for the nearby neighborhood.<sup>88</sup> Of the 1,878 permanent jobs created by the 10 chemical plants in St. Gabriel, Iberville Parish, Louisiana, only 6.7 percent, or 164 jobs, went to local residents, and these chemical plants employed only 20 African Americans from the local area.<sup>89</sup>

Additionally, the data reflects that when better paying, skilled jobs are created they often require skills not present in the workers from the immediate community. St. James Parish, where Shintech sought to locate its Convent plant, has an African American population of approximately 10,300 or half of the total population of the Parish.<sup>90</sup> Of this population there were only 17 qualified engineering technicians, 19 science technicians, and 20 qualified computer equipment operators.<sup>91</sup> Chemical plants that located in St. James Parish did not have access to local workers with the skills they required. In the Convent area, only 58 percent of the population completed high school, and the Louisiana Chemical Association reported that the low educational level in the area impeded Shintech from

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<sup>86</sup> See Monique Harden, Earthjustice Legal Defense Fund, Testimony, January Hearing Transcript, pp. 36; Damu Smith, campaigner, Greenpeace Toxic Campaign, Greenpeace, USA, Testimony, January Hearing Transcript, p. 115; Luke Cole, director, California Rural Legal Assistance Foundation, Testimony, February Hearing Transcript, p. 29.

<sup>87</sup> Peggy Shepard, executive director, West Harlem Environmental Action, Inc., Testimony, January Hearing Transcript, p. 149 ("communities that bear the brunt of these facilities are not getting the jobs" and continue to experience high unemployment rates); Luke Cole, director, California Rural Legal Assistance Foundation, Testimony, February Hearing Transcript, pp. 29–31 (a \$280 million incinerator facility created 12 jobs for the community in South Central Los Angeles, mostly janitorial jobs).

<sup>88</sup> Luke Cole, director, California Rural Legal Assistance Foundation, Testimony, February Hearing Transcript, p. 30.

<sup>89</sup> Elizabeth Teel, deputy director, Environmental Law Clinic, Tulane Law School, "Environmental Justice in Louisiana," written statement delivered to the U.S. Commission on Civil Rights, Washington, DC, Jan. 11, 2002, p. 13 (hereafter cited as Teel, written statement).

<sup>90</sup> See U.S. Census Bureau, <<http://factfinder.census.gov>> (last accessed June 25, 2003) (no significant change in African American population based on 2000 census; African Americans equal 10,606, or 50 percent, of the population in St. James Parish).

<sup>91</sup> Teel, written statement, p. 15.

hiring local residents.<sup>92</sup> As a result of the lack of skilled workers, skilled and higher paying jobs are filled by commuters living in the surrounding suburbs.<sup>93</sup>

For the jobs that are created, local residents are not given the right of first refusal or guaranteed access to training to prepare them for available jobs.<sup>94</sup> In fact, EPA lacks legal authority to ensure that members of affected communities qualify for jobs created by a siting or permitting decision, and does not have authority to condition approval of state programs on their hiring practices.<sup>95</sup> EPA does not maintain records of which state regulatory bodies condition permits on specific hiring practices, or the reasons for such conditions if they are imposed by the states.<sup>96</sup>

Communities are concerned that they are being forced to choose between their health and the hope of economic opportunity.<sup>97</sup> According to Dr. Robert Bullard, director of the Environmental Justice Resource Center, these families are not able to relocate to escape the hazards because racism, housing discrimination, and residential segregation “force many people of color to have to live next door to facilities. Racism has made it very difficult for many communities and many residents to exit environmentally threatening conditions.”<sup>98</sup> There appears to be governmental support for policies that would continue to disproportionately place polluting industries in minority and poor communities to stimulate development. According to Michael Steinberg, an attorney with the law firm of Morgan, Lewis & Bockius, and head of the Environmental Practice Group, the emphasis should not be on “distributional issues,” but on using Brownfields redevelopment programs to clean up after facilities have shutdown:

And I would say not only do we not want to prohibit it. We have on the books, and indeed, the President is signing today a new law designed to encourage, to attract, to induce jobs, businesses, and industry into communities that are economically blighted, that are in need of redevelopment. Often environmental cleanup is the first step on the path to redevelopment, but federal and state governments around the country are pushing to bring jobs to these communities. And so to say that we’re going to shut the door because of concerns about distributional issues I think is really totally contrary to that policy.<sup>99</sup>

The Brownfields Revitalization and Environmental Restoration Act of 2001, signed by President George W. Bush in January 2002, is laudable in that it seeks to bring economic development to areas by cleaning up abandoned, contaminated sites and redeveloping them for commercial or residential use.<sup>100</sup> A 1992 evaluation by the *National Law Journal*, however, found glaring inequities in EPA’s

<sup>92</sup> Ibid. Luke Cole, director, California Rural Legal Assistance Foundation, Testimony, February Hearing Transcript, p. 31 (incentives such as tax breaks offered to attract industry undermine the ability of local residents to take advantage of higher paying, skilled jobs that are created because education institutions receive decreased funding to compensate for the tax incentives).

<sup>93</sup> Dr. Robert Bullard, director, Environmental Justice Resource Center, Testimony, January Hearing Transcript, p. 48.

<sup>94</sup> Elizabeth Teel Testimony, deputy director, Environmental Law Clinic, Tulane Law School, Testimony, January Hearing Transcript, p. 118 (people in these communities do not have the skill levels required to work in the facilities).

<sup>95</sup> EPA, Response to Interrogatory Question 43. *See also* Peggy Shepard, executive director, West Harlem Environmental Action, Inc., Testimony, January Hearing Transcript, p. 149 (companies do not ensure local residents employment at neighboring plants or facilities).

<sup>96</sup> EPA, Response to Interrogatory Question 43.

<sup>97</sup> Dr. Robert Bullard, director, Environmental Justice Resource Center, Testimony, January Hearing Transcript, pp. 48–49.

<sup>98</sup> Ibid., p. 49.

<sup>99</sup> Michael Steinberg, counsel, Morgan, Lewis & Bockius, Testimony, January Hearing Transcript, p. 51.

<sup>100</sup> Brownfields Revitalization and Environmental Restoration Act of 2001, Pub. L. No. 107-118, Sec. 1, tit. II, § 211, 115 Stat. 2356, 2360–61 (codified at 42 U.S.C.S. § 9601(39) (2003)).

cleanup enforcement efforts. According to the authors, “there is a racial divide in the way the U.S. government cleans up toxic waste sites and punishes polluters. White communities see faster action, better results and stiffer penalties than communities where blacks, Hispanics, and other minorities live. These conditions exist whether the community is wealthy or poor.”<sup>101</sup> The same problems exist 10 years after this report.

In addition to uneven cleanup, Brownfields programs do not always result in beneficial reuse of properties in minority and poor communities due to lax enforcement of existing regulations, as described in the *National Law Journal* report and noted by environmental advocates.<sup>102</sup> For example, the opening of a Home Depot as part of a Brownfields project in Harlem created 400 part-time jobs.<sup>103</sup> Unfortunately, in addition to the jobs, the community experienced a significant increase in truck traffic and related emissions in an area with one of the highest asthma rates in the country.<sup>104</sup> Some cities with Brownfields redevelopment projects seek to use the reclaimed properties for industrial purposes, potentially increasing pollution and exposure to environmental hazards. Other cities, however, seek mixed-use activity and non-polluting businesses.<sup>105</sup> Community advocates support and encourage “clean” industry such as schools, colleges and universities, and financial institutions.<sup>106</sup>

Even with these concerns about its fair enforcement and implementation, Brownfields redevelopment remains an important and necessary environmental and economic tool as noted by some advocates and in a December 2001 report by the U.S. Conference of Mayors.<sup>107</sup> The report credits Brownfields redevelopment projects with revitalizing neighborhoods, increasing city tax bases, and improving the environment.<sup>108</sup> Brownfields cannot, however, fully address the health and quality of life issues in the environmental justice context. Assisting local governments in identifying and attracting “clean” industry, instead of industrial plants or certain types of commercial activity, would be a significant step toward improving the usefulness of the Brownfields program.<sup>109</sup> Ensuring equal enforcement and implementation of environmental regulations, including Brownfields and Superfund, as well as providing sufficient funding so that the progress of the cleanup efforts is not slowed, would aid in restoration of these communities.

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<sup>101</sup> Marianne Lavelle and Marcia Coyle, “Unequal Protection: The Racial Divide in Environmental Law,” *National Law Journal*, September 1992, pp. S1, S2.

<sup>102</sup> *Ibid.* See also Peggy Shepard, executive director, West Harlem Environmental Action, Inc., Testimony, January Hearing Transcript, p. 125.

<sup>103</sup> Peggy Shepard, executive director, West Harlem Environmental Action, Inc., Testimony, January Hearing Transcript, p. 130.

<sup>104</sup> *Ibid.*

<sup>105</sup> U.S. Conference of Mayors, *Clean Air/Brownfields Report*, December 2001, p. 19 (hereafter cited as Conference of Mayors, *Clean Air/Brownfields Report*). The pilot projects in Baltimore and Dallas were considered “neutral” on the placement of industrial plants in redeveloped areas; however, these cities generally prefer “mixed-use activity and non-polluting businesses” in developed areas. Chicago, on the other hand, seeks to attract industrial land uses to its Brownfields redeveloped areas. *Ibid.*

<sup>106</sup> Peggy Shepard, executive director, West Harlem Environmental Action, Inc., Testimony, January Hearing, p. 131.

<sup>107</sup> Conference of Mayors, *Clean Air/Brownfields Report*, pp. 11–14; Peggy Shepard, executive director, West Harlem Environmental Action, Inc., Testimony, January Hearing Transcript, p. 125 (Brownfields development has a nexus to economic development, environmental protection, and public health).

<sup>108</sup> Conference of Mayors, *Clean Air/Brownfields Report*, p. 11.

<sup>109</sup> See, e.g., *ibid.*, pp. 43–45 (manufacturing facilities locating to Brownfields sites seek fewer air quality restrictions and potentially expose populations to increased health risks).

## SUPERFUND

Superfund, another hazardous waste site cleanup program, requires the responsible polluting parties to assume responsibility for cleaning up contaminated areas.<sup>110</sup> Where the responsible parties cannot be located, or where a company no longer exists, the site is placed on a national Superfund list called the National Priorities List where EPA Superfund trust funds are used to pay for site cleanup. This program targets some of the worst hazard sites in the country for environmental cleanup, many in communities of color and low-income communities.<sup>111</sup> If Superfund is to continue to be a useful tool, contributing to the cleanup of sites in many areas, it will require Congress to reinstate the “polluter pays” tax. The Superfund Trust Fund, established by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) to fund the Superfund hazardous waste cleanup program, was supported by taxes until its authorization expired in 1995.<sup>112</sup> The Hazardous Substance Superfund Tax, an excise tax on petroleum and other specified chemicals paid by the petroleum and oil industries, and the Corporate Environmental Tax were collected from companies and provided revenue for the Superfund Trust Fund. The trust fund used this money to complete cleanup at sites where the responsible party could not be located. The Bush administration opposes renewing the taxes supporting the trust fund; the funding for Superfund cleanup would, instead, come from the federal government’s general fund.<sup>113</sup> As a result, the amount of money available for hazardous waste cleanup of some of the most hazardous waste sites in the country is declining. Before the taxes expired, the Superfund Trust Fund accounted for 83 percent of Superfund program funds and the general treasury provided 17 percent.<sup>114</sup> In FY 2002, however, the Superfund program received \$1.270 billion; only half of this amount came from the trust fund.<sup>115</sup> The FY 2003 appropriation for the Superfund program is \$1.265 billion; \$700 million is from the trust fund and the balance from the general fund.<sup>116</sup> The FY 2004 Superfund appropriation requested by the administration is \$1.390 billion; \$1.1 billion may come from the general fund and \$290 million from the trust fund.<sup>117</sup> The Congressional Research Service reported in May 2003 that by the end of FY 2003, the trust fund would contain only \$159 million.<sup>118</sup> Without the Superfund taxes, the contribution from the general fund must continue to increase if the Superfund program is to be effective.

Defenders of decreased Superfund funding argue that the program has accomplished its mission of cleaning up the most hazardous sites and that increased funding is not required. This view, however, was contradicted in a study commissioned by Congress to determine the need and required funding levels for Superfund. The report, completed by Resources for the Future, found that between FY 2000 and FY 2009 more than \$15 billion is needed to operate the program and clean up nonfederal

<sup>110</sup> Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601–9675 (1994).

<sup>111</sup> “Nationally, three out of five African Americans live in communities with abandoned toxic waste sites; sixty percent of African Americans live in communities with one or more waste sites.” Bullard, written statement, p. 4.

<sup>112</sup> Katherine N. Probst and David M. Konisky, *Superfund’s Future: What Will It Cost?* (Resources for the Future, 2001), p. 2 (hereafter cited as Probst and Konisky, *Superfund’s Future*) (petrochemical tax, chemical stocks tax, and corporate environmental income tax fund the Superfund Trust Fund).

<sup>113</sup> Robert Perks and Gregory Wetstone, Natural Resources Defense Council, *Rewriting the Rules, Year-End Report 2002*, January 2003, p. 20; Congressional Research Service, *Brownfields and Superfund Issues in the 108th Congress*, the Library of Congress, IB10114, May 22, 2003, pp. 7–8, <<http://www.ncseonline.org/nle/crsreports/03Jun/IB10114.pdf>> (last accessed July 14, 2003) (hereafter cited as CRS, *Brownfields and Superfund Issues*).

<sup>114</sup> CRS, *Brownfields and Superfund Issues*, p. 7.

<sup>115</sup> *Ibid.*

<sup>116</sup> *Ibid.*, pp. 4, 7.

<sup>117</sup> *Ibid.*, p. 7.

<sup>118</sup> *Ibid.*

sites on the National Priorities List.<sup>119</sup> For FY 2009 alone, the cost would be \$1.61 billion, more than the Superfund appropriation for FY 2002, FY 2003, and the requested appropriation for FY 2004.<sup>120</sup>

Senator Frank Lautenberg introduced an amendment to the budget bill seeking to reinstate the tax that was defeated in March 2003.<sup>121</sup> An effort by Senator Lautenberg to amend the FY 2003 continuing resolution<sup>122</sup> to increase Superfund program funding by \$100 million also failed when the proposed amendment was tabled.<sup>123</sup>

In January 2003, Senator Barbara Boxer introduced Senate bill 173 to extend the Superfund tax until 2014. This bill, called the “Toxic Clean-up Polluter Pays Renewal Act,” with 24 co-sponsors, would amend the Internal Revenue Code of 1986 by reinstating the Hazardous Substance Superfund financing rate and the Corporate Environmental Income Tax.<sup>124</sup>

## CONCLUSION

Clearly, race and class play significant roles in environmental decision-making; moreover, communities of color and low-income communities are disproportionately affected by siting decisions and the permitting of facilities. Siting and permitting decisions are not, however, the sole sources of environmental concerns in these communities. Exposure to lead-based paint, diesel emissions, noise, odor, and other pollutants also diminishes the health of these communities.

Minority and low-income communities are most often exposed to multiple pollutants from multiple sources; however, there has been insufficient data collection and scientific research identifying the health risks created by these multiple exposures. Additionally, there is no presumption of adverse health risk from multiple exposures, and no policy on cumulative risk assessment that considers the roles of social, economic, and behavioral factors when assessing risk.

The Commission is also concerned that there may not be sufficient funding for long-term operation of the Superfund program. This is of special concern because a significant number of these sites are in minority and low-income communities. A review of the funds available through the Superfund Trust Fund and the general treasury fund may be needed based on the elimination of the “polluter pays” tax. Even when sufficient funding is in place for the long-term operation of Superfund, there should be a review of the administration of the Superfund program to ensure that all communities receive prompt attention and that sites in communities of color receive the same level and quality of decontamination as cleanup sites in white and affluent communities.

Therefore, the Commission recommends the following:

- A renewed effort by federal agencies to collect, analyze, and maintain data on risks and exposures be undertaken.
- Formal guidance on assessing cumulative risk should be created by federal agencies that considers the roles of social, economic, and behavioral factors when assessing risk.

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<sup>119</sup> Ibid., p. 5; Probst and Konisky, *Superfund's Future*, pp. xxiii, 156–59.

<sup>120</sup> Probst and Konisky, *Superfund's Future*, pp. xxi, 159; CRS, *Brownfields and Superfund Issues*, p. 7.

<sup>121</sup> S.A. 408, 108th Cong. (2003) (amending S. Con. Res. 23, 108th Cong. (2003)).

<sup>122</sup> H.R.J. 2, 108th Cong. (2003).

<sup>123</sup> S.A. 192, 108th Cong. (2003).

<sup>124</sup> S. 173, 108th Cong. (2003).

- Guidance should include a presumption of adverse health risks when populations are exposed to multiple hazards from multiple sources.
- Federal agencies should disaggregate data on risks and exposures by race, ethnicity, gender, age, income, and geographic location if communities are to have the tools they need to defend environmental and human health and if agencies are to fulfill their obligations under Executive Order 12,898 and Title VI.
- Federal agencies should require state and local zoning and land-use authorities, as a condition for receiving and continuing to receive federal funding, to incorporate and implement the principles of environmental justice into their zoning and land-use policies.
- The funding scheme for the Superfund program should be reviewed by Congress to ensure that the program is effectively funded and administered.

## Chapter 3

# Title VI and Environmental Justice

Title VI of the Civil Rights Act of 1964 provides a statutory basis for the nondiscrimination protections of the Constitution,<sup>1</sup> and is the primary mechanism of seeking relief from discriminatory activity in federally funded programs and activities.<sup>2</sup> It provides administrative relief, usually in the form of a federal agency revoking, amending, or suspending a permit issued by its state or local funding recipient, or withholding federal funds from the state and local permitting authorities if their programs are determined to violate Title VI.

Section 601 of Title VI provides that “no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.”<sup>3</sup> This provision is sufficiently broad to include prohibiting discrimination in state or local programs or activities, including permitting assessments, that receive federal funds. Section 602 of Title VI directs agencies distributing federal funds to issue regulations implementing § 601, and mandates that these agencies create a mechanism for processing complaints of racial discrimination.<sup>4</sup>

To establish a *prima facie* case of discrimination, complainants challenging environmental permitting decisions pursuant to § 601 must demonstrate that the decision was motivated by intentional discrimination.<sup>5</sup> This requirement has proved to be a difficult burden for environmental justice complainants to satisfy. Section 602, however, allows a violation to be established by proof of unintentional discrimination or disparate impact, arguably a less stringent burden of proof.<sup>6</sup> Section 602 re-

<sup>1</sup> Michael D. Mattheisen, *Applying the Disparate Impact Rule of Law to Environmental Permitting Under Title VI of the Civil Rights Act of 1964*, 24 WM. & MARY ENVTL. L. & POL’Y REV. 1, 8 (2000). See, e.g., *Goodwin v. Wyman*, 330 F. Supp. 1038, 1040 n.3 (S.D.N.Y. 1971) (“the same showing is required to establish a violation of [Title VI] as is required to make out a racial discrimination violation under the Fourteenth Amendment’s Equal Protection Clause”), *aff’d*, 406 U.S. 962 (1972).

<sup>2</sup> 42 U.S.C. § 2000d (1994).

<sup>3</sup> *Id.*

<sup>4</sup> 40 C.F.R. § 7.35(b) (2002).

<sup>5</sup> See *Bean v. Southwestern Waste Mgmt. Corp.*, 482 F. Supp. 673, 680 (S.D. Tex. 1979) In *Bean*, the approved location of a solid waste facility was in a neighborhood that was 82 percent black and was within 1,700 feet of a predominately black high school. During a motion for a preliminary injunction, the plaintiffs contended that the site selection for the facility was racially discriminatory. The court found, however, that the complainants’ evidence would probably not be sufficient to prove that the permitting decision was motivated by intentional discrimination. *Id.* See also Julie H. Hurwitz and E. Quita Sullivan, *Using Civil Rights Laws to Challenge Environmental Racism: From Bean to Guardians to Chester to Sandoval*, 2 J. L. SOC’Y 5, 19–20 (2001) (hereafter cited as Hurwitz and Sullivan, *Using Civil Rights Laws*).

<sup>6</sup> See 40 C.F.R. § 7.35(b). See also *id.* § 7.35(c) (prohibiting discriminatory program criteria or methods and locating a facility that creates a discriminatory effect); Robert D. Bullard, ed., “Anatomy of Environmental Racism and the Environmental Justice Movement,” in *Confronting Environmental Racism: Voices from the Grass-roots*, 1993, p. 39; *Guardians Ass’n v. Civil Serv. Comm’n*, 463 U.S. 582, 592 n.13 (1983) (“The threshold issue before the Court is whether the private plaintiffs in this case need to prove discriminatory intent to establish a violation of Title VI . . . and administrative implementing regulations promulgated thereunder. I conclude, as do four other Justices, in separate opinions, that the Court of Appeals erred in requiring proof of discriminatory intent.”) See generally *Elston v. Talledaga County Bd. of Educ.*, 997 F.2d 1394 (11th Cir. 1993), *reh’g, en banc denied*, 7 F.3d 242 (11th Cir. Ala. 1993). The *Elston* case describes the fundamental elements of the disparate impact standard:

quires federal agencies to issue regulations detailing how each agency will verify if grant recipients or applicants are participating in racially discriminatory practices.<sup>7</sup> Additionally, federal agencies establish procedures for investigating and reviewing complaints of racial discrimination that are forwarded to their funding recipients.<sup>8</sup>

In 1970, in order to more effectively address pollution control, President Nixon reorganized environmental functions of other federal agencies into the newly created Environmental Protection Agency.<sup>9</sup> This reorganization created tension within the agency, which was acknowledged in June 1971 by EPA Administrator William Ruckelshaus during testimony before the U.S. Commission on Civil Rights. Although Title VI applies to state and local siting and permitting authorities receiving federal funds, Administrator Ruckelshaus viewed EPA's enforcement of Title VI as conflicting with the agency's regulatory function.<sup>10</sup> The administrator testified that EPA has an affirmative obligation to ensure compliance with Title VI, but as a regulatory agency, it has "a somewhat different set of problems" in attempting to take affirmative action to see that Title VI is enforced.<sup>11</sup> For example, Administrator Ruckelshaus asserted that withdrawing funds from Title VI violators inhibits EPA's ability to regulate industry effectively. Receiving federal funding, it is argued, creates a strong incentive to comply with both Title VI and environmental regulations.

In 1972, EPA issued Title VI regulations prohibiting its beneficiary recipient programs from participating in actions that "directly or indirectly, utilize criteria or methods of administration which have or may have the effect of subjecting a person to discrimination because of race, color or national origin."<sup>12</sup>

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To establish liability under the Title VI regulations disparate impact scheme, a plaintiff must first demonstrate by a preponderance of the evidence that a facially neutral practice has a disproportionate adverse effect on a group protected by Title VI. If the plaintiff makes such a prima facie showing, the defendant then must prove that there exists a substantial legitimate justification for the challenged practice, in order to avoid liability. If the defendant carries this rebuttal burden, the plaintiff will still prevail if able to show that there exists a comparably effective alternative practice which would result in less disproportionality, or that the defendant's proffered justification is a pretext for discrimination.

*Elston*, 997 F.2d at 1407.

<sup>7</sup> See 42 U.S.C. § 2000d-1; Michael B. Gerrard, ed., *The Law of Environmental Justice: Theories and Procedures to Address Disproportionate Risks*, "Title VI," by Bradford C. Mank (Chicago: ABA Publishing, 1999), p. 25 (hereafter cited as Mank, "Title VI").

<sup>8</sup> Mank, "Title VI," p. 25. See 42 U.S.C. § 2000d-1.

<sup>9</sup> U.S. Environmental Protection Agency, "Reorganization Plan No. 3 of 1970," *History*, July 9, 1970, <<http://www.epa.gov/cgi-bin/epaprintonly.cgi>> (last accessed Nov. 6, 2002) (certain environmental functions that were being performed by the Department of the Interior; Department of Health, Education and Welfare [now known as the Department of Health and Human Services]; the Atomic Energy Commission; the Federal Radiation Council; and the Department of Agriculture were transferred to EPA).

<sup>10</sup> Richard J. Lazarus, *Pursuing Environmental Justice: The Distributional Effects of U.S. Environmental Protection*, 87 NW. U. L. REV. 787, 835–36 (1993); William D. Ruckelshaus, administrator, U.S. Environmental Protection Agency, testimony before the U.S. Commission on Civil Rights, hearing, Washington DC, June 14–17, 1971, transcript, p. 151.

<sup>11</sup> William D. Ruckelshaus, administrator, U.S. Environmental Protection Agency, testimony before the U.S. Commission on Civil Rights, hearing, Washington DC, June 14–17, 1971, transcript, p. 151.

<sup>12</sup> Nondiscrimination in Programs Receiving Federal Assistance from the Environmental Protection Agency—Effectuation of Title VI of the Civil Rights Act of 1964, 38 Fed. Reg. 17,968, 17,969 (1973). See also *id.* at 17,969 (a recipient may not "directly or indirectly utilize criteria or methods of administration which have or may have the effect of subjecting a person to discrimination because of race, color, or national origin"); U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—1974*, 1975, pp. 592–95 (hereafter cited as USCCR, *Enforcement Effort*). The *Enforcement Effort* report was based on the 1971 testimony of EPA's administrator and additional research. In this report, the Commission relied on EPA's existing Title VI regulations, and disagreed with EPA's position that the agency was not responsible for reversing previous discriminatory practices of its Title VI-funded programs.

This regulation later became effective in August 1973.<sup>13</sup> An amendment in 1984 promulgated regulations that prohibited the selection of a site or the location of a facility that would have discriminatory effects on members of the public.<sup>14</sup> Although the regulations also granted the agency's administrator authority to refuse, delay, or discontinue EPA funding to any program recipient found to be operating in a discriminatory manner, the process for terminating a recipient's funding was challenging.<sup>15</sup>

Despite creating comprehensive regulations, EPA did not enforce its Title VI regulations against state and local recipients of federal funding until 1993.<sup>16</sup> Prior to this time, as first expressed in the 1970s, EPA considered itself as a monitor of pollution control, not an agency equally concerned with issues of environmental justice and public participation in the environmental decision-making process. This approach likely contributed to an increasing number of Title VI complaints alleging discriminatory environmental and health effects caused by the issuance of permits by state and local authorities.<sup>17</sup> Nevertheless, communities continued filing disparate impact complaints, despite EPA's failure to enforce its Title VI regulations.<sup>18</sup>

The Office of Civil Rights (OCR), formerly known as the Office of Equal Opportunity, is responsible for addressing Title VI complaints and enforcement issues.<sup>19</sup> Through this office, allegations of discrimination in violation of the agency's Title VI regulations are reviewed and investigated.<sup>20</sup> In many instances, however, OCR either did not promptly investigate the complaints, or the complaints were dismissed for jurisdictional or technical reasons. Between September 1993 and July 1998, EPA did

<sup>13</sup> 38 Fed. Reg. 17,968.

<sup>14</sup> Nondiscrimination in Programs Receiving Federal Assistance from the Environmental Protection Agency, 49 Fed. Reg. 1656 (1984) (codified at 40 C.F.R. pts. 7, 12 (2003)).

<sup>15</sup> See 40 C.F.R. § 7.130(b)(2)(ii)-(4) (2002). After an administrative law judge (ALJ) makes a finding of a program recipient's noncompliance with Title VI, within 30 days of the determination, the program recipient may file an objection ("exception") to this finding with the EPA administrator. Within 45 days of the ALJ's decision, the administrator can notify the recipient that the ALJ's finding will be reviewed. The ALJ's decision can become the final determination of the matter, if the EPA administrator does not choose to review the decision, or if the recipient does not request an exception to the ALJ's finding. If the administrator decides to review the ALJ's ruling and make a determination to deny a recipient's application, or suspend or terminate EPA's financial assistance, an additional process must be completed. The administrator's finding only becomes effective 30 days from the time a detailed written report of the matter is sent to the committees of the U.S. House of Representatives and U.S. Senate that have legislative jurisdiction over the recipient's program. Pursuant to EPA's regulations for assistance programs, the administrator's decision is not subject to additional administrative appeal. *Id.*

<sup>16</sup> Julia B. Latham Worsham, *Disparate Impact Lawsuits Under Title VI, Section 602: Can a Legal Tool Build Environmental Justice?* 27 B.C. ENVTL. AFF. L. REV. 631, 646 (citing James H. Colopy, *The Road Less Traveled: Pursuing Environmental Justice Through Title VI of the Civil Rights Act of 1964*, 13 STAN. ENVTL. L.J. 125 (1994)).

<sup>17</sup> National Advisory Council for Environmental Policy and Technology, Title VI Committee, "Title VI Implementation Advisory Committee Under the National Advisory Council for Environmental Policy and Technology," <<http://www.epa.gov/oceomp/nacept/titleVI/titlechrage.html>> (last accessed July 8, 2002).

<sup>18</sup> See Angela Rowen, "EPA MIA: Why Won't Feds Enforce Environmental Discrimination Laws?" *SFBG News*, June 10, 1998, <[www.sfbg.com/News/32/36/OnGuard/index.html](http://www.sfbg.com/News/32/36/OnGuard/index.html)> (last accessed Sept. 28, 2002) (hereafter cited as Rowen, "Why Won't Feds Enforce Environmental Discrimination Laws?"). See also USCCR, *Enforcement Effort*, p. 595 (The Commission criticized EPA for its failure to require that local recipients of federal funding supply acceptable sewer services in communities of color. During this time, the Commission also observed that EPA would be "responsible for perpetuating that discrimination" if the agency did not take affirmative steps to prevent it).

<sup>19</sup> See Karen Higginbotham, director, Office of Civil Rights, U.S. Environmental Protection Agency, letter to Office of the General Counsel, U.S. Commission on Civil Rights, Aug. 22, 2003 (hereafter cited as Higginbotham letter); Natalie M. Hammer, *Comment: Title VI as a Means of Achieving Environmental Justice*, 16 N. ILL. U. L. REV. 693, 711 (1996) (citing "Environmental Justice: Use of Civil Rights Law to Advance Equity Goals Discussed," *National Environmental Daily* (BNA), Sept. 29, 1994).

<sup>20</sup> See 40 C.F.R. §§ 7.10-7.135 (2002).

not uphold a single Title VI complaint.<sup>21</sup> During this period, 58 Title VI complaints were filed with the agency, including 50 challenging state or local permitting decisions.<sup>22</sup>

As of July 1998, 31 of these complaints had been rejected, 15 were accepted for investigation, and 12 were still pending acceptance.<sup>23</sup> In 1997, the Colorado River Native Nations Alliance, for example, filed a Title VI complaint to prevent the construction of a nuclear waste facility on Native American sacred land in the Mojave Desert's Ward Valley. It took EPA more than a year to respond to the complaint.<sup>24</sup>

## EPA'S INTERIM GUIDANCE FOR INVESTIGATING TITLE VI COMPLAINTS

EPA issued its *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Interim Guidance)* in 1998 to provide the Office of Civil Rights a mechanism for implementing and enforcing EPA's Title VI regulations, including providing guidance for investigating Title VI complaints and analyzing disparate impact allegations.<sup>25</sup> EPA's *Interim Guidance* also established parameters for filing a properly pleaded Title VI complaint.<sup>26</sup> The *Interim Guidance* did not create any rights enforceable by parties in litigation with the United States, and allowed EPA to opt not to follow its own guidance depending on the specific facts of a complaint.<sup>27</sup>

EPA adheres to the following Title VI complaint processing procedure: acceptance of the complaint, investigation/disparate impact assessment, rebuttal/mitigation, justification, preliminary finding of non-compliance, formal determination of noncompliance, voluntary compliance, and informal resolution.<sup>28</sup>

The *Interim Guidance* addressed Title VI complaints alleging disparate impact resulting from the funding recipient's permitting program.<sup>29</sup> The five-step disparate impact analysis adopted by EPA in the *Interim Guidance* provides for:

<sup>21</sup> Mank, "Title VI," p. 26; Rowen, "Why Won't Feds Enforce Environmental Discrimination Laws?" See Kary L. Moss, *Environmental Justice at the Crossroads*, 24 WM. & MARY ENVTL. L. & POL'Y REV. 35, 42 (2000) (hereafter cited as Moss, *Crossroads*).

<sup>22</sup> Mank, "Title VI," p. 26.

<sup>23</sup> Ibid. See Rowen, "Why Won't Feds Enforce Environmental Discrimination Laws?"

<sup>24</sup> Rowen, "Why Won't Feds Enforce Environmental Discrimination Laws?"

<sup>25</sup> U.S. Environmental Protection Agency, "U.S. EPA Draft Title VI Guidance Documents—Fact Sheet," <<http://www.epa.gov/civilrights/t6dftguidefacts.pdf>> (last accessed May 3, 2002); Karen Higginbotham, director, Office of Civil Rights, U.S. Environmental Protection Agency, testimony before the U.S. Commission on Civil Rights, hearing, Washington, DC, Feb. 8, 2002, official transcript, p. 66 (hereafter cited as February Hearing Transcript); U.S. Environmental Protection Agency, *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits*, February 1998, p. 1, <<http://www.epa.gov/civilrights/docs/interim.pdf>> (last accessed Sept. 3, 2003) (hereafter cited as EPA, *Interim Guidance*); June M. Lyle, *Reactions to EPA's Interim Guidance: The Growing Battle for Control over Environmental Justice Decisionmaking*, 75 IND. L.J. 687, 696 (2000) (hereafter cited as Lyle, *Reactions to EPA's Interim Guidance*); Higginbotham letter, p. 3.

<sup>26</sup> 40 C.F.R. § 7.10. See generally EPA, *Interim Guidance*. EPA considers a properly pleaded Title VI complaint as one that is in writing, signed, and provides contact information (i.e., telephone number and address of the signatory); descriptive enough to detail the alleged illegal act(s) that violate the intentional discrimination and/or discriminatory effects standards of Title VI; filed within 180 days of the alleged discriminatory act(s); and names the EPA recipient that initiated the alleged discriminatory act(s). Accordingly, pursuant to EPA's regulations, OCR makes a decision to accept, reject, or refer to the responsible federal agency a complaint within 20 days upon its acknowledged receipt. OCR will also establish whether the entity or person who is allegedly responsible for the discriminatory activity is an EPA recipient, as defined in 40 C.F.R. § 7.25. EPA, *Interim Guidance*, p. 6.

<sup>27</sup> EPA, *Interim Guidance*, pp. 1, 11.

<sup>28</sup> Ibid., pp. 3–5.

- Identifying the population affected by the facility's permit.
- Determining the racial/ethnic composition of this population.
- Examining other permitted facilities that should be included in the analysis and the racial/ethnic makeup of the populations affected by these permits.
- Conducting a disparate impact analysis, which at least includes analyzing the racial or ethnic factors within the population (as well as comparing the racial characteristics of the affected population with those of a nonaffected population).
- Determining the significance of the disparity pursuant to Title VI by using arithmetic or statistical methods.<sup>30</sup>

If EPA concludes that the challenged permit creates a disparate impact under this analysis, the permitting authority must rebut EPA's findings. This may be done by either supplying a legitimate reason why the benefits of the proposed facility outweigh the severity of the disparate impact or by submitting and obtaining approval of a plan for lessening the disparate impact through implementation of a less discriminatory alternative.<sup>31</sup>

According to EPA, "merely demonstrating that the permit complies with applicable environmental regulations will not ordinarily be considered a substantial, legitimate justification" and is insufficient to rebut a finding of disparate impact.<sup>32</sup> The permitting agency's reason for approving the project may be considered in rebuttal. The permitting authority may justify the permit, despite the disparate impact, based on the existence of substantial legitimate interests.<sup>33</sup> In these circumstances, OCR may examine several factors, in addition to the specific facts of the case, such as whether there is some value to the recipient in the permitted activity, the gravity of the disparate impact, and whether the articulated benefits associated with the permit could be expected to yield any advantages to the community that is the subject of the Title VI complaint.<sup>34</sup>

In the justification phase of a disparate impact analysis, a mitigation plan can be submitted for consideration.<sup>35</sup> If EPA finds that the permit violates Title VI, the plan is evaluated by OCR and other EPA experts.<sup>36</sup> EPA will review the state or local government's interest in consenting to the plan, the gravity of the disparate impacts, if the permit concerns a renewal of an existing facility "with demonstrated benefits" or a new project with "more speculative benefits," and if the plan will provide additional employment or other benefits to a community involved in the Title VI complaint.<sup>37</sup> If EPA de-

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<sup>29</sup> Ibid., p. 1 ("This interim guidance is intended to update the Agency's procedural and policy framework to accommodate the increasing number of Title VI complaints that allege discrimination in the environmental permitting context"); Higginbotham letter, p. 3. EPA's *Interim Guidance* also states, "While Title VI does not alter the substantive requirements of a recipient's permitting program, it obligates recipients to implement those requirements in a nondiscriminatory manner as a condition of receiving Federal funds." EPA, *Interim Guidance*, p. 8, n. 12.

<sup>30</sup> EPA, *Interim Guidance*, pp. 8–10.

<sup>31</sup> Ibid., p. 11.

<sup>32</sup> Ibid.

<sup>33</sup> Ibid.

<sup>34</sup> Ibid. The guidance also examines whether the permit at issue is a renewal with demonstrated benefits or is intended for a new facility with more speculative benefits.

<sup>35</sup> Higginbotham letter, p. 4. See EPA, *Interim Guidance*, p. 11.

<sup>36</sup> EPA, *Interim Guidance*, p. 10. See Michael D. Mattheisen, *The U.S. Environmental Protection Agency's New Environmental Civil Rights Policy*, 18 VA. ENVTL. L.J. 183, 210 (1999). OCR may also consult with complainants to determine the sufficiency of mitigating the public health and environmental impacts.

<sup>37</sup> EPA, *Interim Guidance*, p. 11.

termines that a recipient's permitting program is discriminatory, the agency may move to suspend, deny, annul, or terminate federal funding to a state or local authority when it also determines that (1) mitigation options are impossible, (2) mitigation will not bring the recipient into compliance, or (3) the recipient cannot sufficiently justify the issuance of the permit.<sup>38</sup>

## USING TITLE VI AND EPA'S INTERIM GUIDANCE TO PURSUE ENVIRONMENTAL JUSTICE

There are divergent opinions about the appropriateness of employing a disparate impact analysis to address Title VI complaints. Business representatives and local government officials overwhelmingly object to using disparate impact in the legal analysis of Title VI environmental violations.<sup>39</sup> These groups contend that EPA's *Interim Guidance* removes their discretion in the decision-making process.<sup>40</sup> In fact, the Environmental Council of the States urged EPA to withdraw its *Interim Guidance*, contending that it is in conflict with current state and local land-use laws; that it does not provide definitions, methodologies, and standards which are precise or based on sound, peer-reviewed science; and that it was not developed with the input of the states, who have primary responsibility for implementing most of the nation's environmental protection programs.<sup>41</sup> The National Governors Association echoed this perspective in January 1999, when it adopted its first environmental justice policy. The association asserted that the *Interim Guidance* infringed upon states' land-use authority.<sup>42</sup>

In addition, Glenn Lami, chief counsel of the Washington Legal Foundation's Legal Studies Division, said EPA's Title VI investigations should only focus on whether complainants establish the existence of intentional discrimination, instead of whether disparate impact exists.<sup>43</sup> The Washington Legal Foundation objected to using a disparate impact analysis and asserted that it was an attempt to "incorporate a disparate impact policy that was created in employment law into the environmental law area. . . . Our feeling is that it is still an open legal issue."<sup>44</sup> Mr. Lami added that there was no legal foundation for combining environmental and employment law concepts.<sup>45</sup> These and other responses to the guidance made it apparent that environmental stakeholders disagreed on what the appropriate legal standard should be for reviewing Title VI complaints.

The U.S. Conference of Mayors and various chambers of commerce also objected to the *Interim Guidance*. These groups criticized what they saw as the failure of the guidance to consider the economic plight of poor neighborhoods. According to testimony from Harry C. Alford, president of the National Black Chamber of Commerce, before the House of Representative's Committee on Commerce in 1998, "we looked at this whole issue of environmental justice and the Title VI guidelines as

<sup>38</sup> See 40 C.F.R. §§ 7.115(e), 7.130(b) (1999).

<sup>39</sup> Catherine M. Cooney, "Still Searching for Environmental Justice," *Environmental Science & Technology*, vol. 33, issue 9, May 1, 1999, <<http://pubs.acs.org/hotartcl/est/99/may/still.html>> (last accessed Mar. 14, 2002) (hereafter cited as Cooney, "Still Searching for Environmental Justice").

<sup>40</sup> Lyle, *Reactions to EPA's Interim Guidance*, p. 697.

<sup>41</sup> See Linda M. Ulland, Minnesota Pollution Control Agency, "Environmental Equity: State Implementation of Environmental Justice Requirements," *WM '99 Conference*, Feb. 28–Mar. 4, 1999, <<http://www.wmsym.org/wm99/pqrsta/66/66-3.pdf>> (last accessed Oct. 15, 2002).

<sup>42</sup> Cooney, "Still Searching for Environmental Justice"; Joel Hirschhorn, "Environmental Justice Developments May Affect State Programs," *National Governors Association—Environment, Natural Resources, and Energy*, Mar. 9, 1998, <<http://www.nga.org/common/issueBriefDetailPrint/1,1434,901,00.html>> (last accessed Oct. 27, 2002).

<sup>43</sup> Cooney, "Still Searching for Environmental Justice."

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.* ("I challenge anybody to find the term 'disparate impact' in any environmental statute," agreed Bill Kovacs, vice president, Environment and Regulatory Affairs, U.S. Chambers of Commerce).

an opening for environmental justice [advocates] to go in and throw a monkey wrench against any economic development which we feel is needed, hub zones, empowerment zones, enterprise zones.”<sup>46</sup>

Environmental advocates, though more supportive of EPA’s effort to draft Title VI complaint guidance, did not wholly embrace the *Interim Guidance*. Some environmental justice advocates maintained that Title VI complainants should not just rely on a disparate impact analysis to substantiate their environmental justice claims. In fact, environmental complainants have looked for historical patterns of discrimination to challenge environmental decisions on equal protection grounds and to supplement statistical evidence of environmental disparate impact.<sup>47</sup>

The *Interim Guidance* did not clearly indicate if the complainant has the burden of proving that less discriminatory options exist or if the recipient must demonstrate that these options do not exist.<sup>48</sup> Furthermore, it was argued that EPA should require recipients to implement a less discriminatory option unless the recipient can demonstrate that the alternative is significantly more expensive, less efficient, and less safe than the more discriminatory option.<sup>49</sup>

The controversy over the *Interim Guidance* continued, and Congress eventually intervened. Congress, like some business organizations, believed that the *Interim Guidance* was an ambiguous extension of Executive Order 12,898.<sup>50</sup> According to Representative Joe Knollenberg of Michigan, the *Interim Guidance* “subject[ed] any business that [sought] an environmental permit to construct a new

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<sup>46</sup> EPA’s *Title VI Guidance and Alternative State Approaches: Hearings Before the House Subcomm. on Oversight and Investigations of the House Comm. on Commerce*, 105th Cong. 11 (1998) (testimony of Harry C. Alford, president, National Black Chamber of Commerce). *But see* Lyle, *Reactions to EPA’s Interim Guidance*, pp. 703–04 (the author noted that local residents often face the unfortunate option of having either additional employment opportunities in their neighborhoods or exposure to environmental pollutants); Interim National Black Environmental & Economic Justice Coordinating Committee, “On the Anniversary of King’s Birth, Black Victims of Toxic Exposure and Policy Experts to Declare National State of Emergency on Environmental Racism and Economic Injustice,” Jan. 13, 2000, <[http://www.ejrc.cau.edu/inbeejcc\\_press.htm](http://www.ejrc.cau.edu/inbeejcc_press.htm)> (last accessed June 20, 2003) (hereafter cited as Interim National Black Environmental & Economic Justice Coordinating Committee, “On the Anniversary of King’s Birth”). The Interim National Black Environmental & Economic Justice Coordinating Committee and environmental justice advocates, educators, government officials, and scholars issued a declaration on the national state of emergency on environmental justice issues. Some of their comments related to environmental justice and economic development in communities of color. They observed the following:

Industrial companies gain entry into our communities with the promise of new jobs, but we get few or none of these jobs. The few black residents who work at the plants are typically hired on a temporary contract basis with inadequate safety training and no benefits; or they hold the lowest paying and most hazardous jobs at the facilities. Most of the employees at these plants do not live in our community. At the end of a work shift, there is a long line of traffic of plant workers driving out of our communities to their homes.

Interim National Black Environmental & Economic Justice Coordinating Committee, “On the Anniversary of King’s Birth.”

<sup>47</sup> Kenneth Owen, *Environmental Justice Enforcement Requires Reassessment Under the Equal Protection Clause, Title VI of the Civil Rights Act, and Environmental Statutes*, 30 GOLDEN GATE U. L. REV. 379, 391 (2000).

<sup>48</sup> Bradford C. Mank, *Environmental Justice and Title VI: Making Recipient Agencies Justify Their Siting Decisions*, 73 TUL. L. REV. 787, 818 (1999) (hereafter cited as Mank, *Making Recipient Agencies Justify Their Siting Decisions*) (the author noted that “[t]he Interim Guidance simply states that ‘a justification offered will not be considered acceptable, if it is shown that a less discriminatory alternative exists’”).

<sup>49</sup> Mank, *Making Recipient Agencies Justify Their Siting Decisions*, p. 823.

<sup>50</sup> Peggy Robertson, “Environmental Justice: New Guidance on ‘Environmental Justice’ Complaints Due This Spring,” *The Brownfields Report*, vol. 5, no. 7, Apr. 6, 2000 (hereafter cited as Robertson, “New Guidance”).

facility or expand an existing one to the whim of any individual or group who feels that issuing the permit has a ‘disparate impact’ on a minority community.”<sup>51</sup>

In October 1998, Congress passed an appropriations bill that included a rider provision suspending EPA’s authority to accept new Title VI complaints until the agency published a final Title VI guidance.<sup>52</sup> Representative Knollenberg, a member of the House Appropriations Committee, was responsible for initially and repeatedly attaching the rider to EPA’s budget appropriations.<sup>53</sup> Accordingly, members of Congress continually voted to add rider provisions to the agency’s appropriations bills from October 1998 until September 2001, which effectively prevented EPA from investigating Title VI complaints received after October 21, 1998.<sup>54</sup> The effect of the appropriations rider and the delay in issuing final Title VI guidance served to relax environmental enforcement against industry and state authorities who had allegedly violated Title VI.

The Clinton administration provided a response to what it viewed as the rider’s detrimental effect on environmental enforcement efforts. In June 2000, the Office of Management and Budget strongly objected to the rider’s inclusion in the FY 2001 appropriations bill and characterized the rider as “anti-environmental.” OMB went on to note that:

The Administration is concerned that the . . . bill has retained the language regarding EPA’s Title VI interim guidance. As a matter of principle, the language is a problem because it restricts our ability to effectively process and resolve complaints. The Administration continues to object to this language and notes that revised draft guidance is expected to be available shortly for public review and comment.<sup>55</sup>

Congress did not attach this restrictive rider to EPA’s 2002 appropriations bill, due to its confidence in President George W. Bush’s anticipated approach to environmental issues.<sup>56</sup> In fact, the Bush administration’s environmental strategies have been characterized as pro-industry and anti-regulation of

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<sup>51</sup> *Ibid.*

<sup>52</sup> Department of Veterans Affairs and Housing and Urban Development and Independent Agencies Appropriations Act of 1999, Pub. L. No. 105-174, tit. III, § 214(a), 112 Stat. 2461, 2486 (1998).

Provided further, That none of the funds made available in this Act may be used to implement or administer the interim guidance issued on February 5, 1998, by the U.S. Environmental Protection Agency relating to title VI of the Civil Rights Act of 1964 and designated as the “Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits” with respect to *complaints filed under such title after the date of the enactment of this Act* and until guidance is finalized. Nothing in this proviso may be construed to restrict the U.S. Environmental Protection Agency from developing or issuing final guidance relating to title VI of the Civil Rights Act of 1964.

*Id.* (emphasis added).

<sup>53</sup> Margaret Kriz, “Coloring Justice Green,” *The National Journal*, vol. 33, no. 30, July 28, 2001 (hereafter cited as Kriz, “Coloring Justice”). See 144 CONG. REC. H9359, 9369 (1998); Robertson, “New Guidance.”

<sup>54</sup> See, e.g., Departments of Veterans Affairs and Housing and Urban Development and Independent Agencies Appropriations Act, 2001, Pub. L. No. 106-377, 114 Stat. 1441, 1441A41 (Oct. 27, 2000) (“that none of the funds made available in this Act may be used to implement or administer the interim guidance issued on February 5, 1998, by the [EPA] relating to title VI of the Civil Rights Act of 1964 . . . with respect to complaints filed under such title after October 21, 1998, and until guidance is finalized”).

<sup>55</sup> Office of Management and Budget, “H.R. 4635—Department of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Bill, FY 2001,” June 13, 2000, <<http://www.whitehouse.gov/omb/legislative/sap/106-2/print/HR4635-r.html>> (last accessed June 20, 2003).

<sup>56</sup> See Kriz, “Coloring Justice” (Congress also provided EPA Administrator Christine Todd Whitman an additional \$2.7 million above the FY 2001 budget for the agency’s environmental justice efforts). See generally 149 CONG. REC. H707 (2003).

pollution and environmental hazards.<sup>57</sup> The Clear Skies Act and the funding of the Superfund program are cited as examples of the administration's pro-industry approach. The administration introduced new environmental legislation known as the Clear Skies Act,<sup>58</sup> which some contend would ultimately increase air pollution levels.<sup>59</sup> Sheila Foster, a law professor at Fordham University and senior fellow at the New Democracy Project, and Swati Prakash, environmental health director for West Harlem Environmental Action, asserted that the Clear Skies Act repeals the Clean Air Act's new source review requirements that facilities install current pollution control equipment when expanding their capacities.<sup>60</sup> In addition, the Clear Skies Act provides emissions allowances or credits for nitrogen oxides and mercury pollution within regions. Power plants would be permitted to emit as much of these substances as long as they could purchase credits from other plants. Foster and Prakash noted that in the San Francisco Bay Area, "approximately 87 percent of pollution credits generated by 'cleaner' plants were bought by refineries and power plants located in heavily industrialized and predominantly lower-income and minority neighborhoods of the bay area's Contra Costa County."<sup>61</sup> Also, under the Bush administration, the parties responsible for creating the original contamination do not pay for the cleanup as a result of the elimination of the "polluter pays" tax used by the Superfund program.<sup>62</sup> With the elimination of the tax, parties responsible for polluting pay for 70 percent or less of the cleanup for Superfund sites, while taxpayers compensate for the remaining amount.<sup>63</sup> Over time, the amount paid by taxpayers would significantly increase.

The lifting of the rider set the stage for processing a backlog of Title VI complaints, and for finalizing EPA's *Interim Guidance*. This guidance was due to be finalized in 1999; however, events overtook EPA and the revision process.

### **Application of the Interim Guidance: The *Shintech* and *Select Steel* Decisions**

Before EPA could issue a final guidance, some of the concerns relating to the effectiveness of the *Interim Guidance* in analyzing Title VI complaints came to fruition in the *Shintech* decision in

<sup>57</sup> See generally Grassroots Recycling Network, Natural Resources Defense Council, and Friends of the Earth, "Letter and Comments in Opposition to Proposed Rule Submitted to the Environmental Protection Agency," Aug. 6 and Aug. 9, 2002, p. 1, <[http://www.grrn.org/landfill/landfill\\_dereg\\_petition.pdf](http://www.grrn.org/landfill/landfill_dereg_petition.pdf)> (last accessed June 20, 2003). These organizations opposed a proposed regulation that would deregulate minimum national landfill standards that were promulgated during the 1990s by EPA through the Resource Conservation and Recovery Act (RCRA). They maintained that states would have the authority to waive minimum national landfill standards, which would violate RCRA, and hinder the coordination and production of RCRA research data. Ibid.

<sup>58</sup> H.R. 999, 108th Cong. (2003); S. 485, 108th Cong. (2003). See EPA, "Frequently Asked Questions," *Clear Skies*, <<http://epa.gov/cgi-bin/epaprintonly.cgi>> (last accessed June 20, 2003) (Among other provisions, Clear Skies would "establish caps on sulfur dioxide, nitrogen oxides, and mercury emissions at levels 70% below year 2000 emission levels. The caps on emissions, coupled with rigorous monitoring protocols and automatic enforcement provisions, ensure that these reductions would be achieved and sustained over time").

<sup>59</sup> Sheila Foster and Swati Prakash, "Don't Let Bush Dirty the Air with His Act," *Newsday*, Feb. 17, 2003, p. A-22.

<sup>60</sup> Ibid.

<sup>61</sup> Ibid.

<sup>62</sup> Natural Resources Defense Council, "There He Goes Again: Bush Budget Bashes the Environment," *Environmental Legislation: In Depth Analysis*, Feb. 5, 2003, <<http://www.nrdc.org/legislation/abudget04.asp>> (last accessed July 15, 2003).

<sup>63</sup> Ibid. The Natural Resources Defense Council asserts that "the oil industry enjoys an exemption from liability at these sites, ensuring that it will never be held responsible for its toxic pollution even though it no longer contributes to the Superfund tax." Ibid.

1998.<sup>64</sup> EPA accepted the *Shintech* and *Select Steel*<sup>65</sup> complaints for investigation prior to the October 21, 1998, moratorium on accepting new Title VI cases.

*Shintech* was expected to be the first case decided under EPA's *Interim Guidance*.<sup>66</sup> The controversy began when Shintech, a Japanese-owned company, selected Convent, in St. James Parish, Louisiana, as the site for a toxic waste facility. St. James Parish, located in a heavily industrialized region, is a low-income and predominately African American community.<sup>67</sup> The company gained support for the plant by promising to generate new jobs and to hire half of its 700 construction workers from the local area, 165 permanent employees, and 90 permanent contract employees. Shintech also promised to invest in job training.<sup>68</sup> As a result, most local residents, the St. James chapter of the NAACP, the United Chamber of Commerce, and the Black Chamber of Commerce supported the construction of the Shintech facility.<sup>69</sup>

In May 1997, the Louisiana Department of Environmental Quality issued final air quality operating permits to Shintech, allowing the facility to emit substances such as polyvinyl chlorides, chlor-alkali, and vinyl chloride monomers.<sup>70</sup> One month later, the Tulane Environmental Law Clinic and Greenpeace filed a complaint with EPA's Office of Civil Rights on behalf of the St. James Citizens for Jobs & the Environment, the Louisiana Environmental Action Network, and several other concerned organizations.<sup>71</sup> The complaint alleged that the permit granted by the Louisiana Department of Envi-

<sup>64</sup> See Roy Whitehead, Jr., and Walter Block, *Environmental Justice Risks in the Petroleum Industry*, 24 WM. & MARY ENVTL. L. & POL'Y REV. 67, 78 (2000) (hereafter cited as Whitehead and Block, *Environmental Justice Risks*).

<sup>65</sup> *St. Francis Prayer Ctr. v. Michigan Dept. of Env'tl. Quality*, EPA Complaint 05R-98-R5. The case is commonly known as *Select Steel*.

<sup>66</sup> Mank, "Title VI," p. 46 (citing Angela M. Baggetta, "Environmental Justice: Black Caucus, EPA to Meet on Shintech; Dispute May Be Test Case on Title VI Suits," *Daily Environmental Reporter* (BNA), no. 139, July 21, 1998, p. A-1).

<sup>67</sup> See Mank, "Title VI," p. 46.

<sup>68</sup> *Ibid.* See also Henry Payne, "EPA Policy That Bars Polluting Plants from Minority Communities Comes Under Attack: Planting Prosperity or Sowing Racism?" *Pittsburgh Post-Gazette*, June 16, 1998, p. A-9; Gregory H. Meyers, *Developing a Cohesive Front Against Environmental 'Injustice'*, 8 U. BALT. J. ENVTL. L. 27, 34 (2000) (hereafter cited as Meyers, *Developing a Cohesive Front*) (African Americans in the St. James Parish community had a 65 percent unemployment rate).

<sup>69</sup> Whitehead and Block, *Environmental Justice Risks*, p. 78; Mank, "Title VI," p. 47.

<sup>70</sup> U.S. Environmental Protection Agency, "In re: Shintech Inc., Order Responding to Petitioners' Requests that the Administrator Object to Issuance of State Operating Permits, Permit Nos. 2466-VO, 2467-VO, 2468-VO," Oct. 28, 2002, pp. 1-2, <<http://www.epa.gov/rgytgrnj/programs/artd/air/title5/t5memos/shin1997.pdf>> (hereafter cited as "Shintech Order"). See also U.S. Environmental Protection Agency, "6.6.1-Polyvinyl Chloride," *Organic Chemical Process Industry*, September 1991, p. 1, <<http://www.epa.gov/ttn/chief/ap42/ch06/final/c06s06-1.pdf>> (last accessed July 15, 2003).

The manufacture of most plastics involves an enclosed reaction or polymerizaion step, a drying step, and a final treating and forming step . . . The major sources of air contamination in plastics manufacturing are the raw materials or monomers, solvents, or other volatile liquids emitted during the reaction; sublimed solids such as phthalic anhydride emitted in alkyd production; and solvents lost during storage and handling of thinned resins.

*Ibid.*

<sup>71</sup> EPA, "Shintech Order," p. 1 (some of the other petitioners included the Gulf Coast Tenants Organization, Louisiana Coalition for Tax Justice, Save Our Selves, North Baton Rouge Environmental Association, and Neighbors Assisting Neighbors). See also *ibid.* (the petitioners originally requested EPA to object to the issuance of Shintech's Title V (of the Clean Air Act, 42 U.S.C. §§ 7661-7661f) state operating permits).

ronmental Quality violated EPA's Title VI regulations prohibiting recipients' activities that create a disparate impact on minority populations.<sup>72</sup>

The allegations of disparate impact were supported, in part, by the fact that in 1995 the average St. James Parish resident was exposed to 360 pounds of toxic air pollutant releases, but the average Louisiana resident was exposed to only 21 pounds; 95 percent of the 300 people living within one mile of the proposed plant were black and 49 percent of the households had incomes of less than \$15,000. In addition, in a 50-square-mile area surrounding the site of the facility, 80 percent of the 4,500 residents were black, and 49 percent of the households earned less than \$15,000 a year.<sup>73</sup> At the time of the *Shintech* case, 18 toxic waste facilities, producing approximately 20 percent of Louisiana's air pollution, were already located within a four-mile radius of St. James Parish.<sup>74</sup>

OCR accepted the complaint for investigation, finding that the disparate impact claims "deserve[d] serious attention."<sup>75</sup> The final decision on *Shintech* was expected during the summer of 1998, but the decision was delayed due to EPA's request that its Science Advisory Board review the agency's methods of determining disproportionate environmental "burdens."<sup>76</sup> The board's decision was expected in October 1998. The agency produced a draft report but was unwilling to release a final decision on Shintech's Title VI violations until after it had revised the *Interim Guidance* in 1999.<sup>77</sup>

EPA's response to the allegations of Title VI violations in *Shintech* caused business leaders and government officials to accuse the agency of failing to adhere to the *Interim Guidance* by not considering the economic benefits the facility would bring to the low-income residents of St. James Parish.<sup>78</sup>

Largely due to EPA's delay in releasing a final decision in the *Shintech* case and the impact of the environmental justice community's opposition to the plant's anticipated location and operation, on September 17, 1998, Shintech transferred its proposed facility to Plaquemine (Iberville Parish), Louisiana, a predominately white, middle-class community.<sup>79</sup> It should be noted that the proposed Plaquemine facility was less expensive for Shintech to operate, in comparison to the Convent site it originally selected. The Plaquemine location allowed the plant to pump in raw materials from a nearby Dow Chemical facility instead of producing the raw materials.<sup>80</sup> After Shintech relocated the plant to a more practical location, the move seemed to confirm suspicions that race played a role in the company's original decision to construct the facility in St. James Parish, a minority community already overburdened with environmental pollutants.

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<sup>72</sup> EPA, "Shintech Order," pp. 7-8 (some of the petitioners filed an amended complaint against the Louisiana Department of Environmental Quality pursuant to Title VI and EPA's implementing regulations, alleging environmental justice claims of racial discrimination in the issuance of the Shintech permits). See 40 C.F.R. § 7.35(b).

<sup>73</sup> Mank, "Title VI," p. 46.

<sup>74</sup> Meyers, *Developing a Cohesive Front*, p. 34.

<sup>75</sup> EPA, "Shintech Order," p. 8.

<sup>76</sup> University of Michigan, "Environmental Justice Case Study: Shintech PVC Plant in Convent, Louisiana," Background section, <<http://www.umich.edu/~snre492/shin.html>> (last accessed June 24, 2003) (hereafter cited as University of Michigan, "Environmental Justice Case Study") (during this time, EPA analyzed a disproportionate burden by using data from the 1990 census and estimates of industry-reported emissions).

<sup>77</sup> Mank, "Title VI," p. 48.

<sup>78</sup> See John H. Cushman, Jr., "Pollution Policy is Unfair Burden, States Tell EPA," *New York Times*, May 10, 1998, p. A-1.

<sup>79</sup> Mank, "Title VI," p. 48. See University of Michigan, "Environmental Justice Case Study."

<sup>80</sup> University of Michigan, "Environmental Justice Case Study."

In contrast to its delayed response in *Shintech*, EPA expedited its examination of another Title VI complaint in the case of *St. Francis Prayer Center v. Michigan Department of Environmental Quality*, also known as *Select Steel*, in 1998.<sup>81</sup> In June 1998, the Michigan Department of Environmental Quality approved a Clean Air Act Prevention of Significant Deterioration (PSD) permit for the construction of a steel recycling mini-mill in Flint, Michigan's Genesee Township by the Select Steel Corporation. As a result, the St. Francis Prayer Center filed a Title VI complaint with EPA alleging that the Select Steel mill would have a discriminatory impact on minority residents and that the permitting process was conducted in a discriminatory manner.<sup>82</sup>

The proposed location for the facility was near a largely African American community. OCR accepted the complaint for review and, thereafter, was pressured to resolve the issue as quickly as possible due to threats by Select Steel that it would move its plant site and the related 200 jobs to Ohio if EPA delayed making a decision.<sup>83</sup> The complainant in *Select Steel* encouraged EPA to thoroughly review the situation. Similarly, environmental justice advocates urged the agency to delay its decision, fearing it would succumb to political pressures and approve the permit.<sup>84</sup>

Members of the media and state officials attacked EPA's interest in reviewing the environmental burden placed on the community. Michigan Governor John Engler criticized the agency in a press conference in Genesee Township:

This is about every company that has ever had to deal with the EPA's reckless, ill-defined policy on environmental justice. . . . The EPA is imposing their bureaucratic will over this community and punishing a company with the latest environmental standards, all because of a baseless complaint. . . . The net result is that the EPA is a job killer.<sup>85</sup>

Kary L. Moss, author of a law review article titled "Environmental Justice at the Crossroads," observed that "[t]he Detroit News . . . devoted substantial resources to attacking the [*Interim*] *Guidance* and the environmental justice movement generally."<sup>86</sup> According to Moss, one reporter wrote more than 40 news stories on this subject, of which 23 were given front-page status and were supplemented by editorials calling EPA a "rogue agency" and the "Environmental Deception Agency."<sup>87</sup>

<sup>81</sup> Mank, "Title VI," p. 49. See generally U.S. Environmental Protection Agency, Office of Civil Rights, "Decision Memorandum and Investigative Report for Title VI Administrative Complaint File No. 5R-98-R5 (Select Steel Complaint)," <[http://www.epa.gov/civilrights/docs/ssdec\\_ir.pdf](http://www.epa.gov/civilrights/docs/ssdec_ir.pdf)> (last accessed Oct. 29, 2002) (hereafter cited as EPA, "Select Steel Investigative Report").

<sup>82</sup> Mank, "Title VI," pp. 48–49. See also Hurwitz and Sullivan, *Using Civil Rights Laws*, pp. 54–55 (During the time the *Select Steel* complaint was filed with EPA, there was a Title VI case pending at EPA concerning a facility within 1.5 miles of the Select Steel site. Originally filed in 1992, this complaint, *St. Francis Prayer Ctr. v. Michigan Dept. of Env'tl. Quality* (EPA Complaint 01R-94-R5, the *Genesee Power Station* case), was one of the oldest administrative complaints pending before EPA); Yasmin Yorker, external compliance team leader, U.S. Environmental Protection Agency, e-mail to Office of the General Counsel, U.S. Commission on Civil Rights, Sept. 2, 2003 (as of September 2003, EPA was still investigating the *Genesee Power Station* case, which is in an active pending status).

<sup>83</sup> Mank, "Title VI," p. 49; Meyers, *Developing a Cohesive Front*, p. 35.

<sup>84</sup> Mank, "Title VI," p. 49 (citing "EPA Rejects Select Steel Environmental Justice Complaint," *Environmental Policy Alert*, Nov. 4, 1998, p. 5).

<sup>85</sup> Alex Sagady, "E-M:Engler News Release on Select Steel Case," *Alex J. Sagady & Associates, Enviro-Mich*, Sept. 3, 1998, <<http://www.great-lakes.net/lists/enviro-mich/1998-09/msg00016.html>> (last accessed June 23, 2003). See also David Mastio, "Governor Will Use Flint Press Conference to Denounce Environmental Justice Rules," *Detroit News*, Sept. 2, 1998, p. B-1; Meyers, *Developing a Cohesive Front*, p. 35; Hurwitz and Sullivan, *Using Civil Rights Laws*, p. 67.

<sup>86</sup> Moss, *Crossroads*, pp. 36–37.

<sup>87</sup> *Ibid.*

EPA expedited its review of *Select Steel* and rendered its decision on October 30, 1998.<sup>88</sup> EPA's Office of Civil Rights dismissed the St. Francis Prayer Center's complaint based on the absence of specific EPA regulations monitoring the types of dioxin emissions that were applicable to the Select Steel facility.<sup>89</sup> EPA also found that the permit satisfied the National Ambient Air Quality Control Standards for ozone and lead.<sup>90</sup> Accordingly, any emissions from the Select Steel facility could not be viewed to be harmful or adverse to the neighboring community and, therefore, EPA saw no need to determine whether there was an adverse disparate impact.<sup>91</sup>

There were varied reactions to the *Select Steel* decision. Supporters of industrial development and local officials applauded the outcome. Contrarily, environmentalists emphasized that satisfying the emission rates under the National Ambient Air Quality Control Standards is not the same as complying with Title VI. Community advocates focused on EPA's *Interim Guidance*, which expressly provided that "merely demonstrating that the permit complies with applicable environmental regulations will not ordinarily be considered as substantial, legitimate justification."<sup>92</sup>

Following the *Select Steel* decision, environmental justice and community advocates with pending Title VI cases filed a joint petition requesting EPA to either reconsider its findings in *Select Steel* or, in the alternative, state that the decision would not serve as a basis for deciding the pending claims.<sup>93</sup> In March 1999, largely due to this petition, Select Steel chose to build the steel mill in Lansing, Michigan, instead of its proposed site in Flint.<sup>94</sup> Despite EPA's ruling in their favor, Select Steel officials maintained they were no longer willing to challenge EPA and opponents to the proposed mini-mill in Flint.<sup>95</sup>

<sup>88</sup> Honigman Miller Schwartz & Cohn, Daniella D. Landers, "EPA Dismisses Environmental Justice Complaint Against Select Steel," *Michigan Environmental Compliance Update*, vol. 9, issue 8, November 1998 (EPA's Office of Civil Rights issued a letter dismissing the *Select Steel* environmental justice complaint on October 30, 1998). See also Environmental Appeals Board, EPA, Select Steel Corp., Docket No. PSD 98-21, "Order Denying Review," Sept. 11, 1998, p. 13 <<http://www.epa.gov/boarddec/orders/select.pdf>> (last accessed July 16, 2003) (the Environmental Appeals Board denied review of the *Select Steel* complaint on jurisdictional grounds, since the Office of Civil Rights has the responsibility of ensuring EPA complies with Title VI). See generally Ann E. Goode, director, Office of Civil Rights, U.S. Environmental Protection Agency, "Letter to Father Phil Schmitter, Sister Joanne Chiaverini, and Russell Harding," *Select Steel Decision Memorandum and Report*, Oct. 30, 1998, <[http://www.epa.gov/ocrpage1docs/ssdec\\_ir.pdf](http://www.epa.gov/ocrpage1docs/ssdec_ir.pdf)> (last accessed July 16, 2003).

<sup>89</sup> U.S. Environmental Protection Agency, "Summary Decision on Title VI Complaint Regarding Michigan Department of Environmental Quality's Permit for the Proposed Select Steel Facility, Complaint File No. 5R-98-R5," *Civil Rights*, <<http://www.epa.gov/cgi-bin/epaprintonly.cgi>> (last accessed June 24, 2003).

<sup>90</sup> *Ibid.*, p. 28. See Mank, "Title VI," p. 49 ("the NAAQS [National Ambient Air Quality Standards] are health-based standards that the agency establishes 'at a level presumptively sufficient to protect public health and allows for an adequate margin of safety for the population within the area'").

<sup>91</sup> EPA, "Select Steel Investigative Report," pp. 28–29.

<sup>92</sup> Mank, "Title VI," p. 50 (citing Jerome Balter [Public Interest Center of Philadelphia] letter to Ann E. Goode [director of EPA Office of Civil Rights], Nov. 12, 1998). See also EPA, *Interim Guidance*, p. 11.

<sup>93</sup> Hurwitz and Sullivan, *Using Civil Rights Laws*, p. 57 (citing *Joint Petition to Re-open Select Steel Investigation, or, in the Alternative, to Set Aside Investigative and Analytical Methods*, jointly filed in the cases of *Communities for a Better Env't v. South Coast Air Quality Mgmt. Dist.* (10R-97-R9); *Hyde Park and Aragon Park Improvement Comm., Inc. v. Env'tl. Prot. Div., Georgia Dep't of Natural Resources, et al.* (8R-94-R4)).

<sup>94</sup> Associated Press State & Local Wire, "Steel Company Drops Environmental Fight Over Genessee County Site," Mar. 2, 1999, BC Cycle, State and Regional (hereafter cited as AP, "Steel Company Drops Fight"); David Mastio, "EPA Race Policy Costs Flint Plant: Lansing Gains from Environmental Justice Controversy," *Detroit News*, Mar. 2, 1999, p. 1-A.

<sup>95</sup> AP, "Steel Company Drops Fight" (Bob Bosar, vice president of the Select Steel Corporation/Dunn Industrial Group, stated, "If Genessee County doesn't want us, fine. There are plenty of places that do.").

The handling of the *Select Steel* case highlighted the need to revise the *Interim Guidance*, since it was unclear to what degree facilities' compliance with existing environmental regulations would bar Title VI disparate impact complaints.<sup>96</sup> Environmental advocates observed that minority communities would still be disproportionately affected even if facilities satisfy these environmental regulations.<sup>97</sup> The *Interim Guidance* supports this interpretation by demonstrating that complying with relevant environmental regulations is not usually a substantial environmental justification for a permitting decision.<sup>98</sup> After *Select Steel*, it is clear that the *Interim Guidance* did not provide an unambiguous standard for measuring the cumulative degree of pollution from all industrial facilities in a given community.<sup>99</sup> Because of these and other difficulties that potentially hinder the ability to use the *Interim Guidance* to address Title VI complaints, EPA began revising the document.

### **EPA's Response to *Shintech* and *Select Steel*: Reassessing the Interim Guidance**

After the *Shintech* and *Select Steel* decisions, environmental stakeholders anticipated additional guidance from EPA clarifying how alleged Title VI violations would be analyzed. EPA took two important steps to respond to criticism of the *Interim Guidance*:

- Requesting that the Science Advisory Board make recommendations for perfecting the method in which EPA determines whether a permit creates a disproportionate impact on people of color.<sup>100</sup>
- Convening a Title VI Implementation Advisory Committee to define what constitutes an objectionable disparate impact, review and evaluate how state and local agencies operate permitting programs covered by Title VI, develop recommendations for EPA's Title VI program, and develop a template for state and local environmental justice programs.<sup>101</sup> The committee would collaborate with environmental stakeholders and EPA's National Advisory Council on Policy and Technology.

In response to the Science Advisory Board's recommendations, EPA began modifying its disparate impact methodology.<sup>102</sup> Although the Title VI Implementation Advisory Committee did not reach a

<sup>96</sup> Mank, "Title VI," p. 50.

<sup>97</sup> Ibid.

<sup>98</sup> Ibid. (citing EPA, *Interim Guidance*, p. 12).

<sup>99</sup> Mank, *Making Recipient Agencies Justify Their Siting Decisions*, pp. 811–12 (the *Interim Guidance* also did not show how and when mitigation efforts can counteract disparate impacts, and whether complainants or permit recipients have the burden of proving that the recipient did not select a less discriminatory option).

<sup>100</sup> See U.S. Environmental Protection Agency, Integrated Human Exposure Committee of the Science Advisory Board, *An SAB Report: Review of Disproportionate Impact Methodologies*, EPA-SAB-IHEC-99-007, December 1998, Abstract, p. ii, Introduction, p. 5. Some of SAB's recommendations included performing disproportionate impact analyses in a sequential manner, determining the potential risk to all populations before estimating disproportionate impact, developing the Cumulative Outdoor Air Toxics Concentration Exposure Methodology to a greater extent, evaluating cancer risks and non-cancer health effects separately when analyzing potential risks of emitted chemicals for the purposes of determining whether or not the cumulative risks are minimal, and maintaining good communications with residents of local communities by conveying information of health impact studies. Ibid., Executive Summary, pp. 2–4.

<sup>101</sup> U.S. Environmental Protection Agency, Cooperative Environmental Management, "Report of the Title VI Implementation Advisory Committee—Next Steps for EPA, State, and Local Environmental Justice Programs," Mar. 1, 1999, <<http://www.epa.gov/cgi-bin/epaprintonly.cgi>> (last accessed Sept. 3, 2003) (hereafter cited as EPA, "Report of the Title VI Implementation Advisory Committee").

<sup>102</sup> U.S. Environmental Protection Agency, Office of Civil Rights, "Response to the IHEC Review of the Disproportionate Impact Methodologies," <<http://www.epa.gov/ocrpage1/docs/sabrep2.pdf>> (last accessed June 25, 2003) (hereafter cited as EPA, "Response to IHEC Review").

consensus on the primary question of defining objectionable disparate impacts, subsequent EPA Title VI policy guidelines reflected other elements of the Implementation Committee's recommendations.<sup>103</sup> The Title VI Implementation Committee recommended that EPA:

- Revise and implement the *Interim Guidance* on the basis of broad public review and comment.
- Develop policy statements addressing other areas of concern, including enforcement policy, Brownfields redevelopment, and the control of nonregulated sources.
- Expand research and data-gathering regarding cumulative risks and synergistic effects.
- Develop and disseminate better tools for conducting Title VI assessments.
- Analyze precedent set in other areas of civil rights law.
- Implement pilot projects with state and local governments that address various aspects of environmental justice issues, document the results, and distribute their findings to the public.
- Undertake a concerted effort to integrate Title VI issues and constituencies into other major agency initiatives.<sup>104</sup>

In addition to these recommendations, the Title VI Implementation Committee endorsed several general principles intended to provide a basis for EPA's future activities. These principles included:

- Endorsing the concept of environmental justice.
- Recognizing that early and proactive steps are necessary to deter Title VI violations and complaints.
- Acknowledging that affected communities should not be viewed by EPA as just another stakeholder group.
- Encouraging EPA to develop clear and accessible standards for evaluating Title VI complaints.
- Maintaining that EPA should recognize that cumulative exposure to pollution and the resulting effects are important concerns in Title VI cases.
- Encouraging EPA to engage in meaningful communication with all affected stakeholders about its Title VI guidance for recipients and investigations.<sup>105</sup>

As a result of these recommendations and general principles, in June 2000, EPA's Office of Civil Rights issued the *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Draft Revised Investigation Guidance)* and the *Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Draft Recipient Guidance)*. The *Draft Revised Investigation Guidance* and the *Draft Recipient Guidance* provide details that were lacking in the *Interim Guidance*.

### **Draft Recipient Guidance**

The *Draft Recipient Guidance* provides recipients with a range of strategies for improving existing permitting programs and for decreasing the likelihood of Title VI complaints alleging either dis-

<sup>103</sup> EPA, "Report of the Title VI Implementation Advisory Committee." See generally *Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Draft Recipient Guidance)* and *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Draft Revised Investigation Guidance)*, 65 Fed. Reg. 39,650 (June 27, 2000).

<sup>104</sup> EPA, "Report of the Title VI Implementation Advisory Committee."

<sup>105</sup> *Ibid.*

criminary human health or environmental effects resulting from permitting decisions.<sup>106</sup> It provides strategies for avoiding complaints of discrimination during the public participation phase of the permitting process. The guidance provides, for example, information on using informal resolution techniques to resolve impending Title VI issues, and conducting assessments to determine the existence of an adverse impact.<sup>107</sup> The guidance is not mandatory.<sup>108</sup> In developing the *Draft Recipient Guidance*, EPA adopted several guiding principles, which incorporated the principles and recommendations made by the Title VI Implementation Advisory Committee. The guiding principles adopted for the *Draft Recipient Guidance* include recognition that:

- “All persons regardless of race, color, or national origin are entitled to a safe and healthful environment.
- Strong civil rights enforcement is essential.
- Enforcement of civil rights laws and environmental laws are complementary, and can be achieved in a manner consistent with sustainable economic development.
- Potential adverse cumulative impacts from stressors should be assessed, and reduced or eliminated wherever possible.
- Research efforts by EPA and state and local environmental agencies into the nature and magnitude of exposures, stressor hazards, and risks are important and should be continued.
- Decreases in environmental impacts through applied pollution prevention and technological innovation should be encouraged to prevent, reduce, or eliminate adverse disparate impacts.
- Meaningful public participation early and throughout the decision-making process is critical to identify and resolve issues, and to ensure proper consideration of public concerns.
- Early preventive steps, whether under the auspices of state and local governments, in the context of voluntary initiatives by industry, or at the initiative of community advocates, are strongly encouraged to prevent potential Title VI violations and complaints.
- Use of informal resolution techniques in disputes involving civil rights or environmental issues yield the most desirable results for all involved.

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<sup>106</sup> 65 Fed. Reg. 39,652, 39,655; Karen Higginbotham, director, Office of Civil Rights, U.S. Environmental Protection Agency, Testimony, February Hearing Transcript, p. 67 (the guidance “provides a framework to help recipients address situations that might otherwise result in the filing of complaints alleging violations of Title VI in EPA’s Title VI regulations”).

<sup>107</sup> U.S. Environmental Protection Agency, “U.S. EPA Draft Title VI Guidance Documents—Fact Sheet,” <<http://www.epa.gov/civilrights/t6dftguidefacts.pdf>> (last accessed May 3, 2002) (other approaches included fostering effective public participation and developing areawide pollution reduction programs).

<sup>108</sup> U.S. Environmental Protection Agency, “Draft Title VI Guidance Documents Questions and Answers,” p. 3, <<http://www.epa.gov/civilrights/docs/t6guidefaq2.pdf>> (last accessed June 27, 2003) (hereafter cited as EPA, “Questions and Answers”).

[R]ecipient means for the purposes of this regulation, any state or its political subdivision, any instrumentality of a state or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance.

Ibid. See also 65 Fed. Reg. at 39,656 (*Draft Recipient Guidance* and the *Draft Revised Investigation Guidance* serve solely as guidance and do not create enforceable “rights or obligations enforceable by any party in litigation with the United States”); EPA, “Questions and Answers,” p. 5.

- Intergovernmental and innovative problem-solving provide the most comprehensive response to many concerns raised in Title VI complaints.”<sup>109</sup>

The *Draft Recipient Guidance* provides three general approaches recipients should use to analyze and resolve issues that may lead to Title VI complaints: (1) a comprehensive approach, (2) an area-specific approach, and (3) a case-by-case approach.<sup>110</sup> Specifically, the comprehensive approach integrates all or most of the Title VI activities in the *Draft Recipient Guidance*.<sup>111</sup> These include implementing staff training opportunities, encouraging effective public participation and outreach, conducting adverse impact and demographic analyses, encouraging intergovernmental involvement, participating in alternative dispute resolution, reducing or eliminating the alleged adverse disparate impact(s), and evaluating Title VI activities.<sup>112</sup> The area-specific approach identifies geographic areas where adverse disparate impacts may exist, while the case-by-case approach allows a recipient to develop criteria to evaluate permit actions that are likely to raise Title VI concerns.<sup>113</sup>

The *Draft Recipient Guidance* generated numerous responses, and the most significant of those comments relate to area-specific agreements and alternative dispute resolution. Several of the stakeholder comments relating to these areas are briefly presented here. In the guidance, EPA encourages recipients to enter into “area specific agreements,” which identify “geographic areas where adverse disparate health impacts or other potential Title VI concerns may exist.”<sup>114</sup> This concept encourages recipients to work collaboratively with affected communities to reduce or eliminate adverse disparate impact in particular geographic areas.<sup>115</sup> Some agreements may, for example, identify a maximum amount of pollutants for air and water that can be discharged into a certain area over a particular time period.<sup>116</sup> Area-specific agreements also require recipients to continue operating their programs in compliance with the nondiscrimination requirements of Title VI and EPA’s Title VI regulations.<sup>117</sup>

Although state or local recipient agencies are responsible for developing area-specific agreements, OCR reviews these agreements to ensure that they achieve the appropriate results.<sup>118</sup> If OCR accepts a Title VI complaint for investigation that alleges adverse disparate impact relating to permitting activity in an area-specific agreement, it reviews the area-specific agreement and defers to the provi-

<sup>109</sup> 65 Fed. Reg. at 39,656 (emphasis omitted).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 39,652.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 39,658.

<sup>115</sup> *Id.*

<sup>116</sup> *See, e.g., id.* at 39,675.

Another example might be an area-specific agreement that establishes a ceiling on pollutant *releases* with a steady reduction in those pollutants over time. The period of time over which those reductions should occur will likely vary with a number of factors, including the magnitude of the adverse disparate impact, the number and types of sources involved, the scale of the geographic area, the *pathways* of exposure, and the number of people in the *affected population*. It is worth noting, however, that pre-existing obligations to reduce impacts imposed by environmental laws (e.g., “reasonable further progress” as defined in Clean Air Act section 171(1)) might not be sufficient to constitute an agreement meriting due weight. Also, area-specific agreements need not be limited to one environmental *media* (e.g., air emissions); they may also cover adverse disparate impacts in several environmental media (e.g., air and water).

*Id.* (emphasis in original).

<sup>117</sup> *Id.* at 39,652; Higginbotham letter, p. 5.

<sup>118</sup> Higginbotham letter, pp. 5–6.

sions in the agreement. Deference is given only if the agreement is “supported by underlying analyses that have sufficient depth, breadth, completeness, and accuracy, and are relevant to the Title VI concerns, and will result in actual reductions over a reasonable time to the point of eliminating or reducing, to the extent required by Title VI, conditions that might result in a finding of non-compliance with EPA’s Title VI regulations.”<sup>119</sup>

OCR closes an area-specific agreement investigation if it determines that the agreement eliminates or reduces an existing adverse disparate impact.<sup>120</sup> OCR can, however, initiate its own investigation in Title VI complaints associated with area-specific agreements, if it determines that they do not produce significant reductions in environmental hazards that would result in a finding of noncompliance with EPA’s Title VI regulations.<sup>121</sup> In addition to initiating its own investigation, OCR can also consider other information, including information from complainants that relate to Title VI complaints associated with these agreements.<sup>122</sup>

Furthermore, as an overall provision of area-specific agreements, OCR generally relies on its initial assessment and dismisses Title VI complaints against a recipient that include allegations relating to the recipient’s other permitting actions that are covered by the same area-specific agreement.<sup>123</sup> An exception to this guideline, however, occurs in those instances where complaints relating to an area-specific agreement contain allegations that the agreement is improperly implemented or that circumstances have substantially changed.<sup>124</sup> In these circumstances, OCR would not dismiss the Title VI complaints.

Nevertheless, both industry representatives and environmental groups remain skeptical of area-specific agreements. For example, Chevron Companies commented that area-specific agreements encourage states to stigmatize local communities as problem areas and effectively redline them.<sup>125</sup> Chevron maintained, however, that to minimize the likelihood of being involved in a future Title VI complaint, industry is required to conform to the demands of community and environmental groups who may force businesses to make extensive concessions so that residents will assent to area-specific agreements.<sup>126</sup> The likelihood that minority and poor communities would be able to coerce industry into conciliatory arrangements is unlikely. As previously noted, most communities that have been adversely and disproportionately affected by environmental decisions do not have the same access to legal and technical expertise as industry stakeholders. Because of this unequal bargaining power, consenting to area-specific agreements may hinder minority and poor communities from exercising an essential means of regulating pollutants in their neighborhoods. To guard against abuse that could result from inequities in resources and knowledge, EPA should vigorously monitor area-specific agreements to ensure that they are achieving appropriate and equitable results.

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<sup>119</sup> 65 Fed. Reg. at 39,675.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 39,675–76.

<sup>122</sup> *Id.* at 39,676.

<sup>123</sup> *Id.* at 39,675–76; Higginbotham letter, p. 4. *See also* Lawyers’ Committee for Civil Rights Under Law and NAACP Legal Defense & Educational Fund, letter to Carol Browner, administrator, and Ann Goode, director, Office of Civil Rights, U.S. Environmental Protection Agency, Aug. 28, 2000, p. 43, <[http://www.epa.gov/civilrights/docs/t6com2000\\_060.pdf](http://www.epa.gov/civilrights/docs/t6com2000_060.pdf)> (last accessed June 25, 2003) (hereafter cited as Lawyers’ Committee/LDF letter).

<sup>124</sup> 65 Fed. Reg. at 39,675–76; Higginbotham letter, p. 4.

<sup>125</sup> Chevron Companies, letter to Ann Goode, director, Office of Civil Rights, U.S. Environmental Protection Agency, Aug. 24, 2000, p. 2, <[http://www.epa.gov/civilrights/docs/t6com2000\\_015.pdf](http://www.epa.gov/civilrights/docs/t6com2000_015.pdf)> (last accessed June 27, 2003) (hereafter cited as Chevron letter).

<sup>126</sup> *Ibid.*

Advocates and communities, like industry, expressed strong reservations about such agreements. According to the National Environmental Justice Advisory Council, these agreements induce business and industry to commit “fraud”:

Recipients . . . polluters and developers have every incentive to draft a fine-sounding plan, set up a few front groups of employees, friends, and/or relatives of the industry or developer, and have the front groups sign the plan. Then after a group whose members are actually residents of the affected community of color files a Title VI complaint with EPA, the recipient triumphantly produces the area-specific agreement for EPA’s review, with the expectation that the complaint will be dismissed.<sup>127</sup>

Similarly, the Center on Race, Poverty, & the Environment contended that the only enforceable result of area-specific agreements is EPA’s plan to use them to dismiss Title VI complaints, without establishing whether the assertions contain any merit.<sup>128</sup>

EPA, in its *Draft Recipient Guidance*, also discusses and urges funding recipients to incorporate specific Title VI activities and approaches such as effective public participation, intergovernmental involvement, and alternative dispute resolution (ADR).<sup>129</sup> EPA strongly supports ADR as a means of reducing Title VI administrative complaints and managing its complaint caseload.<sup>130</sup> EPA views ADR as a case management tool because EPA can dismiss a complaint if it is resolved in ADR and withdraw it from the administrative process. EPA may also negotiate with a funding recipient to reach an agreement and request that other parties in the matter participate in the negotiation.<sup>131</sup> In these informal proceedings, OCR’s primary responsibilities are to secure the interests of the federal government and to prevent violations of Title VI and EPA’s implementing regulations in the recipient’s programs or activities.<sup>132</sup>

Not many of the stakeholders who commented on the guidance supported informal resolution techniques as an equitable strategy for resolving Title VI complaints. In fact, Shintech, Inc., noted that in those instances where complainants are excluded from informal resolution, it could be interpreted as a one-sided negotiation that does not adequately represent their interests or their legal rights.<sup>133</sup>

Similarly, the Center on Race, Poverty, & the Environment observed that informal resolution does not factor in inequalities in bargaining power and technical resources that leave most complainants at

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<sup>127</sup> National Environmental Justice Advisory Council, Title VI Task Force, “Comments to Carol Browner and Ann Goode,” Aug. 26, 2000, p. 39, <[http://www.epa.gov/civilrights/docs/t6com2000\\_021.pdf](http://www.epa.gov/civilrights/docs/t6com2000_021.pdf)> (last accessed June 25, 2003) (hereafter cited as NEJAC comments).

<sup>128</sup> See also Luke W. Cole, director, Center on Race, Poverty, & the Environment, California Rural Legal Assistance Foundation, letter to EPA Administrator Carol Browner, re: “Comments on Draft Revised Guidance Investigating Title VI Administrative Complaints Challenging Permits and Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs,” Aug. 26, 2000, p. 26 (hereafter cited as Cole, “Comments on Draft Revised Guidance”) (“there is no requirement that any of the parties actually represent any people in any affected community, or that any party has the power to deliver what it is promising”).

<sup>129</sup> 65 Fed. Reg. at 39,652.

<sup>130</sup> *Id.* at 39,673. “ADR includes a variety of approaches including the use of a third party neutral acting as a mediator or the use of a structured process through which the parties can participate in shared learning and creative problem solving to reach a consensus.” *Id.*

<sup>131</sup> *Id.* at 39,673.

<sup>132</sup> *Id.*

<sup>133</sup> Shintech, Inc., letter to Ann Goode, director, Office of Civil Rights, U.S. Environmental Protection Agency, Aug. 25, 2000, p. 5, <[http://www.epa.gov/civilrights/docs/t6com2000\\_017.pdf](http://www.epa.gov/civilrights/docs/t6com2000_017.pdf)> (last accessed June 27, 2003). Shintech advised EPA to involve complainants in the informal resolution process, to avoid further delay and litigation. *Ibid.*

a disadvantage when solving a Title VI dispute.<sup>134</sup> Unlike recipients, poor communities and neighborhoods of color that wish to resolve Title VI complaints may not have the resources to be represented by legal counsel or negotiation experts who are skilled at conciliation techniques.<sup>135</sup> Community residents also may not have sufficient resources to obtain technical information and data that could prove the existence of disparate impact. In effect, there is no guarantee that the complainants' interests will be fairly considered. Contrarily, formal adjudication settings have established procedural rules that equalize the positions of the parties and ensure the fairness of the proceeding.<sup>136</sup> Alternative dispute resolution in the environmental context is discussed more specifically in Chapter 5.

### Draft Revised Investigation Guidance

The *Draft Revised Investigation Guidance*, the companion to the *Draft Recipient Guidance*, establishes how the Office of Civil Rights processes Title VI complaints alleging discrimination in permitting pursuant to EPA's implementing regulations.<sup>137</sup> The guidance describes procedures that EPA staff can use to investigate Title VI administrative complaints, as well as provides information for the public on the agency's internal investigation procedures.<sup>138</sup> It also explains how OCR determines if a permitting decision creates objectionable adverse impacts and judges the recipient's efforts to diminish them.<sup>139</sup> According to OCR's director, the *Draft Revised Investigation Guidance* explains to all stakeholders, especially state and local government entities, the types of concerns that Title VI addresses and their roles in the investigative process.<sup>140</sup>

According to the *Draft Revised Investigation Guidance*, OCR adheres to the following steps when processing Title VI complaints, pursuant to federal standards: acknowledgement of the complaint; acceptance of the complaint for investigation, rejection, or referral; investigation; preliminary finding of noncompliance; formal finding of noncompliance; voluntary compliance; and the hearing/appeal process.<sup>141</sup>

The *Draft Revised Investigation Guidance* offers a more detailed explanation of how EPA determines if an environmental impact is harmful as experienced by individuals based on their national origin,

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<sup>134</sup> Cole, "Comments on Draft Revised Guidance," p. 25. See Lawyers' Committee/LDF letter, p. 43. See generally NEJAC comments, pp. 20–25 (provides information on other disadvantages of ADR).

<sup>135</sup> See Stephen Donahue, resident of Baton Rouge, Louisiana, letter to Ann Goode, director, Office of Civil Rights, U.S. Environmental Protection Agency, <[http://www.epa.gov/civilrights/docs/t6com2000\\_099.pdf](http://www.epa.gov/civilrights/docs/t6com2000_099.pdf)> (last accessed June 27, 2003) ("I live in Baton Rouge, Louisiana. Almost anybody can see if they visit here that heavy polluting industry locates in poor neighborhoods and in neighborhoods where the majority of people are people of color. The poor cannot afford to constantly contest industrial expansion in their neighborhoods.")

<sup>136</sup> Cole, "Comments on Draft Revised Guidance," pp. 25–26.

<sup>137</sup> 65 Fed. Reg. at 39,670. EPA reminded recipients that the Title VI guidance did not apply to other issues, such as enforcement-related matters and adequacy of public participation. These and other topics would be addressed in future EPA guidance. *Id.* at 39,669.

<sup>138</sup> EPA, "Questions and Answers," p. 3.

<sup>139</sup> 65 Fed. Reg. at 39,651–54; Bradford C. Mank, *The Draft Title VI Recipient and Revised Investigation Guidances: Too Much Discretion for EPA and a More Difficult Standard for Complainants?* 30 ENVTL. L. REP. 11144 (2000) (hereafter cited as Mank, *Too Much Discretion for EPA*). See also EPA, "Questions and Answers," p. 5. Since the *Draft Revised Investigation Guidance* does not address complaints against EPA recipients that are federally recognized Indian tribes, EPA intends to provide a different guidance that takes into account the relationship of federal Indian law to Title VI, in order to address these issues. EPA plans to continue collaborative efforts with federally recognized tribes and the Department of Justice to accomplish this objective. *Ibid.*, p. 5.

<sup>140</sup> Karen Higginbotham, director, Office of Civil Rights, U.S. Environmental Protection Agency, February Hearing Transcript, p. 67.

<sup>141</sup> 65 Fed. Reg. at 39,670–77; *id.* at 39,670 (citing 28 C.F.R. §§ 42.101–42.112).

race, or color, and if so, whether this impact is a defensible circumstance.<sup>142</sup> This guidance expands the definition of disparity analysis concepts, which were mentioned in the *Interim Guidance*, and provides additional information on how the agency will consider existing environmental laws, regulations, policies, and scientific standards to determine when health indicator levels are adverse.<sup>143</sup> Additionally, the *Draft Revised Investigation Guidance* explains the method used to identify and determine the characteristics of the affected population.<sup>144</sup> Lastly, the guidance presents a six-step procedure that OCR will use to determine whether an adverse disparate impact exists: assessing applicability of Title VI to the permit, defining the scope of the investigation, conducting an impact assessment, making an adverse impact decision, characterizing populations and conducting comparisons, and making an adverse disparate impact assessment.<sup>145</sup>

### ***Environmental Stakeholders' Responses to the Draft Revised Investigation Guidance***

State recipients, industry representatives, community residents, and environmental justice and civil rights advocates had varying responses to the investigative guidance. During the comment period, environmental justice advocates generally did not embrace the substance of the guidance. State officials and industry representatives issued guarded praise for EPA's attempt to clarify the *Interim Guidance*, although they expressed concern about particular subject areas.<sup>146</sup> In addition to other overall categories of observations, EPA received comments that dealt with the overall lack of enforceable rights and agency obligations; the restriction of the applicability of Title VI to those recipients who are the direct cause of environmental hazards; the lack of applicability of the guidance to EPA actions that cause adverse disparate impacts; the questionable utility of alternative dispute resolution in the Title VI enforcement context; EPA's reluctance to conduct an independent analysis of environmental impacts and the agency's reliance on recipients' analyses; the use of "cumulative impacts" when assessing environmental impacts; and the utility of area-specific agreements.

***Perception of an Overall Lack of Enforceable Rights and Agency Obligations.*** A number of the comments received from industry and local government representatives, as well as from environmental justice and community stakeholders, maintained that the guidance was not specific enough to determine

<sup>142</sup> 65 Fed. Reg. at 39,654; Mank, *Too Much Discretion for EPA*, p. 11158.

<sup>143</sup> 65 Fed. Reg. at 39,654. *See also id.* at 39,654, 39,676–77 (the guidance differentiates between a decrease in emissions at a certain facility and in a specific area, in order to eliminate adverse disparate impacts).

[I]f a permit action that is the subject of the complaint will significantly decrease either overall emissions or pollutants of concern at the facility named in the complaint, the [EPA] usually would not initiate an investigation of allegations regarding cumulative impacts. A recipient has the burden of demonstrating that the decrease at a particular facility is actual and significant. The decreases should be in the same media and from the same facility that is alleged in the complaint.

Mank, *Too Much Discretion for EPA*, p. 11164 (internal footnotes omitted).

<sup>144</sup> 65 Fed. Reg. at 39,654.

<sup>145</sup> *Id.* at 39,676–77 (the agency anticipated that parts of the adverse disparate impact analysis would be altered or omitted, based on the facts and totality of the circumstances in each complaint). *See generally id.* at 39,677–82 (provides a detailed discussion of the EPA's proposed adverse disparate impact analysis).

<sup>146</sup> National Petrochemical & Refiners Association, letter to Ann Goode, director, Office of Civil Rights, U.S. Environmental Protection Agency, "Comments of National Petrochemical & Refiners Association: Draft Title VI Guidance for EPA Assistance Recipients Adminstrating Environmental Permitting Programs and Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits," Aug. 28, 2000, pp. 1–2, <[http://www.epa.gov/civilrights/docs/t6\\_com2000\\_046.pdf](http://www.epa.gov/civilrights/docs/t6_com2000_046.pdf)> (last accessed Nov. 4, 2002) (hereafter cited as NPRA letter and comments). *See also* Chevron letter, p. 2 (Chevron maintained that the *Draft Revised Investigation Guidance* and the *Draft Recipient Guidance* were substantial improvements over the *Interim Guidance*, due to extensive stakeholder input).

when violations of Title VI occur in permitting situations.<sup>147</sup> Industry representatives contended that the guidelines allowed EPA to retain excessive discretion in determining issues that were critical elements in complying with Title VI.<sup>148</sup> Other observations questioned which complaints EPA would actually investigate and when the start of the 180-day statute of limitations for filing a Title VI complaint commenced. The state of New Jersey urged EPA to provide a consistent and clear definition of disparate impact, so that recipients and communities would know when discriminatory acts occurred.<sup>149</sup> Stakeholders also had divergent opinions on the appropriateness of EPA's position, that since it is unlikely that a single permit is responsible for adverse disparate impacts in a community, denial or revocation of that particular permit is not an appropriate remedy. As a result of these and other issues, the guidance left environmental stakeholders questioning when alleged violations of Title VI are enforced, when complaints should be filed, and who is responsible for taking specific corrective action.

Environmental justice advocates and community stakeholders expressed disappointment with EPA's position on when the agency accepts a complaint for investigation. According to the guidance, EPA is able to dismiss a Title VI complaint that is also involved in litigation to await the judicial outcome.<sup>150</sup> It may also dismiss a complaint involved in an administrative appeal. In these circumstances, however, OCR waives the timeliness requirement if the complainant refiles the Title VI complaint after the judicial and appellate processes are exhausted.<sup>151</sup> Nevertheless, environmental advocates still believe that their complaints may be barred if not filed within 180 days of the alleged discriminatory act. The Center on Race, Poverty, & the Environment (California Rural Legal Assistance Program) contended that EPA provided contradictory time periods for accepting a complaint. The center compared two statements in the *Draft Revised Investigation Guidance*, that indicate the agency would "investigate all administrative complaints concerning the conduct of a recipient of EPA's financial assistance that satisfy the jurisdictional criteria in EPA's implementing regulations,"<sup>152</sup> while simultaneously stating that it would dismiss complaints that "'satisfy the jurisdictional criteria in EPA's implementing regulations' if complainants are attempting to exhaust their administrative remedies before the recipient agency . . . or pursue their rights in court."<sup>153</sup>

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<sup>147</sup> See, e.g., Public Interest Law Center of Philadelphia, letter to the U.S. Environmental Protection Agency, "Title VI Guidance Comments," July 21, 2000, p. 5, <[http://www.epa.gov/civilrights/docs/t6com2000\\_003.pdf](http://www.epa.gov/civilrights/docs/t6com2000_003.pdf)> (last accessed June 27, 2003). The Public Interest Law Center indicated that representatives of communities of color and the EPA's Implementation Advisory Committee did not recommend the use of the adverse disparate impact analysis method, as described in the *Interim Guidance* and again included in the *Draft Revised Investigation Guidance*. Ibid.

<sup>148</sup> Chevron letter, p. 2.

<sup>149</sup> See, e.g., Pamela Lyons, director, State of New Jersey Department of Environmental Protection, letter to Yasmin Yorker, Title VI team leader, U.S. Environmental Protection Agency, Aug. 22, 2000, p. 1, <[http://www.epa.gov/civilrights/docs/t6com2000\\_030.pdf](http://www.epa.gov/civilrights/docs/t6com2000_030.pdf)> (last accessed Nov. 5, 2002) (hereafter cited as Lyons letter); Dennis W. Archer, mayor, city of Detroit, letter to Ann Goode, director, Office of Civil Rights, U.S. Environmental Protection Agency, Aug. 28, 2000, p. 3, <[http://www.epa.gov/civilrights/docs/t6com2000\\_059.pdf](http://www.epa.gov/civilrights/docs/t6com2000_059.pdf)> (last accessed Nov. 5, 2002) (industry representatives and local government officials stressed that the new guidance does not provide single definitions to important terms such as "adverse disparate impact," "adequate justification," "comparison populations," or "affected populations"). See generally Lyons letter, p. 1 ("EPA still clings to the position, that no matter what a state recipient does in implementing a Title VI program, that . . . [the EPA] reserve[s] the right to a *de novo* investigation and determination as to whether the state effort is good enough").

<sup>150</sup> 65 Fed. Reg. at 39,673; Higginbotham letter, p. 8.

<sup>151</sup> 65 Fed. Reg. at 39,673; Higginbotham letter, p. 8.

<sup>152</sup> 65 Fed. Reg. at 39,672.

<sup>153</sup> Cole, "Comments on Draft Revised Guidance," p. 16 (quoting 65 Fed. Reg. at 39,672). See also NEJAC comments, p. 13 ("The Guidance . . . forces complainants to file a complaint before exhausting their administrative remedies . . . , it then will dismiss that timely filed complaint, however, because the complainant is exhausting its administrative remedies!").

Stakeholders were also concerned about when the guidance allows the 180-day time period to begin for filing a Title VI complaint. EPA's implementing regulations require that the complaint be filed "within 180 calendar days of the alleged discriminatory acts, unless the OCR waives the time limit for good cause."<sup>154</sup> Furthermore, the guidance provides that "complaints alleging discriminatory effects resulting from a permit should be filed with EPA within 180 calendar days of issuance of that permit."<sup>155</sup> Despite these provisions, industry and community representatives disagreed on whether the 180 days was sufficient to address the alleged violation. For example, the National Petrochemical & Refiners Association urged the agency not to delay addressing adverse environmental impacts:

If the impacts identified in the complaint are in fact significant, adverse, disparate impacts on the community, delaying the process does not solve the problem; it only makes it worse. For this reason, it is very important that EPA's 180 day time limit be fixed. Currently in the Guidance, EPA indicates that it may waive the 180 day limit "for good cause" or on a "case-by-case" basis. We urge the EPA to eliminate these potential delays in the process and provide certainty with the 180 day limit.<sup>156</sup>

In contrast, the Sierra Club and the Galveston-Houston Association for Smog Prevention asserted that placing a time limit on the filing of a complaint of discrimination was inconsistent with the idea of civil rights enforcement. The organizations described the 180-day time limit as:

[being] inconsistent with Title VI of the 1964 Civil Rights Act where no such time line is required since several years may be necessary to establish the pattern of discriminatory environmental regulation by an agency and toxic polluter. EPA has chosen an arbitrary time requirement in order to potentially discourage certain older Title VI complaint actions where individuals may need considerable time to perform their own investigation and establish reasonable evidence as a basis that racial discrimination occurred.<sup>157</sup>

The National Environmental Justice Advisory Council's (NEJAC) Title VI Task Force provided another observation that complicates the stakeholders' controversy over the appropriateness of the 180-day filing deadline for Title VI complaints. According to NEJAC, the *Draft Revised Investigation Guidance* advises stakeholders that the statute of limitations begins before a final and reviewable agency action has occurred, pursuant to EPA's regulations.<sup>158</sup> In effect, despite EPA's implementing regulations and guidelines suggested in the *Draft Revised Investigation Guidance* relating to the 180-day filing deadline, environmental stakeholders perceive that this is an inappropriate time period for filing Title VI complaints with the agency.

In reference to EPA's position that denial or revocation of a permit is not necessarily an appropriate remedy in a Title VI investigation, since it is unlikely that the permit in question is the sole cause of an adverse disparate impact, industry stakeholders largely concurred with EPA's perspective.<sup>159</sup> In

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<sup>154</sup> 40 C.F.R. § 7.120(b)(2) ("the filing of a grievance with the recipient does not satisfy the requirement that complaints must be filed within 180 days of the alleged discriminatory acts"); Higginbotham letter, p. 8.

<sup>155</sup> 65 Fed. Reg. at 39,672. See Higginbotham letter, p. 8.

<sup>156</sup> NPRA letter and comments; Environmental Council of the States, letter to Ann Goode, director, Office of Civil Rights, U.S. Environmental Protection Agency, Aug. 24, 2000, p. 3, <[http://www.epa.gov/civilrights/docs/t6com2000\\_043.pdf](http://www.epa.gov/civilrights/docs/t6com2000_043.pdf)> (last accessed Nov. 4, 2002); Chevron letter, p. 5 (describing EPA's timeframes as unnecessarily lengthy and open-ended).

<sup>157</sup> Sierra Club—Lone Star Chapter and Galveston-Houston Association for Smog Prevention, letter to Carol Browner, administrator, and Ann Goode, director, Office of Civil Rights, U.S. Environmental Protection Agency, Aug. 28, 2000, <[http://www.epa.gov/civilrights/docs/t6com2000\\_091.pdf](http://www.epa.gov/civilrights/docs/t6com2000_091.pdf)> (last accessed Nov. 6, 2002).

<sup>158</sup> NEJAC, comments, p. 14 (citing 40 C.F.R. § 124.19(f)(1)). *But see* 65 Fed. Reg. at 39,672.

<sup>159</sup> See generally Mank, *Too Much Discretion for EPA*.

contrast, the Lawyers' Committee for Civil Rights Under Law and the NAACP Legal Defense & Educational Fund (Lawyers' Committee/LDF) observed that Title VI requires recipient environmental agencies to consider all impacts of their permitting decisions that are adverse to a community, and not solely environmental considerations.<sup>160</sup> The Lawyers' Committee/LDF then cited the Civil Rights Restoration Act of 1988,<sup>161</sup> which took precedence over a Supreme Court case that held that Title VI was only applicable to prohibiting discrimination in specific activities for which federal funding was reserved.<sup>162</sup> It was noted that the act interpreted "program or activity" in Title VI to include "all of the operations" of departments, agencies, or other institutions "any part of which" receives federal funding.<sup>163</sup> As a result of Title VI, EPA is required to terminate the federal funding of any facility that discriminates in any of its activities, except in employment cases.<sup>164</sup>

Other environmental justice advocates maintained that EPA's reluctance to suspend or revoke permits in violation of Title VI created problems for those who need to challenge the legitimacy of a permit proceeding or agency action.<sup>165</sup> According to the Golden Gate University School of Law's Environmental Law and Justice Clinic:

The Guidance presumes that the disputed permit will be issued—indeed there is no stay provision at all. This puts complainant groups at risk from ongoing project impacts and greatly undermines their ability to effectively negotiate with recipient agencies. Complainants must bear the burdens stemming from implementation of permits while their complaints are pending, and indeed languishing for years, at EPA (often while simultaneously fighting to ensure that the permits are complied with).<sup>166</sup>

EPA does not dispute that neither its Title VI regulations nor the guidance grants the agency the authority to adopt such a provision.<sup>167</sup> One explanation for EPA's reluctance to suspend or revoke a permit that violates Title VI originates from the agency's policy of providing its funding recipients opportunities to voluntarily improve their Title VI programs.<sup>168</sup> The agency's reluctance also stems from the lingering tension between EPA's role as environmental regulator and its concurrent duty as an enforcer of Title VI.

Finally, community advocates and environmental justice organizations contended that EPA's guidance does not provide stakeholders with clear authority on critical questions, such as how and when a Title VI complaint can be filed, and the circumstances for suspending or revoking permits that violate Title VI. It is essential that community stakeholders, state and local recipients, and industry representatives are aware of the areas of EPA's authority, as well as understand how the agency inter-

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<sup>160</sup> Lawyers' Committee/LDF letter, p. 17.

<sup>161</sup> 42 U.S.C. § 2000d-4a.

<sup>162</sup> *Grove City College v. Bell*, 465 U.S. 555 (1984) (*Grove* held that covered "program or activity" of a university meant only the federally funding financial aid program).

<sup>163</sup> Lawyers' Committee/LDF letter, p. 20 ("the . . . statutory exception was employment discrimination (except in cases where federal funds are earmarked for employment), to avoid overlap with Title VII").

<sup>164</sup> Lawyers' Committee/LDF letter, p. 20.

<sup>165</sup> NEJAC comments, p. 28.

<sup>166</sup> Golden Gate University School of Law Environmental Law and Justice Clinic, letter to Carol Browner, administrator, and Ann Goode, director, Office of Civil Rights, U.S. Environmental Protection Agency, Aug. 28, 2000, p. 5, <[http://www.epa.gov/civilrights/docs/t6com2000\\_033.pdf](http://www.epa.gov/civilrights/docs/t6com2000_033.pdf)> (last accessed Nov. 5, 2002).

<sup>167</sup> Higginbotham letter, p. 9.

<sup>168</sup> Mank, *Too Much Discretion for EPA*, p. 11146 (citing John McQuaid, "Environmental Justice Revisited in New EPA Plan," *New Orleans Times-Picayune*, June 20, 2000, p. A-1).

prets terms such as “adverse disparate impact,” “affected population,” and “comparison populations” that are critical to an administrative Title VI analysis.

***Investigations Limited by “Authority to Consider” Provision.*** Environmental justice advocates maintained that the guidance does not provide a comprehensive safeguard against adverse disparate impact.<sup>169</sup> When the Lawyers’ Committee for Civil Rights Under Law and the NAACP Legal Defense Fund examined the *Draft Revised Investigation Guidance*, they concluded that EPA unnecessarily limits its investigations to pollutants and impacts “within the recipient’s authority to consider,” as defined under applicable state laws and regulations.<sup>170</sup> According to these two civil rights organizations, the “authority to consider” provision allows states to narrowly define their Title VI duties by passing laws, or being shielded by existing state laws and regulations, that restrict the authority of their permitting agencies to examining a limited number or type of pollutants and adverse impacts. Some states have laws allowing permitting authorities to consider socioeconomic impact, while other jurisdictions restrict their analyses to environmental or health impact. For example, if state laws prohibit consideration of an adverse social, economic, or cultural impact resulting from a permitting decision, no Title VI violation could be established based on these grounds because there is no “authority to consider” these issues.<sup>171</sup> This approach by the states, it is argued, violates the supremacy clause of the U.S. Constitution and federal civil rights laws.<sup>172</sup>

EPA, however, has not yet encountered a situation where a state has intentionally limited its authority to consider the types of pollutants and impacts to make Title VI adverse disparate impact claims more difficult to establish.<sup>173</sup> The agency does not dispute that there is variance between states on what pollutants and impacts they have “authority to consider.”<sup>174</sup>

Lastly, the Lawyers’ Committee/LDF contend that the “authority to consider” rule improperly allows EPA’s Office of Civil Rights to interpret state laws in order to determine what environmental impacts are within the jurisdiction’s authority, when the agency does not have the expertise or power to do so.<sup>175</sup>

***Guidance Does Not Apply to EPA’s Activities and Programs.*** According to the *Draft Revised Investigation Guidance*, Title VI is not applicable to EPA’s actions and permitting activities, since it only applies to the programs and activities of recipients of federal financial assistance, not to federal agencies. The statute clearly excludes federal agencies from its definition of “program or activity.”<sup>176</sup> Be-

<sup>169</sup> See generally Robert D. Bullard, Ph.D., “EPA Draft Title VI Guidance Misses Mark,” pp. 1–2, <[www.epa.gov/civilrights/docs/t6com2000\\_077.pdf](http://www.epa.gov/civilrights/docs/t6com2000_077.pdf)> (last accessed Nov. 5, 2002).

<sup>170</sup> Lawyers’ Committee for Civil Rights Under Law, “Comments before the U.S. Commission on Civil Rights,” Apr. 9, 2002, p. 10. See generally 65 Fed. Reg. at 39,671.

In determining whether a recipient is in violation of Title VI or EPA’s implementing regulations, the Agency expects to assess whether the adverse disparate impact results from factors within the recipient’s *authority to consider* as defined by applicable laws and regulations.

*Id.* (emphasis added).

<sup>171</sup> Lawyers’ Committee/LDF letter, p. 24.

<sup>172</sup> *Ibid.*, p. 22 (citing *Milliken v. Bradley*, 433 U.S. 267, 280–281 (1974) (federal law has supremacy over state law as indicated in the United States Constitution)); *R.I.S.E. v. Kay*, 768 F. Supp. 1144 (E.D. Va. 1991), *aff’d without opinion*, 977 F.2d 573 (4th Cir. 1992) (civil rights law provides that all potentially adverse impacts on communities of color are essential to establishing whether disparate impacts exist).

<sup>173</sup> Higginbotham letter, p. 9.

<sup>174</sup> *Ibid.*

<sup>175</sup> *Ibid.*, p. 25.

<sup>176</sup> 65 Fed. Reg. at 39,669–70 (citing 42 U.S.C. § 2000d-4a).

cause of this disclaimer, community residents must rely on EPA's commitment to monitor its own activities and permitting programs to ensure that they do not violate Title VI.<sup>177</sup> Although the agency acknowledged that Title VI is not applicable to federal agencies, it maintained that it continues to take significant strides in ensuring that its programs avoid disproportionately high and adverse impacts on minority and low-income communities, pursuant to Executive Order 12,898.<sup>178</sup> Despite this assurance, the Arizona Center for Law in the Public Interest expressed concern in its comments to the agency on the guidance that EPA may have excessive discretion to not comply with nondiscriminatory practices.<sup>179</sup> The center also observed that the authority of Title VI is lessened when EPA is statutorily excluded from adhering to this civil rights law while other stakeholders must uphold its concepts of nondiscrimination.<sup>180</sup>

***Stakeholders Are Concerned That EPA Allows Recipients to Submit Their Own Disparate Impact Analyses in Lieu of Conducting an Independent Examination.*** To provide state agencies with an incentive for creating active Title VI programs, EPA assigns "due weight" to funding recipients' adverse disparate impact investigations.<sup>181</sup> Because the Civil Rights Act of 1964 mandates that EPA cannot delegate its Title VI enforcement duty, OCR cannot entirely rely on a recipient's contention that Title VI has not been violated.<sup>182</sup>

In some situations, however, the guidance allows EPA to consider the recipient's assessment that an adverse disparate impact does not exist. OCR provides "due weight" to these studies when, at a minimum, they reflect accepted scientific methods.<sup>183</sup> Although OCR may consider a recipient's evaluation of its compliance with Title VI, this does not preclude the agency from independently investigating the matter or considering other relevant information.<sup>184</sup>

Environmental justice stakeholders do not favor EPA's "due weight" provision. Some groups allege that EPA relies too heavily on recipient assessments and that, as a result, state agencies use the "due weight" provision to shield themselves from potential Title VI complaints.<sup>185</sup> Although the guidance allows complainants to also submit supporting data and analyses to establish that a disparate impact exists, few have access to complex data and methodologies to do so.<sup>186</sup> As a result, both recipients and complainants should have access to the resources to conduct their own analyses. Moreover, the Lawyers' Committee/LDF encouraged OCR to conduct an independent analysis in order to thoroughly review the assertions of both the complainants and the recipients.<sup>187</sup>

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<sup>177</sup> *Id.* at 39,670–71 (citing the due process clause of the U.S. Constitution, which prohibits the federal government from engaging in intentional discrimination).

<sup>178</sup> Higginbotham letter, p. 9.

<sup>179</sup> Arizona Center for Law in the Public Interest, "Letter and Comments to EPA," Aug. 28, 2000, p. 2, <[http://www.epa.gov/civilrights/docs/t6com2000\\_066.pdf](http://www.epa.gov/civilrights/docs/t6com2000_066.pdf)> (last accessed June 27, 2003).

<sup>180</sup> *See* *ibid.*

<sup>181</sup> 65 Fed. Reg. at 39,653.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* "It may focus on a spectrum of potential adverse impacts, such as that described in the analytical framework set forth in the *Draft Revised Investigation Guidance*, or may be more focused, such as the impact of a specific pollutant on nearby populations (e.g., a study regarding the impact of lead emissions on blood lead levels in the surrounding area)." *Id.*

<sup>184</sup> Higginbotham letter, p. 9 (EPA considers all pertinent information related to an investigation, including information submitted by recipients).

<sup>185</sup> Lawyers' Committee/LDF letter, p. 41.

<sup>186</sup> *Ibid.*

<sup>187</sup> *Ibid.*, p. 42. *See also* Cole, "Comments on Draft Revised Guidance," p. 28.

## EPA'S TITLE VI COMPLAINT PROGRAM

The issue of whether existing Title VI regulations and corresponding agency policies are effective enforcement tools in the environmental justice context is an essential question. In February 2002, the U.S. Commission on Civil Rights heard testimony from representatives of the Environmental Protection Agency, as well as three other federal agencies, who discussed the implementation of Title VI and Executive Order 12,898.<sup>188</sup> The remainder of this chapter will review each of the four agencies' Title VI programs, with emphasis on the number of complaints, the length of time from filing a complaint to disposition, the number of complaints dismissed and the reasons, when and how agencies share jurisdiction over complaints, and how complainants and permitting authorities are informed of decisions relating to a complaint.

### Status of EPA Title VI Complaint Backlog

Despite acknowledged obligations to address Title VI complaints in a timely manner, EPA accumulated a backlog of Title VI complaints from 1998 to 2001.<sup>189</sup> This accumulation of complaints was attributed to the lack of staff resources, as well as the presence of a 1998 congressional restriction prohibiting the use of EPA's appropriations to investigate and resolve Title VI complaints until the agency issued final guidance.<sup>190</sup> EPA's appropriations bill for FY 2002, however, did not include this restriction.<sup>191</sup> Instead, the Bush administration's proposed FY 2002 budget for EPA allocated additional funds to address pending Title VI complaints.<sup>192</sup>

Former Administrator Christine Todd Whitman responded to this opportunity to address the complaint backlog problem by forming a Title VI Task Force in May 2001.<sup>193</sup> Administrator Whitman directed EPA's Region 5 counsel, Gail Ginsberg, as well as the agency's Office for Enforcement and Compliance Assistance and the Office of Civil Rights, to lead the work of the task force in eliminating the accumulated Title VI complaints.<sup>194</sup>

According to Ms. Ginsberg, when the task force was created in 2001, there were 66 open Title VI complaints. Twenty-one of the complaints were previously accepted for investigation,<sup>195</sup> and 45

<sup>188</sup> Information relating to the Departments of Housing and Urban Development, Interior, and Transportation will be discussed later in this chapter.

<sup>189</sup> Karen Higginbotham, director, Office of Civil Rights, U.S. Environmental Protection Agency, interview, Jan. 17, 2002 (hereafter cited as Higginbotham January 2002 interview).

<sup>190</sup> Department of Veterans Affairs and Housing and Urban Development and Independent Agencies Appropriations Act of 1999, Pub. L. No. 105-174, tit. III, § 214(a), 112 Stat. 2461, 2486 (1998); Higginbotham January 2002 interview; Marcia Coyle, "The EPA Braces to Clear Title VI Pileup," *National Law Journal*, Oct. 15, 2001, p. A-12 (hereafter cited as Coyle, "EPA Braces"). See also Gail Ginsberg, chairperson, EPA Title VI Task Force, Testimony, February Hearing Transcript, p. 71 ("The EPA construed that prohibition from the Congress to extend also to the June 2000 draft investigative guidance. As a consequence, for a period of three years, commencing in October of '98, the EPA could not act on most of the permit related complaints, Title VI complaints, pending before the agency.").

<sup>191</sup> 149 CONG. REC. H707 (2003) (describes EPA's budget for the fiscal year ending September 30, 2003); Kriz, "Coloring Justice."

<sup>192</sup> Kriz, "Coloring Justice" (during a July 10, 2001 appropriations markup, \$11.9 million was allotted for EPA's environmental justice efforts, which was \$2.7 million more than in FY 2001).

<sup>193</sup> U.S. Environmental Protection Agency, "Remarks of Governor Christine Todd Whitman, Administrator of the U.S. Environmental Protection Agency, at a Meeting of the EPA Senior Executive Service: Dulles, Virginia," *Office of the Administrator—Major Speeches Delivered by U.S. EPA Administrator Christie Whitman*, May 31, 2001, <<http://www.yosemite.epa.gov/administrator/speeches.nsf>> (last accessed Nov. 9, 2002).

<sup>194</sup> *Ibid.*

<sup>195</sup> Gail Ginsberg, chairperson, EPA Title VI Task Force, Testimony, February Hearing Transcript, p. 70.

complaints were under review to determine whether they should be accepted for investigation, rejected, or referred to another agency for action.<sup>196</sup>

As of January 31, 2002, the backlog had been reduced from 66 to 42 complaints.<sup>197</sup> Subsequently, by the time of the Commission's hearing on February 8, 2002, the case backlog was reduced to 41 complaints.<sup>198</sup> Of these 41 cases, 34 were then identified as being acceptable for investigation.<sup>199</sup> The backlog caseload was then seven complaints. Ms. Ginsberg explained that five of these cases were put in a suspense status due to secondary litigation that could affect the Title VI complaints.<sup>200</sup> As a result, two of EPA's Title VI complaints remain backlogged. These cases are being reviewed pending the agency's receipt of clarifying information.<sup>201</sup> One of these complaints is *St. Francis Prayer Center v. Michigan Department of Environmental Quality (Genesee Power Station)*, which was originally filed with EPA in 1992.<sup>202</sup> As recently as 2001, the Genesee Power Station facility was still operational and reportedly discharging pollutants into a predominately African American community.<sup>203</sup>

Although no decisions had been made on the merits of the backlogged complaints at the time of the Commission's February 2002 hearing, EPA was investigating most of the accepted complaints and had informed complainants whether or not their complaint was accepted for investigation.<sup>204</sup> In August 2003, EPA reported that it entered into an agreement in May 2003 with the Texas Commission on Environmental Quality that resolved allegations from six Title VI complaints.<sup>205</sup> According to EPA, the Title VI Task Force will not eliminate the accumulated complaints until some time in early 2004.<sup>206</sup>

Despite progress in eliminating the complaint backlog, some concerns remain about EPA's handling of Title VI complaints. Luke Cole, director of the Center on Race, Poverty, & the Environment, voiced concerns that the task force will "find the easy way to get rid of the complaints is just to dismiss them all."<sup>207</sup> As an example, Mr. Cole referred to the agency's *Select Steel* complaint that involved environmental permits issued by the Michigan Department of Environmental Quality. EPA found that the proposed steel mill's emissions were within existing federal pollution limits and, therefore, never ruled on the merits of the disparate impact claim.<sup>208</sup> Sheila Foster, a professor of law at

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<sup>196</sup> *Ibid.* (stating that "this jurisdictional review is conducted pursuant to EPA's Title VI regulations, which are found at 40 C.F.R. Part 7").

<sup>197</sup> *Ibid.*

<sup>198</sup> *Ibid.*

<sup>199</sup> *Ibid.*

<sup>200</sup> *Ibid.*

<sup>201</sup> *Ibid.*

<sup>202</sup> Yasmin Yorker, external compliance team leader, U.S. Environmental Protection Agency, e-mail to Office of the General Counsel, U.S. Commission on Civil Rights, Sept. 2, 2003 (EPA's docket number for this complaint is IR-94-R5). As of September 2003, EPA was still investigating the *Genesee Power Station* case, which is in an active pending status. *Ibid.* See also Hurwitz and Sullivan, *Using Civil Rights Laws*, pp. 54–55 (describing how EPA expedited its review of the *Select Steel* case, as opposed to the *Genesee Power Station* complaint).

<sup>203</sup> Hurwitz and Sullivan, *Using Civil Rights Laws*, pp. 56–57.

<sup>204</sup> Gail Ginsberg, chairperson, EPA Title VI Task Force, Testimony, February Hearing Transcript, p. 71.

<sup>205</sup> Higginbotham letter, p. 10.

<sup>206</sup> Gail Ginsberg, chairperson, EPA Title VI Task Force, Testimony, February Hearing Transcript, p. 72 (the backlog consists mostly of permitting complaints, but there are also some that involve alleged discriminatory public participation processes and disproportionate enforcement).

<sup>207</sup> April Reese, "Enviro Justice: EPA's Whitman Forms Task Force—Civil Rights Community Doubts Agency Commitment," *Greenwire*, Aug. 27, 2001 (quoting Luke Cole).

<sup>208</sup> See generally *ibid.*

Rutgers University, observed that “[e]ven though the agency [EPA] investigated the complaint, it did it in a way that allowed them to not even look at the disparate impact.”<sup>209</sup> Rejecting complaints for technical issues will result in better case management, but will not address the human health and environmental concerns of minority and poor communities.

### Number of Title VI Complaints at EPA

Pursuant to its regulations, OCR is required to review a Title VI complaint and either accept, reject, or refer it to the appropriate federal agency for further action within 20 calendar days of acknowledgment of the complaint.<sup>210</sup> Of 124 Title VI complaints filed with EPA by January 1, 2002, only 13 cases, or 10.5 percent, were processed by the agency in compliance with its own regulation.<sup>211</sup> None of the 13 complaints processed within the 20-day window were accepted for investigation.<sup>212</sup> All were rejected because EPA assessed that they did not meet the agency’s regulatory requirements.<sup>213</sup>

By February 2002, there were several cases that had been pending for more than three years in which EPA had not made its 20-day decision timeline.<sup>214</sup> For example, a permitting-related Title VI complaint was filed in August 1995 on behalf of migrant farm workers who resided in a labor camp one block from a toxic waste processing facility in Salinas, California.<sup>215</sup> The complaint alleged that the complainants were exposed to hazardous substances from the facility and identified the alleged recipient as the California Environmental Protection Agency, Department of Toxic Substances Control, and the toxic waste facility as the Pure-Etch Company.<sup>216</sup> EPA did not decide to accept the case for investigation until July 2001, six years after it was filed with the agency.<sup>217</sup> In April 2003, the agency partially dismissed the complaint.<sup>218</sup>

<sup>209</sup> *Ibid.* (quoting Sheila Foster). *See also* Coyle, “EPA Braces” (some civil rights advocates are concerned as to whether complainants are being treated equitably if the EPA reviews their complaints too quickly).

<sup>210</sup> 40 C.F.R. § 7.120(d)(1)(i). OCR also has an identified time period for notifying permitting recipients of the status of Title VI investigations. *Id.* § 7.115. “Within 180 calendar days from the start of the compliance review or complaint investigation, the OCR will notify the recipient in writing by certified mail, return receipt requested, of: (i) Preliminary findings; (ii) Recommendations, if any, for achieving voluntary compliance; and (iii) Recipient’s right to engage in voluntary compliance negotiations where appropriate.” *Id.*

<sup>211</sup> Luke Cole, director, California Rural Legal Assistance Foundation, “EPA Accountability,” written submission to the U.S. Commission on Civil Rights, Washington, DC, Feb. 8, 2002, p. 1 (hereafter cited as Cole, written submission).

<sup>212</sup> U.S. Environmental Protection Agency, “Title VI Complaints Filed with EPA,” June 20, 2003, pp. 1–27, <[www.epa.gov/ocrpage1/docs/t6csjune2003.pdf](http://www.epa.gov/ocrpage1/docs/t6csjune2003.pdf)> (last accessed July 30, 2003) (hereafter cited as EPA, “Title VI Complaints Filed”). The 13 Title VI complaints that were filed with EPA by January 2002 and rejected were complaint 02R-01-R4 (an Alabama enforcement-related case); complaint 22R-99-R10 (an Oregon permitting case); complaint 02R-98-R4 (an Alabama case—activity was not stated in data); complaint 03R-98-R6 (an Arkansas case—activity not stated in data); complaint 15R-97-R4 (an Alabama permitting case); complaint 12R-97-R3 (a Virginia permitting enforcement case); complaint 03R-97-R9 (a California permitting case); complaint 02R-96-R9 (a California case involving District Industrial Emissions Reporting Rule 1210); complaint 01R-95-R2 (a Puerto Rico permitting case); complaint 01R-95-R6 (a Texas permitting enforcement case); complaint 05R-94-R4 (an Alabama case—activity was not stated in data); complaint 03R-94-R4 (an Alabama case—activity was not stated in data); and complaint 02R-94-R4 (an Alabama permitting case). EPA’s disposition of the 13 complaints occurred either during the same month the complaints were filed or in the next month. *Ibid.*

<sup>213</sup> *Ibid.*

<sup>214</sup> Cole, written submission, p. 1.

<sup>215</sup> *Ibid.*

<sup>216</sup> *Ibid.* *See generally* EPA, “Title VI Complaints Filed,” p. 21 (the complaint identification number is 02R-95-R9).

<sup>217</sup> Cole, written submission, p. 1.

<sup>218</sup> EPA, “Title VI Complaints Filed,” p. 21.

There is yet another example of EPA's inability to meet its own regulatory deadlines. A permitting-related complaint was filed in December 1999 by the Columbia Deepening Opposition Group of Astoria [Oregon] (CDOG) against the U.S. Army Corps of Engineers, the Environmental Protection Agency, the Oregon Departments of Environmental Quality and Fish and Wildlife, the Oregon Division of State Lands, and the Washington Departments of Ecology and Natural Resources.<sup>219</sup> This complaint, still pending at the time of the Commission's February 2002 hearing, was filed on behalf of minority and low-income populations living in the areas adversely affected by the Columbia and Lower Willamette River Federal Navigation Channel facility.<sup>220</sup> EPA did not decide whether to allow the complaint to remain open for investigation until January 2002.<sup>221</sup> A decision that should have been reached within 20 days was not made for more than two years.<sup>222</sup>

From 1993 to February 2002, OCR received an estimated 124 Title VI complaints.<sup>223</sup> Of these complaints, 83 alleged adverse disparate impact for environmental permitting or discrimination in the permitting process.<sup>224</sup> An updated review of the number of Title VI complaints filed with EPA, as of June 20, 2003, indicated that the agency received a total of 136 complaints.<sup>225</sup> As shown in Table 1, most complaints were not accepted for investigation, with 75 of the total 136 complaints rejected.

Status of complaint	Number of complaints
Rejected	75
Dismissed	26
Accepted	16
Suspended	7
Under review	5
Partially dismissed	3
Informally resolved	2
Referred to another federal agency	2
<b>Total</b>	<b>136</b>

Source: U.S. Environmental Protection Agency, "Title VI Complaints Filed with EPA," June 20, 2003.<sup>226</sup>

<sup>219</sup> Cole, written submission, p. 1; EPA, "Title VI Complaints Filed," p. 8 (complaint 26R-99-R10). Other alleged recipients included the Port of Portland; Clatsop, Columbia, and Multnomah Counties, Oregon; and Pacific, Wahkiakum, Cowlitz, and Clark Counties, Washington. *Ibid.*

<sup>220</sup> EPA, "Title VI Complaints Filed," p. 8.

<sup>221</sup> *See ibid.*, p. 8 (in January 2002, the complaint was withdrawn, while EPA dismissed the case and closed the complaint file).

<sup>222</sup> *See Cole*, written submission, p. 1.

<sup>223</sup> Karen Higginbotham, director, Office of Civil Rights, U.S. Environmental Protection Agency, Testimony, February Hearing Transcript, p. 65.

<sup>224</sup> *Ibid.*

<sup>225</sup> EPA, "Title VI Complaints Filed," pp. 1–27. OCR identifies each complaint with a number when it is received. This identification number "indicates the order in which the complaint was received that year (e.g., the first complaint received each year is number 1)" and if the complaint was based on race, national origin, or disability. *Ibid.*, p. 26. Thus, in several instances, there is more than one complaint per complainant and alleged permitting recipient(s). The total number of complaints for each complainant and alleged permitting recipient(s) is not included for purposes of this discussion, and thus the numbers of actual complaints are undercounted in Tables 1 and 2.

<sup>226</sup> "Accepted" means the complaints met the regulatory requirements for an investigation under 40 C.F.R. pt. 7 and were accepted for investigation. "Under Review" means complaints for which no decision has yet been made to reject, accept for investigation, or refer to another federal agency. "Informally Resolved" means complaints that have reached a documented

Table 2 shows EPA's Title VI permitting-related complaints as of June 2003. Eighty-six of a total 136 Title VI complaints focused on permitting as the primary activity. EPA rejected 39, or nearly half, of its permitting complaints. EPA only accepted 13 permitting complaints for investigation and dismissed 20 complaints.<sup>227</sup>

Status of complaint	Number of complaints
Rejected	39
Dismissed	20
Accepted	13
Suspended	7
Partially dismissed	3
Informally resolved	2
Under review	2
Referral to another federal agency	0
Total	86

Source: U.S. Environmental Protection Agency, "Title VI Complaints Filed with EPA," June 20, 2003.

A closer examination of the 136 Title VI complaints filed with EPA before, during, and after the time of the agency's appropriations bill containing a rider provision prohibiting the agency from investigating and resolving Title VI complaints starting from the bill's enactment revealed that 64 complaints, or nearly half, were held in abeyance and backlogged by this provision.<sup>228</sup> These complaints were filed with EPA on October 21, 1998, through 2001. Of these 64 complaints, seven were later suspended, while 57 complaints had other dispositions (e.g., rejected, accepted, partially dismissed, informally resolved, referred to another agency, or dismissed).<sup>229</sup> Thus, the data demonstrates that the presence of the rider provision had a significant impact on the number of Title VI complaints that EPA could have investigated and resolved during the time the agency's complaints remained backlogged.<sup>230</sup>

resolution by informal voluntary negotiations, including alternative dispute resolution (ADR). "Rejected" refers to complaints not accepted for investigation because they did not meet the regulatory requirements of 40 C.F.R. pt. 7 (e.g., no recipient of EPA financial assistance; complaint filed more than 180 days after the alleged discriminatory act). "Dismissed" refers to complaints accepted for investigation, but later dismissed and the files closed. "Suspended" means the complaints are currently in litigation concerning matters related to their Title VI complaint. "Referred" denotes complaints received but referred to another federal agency because that agency is the grantor or has subject-matter jurisdiction. EPA, "Title VI Complaints Filed," pp. 26–27.

<sup>227</sup> EPA, "Title VI Complaints Filed," pp. 1–27. One Title VI complaint that involved siting as the primary activity was also included in the total of 136 cases. This complaint (02R-97-R6) was filed with EPA in February 1997 and was eventually not accepted for investigation in May 1997. In this case, the recipient was Texas A&M University, and the complainants were the Residents Opposed to Pigs and Livestock, who objected to the construction of a large animal complex in Texas. *Ibid.*, p. 19. In addition to permitting, other Title VI activities included asbestos removal, plan approvals, public hearings, pipeline expansion/replacement, zoning, public complaint process, compliance with environmental programs, enforcement, and cleanup. *Ibid.*, pp. 1–27.

<sup>228</sup> *Ibid.* See also Department of Veterans Affairs and Housing and Urban Development and Independent Agencies Appropriations Act, Pub. L. No. 105-276 (H.R. 4194), 112 Stat. 2461, 2496, tit. III (1998) (contains a rider provision preventing EPA's investigation and disposition of Title VI complaints, as of the date of the act's enactment).

<sup>229</sup> EPA, "Title VI Complaints Filed," pp. 1–27.

<sup>230</sup> See generally Department of Veterans Affairs and Housing and Urban Development and Independent Agencies Appropriations Act, Pub. L. No. 105-276 (H.R. 4194), 112 Stat. 2461, 2496, tit. III (1998). *But see* Higginbotham letter, p. 10

## EPA's Title VI Complaint Process, Jurisdictional Responsibilities, and Appeal Procedure

A complainant may file a Title VI complaint with EPA when disparate impact discrimination is believed to have occurred.<sup>231</sup> The public is provided information on the procedure for filing Title VI complaints through the agency's Web site or by contacting the Office of Civil Rights by mail or telephone.<sup>232</sup>

In reviewing Title VI complaints for jurisdictional sufficiency, EPA evaluates each complaint for compliance with four criteria:

- Whether the complaint describes the acts that allegedly violate EPA's Title VI regulations.
- Whether the complaint identifies an EPA funding recipient as the respondent.
- Whether the complaint is in writing.
- Whether the complaint is filed within 180 calendar days of an alleged discriminatory activity.<sup>233</sup>

If any of the criteria are absent, EPA may contact the complainant to request supplemental information or clarification. This contact can be telephonic, electronic, written, or in person. EPA may communicate with a complainant several times in an attempt to obtain sufficient information to enable the agency to accept a complaint for investigation. EPA may also use its own internal resources to ascertain whether the complaint involves a recipient of federal financial assistance. According to EPA, a complaint is not rejected on jurisdictional grounds until all efforts to identify information to satisfy the four criteria have been exhausted.<sup>234</sup> EPA maintains responsibility for investigating and resolving Title VI complaints that meet threshold requirements, such as standing, timeliness, and ripeness.<sup>235</sup>

The agency maintains exclusive jurisdiction over Title VI complaints when permit recipients obtained federal funding solely from EPA or the complaints are clearly within the agency's enforcement authority.<sup>236</sup> When EPA maintains its jurisdiction over a Title VI complaint, the agency will inform complainants of this development via the telephone or EPA's Web site.<sup>237</sup> Furthermore, EPA does not necessarily maintain exclusive jurisdiction over a Title VI complaint if the recipient received federal funding from other agencies or if the recipient is also within the authority of other federal agencies.<sup>238</sup> In these scenarios, the agencies may proceed with coordinated investigations or independently investigate.<sup>239</sup>

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("the rider applied to complaints filed before and during its existence, i.e., all complaints concerning adverse disparate impacts from environmental permitting filed before passage of EPA's FY 2002 appropriations").

<sup>231</sup> 40 C.F.R. § 7.120(a).

<sup>232</sup> Karen Higginbotham, director, Office of Civil Rights, U.S. Environmental Protection Agency, interview, July 25, 2003 (hereafter cited as Higginbotham July 2003 interview). See generally EPA, "How to File a Title VI Complaint," *Civil Rights*, <<http://www.epa.gov/cgi-bin/epaprintonly.cgi>> (last accessed July 31, 2003); 40 C.F.R. § 7.120(b)-(d) (describes how to file a Title VI complaint with EPA and the complaint investigation process).

<sup>233</sup> U.S. Environmental Protection Agency, Response to the Commission's Interrogatory Question 4, April 2002 (hereafter cited as EPA, Response to Interrogatory Question).

<sup>234</sup> *Ibid.*

<sup>235</sup> 40 C.F.R. §§ 7.120(a), (b)(1), (b)(2). "[T]he complaint must be filed within 180 calendar days of the alleged discriminatory acts unless OCR waives the time limit for good cause." *Id.* § 7.120(b)(2). See also Higginbotham July 2003 interview.

<sup>236</sup> Higginbotham letter, p. 10.

<sup>237</sup> Higginbotham July 2003 interview.

<sup>238</sup> Higginbotham letter, p. 10.

<sup>239</sup> *Ibid.*

In those instances where another federal agency has jurisdiction over the subject of a Title VI complaint that was originally filed with EPA, OCR will refer the complaint to that agency for investigation and resolution. The agency will also send written confirmation to the complainant that the Title VI complaint has been referred for investigation to another federal agency.<sup>240</sup> After referral, EPA maintains some involvement in the investigation by coordinating its efforts with the other federal agency and determining whether it or the other agency will become the lead agency that investigates and resolves the complaint.<sup>241</sup> Moreover, when it is clear from the subject of the complaint that the permitting authority obtained federal financial assistance from the receiving agency, instead of EPA, it is likely that the receiving agency would be designated as the lead agency.<sup>242</sup> If the receiving agency becomes the lead agency, its actions have the same effect as any measures that would have been taken by EPA.<sup>243</sup>

When a Title VI complaint contains issues that may affect federal agencies other than EPA, EPA will share the responsibility with that agency for investigating and resolving the complaint.<sup>244</sup> The Department of Justice also instructs that when numerous recipients receive funding for similar purposes from two or more federal agencies, or when these agencies jointly administer federal assistance for a given class of recipients, the federal agencies must cooperatively ensure compliance with Title VI.<sup>245</sup> EPA will inform a complainant in this circumstance, in writing, that the complaint is being jointly investigated and resolved with another federal agency.<sup>246</sup>

EPA does not have a formal appeal process. Nevertheless, OCR may reconsider a complaint, and will also notify a complainant in writing of the status of his or her complaint.<sup>247</sup>

### **EPA's Funding and Staffing Resources for Addressing Title VI Complaints**

In order to appropriately investigate and resolve the volume of Title VI complaints filed or referred to EPA, the agency's staffing and budgetary resources are critical factors in program success and effectiveness. During testimony in February 2002, Linda Fisher, then deputy administrator of EPA, stated that the agency's overall budget for FY 2002 was approximately \$7.8 billion.<sup>248</sup> In FY 2003, the overall budget was \$8.1 billion and EPA requested \$7.6 billion for FY 2004.<sup>249</sup> At the time of the hearings in FY 2002, OCR's budget was \$6.78 million.<sup>250</sup> In February 2002, OCR had 30.5 full-time-

<sup>240</sup> Ibid.

<sup>241</sup> 40 C.F.R. § 7.125(b).

<sup>242</sup> See *id.*; Higginbotham July 2003 interview.

<sup>243</sup> 40 C.F.R. § 7.125(b).

<sup>244</sup> *Id.* § 7.125(a). See also Higginbotham July 2003 interview. EPA worked jointly with the Department of Defense (DOD) on a complaint involving the closure of an air force base. DOD examined a public notification issue, while EPA was concerned with the placement of hazardous material on the property. The two agencies met to discuss these issues, in addition to sponsoring community meetings to review these concerns. Ibid.

<sup>245</sup> 28 C.F.R. § 42.413(a)(1) (2002). See also *id.* § 42.413(a)(2) (one of the agencies must also be designated as the lead agency for Title VI compliance purposes).

<sup>246</sup> Higginbotham July 2003 interview.

<sup>247</sup> Ibid.

<sup>248</sup> Linda Fisher, deputy administrator, U.S. Environmental Protection Agency, Testimony, February Hearing Transcript, p. 93.

<sup>249</sup> Susan Bruninga, "EPA Criticized by Senators for Cuts to Clean Water State Revolving Fund," *Environmental Reporter* (BNA), vol. 34, no. 13, Mar. 28, 2003, p. 710.

<sup>250</sup> EPA, Response to Interrogatory Question 10; U.S. Commission on Civil Rights, *Ten Year Check-Up: Have Federal Agencies Responded to Civil Rights Recommendations? Volume III: An Evaluation of the Departments of Agriculture and*

equivalent employees (FTEs) with two staff members detailed to the Title VI Task Force.<sup>251</sup> If fully staffed, however, OCR would have 42.5 FTEs.

OCR reported that it annually evaluates its resources and program needs.<sup>252</sup> The office has been “held harmless” for the effects of its decreased staffing levels and resources since 1999, due to a number of budget reductions.<sup>253</sup> OCR has compensated for this reduction by employing resources from other program offices in the agency and using employment detail opportunities for additional staff members with relevant experience.<sup>254</sup>

When the Title VI Task Force became operational in July 2001, there were concerns that there would be insufficient staff to conduct Title VI complaint investigations.<sup>255</sup> The task force is currently composed of 13 full-time personnel from EPA’s offices of enforcement, general counsel, regional counsel, solid waste, water, and civil rights.<sup>256</sup> Two investigators assist the task force on an as-needed basis.<sup>257</sup> The task force may also request technical, policy, and legal assistance from any of EPA’s offices.<sup>258</sup> In FY 2001 and 2002, the task force was allocated \$1.5 million to retain contract assistance for its complaint investigations.<sup>259</sup>

In 2002, EPA believed that it had sufficient funding and staffing levels to execute Executive Order 12,898, to the extent it was implicated by Title VI. Primary responsibility for implementing and enforcing Title VI rests with OCR. In spite of budget reductions, according to EPA, OCR has adequate means to address Title VI matters, including new complaints and compliance reviews, by using resources from other parts of the agency. According to EPA in 2002, the Title VI Task Force, which is processing older complaints, has sufficient funding and staffing to handle the backlog.<sup>260</sup>

## OVERVIEW OF SELECTED FEDERAL AGENCIES’ TITLE VI COMPLAINT PROGRAMS

In February 2002, representatives from the Departments of Transportation, Interior, and Housing and Urban Development testified before the U.S. Commission on Civil Rights regarding their agencies’ Title VI complaint programs. The following section details these agencies’ Title VI programs, the number and types of Title VI complaints received, the disposition of complaints, and their staffing and funding resources for Title VI enforcement purposes. Unlike EPA, none of the other agencies have formal guidance for their funding recipients or on conducting Title VI investigations. Furthermore, none of the agencies reviewed by the Commission, including EPA, reported having regular and com-

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*the Interior, the U.S. Environmental Protection Agency, and the Small Business Administration*, June 12, 2003, <<http://www.usccr.gov/pubs/10yr03/10yr03.pdf>> (last accessed July 31, 2003) (hereafter cited as USCCR, *Ten-Year Check-Up: Volume III*).

<sup>251</sup> Higginbotham letter, p. 11.

<sup>252</sup> EPA, Response to Interrogatory Question 2.

<sup>253</sup> See *ibid.*

<sup>254</sup> *Ibid.* The use of this approach is due to the limited number of OCR applicants with direct Title VI or Title VI-related experience.

<sup>255</sup> EPA, Response to Interrogatory Question 2.

<sup>256</sup> *Ibid.*

<sup>257</sup> *Ibid.*

<sup>258</sup> *Ibid.*

<sup>259</sup> EPA, Response to Interrogatory Question 11.

<sup>260</sup> EPA, Response to Interrogatory Question 13.

prehensive Title VI compliance reviews executed through formal compliance review programs.<sup>261</sup> Routine and comprehensive reviews of the recipients' programs, before complaints are filed, would likely result in fewer Title VI complaints and swifter enforcement action when complaints are filed.

## **The Department of Transportation**

### ***Number of Title VI Complaints at DOT***

The Department of Transportation (DOT) receives relatively few Title VI complaints.<sup>262</sup> DOT attributes the lack of complaints to its outreach efforts and requirements for early community involvement in transportation planning.<sup>263</sup> This, however, may not account for the low number of reported complaints. The number of complaints filed may also be a function of affected communities being unaware of how and when to participate in the decision-making process, lack of access to technical and scientific information, cultural and language barriers, and insufficient access to clear guidance on how to file Title VI complaints. DOT's public outreach and participation efforts and initiatives, as well as those of the other agencies reviewed by the Commission, are discussed in Chapter 5 of this report.

In response to the Commission's inquiry regarding the number of Title VI complaints received by the Department of Transportation from 1995 to 2001, the U.S. Coast Guard reported no complaints and the Federal Aviation Administration's (FAA) Office of Civil Rights responded that it received four complaints during this time period.<sup>264</sup> Table 3 provides greater detail on the disposition of the FAA's complaints.

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<sup>261</sup> For example, HUD's regulations provide that it shall "from time to time" review the practices of its funding recipients. 24 C.F.R. § 1.7(a) (2003).

<sup>262</sup> Marc Brenman, senior policy advisor, Office of the Secretary, U.S. Department of Transportation, Testimony, February Hearing Transcript, p. 188.

<sup>263</sup> *Ibid.* Mr. Brenman stated:

A major instrument for this public participation are the efforts by the Metropolitan Planning Organizations [MPOs] to consider their local demographics, the transportation needs of their communities, and the benefits and burdens of transportation projects and planning on those communities. These MPOs . . . are responsible for administering a continuing and comprehensive, and cooperative planning process in urbanized areas. FTA and the Federal Highway Administration's joint instructions concerning Title VI and environmental justice and certification reviews of these MPOs illustrate the considerations that have been incorporated in this process.

*Ibid.*, pp. 188–89.

<sup>264</sup> U.S. Department of Transportation, Response to the Commission's Interrogatory Question 5, April 2002 (hereafter cited as DOT, Response to Interrogatory Question) (the Coast Guard was under the jurisdiction of the Department of Transportation during the time of the Commission's hearing in February 2002).

<b>Origin of complaint</b>	<b>Date filed/received by agency</b>	<b>Nature of complaint</b>	<b>Disposition of complaint</b>
Seattle, WA	July 1997	Alleged discrimination caused by approval of expanded airport services/lack of environmental assessment.	Complaint was closed in September 1999. An investigation revealed no discrimination (but recommended future mechanisms for non-English-speaking residents to receive information on public comment periods for noise remedy programs).
Charlotte, NC	July 1999	Alleged racial discrimination by the airport (causing noise pollution, and violating easements and federal aviation regulations).	Complaint was closed in October 2001. An investigation found that neither the city of Charlotte nor the Charlotte/Douglas International Airport discriminated against the complainants because of race.
New York, NY	May 2000	Alleged discrimination based on race—location of an extended rail system through predominately African American neighborhoods that was originally supposed to go through a nonminority neighborhood. Complaint alleged the creation of negative environmental impacts in African American neighborhoods.	On October 12, 2000, the U.S. Court of Appeals for the Second Circuit found that the FAA's 1999 Record of Decision for the environmental review was not arbitrary, capricious, an abuse of discretion, or otherwise contrary to law and denied the petition for review. The complaint is currently under legal review with the FAA's Office of the Chief Counsel.
McKinney, TX	June 2000	Alleged discrimination based on race and ethnicity; disproportionate and adverse impact on Latino community (more noise pollution, traffic, secondary environmental contamination).	In April 2003, the FAA's Southwest Region sent a letter to the city of McKinney outlining seven allegations for investigation (public involvement, disproportionate environmental hazards, disproportionate social and economic effects, noise pollution, environmental justice, lack of notice of public meetings). On May 30, 2003, the city of McKinney responded to the FAA's inquiry. The FAA Southwest Region is currently reviewing the response. Complaint is pending.

Sources: DOT/FAA, Answer to Interrogatory Question 5, April 2002; Michael Freilich, national external program manager, Federal Aviation Administration, U.S. Department of Transportation, e-mail to Office of the General Counsel, U.S. Commission on Civil Rights, Aug. 19, 2003, p. 2.

Of these complaints, the New York (DOT #2000-0220) and the city of McKinney (DOT #2001-0213) cases are currently pending.<sup>265</sup> The New York complaint has been judicially reviewed and is under administrative review by the FAA's Office of the Chief Counsel.<sup>266</sup> The FAA issued a ruling approving the application from the Port Authority of New York and New Jersey to use passenger fees to construct a light rail system connecting the airport with transit stations, and determined that the pro-

<sup>265</sup> Michael Freilich, national external program manager, Office of Civil Rights, Federal Aviation Administration, U.S. Department of Transportation, e-mail to Office of the General Counsel, U.S. Commission on Civil Rights, Aug. 26, 2003, p. 1 (hereafter cited as Freilich e-mail).

<sup>266</sup> *Ibid.*, p. 2

posal would not significantly affect the environment.<sup>267</sup> The complaint has been pending for more than three years and alleges that locating the light rail system through an African American neighborhood is racially discriminatory and will have an adverse environmental impact.

In October 2000, the U.S. Court of Appeals for the Second Circuit denied the petitioners' request for judicial review of the FAA's Record of Decision to approve the proposed plan from the Port Authority of New York and New Jersey.<sup>268</sup> The petitioners maintained that the FAA's Record of Decision should be vacated since important information was omitted from the final environmental impact statement, which allegedly violated the National Environmental Policy Act (NEPA).<sup>269</sup> Ultimately, the Second Circuit found that the final environmental impact statement adequately described the possible environmental consequences of the light rail system project and that the FAA's final ruling approving the project was reasonable.<sup>270</sup> Accordingly, because the Second Circuit effectively approved the FAA's Record of Decision, it is anticipated that OCR will similarly defer to the Record of Decision and dismiss the complaint.

The complaint in McKinney, Texas, has also been pending for more than three years. The FAA believes that the complaint may eventually become moot.<sup>271</sup> The affected Latino community alleges that an adverse disparate environmental impact will result from a tentatively planned second runway of a municipal airport. The community specifically alleges that the proposed runway would create noise, traffic, and secondary contamination/pollution issues. Although the second runway is currently included on the airport layout plan, the FAA stated that the Texas Department of Transportation is not likely to fund this plan.<sup>272</sup> The two closed complaints, on average, took slightly more than two years to resolve.

### ***DOT's Title VI Complaint Process, Jurisdictional Responsibilities, and Appeal Procedure***

According to Marc Brenman, senior policy advisor for civil rights in DOT's Office of the Secretary, the agency receives Title VI complaints from the Department of Justice (DOJ), directly from the public, and by referral from other federal agencies.<sup>273</sup> Complainants can file complaints with the department's Office of Civil Rights, an operating administration's office of civil rights, or with DOJ.<sup>274</sup> If members of the public participate in DOT's community outreach activities, consult agency brochures, or access DOT's Web site, they obtain information on how and where to file Title VI complaints.<sup>275</sup>

<sup>267</sup> See generally *Southeast Queens Concerned Neighbors, Inc. and the Committee for Better Transit, Inc. v. FAA*, No. 99-4173, 2000 U.S. App. LEXIS 25697, at \*1 (2d Cir. Oct. 12, 2000).

<sup>268</sup> 2000 U.S. App. LEXIS 25697, at \*1.

<sup>269</sup> *Id.* at \*2. See generally National Environmental Policy Act of 1969, 42 U.S.C. § 4332(C)(i), (ii) (1994).

<sup>270</sup> 2000 U.S. App. LEXIS 25697 at \*15.

<sup>271</sup> Freilich e-mail, p. 1.

<sup>272</sup> *Ibid.*

<sup>273</sup> Marc Brenman, senior policy advisor, Office of the Secretary, U.S. Department of Transportation, e-mail to Office of the General Counsel, U.S. Commission on Civil Rights, Aug. 15, 2003 (hereafter cited as Brenman Aug. 15, 2003, e-mail). See also Marc Brenman, senior policy advisor, Office of the Secretary, U.S. Department of Transportation, e-mail to Office of the General Counsel, U.S. Commission on Civil Rights, Aug. 26, 2003, p. 1 (hereafter cited as Brenman Aug. 26, 2003, e-mail) (stating that "generally, it appears that DOJ attempts to refer complaints to all federal agencies that have jurisdiction over the issue and recipient mentioned in the incoming complaints").

<sup>274</sup> Brenman Aug. 26, 2003, e-mail, p. 1. Complainants are also reminded that their complaints must meet the timeliness requirements for filing a Title VI complaint, in order to preserve their right to redress grievances. *Ibid.*

<sup>275</sup> Marc Brenman, senior policy advisor, Office of the Secretary, U.S. Department of Transportation, telephone interview, July 25, 2003 (hereafter cited as Brenman interview).

Moreover, when potential complainants contact DOT directly, they are informed about the procedures for filing formal complaints with DOT's Office of Civil Rights or with the DOT operating administration that is involved in the particular allegation.<sup>276</sup> Potential complainants are informed that if they file their complaints with DOT's OCR, their complaint will be referred to the appropriate DOT operating administration for investigation, if it satisfies Title VI regulatory criteria.<sup>277</sup>

Complaints must be filed within 180 days after the date of the alleged Title VI violation unless an extension is granted by the Secretary of the Department of Transportation.<sup>278</sup> DOT's Office of Civil Rights forwards complaints accepted for investigation to the appropriate agency division or administration, such as the Federal Transit Administration or the Federal Highway Administration.<sup>279</sup> Like several other agencies, DOT does not specifically establish how soon after the filing of a complaint an investigation must be undertaken. The agency's regulations make reference to a "prompt" investigation of Title VI noncompliance allegations.<sup>280</sup>

As a result of the investigation, if a violation of Title VI is found, DOT contacts the recipient and attempts to obtain voluntary compliance.<sup>281</sup> DOT's regulations, however, do not include a provision for notifying the complainant of the violation and the attempts to obtain voluntary compliance with the recipient. There is no timeline established in DOT's regulations for how long the agency has to conclude an investigation.

If the complaint concerns more than one mode of transportation, the Office of Civil Rights will meet with all operating administrations potentially involved in the complaint to coordinate the details of the Title VI investigation.<sup>282</sup> Generally, a multidisciplinary team of civil rights specialists, engineers, planners, and attorneys is used to resolve complex complaints.<sup>283</sup> If a noncompliance finding is made and voluntary compliance attempts are unsuccessful, DOT follows its Title VI regulatory procedures. These procedures include a notice of opportunity for a hearing to the recipient, and either an adminis-

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<sup>276</sup> Brenman Aug. 26, 2003, e-mail, p. 1.

[The Federal Highway Administration]'s Civil Rights Office writes investigative plans and implements them. In the event expert advice is needed regarding a specific program, disinterested specialists (not involved in the matter which gave rise to the allegations of discrimination) are enlisted to provide advice, clarification and interpretation of requirements to allow the investigator to make informed decisions. FHWA's recipients are responsible for complying with Title VI and related nondiscrimination statutes. FHWA's program offices have the primary responsibility to ensure nondiscrimination in the programs and functions for which they are responsible. In the event anyone affected by those programs and functions believes they have been subjected to discrimination, they have the right to file a complaint that will be investigated/resolved by OCR.

Ibid., p. 2.

<sup>277</sup> Ibid.

<sup>278</sup> 49 C.F.R. § 21.11(b) (2002).

<sup>279</sup> Jennifer L. Dorn, administrator, Federal Transit Administration, U.S. Department of Transportation, Testimony, February Hearing Transcript, p. 180. *See also* Marc Brenman, senior policy advisor, Office of the Secretary, U.S. Department of Transportation, Testimony, February Hearing Transcript, p. 189.

<sup>280</sup> 49 C.F.R. § 21.11(c).

<sup>281</sup> *Id.* § 21.11(d)(1).

<sup>282</sup> Marc Brenman, senior policy advisor, Office of the Secretary, U.S. Department of Transportation, Testimony, February Hearing Transcript, p. 189; Brenman Aug. 15, 2003, e-mail.

<sup>283</sup> Jennifer L. Dorn, administrator, Federal Transit Administration, U.S. Department of Transportation, Testimony, February Hearing Transcript, p. 180.

trative enforcement hearing or referral to the Department of Justice for litigation.<sup>284</sup> After the regulatory procedures are completed, DOT can consider terminating or suspending a recipient's federal financial assistance.<sup>285</sup> DOT has the authority to make the decision to refer an unsettled Title VI violation case to the Department of Justice for litigation or to an administrative enforcement hearing.<sup>286</sup>

The Department of Transportation maintains exclusive jurisdiction over Title VI complaints that involve permitting agencies that have received financial assistance from DOT or when DOT has sole enforcement responsibility.<sup>287</sup> In these circumstances, complaints must also satisfy threshold requirements of recipient status, standing, statute of limitations, and ripeness.<sup>288</sup>

When a complaint involves multiple issues that require Title VI enforcement from several federal agencies, DOT shares the responsibility for investigating and resolving the complaint with those agencies, particularly when matters of public safety are involved.<sup>289</sup> For example, DOT frequently coordinates with HUD to review Title VI complaints relating to sidewalks and streets.<sup>290</sup> Furthermore, in instances where the complaint involves more than one federal agency, the Department of Justice often coordinates how the Title VI investigation will proceed.<sup>291</sup>

Lastly, complainants do not have any appeal rights in DOT's Title VI complaint procedure, since the agency does not have a formal appeal process. DOT's Office of Civil Rights, however, has encouraged operating administrations to implement another level of review within their components, such as through their chief counsels.<sup>292</sup> No specific criteria exist to determine when an additional level of review is warranted, since DOT's Title VI regulations do not include a provision for appeals.<sup>293</sup> Al-

<sup>284</sup> Marc Brenman, senior policy advisor, Office of the Secretary, U.S. Department of Transportation, Testimony, February Hearing Transcript, p. 189; Brenman Aug. 15, 2003, e-mail.

<sup>285</sup> Marc Brenman, senior policy advisor, Office of the Secretary, U.S. Department of Transportation, Testimony, February Hearing Transcript, pp. 202–04; Brenman Aug. 15, 2003, e-mail.

<sup>286</sup> Brenman Aug. 26, 2003, e-mail, p. 2.

<sup>287</sup> Brenman interview.

<sup>288</sup> *Ibid.* See generally 49 C.F.R. § 21.11(b) (complainant has no later than 180 days after the date of the alleged discrimination to file a Title VI complaint with DOT).

<sup>289</sup> See *id.* §§ 21.11(b), 21.15(e).

<sup>290</sup> Brenman interview.

<sup>291</sup> Marc Brenman, senior policy advisor, Office of the Secretary, U.S. Department of Transportation, Testimony, February Hearing Transcript, p. 189.

Sometimes these complaints reflect longstanding controversies in local land use, and may result in serious . . . and fundamental community debates. There are also few legal precedents to follow in environmental justice cases. This is very much an evolving area of the law, and we encourage the resolution of problems at the most local level possible. We have opened discussions with our department's senior dispute resolution counsel, with the environmental justice interagency working group, and with the Environmental Conflict Resolution Institute, to assess the desirability of using alternative dispute resolution mechanisms in environmental justice cases.

*Ibid.*, p. 190.

<sup>292</sup> Brenman Aug. 15, 2003, e-mail.

<sup>293</sup> Brenman Aug. 26, 2003, e-mail, p. 2.

[DOT's OCR] recommended the additional level of review in the report of a review of FHWA's civil rights program management, and in memos transmitting DOJ's review of FHWA's Title VI program management. The sense of the approach is reinforced informally, in discussions of specific cases, and at scheduled meetings of DOT operating administration's civil rights directors. In addition, DOJ's Title VI training, presented by [DOT's OCR] and several other DOT modes at their investigative training and conferences, clearly articulates the advisability of having the operating administration's legal counsel's office review decisions.

though DOT's OCR attempted to institute an appeal mechanism several years ago, OCR found it to be difficult and time consuming.<sup>294</sup> As a result, DOT may reconsider Title VI decisions on a case-by-case basis.<sup>295</sup> DOT's Office of Civil Rights reports that it rarely receives requests for reconsideration.<sup>296</sup> Once a decision on a complaint is reached at the completion of the investigation, DOT notifies complainants in writing of the status and disposition of their complaints.<sup>297</sup>

### ***DOT's Funding and Staffing Resources for Addressing Title VI Complaints***

The Federal Aviation Administration, the Federal Highway Administration, and the Federal Transit Administration have varying budget requests that have been affected by recent national security concerns. The 2003 budget request for the Federal Aviation Administration was \$14 billion, 1.6 percent lower than FAA's budget in 2002.<sup>298</sup> The Federal Highway Administration's budget request for 2003 was \$24.1 billion, which was \$9.2 billion, or 28 percent, below the 2002 enacted budget.<sup>299</sup> The Federal Transit's proposed budget for 2003 was \$7.2 billion, 5 percent above 2002.<sup>300</sup> The agency attributed this increase to the need to "promote mobility and access, address . . . critical security vulnerabilities, and further the President's Management Agenda."<sup>301</sup>

For the Federal Highway Administration (FHWA), the primary responsibility for environmental justice implementation lies with the Office of Human Environment, which does not investigate or become involved with Title VI complaints.<sup>302</sup> FHWA's Title VI implementation responsibility is designated for its Office of Civil Rights, with 3.5 full-time-equivalent employees.<sup>303</sup> This office has been allocated an estimated \$1 million for an Environmental Justice Research Focus Area since 2000.<sup>304</sup> Marc Brenman, senior policy advisor for civil rights in DOT's Office of the Secretary, maintained that DOT's Office of Civil Rights' staffing and budgetary resources are currently sufficient.<sup>305</sup>

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Ibid., p. 3.

<sup>294</sup> Ibid.

<sup>295</sup> Ibid., p. 2.

<sup>296</sup> Ibid.

<sup>297</sup> Ibid. Brenman Aug. 15, 2003, e-mail.

<sup>298</sup> U.S. Department of Transportation, "U.S. Department of Transportation 2003 Budget in Brief—Federal Aviation Administration," Feb. 4, 2002, <<http://www.dot.gov/bib/faa.html>> (last accessed Nov. 11, 2002) (the agency attributes the reduction to security responsibilities being shifted from the FAA to the Transportation Security Administration by 2003).

<sup>299</sup> U.S. Department of Transportation, "U.S. Department of Transportation 2003 Budget in Brief—Federal Highway Administration," Feb. 4, 2002, <<http://www.dot.gov/bib/fhwa.html>> (last accessed Nov. 11, 2002).

<sup>300</sup> Ibid.

<sup>301</sup> U.S. Department of Transportation, "U.S. Department of Transportation 2003 Budget in Brief—Federal Transit Administration," Feb. 4, 2002, <<http://www.dot.gov/bib/fta/html>> (last accessed Nov. 11, 2002).

<sup>302</sup> Brenman Aug. 15, 2003, e-mail; Brenman Aug. 26, 2003, e-mail, p. 2 ("If . . . allegations deal with matters that might occur if a project or program is implemented in a way the complainant fears, but no harm has been suffered that can be investigated, the matter is forwarded by the FHWA Civil Rights Office to the appropriate FHWA program office (usually Environment and Planning since transportation plans and project development are within its domain) for consideration in the public involvement process.").

<sup>303</sup> DOT, Response to Interrogatory Question 14. See Brenman Aug. 15, 2003, e-mail ("The FHWA's Office of Civil Rights, in concert with its Office of Chief Counsel is responsible for referring allegations not ripe for investigation to responsible offices, for informally resolving or investigating complaints of discrimination, and for determining and obtaining compliance with Title VI and related nondiscrimination statutes.").

<sup>304</sup> DOT, Response to Interrogatory Question 14.

<sup>305</sup> Marc Brenman, senior policy advisor, Office of the Secretary, U.S. Department of Transportation, Testimony, February Hearing Transcript, pp. 204–05.

## The Department of the Interior

### Number of Title VI Complaints at DOI

The Department of the Interior (DOI) designates bureau and office equal opportunity officers as the responsible officials for investigating and processing civil rights complaints.<sup>306</sup> As of August 2003, DOI had two open Title VI complaints that raised environmental justice issues. In both cases, tribes are the complainants (see Table 4).<sup>307</sup>

The complaints, both filed in 1997, remain open six years later.<sup>308</sup> The California complaint alleges a disproportionate impact on Native American residents resulting from radioactive waste. The complaint requires an environmental impact study from DOI.<sup>309</sup> The Department of Energy must also investigate the allegations in the complaint, since the recipient in question received federal funding from that agency.<sup>310</sup>

The New Mexico complaint also alleges an adverse disproportionate impact on a Native American community based on a proposed highway extension. The complaint requires further investigations by DOT's Federal Highway Administration's Office of Civil Rights and other state agencies.<sup>311</sup> In effect, although DOI receives few Title VI complaints, coordinating and completing investigations with affected federal and local agencies appears to impede the agency's ability to address adverse environmental impacts in communities and dispose of complaints in a timely manner. As a result, in these instances, the likelihood that Native American communities are disproportionately exposed to environmental and other harm continues until the dispositions of the cases are completed.

**TABLE 4: DOI—Number and Status of Title VI Complaints, 1995–2001** (as of August 2003)

Origin of complaint	Date filed/received by agency	Nature of complaint	Disposition of complaint
San Bernardino County, CA	February 1997	Alleged disproportionate impact of proposed low-level radioactive waste depository would cause cultural and spiritual harm to the land and physical harm to Native American residents.	Remains open—Department of Energy is conducting an investigation (since it provided federal funds to the respondent). DOI to conduct an environmental impact study.
Albuquerque, NM	August 1997	Alleged discrimination caused by proposed highway extension through area of cultural and spiritual significance to Native American community.	Remains open—the National Park Service has completed an investigation. Federal Highway Administration's OCR and state agencies are currently investigating.

Sources: Department of the Interior, Answer to Interrogatory Question 3, May 1, 2002; Department of the Interior, Answer to Second Set of Interrogatories, Question 5, Aug. 20, 2003.

<sup>306</sup> E. Melodee Stith, director, Office of Equal Opportunity, U.S. Department of the Interior, "Equal Opportunity Directive No. 1998-13," *Internal Civil Rights Complaint Processing Procedures*, <[http://www.doi.gov/diversity/doc/doc/eod98\\_13.htm](http://www.doi.gov/diversity/doc/doc/eod98_13.htm)> (last accessed Aug. 1, 2003).

<sup>307</sup> U.S. Department of the Interior, Response to the Commission's Second Set of Interrogatories, Question 5, August 2003 (hereafter cited as DOI, Response to Second Set of Interrogatories, Question).

<sup>308</sup> U.S. Department of the Interior, Response to the Commission's Interrogatory Question 3, May 2002 (hereafter cited as DOI, Response to Interrogatory Question); DOI, Response to Second Set of Interrogatories, Question 5.

<sup>309</sup> DOI, Response to Interrogatory Question 3; DOI, Response to Second Set of Interrogatories, Question 5.

<sup>310</sup> DOI, Response to Interrogatory Question 3; DOI, Response to Second Set of Interrogatories, Question 5.

<sup>311</sup> DOI, Response to Interrogatory Question 3; DOI, Response to Second Set of Interrogatories, Question 5 (it could not be determined whether DOI was serving as the primary investigator in the New Mexico case).

### ***DOI's Title VI Complaint Process, Jurisdictional Responsibilities, and Appeal Procedure***

The Department of the Interior requires individuals who believe they have been discriminated against based on their race, color, or national origin to file a written complaint with the Secretary of DOI no later than 180 days from the date the alleged discrimination occurred.<sup>312</sup> The investigation and resolution of Title VI complaints are accomplished through DOI's departmental Office for Equal Opportunity.<sup>313</sup> Additionally, the DOI bureau that provided federal financial assistance to the recipient is responsible for ensuring compliance with Title VI in programs and activities in which it provided the federal funding.<sup>314</sup> In complex Title VI cases, DOI's Office for Equal Opportunity will assume jurisdiction over cases that would routinely be handled by bureaus and offices of the agency.<sup>315</sup>

DOI also requires its funding recipients to maintain Title VI compliance reports of their activities and submit them to the Secretary.<sup>316</sup> DOI regulations neither provide guidance to recipients on how often compliance reports should be prepared nor do they specify under what circumstances these reports will be used to determine whether recipients comply with Title VI.<sup>317</sup>

The Department of the Interior informs the public how and where to file Title VI complaints through a national public notification program and educational outreach pamphlets, its Web site, and bilingual civil rights posters in English and Spanish in the funding recipients' areas of operation.<sup>318</sup> Since the United States is becoming increasingly diverse linguistically, and DOI works extensively with Native American populations, the Commission notes that DOI did not report providing information in languages other than English and Spanish. According to DOI, the sources mentioned above explain that the recipient receives federal funding from DOI, and provide information on DOI's nondiscrimination policy, as well as the procedure for filing Title VI complaints.<sup>319</sup>

If a complaint reveals that discriminatory activity may have taken place, DOI conducts a preliminary investigation of the allegation, as well as the circumstances of the alleged noncompliance and other factors to determine whether a violation of Title VI occurred.<sup>320</sup> DOI also determines whether it has jurisdiction over the Title VI complaint by determining whether the complainant has standing or a DOI funding recipient is involved, and examining other jurisdictional issues.<sup>321</sup> If the complaint satisfies the relevant jurisdictional elements, it is accepted for investigation.<sup>322</sup>

As with other agencies, DOI may not always be the sole source of federal funding. In these cases, DOI coordinates the investigation of the complaint with the other federal agencies providing federal

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<sup>312</sup> 43 C.F.R. § 17.6(b) (2002). *See generally id.* § 17.1.

<sup>313</sup> Deborah Charette, assistant solicitor, Branch of Personnel Litigation and Civil Rights, Office of the Solicitor, U.S. Department of the Interior, facsimile to Office of the General Counsel, U.S. Commission on Civil Rights, Aug. 20, 2003, p. 6 (hereafter cited as Charette facsimile).

<sup>314</sup> *Ibid.* (stating that if a complaint is filed against a state park program, the complaint will be investigated and resolved by the National Park Service, since the park service provides federal funding to the park program).

<sup>315</sup> *Ibid.*

<sup>316</sup> 43 C.F.R. § 17.5(b).

<sup>317</sup> *Id.*

<sup>318</sup> Charette facsimile, p. 2.

<sup>319</sup> *Ibid.*

<sup>320</sup> 43 C.F.R. § 17.6(c).

<sup>321</sup> Charette facsimile, p. 3.

<sup>322</sup> *Ibid.*, pp. 3–4.

assistance to the alleged violator.<sup>323</sup> DOI accepts lead responsibility for investigating a matter of joint shared jurisdiction only if the agency provided the greatest amount of federal financial assistance or the complaint involves a DOI program area in which the agency has a mission-related responsibility, such as fishing and wildlife management, outdoor recreation, or public lands.<sup>324</sup> In instances where it is determined that the funding recipient named in the complaint did not receive federal funding from DOI, the agency refers the complaint to the appropriate federal agency for resolution.<sup>325</sup> When DOI refers a complaint to another federal agency due to lack of jurisdiction, DOI closes the complaint and should inform the parties involved in the complaint.<sup>326</sup>

Where DOI retains a complaint, and accepts it for investigation, and then determines that the funding recipient violated the nondiscrimination provisions of Title VI, DOI informs the recipient of its non-compliance decision in writing.<sup>327</sup> The agency then uses informal means to bring the funding recipient into compliance with Title VI. If the noncompliance with Title VI cannot be corrected informally, however, DOI may suspend or terminate the recipient's federal financial assistance.<sup>328</sup> Once a complaint has been resolved by DOI, the affected parties are not afforded appeal rights through Title VI.<sup>329</sup>

### ***DOI's Funding and Staffing Resources for Addressing Title VI Complaints***

DOI's Office of Equal Opportunity (OEO) is primarily responsible for implementing and enforcing Title VI in the agency's federally assisted programs and activities.<sup>330</sup> In a recent Commission report, it was noted that OEO experienced an increase in funding between FY 1998 and 2002. OEO's average annual funding was \$1.3 million from FY 1996 through the FY 2002 budget request.<sup>331</sup> However, funding for OEO is contained in the departmental management portion of DOI's budget—which indicates that funding is not earmarked for OEO's activities in 2003.<sup>332</sup> Additionally, OEO only has five civil rights program staff members, which includes four assigned to individual bureaus.<sup>333</sup> OEO's staff members are reportedly overburdened, despite being periodically assisted by other staff temporarily detailed to their office for Title VI activities.<sup>334</sup>

## **The Department of Housing and Urban Development**

### ***Number of Title VI Complaints at HUD***

The Department of Housing and Urban Development had four Title VI complaints in August 2003, two of which remain open. These four complaints originated in Mississippi, California, Texas, and

<sup>323</sup> Ibid.

<sup>324</sup> Ibid., p. 4 (stating that other mission-related responsibilities include those programs that relate to historic preservation, water reclamation projects, and reclamation issues).

<sup>325</sup> See *ibid.*, p. 3.

<sup>326</sup> Ibid.

<sup>327</sup> 43 C.F. R. § 17.6(d).

<sup>328</sup> *Id.* § 17.7(a).

<sup>329</sup> Charette facsimile, p. 3.

<sup>330</sup> USCCR, *Ten-Year Check-Up: Volume III*, p. 93.

<sup>331</sup> Ibid.

<sup>332</sup> Ibid., p. 94.

<sup>333</sup> Ibid., p. 95.

<sup>334</sup> Ibid.

Louisiana and, with the exception of the Louisiana complaint, HUD's Title VI complaints required several years to resolve.

The two open complaints, based on activity in Mississippi and Texas, were filed with HUD in 1997 and 1999, respectively. The Mississippi matter has been pending for approximately six years, while the Texas complaint has been pending for approximately four years. The two closed HUD complaints, from California and Louisiana, closed in 2001. The 1997 California complaint contested a permit to expand a landfill affecting a Latino community. This complaint was closed when EPA and HUD determined that they both lacked jurisdiction and the complainants reached an agreement with Los Angeles County. Before being dismissed, this complaint had been pending for almost four years.

The August 2000 Louisiana complaint involved allegations that HUD funded the construction of public housing on a sinking landfill in an African American community. HUD ultimately found that no HUD funds were involved, and the matter closed in March 2001. A summary of the reported HUD Title VI complaints is found below in Table 5.

<b>Origin of complaint</b>	<b>Date filed/received by agency</b>	<b>Nature of complaint</b>	<b>Disposition of complaint</b>
Columbia, MS	1997 (month/date not available)	Information unavailable.	Open
County of Los Angeles, CA	December 4, 1997	Alleged discrimination caused by permit to expand landfill, and failure to enforce landfill permit violations, resulting in a disproportionate impact on Latino residents.	HUD and EPA investigated the complaint. EPA concluded that it lacked jurisdiction and did not investigate further. HUD's Fair Housing and Equal Opportunity's San Francisco office also closed the investigation for lack of jurisdiction. Private agreement reached between the parties and Los Angeles County. Case closed on March 5, 2001.
San Antonio, TX	April 30, 1999	Information unavailable.	Open
City of Lake Charles, LA	August 28, 2000	Alleged discrimination due to inappropriate use of HUD funds for affordable housing, and construction of public housing on a sinking landfill, which caused disproportionate impact on African American residents.	HUD issued letters of compliance on March 12, 2001, since no HUD funds were used in construction of public housing. Lake Charles Housing Authority reinforced foundation of public housing.
Sources: Department of Housing and Urban Development, Response to Interrogatory Question 1; Carole W. Wilson, associate general counsel, Office of Litigation, U.S. Department of Housing and Urban Development, e-mail to Office of the General Counsel, U.S. Commission on Civil Rights, Aug. 15, 2003.			

### **HUD's Title VI Complaint Process, Jurisdictional Responsibilities, and Appeal Procedure**

HUD provides information on filing a Title VI complaint through its outreach programs. Specifically, HUD's Office of Fair Housing and Equal Opportunity Web site provides some information about Title VI and the agency's regulations relating to filing complaints.<sup>335</sup> The Office of Fair Housing and Economic Opportunity is the sole operating administration responsible for investigating and resolving HUD's Title VI complaints.<sup>336</sup>

When FHEO receives a Title VI complaint it convenes compliance review teams to conduct an on-site review and investigate the allegations.<sup>337</sup> The compliance review teams consist of staff members from FHEO and HUD program areas who provide technical expertise relating to the operation of the programs allegedly involved in the complaint.<sup>338</sup> Additionally, because Title VI complaints are often processed under the Fair Housing Act when the allegations involve housing discrimination, HUD will also investigate and process these complaints through that statute.<sup>339</sup> Generally, the Title VI complaints that are received by HUD's Office of Fair Housing and Equal Opportunity are jointly filed with other federal agencies, such as EPA and the Department of Defense.<sup>340</sup>

Title VI discrimination complaints must be filed with HUD no later than 180 days from the date of the alleged discriminatory activity, unless HUD grants an extension for filing the complaint.<sup>341</sup> HUD's regulations provide that it will initiate an investigation to review the recipient's policies and practices, the circumstances in which the alleged noncompliance of Title VI occurred, and other applicable factors.<sup>342</sup> HUD does not create a specific time by which its investigations should be initiated or completed.<sup>343</sup> If a violation is found, HUD informs the recipient and attempts to resolve the matter through informal methods.<sup>344</sup> The regulation governing notification to the recipient of a violation does not speak to notifying the complainant.<sup>345</sup> If an informal resolution is not feasible, the department may take steps to ensure compliance by suspension, termination, or refusal to grant funding or by referring the matter to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce rights under Title VI.<sup>346</sup>

In order to revoke or suspend funding, the agency must complete a rather cumbersome process that includes reporting to Congress. The process, including the congressional provision, may act as a de-

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<sup>335</sup> Carole Wilson, associate general counsel, Office of Litigation, U.S. Department of Housing and Urban Development, Responses to Follow-Up Questions for Title VI Chapter, Aug. 26, 2003 (hereafter cited as Wilson Aug. 26, 2003, e-mail) (stating that most complaints are filed with the funding agency).

<sup>336</sup> *Ibid.*

<sup>337</sup> U.S. Department of Housing and Urban Development, Response to the Commission's Interrogatory Question 42, April 2002 (hereafter cited as HUD, Response to Interrogatory Question).

<sup>338</sup> *Ibid.*

<sup>339</sup> See 24 C.F.R. § 103.5 (2003); Carole W. Wilson, associate general counsel, Office of Litigation, U.S. Department of Housing and Urban Development, Responses to Follow-Up Questions for Title VI Chapter, Aug. 4, 2003.

<sup>340</sup> HUD, Response to Interrogatory Question 42.

<sup>341</sup> 24 C.F.R. § 1.7(b) (2003).

<sup>342</sup> *Id.* § 1.7(c).

<sup>343</sup> *Id.*

<sup>344</sup> *Id.* § 1.7(d)(1).

<sup>345</sup> *Id.*

<sup>346</sup> *Id.* § 1.8(a); Carole W. Wilson, associate general counsel, Office of Litigation, U.S. Department of Housing and Urban Development, e-mail to Office of the General Counsel, U.S. Commission on Civil Rights, Aug. 15, 2003, p. 1.

terrent to using revoking funds as an enforcement or compliance tool. For termination or revocation of funding the following must occur:

- HUD must advise the funding recipient of its noncompliance with Title VI.
- HUD must determine that compliance cannot be obtained voluntarily.
- HUD's Secretary must approve the action and file a full report with the appropriate congressional committee explaining the reasons for the proposed revocation or termination.<sup>347</sup>

Information provided by HUD does not report that the agency has ever withheld or revoked funding for Title VI violations.<sup>348</sup> If HUD, through its investigation, finds that no action is warranted or no violation occurred, HUD notifies both the complainant and its funding recipient in writing.<sup>349</sup>

There are instances when HUD refers a complaint to other federal agencies to either assume sole responsibility for the Title VI complaint or to share that responsibility with HUD. As discussed earlier, referrals are also made to other federal agencies when these agencies provided the recipient with federal financial assistance or where HUD has no jurisdiction over the matter. DOJ also plays an essential role in enforcing HUD's Title VI complaints.<sup>350</sup>

HUD also refers a Title VI complaint to DOJ in any of the following circumstances: (1) the complaint involves facts that are similar to another case or set of cases that DOJ is currently handling; or (2) HUD determines that the recipient is not fulfilling its obligations pursuant to a compliance agreement reached with HUD, and that DOJ could more effectively enforce compliance.<sup>351</sup> As noted earlier, HUD also refers matters to DOJ when it encounters difficulties in reaching a voluntary resolution of a complaint with the recipient. Since 1998, HUD has referred one Title VI complaint to DOJ.<sup>352</sup> If a complaint is referred to another federal agency, HUD notifies the parties of the referral and the receiving agency is responsible for initiating subsequent communications with the parties.<sup>353</sup> HUD's Title VI regulations do not include a right of appeal.

### ***HUD's Funding and Staffing Resources for Addressing Title VI Complaints***

The Office of the Secretary of HUD is responsible for providing the Office of Fair Housing and Equal Opportunity with its salaries and budget. FHEO's 2002 budget for the Fair Housing Assistance Program and Fair Housing Initiatives Program was \$46 million. The overall 2002 salary and expenses for FHEO's budget was \$57.3 million. Enforcement activities related to Title VI, § 504 of the Rehabilitation Act, and the Fair Housing Act were not identified as separate line items as part of this budget.<sup>354</sup>

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<sup>347</sup> 24 C.F.R. § 1.8(c)(1)–(4).

<sup>348</sup> HUD, Response to Interrogatory Question 20.

<sup>349</sup> 24 C.F.R. § 1.7(d)(2).

<sup>350</sup> Wilson Aug. 26, 2003, e-mail.

<sup>351</sup> *Ibid.*

<sup>352</sup> *Ibid.*

<sup>353</sup> *Ibid.*

<sup>354</sup> HUD, Response to Interrogatory Question 8.

Additionally, HUD's Lead Hazard Control budget increased 10 percent in 2002 with an allocation of \$110 million.<sup>355</sup> For FY 2003, HUD's Lead Hazard Control program's budget increased to \$176 million.<sup>356</sup> Dr. David Jacobs, director of HUD's Office of Healthy Homes and Lead Hazard Control, indicated that President Bush has provided his office with additional staff in order to increase grant management operations, enforcement capacity, and public outreach activities.<sup>357</sup>

HUD maintained that because FHEO receives relatively few Title VI complaints, its funding and staffing levels are sufficient to carry out the mandates of Executive Order 12,898, in contrast to what is required for HUD's other civil rights enforcement obligations.<sup>358</sup>

## CONCLUSION

Environmental advocates in general, and minority and low-income residents in particular, look to EPA for definitive guidelines on how to file administrative complaints alleging adverse disparate impact in violation of Title VI of the Civil Rights Act of 1964. Residents of low-income neighborhoods are often victims of an environmental/economic dilemma, finding that new industrial facilities planned for their neighborhoods offer the promise of new jobs while, at the same time, creating an adverse environmental and health impact. These communities are forced to choose between maintaining their health and the often unrealized promise of employment and community revitalization. For state and local regulators and industry representatives seeking to avoid the construction and operating delays, Title VI complaints are seen as obstacles to profit-making, unnecessarily delaying the construction and operation of new facilities. Industry representatives claim to be procedurally frustrated by the amount of uncertainty in the permitting process. Even when they satisfy existing environmental standards when submitting permit applications to state and local environmental recipients, their permits may be later denied in a pending Title VI complaint investigation.

EPA receives the bulk of Title VI complaints that raise environmental justice concerns and has taken the lead in providing guidance to environmental stakeholders. Even though the agency has issued *Interim Guidance*, *Draft Revised Investigation Guidance*, and *Draft Recipient Guidance*, environmental stakeholders, advocates, and legal scholars continue to seek clearer answers to questions of what constitutes disparate impact, when complaints can be filed, how long a complaint should take to process, how communities are given access and information for participation in decision-making, and how the interests of industry and communities can be balanced.

Although the Commission realizes the necessity of thoroughly reviewing comments and concerns of environmental stakeholders and other regulators regarding the *Draft Recipient Guidance* and the *Draft Revised Investigation Guidance*, there has been a significant delay in the release of final guidance that addresses these and other concerns. Communities that are continually exposed to harmful pollutants cannot tolerate more procedural delays in being informed of what will be deemed to be important elements of an adverse disparate impact Title VI violation. Simultaneously, industry representatives and state and local regulators should also be informed of how potential industrial facilities

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<sup>355</sup> Dr. David Jacobs, director, Office of Healthy Homes and Lead Hazard Control, U.S. Department of Housing and Urban Development, Testimony, February Hearing Transcript, pp. 126–27; HAC News, “Information on Rural Low-Income Housing Issues,” Feb. 21, 2003, <<http://www.ruralhome.org/pubs/hacnews/2003/0221.htm>> (last accessed Aug. 20, 2003).

<sup>356</sup> HAC News, “Information on Rural Low-Income Housing Issues.”

<sup>357</sup> Dr. David Jacobs, director, Office of Healthy Homes and Lead Hazard Control, U.S. Department of Housing and Urban Development, Testimony, February Hearing Transcript, p. 127.

<sup>358</sup> HUD, Response to Interrogatory Question 9.

may be in violation of Title VI, environmental regulations, and other civil rights laws in order to avoid and prevent such infractions.

Furthermore, the impact of the Supreme Court decision in *Alexander v. Sandoval*<sup>359</sup> barring private rights of action under agency regulations promulgated under § 602 of Title VI remains a controversial legal development for environmental and community stakeholders. These stakeholders must increasingly rely on administrative remedies, as opposed to judicial mechanisms to obtain relief from alleged violations of Title VI. Environmental stakeholders and regulators have varied reactions to the impact of the decision. Sue Briggum, director of government affairs and environmental affairs for Waste Management, Inc., testified that she was “unaware of a single court decision that has awarded judgment to the plaintiffs under a Title VI disparate impact analysis in the environmental justice setting. So the court’s refusal to allow such suits to go forward is nothing new.”<sup>360</sup> Ms. Briggum noted that “while a number of federal agencies have had Title VI disparate impact regulations on the books for many years, most have never been enforced, and their meaning has never been fleshed out.”<sup>361</sup> This industry representative concluded by telling the Commission:

[E]ver since the Supreme Court’s *Guardians* decision 20 years ago, the validity of those regulations has been in serious doubt. *Guardians* suggested that because Title VI itself does not prohibit policies that have disparate racial impact but rather only prohibits intentional discrimination, Congress may not have intended to permit agencies to adopt regulations that outlaw disparate impact. . . .

I do not believe that Congress should change the law in order to permit private suits to prevent federal fund recipients from adopting policies that have a disparate racial impact.<sup>362</sup>

In contrast, Elizabeth Teel, clinical fellow and deputy director of the Tulane Law School Environmental Law Clinic, maintained that the *Sandoval* case should be reversed.<sup>363</sup> She emphasized that, faced with the unwillingness of the federal government to protect communities of color and low-income populations, the availability of a viable judicial remedy is essential. According to Ms. Teel, the impact of the *Sandoval* decision is devastating to minority and low-income communities seeking environmental justice:

The *Sandoval* decision . . . and the following decision in the Third Circuit have now effectively made it impossible for citizens to protect themselves. If the government won’t, at least let’s make sure that the citizens have a possibility of protecting themselves in the court system.<sup>364</sup>

Regardless of the perspective of *Sandoval*’s value, environmental justice complainants have one less avenue of redress. Accordingly, final Title VI guidance and aggressive administrative enforcement are even more critical now than in the past, since administrative enforcement may be the sole avenue for relief for many communities.

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<sup>359</sup> 532 U.S. 275 (2001).

<sup>360</sup> Sue Briggum, director of environmental affairs, Waste Management, Inc., testimony before the U.S. Commission on Civil Rights, hearing, Washington, DC, Jan. 11, 2002, official transcript, p. 174 (hereafter cited as January Hearing Transcript).

<sup>361</sup> *Ibid.*

<sup>362</sup> *Ibid.*, pp. 174–75.

<sup>363</sup> Elizabeth Teel, deputy director, Environmental Law Clinic, Tulane Law School, January Hearing Transcript, p. 158.

<sup>364</sup> *Ibid.*

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The Commission makes the following recommendations concerning the effective use of Title VI to ensure that environmental decision-making is free of discrimination based on race, ethnicity, gender, and level of income:

- EPA should avoid any further unnecessary delays and issue a final Title VI guidance on processing complaints and methods to improve permitting programs, pursuant to the expressed intent of the agency and Executive Order 12,898. When this is accomplished, stakeholders will have a clear understanding of strategies to avoid environmental justice issues that may lead to Title VI complaints, as well as how EPA’s Office of Civil Rights analyzes and resolves these complaints.
- In the appropriate circumstances, EPA should conduct independent analyses of adverse disparate impacts, in order to determine if they actually are present in a given community. Accordingly, the agency should review analyses from recipients and complainants, but not solely rely on them as a basis for its administrative Title VI decisions.
- In its 1975 report, *The Federal Civil Rights Enforcement Effort—1974*, the Commission supported terminating federal funding in instances of noncompliance with Title VI as an appropriate remedy, when it has been determined that fund termination would not have a detrimental effect on the health of the public.<sup>365</sup> We again urge the agencies to use all available tools to protect the precarious health status of the poor and people of color, whose overall lower health status can be exacerbated by exposure to environmental hazards.
- EPA should eliminate the “authority to consider” provision from its final guidance. The provision unnecessarily limits the agency’s Title VI adverse disparate impact investigations and the ability of communities to establish adverse disparate impact. This provision is especially a problem where state funding recipients either create laws and regulations, or are shielded by existing state laws and regulations, that restrict or limit what is within their “authority to consider” when determining adverse disparate impact in their permitting process.
- EPA should establish a guideline for its state funding recipients that incorporates an inclusive definition of adverse disparate impact, including socioeconomic, health, and environmental factors.
- Federal agencies should clarify their requirements for the exercise of shared and sole jurisdictional responsibilities in investigating and resolving Title VI complaints, in instances where Title VI complaints involve two or more federal agencies. Establishing and providing environmental justice stakeholders with easy access to these policies would minimize the amount of time to administratively process complaints.
- Federal agencies should establish clear notification requirements to all parties involved in Title VI complaints of the status of those complaints, as well as the shared, transferred, or sole jurisdiction of the federal agencies responsible for investigating and resolving the complaints.
- Federal agencies should establish formal appeal procedures for their decisions. Currently, although EPA may reconsider its Title VI decisions, it is uncertain what factors are used to determine when this can occur, as well as what criteria would be considered in the reconsideration. In other federal agencies, no appeal mechanisms exist at all.

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<sup>365</sup> USCCR, *Enforcement Effort*, p. 593.

- Once federal agencies have established procedures for the right of appeal, appropriate mechanisms should be instituted for notifying the parties of when their complaints are ready for appeal and advising the parties on the procedure for filing appeals.
- EPA and other federal agencies should enforce or reform their penalty policies to enhance incentives for compliance and assess penalties for willful, repeated noncompliance by any facility located in a low-income and/or minority community.
- Federal agencies should institute Title VI compliance review programs to periodically review the number and types of Title VI complaints and to ensure that their funding recipients are complying with their Title VI obligations. The formal complaint review programs should assist in preventing Title VI complaints before they arise. To be most effective, these programs must be provided sufficient funding and staff.
- All federal agencies should create formal guidance for their Title VI administrative complaints and activities of their funding recipients that have implications for human health and the environment. Clear guidance is required if all stakeholders are to understand what actions may constitute a violation of Title VI, how complaints will be processed and investigated, and what actions can be taken to prevent or decrease Title VI complaints.

## Chapter 4

# Environmental Justice Litigation and Remedies: The Impact of *Sandoval* and *South Camden*

Title VI of the Civil Rights Act of 1964<sup>1</sup> is used extensively to pursue claims of discrimination for both administrative and judicial relief.<sup>2</sup> Because of the difficulty in proving intentional discrimination under § 601, many minority and poor communities, concerned that they are being disproportionately overburdened by hazardous and toxic facilities in their neighborhoods, bring claims of disparate impact discrimination under federal agency regulations promulgated under § 602.<sup>3</sup> Prevailing on a disparate impact claim in the administrative Title VI process is neither guaranteed nor does success come swiftly. In fact, few complaints are upheld and the process may take many months, if not years, to conclude. Section 602 claims, however, can also be brought in court. Although Title VI does not explicitly state that there is a private right of action under § 602 for allegations of disparate impact, the federal courts consistently acknowledged this implied right.<sup>4</sup>

In 2001, the Supreme Court in *Alexander v. Sandoval*, however, ruled that there is no private right of action to enforce disparate impact regulations promulgated under Title VI.<sup>5</sup> This Supreme Court ruling eliminated a major judicial tool for private civil rights and environmental justice plaintiffs to enforce their claims of discrimination in violation of Title VI. This enforcement of disparate impact regulations promulgated under Title VI by private individuals was further narrowed by a Third Circuit ruling in *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*.<sup>6</sup> The Third Circuit Court of Appeals in *South Camden* held that in addition to the lack of standing for private individuals to bring claims of discrimination in violation of regulations promulgated under § 602 of Title VI, these regulations do not create free standing rights to be enforced through 42 U.S.C. § 1983<sup>7</sup> by private individuals.<sup>8</sup> Although the Supreme Court has not directly ruled on the en-

<sup>1</sup> 42 U.S.C. § 2000d (1994) (“No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”).

<sup>2</sup> *The Supreme Court—Leading Case*, 115 HARV. L. REV. 306, 497–98 (2001).

<sup>3</sup> John DiBari, *Comment: How the Sandoval Ruling Will Affect Environmental Justice Plaintiffs*, 76 ST. JOHN’S L. REV. 1019, 1025 (2002). Section 601 of Title VI prohibits intentional discrimination against individuals based on race, color, or national origin. 42 U.S.C. § 2000d. Section 602 of Title VI authorizes and directs federal agencies to issue regulations to implement § 601. *Id.* § 2000d-1. Pursuant to § 602, agencies have promulgated regulations prohibiting funding recipient agencies from engaging in practices that have a disparate impact on a protected class.

<sup>4</sup> *Alexander v. Sandoval*, 532 U.S. 275, 295 n.1 (J. Stevens, Dissenting).

<sup>5</sup> *Id.* at 293.

<sup>6</sup> *South Camden Citizens in Action v. New Jersey Dep’t of Env’tl. Prot.*, 274 F.3d 771, 790 (3d Cir. 2001) (hereafter cited as *South Camden II*).

<sup>7</sup> 42 U.S.C. § 1983 (1994). Section 1983 provides a federal remedy for persons whose rights have been violated under the Constitution and federal laws. It states, “Every person who, under color of any statute, ordinance, regulation, custom, usage, of any State of Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.” *Id.*

forceability of Title VI regulations through 42 U.S.C. § 1983, the Third Circuit has barred this enforcement. Additionally, though other federal courts of appeals are split on the issue, these circuits may potentially follow the Third Circuit's prohibition. Lastly, the Supreme Court in *Gonzaga v. Doe*, adopting the same test of implied right of action cases,<sup>9</sup> held that there must be explicit congressional intent to confer a private right in spending clause legislation to be enforced through § 1983.<sup>10</sup>

While the full implications of *Sandoval*, *South Camden*, and *Gonzaga* on civil rights and environmental justice enforcement are yet to be realized, it is clear that plaintiffs alleging discrimination based on disparate impact are substantially limited in their ability to bring these claims to court. Accordingly, this chapter reviews the rulings of *Sandoval*, *South Camden*, and *Gonzaga* and analyzes the judicial limitations set by these cases that affect the enforceability of Title VI regulations. First, in order to explain the history of Title VI and implied right of action cases, the chapter gives a brief overview of Title VI enforcement and implied right of action cases prior to *Sandoval* and *South Camden*. It then reviews and analyzes the *Sandoval* and *South Camden* decisions, addresses the enforceability of Title VI using § 1983, and reviews and analyzes the *Gonzaga* decision. Next, it discusses current and future environmental justice and civil rights enforcement in light of *Sandoval*, *South Camden*, and *Gonzaga*. The chapter ends with recommendations.

## HISTORY OF TITLE VI AND IMPLIED RIGHT OF ACTION CASES

### Pre-*Sandoval* Title VI Enforcement

Prior to the *Sandoval* decision, the Supreme Court had long debated and ruled on the enforceability of Title VI. In *Lau v. Nichols*, the Supreme Court held that the English language requirement for graduation had a disparate impact on non-English-speaking Chinese students and, therefore, was actionable under Title VI without proving discriminatory intent.<sup>11</sup> The Court in *Regents of the University of California v. Bakke*, however, suggested in *dicta*, that claims of Title VI violations require proof of intentional discrimination.<sup>12</sup> The Court revisited the standard of proof required to establish a Title VI violation in *Guardians Association v. Civil Service Commission*.<sup>13</sup> The Supreme Court found that a written entrance examination required by a police department, though neutral on face, had a disparate effect on black and Hispanic candidates and therefore established a Title VI violation.<sup>14</sup> Finally in *Alexander v. Choate*, the Supreme Court stated, “we [have] held that Title VI [has] delegated to the agencies in the first instance the complex determination of what sort of disparate impacts upon minorities constituted sufficiently significant social problems, and [are] readily enough remediable, to warrant altering the practices of the federal grantees that have produced those impacts.”<sup>15</sup> Since then many civil rights plaintiffs have brought their discrimination claims in violation of disparate impact regulations promulgated under § 602. Though this right of action is not explicitly stated in the statute, courts have generally recognized it as an implied right of action.

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<sup>8</sup> *South Camden II*, 274 F.3d 771, 790 (3d Cir. 2001).

<sup>9</sup> An implied right of action allows private individuals to file lawsuits under a federal statute that does not explicitly provide for such a right.

<sup>10</sup> *Gonzaga v. Doe*, 536 U.S. 273 (2002).

<sup>11</sup> 414 U.S. 563 (1974).

<sup>12</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 318–19 (1978) (ruling that § 601 “proscribes only those racial classifications that would violate the Equal Protection Clause of the Fifth Amendment”).

<sup>13</sup> See *Guardians Ass’n. v. Civil Serv. Comm’n of New York City*, 463 U.S. 582 (1983).

<sup>14</sup> *Id.*

<sup>15</sup> 469 U.S. 287, 293–94 (1985).

## Pre-*Sandoval* Implied Right of Action Enforcement

The Supreme Court first recognized an implied right of action in *J.I. Case Co. v. Borak* under the Securities Exchange Act of 1934.<sup>16</sup> Since *Borak*, both the Supreme Court and lower courts acknowledged this implied private right of action under several statutes. In *Cort v. Ash*, the Court established a four-part test to determine whether a private right of action is implicit in a statute that does not explicitly state one.<sup>17</sup> Under this four-part test, the Court in *Ash* found that there was no implied private right of action in 18 U.S.C. § 610, which prohibits corporate contributions to federal elections, for plaintiff stockholder to enforce against the corporate directors.<sup>18</sup>

In *Cannon v. University of Chicago*, the Supreme Court allowed an implied right of action for private individuals to sue an educational institution under Title XI of the Education Act Amendments of 1972.<sup>19</sup> Since *Cannon*, the Supreme Court has applied Justice Powell's dissenting argument in *Cannon*, that in order to imply a private right of action there must be "substantial evidence" of congressional intent to create that right, and has restricted the implied right of action cases.<sup>20</sup> Finally, in *Sandoval*, the Supreme Court ruled that there must be clear congressional intent to create an implied right of action before a private individual may bring this claim.<sup>21</sup>

## REVIEW OF *ALEXANDER V. SANDOVAL*

In 1990, the state of Alabama declared English to be its official language.<sup>22</sup> Following this declaration, the Alabama Department of Public Safety chose to administer state driver's license exams only in English.<sup>23</sup> Martha Sandoval, a Hispanic woman, filed a class action suit under § 602 of Title VI against the Department of Public Safety and its director in the District Court for the Middle District of Alabama, alleging that the English-only policy violated Department of Justice regulations prohibiting the use of federal funds in a way that has the effect of discriminating on the basis of national origin.<sup>24</sup> The court held that the English-only policy discriminated on the basis of national origin, and the Court of Appeals for the Eleventh Circuit later affirmed that decision.<sup>25</sup> In a 5 to 4 vote, however,

<sup>16</sup> 377 U.S. 426 (1964).

<sup>17</sup> 422 U.S. 66, 78 (1975). This four-part test looks to determine (1) whether the plaintiff is one of the class for whose special benefit the statute was created, that is, whether the statute creates a federal right in favor of the plaintiff; (2) whether there is any indication of legislative intent, explicit or implicit, either to create or deny such a remedy; (3) whether it is consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff; and (4) whether the cause of action is one traditionally relegated to state law, in an area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on federal law. *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> 441 U.S. 677 (1979) (holding that there is a private right of action to enforce Title IX of the Education Amendments of 1972, reasoning that Title IX was patterned after Title VI, which had already been construed to have created a private remedy).

<sup>20</sup> Bradford C. Mank, *Suing Under §1983: The Future After Gonzaga University v. Doe*, 39 HOUS. L. REV. 1417, 1424 (2003).

<sup>21</sup> *Sandoval*, 532 U.S. at 293.

<sup>22</sup> *Id.* at 279.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

the Supreme Court held that Congress did not intend for § 602 of Title VI to provide a private right of action for disparate impact discrimination claims.<sup>26</sup>

### The Majority Opinion

Justice Scalia, writing for the majority, began his opinion by defining the scope of review, limiting review to the question of whether there is a private right of action to enforce regulations promulgated under § 602 of Title VI.<sup>27</sup> He also reaffirmed three points: (1) there is a private right of action under § 601 of Title VI that can provide injunctive relief and damages; (2) § 601 prohibits only intentional discrimination; and (3) the Court assumes that regulations promulgated under § 602 may prohibit activities having a disparate impact that would otherwise be allowable under § 601.<sup>28</sup>

Justice Scalia explained that in *Lau v. Nichols*,<sup>29</sup> the Supreme Court interpreted § 601 of Title VI to prohibit disparate impact discrimination.<sup>30</sup> This interpretation of § 601, Scalia stated, had since been rejected.<sup>31</sup> The majority explained that the disparate impact regulations promulgated pursuant to § 602 forbid activities permitted under § 601 and, accordingly, the private right of action found under § 601 does not include a private right of action to enforce § 602 disparate impact regulations.<sup>32</sup> Therefore, that right, if it is to exist, must originate from § 602.<sup>33</sup> The Court first reiterated its assumption, for the purpose of this case, that § 602 regulations do apply to disparate impact discrimination.<sup>34</sup> The Court noted, however, that the question remained unanswered whether there is a private right of action to enforce disparate impact regulations promulgated under § 602.<sup>35</sup>

Having defined the scope of review, Justice Scalia articulated that private rights of action to enforce federal law must be created by Congress.<sup>36</sup> He added that, accordingly, the role of the Court is to interpret the statute to determine whether Congress intended to create not only a private right of action, but also a private remedy.<sup>37</sup> The Court went on to explain that, despite the respondents' wish to revert to the method of discerning private rights of action as found in *J.I. Case Co. v. Borak*,<sup>38</sup> the Court in *Cort v. Ash*<sup>39</sup> abandoned that method.<sup>40</sup> In *Borak*, the Court found that "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose of the statute."<sup>41</sup> The majority in *Sandoval* explained that since *Cort v. Ash*, the Supreme Court has aban-

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<sup>26</sup> *Id.* at 288–89.

<sup>27</sup> *Id.* at 283.

<sup>28</sup> *Sandoval*, 532 U.S. at 279–82 (citing *Cannon*, 441 U.S. at 694; *Bakke*, 438 U.S. at 287).

<sup>29</sup> *Lau v. Nichols*, 414 U.S. 563 (1974).

<sup>30</sup> *Sandoval*, 532 U.S. at 285 (citing *Lau*, 414 U.S. at 570–71).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 286.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* (citing *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979)).

<sup>38</sup> *Borak*, 377 U.S. at 426.

<sup>39</sup> *Cort*, 422 U.S. at 66.

<sup>40</sup> *Sandoval*, 532 U.S. at 287.

<sup>41</sup> *Id.* (citing *Borak*, 377 U.S. at 433).

done the *Borak* method of discerning and defining causes of action and has not returned to it.<sup>42</sup> Thus, the Court explained that it would not go beyond Congress' intent in interpreting the statute.<sup>43</sup> The Court further refused to give "dispositive weight" to the expectations formed by the enacting Congress in light of the "contemporary legal context" in interpreting statutes.<sup>44</sup> It explained, "legal context matters only to the extent that it clarifies text."<sup>45</sup>

The majority in *Sandoval* then reviewed the text and structure of Title VI itself to determine whether Congress intended to create a private right of action.<sup>46</sup> The Court expressed that the "rights-creating" language, "no person . . . shall be subjected to discrimination," in § 601 was absent in § 602.<sup>47</sup> It stated that § 602 limits agencies to "effectuating" rights already created in § 601.<sup>48</sup> After its examination of the text and structure of § 602, the majority found that the text itself did not suggest that Congress intended to create a private right of action to enforce § 602's disparate impact regulations.<sup>49</sup> It then considered the method of remedies provided under § 602 and explained that § 602 authorizes agencies to enforce their regulations through termination of funding or through other means provided under the law.<sup>50</sup> The Court further added that every agency enforcement action is subject to judicial review. The majority, examining the remedial scheme of § 602, found that the funding agency's ability to terminate funding and the judicial review of its enforcement action suggest that Congress did not intend to create a private right of action. It reasoned that, as indicated in 42 U.S.C. § 1983 cases, some remedial schemes, such as the one found in § 602, foreclose a private right of action, even if the language of the statute creates substantive individual rights.<sup>51</sup> In *Sandoval*, the majority found no need to determine whether § 602's remedial scheme overcomes other evidence of congressional intent to create a private right of action, as it could not find one in the text of the statute.<sup>52</sup>

Writing for the majority, Justice Scalia maintained that it is not the role of the courts to create a cause of action where Congress has not allowed for one in the statute.<sup>53</sup> Justice Scalia asserted that the text of § 602 expressly includes the enforcement methods to be undertaken by the funding agencies for § 602 violations.<sup>54</sup> These designated methods of enforcement are evidence that Congress intended to exclude private rights of actions.<sup>55</sup> Justice Scalia discounted the contention that amendments to § 602 of Title VI show evidence of an implied private right of action.<sup>56</sup> Finally, the majority concluded that there is no implied private right of action without "affirmative" proof of congressional intent.<sup>57</sup> The Court stated, "neither as originally enacted nor as later amended does Title VI display an intent to create a

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 287–88.

<sup>45</sup> *Id.* at 288.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* (citing 42 U.S.C. § 2000d).

<sup>48</sup> *Id.* at 289.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 290 (citing *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n.*, 453 U.S. 1, 19–20 (1981)).

<sup>52</sup> *Id.* at 291.

<sup>53</sup> *Id.* at 286–87.

<sup>54</sup> *Id.* at 289–90.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 291.

<sup>57</sup> *Id.* at 293.

freestanding private right of action to enforce regulations promulgated under § 602. We therefore hold that no such right of action exists.”<sup>58</sup>

### The Dissent

Justice Stevens, writing for the dissent in which Justices Souter, Ginsburg, and Breyer joined, argued that *Lau*, *Cannon*, and *Guardians* support a private right of action.<sup>59</sup> Justice Stevens argued these cases were identical in substance to the case at hand and that the majority’s decision in *Sandoval* was unprecedented.<sup>60</sup> He further stated, “a majority of this Court carves out an important exception to the right of private action long recognized under Title VI.”<sup>61</sup>

Justice Stevens explained that the Court in *Cannon* allowed for a private right of action under Title XI by reasoning that Title XI was patterned after Title VI, which conferred a private right of action.<sup>62</sup> Accordingly, he saw the majority’s attempt to limit *Cannon*’s holding as being “wholly foreign to *Cannon*’s text and reasoning.”<sup>63</sup>

In addition, the dissent contended, “[t]he majority’s statutory analysis does violence to both the text and the structure of Title VI.”<sup>64</sup> Justice Stevens saw §§ 601 and 602 as part of “an integrated remedial scheme.”<sup>65</sup> He stated that the purpose of § 602 is to effectuate the antidiscrimination ideals of § 601.<sup>66</sup> Thus, Justice Stevens argued that there is no statutory support for the majority’s view that §§ 601 and 602 function independently of each other.<sup>67</sup> The dissent further explained that, for the past three decades, the Supreme Court has treated § 602 as giving broad power to funding agencies to create regulations to effectuate § 601.<sup>68</sup>

Lastly, Justice Stevens maintained, “there is clear precedent of this Court for the proposition that the plaintiffs in this case can seek injunctive relief either through an implied right of action or through § 1983.”<sup>69</sup> He noted that the majority’s denial of relief is caused by the fact that respondents failed to frame their claim under 42 U.S.C. § 1983.<sup>70</sup> Accordingly, Justice Stevens suggested that future litigants must bring their Title VI § 602 claim under § 1983.<sup>71</sup>

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 294 (Stevens, J., dissenting).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*; see *Cannon*, 441 U.S. at 684.

<sup>63</sup> *Sandoval*, 532 U.S. at 297 (Stevens, J., dissenting).

<sup>64</sup> *Id.* at 304 (Stevens, J., dissenting).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 305 (Stevens, J., dissenting).

<sup>67</sup> *Id.* at 304 (Stevens, J., dissenting).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 301 (Stevens, J., dissenting).

<sup>70</sup> *Id.* at 299–300 (Stevens, J., dissenting).

<sup>71</sup> *Id.* at 300 (Stevens, J., dissenting).

## The Impact of *Sandoval*

The majority in *Sandoval* ruled that while plaintiffs may bring Title VI claims for intentional discrimination under § 601, there is no implied right of private action under § 602 regulations to bring disparate impact claims in court. The Court in *Sandoval* found it critical that before this implied right of action be recognized, it must be established that Congress in enacting the legislation also intended for private individuals to have the right to enforce that legislation. To determine whether Congress intended to confer a private right of action under § 602, the Court analyzed its precedent interpreting Title VI and the text and structure of Title VI. After its analysis, the majority concluded that Title VI did not indicate the intent to create a private right of action in § 602 regulations.<sup>72</sup>

In the dissent, Justice Stevens argued, however, that a review of the Court's prior decisions and the legislative history behind § 602 revealed that there exists a private right of action to enforce § 602 regulations.<sup>73</sup> The majority in *Sandoval* applied a very narrow reading of Title VI to conclude that it could not find congressional intent to create a private right of action in § 602 regulations. The Court in *Sandoval* limited its review of congressional intent to the text and the structure of Title VI itself and refused to consider any other indicia of intent. Furthermore, the majority failed to recognize §§ 601 and 602 of Title VI as an "integrated remedial scheme" as Justice Stevens did.

In passing Title VI, Congress sought to remedy discrimination. It would be inconsistent to conclude that, while Congress saw regulations promulgated under § 602 as effectuating the antidiscrimination ideals of § 601, it only intended to allow the agencies implementing disparate impact regulations to enforce § 602 violations. The intent of Title VI is to provide a remedy for individuals who are discriminated by programs or activities that receive federal funding. Section 602 specifically mandates that each funding agency implement regulations to ensure that the funding is not used to discriminate. Since the overarching goal of Title VI is to prevent discrimination and to provide remedies for discrimination, it is inconsistent to read §§ 601 and 602 as providing two separate remedies. The purpose of § 602 is to carry out the antidiscrimination ideals of § 601 and, therefore, the same private right of action to enforce the purpose of § 601 should apply in § 602 regulations.

The Court's narrow reading of Title VI does injustice to the antidiscrimination ideals of Title VI. The Court should have recognized that, just as § 601 allows private individuals to bring their claims of intentional discrimination, § 602 should allow private individuals to bring disparate impact claims in court. The Court's prohibition of this implied private right of action to enforce regulations promulgated under § 602 bars civil rights and environmental justice plaintiffs from enforcing their disparate impact discrimination claims.

As stated, prior to *Sandoval*, many federal courts had recognized an implied private right of action under Title VI disparate impact regulations. Because of difficulty in proving intentional discrimination, many civil rights and environmental justice plaintiffs have relied on § 602 regulations to bring their claims of disparate impact discrimination to court. The Supreme Court's decision in *Sandoval* eliminated this judicial remedy for these plaintiffs. While these plaintiffs may seek administrative relief by filing their complaints with the federal funding agencies, these agencies have been slow to respond.

As Justice Stevens pointed out in his dissent, the majority in *Sandoval* did not address whether a private plaintiff may bring a claim of Title VI through 42 U.S.C. § 1983. Section 1983 provides a pri-

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<sup>72</sup> *Id.* at 293.

<sup>73</sup> *Id.* at 309–10 (Stevens, J., dissenting).

vate cause of action for violations of the Constitution and federal laws.<sup>74</sup> Accordingly, while the *Sandoval* decision barred direct enforcement of § 602 of Title VI, § 1983 may potentially provide a private right of action to enforce § 602 violations. Although the Supreme Court has not addressed this issue, the Third Circuit Court of Appeals in *South Camden* ruled that a private plaintiff is barred from using § 1983 to bring a § 602 Title VI regulation claim to court.

### **REVIEW OF *SOUTH CAMDEN CITIZENS IN ACTION V. NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION***

The impact of the *Sandoval* decision was felt immediately in the environmental justice arena. In *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*, the plaintiffs, South Camden Citizens in Action, filed for a preliminary injunction pursuant to Title VI, in order to prevent the final approval of the New Jersey Department of Environmental Protection's (NJDEP) air quality permit to the St. Lawrence Cement Company for the operation of its cement facility in the Waterfront South area.<sup>75</sup> The plaintiffs filed a complaint against NJDEP stating that its issuance of an air quality permit to operate a cement facility in a predominantly minority community, already hosting 20 percent of the city's contaminated sites, would have an adverse disparate impact on the plaintiffs in violation of § 602 of Title VI.<sup>76</sup> Before the Supreme Court ruled in *Sandoval*, the District Court for the District of New Jersey granted injunctive relief and a declaratory judgment for the plaintiffs in *South Camden* on the basis that NJDEP discriminated against the plaintiffs by issuing an air permit in violation of § 602 of Title VI.<sup>77</sup>

Although environmental justice advocates applauded this ruling, their celebration was short-lived. Five days after the district court decided this case, the Supreme Court held in *Sandoval* that there is no private right of action to enforce regulations promulgated under § 602 of Title VI.<sup>78</sup> Following the *Sandoval* decision, the defendants requested a stay of the injunction, pending a motion for reconsideration.<sup>79</sup> The district court instructed the parties to file supplemental briefs analyzing the impact of *Sandoval*.<sup>80</sup> Specifically, the district court allowed the parties to examine the issue of whether disparate impact regulations that could not be enforced with a private right of action pursuant to § 602 of Title VI could be imposed instead by 42 U.S.C. § 1983.<sup>81</sup> The district court subsequently ruled that the *Sandoval* decision did not prevent the complainants from bringing a suit under § 1983 to enforce EPA's Title VI § 602 disparate impact regulations.<sup>82</sup>

The Third Circuit Court of Appeals, however, reversed the lower court, holding that no private right of action was allowed under § 1983.<sup>83</sup> The court of appeals ruled that private citizens cannot sue un-

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<sup>74</sup> 42 U.S.C. § 1983.

<sup>75</sup> *South Camden Citizens in Action v. New Jersey Dep't of Env'tl. Prot.*, 145 F. Supp. 2d 505 (D.N.J. 2001) (hereafter cited as *South Camden I*).

<sup>76</sup> *South Camden II*, 274 F.3d at 774–75.

<sup>77</sup> See *South Camden I*, 145 F. Supp. 2d at 446.

<sup>78</sup> See *Sandoval*, 532 U.S. at 275.

<sup>79</sup> *South Camden I*, 145 F. Supp. 2d at 511.

<sup>80</sup> *Id.* at 451–52.

<sup>81</sup> *Id.* at 508.

<sup>82</sup> *Id.* at 549.

<sup>83</sup> *South Camden II*, 274 F.3d at 791.

der 42 U.S.C. § 1983 to enforce environmental justice regulations promulgated under § 602 of Title VI.<sup>84</sup>

### The Majority Opinion

The Third Circuit began its analysis by stating that the *Sandoval* decision overruled *Powell v. Ridge*,<sup>85</sup> a Third Circuit decision that was heavily relied on by the district court in deciding that plaintiffs can bring § 602 claims under § 1983.<sup>86</sup> At the end of its review of the *Sandoval* analysis and decision, the Third Circuit pointed out that the plaintiff in *Sandoval* did not raise a cause of action under § 1983 and that the Supreme Court did not consider whether such action is available.<sup>87</sup> The court in *South Camden* noted that the plaintiffs in this case sought to enforce disparate impact discrimination regulations promulgated by EPA and not explicitly stated in Title VI.<sup>88</sup> Accordingly, the Third Circuit framed the issue as “whether a regulation can create a right enforceable through section 1983 where the alleged right does not appear explicitly in the statute, but only appears in the regulation.”<sup>89</sup>

The majority in *South Camden* explained that § 1983 provides a remedy for deprivation of any rights secured by the Constitution and laws.<sup>90</sup> It further explained that the Supreme Court has ruled that certain rights created under federal statutes are also enforceable under § 1983.<sup>91</sup> The court listed two situations where rights are not enforceable under § 1983: (1) where Congress has foreclosed such enforcement, and (2) where the statute does not create such enforceable rights.<sup>92</sup>

In addition, the court stated that the Supreme Court’s *Blessing* three-part test must be applied to determine whether a federal statute creates an enforceable individual right through § 1983.<sup>93</sup> This test weighs three factors: (1) whether Congress intended that the provision in question benefit the plaintiff; (2) whether the plaintiff has demonstrated that the right protected by the statute is not so “vague and amorphous” that its enforcement would strain judicial competence; and (3) whether the statute clearly imposes a binding obligation on the states.<sup>94</sup>

Applying the three-part test, the court sought to determine whether Congress intended to confer a federal private right of action in administrative regulations promulgated under § 602 of Title VI.<sup>95</sup> The court explained that a federal regulation alone may not create an enforceable right through § 1983 if that right is not implicit in the statute.<sup>96</sup> The majority in *South Camden* added that, in light of

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<sup>84</sup> *Id.* at 771.

<sup>85</sup> *Powell v. Ridge*, 189 F.3d 387 (3d Cir. 1999) (holding that a plaintiff can bring a disparate impact claim under § 602 and/or under § 1983).

<sup>86</sup> *See South Camden II*, 274 F.3d at 777–78.

<sup>87</sup> *Id.* at 779.

<sup>88</sup> *Id.* at 780.

<sup>89</sup> *Id.* at 781.

<sup>90</sup> *Id.* at 779.

<sup>91</sup> *Id.* (citing *Maine v. Thiboutot*, 448 U.S. 1, 6–8 (1980) (holding that causes of action under § 1983 are not limited to claims based on constitutional or equal rights violations)).

<sup>92</sup> *Id.* at 779.

<sup>93</sup> *Id.* at 780.

<sup>94</sup> *Id.* at 779–80 (citing *Blessing v. Freestone* 520 U.S. 329, 343 (1997)).

<sup>95</sup> *Id.* at 790.

<sup>96</sup> *Id.*

*Sandoval*, it did not believe that Congress intended to create enforceable rights in adopting Title VI.<sup>97</sup> The Third Circuit found that the district court's conclusion that the EPA regulations created a federal right was erroneous and, therefore, erred in granting relief based on § 1983.<sup>98</sup> Accordingly, the Third Circuit in *South Camden* ruled that 42 U.S.C. § 1983 cannot be used to enforce a federal regulation, "unless the interest already is implicit in the statute authorizing the regulation."<sup>99</sup>

### The Third Circuit Dissent

Judge McKee argued in his dissent that, while the majority is correct in pointing out that *Sandoval* overruled a part of the Third Circuit's decision in *Powell*, it did not overrule it in its entirety.<sup>100</sup> McKee asserted that the majority in *South Camden* instead overruled *Powell* in its entirety "by engaging in an analysis that over-reads *Sandoval*" while, at the same time, unduly limiting the decision in *Powell*.<sup>101</sup>

To establish that the majority opinion in *South Camden* overread the *Sandoval* decision, Judge McKee noted that *Sandoval* only addressed whether a freestanding private right of action exists to enforce regulations promulgated under § 602.<sup>102</sup> The dissent argued that, based on the question presented, *Sandoval* only overruled that portion of the holding in *Powell* recognizing that a private right of action exists under § 602.<sup>103</sup> Judge McKee reasoned that the Supreme Court, therefore, did not address the second part of the holding in *Powell* establishing a right to enforce regulations promulgated pursuant to § 602 of Title VI under § 1983.<sup>104</sup>

Judge McKee further noted that the Third Circuit's analysis in *Powell* was based on Supreme Court precedent holding that § 1983 provides a remedy for violations of federal rights unless foreclosed by Congress.<sup>105</sup> He explained that, in *Powell*, the Third Circuit held that where there is no explicit foreclosure of suit under § 1983, there is a private right of action to enforce regulations promulgated under § 602 of Title VI through a § 1983 action.<sup>106</sup> Accordingly, Judge McKee contended that the holding in *Powell*, allowing enforcement of § 602 disparate impact regulations under § 1983, was not overturned by *Sandoval* and remains the controlling authority on the issue.<sup>107</sup>

### The Impact of *South Camden*

Though the Supreme Court ruled in *Sandoval* that there is no private right of action to enforce § 602 regulations, many civil rights and environmental justice plaintiffs have viewed with hope Justice Stevens' suggestion in his dissent that § 1983 might remain as a means to bring forth their Title VI disparate impact claims. Unfortunately, the court in *South Camden* barred that enforcement in the Third

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<sup>97</sup> *Id.*

<sup>98</sup> *South Camden II*, 274 F.3d at 781.

<sup>99</sup> *Id.* at 786.

<sup>100</sup> *Id.* at 791 (McKee, J., dissenting).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 793 (McKee, J., dissenting).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 796 (McKee, J., dissenting).

Circuit. The court in *South Camden* used the *Sandoval* decision as the basis to overturn its previous ruling in *Powell*, which had previously found an enforceable right in federal administrative regulations under § 1983. Like the Supreme Court in *Sandoval*, the Third Circuit in *South Camden* asserted that before a federal right be recognized, there must be proof of congressional intent in the statute authorizing the regulation. Under the *South Camden* ruling, short of Congress explicitly indicating its intent to confer a private right in enacting any legislation, a private individual may not enforce that implied right through § 1983.

### ENFORCEMENT OF TITLE VI REGULATIONS USING SECTION 1983

While the Third Circuit has foreclosed the possibility of bringing § 602 disparate impact claims under § 1983, other federal courts are split on this issue. Some courts have followed the ruling of the Third Circuit in *South Camden* to further narrow the enforceability of regulations promulgated under § 602, while others have ruled that there is a viable claim of disparate impact discrimination in violation of § 602 through § 1983. For example, the Ninth Circuit<sup>108</sup> and a district court in the Second Circuit<sup>109</sup> do not recognize a private right of action under § 1983 for disparate impact claims under § 602. On the other hand, the Tenth Circuit<sup>110</sup> and a district court within the Sixth Circuit<sup>111</sup> enforce the regulations under § 1983.

Despite this split, the Supreme Court has not directly addressed the issue of whether a private individual, who otherwise does not have a private right of action to directly enforce disparate impact regulations promulgated pursuant to § 602, has a right to enforce those regulations under § 1983. On June 24, 2002, the Supreme Court denied *South Camden*'s petition for writ of certiorari.<sup>112</sup> In January 2003, the Court denied the petition for writ of certiorari in *Robinson v. Kansas*,<sup>113</sup> another case dealing with the enforceability of Title VI regulations through § 1983.<sup>114</sup> The fact that the Supreme Court has not directly addressed this issue brings some hope to civil rights and environmental justice plaintiffs in their attempts to enforce claims of disparate impact discrimination in violation of § 602 regu-

<sup>108</sup> *Save Our Valley v. Sound Transit*, 335 F.3d 932 (9th Cir. 2003) (holding that the plaintiffs did not have a private right of action under 42 U.S.C. § 1983 to challenge the Central Puget Sound Regional Transit Authority's plan to build a light rail line that allegedly discriminated against its residents based on race in violation of DOT's regulations promulgated pursuant to § 602 of Title VI).

<sup>109</sup> In *Ceaser v. Pataki*, the District Court for the Southern District of New York, following the Supreme Court holding in *Sandoval*, refused to recognize a freestanding private right of action to enforce regulations promulgated under § 602. 2002 U.S. Dist. LEXIS 5098 (S.D.N.Y. Mar. 25, 2002) The United States Court of Appeals for the Second Circuit, however, has not addressed whether there is a private right of action in regulations promulgated under § 602 to be enforced under § 1983. Accordingly, while a district court ruling alone carries little precedential value, without further review by the Second Circuit, § 602 claims are unlikely to be enforced under § 1983.

<sup>110</sup> *Robinson v. Kansas*, 295 F.3d 1183, 1186 (10th Cir. 2002) (holding that plaintiffs are not barred from bringing a disparate impact claim in violation of § 602 regulations under § 1983).

<sup>111</sup> *White v. Engler*, 188 F. Supp. 2d 730 (E.D. Mich. 2001) (holding that while the plaintiff had no direct private right of action under Title VI and its implementing regulations to bring a private action against the state of Michigan for its Merit Award Scholarship Program, which allegedly "perpetuates racial and ethnic bias and discriminates against African Americans, Hispanics, Native Americans, and educationally disadvantaged high school students," the plaintiff could bring a private action under § 1983 to enforce disparate impact regulations promulgated pursuant to § 602).

<sup>112</sup> *South Camden in Action v. New Jersey Dep't of Env'tl. Prot.*, 274 F.3d 771 (2001), *cert. denied*, 536 U.S. 939 (2002).

<sup>113</sup> *Robinson v. Kansas*, 295 F.3d 1183 (10th Cir. 2002), *cert. denied*, 123 S. Ct. 2574 (2003).

<sup>114</sup> Steve France, *High Court Is Rolling Back Implied Private Rights Action*, 89 A.B.A. J. 18 (2003) (contending that while it is certain that the Supreme Court is likely to address the issue of implied private rights of action in the future, it is more likely to let the lower courts take the lead on addressing the issue before it is to make further legal development).

lations under § 1983 in federal circuits that have either ruled to uphold enforceability or have not directly ruled on this issue.

Section 1983 enforceability has been debated since the *Sandoval* and *South Camden* decisions and has also been seen as a way to enforce Title VI regulations. In an article written prior to the ruling in *Sandoval*, Professor Bradford Mank argued that, even if the Supreme Court found that there is no direct private right of action under § 602, courts could still use § 1983 to enforce regulations promulgated under § 602.<sup>115</sup> He proposed that Congress clearly authorized § 1983 suits, and those suits do not raise the same separation of powers issue in implied private rights of action.<sup>116</sup> Accordingly, a Title VI plaintiff, by meeting the *Blessing* three-part test of whether a statute creates a federal right, can successfully bring a § 1983 claim.<sup>117</sup> Professor Mank saw § 1983 as “a powerful tool for vindicating both constitutional and federal statutory rights, including regulations such as those issued pursuant to § 602 that ‘flesh out’ existing statutory rights.”<sup>118</sup>

While § 1983 is a viable means to enforce § 602 claims against federal agencies, it is important to point out that in its most recent decision, *Gonzaga v. Doe*, the Supreme Court indicated its unwillingness to find federal rights in legislation and regulations created under Congress’ spending clause power.<sup>119</sup> *Gonzaga* is controlling precedent for both environmental justice and more general civil rights claims<sup>120</sup> because like the Civil Rights Act of 1964, the Family Educational Rights and Privacy Act of 1974 (FERPA), which was at issue in the suit, is spending clause legislation.<sup>121</sup> FERPA forbids federal funding recipient schools from instituting a policy or practice of releasing students’ educational records without written consent from parents.<sup>122</sup> In *Gonzaga*, the Supreme Court examined whether regulations promulgated under FERPA create a federal right enforceable under § 1983.<sup>123</sup> Civil rights advocates believe that *Gonzaga* when viewed in light of the *Sandoval* ruling, which narrowed the test for finding implied rights of action, is a case signaling the Court’s intention to “substantially curb private lawsuits.”<sup>124</sup>

### ***Gonzaga University and Roberta S. League v. John Doe***

In *Gonzaga*, the plaintiff sued Gonzaga University, a private educational institution in Washington State, alleging a violation of the Family Education Rights and Privacy Act of 1974 because the university released information on an allegation of sexual misconduct to the state teacher certification

<sup>115</sup> Bradford C. Mank, *Using § 1983 to Enforce Title VI’s Section 602 Regulations*, 49 U. KAN L. REV. 321, 322 (2001) (hereafter cited as Mank, *Using § 1983 to Enforce Title VI*).

<sup>116</sup> *Ibid.*

<sup>117</sup> *Ibid.*, p. 380.

<sup>118</sup> *Ibid.*

<sup>119</sup> See *Gonzaga v. Doe*, 536 U.S. 273 (2002). Congress, under its spending clause power, imposes certain conditions in granting federal funds to state and local governments for their programs. As recipients of federal funds, state and local governments must comply with regulations established by Congress, generally known as spending clause legislation. See Susan M. Luken, *Comment: Irreconcilable Differences: The Spending Clause and the Eleventh Amendment: Living Congress’s Use of Conditional Spending to Circumvent Eleventh Amendment Immunity*, 70 U. CIN. REV. 693 (Winter 2002).

<sup>120</sup> Suzanne Smith, *Current Treatment of Environmental Justice Claims: Plaintiffs Face a Dead End in the Courtroom*, 12 B.U. PUB. INT. L.J. 223, 245 (Fall 2002).

<sup>121</sup> See 20 U.S.C. § 1232g (1994).

<sup>122</sup> *Id.*

<sup>123</sup> *Gonzaga*, 536 U.S. at 276.

<sup>124</sup> France, *High Court Is Rolling Back Implied Private Rights Action*, p. 18.

agency.<sup>125</sup> The plaintiff alleged that 42 U.S.C. § 1983 creates a private right of action to challenge the university's release of his education record in violation of FERPA.<sup>126</sup>

### **The Majority Opinion**

Chief Justice Rehnquist, writing for the majority, stated that lower courts, both state and federal, have been divided on the question of FERPA's enforceability under § 1983, but have relied on the same set of Supreme Court opinions in their differing rulings.<sup>127</sup> Accordingly, the Supreme Court had granted certiorari in this case "to resolve the conflict among the lower courts and in the process resolve an ambiguity in [the Supreme Court's] own opinion."<sup>128</sup>

Chief Justice Rehnquist began his analysis by reviewing the line of cases that dealt with actions brought under 42 U.S.C. § 1983 to enforce spending clause statutes. He explained that in *Maine v. Thiboutot*,<sup>129</sup> the Court, for the first time, recognized that § 1983 can be used to enforce rights created by federal statutes.<sup>130</sup> In *Pennhurst State School and Hospital v. Halderman*,<sup>131</sup> however, the Court found that "in legislation enacted pursuant to the spending power, the typical remedy for state non-compliance with federally imposed conditions is not a private cause of action for noncompliance, but rather action by the Federal Government to terminate funds to the state."<sup>132</sup> Accordingly, the Court in *Pennhurst* found that unless Congress "speaks with a clear voice and manifests an unambiguous intent to confer individual rights, federal funding provisions provide no basis for private enforcement by § 1983."<sup>133</sup>

Chief Justice Rehnquist further explained that, since *Pennhurst*, there have been only two cases where the Court has found that spending legislation gave rise to enforceable rights under § 1983.<sup>134</sup> In *Wright v. City of Roanoke Redevelopment and Housing Authority*, the Court allowed enforcement of a rent-ceiling provision of the Public Housing Act because the entitlement language was "sufficiently specific and definite to qualify as enforceable rights."<sup>135</sup> The Court in *Wright* found it significant that there was no procedure in place for the tenants to file complaints.<sup>136</sup>

In the only other case where the Supreme Court found enforceable rights under § 1983, *Wilder v. Virginia Hospital Association*, the Court ruled that a reimbursement provision of the Medicaid Act explicitly conferred specific monetary entitlements upon the plaintiffs.<sup>137</sup> Additionally, it found that

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<sup>125</sup> *Gonzaga*, 536 U.S. at 276.

<sup>126</sup> *Id.* at 277.

<sup>127</sup> *Id.* at 278.

<sup>128</sup> *Id.*

<sup>129</sup> *Maine v. Thiboutot*, 448 U.S. 1 (1980).

<sup>130</sup> *Gonzaga*, 536 U.S. at 276.

<sup>131</sup> *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1 (1981).

<sup>132</sup> *Gonzaga*, 536 U.S. at 279–80 (quoting *Pennhurst*, 451 U.S. at 28).

<sup>133</sup> *Id.* (citing *Pennhurst* 451 U.S. at 17, 28 and n. 21).

<sup>134</sup> See *Wilder v. Va. Hosp. Ass'n.*, 496 U.S. 498 (1990); *Wright v. Roanoke Redevelopment and Hou. Auth.*, 479 U.S. 418 (1987).

<sup>135</sup> *Gonzaga*, 536 U.S. at 280 (citing *Wright*, 479 U.S. at 432).

<sup>136</sup> *Wright*, 479 U.S. at 426.

<sup>137</sup> *Wilder*, 496 U.S. at 522–23.

there was no sufficient administrative means to enforce the reimbursement provision against states for noncompliance.<sup>138</sup>

The majority in *Gonzaga*, however, noted that in the Supreme Court's most recent cases, it has declined to infer enforceable rights from spending clause statutes. In *Suter v. Artist M.*, the Court rejected the plaintiffs' claim that a provision of the Adoption Assistance and Child Welfare Act of 1980, which required funding recipient states to have a plan to make "reasonable efforts" to keep children out of foster homes, conferred enforceable rights under § 1983.<sup>139</sup> The Court in *Suter* found that the language of the provision did not create enforceable rights by private individuals.<sup>140</sup>

Similarly, the Court in *Blessing v. Freestone* again rejected the plaintiff's § 1983 claim. In *Blessing*, the plaintiff mothers filed a § 1983 claim against Arizona state officials on the ground that they failed to comply with Title VI-D of the Social Security Act, which required funding recipient states to "substantially comply" with requirements that were put in place to ensure timely child support payments.<sup>141</sup> *Blessing* set forth three factors to guide the Court in determining whether a statute confers a right.<sup>142</sup> Applying this three-part test, the Court in *Blessing* stated, "Congress must have intended that the provision in question benefit the plaintiff."<sup>143</sup> It concluded that Title VI-D focused on "the aggregate services provided by the state" and not the need of any particular person.<sup>144</sup> Accordingly, the Court in *Blessing* found that Title VI-D conferred no private rights to enforce under § 1983.<sup>145</sup>

Having examined the line of cases that determined the enforceability of rights created under spending clause statutes through § 1983, the majority in *Gonzaga* rejected the respondent's claim that this line of cases establishes a loose standard for finding rights enforceable under § 1983 with the showing of congressional intent to benefit the plaintiff.<sup>146</sup> The Court noted that some courts have misinterpreted *Blessing*'s three-part test as allowing plaintiffs to enforce a statute under § 1983 by showing that the plaintiff is within the "general zone of interest" that the statute intended to protect.<sup>147</sup> This, the Court explained, is less than the requirement established for implied private right of action cases.<sup>148</sup> This misinterpretation of *Blessing*, the Court explained, is caused by the belief that the implied right of action cases have no bearing on the standards for determining whether a statute creates rights enforceable by § 1983.<sup>149</sup> The majority stated:

We now reject the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983. Section 1983 provides a remedy only for the deprivation of "rights, privileges, or immunities secured by the Constitution and laws"

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<sup>138</sup> *Id.*

<sup>139</sup> *Suter v. Artist M.*, 503 U.S. 347, 358 (1992).

<sup>140</sup> *Id.* at 357.

<sup>141</sup> *Blessing*, 520 U.S. at 343.

<sup>142</sup> This three-part test looks at (1) whether Congress intended the plaintiff to be a beneficiary; (2) whether the plaintiff can demonstrate that the statute creates a right that is not "vague and amorphous"; and (3) whether the right is mandatory in terms. *Blessing*, 520 U.S. at 343.

<sup>143</sup> *Id.* at 340–41.

<sup>144</sup> *Id.* at 343.

<sup>145</sup> *Id.*

<sup>146</sup> *Gonzaga*, 536 U.S. at 283.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

of the United States. Accordingly, it is *rights*, not the broader or vaguer “benefits” or “interest,” that may be enforced under the authority of that section. This being so, we further reject the notion that our implied right of action cases are separate and distinct from our § 1983 cases. To the contrary, our implied right of action cases should guide the determination of whether a statute confers rights enforceable under § 1983.<sup>150</sup>

In addition, Chief Justice Rehnquist reiterated that, in *Sandoval*, the Court found that a plaintiff must show that the statute creates not only a private right but also a private remedy.<sup>151</sup> He went on to explain that plaintiffs filing § 1983 claims do not have the burden of showing an intent to create a private remedy, as § 1983 generally provides a remedy for rights secured by the federal statutes.<sup>152</sup> Like implied private right of action claims, however, the plaintiff must demonstrate that the statute “confers rights on a particular class of person.”<sup>153</sup> The Court in *Gonzaga* found this to make “obvious sense,” as § 1983 is a mechanism by which individual rights “secured” elsewhere can be enforced.<sup>154</sup>

In *Gonzaga*, the Court found that FERPA’s provision prohibiting the schools that receive federal funding from releasing students’ education records without written consent did not include the “rights-creating” language that the Court in *Sandoval* found critical in determining congressional intent.<sup>155</sup> It further found that the language of the provision does not confer “individual entitlement” required under *Blessing*.<sup>156</sup> The majority in *Gonzaga* asserted that, “if Congress wishes to create new rights enforceable under § 1983, it must do so in clear and unambiguous terms—no less and no more than what is required for Congress to create new rights enforceable under an implied private right of action.”<sup>157</sup> Accordingly, the Supreme Court in *Gonzaga* concluded that FERPA’s nondisclosure provision fails to confer enforceable rights.<sup>158</sup>

### **The Dissent**

Writing for the dissent, Justice Stevens, in which Justice Ginsburg joined, argued that the nondisclosure provision meets the *Blessing* standard for establishing a federal right.<sup>159</sup> Justice Stevens expressed his opinion that, while the nondisclosure provision, § 1232b(b), alone indicates evidence that an individual federal right has been created, it is clear that there is a federal right to be enforced under § 1983 when the provision is reviewed “in light of the entire legislative enactment.”<sup>160</sup>

Justice Stevens further asserted that Congress has not foreclosed enforcement of FERPA under § 1983.<sup>161</sup> He explained that while FERPA has provisions establishing administrative enforcement by the Secretary of Education, the administrative avenue to enforce FERPA violations is insufficient to overcome the presumption that an enforceable private right of action exists under the statute us-

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 284 (quoting *Sandoval*, 532 U.S. at 286).

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 285 (quoting *California v. Sierra Club*, 451 U.S. 287, 294 (1981)).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 290.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 295 (Stevens, J., dissenting).

<sup>160</sup> *Id.* at 296 (Stevens, J., dissenting).

<sup>161</sup> *Id.* at 297 (Stevens, J., dissenting).

ing § 1983.<sup>162</sup> He reasoned that, since the enactment of FERPA in 1974, all of the federal circuit courts have ruled that there is a federal right under FERPA to enforce under § 1983, and that Congress has not taken any action to foreclose this enforceability by amending FERPA.<sup>163</sup> The dissent in *Gonzaga* criticized the majority for borrowing from implied right of action cases to raise the standard for § 1983 claims and establishing that in order to create new rights enforceable under § 1983, Congress must do so “in clear and unambiguous terms.”<sup>164</sup>

Justice Stevens pointed out that the Court’s previous rulings in implied right of action claims “reflect a concern, grounded in separation of powers, that Congress rather than the courts controls the availability of remedies for violation of statutes.”<sup>165</sup> He suggested that the separation of powers concerns inherent in implied right of action cases do not exist in § 1983 claims, as Congress specifically authorized private suits in § 1983.<sup>166</sup> The dissent asserted that the majority’s ruling is inconsistent with the Court’s precedent, “which has always treated the implied right of action and § 1983 inquiries as separate.”<sup>167</sup>

### ***The Impact of Gonzaga***

Like the Court in *Sandoval*, the Court in *Gonzaga* limited its analysis to the text and structure of the statute itself to determine whether the statute confers a private right of action. Furthermore, the majority in *Gonzaga* applied the *Blessing* implied right of action test to determine whether there is clear and unambiguous evidence of congressional intent to establish an individual right. The Court, however, failed to define what evidence would constitute “clear and unambiguous.” By limiting its interpretation of the statute narrowly to the text and structure of the statute itself, the Court in *Gonzaga* limited the enforceability of federal statutes under § 1983. Without defining what evidence constitutes “clear and unambiguous” congressional intent, the Court is unlikely to grant a private right of action arising out of regulations and statutes that do not explicitly confer that right. Additionally, it is unlikely that a federal regulation, without looking at the legislative history and general context, alone would provide this clear and unambiguous evidence of congressional intent to establish an individual right. As Justice Stevens stated in his dissent, the Court in *Gonzaga* adopts an unnecessarily stringent standard in § 1983 cases by inferring the implied right of action claims test, even though the same separation of powers concerns did not apply.<sup>168</sup> By adopting a stringent standard in § 1983 claims, the Supreme Court in *Gonzaga* made it difficult for plaintiffs seeking judicial fora to enforce their Title VI rights using § 1983.

## **CURRENT ENVIRONMENTAL JUSTICE AND CIVIL RIGHTS ENFORCEMENT**

Heightening the standard for § 1983 claims has serious consequences for many civil rights and environmental justice groups that have turned to federal courts to enforce their rights. As a result of *Sandoval*, individual plaintiffs have lost a forum in which to enforce their § 602 rights. The Third Circuit Court of Appeals in *South Camden* barred this enforcement of Title VI § 602 regulations un-

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<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 299 (Stevens, J., dissenting).

<sup>164</sup> *Id.* at 300 (Stevens, J., dissenting).

<sup>165</sup> *Id.* (quoting *Wilder*, 496 U.S. at 509).

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 300 (Stevens, J., dissenting).

<sup>168</sup> *Id.* at 302 (Stevens, J., dissenting).

der § 1983 in that circuit. While the Supreme Court in *Gonzaga* did not directly address the enforceability of § 602 regulations under § 1983, it generally ruled that legislation and regulations created pursuant to Congress' spending power do not create individual rights enforceable through § 1983.<sup>169</sup> Furthermore, the Court in *Gonzaga* established that there must be explicit congressional intent to create an individual right to enforce legislation or regulations under § 1983.<sup>170</sup> Ironically, and as Justice Stevens pointed out, § 1983 is a statute that Congress explicitly established to allow individuals to enforce rights created in other statutes.<sup>171</sup> In light of the Supreme Court's decision in *Gonzaga*, and short of Congress explicitly providing in legislation that private individuals have the right to seek enforcement of Title VI under § 1983, Title VI enforcement under § 1983 is all but impossible. Once a plaintiff can establish that a regulation or legislation includes a federal right, a private individual should be allowed to raise a § 1983 claim to enforce that federal right.

Unfortunately, the Supreme Court in *Gonzaga* established a new stringent standard for § 1983 claims by requiring that "if Congress wishes to create new rights enforceable under § 1983, it must do so in clear and unambiguous terms."<sup>172</sup> This ruling may have a devastating effect on how the Supreme Court will handle future civil rights and environmental justice litigation brought under § 1983. In future cases, the Supreme Court could hold that before individual plaintiffs can use § 1983 to enforce disparate impact regulations promulgated pursuant to § 602 of Title VI, the plaintiffs must establish that Congress intended to create that right in "clear and unambiguous" terms. The Court in *Sandoval* already found that it could not establish, by the language of § 602, that Congress intended to establish rights enforceable by private individuals. The Court in *Gonzaga*, narrowing the analysis of the case to textual reading of the statute, ruled that before spending clause legislation can be enforced under § 1983, there must be clear and unambiguous congressional intent to create a private right of action. Like FERPA, Title VI is spending clause legislation. Accordingly, in addition to already having ruled that the language of § 602 does not establish congressional intent to create a private right of action, the current Supreme Court, applying the same textual reading of Title VI, could likely rule that Congress did not confer a private right of action in Title VI to be enforced under § 1983.

Currently, federal circuit courts are split on the enforceability of § 602 regulations under § 1983. Accordingly, civil rights and environmental justice litigants can continue to raise their claims of disparate impact discrimination in violation of § 602 under § 1983 in federal courts that have not barred this enforcement. When viewed, however, in light of the *Gonzaga* ruling on general enforcement through § 1983, it is questionable that § 1983 is a long-term remedy for civil rights litigants. Just as the Court in *Gonzaga* sought to resolve the disagreement of enforceability of FERPA under § 1983, the Supreme Court is likely to rule on the enforceability of § 602 under § 1983. Just as the Court in *Sandoval* refused to grant a private right of action without explicit statutory language indicating congressional intent, the same Court is unlikely to grant a private right of action for § 602 disparate impact claims without "clear and unambiguous" language authorizing that enforcement under § 1983.<sup>173</sup>

As Chapter 3 demonstrated, federal agencies have not been effective in enforcing § 602 regulations. Accordingly, both civil rights groups and environmental justice groups have turned to courts to enforce their civil rights. By eliminating this major legal tool, civil rights and environmental justice

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<sup>169</sup> *Id.* at 276.

<sup>170</sup> *Id.* at 290.

<sup>171</sup> *Id.* at 301–02 (Stevens, J., dissenting). The statute, 42 U.S.C. § 1983, explicitly allows persons deprived of any rights secured by the Constitution and laws to bring a cause of action under its provisions. *See* 42 U.S.C. § 1983.

<sup>172</sup> *Id.* at 290.

<sup>173</sup> *Id.*

groups are now faced with the possibility that the discriminatory effects of activities and programs receiving federal funding may go unchallenged.<sup>174</sup> They must now solely rely on the very funding agencies that have been slow to respond to administrative complaints to enforce their civil rights.

Many environmental justice advocates testifying at the Commission's hearings in January and February 2002 agreed that, in light of *Sandoval* and *South Camden*, enforcing Title VI regulations has become difficult.<sup>175</sup> Some environmental advocates have called for overturning *Sandoval*.<sup>176</sup> However, because of the newness of the decision and the current climate of the Supreme Court, overturning *Sandoval* is not realistic.<sup>177</sup> Other advocates believe that Title VI is not completely lost. To the extent that the federal agencies have enforcement authority under Title VI, individual complainants can bring administrative complaints to appropriate federal agencies. Unfortunately, many communities and advocates who have patiently waited for positive resolution from the federal agencies, all express their concern that the federal agencies have not been very effective in enforcing Title VI.<sup>178</sup>

As Justice Scalia wrote in the *Sandoval* decision, "like substantive federal law itself, private rights of action to enforce federal law must be created by Congress."<sup>179</sup> Therefore, it is no surprise that many policy analysts and advocates are interested in having Congress address the problems created by the *Sandoval* decision. Luke Cole testified that the only way to undo the harm that has been caused by the Supreme Court in *Sandoval* is to pass legislation overturning it.<sup>180</sup> In addition, the National Environmental Policy Commission, in its report to the Congressional Black Caucus & Congressional Black Caucus Foundation Environmental Justice Braintrust, recommended that (1) congressional riders interfering with the processing of Title VI be defeated, and that (2) the Congressional Black Caucus consider amending the civil rights laws to provide a private right of action.<sup>181</sup>

Despite recommendations and calls for Congress to pass legislation to supercede *Sandoval*, no such legislation has been introduced. Mr. Cole expressed his optimism that, just as President George H.W. Bush signed into law the Civil Rights Restoration Act of 1991, undoing the very real damage that the Supreme Court decisions of the late 1980s had done, advocates should work to introduce and have passed a Civil Rights Restoration Act to supercede *Sandoval*.<sup>182</sup> In the absence of congressional action, federal agencies must become active in enforcing Title VI.

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<sup>174</sup> Mank, *Using § 1983 to Enforce Title VI*, p. 322.

<sup>175</sup> See Luke Cole, director, California Rural Legal Assistance Foundation, testimony before the U.S. Commission on Civil Rights, hearing, Washington, DC, Feb. 8, 2002, official transcript, p. 37 (hereafter cited as February Hearing Transcript).

<sup>176</sup> *Ibid.*

<sup>177</sup> *Ibid.*

<sup>178</sup> See *ibid.*, pp. 17, 19–21; Monique Harden, Earthjustice Legal Defense Fund, testimony before the U.S. Commission on Civil Rights, hearing, Washington, DC, Jan. 11, 2002, official transcript, pp. 23–25 (hereafter cited as January Hearing Transcript); and Peggy Shepard, executive director, West Harlem Environmental Action, Inc., Testimony, January Hearing Transcript, p. 123.

<sup>179</sup> *Sandoval*, 532 U.S. at 1519.

<sup>180</sup> Luke Cole, director, California Rural Legal Assistance Foundation, Testimony, February Hearing Transcript, p. 37.

<sup>181</sup> National Environmental Policy Commission, *Report to the Congressional Black Caucus and Congressional Black Caucus Foundation Environmental Braintrust*, Sept. 28, 2001, p. 37.

<sup>182</sup> Luke Cole, director, California Rural Legal Assistance Foundation, Testimony, February Hearing, p. 37.

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## CONCLUSION

*Sandoval*'s ruling that there is no freestanding private right of action in regulations promulgated under § 602 of Title VI eliminated a major tool in enforcing civil rights for civil rights and environmental justice groups. *South Camden*, which held that in addition to having no freestanding private right of action under § 602, private individuals are barred from bringing their disparate impact discrimination claims under § 1983, foreclosed the possibility of enforcing these civil rights in the Third Circuit. Other circuits may potentially follow the Third Circuit's ruling. The Court in *Gonzaga* established a heightened standard for § 1983 claims by requiring that, "if Congress wishes to create new rights enforceable under § 1983, it must do so in clear and unambiguous terms."<sup>183</sup> Accordingly, both civil rights and environmental justice groups are left with few legal channels to enforce these civil rights. While § 1983 is a tool that can be utilized in federal circuit courts that have not barred this enforcement, civil rights enforcement attempts must be at the administrative level.

Therefore, the Commission recommends congressional and agency action to provide relief to private plaintiffs. Specifically, the Commission recommends that:

- In light of the *Sandoval*, *South Camden*, and *Gonzaga* decisions, Congress should pass a Civil Rights Restoration Act to clearly and unambiguously provide for a private right of action for disparate impact claims under § 602 of Title VI and § 1983.
- In light of the currently limited legal enforceability of disparate impact discrimination regulations promulgated under § 602 of Title VI, federal agencies providing financial assistance to state and local agencies must vigorously enforce their existing nondiscrimination regulations by assuming greater oversight responsibility, implementing effective policy and guidelines for administrative enforcement of Title VI violations, and imposing appropriate penalties when violations of Title VI occur.

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<sup>183</sup> *Gonzaga*, 536 U.S. at 290.

## Chapter 5

# Alternative Dispute Resolution and Meaningful Public Participation

During the last two decades, agencies have increasingly supported alternative dispute resolution (ADR) as a way of resolving environmental conflicts with communities.<sup>1</sup> ADR refers to voluntary techniques for preventing and resolving conflict with the help of neutral third parties. ADR is broadly understood to include, but not be limited to, mediation, arbitration, negotiation, mini-trials, or negotiated rule-making.<sup>2</sup> Generally, ADR has not been viewed as a form of public participation; rather, it is considered an initial alternative to litigation and other court action.<sup>3</sup>

Agencies assert that ADR promotes more creative and enduring solutions, fosters a culture of trust between the agencies and the stakeholders, and results in faster resolution of issues. In testimony before the Commission, the Environmental Protection Agency stated that ADR allows for a quick, voluntary, and community-based resolution.<sup>4</sup> EPA also explained that complainants have full rights in the process, since ADR is voluntary and disputes will return to EPA to investigate if ADR fails.<sup>5</sup> Community interest groups, however, are concerned that ADR focuses on achieving consensus, rather than eliminating discrimination. They suggest that for ADR to be effective, safeguards need to be put into place to equalize the bargaining power between them and industry,<sup>6</sup> and to protect communities from being disadvantaged by a lack of access to technical data, research, and other information.

Federal agencies have also tried to make progress with communities to increase and improve meaningful public participation in information gathering and dissemination, and to a lesser extent, in the decision-making process as a means of preventing conflicts before the need for litigation or ADR arises. After the Commission's hearings, however, the Natural Resources Defense Council, a national nonprofit environmental organization, reported that the President's Council on Environmental Qual-

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<sup>1</sup> Matthew Patrick Clagett, *Environmental ADR and Negotiated Rule and Policy Making: Criticisms of the Institute for Environmental Conflict Resolution and the U.S. Environmental Protection Agency*, 15 TUL. ENVTL. L.J. 409 (Summer 2002) (hereafter cited as Clagett, *Environmental ADR*).

<sup>2</sup> *Ibid.*

<sup>3</sup> J. Clarence Davies, *Environmental ADR and Public Participation*, 34 VAL. U.L. REV. 389 (Spring 2000).

<sup>4</sup> Linda Fisher, deputy administrator, U.S. Environmental Protection Agency, testimony before the U.S. Commission on Civil Rights, hearing, Washington, DC, Feb. 8, 2002, official transcript, p. 81 (hereafter cited as February Hearing Transcript).

<sup>5</sup> Gail Ginsberg, chairperson, EPA Title VI Task Force, Testimony, February Hearing Transcript, p. 82.

<sup>6</sup> Mary M. O'Lone, director, Environmental Justice Project, Lawyers' Committee for Civil Rights Under Law, "Comments of the Lawyer's Commission for Civil Rights Under Law Before the United States Commission on Civil Rights," Apr. 9, 2002, pp. 11–12. For example, advocates view ADR as ineffective in permitting disputes, since the process already favors industry because complaints cannot be filed until after permits are granted, making agencies less inclined to revoke them. *See, e.g.*, Luke W. Cole, director, Center on Race, Poverty, & the Environment, California Rural Legal Assistance Foundation, letter to EPA Administrator Carol Browner, re: "Comments on Draft Revised Guidance Investigating Title VI Administrative Complaints Challenging Permits and Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs," Aug. 26, 2000, pp. 25–26 (hereafter cited as Cole, "Comments on Draft Revised Guidance").

ity (CEQ) and other agencies have moved, through a series of proposals, to undercut the National Environmental Protection Act (NEPA).<sup>7</sup> It is this statute that requires agencies to have public participation in certain environmental decisions and to prepare environmental impact statements<sup>8</sup> for federal actions with potentially important environmental repercussions.<sup>9</sup> In recent proposals, the Bush administration has sought to roll back requirements for public participation and environmental reviews applying, for example, to highway construction and forest management plans.<sup>10</sup>

<sup>7</sup> Robert Perks and Gregory Wetstone, Natural Resources Defense Council, *Rewriting the Rules, Year-End Report 2002*, January 2003, p. v (hereafter cited as NRDC, *Rewriting the Rules*).

<sup>8</sup> In an early step under NEPA, an agency must decide whether to prepare an environmental impact statement (EIS). See 40 C.F.R. § 1501.4 (2002). EISs are required under NEPA for major federal actions significantly affecting the environment. See National Environmental Protection Act of 1969, 42 U.S.C. § 4332(2)(C) (1994). In order to make this determination, the agency first prepares an environmental assessment (EA) that focuses on whether the possible proposed action may have a significant impact on the human environment. If it might, the agency will prepare an EIS. See *id.*; see also 40 C.F.R. pts. 1501–1508. The EIS serves two main purposes: to ensure that agencies consider environmental impacts in their decision-making, and to ensure that the agencies disclose the relevant information to the public. Michael B. Gerrard, ed., *The Law of Environmental Justice: Theories and Procedures to Address Disproportionate Risks*, “Impact Assessment,” by Sheila Foster (Chicago: ABA Publishing, 1999), p. 265 (hereafter cited as Foster, “Impact Assessment”).

If the agency determines that an EIS is required, it usually must begin a process called “scoping” during which the agency holds a meeting to identify the issues for the EIS. 40 C.F.R. § 1501.7. If the scoping meeting is held, it is supposed to seek the participation of other agencies and the public. *Id.* Scoping comments can occur in writing or at public meetings held by the agency. After scoping, the agency prepares the draft EIS detailing the potential effects of the project. NEPA requires that the EIS analyze the direct and indirect environmental consequences of the proposed action, as well as any alternatives or mitigation measures. 42 U.S.C. § 4332(2)(C); 40 C.F.R. §§ 1502.14, 1502.16. The agency distributes the EIS to the public for written comment, although a public hearing is discretionary. See 40 C.F.R. § 1502.19; Michael B. Gerrard, ed., *The Law of Environmental Justice: Theories and Procedures to Address Disproportionate Risks*, “Public Participation,” by Sheila Foster (Chicago: ABA Publishing, 1999), pp. 196–97 (hereafter cited as Foster, “Public Participation”). After receiving comments, the agency revises the draft EIS to produce a final EIS. Foster, “Public Participation,” p. 197. Thirty days after the agency distributes the final EIS, the agency must issue a record of decision, which should “state the agency’s decision, identify the alternatives considered, specify the environmentally preferable alternatives, discuss factors that the agency balanced in making its decision, and indicate whether all practical means of avoiding or minimizing the environmental harm were incorporated into the decision.” *Ibid.* It is important to note that while the information disclosed as part of NEPA can affect official or public opinion in a way that affects the outcome, NEPA is essentially a procedural guarantee that does not establish any substantive standards or mandate particular outcomes. Foster, “Impact Assessment,” p. 264. Nevertheless, the agencies’ use of the public participation aspects of NEPA and the EIS process play a critical role in meaningfully involving communities in agency decision-making.

<sup>9</sup> NRDC, *Rewriting the Rules*, p. v.

<sup>10</sup> *Ibid.* President Bush has set up an NEPA task force headed by the CEQ to “help federal agencies update their practices and procedures and better integrate NEPA into federal agency decision making.” See National Environmental Policy Task Force, 67 Fed. Reg. 45,510, 45,511 (July 9, 2002); see also Council on Environmental Quality, “NEPA Task Force,” <<http://ceq.eh.doe.gov/ntf/>> (last accessed Aug. 14, 2003). While the administration indicates it intends to enhance or “streamline” NEPA, environmental advocates argue that many recent actions by the administration work to circumvent NEPA. See Natural Resources Defense Council, NRDC Backgrounder, “Defending NEPA from Assault,” July 2003, p. 1. For example, the CEQ is considering stripping NEPA protection, including public participation requirements, from the oceans. *Ibid.*, p. 3. If this occurs, waste dumping, commercial fishing, and oil and gas drilling, for example, could take place without careful review of their environmental impacts, assessment of alternatives, or opportunity for public participation and scrutiny. *Ibid.* The administration has also proposed exempting forest management plans from NEPA review. *Ibid.*, p. 2. In addition, on August 7, 2003, as part of its implementation of President Bush’s National Energy Policy, the Bureau of Land Management issued new policies aimed at reducing or eliminating “impediments” to oil and gas leasing on BLM-managed lands, and to do so “in a timely manner.” See BLM Web site, <[www.blm.gov/nhp/index.htm](http://www.blm.gov/nhp/index.htm)> (last accessed Aug. 15, 2003). According to NRDC, this policy expedites the permitting process by limiting environmental reviews and shortening public comment periods under NEPA. Robert Perks, Natural Resources Defense Council, telephone interview, Aug. 12, 2003. Finally, President Bush signed an executive order to “streamline” the environmental review process for transportation projects, after which DOT announced its first NEPA expedited projects. See Environmental Stewardship and Transportation Infrastructure Project Reviews, Exec. Order No. 13,274, 67 Fed. Reg. 59,449

Even prior to the administration's proposals, some environmental justice advocates found that problems such as nonexistent or very limited public notice periods, combined, in some instances, with a community's difficulty in wading through complicated technical information, prevented participation from being meaningful in any sense.<sup>11</sup> Others have commented that even where communities have been able to organize, mobilize, and lead efforts to oppose a siting decision, for example, government agencies do not view the communities as legitimate actors in the situation whose concerns must be addressed.<sup>12</sup> Unfortunately, the recent moves by the administration in seeking to scale back opportunities for meaningful participation will not foster additional trust in these communities.

## ALTERNATIVE DISPUTE RESOLUTION

ADR has been rapidly growing due to early successes in the labor community and some early environmental mediation cases.<sup>13</sup> This led federal and state governments to pass legislation calling for the use of ADR for environmental disputes.<sup>14</sup> Proponents of ADR see these approaches as speedier and less costly than litigation, as providing for greater and more effective public participation than litigation, and as potentially allowing a more agreeable solution than one that can be obtained through litigation.<sup>15</sup> Recently, there have been some major events in the environmental ADR field. These include the creation of the United States Institute for Environmental Conflict Resolution (IECR),<sup>16</sup> with which EPA has entered into an interagency agreement, and EPA's final promulgation of its policy on environmental ADR.<sup>17</sup> EPA issued this final policy in December 2000 pursuant to the Administrative Dispute Act,<sup>18</sup> which requires all federal agencies to appoint a senior official as agency dispute reso-

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(Sept. 23, 2002); U.S. Department of Transportation, *Report to Congress on Federal Highway Administration Environmental Streamlining Activities During 2002*, April 2003, <[www.fhwa.dot.gov/enviornment/strmlmg/final02rpt.htm](http://www.fhwa.dot.gov/enviornment/strmlmg/final02rpt.htm)> (last accessed Aug. 14, 2003); see also, e.g., U.S. Department of Transportation, Environmental Impact Statement Notice for Philadelphia International Airport, 68 Fed. Reg. 44,834 (July 30, 2003).

Finally, Congress is considering several provisions that also would limit public participation and weaken environmental reviews of environmental projects. For example, Title III of Senate Bill S. 14 could remove the application of NEPA from energy development decisions on tribal lands. Natural Resources Defense Council, NRDC Backgrounder, "Defending NEPA from Assault," July 2003, p. 1. Moreover, the Senate majority staff of the Environmental and Public Works Committee has included language limiting public participation and environmental review requirements for highway projects in its legislative proposal to reauthorize the Transportation Equity Act for the 21st Century. *Ibid.*, p. 2.

<sup>11</sup> Elizabeth Teel Testimony, deputy director, Environmental Law Clinic, Tulane Law School, testimony before the U.S. Commission on Civil Rights, hearing, Washington, DC, Jan. 11, 2002, official transcript, pp. 132-33 (hereafter cited as January Hearing Transcript).

<sup>12</sup> Damu Smith, campaigner, Greenpeace Toxic Campaign, Greenpeace, USA, Testimony, January Hearing Transcript, p. 133.

<sup>13</sup> Michelle Ryan, Comment, *Alternative Dispute Resolution in Environmental Cases: Friend or Foe?* 10 TUL. ENVTL. L.J. 397, 399 (Summer 1997) (hereafter cited as Ryan, *Friend or Foe?*).

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*, pp. 401-02.

<sup>16</sup> According to the Environmental Policy and Conflict Resolution Act of 1998, IECR will "identify and conduct such programs, activities and services as the foundation determines appropriate and to permit [it] to provide assessment, mediation, training, and other related services to resolve environmental disputes." Environmental Policy and Conflict Resolution Act of 1998, Pub. L. 105-156, 112 Stat. 8 (1998). Furthermore, "a federal agency may use the foundation and the institute to provide assessment, mediation, or other related services in connection with a dispute or conflict related to the environment, public lands, or natural resources." *Id.* There are two types of disputes the IECR will not hear: (1) those that concern purely legal issues, interpretations or determination of law, or enforcement by one agency against another, and (2) where Congress has mandated another ADR mechanism to resolve the dispute. *Id.*

<sup>17</sup> Clagett, *Environmental ADR*, p. 417.

<sup>18</sup> See 5 U.S.C. §§ 571 *et seq.* (1994 & Supp. IV 1998).

lution specialist and implement a policy designed to encourage the use of ADR.<sup>19</sup> EPA's policy emphasizes its support of ADR to resolve disputes and potential conflicts.<sup>20</sup> EPA has also established within its Office of General Counsel the Alternative Dispute Resolution Law Office, which houses EPA's Conflict Prevention and Resolution Center.<sup>21</sup> The center is headed by EPA's dispute resolution specialist and serves as EPA's national program office for environmental dispute resolution.<sup>22</sup>

Furthermore, as discussed in Chapter 3, EPA's Title VI regulations<sup>23</sup> require that agencies try to resolve complaints informally, whenever possible.<sup>24</sup> EPA has stated that it wants to encourage informal approaches to dealing with Title VI problems due to the backlog of these administrative complaints.<sup>25</sup> If the parties choose not to engage in informal resolution, EPA will investigate the accepted allegations in the complaint.<sup>26</sup>

As will be discussed further below, those critical of ADR have suggested that safeguards are needed during the ADR of a Title VI complaint to protect communities from being disadvantaged by unequal bargaining power, and a lack of judicial safeguards and access to technical data, research, and other information. According to EPA, in response to these concerns, it has incorporated the following three safeguards into its dispute resolution program:

<sup>19</sup> Karen D. Higginbotham, director, Office of Civil Rights, U.S. Environmental Protection Agency, letter to Office of the General Counsel, U.S. Commission on Civil Rights, Aug. 22, 2003, p. 12 (hereafter cited as Higginbotham letter).

<sup>20</sup> See Policy on Alternative Dispute Resolution, 65 Fed. Reg. 81,858 (Dec. 27, 2000).

<sup>21</sup> Higginbotham letter, p. 12.

<sup>22</sup> Ibid.

<sup>23</sup> See 40 C.F.R. § 7.120(d)(2) (2002). Participation in any type of informal resolution process is voluntary and must be agreed to by both the complainant and the recipient. There is no exhaustion requirement. See U.S. Environmental Protection Agency, Response to the Commission's Interrogatory Question 5, April 2002 (hereafter cited as EPA, Response to Interrogatory Question).

<sup>24</sup> Environmental ADR has been implemented in varying degrees by other agencies as well. Other than EPA, it has been most notably used by DOI. See Clagett, *Environmental ADR*, p. 416. HUD does not have a formal alternative dispute resolution process for Title VI complaints. See U.S. Department of Housing and Urban Development, Response to the Commission's Interrogatory Question 3, April 2002 (hereafter cited as HUD, Response to Interrogatory Question). HUD's Title VI regulations, however, do set forth a mechanism for achieving voluntary compliance. 24 C.F.R. § 1.7(d); see also HUD, Response to Interrogatory Question 3. Since FY 2000, HUD's Office of Fair Housing and Equal Opportunity (FHEO) has tracked Title VI cases through its Title Eight Automated Paperless Office Tracking System (TEAPOTS). Voluntary Compliance Agreements (VCAs) and informal resolutions of Title VI complaints are tracked, along with other case activities, in TEAPOTS. See HUD, Response to Interrogatory Question 5.

DOT does not require Title VI complainants to participate in ADR before pursuing administrative remedies. See U.S. Department of Transportation, Response to the Commission's Interrogatory Question 7, April 2002 (hereafter cited as DOT, Response to Interrogatory Question). The agency, however, "encourages parties to all types of conflict to pursue ADR," and said that ADR was used in three Title VI environmental justice complaints between 1995 and 2001. Ibid. Two involved the funding of surface transportation projects in a major metropolitan area, and one involved the routing of a new highway. All three alleged disparate impact on African American communities. See DOT, Responses to Interrogatory Questions 7 and 10. The agency said it "informally" tracks Title VI agreements reached through ADR, but that the number of Title VI environmental justice complaints "has been too few to establish a pattern or practice of discrimination." DOT, Response to Interrogatory Question 9.

<sup>25</sup> U.S. Environmental Protection Agency, *ADR Accomplishments Report*, EPA-100-R-00-003, March 2000, p. 9.

<sup>26</sup> EPA, Response to Interrogatory Question 5. As of March 2002, the date of its responses to the Commission's interrogatories, EPA reported that it had resolved only one Title VI complaint through an informal resolution process. It reported that "[b]ased upon this limited experience, EPA is not in a position to evaluate whether such negotiated agreements to Title VI complaints can be used to establish a pattern or practice of discrimination, or serve as precedents for other complaints." See EPA, Response to Interrogatory Question 6. As of June 30, 2003, EPA reports that it has informally resolved an additional complaint. See U.S. Environmental Protection Agency, "Title VI Complaints Filed with EPA," June 20, 2003, pp. 4, 20, <[www.epa.gov/ocrpage1/docs/t6csjune2003.pdf](http://www.epa.gov/ocrpage1/docs/t6csjune2003.pdf)> (last accessed July 30, 2003).

- Participation in ADR is voluntary. All parties must voluntarily choose to participate in ADR and may withdraw at any time, for any reason, including lack of understandable information, without affecting the disposition of the Title VI complaint or the investigation process. In addition, parties to ADR have a role in selecting the neutral third party, who serves at the pleasure of all participants.<sup>27</sup>
- Ground rules have been established for ADR processes. Such ground rules vary depending on what the ADR participants decide. They typically address issues such as confidentiality, good-faith participation, information exchanges, the role of the neutral third party in the process, and rules for decision-making, such as by consensus. All participants in an ADR process must agree to the ground rules, and the neutral third party is responsible for enforcing them.<sup>28</sup>
- Where parties agree to try ADR to resolve their disputes, EPA can assist those parties who feel disadvantaged by offering training on how to participate effectively in ADR processes and by securing expert technical advice. Such technical advice may come from a variety of sources, including EPA staff, technical assistance grants, and contractor experts.<sup>29</sup>

Nevertheless, EPA has not conducted or funded any research or empirical analyses to assess whether ADR, despite these safeguards, is the most appropriate or effective method for resolving conflicts with traditionally disadvantaged groups and groups with limited-English proficiency.<sup>30</sup> In March 2000, however, EPA did publish its ADR Accomplishments Report, which examined its ADR activities generally.<sup>31</sup> And since July 2000, EPA's Office of Environmental Justice (OEJ) has funded a pilot project to help facilitate consultative decision-making processes in order to achieve equitable resolution of situations involving environmental justice concerns.<sup>32</sup> EPA reports that it "will analyze the success of these efforts to evaluate and improve the use of consultative processes in situations involving environmental justice concerns"<sup>33</sup> and to "understand better the value and appropriate use of dispute resolution techniques . . . to environmental justice disputes."<sup>34</sup> The agency also has a three-year cooperative agreement with the Consensus Building Institute (CBI) to train members of affected community groups in ADR.<sup>35</sup> In addition, on September 20–21, 2002, OEJ sponsored a pilot training session in El Monte, California, in which 30 community representatives participated in a workshop to

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<sup>27</sup> EPA, Response to Interrogatory Question 7.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

<sup>30</sup> EPA, Response to Interrogatory Question 9.

<sup>31</sup> U.S. Environmental Protection Agency, *ADR Accomplishments Report*, EPA-100-R-00-003, March 2000. This report discusses EPA's use of ADR in Title VI programs, permitting programs, Brownfields pilot programs, regional Superfund activities, and enforcement actions. See also U.S. Environmental Protection Agency, *Status Report on the Use of Alternative Dispute Resolution in U.S. Environmental Protection Agency Enforcement and Site-Related Actions through Fiscal Years 1997 & 1998*, EPA-330-R-00-001, December 1999 (providing an overview of EPA's ADR programs, including the use of ADR in Superfund remedy disputes and Brownfields facilitation pilots).

<sup>32</sup> U.S. Environmental Protection Agency, Contract 68-W99-0010, Task Order No. 66, "Consultative Decisionmaking in Support of Environmental Justice."

<sup>33</sup> Ibid.

<sup>34</sup> U.S. Environmental Protection Agency, *Environmental Justice 2000 Biennial Report: Continuing to Move Towards Collaborative and Constructive Problem-Solving*, EPA/300-R-01-005, October 2001, p. 2.26.

<sup>35</sup> EPA, Response to Interrogatory Question 9.

learn about basic dispute resolution techniques.<sup>36</sup> CBI is also developing six environmental justice dispute resolution case studies as a supplement to the workshop.<sup>37</sup>

Environmental ADR has been considered by many as a boon to the environmental justice arena. Complainants may find a less formal adversarial system less intimidating and more accessible. It is important, however, that citizen groups make informed decisions about whether dispute resolution ultimately will resolve their conflicts effectively, efficiently, and finally. The affected communities must weigh the advantages and potential disadvantages of ADR. For example, while ADR may be appealing as a “streamlined” version of litigation, ADR is not necessarily speedier than litigation. Most environmental disputes go on for years and frequently have already been to court first or ultimately proceed to court.<sup>38</sup> In addition, ADR may not be cheaper than litigation. Before reaching the impasse requiring mediation, time and money had been expended. Often communities will hire attorneys and experts, and costs will be incurred preparing for mediation or arbitration.<sup>39</sup> Moreover, while a judge, jury, and court personnel are free to litigants (other than nominal filing fees), costs for third-party neutrals, who normally charge for their time, travel, and expenses, will be borne by the parties.<sup>40</sup>

Although the informality of ADR may appeal to community groups, it may be this quality that could make these groups vulnerable when using ADR. Legal protections involved in litigation ensure due process and a fair trial. These procedural safeguards help to minimize differences between the parties and ensure that parties of unequal power have equal and full rights in litigation. These assurances are not normally provided in ADR,<sup>41</sup> nor does ADR account for these inherent inequalities in bargaining power. Industry is often very experienced in the field of ADR, having used it for decades in many of its other disputes.<sup>42</sup> Community or public interest groups would not commonly have the same degree of knowledge or experience using ADR.<sup>43</sup> Unequal bargaining power can arise because of differences in education, culture, and experience or training for negotiations.<sup>44</sup> The imbalance of power in an informal negotiation is exacerbated by the fact that ADR may favor the party with more funding, greater and earlier access to information, and a greater availability of technical resources.<sup>45</sup> The imbalance creates a danger that community groups will be disadvantaged throughout the ADR process and coerced into settlements they may not think they have the power to reject.<sup>46</sup>

EPA asserts that “the very heart of ADR processes . . . is to level the playing field, neutralize power imbalances during negotiations, and empower all stakeholders to participate on an equal footing. This

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<sup>36</sup> U.S. Environmental Protection Agency, Office of Environmental Justice, “Environmental Justice Fact Sheet, EPA’s Commitment to Environmental Justice,” EPA/300-F-03-003, May 2003 (hereafter cited as EPA, “Environmental Justice Fact Sheet”).

<sup>37</sup> *Ibid.* As of this writing, a similar workshop is being planned for September 2003 in Memphis, Tennessee. *Ibid.*

<sup>38</sup> See Ryan, *Friend or Foe?* p. 412.

<sup>39</sup> See *ibid.*

<sup>40</sup> See, e.g., *Shankle v. B-G Maint. of Colorado, Inc.*, 163 F.3d 1230, 1234–35 (10th Cir. 1999) (affirming district court’s holding that an arbitration agreement was unenforceable where arbitration costs exceeded judicial forum costs); see *generally* Brief for Respondent at 31–33, *Green Tree Financial Corp. v. Randolph*, 51 U.S. 79 (2000) (No. 99-1235) (discussing cases where arbitration agreements were unenforceable because arbitration costs exceeded those in a judicial forum).

<sup>41</sup> Ryan, *Friend or Foe?* p. 413.

<sup>42</sup> *Ibid.*, p. 412.

<sup>43</sup> *Ibid.*, p. 413.

<sup>44</sup> Cole, “Comments on Draft Revised Guidance,” p. 26.

<sup>45</sup> See Ryan, *Friend or Foe?* p. 413.

<sup>46</sup> See *ibid.*, pp. 413–14; Clagett, *Environmental ADR*, p. 422.

is accomplished through . . . the skills held by trained neutral third-parties.”<sup>47</sup> Nevertheless, community groups can be disadvantaged in this process because they lack the resources and influence to gather crucial data about the environmental hazards that are in the hands of industry.<sup>48</sup> According to one environmental advocate, “[i]n any negotiation, knowledge is power.”<sup>49</sup> Low-income or minority complainants may not have the leverage to gain this information through negotiation, nor would they have the money or resources to hire legal and technical experts to develop it for them.<sup>50</sup> Without some form of a formal discovery process, ADR fails to provide for the equal exchange of information, as guaranteed in litigation, resulting in facts that may be “incomplete, one-sided, and inaccurate.”<sup>51</sup> Moreover, a third-party neutral in an ADR process may not have the same authority or enforcement power as a judge to force a fair exchange of facts and data.<sup>52</sup>

In addition to ADR lacking discovery requirements, it also fails to provide any structure of legal precedent—a fundamental principle of our legal system. A system of precedence provides that similar cases will be treated alike, provides uniformity and fairness in decision-making, and allows the participants to draw on lessons learned in past disputes.<sup>53</sup> Parties in an ADR are unable to use favorable or adverse prior decisions as binding authority, nor will future communities be able to have guarantees of guidance from battles fought today. And, unlike a court proceeding, ADR is generally closed to the public and not on a public record.<sup>54</sup> This creates little opportunity for “public scrutiny, accountability or accessibility.”<sup>55</sup>

Moreover, ADR poorly serves Title VI’s purpose of remedying discrimination because it focuses on individual disputes rather than on larger patterns of racial inequities.<sup>56</sup> By looking at discrimination on a case-by-case basis and the community’s inability to use precedent-setting cases as binding authority, ADR cannot address potentially larger and reoccurring patterns of systemic discrimination by industry. Indeed, ADR focuses much more on achieving consensus than on eliminating discrimination.<sup>57</sup> While ADR may remove complaints from EPA’s caseload, which still remains to be seen, the underlying racial inequities may not have been addressed.<sup>58</sup>

Finally, the purpose of mediation or ADR is to reach compromise. The difficulty with imposing this goal, in addition to resolving environmental disputes, is that for many communities the environmental issues may be an emotionally charged debate over their historic or cultural values, such as the use of sacred grounds, and the well-being of their neighborhoods, families, and future generations.<sup>59</sup>

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<sup>47</sup> Higginbotham letter, p. 6.

<sup>48</sup> Cole, “Comments on Draft Revised Guidance,” p. 27.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*, pp. 29–30.

<sup>52</sup> Lawyers’ Committee for Civil Rights Under Law, “Comments before the U.S. Commission on Civil Rights,” Apr. 9, 2002, p. 12.

<sup>53</sup> Cole, “Comments on Draft Revised Guidance,” p. 30.

<sup>54</sup> *Ibid.*, p. 28.

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*, p. 30.

<sup>57</sup> Mary M. O’Lone, Lawyers’ Committee for Civil Rights Under Law, “Remarks Before the National Academy of Public Administration,” Aug. 30, 2001, <[www.lawyerscomm.org/projects/environmentalspeech2.html](http://www.lawyerscomm.org/projects/environmentalspeech2.html)> (last accessed June 30, 2003).

<sup>58</sup> *Ibid.*

<sup>59</sup> *See, e.g.,* Clagett, *Environmental ADR*, pp. 421–22.

These values cannot be easily compromised in return for a certain result. Agencies may measure success by their ability to gain consensus among the parties, however, communities and public interest groups may feel that consensus can only mean compromising the environment, their health, or their values.

To adequately address environmental justice concerns, agencies must recognize the role of communities in every step of their programs. Agencies have increasingly supported alternative dispute resolution as a way of resolving environmental conflicts with communities. With proper protections in place, ADR could be a useful tool, but agencies need to recognize that community interest groups do not always come to the table with equal bargaining power. As it is currently conceived, ADR does not generally afford safeguards needed to equalize the power differential between the complainants and industry, nor does it protect complainants from being disadvantaged by a lack of access to technical data, research, and other information.

## MEANINGFUL PUBLIC PARTICIPATION

Meaningful participation of affected communities is one of the cornerstones of environmental justice and should be used to prevent conflicts before the need for ADR or litigation arises.<sup>60</sup> One of the goals of Executive Order 12,898 is to give minority and low-income communities greater opportunities for public participation and access to information relating to human health and the environment.<sup>61</sup> Federal agencies have begun to recognize the need to increase and improve the meaningful public participation of communities in information gathering, dissemination, and decision-making processes as a method of empowering communities, avoiding conflict, and fostering trust.

In the memorandum to heads of departments and agencies that accompanied Executive Order 12,898, President Clinton recognized the importance of procedures under the National Environmental Policy Act<sup>62</sup> for identifying and addressing environmental justice concerns. The memorandum states that “[e]ach Federal agency shall analyze the environmental effects, including human health, economic and social effects, of Federal actions, including effects on minority communities and low-income communities, when such analysis is required by [NEPA].”<sup>63</sup> The memorandum emphasizes the importance of NEPA’s public participation process, directing that “[e]ach Federal agency shall provide opportunities for community input in the NEPA process.”<sup>64</sup> Agencies are further directed to “identify[] potential effects and mitigation measures in consultation with affected communities, and im-

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<sup>60</sup> EPA defines “meaningful involvement” as meaning that:

(1) potentially affected community residents have an appropriate opportunity to participate in decisions about a proposed activity that will affect their environment and/or health; (2) the public’s contribution can influence the regulatory agency’s decision; (3) the concern of all participants involved will be considered in the decision making process; and (4) the decision makers seek out and facilitate the involvement of those potentially affected.

See U.S. Environmental Protection Agency, Environmental Justice Web site, <<http://www.epa.gov/compliance/environmentaljustice/index.html>> (last accessed June 30, 2003).

<sup>61</sup> Denis Binder et al., *A Survey of Federal Agency Response to President Clinton’s Executive Order No. 12898 on Environmental Justice*, 31 ENVTL. L. REP. 11134 (2001) (hereafter cited as Binder et al., *Federal Agency Response to President Clinton’s Executive Order No. 12898*).

<sup>62</sup> National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370 (1994).

<sup>63</sup> Presidential Memorandum Accompanying Executive Order 12,898, 30 WEEKLY COMP. PRES. DOC. 279, 280 (Feb. 11, 1994).

<sup>64</sup> *Id.*

prove[] the accessibility of meetings, crucial documents, and notices.”<sup>65</sup> Specifically, in the order, President Clinton called on the agencies to “translate crucial public documents, notices, and hearings” for limited-English-speaking populations, and ensure that such documents are also “concise, understandable, and readily accessible to the public.”<sup>66</sup>

Public participation is already mandated by NEPA. The Executive Order broadens that approach, provides environmental justice communities with another mechanism to use concurrently with the NEPA requirement of public participation,<sup>67</sup> and encourages community involvement in the phases of environmental decision-making, including scoping, data gathering, identification of alternatives, analysis of impacts, and mitigation options.<sup>68</sup>

The Executive Order’s intent is to give those communities previously disenfranchised from the decision-making arena greater ability to be part of the debate.<sup>69</sup> For example, many minority and low-income communities have been victims of discrimination caused by many years of the segregation that was part of land-use planning policies.<sup>70</sup> Even ostensibly neutral decisions, such as burying hazardous material or siting a chemical plant on cheap land, have racial implications because the cheapest land may have become the least valuable because of previous discrimination and racial segregation.<sup>71</sup> Having greater public participation allows such communities access to the processes that affect their lives, as well as educates the public, fosters trust in institutions, incorporates the community values into decision-making, reduces conflict, and may reduce costs associated with prolonged disputes.<sup>72</sup>

As part of its fact-finding mission, the Commission wanted to determine what efforts the federal agencies have taken to increase meaningful public participation, by examining (1) whether the agencies were giving communities early opportunity for participation in decision-making processes; and (2) whether the federal agencies were making it a priority to translate material into native languages.

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<sup>65</sup> *Id.*

<sup>66</sup> Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, Exec. Order No. 12,898, 3 C.F.R. 859 (1995), *reprinted as amended in* 42 U.S.C. § 4321 at 73, § 5-5(b), (c) (1994 & Supp. VI 1998) (hereafter cited as Exec. Order No. 12,898).

<sup>67</sup> Presidential Memorandum Accompanying Executive Order 12,898, 30 WEEKLY COMP. PRES. DOC. 279, 280 (Feb. 11, 1994). Public participation requirements can be found in the Counsel on Environmental Quality’s Regulations for Implementing the Procedural Provisions of NEPA. *See* 40 C.F.R. pts. 1500–1508. While the regulations state broad goals for public participation in the NEPA process, they do provide that federal agencies are required, to the fullest extent possible, to encourage and facilitate public participation in agency decisions that affect the quality of the human environment. *See* 40 C.F.R. § 1500.2(d). Agencies must also make diligent efforts to involve the public in preparing and implementing their NEPA procedures. *See* 40 C.F.R. § 1506.6(a).

<sup>68</sup> Robert D. Bullard, Ph.D., “Environmental Justice in the 21st Century,” p. 3, <[www.ejrc.cau.edu/ejinthe21century.htm](http://www.ejrc.cau.edu/ejinthe21century.htm)> (last accessed July 10, 2003).

<sup>69</sup> National Environmental Policy Commission, *Report to the Congressional Black Caucus & Congressional Black Caucus Foundation Environmental Justice Braintrust*, Sept., 28, 2001, p. 41 (hereafter cited as NEPC, *Report to the Congressional Black Caucus*).

<sup>70</sup> Sara Pirk, *Expanding Public Participation in Environmental Justice*, 17 ENVTL. L. & LITIG. 207 (Spring 2002) (hereafter cited as Pirk, *Expanding Public Participation*); *see also* Lawyers’ Committee for Civil Rights Under Law, “Comments before the U.S. Commission on Civil Rights,” Apr. 9, 2002, p. 4.

<sup>71</sup> Pirk, *Expanding Public Participation*, pp. 207–08.

<sup>72</sup> Thomas C. Beierle, “Public Participation in Environmental Decisions: An Evaluation Framework Using Social Goals,” Discussion Paper 99-06, November 1998, p. 25.

## EPA's Public Participation Initiatives

The Environmental Protection Agency has several programs and policies that aim to increase community involvement by minority and low-income groups. EPA has stated that it “strives to involve the public at the earliest point and as often as practicable in [its] decision making processes . . . [and] . . . works to provide sufficient information for meaningful public participation.”<sup>73</sup> In December 2000, EPA’s Public Participation Workgroup examined the agency’s 1981 public participation policy and issued *Engaging the American People: A Review of EPA’s Public Participation Policy and Regulations with Recommendations for Action*.<sup>74</sup> The report included goals and objectives for the gamut of public involvement, from building awareness to participating in binding agreement activities.<sup>75</sup> EPA observed that “active public participation in EPA decision-making processes is critical to ensuring long-term solutions for affected communities, industries, public health and the environment.”<sup>76</sup> The report also notes that “to engage the public in this new century, EPA will need to reach out to a more diverse society, enhance public participation practices, and work more closely with our co-regulators.”<sup>77</sup> In 2000, EPA published *The Model Plan for Public Participation*, developed by the National Environmental Justice Advisory Council, which sets out a model for the core values and guiding principles of public participation, critical elements for conducting public participation, and an environmental public participation checklist for government agencies.<sup>78</sup>

Building on these recommendations, in May 2003, the Office of Policy, Economics, and Innovation (OPEI) published EPA’s final Public Involvement Policy, providing guidance to EPA staff on effective and reasonable ways to involve the public in the agency’s regulatory and program implementation decisions.<sup>79</sup> According to EPA, the Public Involvement Policy is to accomplish the following:

- Improve the acceptability and efficiency of agency decisions.
- Reaffirm EPA’s commitment to early and meaningful public involvement.
- Ensure that EPA makes decisions considering the concerns of affected communities.

<sup>73</sup> EPA, Response to Interrogatory Question 27.

<sup>74</sup> U.S. Environmental Protection Agency, *Engaging the American People: A Review of EPA’s Public Participation Policy and Regulations with Recommendations for Action*, EPA-240-R-00-005, December 2000.

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.*, p. 1.

<sup>77</sup> *Ibid.*

<sup>78</sup> U.S. Environmental Protection Agency, Office of Environmental Justice, *The Model Plan for Public Participation*, EPA-300-K-00-001, February 2000.

<sup>79</sup> U.S. Environmental Protection Agency, Office of Policy, Economics, and Innovation, *Public Involvement Policy of the U.S. Environmental Protection Agency*, EPA 223-B-03-002, May 2003 (hereafter cited as EPA, *Public Involvement Policy*). In 1981, EPA published its first agencywide Public Participation Policy. *See* Final EPA Policy on Public Participation, 46 Fed. Reg. 5736 (Jan. 19, 1981). In November 1999, EPA requested public comment on whether and how to change that policy, and subsequently began a process to revise the policy and a plan to implement it across EPA. In December 2000, EPA released a draft revised Public Involvement Policy for public comment. *See* EPA Draft Public Involvement Policy, 65 Fed. Reg. 82,335 (Dec. 28, 2000). The comment period closed on July 31, 2001, following a two-week Internet dialogue on “Public Involvement in EPA Decisions,” which included more than 1,000 participants from all 50 states, two territories, and several other nations. *See* EPA, *Public Involvement Policy*, p. 32; *see also* Higginbotham letter, pp. 12–13. EPA recruited national and regional environmental justice advocates as expert panelists and participants in that event, whose ideas helped EPA complete the *Framework*. Higginbotham letter, pp. 12–13. EPA’s OPEI used some of the information from the Internet dialogue and public comments to develop a series of public involvement brochures aimed at, for example, discussing the policy itself, improving hearing and meetings, involving environmental justice communities in EPA decision-making processes, and consulting with tribes and overcoming barriers to public involvement. EPA expects all the brochures to be available in 2003. *Ibid.*, p. 13.

- Promote the use of techniques to create early and possibly continuing opportunities for public involvement in agency decisions.
- Establish clear and effective guidance for conducting public involvement activities.<sup>80</sup>

The policy applies to all EPA programs and activities, and according to EPA, should be particularly considered in, for example, EPA rule-making; EPA issuance or significant modification of permits, licenses, or renewals; and selection of plans for cleanup, remediation, or restoration of hazardous waste sites or Brownfields properties.<sup>81</sup> The agency identified seven steps to consider when planning public involvement, but notes that “budgetary constraints may affect the implementation of any of these elements.”<sup>82</sup> The policy specifies that EPA employees should consider the following steps for effective public involvement in any environmental decision or activity:

- Plan and budget for public involvement activities.
- Identify the interested and affected public.
- Consider providing technical or financial assistance to the public to facilitate involvement.
- Provide information and outreach to the public.
- Conduct public consultation and involvement activities.
- Review and use input and provide feedback to the public.
- Evaluate public involvement activities.<sup>83</sup>

The policy continues by giving guidance on ways to meet the goals of each of these steps.<sup>84</sup> According to EPA, the policy reflects changes over 22 years, such as new and expanding public participation techniques, new opportunities for public involvement through the Internet, and increased capacity of states, tribes, and local governments to carry out delegated programs.<sup>85</sup> The policy also reflects EPA’s experience with public involvement and many of the ideas provided to EPA through public comments on the draft policy.<sup>86</sup>

In conjunction with the final policy, in June 2003, EPA released its *Framework for Implementing EPA’s Public Involvement Policy*.<sup>87</sup> The guidance proposes and outlines information sharing, training, and evaluation activities to support the implementation of the policy.<sup>88</sup>

The *Framework* notes that, although some individual programs evaluate their public participation activities, “EPA has not encouraged a sustained agency-wide effort to determine the extent and quality of such activities and to improve their effectiveness for both participants and EPA.”<sup>89</sup> Moreover,

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<sup>80</sup> EPA, *Public Involvement Policy*, p. 2.

<sup>81</sup> *Ibid.*, p. 3.

<sup>82</sup> *Ibid.*, p. 5.

<sup>83</sup> *Ibid.*, p. 6.

<sup>84</sup> *Ibid.*, Appendix 1, pp. 7–20.

<sup>85</sup> *Ibid.*, p. 32.

<sup>86</sup> *Ibid.*

<sup>87</sup> U.S. Environmental Protection Agency, Office of Policy, Economics, and Innovation, *Framework for Implementing EPA’s Public Involvement Policy*, EPA-233-F-03-001, May 2003 (hereafter cited as EPA, *Framework for Implementing Public Involvement Policy*).

<sup>88</sup> *Ibid.*, p. 1.

<sup>89</sup> *Ibid.*, p. 8.

like the public involvement policy itself, the *Framework* states that it is “internal EPA guidance and does not describe mandatory activities.”<sup>90</sup> Nevertheless, the *Framework* provides suggestions for measuring results and increasing accountability, including, for example:

- Developing a five-year strategy for evaluation.
- Establishing minimum expectations for public involvement activities and staff and manager performance (including developing criteria for employee position descriptions and performance standards linked to public participation activities).
- Developing a baseline survey to evaluate how the agency is currently implementing the policy.
- Developing a suite of tools that staff can use to measure public involvement in activities on a consistent basis.
- Establishing a dedicated, centralized staff, budget, and responsibility to support evaluation activities in programs and the regions.<sup>91</sup>

Before issuing the final policy, EPA headquarters and regional offices had begun reaching out to communities on the programmatic level. EPA’s OCR is responsible, along with the agency’s program and regional offices, for helping low-income and limited-English-proficient communities obtain access to information, resources, and decision makers that may lead to the resolution of environmental issues.<sup>92</sup> For example, the agency translates documents into languages other than English and has published documents on how communities can get involved in the permitting process.<sup>93</sup> EPA has also produced a videotape in both English and Spanish that explains how the Superfund risk assessment process works in communities near Superfund sites.<sup>94</sup> In addition, while not an EPA publication, the Environmental Law Institute, supported by OEJ under an assistance agreement, published *A Citizen’s Guide to Using Environmental Laws to Secure Environmental Justice* as a “plain English” resource to familiarize communities with federal statutes and help them find opportunities to participate in environmental decision-making.<sup>95</sup>

Other public participation initiatives include the Office of Enforcement and Compliance Assurance’s recently issued interim guidance for EPA staff on involving communities in the selection and imple-

<sup>90</sup> *Ibid.*, p. 1, n. 1.

<sup>91</sup> *Ibid.*, pp. 8–10. EPA recently reported that OPEI has completed the baseline survey and has drafted 20 feedback questionnaires, which include minimum expectations for performance of public involvement activities. Higginbotham letter, p. 13.

<sup>92</sup> See EPA, Response to Interrogatory Question 9; Higginbotham letter, p. 13.

<sup>93</sup> See, e.g., U.S. Environmental Protection Agency, Office of Solid Waste and Emergency Response, *Public Involvement in Environmental Permits: A Reference Guide*, EPA-500-R-00-007, August 2000.

<sup>94</sup> EPA, Response to Interrogatory Question 21. The agency also reported that it makes available to the general public various outreach materials and publications, including climate change outreach material from the Office of Air and Radiation, designed to inform the public about global warming; publications from the Office of Pesticide Programs, offering information about reducing pesticide exposure; and general publications from the Office of Wetlands, Oceans, and Watersheds, expressly intended for lay readers. *Ibid.*

<sup>95</sup> Environmental Law Institute, *A Citizen’s Guide to Using Federal Environmental Laws to Secure Environmental Justice*, 2002, <www.eli.org> (last accessed June 30, 2003) (hereafter cited as Environmental Law Institute, *A Citizen’s Guide*). As discussed in more depth in Chapter 6, Congress has decided that EPA should provide funds for community participation in some selected government decisions considered so vital that it acknowledges communities should have money for necessary technical assistance. *Ibid.*, pp. 35–36. Examples of funding and other assistance for public participation provisions in environmental laws include under Superfund (CERLA), the Technical Assistance Grants (TAGS), which offers \$50,000 to groups affected by a release or threatened release of hazardous substances from a listed Superfund site, and the Technical Outreach for Communities (TOSC) program, which uses university educational and technical resources to help community groups understand the technical issues relating to hazardous waste sites. *Ibid.*, p. 35.

mentation of Supplemental Environmental Projects (SEPs) in settlement agreements in certain enforcement cases.<sup>96</sup> In addition, the regional offices have agreed to conduct Regional Listening Sessions to engage the community, in partnership with federal, state, tribal, and local governments, on their environmental, health, and quality of life concerns.<sup>97</sup>

Despite EPA's efforts in integrating discretionary public involvement initiatives into its programs, much remains to be done to increase the involvement of minority communities. For example, OEJ reports in its answers to the Commission's interrogatories that it had conducted "no public meetings for the purpose of discussing EPA's environmental justice policies, the Executive Order, or how minority and low-income communities can participate in the decision-making."<sup>98</sup> Furthermore, EPA's permit programs, such as those concerning permits for air and water emissions,<sup>99</sup> allow formal opportunities for public participation, although opportunities often occur late in the process once most projects have been fully conceived.<sup>100</sup> Public hearings and review and comment periods are often held after main first steps have been taken in the project.<sup>101</sup> This late participation significantly limits the community's ability to influence the debate, and may lead the community to believe that EPA and the industry permit applicant are allies.<sup>102</sup> Communities do not always trust the objectivity of EPA staff, and may feel further concerned by limited access to experts and technical assistance.<sup>103</sup> As discussed more fully in Chapter 6, while EPA provides limited grants for communities to acquire technical assistance, groups often have to "jump through hoops" to qualify for assistance,<sup>104</sup> and some are concerned about the complexities and long delays when applying for the grants.<sup>105</sup> Communities often lack information that would put them on a level playing field with industry, government, and scientists.<sup>106</sup>

Despite the programs described above and the numerous laws, mandates, and directives by the federal government to involve the public in decision-making, communities and tribal leaders have expressed

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<sup>96</sup> U.S. Environmental Protection Agency, Interim Guidance for Community Involvement in Supplemental U.S. Environmental Projects, 68 Fed. Reg. 35,884 (June 17, 2003). The May 1998 SEP policy allows EPA to consider a defendant's willingness to perform an environmentally beneficial project when setting an appropriate penalty to settle an enforcement action. The purpose of an SEP is to secure significant environmental protection improvements beyond those achieved by bringing the defendant into compliance. The June 2003 interim policy encourages EPA staff to include community involvement in settlements, where appropriate. EPA notes that not every settlement can include an SEP or an SEP that is proposed or favored by community members. SEPs are projects undertaken voluntarily by defendants, and certain defendants may not be willing to solicit input from the community. 68 Fed. Reg. at 35,886 & n.3. This SEP public participation guidance is not mandatory, and the agency may determine, for example, that a settlement with an SEP, even if not obtained with community involvement, is better than a settlement without an SEP. *Id.* at 35,885.

<sup>97</sup> EPA, "Environmental Justice Fact Sheet."

<sup>98</sup> EPA, Response to Interrogatory Question 36.

<sup>99</sup> EPA has implemented environmental laws, such as the Clean Air Act and the Clean Water Act, by establishing permit application and review procedures for facilities, including opportunities for public comment. See National Academy of Public Administration, *Environmental Justice in EPA Permitting: Reducing Pollution in High-Risk Communities Is Integral to the Agency's Mission*, December 2001, p. 13 (hereafter cited as NAPA, *Environmental Justice in EPA Permitting*). These are designed to help regulatory officials make informed decisions about whether to allow the emission of specified amounts of pollution proposed by a facility. *Ibid.*

<sup>100</sup> See *ibid.*, p. 63 (discussing how EPA can incorporate environmental justice into EPA's water, air, and waste permitting programs).

<sup>101</sup> Pirk, *Expanding Public Participation*, p. 209.

<sup>102</sup> *Ibid.*

<sup>103</sup> NAPA, *Environmental Justice in EPA Permitting*, p. 68.

<sup>104</sup> Environmental Law Institute, *A Citizen's Guide*, pp. 35–36.

<sup>105</sup> NAPA, *Environmental Justice in EPA Permitting*, p. 68.

<sup>106</sup> Pirk, *Expanding Public Participation*, p. 210.

their frustration over the continued lack of involvement in decisions that affect their daily lives and the lives of their future generations.<sup>107</sup> One problem is that executive orders are essentially “tentative and unenforceable legal endeavors,”<sup>108</sup> and as such, Executive Order 12,898 has no enforcement power.<sup>109</sup> Furthermore, NEPA’s public participation guidance is merely procedural, and agencies’ public participation programs and policies are generally discretionary.<sup>110</sup>

And while EPA has finalized its public involvement policy since the Commission’s hearings, it is too soon to determine whether it will satisfy public concerns on meaningful involvement. EPA is to be commended for issuing a comprehensive, centralized, agencywide and programwide public involvement policy, and many of the concerns voiced by environmental justice advocates are discussed in the policy, such as access to technical and financial assistance and early participation in decision-making. Nothing in the policy, however, makes these aspirational goals binding upon the agency or its employees, and much of the policy is qualified by language acknowledging that implementation may be hampered by financial constraints.<sup>111</sup> For example, the policy acknowledges the importance of providing technical or financial assistance to the public to facilitate involvement, but essentially summarizes existing programs, and does not provide any mandatory services to communities or additional funding.<sup>112</sup>

Moreover, the policy acknowledges the need for agency accountability,<sup>113</sup> and the *Framework* discusses the implementation of a five-year evaluation plan (including the development of performance standards for managers and staff involved in public participation activities).<sup>114</sup> But nothing in the policy or *Framework* makes any measure mandatory or requires assessments of the agency’s success in increasing public participation.<sup>115</sup> Furthermore, the policy indicates that managers will be responsible for implementing this policy, but gives them the discretion to do so or not.<sup>116</sup> Worse still, the new policy eliminates accountability portions of the 1981 policy, including a requirement that EPA programs create public participation plans and a provision for withholding grant funds from grantees whose public involvement activities are not sufficient.<sup>117</sup>

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<sup>107</sup> National Environmental Justice Advisory Council, *Integration of Environmental Justice in Federal Agency Programs* (report developed from NEJAC Meeting, Dec. 11–14, 2000), p. 43 (hereafter cited as NEJAC, *Integration of Environmental Justice*).

<sup>108</sup> William H. Rodgers, Jr., *Executive Orders and Presidential Commands: Presidents Riding to the Rescue of the Environment*, 21 J. LAND RESOURCES & ENVTL. L. 13, 17 (2001).

<sup>109</sup> See NEPC, *Report to the Congressional Black Caucus*, p. 97.

<sup>110</sup> Binder et al., *A Survey of Federal Agency Response to President Clinton’s Executive Order No. 12898*, p. 11149. See generally Foster, “Impact Assessment,” p. 264.

<sup>111</sup> See, e.g., EPA, *Public Involvement Policy*, pp. 3, 10.

<sup>112</sup> *Ibid.*, pp. 9–10.

<sup>113</sup> *Ibid.*, p. 20.

<sup>114</sup> EPA, *Framework for Implementing Public Involvement Policy*, pp. 8–10.

<sup>115</sup> See EPA, *Public Involvement Policy*, p. 3 (stating that the *Public Involvement Policy* is “not a rule, is not legally enforceable, and does not confer legal rights or impose legal obligations upon any member of the public, EPA or any other agency”); EPA, *Framework for Implementing Public Involvement Policy*, p. 1, n. 1 (stating that the *Framework* is “internal EPA guidance; it does not describe mandatory activities”).

<sup>116</sup> Compare EPA, *Public Involvement Policy*, p. 6, with pp. 3–4.

<sup>117</sup> U.S. Environmental Protection Agency, “Frequently Asked Questions on the Final Public Involvement Policy,” Response 15, <[www.epa.gov/publicinvolvement/policy2003/faqs.pdf](http://www.epa.gov/publicinvolvement/policy2003/faqs.pdf)> (last accessed July 9, 2003). EPA recently reported that, like the current public involvement policy, the 1981 policy was similarly not binding. Higginbotham letter, p. 14. It also noted that the 1981 provision for withholding grant funds was never implemented, so EPA found no reason to include

## HUD's Public Participation Initiatives

The Department of Housing and Urban Development had several community outreach projects and public participation procedures in place prior to the Executive Order. Community education is a large part of its lead-paint program, and HUD translates the material for that program into foreign languages to reach diverse communities.<sup>118</sup> In general, however, HUD does not undertake projects directly, but provides financial assistance for projects of HUD recipients.<sup>119</sup> HUD, therefore, has provisions in its program regulations requiring recipients to ensure public and community participation, including specific criteria and time periods to allow for public comments after notices are published.<sup>120</sup> For example, federal regulations require all local governments receiving HUD assistance to develop a citizen participation plan.<sup>121</sup> In addition, the regulations for HUD's Community Development Block Grant program set forth requirements for public participation,<sup>122</sup> reporting,<sup>123</sup> and public access to records.<sup>124</sup> HUD also requires bilingual notices as needed, and routinely, in certain regions of the country.<sup>125</sup>

In responding to Commission interrogatories, HUD stated that it has conducted major public education efforts to translate material into understandable explanations.<sup>126</sup> HUD cited several examples of these efforts, most of which attempt to educate people on protecting themselves from lead in their homes.<sup>127</sup> HUD also responded, however, that it has not held any public meetings to discuss environmental justice issues.<sup>128</sup> Instead, according to HUD, such information is disseminated "mainly through training,"<sup>129</sup> although staff training does not directly inform or engage environmental justice

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it in the new policy. *Ibid.* EPA's decision not to include or implement accountability measures in its 1981 public involvement policy does not diminish the fact that the current policy still does not put such important measures into place.

<sup>118</sup> Binder et al., *A Survey of Federal Agency Response to President Clinton's Executive Order No. 12898*, p. 11138.

<sup>119</sup> HUD, Response to Interrogatory Question 26.

<sup>120</sup> *Ibid.*

<sup>121</sup> *See* 24 C.F.R. § 91.105 (2002).

<sup>122</sup> HUD, Response to Interrogatory Question 28. According to HUD, jurisdictions are expected to "take whatever actions are appropriate to encourage the involvement of all their residents, including minorities, non-English speaking persons, and persons with disabilities. . . . When submitting their Consolidated Plan to HUD, local jurisdictions must summarize the citizen participation process, as well as citizens commentary on the plan, and document their efforts to broaden public participation in developing the plan." *Ibid.*

<sup>123</sup> 24 C.F.R. § 570.507 (2002).

<sup>124</sup> *Id.* § 570.508. In addition, HUD's environmental regulations require that, before HUD may release project funds, state and local governments that are responsible for environmental reviews must provide public notice and comment periods concerning those reviews. *See* 24 C.F.R. pt. 58. HUD's environmental regulations require additional public notice for projects proposed in floodplains and wetlands. *See* 24 C.F.R. pt. 55. HUD's environmental regulations also incorporate by reference the public participation requirements of the Advisory Council on Historic Preservation. HUD, Response to Interrogatory Question 26.

<sup>125</sup> HUD, Response to Interrogatory Question 26.

<sup>126</sup> HUD, Response to Interrogatory Question 45.

<sup>127</sup> These included (1) the joint HUD/EPA/CPSC brochure "Protect Your Family From Lead in Your Home," a pamphlet that is required to be provided by landlords and sellers to tenants and buyers for most pre-1978 housing, numbering an estimated 12 million transactions under the HUD/EPA Lead-based Paint Disclosure Regulation; (2) "Lead Paint Safety Field Guide," a picture book for maintenance and rehabilitation workers, developed jointly by HUD, CDC, and EPA; (3) "Danger in the Home," a large one-page brochure summarizing major health and safety hazards in the home environment and how to eliminate them; and (4) "Help Yourself to a Healthy Home," a booklet developed by the Home-A-Syst program (Department of Agriculture) with funding from HUD's Healthy Homes program. *See* HUD, Response to Interrogatory Question 45.

<sup>128</sup> HUD, Response to Interrogatory Question 23.

<sup>129</sup> *Ibid.*

communities in meaningful public participation. And while the agency “has not conducted any general education campaigns on environmental justice [or] how agency decisions impact low-income and minority communities,” former HUD Secretary Mel Martinez has discussed in various articles, press releases, and statements the department’s “commitment to suitable living environments, affordable housing, and improving housing and employment opportunities for low-income populations and minorities.”<sup>130</sup>

### DOT’s Public Participation Initiatives

The Department of Transportation (DOT) has designed programs to improve public participation outreach to facilitate cooperative efforts in resolving pressing environmental justice concerns. When asked, through interrogatory, to describe “what public outreach has been done by [DOT] to inform affected communities of projects undertaken by [DOT] to ensure their participation and early input in the environmental decision-making process,”<sup>131</sup> the agency responded:

DOT’s recipients generally provide such opportunities under DOT’s planning and environmental regulations. For example, metropolitan planning organizations are required to provide substantial opportunities for public input and involvement. Under NEPA, public involvement is encouraged and sought as early as possible through means such as hearings, personal contact, press releases, and newspaper notices, including ethnic and foreign language papers, when appropriate.<sup>132</sup>

DOT guidelines require stakeholder involvement during the planning process.<sup>133</sup> The agency has also held several national and regional conferences and workshops to address environmental justice issues.<sup>134</sup> In addition, DOT has taken several steps to reduce cultural barriers to community participation in environmental decision-making. For example, DOT has issued a Native American Policy Order and *Guidance to Recipients of Federal Financial Assistance on Services to Limited English Proficient Beneficiaries*.<sup>135</sup> DOT also participates in the federal government’s “plain English” initiative.<sup>136</sup>

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<sup>130</sup> HUD, Response to Interrogatory Question 25.

<sup>131</sup> DOT, Response to Interrogatory Question 31.

<sup>132</sup> Ibid. The agency also responded that it has held a series of meetings around the country on proposed environmental planning, that it has received input on what should be included in the reauthorization of the Transportation Equity Act for the 21st Century, that it has “active relations with minority serving institutions of higher education, including intern programs,” and that the agency has “memoranda of understanding for mutual cooperation with a large number of community-based organizations, including the National Urban League.” Ibid.

<sup>133</sup> NEJAC, *Integration of Environmental Justice*, p. 18.

<sup>134</sup> The workshops and conferences included (1) a national conference, “Environmental Justice and Transportation: Building Model Partnerships,” held in Atlanta, GA, on May 11–13, 1995; (2) regional and locally based transportation workshops in Atlanta, Harlem, San Francisco, and Marysville, WA, during October and November, 1998; (3) a regional workshop, “Making Environmental Justice Work,” in Atlanta on December 14–15, 1999; (4) the National Environmental Justice Summit held in the Washington, DC, metropolitan area in September 2000; and (5) a public meeting in Lake Charles, LA, in which Federal Railroad Administration staff participated, to address its process for transporting and storing hazardous materials. See DOT, Response to Interrogatory Question 28.

<sup>135</sup> DOT, Response to Interrogatory Question 36.

<sup>136</sup> DOT, Response to Interrogatory Question 34. “Plain language” resources are also linked to the agency’s Office of Civil Rights’ Web site. Ibid. In addition, the agency points out that the Federal Motor Carrier Safety Administration (FMCSA) has developed a Web site written in Spanish and has translated a broad range of documents into Spanish, including several that are related to environmental justice issues, such as various hazardous materials regulations and its Educational and Technical Assistance Manual. Ibid.

Within DOT, operating administrations also provide instruction, opportunities for community involvement, and programs designed to reduce cultural barriers to meaningful involvement. For example, the Federal Highway Administration has prepared and distributed two publications informing people how they can become involved in state and regional transportation decision-making titled *A Citizen's Guide to Transportation Decisionmaking* and *Overview of Transportation and Environmental Justice*.<sup>137</sup> FHWA also conducts public involvement training for staff, which includes a unit on "Cultural Variables That Can Impact Participation."<sup>138</sup> FHWA and FTA jointly produced the publication *Public Involvement Techniques for Transportation Decision-making*, which includes guidelines for designing a public involvement program, with techniques "designed to respect cultural differences."<sup>139</sup> They, jointly, have also published an environmental justice brochure discussing Title VI and the executive order for Spanish-speaking communities.<sup>140</sup> In addition, the Federal Railroad Administration (FRA) led the formation of a Partnership in Promoting Diversity with the railroad industry.<sup>141</sup> The partnership includes representatives from the Office of the Secretary of Transportation, Burlington Northern Santa Fe, and Amtrak.<sup>142</sup> DOT reports:

One of the Partnership's goals is to address cultural barriers and influence their removal through communication, interaction, and working on projects together. The Partnership plans to conduct outreach activities involving the community. This will have a significant positive impact on helping to shape the culture in the industry with the connected goal of preventing lawsuits based on perceived or actual discriminatory practices.<sup>143</sup>

Moreover, whenever the Federal Railroad Administration proposes rule-making that affects citizens or communities, public hearings are held.<sup>144</sup>

Having input into where bus depots, railways, or highways are located, for example, may be of utmost importance to some communities, especially those who suffer with cumulative exposure from transportation-related pollution. The hallmarks of meaningful participation are whether the public can change a feature of the transportation project or plan, how the project is evaluated, and whether the public is involved before it is too late in the decision-making.<sup>145</sup> While DOT has Web sites, programs, and publications devoted to helping communities participate,<sup>146</sup> when asked how it measures the effectiveness of programs designed to reduce and eliminate cultural barriers to participation, the

<sup>137</sup> DOT, Response to Interrogatory Question 31.

<sup>138</sup> DOT, Response to Interrogatory Question 36. FHWA also reports that it delivers training in public involvement and Title VI in transportation decision-making for state and local transportation professionals. It has offered the course six times in FY 2003 and plans to offer it eight times in FY 2004. Marc Brenman, senior policy advisor, Office of the Secretary, U.S. Department of Transportation, e-mail to Office of the General Counsel, U.S. Commission on Civil Rights, Aug. 26, 2003, pp. 6–7 (hereafter cited as Brenman Aug. 26, 2003, e-mail).

<sup>139</sup> Ibid. DOT reports that FHWA and FTA also have a joint planning rule requiring their recipients to engage in public participation. Marc Brenman, senior policy advisor, Office of the Secretary, U.S. Department of Transportation, e-mail to Office of the General Counsel, U.S. Commission on Civil Rights, Aug. 26, 2003, p. 4 (hereafter cited as Brenman Aug. 15, 2003, e-mail).

<sup>140</sup> See U.S. Department of Transportation, *Justicia Ambiental*, No. FHWA-EP-01-020.

<sup>141</sup> DOT, Response to Interrogatory Question 36.

<sup>142</sup> Ibid.

<sup>143</sup> Ibid.

<sup>144</sup> DOT, Response to Interrogatory Question. 31.

<sup>145</sup> See Shannon Cairns et al., Institute of Transportation Studies, *Environmental Justice & Transportation, A Citizen's Handbook* (University of California, Berkeley, 2003), p. 20.

<sup>146</sup> DOT, Responses to Interrogatory Questions 30 and 31.

agency responded that it “does not have a formal mechanism to measure the effectiveness” of such programs.<sup>147</sup> Indeed, the Federal Highway Administration responded that “while [it does] measure the effectiveness of public involvement processes in general through the use of Community Satisfaction Surveys, [it does] not differentiate the results of different racial, cultural or income groups.”<sup>148</sup> Nevertheless, the agency asserts that “notice is taken of such matters through certification reviews of metropolitan planning organizations and other methods, such as meetings with community and advocacy groups.”<sup>149</sup> The agency also recently noted that its statewide and metropolitan planning regulations call for regular review by DOT of the recipients’ public involvement process.<sup>150</sup> The regulations, however, do not provide detailed information on how the process is carried out in environmental justice communities.

### DOI’s Public Participation Initiatives

Like the other agencies, the Department of the Interior (DOI) is required to comply with the Executive Order and address issues of environmental justice in its operations. DOI has incorporated public participation requirements as part of its land and resource management responsibilities, although generally, as discussed more fully in Chapter 7, DOI’s individual bureaus independently choose how, and the extent to which, they will implement environmental justice initiatives.<sup>151</sup> And while none of the responding bureaus report that they had had public meetings specifically to discuss environmental justice or the Executive Order, many did report that they had conducted meetings with affected communities as part of the NEPA process or to discuss project-related issues.<sup>152</sup> The Bureau of Land Management (BLM), for example, requires public participation before resource management plans are finalized.<sup>153</sup> The Minerals Management Service (MMS) reports that it involves communities and tribal governments in environmental decision-making through the NEPA process.<sup>154</sup> MMS notes that, in connection with potential development of the Outer Continental Shelf, it conducted meetings with

<sup>147</sup> DOT, Response to Interrogatory Question 37.

<sup>148</sup> *Ibid.* Recently, DOT commented that its “2000 Moving Ahead” survey, intended to measure public satisfaction with the nation’s highways and with community transportation systems, “included information about race, ethnicity and income so FHWA did analyze the survey responses from different populations.” Brenman Aug. 15, 2003, e-mail. DOT did not explain, however, the nature of this survey as it related to DOT’s environmental justice activities or the promotion of meaningful public participation of minority communities. Nor did DOT explain the nature of the analysis conducted or the survey’s findings as they related to the racial data collected in the survey. *See generally* U.S. Department of Transportation, *Moving Ahead: The American Public Speaks on Roadways and Transportation in Communities, A Report from the Federal Highway Administration*, February 2001, <[www.movingahead.pdf](http://www.movingahead.pdf)> (last accessed Aug. 24, 2003).

<sup>149</sup> DOT, Response to Interrogatory Question 37.

<sup>150</sup> Brenman Aug. 26, 2003, e-mail, p. 4; *see also* 23 C.F.R. § 450.212 (2002), Public Involvement; *id.* § 450.316, Metropolitan Transportation Planning: Elements.

<sup>151</sup> The bureaus are the Bureau of Land Management (BLM), Office of Surface Mining (OSM), Minerals Management Service (MMS), Bureau of Reclamation (BOR), U.S. Fish and Wildlife Park Service (FWS), National Park Service (NPS), Bureau of Indian Affairs (BIA), and U.S. Geological Survey (USGS).

<sup>152</sup> U.S. Department of the Interior, Response to the Commission’s Interrogatory Question 21, May 2002 (hereafter cited as DOI, Response to Interrogatory Question).

<sup>153</sup> Binder et al., *A Survey of Federal Agency Response to President Clinton’s Executive Order No. 12898*, p. 11139.

<sup>154</sup> DOI, Response to Interrogatory Question 24. MMS also notes that it is a party to DOI’s Alaska Policy on Government-to-Government Relations with Alaska Native Tribes, which was signed in January 2001. *Ibid.* According to MMS, the policy is intended to promote and reinforce the foundation for establishing and maintaining effective governmental communication, consultation, and coordination with federally recognized tribes in Alaska. *Ibid.* BLM also reported that it engages in “government-to-government consultations with tribes,” which provides the tribes with “early and frequent input in environmental decision-making.” *Ibid.*

Native American communities, using Inupiat translators at public meetings.<sup>155</sup> The Bureau of Reclamation (BOR) holds public meetings by field offices with Indian tribes to discuss water project issues, typically as part of the NEPA process for a particular proposed action.<sup>156</sup> Each BOR environmental impact statement process includes public meetings at which potential environmental justice issues are discussed.<sup>157</sup> The Office of Surface Mining (OSM) reports that it holds public meetings early in the decision-making process regarding all significant permitting actions near mines that are on the reservations of affected Indian tribes and tribal members.<sup>158</sup> Lastly, the Bureau of Indian Affairs (BIA) has a policy requiring consultation with the elected government of the tribes on actions that will affect them.<sup>159</sup>

Only two bureaus, the Fish and Wildlife Service (FWS) and MMS, report conducting any public education campaigns on environmental justice, including how environmental decisions can affect Native American and other communities, and how they can participate in decision-making.<sup>160</sup> FWS has developed five major public education activities for rural and Alaska Native villages.<sup>161</sup> MMS includes an education component on environmental justice as part of the NEPA process for oil and gas activities proposed in the Alaska Outer Continental Shelf Region.<sup>162</sup> MMS further reports that during scoping meetings held in local Native communities, prior to commencing an environmental impact statement, MMS explains its environmental justice policy and how input from Native communities will be used to help identify the issues, alternatives, and mitigation measures to be analyzed to support decisions for the proposed oil and gas activities.<sup>163</sup>

Finally, DOI reports some agencywide initiatives. According to the Office of American Indian Trust (OAIT), the Secretary has required, partly to protect tribal health and safety, that each bureau and office is to “engage in meaningful consultation with tribal government(s) when impacts on Indian trust resources, tribal rights, and tribal health and safety are identified. Consultation must be open and candid with respect for the sovereign status of American Indian tribal governments.”<sup>164</sup> In addition, the Office of Equal Opportunity reports that on September 22, 2000, it ordered all bureau and office heads throughout DOI to develop and implement a plan for making their programs, activities, and services readily accessible to all people who do not speak or understand English.<sup>165</sup>

Despite these mandates, however, according to its interrogatory responses, no DOI bureau or office, other than OAIT, reports implementing programs to increase public participation by reducing or eliminating cultural barriers.<sup>166</sup> Nor does *any* bureau or office report having current measures in place

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<sup>155</sup> Binder et al., *A Survey of Federal Agency Response to President Clinton's Executive Order No. 12898*, p. 11139.

<sup>156</sup> DOI, Response to Interrogatory Question 21.

<sup>157</sup> *Ibid.*

<sup>158</sup> *Ibid.*

<sup>159</sup> DOI, Response to Interrogatory Question 26.

<sup>160</sup> DOI, Response to Interrogatory Question 23.

<sup>161</sup> *Ibid.* These programs include the Subsistence Radio Documentary, Alaska Waterfowl Calendar, Emperor Goose Harvest Outreach, Walrus Waste Harvest Outreach, and Communication on Subsistence Regulations. *Ibid.*

<sup>162</sup> *Ibid.*

<sup>163</sup> *Ibid.*

<sup>164</sup> See U.S. Department of the Interior, Office of American Indian Trust, “Mission Statement & Responsibilities,” <[www.doi.gov/oait/mission.htm](http://www.doi.gov/oait/mission.htm)> (last accessed Aug. 4, 2003).

<sup>165</sup> DOI, Response to Interrogatory Question 27.

<sup>166</sup> DOI, Response to Interrogatory Question 28. FWS recently reported that, in the year since it responded to the Commission's interrogatories, it has implemented programs designed to increase public participation by reducing or eliminating

to determine the effectiveness of any such program.<sup>167</sup> Moreover, only a few offices or bureaus report engaging in outreach programs in areas where English is not the primary language.<sup>168</sup>

A criticism of DOI is that programs are often implemented in a decentralized way, where each office or bureau has the discretion to determine the manner and the extent to which the office will implement environmental justice policies.<sup>169</sup> To the extent that DOI has issued agencywide public participation policies, it has made steps forward. The key, however, is to ensure that each bureau and office implement these policies, and that there is agency, office, bureau, and staff accountability for failure to do so. Federal, state, and tribal government collaboration should be a critical element of federal executive and staff training and incorporated into performance evaluations.<sup>170</sup> Consultation with tribes, for example, is important, but it is critical that this consultation be meaningful—that is, involving the affected communities at a point in the process where their input can influence agency decision-making. Many bureaus report consultations with the tribes, but they do not indicate at what point in the process, and to what extent, they involve the tribes in decision-making.

Agencies have made progress with affected minority communities in trying to increase and improve meaningful public participation, but as long as agencies continue to view public participation as a programmatic appendage to existing policies or as a discretionary option not linked to any meaningful consequences, the full participation of affected communities in their own destinies will never be realized. Communities must have a basic right to be an integral part of “decision-making, planning, monitoring, problem solving, implementation and evaluation of environmental policy and practice.”<sup>171</sup>

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cultural barriers. According to DOI, these have included, for example, two training sessions, open to federal employees, state recipient staff, and multicultural community partners on “cultural barrier issues, Environmental Justice and Civil Rights.” See Deborah Charette, assistant solicitor, Branch of Personnel Litigation and Civil Rights, Office of the Solicitor, U.S. Department of the Interior, facsimile to Office of the General Counsel, U.S. Commission on Civil Rights, Aug. 20, 2003, p. 2 (hereafter cited as Charette facsimile). FWS has also developed an ongoing partnership with an association of African American mayors to discuss “critical issues involving cultural barriers, environmental equity, brown fields [sic], and disparate health patterns” affecting minority and tribal groups. FWS also reported that in the Alaska Regional Office, Regional Advisory Councils have been established to encourage participation by Alaska Natives in the “management of subsistence resources, and to address cultural barriers impacting indigenous populations.” Ibid. Other than with the possible exception of the Regional Advisory Councils, FWS did not note, however, if these activities were specifically devoted to increasing communities’ meaningful public participation in DOI’s environmental decision-making.

<sup>167</sup> DOI, Response to Interrogatory Question 29. FWS reports that it is currently developing criteria to measure the effectiveness of programs designed to increase public participation of communities of different racial and cultural backgrounds. Ibid.

<sup>168</sup> For example, OSM reported that notices of public meetings are advertised in newspapers circulated on the reservations and are broadcast in native languages on radio stations serving the reservations. DOI, Response to Interrogatory Question 21. The National Park Service (NPS), Southwest System Support Office, which covers Texas, Oklahoma, and portions of New Mexico, Arizona, and Colorado, reported that it is working with the Hispanic Radio Network to provide public service announcements in Spanish to ensure that they have greater access to information regarding their natural resources and cultural heritage. U.S. Department of the Interior, “Environmental Justice at DOI, Environmental Justice Project Examples,” <[www.doi.gov/oepe/ej\\_examples.html](http://www.doi.gov/oepe/ej_examples.html)> (last accessed June 30, 2003). FWS reported that its Southeast Region’s Environmental Justice Team has developed, in conjunction with the public affairs office, outreach planning tools that “incorporate sensitivity to communities where English is not the primary language.” Charette facsimile, pp. 3–4. This team also has a tribal liaison component, includes Spanish language translators, and has worked with the regional director to ensure that in Caribbean areas, key FWS managers are fluent in Spanish. Ibid.

<sup>169</sup> For a further discussion, see Chapter 7.

<sup>170</sup> Federal Interagency Working Group, *American Indian & Alaska Native Environmental Justice Roundtable*, Albuquerque, New Mexico, Final Report (Environmental Biosciences Program, Medical University of South Carolina, ed., Jan. 31, 2001), p. xv.

<sup>171</sup> NEPC, *Report to the Congressional Black Caucus*, p. 45.

## CONCLUSION

ADR can be a useful tool, but to address environmental justice concerns adequately, agencies must recognize the role of minority communities in every step of their programs and the unique needs of those communities in the ADR process. As it is currently conceived, however, ADR does not afford communities the safeguards needed to equalize the power differential between them and industry. Through the administrative process or a guaranteed private right of action, communities will be allowed the procedural safeguards and civil rights protections needed in securing environmental justice. If ADR is pursued by the parties or required by agencies' guidelines, the Commission recommends that the federal agencies do the following:

- Study different approaches to ADR and implement one that accounts for inequalities in bargaining power between the agency, industry, and the complainant.
- Develop clear procedures for the ADR process that take those inequalities into account.
- Focus on eliminating and remedying systemic discrimination, not just reaching consensus in individual cases.
- Provide for more formal methods of discovery and other procedural safeguards, such as enforcement authority for the third-party neutral, which is needed to level the playing field and ensure equal access to information.
- Require that the ADR process and outcomes be more accessible to public scrutiny (e.g., limit the use of confidentiality or nondisclosure agreements as to the ADR's findings and outcomes).
- Provide technical expertise to the affected communities and not require communities to bear significant mediation costs.
- Develop a system of precedence so that communities and industry can rely on previous decisions.
- Ensure that all parties for whom the ADR would substantially affect be involved in the process.
- Be aware of historic cultural sensitivities and not use ADR where such beliefs could be substantially compromised (e.g., siting facilities on sacred burial grounds).

Similarly, communities have been equally disadvantaged in having meaningful access to agency decision-making. The federal agencies have made progress with affected minority communities in trying to increase and improve meaningful public participation in information gathering and dissemination, and to a lesser extent, in decision-making processes, but more work remains to be done. The Commission, therefore, recommends the following:

- Stringent enforcement should be guaranteed in legislation with federal requirements ensuring that all affected parties are at the table with adequate public support. Such legislation could, for example, specifically provide for increased public comment periods or mandate public hearings in situations where there are major projects near minority communities.
- Federal agencies should develop where needed, and reform where necessary, centralized agencywide and programwide public participation policies to promote more meaningful and binding requirements for "early and often" participation. These should provide communities with a basic right to be an integral part of decision-making, planning, monitoring, problem-solving, and implementation and evaluation of environmental policies and practices.

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- Federal agencies and their funding recipients should integrate early public participation into agency programs and activities, including permitting and siting. This affords the community the ability to identify concerns early and to avoid the mistrust communities may normally feel by being excluded from early decision-making processes.
  - Federal agencies should not waive or limit environmental reviews or reduce the time periods for public comment under NEPA for proposed projects that could affect minority communities.
  - Federal agencies should translate relevant government and industry information into multiple languages other than English to ensure that communities are able to participate effectively in the decision-making process.
  - For notices or other information pertaining to proposed projects that affect specific minority communities, federal agencies should undertake additional efforts to ensure that the information is translated into the native languages of those communities.
  - Meaningful participation also means that all public meetings should be conducted in a manner that is more accessible to the affected community, in both location and timing of the meetings.
  - Federal agencies should advertise the meetings by using media and other forms of communication, but especially media serving communities of color. When utilizing print media, the agencies should prominently publish the information.
  - Resources should be available for outreach workers and translation services when English is not the primary language in the affected community. Community members should not bear the burden of providing these translations.
  - Federal agencies should involve tribal membership in the identification and prioritization of environmental issues.
  - Once communities are able to secure more meaningful public participation, federal agencies should be more willing to use the communities' environmental justice concerns as a basis for altering the course of decision-making.
  - Federal agencies and their funding recipients should conduct assessments to determine to what extent their programs and initiatives result in increased public participation and to emphasize accountability.
  - Agency representatives should be given mandatory training in encouraging effective public participation, and then be held accountable for effective program implementation and incorporation of meaningful public participation into the programs.
  - Environmental justice performance standards should be incorporated into government officials' job descriptions and performance evaluations, in order to measure both their obligations to ensure early public participation, but also to require that they complete follow-up work after the communities have voiced their concerns.
  - In order to signal a commitment to requiring meaningful public participation, EPA should reinstate, implement, and enforce the portion of its 1981 public involvement policy that included a provision for withholding grant funds from grantees whose public involvement activities are insufficient.

## Chapter 6

# Data Collection and Technical Assistance

A 1987 report by the United Church of Christ's Commission on Racial Justice identified tools that can improve how communities respond to environmental problems. The report identified access to information, including data and scientific research, as particularly critical for communities disproportionately and adversely affected by environmental decision-making.<sup>1</sup> The Commission on Racial Justice, citing another study released near the time of its report on toxic waste and the role of race, reported that out of 110 community groups "nearly nine out of every 10 groups (88 percent) perceived obstacles to obtaining information. Almost half (45 percent) claimed that government agencies blocked their learning process."<sup>2</sup> The Commission on Racial Justice also reported that "institutional resistance to providing information is likely to be greater when agencies are confronted by groups, such as those among racial and ethnic communities and the poor, who are perceived to wield less political clout."<sup>3</sup>

These 1987 findings of the Commission on Racial Justice were reaffirmed before the U.S. Commission on Civil Rights during its 2002 environmental justice hearings. As noted previously, minority and low-income communities are still home to a disproportionate number of hazardous and polluting facilities.<sup>4</sup> This burden is related to the political disempowerment of these communities, and the burden can be exacerbated by lack of access to information critical to participating in the decision-making process and protecting human health. For example, to establish that they are disproportionately burdened and that their health is at greater risk, communities must have access to information on siting and permitting decision-making processes; demographic and socioeconomic data; and information on the location and concentration of hazardous waste sites, landfills, incinerators, and other facilities in communities of color compared with similarly situated white communities. Most importantly, communities need information on the types of and risks associated with various chemicals, wastes, and emissions.<sup>5</sup>

Executive Order 12,898 realizes the importance of gathering data and conducting research to identify and address the disproportionately high and adverse human health, environmental, social, and eco-

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<sup>1</sup> United Church of Christ, Commission for Racial Justice, *Toxic Wastes and Race in the United States: A National Report on the Racial and Socioeconomic Characteristics of Communities with Hazardous Waste Sites*, 1987, pp. 6–7 (hereafter cited as Commission for Racial Justice, *Toxic Wastes and Race*).

<sup>2</sup> *Ibid.*, p. 7.

<sup>3</sup> *Ibid.*

<sup>4</sup> See, e.g., Luke W. Cole and Shelia R. Foster, *From the Ground Up: Environmental Racism and the Rise of the Environmental Justice Movement* (New York University Press, 2001), pp. 54–55, 167–83 (hereafter cited as Cole and Foster, *From the Ground Up*); Manuel Pastor, Jr., Jim Sadd, and John Hipp, "Which Came First? Toxic Facilities, Minority Move-In, and Environmental Justice," *Journal of Urban Affairs*, vol. 23, no. 1, 2001, p. 3; Robert Bullard, *Building Just, Safe and Healthy Communities*, 12 TULANE ENV'T'L L.J. 373, 377 (Spring 1999) (hereafter cited as Bullard, *Building Just, Safe and Healthy Communities*); Benjamin A. Goldman and Laura Fitton, *Toxic Wastes and Race Revisited: An Update of the 1987 Report on the Racial and Socioeconomic Characteristics of Communities with Hazardous Waste Sites* (Center for Policy Alternatives and the United Church of Christ, Commission for Racial Justice, 1994), pp. 2–4, 16.

<sup>5</sup> Dr. Robert Bullard, director, Environmental Justice Resource Center, telephone interview, Apr. 10, 2002.

conomic effects of federal agency programs and policies on minority and low-income communities.<sup>6</sup> Unfortunately, there is insufficient literature on the causal relationship between environmental decision-making and health, economic, and social effects.<sup>7</sup> A 1999 Institute of Medicine (IOM) report found insufficient data exists for examining the relationships among the environmental, racial, ethnic, and other socioeconomic determinants of adverse health outcomes.<sup>8</sup> This lack of data should not, however, lead to an assumption that there is no relationship between these factors.<sup>9</sup> Instead, IOM's conclusions highlight a need for more research clarifying these relationships.<sup>10</sup> Clearly, improving data collection and analysis is an important process in accomplishing environmental justice.

This need for research clarification is acknowledged in EPA's *Draft Report on the Environment 2003*. The report found a lack of national data on the relationship between changes in environmental resources (air, water, and land resources), the stresses placed on these resources by pollutants and contaminants, and the resulting effects on human health and the environment.<sup>11</sup> It is encouraging that the report calls for more data designed to determine the role of environmental factors, the role of genetic and behavioral factors, and the interaction of all these factors on human health.<sup>12</sup> The report also calls for more research in the area of "combined (additive), synergistic, and cumulative effects of numerous pollutants in the environment" on human health.<sup>13</sup> This is an important step forward for minority and low-income communities because they are most often exposed to multiple pollutants from multiple sources.

Like the reports by EPA and the Institute of Medicine, environmental justice advocates and communities also see the need for additional scientific research and data collection on the connection between environmental pollutants and human health. Like IOM, environmental justice advocates and community groups seek more specific research on the human health risks associated with landfills, hazardous waste sites, incinerators, odors, noise, lead-based paint, and other hazards concentrated in their homes and neighborhoods. They also need data disaggregated by race, ethnicity, income, gender, age, and geographic location.

Access to data related to distributional issues and health risks, as well as community participation in research and data collection, will result in minority and low-income communities being better educated about environmental justice issues. With this information, these communities can actively participate in the environmental decision-making process and be better prepared to challenge decisions that harm their health and quality of life.

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<sup>6</sup> Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, Exec. Order No. 12,898, 3 C.F.R. 859 (1995), *reprinted as amended in* 42 U.S.C. § 4321 at 72-73, §§ 1-101, 1-103(a), 3-302 (1994 & Supp. IV 1998) (hereafter cited as Exec. Order No. 12,898).

<sup>7</sup> Institute of Medicine, *Toward Environmental Justice: Research, Education, and Health Policy Needs*, 1999, p. 5 (hereafter cited as Institute of Medicine, *Toward Environmental Justice*).

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> U.S. Environmental Protection Agency, *Draft Report on the Environment 2003*, p. 6-2, <<http://www.epa.gov/indicators>> (last accessed July 12, 2003) (hereafter cited as EPA, *Draft Report on the Environment 2003*). In 1987, the Commission for Racial Justice recommended that the Department of Health and Human Services conduct epidemiological studies to determine to what extent hazardous wastes and environmental pollutants contribute to the known health problems in poor communities and communities of color. Commission for Racial Justice, *Toxic Wastes and Race*, p. 25.

<sup>12</sup> EPA, *Draft Report on the Environment 2003*.

<sup>13</sup> *Ibid.*

This chapter explores the need for scientific research and data collection on the relationship between the levels and types of exposures and health risks faced by the poor and people of color, the availability and use of technical assistance by minority and low-income communities, to what extent communities are provided translation of scientific and technical data, and whether community groups play a participatory role in research and data collection.

## SCIENTIFIC RESEARCH ON EXPOSURES, HEALTH RISKS, AND OUTCOMES

According to Dr. John Groopman, program director and chairman of the Department of Environmental Health Sciences Toxicological Sciences at Johns Hopkins University, researchers can assist environmental and community advocates by identifying the full spectrum of exposures, in addition to being familiar with health outcomes.<sup>14</sup> In addition to needing to identify what communities are exposed to, the Environmental Equity Workgroup, established by the Environmental Protection Agency in response to growing demands for environmental justice, concluded in 1992 that there was a lack of data on environmental health effects disaggregated by race and income.<sup>15</sup> This lack of data remains a problem today, as noted in EPA's *Draft Report on the Environment 2003*.<sup>16</sup> EPA acknowledges in this report that it is challenged to improve how to collect and analyze data.<sup>17</sup>

Not only should research and data collection be undertaken to firmly establish the causal relationship between environmental contamination and adverse human health, this information is needed to create better public health policies in response to environmental conditions and to document distributional issues.<sup>18</sup> Clearly, then, there is a role for environmental health sciences in seeking and obtaining environmental justice. As noted by the Institute of Medicine, "[e]nvironmental health sciences research can contribute to environmental justice most effectively by identifying hazards to human health, evaluating the adverse health effects, and developing interventions to reduce or prevent risks for all members of society."<sup>19</sup>

While researchers and environmental advocates seek more research, critics of the environmental justice movement attack existing research that finds poorer health status outcomes correspond to race, income, and exposure to environmental hazards. The critics assert that the research is tainted by politics or by the involvement of community groups and environmental organizations. Researchers say these assertions are unsubstantiated.<sup>20</sup> Any scientific study that has withstood an appropriate peer review process is inherently shielded from the effect of bias.<sup>21</sup> According to Patricia Hynes, a professor at Boston University School of Public Health, sound research methods, statistics, and studies are employed when conducting legitimate research, and peer review of the research methods and find-

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<sup>14</sup> Dr. John Groopman, program director and chairman of the Department of Environmental Health Sciences Toxicological Sciences at Johns Hopkins University, telephone interview, Apr. 11, 2002 (hereafter cited as Groopman interview).

<sup>15</sup> See U.S. Environmental Protection Agency, Environmental Equity Workgroup, *Environmental Equity: Reducing Risk for All Communities*, 1992.

<sup>16</sup> EPA, *Draft Report on the Environment 2003*, p. 6-2.

<sup>17</sup> *Ibid.*

<sup>18</sup> H. Patricia Hynes et al., *Public Health and the Physical Environment in Boston Public Housing: A Community-based Survey and Action Agenda* (Planning Practice & Research), vol. 15, 2000, p. 31.

<sup>19</sup> Institute of Medicine, *Toward Environmental Justice*, p. 4.

<sup>20</sup> See Groopman interview; H. Patricia Hynes, professor, Department of Environmental Health, Boston University School of Public Health, telephone interview, Apr. 4, 2002 (hereafter cited as Hynes interview).

<sup>21</sup> Groopman interview; Hynes interview.

ings is used to determine the objectivity of the research and the subjectivity of the researcher.<sup>22</sup> During peer review, the researcher in question is commonly asked about his or her personal belief system and values, since all individuals inherently have a philosophical belief system.<sup>23</sup> This peer review process ensures that scientific research is not tainted by personal beliefs.

Dr. Groopman concurs. Researchers would be more concerned about the misuse of scientific data if federal research funding requirements did not require that research be published in peer review literature.<sup>24</sup> The peer review process identifies any questionable research.<sup>25</sup> Accordingly, any criticism that scientific research is tainted by politics or community involvement is unfounded.<sup>26</sup>

In addition to the need for general causation research, there is the need to conduct significant new scientific research on risks associated with multiple exposures and cumulative impact.<sup>27</sup> The reason this analysis is so vital is because “poor people are more likely than others to have multiple exposures to environmental dangers, facing more severe hazards on the job, in the home, in the air they breathe, in the water they drink, and in the food they eat.”<sup>28</sup> Multiple exposures also result from the placement of many industries adjacent to populated areas, which is allowed by mixed land-use practices and zoning practices.<sup>29</sup> According to Dr. Robert Bullard with the Environmental Justice Resource Center, “environmental analysts should be able to assess not only the impacts of a proposed facility, but also the impact of the proposed action when added to other past and existing environmental and health hazards. This type of analysis goes to the heart of assessing cumulative impacts.”<sup>30</sup> Richard Lazarus, a professor of law at Georgetown University School of Law, also notes that “most environmental protection standards . . . do not account for aggregation of environmental risks arising from the cumulative impact of different pollutants and through different environmental media.”<sup>31</sup>

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<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> Groopman interview. The research and data are varied enough for the political left and right to find material to bolster most positions. The political debate, however, should not overshadow the need for environmental justice research. Michael B. Gerrard, Esq., Arnold & Porter, telephone interview, Apr. 1, 2002.

<sup>25</sup> See David Bates, *Environmental Health Risks and Public Policy* (University of Washington Press, 1994).

<sup>26</sup> For some scientists, science, in itself, is not filtered or tainted by politics. Instead, they believe, politics taints how individuals use scientific data. One example is when individuals choose not to cite a study’s complete findings or data because of their particular political interests. Another example, in reference to the proven link between exposure to tobacco smoke and lung cancer, is the selective use or non-use of certain information in these studies to prove a point. Groopman interview.

<sup>27</sup> The Council on Environmental Quality defines cumulative impact as the overall environmental impact of past, present, and reasonably foreseeable future actions that individually may result in minor impact, but when taken collectively have a significant impact over a long period of time. 40 C.F.R. § 1508.7 (2002).

In 1998 EPA’s Title VI Implementation Advisory Committee determined that cumulative impact is a fundamental concern of communities of color and low-income communities and recommended that responsible parties and authorities act to reduce or eliminate the impact of multiple exposures in these communities, and that research on cumulative exposures and synergistic effects be undertaken. U.S. Environmental Protection Agency, Cooperative Environmental Management, “Report of the Title VI Implementation Advisory Committee—Next Steps for EPA, State, and Local Environmental Justice Programs,” Mar. 1, 1999, p. 6 (hereafter cited as EPA, “Report of the Title VI Implementation Advisory Committee”).

<sup>28</sup> Cole and Foster, *From the Ground Up*, p. 59; Bullard, *Building Just, Safe, and Healthy Communities*, p. 376 (environmental hazards often do not result from a single environmental threat). Cumulative impact has a special significance for people of color and for low-income communities who are disproportionately affected by locally unwanted land uses. Bullard, *Building Just, Safe, and Healthy Communities*, p. 378.

<sup>29</sup> Bullard, *Building Just, Safe, and Healthy Communities*, p. 376.

<sup>30</sup> Ibid.

<sup>31</sup> Richard Lazarus, *Essay: Fairness in Environmental Law*, 27 ENVTL. L. 705, 712–13 (1997).

The lower Mississippi River industrial corridor is an example of a mostly minority community facing multiple and long-term exposure to severe environmental hazards.<sup>32</sup> This area, also known as “Cancer Alley,” is an 80-mile toxic stretch along the Mississippi between Baton Rouge and New Orleans where the air, ground, and water are full of carcinogens, mutagens, and embryo toxins emitted by more than 100 oil refineries and petrochemical plants.<sup>33</sup> Elizabeth Teel, deputy director of the Environmental Law Clinic at Tulane Law School, testified before the Commission in 2002 that based on the latest toxic release inventory and 2000 census figures, the U.S. average for pounds of toxic air releases per person is seven pounds and 60 pounds per person in Louisiana’s industrial corridor.<sup>34</sup> In terms of square mile, the U.S. average is 576 pounds per square mile and more than 17,000 pounds per square mile in the industrial corridor.<sup>35</sup>

Data on health risks associated with multiple exposures is, obviously, critical to protecting the health of communities in Cancer Alley and similarly situated communities of color and poor communities. Identifying communities with multiple exposures, and determining related health risks, would enable EPA and other agencies to create interventions and strategies to improve the environment and reduce health risks.<sup>36</sup> In 2001, the National Academy of Public Administration recommended that these strategies include pollution prevention to reduce high-risk chemicals, closer scrutiny of new and renewal permit applications, and voluntary pollution reduction agreements involving communities, regulated industries, and EPA.<sup>37</sup> The strategies should include public education, the development of appropriate public health policies, as well as incentives for industry to use the latest available technologies to reduce environmental pollution and hazards.<sup>38</sup>

Even with this demonstrated need for research on cumulative impact, or the threat to public health caused by exposure to the sum total of releases of environmental hazards,<sup>39</sup> EPA has not yet adopted a formal cumulative impact standard.<sup>40</sup> When asked to define its cumulative impact standard, EPA responded that it is still refining the process of conducting cumulative impact assessments and has no

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<sup>32</sup> In 1993, the Louisiana Advisory Committee to the U.S. Commission on Civil Rights also found that many of the facilities emitting large amounts of chemicals in the industrial corridor are located in areas with predominantly minority populations. The advisory committee noted in its report that its findings were supported by EPA’s report, *Toxics Release Inventory and Emissions Reductions 1987–1990 in the Lower Mississippi River Industrial Corridor*. Louisiana Advisory Committee to the U.S. Commission on Civil Rights, *The Battle for Environmental Justice in Louisiana . . . Government, Industry, and the People*, September 1993, p. 63.

<sup>33</sup> Chatham College, “Leaders of Cancer Alley,” <<http://www.chatham.edu/rci/well/women21-30/canceralley.html>> (last accessed Apr. 10, 2003).

<sup>34</sup> Elizabeth Teel, deputy director, Environmental Law Clinic, Tulane Law School, testimony before the U.S. Commission on Civil Rights, hearing, Washington, DC, Jan. 11, 2002, official transcript, p. 117 (hereafter cited as January Hearing Transcript).

<sup>35</sup> *Ibid.*

<sup>36</sup> NAPA, *Environmental Justice in EPA Permitting*, p. 48.

<sup>37</sup> *Ibid.*

<sup>38</sup> Michael B. Gerrard, Esq., Arnold & Porter, Testimony, January Hearing Transcript, pp. 73–74 (newer facilities are cleaner than older facilities and older facilities enjoy grandfather clause protections under current environmental laws).

<sup>39</sup> EPA uses the term “cumulative risk” to define the risk associated with multiple exposures. EPA, “Report of the Title VI Implementation Advisory Committee,” p. 24.

<sup>40</sup> U.S. Environmental Protection Agency, Response to the Commission’s Interrogatory Question 38, April 2002 (hereafter cited as EPA, Response to Interrogatory Question). A 2001 National Academy of Public Administration study of EPA’s programs for issuing air, water, and waste permits concluded that the agency needed to develop scientifically valid methods for assessing cumulative risks created by pollution but that it lacked the practical tools to conduct cumulative risk assessments. NAPA, *Environmental Justice in EPA Permitting*, p. 45.

official agencywide policy or guidance on cumulative impact.<sup>41</sup> Some environmental program offices within EPA, however, do have published guidance on cumulative risk assessment.<sup>42</sup> These offices include the Office of Superfund Remediation Technology Innovation, which is responsible for managing the Superfund program, the Office of Pesticide Programs, the Office of Federal Activities, and the Office of Civil Rights.<sup>43</sup> Even EPA's most recent report on the environment, *Draft Report on the Environment 2003*, fails to address the issue of adverse health effects resulting from multiple exposures to environmental hazards.<sup>44</sup> The report merely states that the link between some environmental pollutants and health problems is a challenging question that remains to be answered because causal relationships are difficult to establish.<sup>45</sup> Rather than making a case that it is an enormous scientific challenge to sort out the various environmental factors causing adverse human health outcomes, federal agencies must establish a cumulative impact based on the best available research.

Also of concern is the fact that while EPA's risk assessments include information on multiple exposures, the agency does not presume that the presence of multiple chemicals in any amount constitutes an adverse health impact.<sup>46</sup> This failure to use the assessment criteria to establish a presumption of adverse health impact further indicates that EPA has not integrated cumulative impact concerns into its day-to-day operation.

Troubling, still, is the failure of EPA's *Draft Report on the Environment 2003* to embrace the notion that the distribution of environmental benefits and burdens is based on race, income, and political power.<sup>47</sup> This is an apparent retreat from earlier EPA positions and Executive Order 12,898. Instead of retreating from this position, EPA and other federal agencies must work more closely with the health policy community to develop strategies to address health risks, and also work with all their stakeholders to develop environmental policies to eliminate or minimize the risks in these communities.

In addition to reviewing EPA's compliance with the Executive Order, the Commission also reviewed three other agencies regarding the extent and nature of their data collection and research efforts aimed at identifying and addressing any disproportionately high and adverse human health and environmental effects of their programs and activities on minority and low-income communities. Only significant issues are raised here concerning these agencies.

Under the trust relationship, the federal government has the legal obligation to properly manage, protect, and conserve resources and lands of American Indians and Alaska Natives.<sup>48</sup> As the federal agency delegated to take the lead in implementing much of the trust responsibilities, the Department of the Interior (DOI) has an affirmative duty to protect tribal health and safety.<sup>49</sup> Accordingly, the

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<sup>41</sup> Ibid.

<sup>42</sup> EPA, Response to Interrogatory Question 38.

<sup>43</sup> Ibid.

<sup>44</sup> EPA, *Draft Report on the Environment 2003*.

<sup>45</sup> Ibid., pp. 4–20.

<sup>46</sup> EPA, Response to Interrogatory Question 38.

<sup>47</sup> EPA, *Draft Report on the Environment 2003*, "Environmental Pollution and Disease," p. 4-12 ("[p]oor or other disadvantaged populations *may* live in more polluted environments that expose them to higher concentrations of pollutants") (emphasis added).

<sup>48</sup> See U.S. Department of the Interior, "American Indians and Alaska Natives," <<http://www.doi.gov/oait/natives.htm>> (last accessed Oct. 9, 2002).

<sup>49</sup> Ibid.

role of DOI in conducting research or collecting data on the impact of their land is crucial for Native Americans.

Generally, the eight bureaus and divisions at DOI do not collect, maintain, and analyze information to assess the impact of environmental factors on the human health risks borne by Native American populations.<sup>50</sup> For example, the Fish and Wildlife Service (FWS) recognizes that Native Americans and Alaska Natives are subsistence users of chinook and chum salmon and that they are concerned about contamination of their food sources with heavy metals, pesticides, and PCBs.<sup>51</sup> DOI, however, reports that sufficient information on this issue and its related health risks is “lacking.”<sup>52</sup> When data is available to FWS indicating a significant threat to the stability and sustainability of fish and wildlife populations, FWS merely shares the information with appropriate agencies.<sup>53</sup> There is no coordinated interagency response to such data.

The Department of Housing and Urban Development relies, largely, on the research conducted by other agencies. The exception is in the area of lead paint. A 2001 HUD report, *National Survey of Lead and Allergens in Housing*, provides information on lead hazards based on income level, race, ethnicity, and region.<sup>54</sup> HUD will repeat this survey of housing with lead hazards in 2004. While the rates of asthma in urban areas and in low-income communities are another growing health concern for communities of color and poor communities,<sup>55</sup> HUD does not maintain or collect data on asthma prevalence rates in urban areas or within HUD housing units in urban areas.<sup>56</sup> This data is collected by the Centers for Disease Control and Prevention through its National Health Nutrition Examination Survey.<sup>57</sup>

The Department of Transportation (DOT) encounters environmental and health issues in the context of:

- Transportation equity and fairness in the placement of sound barriers along freeways.
- The use of diesel buses in minority and low-income communities.

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<sup>50</sup> U.S. Department of the Interior, Response to the Commission’s Interrogatory Question 30, May 2002 (hereafter cited as DOI, Response to Interrogatory Question). The bureaus are the Bureau of Land Management (BLM), Office of Surface Mining (OSM), Minerals Management Service (MMS), Bureau of Reclamation (BOR), U.S. Fish and Wildlife Park Service (FWS), National Park Service (NPS), Bureau of Indian Affairs (BIA), and U.S. Geological Survey (USGS).

<sup>51</sup> DOI, Response to Interrogatory Question 30.

<sup>52</sup> Ibid.

<sup>53</sup> Ibid. According to FWS, it is currently conducting a large-scale study of contamination of salmon in major river systems in Alaska. As part of this study, FWS is sharing this study data with local communities, and public health agencies and organizations, such as the Yukon River Drainage Fishermen’s Association, but it does not make public health interpretations of the data. See Deborah Charette, assistant solicitor, Branch of Personnel Litigation and Civil Rights, Office of the Solicitor, U.S. Department of the Interior, facsimile to Office of the General Counsel, U.S. Commission on Civil Rights, Aug. 20, 2003, p. 5 (hereafter cited as Charette facsimile).

<sup>54</sup> U.S. Housing and Urban Development, Document Exhibit 23, “National Survey of Lead and Allergens in Housing,” Apr. 18, 2001.

<sup>55</sup> The prevalence of asthma has been steadily increasing in the United States. The increase in asthma has been most marked in children and in minority populations. Moreover, evidence indicates that inner-city and urban populations are most at risk. The role of ambient air pollution has been widely investigated, but more recently the focus has been on indoor environmental risk factors such as moisture and mold growth, pest infestation, high dust levels, heating systems, inadequate ventilation, and exposure to cigarette smoke. Doug Brugge et al., *Housing Conditions and Respiratory Health in a Boston Public Housing Community*, p. 150.

<sup>56</sup> U.S. Department of Housing and Urban Development, Response to the Commission’s Interrogatory Question 30, April 2002 (hereafter cited as HUD, Response to Interrogatory Question).

<sup>57</sup> Ibid.

- Light rail systems running underground in tunnels in affluent suburban communities and at street level in minority and low-income communities.
- Location of bus depots in minority communities.
- Noise related to airport operations.

Accordingly, it is important that these and other environmental justice and health issues arising in the transportation context be studied and addressed. Unfortunately, DOT “does not collect, maintain, and analyze information on a national basis to assess and compare the environmental and health risks related to transportation that may be borne by low income communities and communities of color relative to other populations.”<sup>58</sup> As part of transportation planning conducted under DOT requirements, metropolitan transportation planning organizations collect information on race, national origin, and income of persons affected by transportation programs. This data is used to identify transportation needs and develop plans, and it does not necessarily address transportation-related health risks.<sup>59</sup> According to DOT, environmental and health impact data is collected during the preparation of environmental assessments and environmental impact statements and as required by National Environmental Policy Act (NEPA).<sup>60</sup>

Agencies generally rely on compliance with NEPA as evidence of sufficient data collection and research on the human health, environmental, economic, and other impacts of their actions on minority and low-income populations. While Executive Order 12,898 and NEPA are compatible, compliance with NEPA alone does not ensure the protection of minority and low-income communities. This is evident in several areas. First, federal agencies are not required to comply with NEPA in all circumstances. NEPA is not triggered unless there is “major” federal action that “significantly” affects the “quality of the human environment.”<sup>61</sup> Only after there is a determination or an environmental assessment finding that a proposed action will have a “significant” impact on the environment is a responsible agency required to prepare an environmental impact statement.<sup>62</sup>

Second, NEPA fails to ensure environmental justice for communities because it does not consider the socioeconomic impact of a proposed action. Socioeconomic factors will only be considered if they are closely connected to physical environmental factors.<sup>63</sup>

The third shortcoming of NEPA in the environmental justice context is the number of exemptions that exist to NEPA compliance. For example, EPA actions under the Clean Air Act are exempt from the environmental impact statements.<sup>64</sup> Certain EPA exemptions also exist relating to the Resource Con-

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<sup>58</sup> U.S. Department of Transportation, Response to the Commission’s Interrogatory Question 38, April 2002 (hereafter cited as DOT, Response to Interrogatory Question). The Federal Aviation Administration (FAA) responded that it collects, maintains, and analyzes information during the preparation of an environmental impact statement as part of the NEPA process. *Ibid.*

<sup>59</sup> DOT, Response to Interrogatory Question 38.

<sup>60</sup> *Ibid.* National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370 (1994).

<sup>61</sup> *Id.* § 4332(2)(C).

<sup>62</sup> *Save Our Heritage, Inc., et al. v. Fed. Aviation Admin.*, 269 F.3d 49, 57 (1st Cir. 2001); *Sierra Club v. U.S. Forest Serv.*, 46 F.3d 835 (8th Cir. 1995); *D’Agnillo v. Dep’t of Hous. and Urban Dev.*, 965 F. Supp. 535, 542 (S.D.N.Y. 1997).

<sup>63</sup> Michael B. Gerrard, ed., *The Law of Environmental Justice: Theories and Procedures to Address Disproportionate Risks*, “Impact Assessment,” by Shelia Foster (Chicago: ABA Publishing, 1999), pp. 260–64 (hereafter cited as Foster, “Impact Assessment”).

<sup>64</sup> Energy Supply and Environmental Coordination Act of 1974, 15 U.S.C. § 793(c)(1) (1994).

servation and Recovery Act,<sup>65</sup> the Safe Drinking Water Act,<sup>66</sup> the Toxic Substance Control Act,<sup>67</sup> the Federal Insecticide, Fungicide and Rodenticide Act,<sup>68</sup> and the Clean Water Act.<sup>69</sup>

The fourth, and possibly the most significant, reason why NEPA compliance does not fully address environmental justice concerns results from the fact that NEPA merely imposes procedural, not substantive, requirements on federal agencies. NEPA does not require that specific environmental results be achieved.<sup>70</sup> For example, NEPA does not require agencies to mitigate environmental or health risks or select the most environmentally advantageous options. Instead, NEPA only requires that agencies assess the environmental impact based on full information and provide the public access to the information.<sup>71</sup>

Of the agencies reviewed, EPA has the most comprehensive and detailed guidance on incorporating environmental justice into the NEPA process.<sup>72</sup> In fact, EPA's guidance includes social, economic, and cultural effects in its assessments even though these factors alone will not justify an environmental impact statement under NEPA in the absence of a connection to the physical environment.<sup>73</sup> Additionally, in identifying affected populations, EPA not only uses census tract information as recommended by the Council on Environmental Quality, it also attempts to identify "pockets" or small concentrations of people of color and low-income communities.<sup>74</sup> EPA also incorporates more refined information from community groups, local records, interviews, and other sources to assist in identifying minority and low-income communities.<sup>75</sup>

## TECHNICAL ASSISTANCE FOR COMMUNITIES

Public participation is an integral part of addressing environmental justice concerns.<sup>76</sup> Meaningful public participation is more than merely notifying the public of meetings and decisions; it means ac-

<sup>65</sup> See, e.g., 40 C.F.R. § 124.9(b)(6) (2003). See also U.S. Environmental Protection Agency, *Final Guidance for Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analyses*, April 1988, <[http://www.epa.gov/compliance/resources/policies/ej/ej\\_guidance\\_nepa\\_epa0498.pdf](http://www.epa.gov/compliance/resources/policies/ej/ej_guidance_nepa_epa0498.pdf)> (last accessed Aug. 1, 2003) (hereafter cited as EPA, *Final Guidance for Incorporating Environmental Justice Concerns*).

<sup>66</sup> See, e.g., *Western Nebraska Resources Council v. U.S. Env'tl. Prot. Agency*, 943 F.2d 867, 871–872 (8th Cir. 1991).

<sup>67</sup> See, e.g., Foster, "Impact Assessment," p. 260.

<sup>68</sup> *Env'tl. Def. Fund v. U.S. Env'tl. Prot. Agency*, 489 F.2d 1247, 1256 (D.C. Cir. 1973).

<sup>69</sup> 33 U.S.C. § 1371(c)(1) (1994); *Cross Timbers Concerned Citizens v. Saginaw*, 991 F. Supp. 563 (N.D. Tex. 1997).

<sup>70</sup> *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349–354 (1989) (NEPA itself does not mandate particular results, but simply prescribes the necessary process); *Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 546 (11th Cir. 1996).

<sup>71</sup> *Methow Valley Citizens Council*, 490 U.S. at 349; *Sierra Club*, 46 F.3d at 837.

<sup>72</sup> The Council on Environmental Quality (CEQ) is responsible for providing federal agencies guidance on implementing environmental justice through the NEPA process, and EPA is the lead agency responsible for implementing the Executive Order. CEQ's guidance notes that Executive Order 12,898 does not alter existing requirements and interpretations of NEPA. See Council on Environmental Quality, *Environmental Justice Guidance Under the National Environmental Policy Act*, Dec. 10, 1997, pp. 1, 10, <<http://ceq.eh.doe.gov/nepa/regs/ej/justice.pdf>> (last accessed Aug. 1, 2003).

<sup>73</sup> EPA, *Final Guidance for Incorporating Environmental Justice Concerns*.

<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.*

<sup>76</sup> See U.S. Environmental Protection Agency, Office of Policy, Economics, and Innovation, *Engaging the American People: A Review of EPA's Public Participation Policy and Regulations with Recommendations for Action*, EPA 240-R-00-005, December 2000, p. 1; Damu Smith, campaigner, Greenpeace Toxic Campaign, Greenpeace, USA, Testimony, January Hearing Transcript, p. 115; Peggy Shepard, executive director, West Harlem Environmental Action, Inc., Testimony, January Hearing Transcript, p. 123.

tively involving the community in decision-making. The degree to which these communities can effectively participate in the decision-making process is strongly dependent on their technical knowledge of the environmental hazards and the effects of these hazards on their health. A community's technical understanding can be enhanced through technical assistance grants and by disseminating scientific information in language understandable to the general public. Based on the information gathered, federal agencies experience varying degrees of success providing technical assistance to the affected communities. For example, EPA has a Technical Assistance Grant (TAG) program designed to provide technical assistance to communities with Superfund sites and to enable these communities to make independent assessments of the technical aspects of pending environmental issues or decisions.<sup>77</sup>

In 2001, the National Academy of Public Administration (NAPA) recommended that EPA expand its TAG program to offer more timely and accessible technical assistance to communities; this expansion would allow communities to participate more effectively in EPA permitting processes.<sup>78</sup> At the time of the recommendation, EPA's TAG program had scarce resources and the program still has not received expanded funding.<sup>79</sup> According to EPA, funding for the TAG program varies from year to year depending on public requests.<sup>80</sup> The TAG program had its lowest funding of \$193,067 in 1988 and its highest in 1995 of \$2.08 million.<sup>81</sup> According to EPA budget information, funding for FY 2001 was at \$1.86 million.<sup>82</sup> According to EPA, there is little likelihood that the budget for TAG programs will increase. EPA notes that Superfund, TAG's funding source, has never denied a TAG request due to lack of funds<sup>83</sup> and that the agency expects to meet the foreseeable needs of TAG recipients without an additional increase in its budget.<sup>84</sup> The Commission, however, believes that the availability of TAG grant money will be hindered as a result of the decrease in the overall Superfund budget and the decrease in the Superfund Trust Fund with the expiration of the "polluter pays" tax. The overall Superfund budget in FY 2002 and FY 2003 decreased from \$1.45 billion in FY 2001 to \$1.3 billion for both years.<sup>85</sup>

In addition to concerns about funding, from the community perspective, the application process for TAG is complex and prolonged,<sup>86</sup> which can prevent or dissuade communities from applying for technical assistance grants. EPA has taken steps to make the grant application less complex and to eliminate delays in processing grant requests through its revised TAG rules finalized in October 2000.<sup>87</sup> Although it is difficult to assess whether these revised rules will lessen the complexities and

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<sup>77</sup> Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9617(e) (1994).

<sup>78</sup> National Academy of Public Administration, *Environmental Justice in EPA Permitting: Reducing Pollution in High-Risk Communities Is Integral to the Agency's Mission*, December 2001, pp. 68, 75 (hereafter cited as NAPA, *Environmental Justice in EPA Permitting*).

<sup>79</sup> See EPA, Response to Interrogatory Question 20.

<sup>80</sup> Ibid.

<sup>81</sup> Ibid.

<sup>82</sup> Ibid.

<sup>83</sup> Ibid. EPA responded that it has granted a total of 244 grants since 1988. The number of new TAGs varied from year to year. In 1995 EPA had 26 grants, and in 2001 it had 18 grants. Ibid.

<sup>84</sup> Ibid.

<sup>85</sup> U.S. Environmental Protection Agency, Summary of the EPA Budget, <<http://www.epa.gov/ocfo/budget/2003/2003bib.pdf>>; <<http://www.epa.gov/ocfo/budget/2002/2002bib.pdf>> (last accessed July 14, 2003). The Superfund budget for FY 2004 is \$1.39 billion, a slight increase over the previous two years. Ibid.

<sup>86</sup> NAPA, *Environmental Justice in EPA Permitting*, p. 68.

<sup>87</sup> EPA, Response to Interrogatory Question 20.

eliminate delays, EPA nonetheless should continue to take steps to ensure that TAG programs are a continuing resource for communities to obtain technical assistance.

While the TAG program at EPA provides technical assistance to Superfund National Priorities List site communities,<sup>88</sup> non-Superfund site communities receive technical assistance on permitting issues through Technical Outreach Services for Communities (TOSC) at EPA.<sup>89</sup> TOSC, a service of the university-based Hazardous Substance Research Centers, focuses on hazardous waste issues and provides fundamental scientific information, interprets reports, explains the regulatory process, assists communities in preparing written comments to proposed regulations and actions, and conducts workshops for public education.<sup>90</sup> A group of 30 universities across the country form a network of five Hazardous Substance Research Centers, serving 10 EPA regions.<sup>91</sup> Through independent technical information and assistance, TOSC works with communities to help them better understand technical issues and to participate in environmental decision-making.<sup>92</sup> Unlike TAG, TOSC is not a grant program and, therefore, communities do not undergo a formal grant process,<sup>93</sup> which makes it easier for community groups to access.

While it has proved to be useful for some environmental situations, TOSC is limited by scarce resources and can meet the needs of only a few communities.<sup>94</sup> From 1995 through March 2002, TOSC assisted approximately 155 communities.<sup>95</sup> The Environmental Protection Agency reports that the TOSC program is funded by the Resource Conservation and Recovery Act (RCRA) program and the Superfund program.<sup>96</sup> The RCRA program is funded at \$50,000 a year and the Superfund program is funded at \$1,325,000 a year.<sup>97</sup> EPA responded that it expects to continue the TOSC program at the current funding levels.<sup>98</sup> It added that the RCRA is a pilot program and that even though the overall Superfund budget has been cut, funding for the TOSC program remained level.<sup>99</sup> In light of decreasing Superfund Trust Fund revenue and record federal deficits, it is unrealistic for EPA to assume that it can continue to appropriately fund its TOSC program.

Finally, like the TAG program, NAPA also recommended that EPA expand its TOSC program to offer more timely and accessible technical assistance to communities. Funding concerns may not make this possible.

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<sup>88</sup> Ibid.

<sup>89</sup> NAPA, *Environmental Justice in EPA Permitting*, p. 68.

<sup>90</sup> Ibid.

<sup>91</sup> U.S. Environmental Protection Agency, "Technical Outreach Services," <[http://epa.gov/unix0008/community\\_resources/tosc/whattosc.html](http://epa.gov/unix0008/community_resources/tosc/whattosc.html)> (last accessed July 31, 2003); EPA, Response to Interrogatory Question 20.

<sup>92</sup> NAPA, *Environmental Justice in EPA Permitting*, p. 68. Communities seeking TOSC assistance must meet the threshold criteria of hazardous contamination or toxic contamination. After threshold eligibility is established, communities are more likely to receive assistance if one or more of the following exists: environmental justice issues, human health protection issues, high community interest, good community organization, multiple requests from different sources, benefit to the community, or the potential for TOSC to provide assistance early enough in the process to be meaningful. See Hazardous Substance Research Centers, "HSRC Outreach Programs for Communities: Selection Criteria," <<http://www.hsrb.org/hsrb/html/tosc/tosc-overview.html#selection>> (last accessed July 31, 2003).

<sup>93</sup> NAPA, *Environmental Justice in EPA Permitting*, p. 68.

<sup>94</sup> Ibid.

<sup>95</sup> EPA, Response to Interrogatory Question 20.

<sup>96</sup> Ibid.

<sup>97</sup> Ibid.

<sup>98</sup> Ibid.

<sup>99</sup> Ibid.

The Department of Housing and Urban Development, like EPA, provides technical assistance. HUD does not provide technical assistance grants directly to the communities needing assistance, but rather uses intermediaries who provide technical assistance to communities.<sup>100</sup> As discussed in this report, lead-based paint exposure is a significant health risk to minority and poor communities, especially children. In fact, reducing lead-paint exposure and lead poisoning has been identified as a HUD priority. Examples of HUD technical assistance grants related to lead exposure include:

- Lead and Healthy Homes Technical Studies funding research to improve methods for detecting and controlling residential lead-based paint and other residential health and safety hazards. The grants are available to academic and not-for-profit institutions.
- Lead Hazard Control Program assisting state and local governments and Indian tribes in establishing programs for the identification and control of lead-based paint hazards in eligible privately owned housing units for rental and owner-occupants to reduce the exposure of young children to lead-based paint hazards in their homes.
- Healthy Homes Demonstration Program intended to fund the development of cost-effective, preventive ways to correct health hazards in the home causing disease or injury to children.

Though lead exposure is a serious health threat, especially in older homes, which are often occupied by the poor and people of color, unlike EPA, HUD has no specific funding set aside for environmental reviews.<sup>101</sup> HUD attributes this absence of specific funding to competing priorities set for other technical assistance needs.<sup>102</sup> Technical assistance funds at HUD are available for a wide variety of needs, but with competing priorities “a very small percentage” of the technical assistance funding is used for environmental reviews.<sup>103</sup> HUD could not provide the Commission the specific dollar amount spent on technical assistance to address environmental concerns in its programs.<sup>104</sup>

The Office of Healthy Homes and Lead Hazard Control at HUD has not received an increase in its technical assistance and Healthy Homes budgets for the past two years, even though its overall budget increased by \$10 million.<sup>105</sup> The Healthy Homes program, targeting housing-related childhood diseases such as asthma, has remained at \$10 million since FY 2002 and no increase is sought in the FY 2004 budget.<sup>106</sup> Likewise, the technical assistance program will continue to function at \$10 million. Operation LEAP, in the Office of Lead-Based Paint, will receive no additional funding in FY 2004, remaining at \$10 million.<sup>107</sup> HUD describes this program as “the President’s program to eradicate childhood lead-based paint poisoning in 10 years or less.”<sup>108</sup> Operation LEAP provides funds to organizations with a demonstrated capacity to leverage private sector funds for local lead hazard control programs. This program does not provide community technical assistance grants. HUD does report that community groups, as subgrantees of the Healthy Homes and Lead Hazard

<sup>100</sup> HUD, Response to Interrogatory Question 46.

<sup>101</sup> *Ibid.*

<sup>102</sup> *Ibid.*

<sup>103</sup> *Ibid.*

<sup>104</sup> *Ibid.*

<sup>105</sup> U.S. Department of Housing and Urban Development, Fiscal Year 2004 Budget Summary, Appendix B, <<http://www.hud.gov/about/budget/fy04/appendixb.pdf>> (last accessed July 31, 2003).

<sup>106</sup> *Ibid.*, p. 32.

<sup>107</sup> *Ibid.*, Appendix B.

<sup>108</sup> *Ibid.*, p. 31.

Control programs, do receive funding for public education on childhood lead poisoning.<sup>109</sup> Based on the information provided by HUD, these programs are not designed to provide scientific and technical assistance for challenging technical decisions related to administering HUD's lead abatement program or other decisions that may harm human health.<sup>110</sup> The groups funded by these programs provide general public education information on lead poisoning prevention and housing-related childhood diseases and injuries.

The remaining two agencies, the Department of Transportation and the Department of the Interior, provide fewer opportunities for communities to access technical assistance than EPA and HUD. DOT reported that it does not generally provide technical assistance grants to communities to assist them in participating in the environmental decision-making process.<sup>111</sup> The Federal Aviation Administration at DOT, however, reports that it funds noise abatement planning for communities. Based on information provided by FAA, this program does not provide grant money to communities directly, or through third parties working with communities, for research and data collection on the adverse health and quality of life issues related to exposure to various noise levels. Furthermore, FAA reports that the program does not target minority and low-income communities.<sup>112</sup>

According to DOI, it does not have formal grant programs for helping tribes and affected communities participate in environmental decision-making processes.<sup>113</sup> Nevertheless, BIA occasionally provides funds to Indian tribes to participate in the preparation of NEPA documents, and the Bureau of Reclamation provides opportunities for affected Indian tribes to participate in the NEPA investigation process. Funding for BIA's NEPA activities does not exceed \$100,000 per year.<sup>114</sup>

The U.S. Geological Survey provides information to tribes and other communities, but does not provide technical assistance grants. The Office of Surface Mining (OSM) provides Abandoned Mine Land Program (AML) grants to the Navajo and the Crow and Hopi tribes to help them address hazards and environmental problems resulting from past mining on tribal lands.<sup>115</sup> The total grants were \$7,288,963 for FY 2001. Under its regulatory and AML programs, OSM provides technical assistance to some tribal governments.<sup>116</sup>

The Bureau of Land Management (BLM) does not provide any technical assistance grants. According to the bureau, "The funding level for technical assistance grants or community assistance grants is zero. We know of no increase in funding for technical and community assistance grants."<sup>117</sup> BLM does not anticipate any additional funding for this type of assistance.<sup>118</sup>

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<sup>109</sup> Carol Wilson, associate general counsel, Office of Litigation, U.S. Department of Housing and Urban Development, e-mail to Office of the General Counsel, U.S. Commission on Civil Rights, Aug. 15, 2003.

<sup>110</sup> *Ibid.*

<sup>111</sup> DOT, Response to Interrogatory Question 35.

<sup>112</sup> Marc Brenman, senior policy advisor, Office of the Secretary, U.S. Department of transportation, e-mail to Office of the General Counsel, U.S. Commission on Civil Rights, Aug. 15, 2003, p. 3.

<sup>113</sup> DOI, Response to Interrogatory Question 37.

<sup>114</sup> *Ibid.*

<sup>115</sup> *Ibid.*

<sup>116</sup> *Ibid.*

<sup>117</sup> *Ibid.*

<sup>118</sup> *Ibid.*

Finally, the U.S. Fish and Wildlife Service stated that it does not have a formal technical assistance program, but that it has been providing technical training and assistance to tribes on fish and wildlife management. This assistance is implemented through its Fish and Wildlife Management Assistance and Fisheries Resources Offices.<sup>119</sup>

## TRANSLATION OF SCIENTIFIC AND TECHNICAL DATA

The degree to which communities of color and low-income communities can participate in the decision-making process is strongly dependent on their knowledge of the environmental hazards and the effects of these hazards on their health. Therefore, in addition to providing more opportunities for data collection and gathering scientific information on the connection between hazards and health, the information gathered through these efforts must be made accessible to communities. One way of making this information accessible is to translate highly technical and scientific information into plain and understandable language.

In general, the federal agencies reviewed by the Commission have not taken measures to provide technical and scientific information in plain, understandable language. All federal agencies should ensure that communities affected by their environmental decisions can receive proper technical information that is understandable and that the information is available in languages other than English.

EPA emphasizes the importance of translating technical data into nonscientific language.<sup>120</sup> Accordingly, EPA has been operating under the “Preliminary Plain Language Guidance.”<sup>121</sup> This guideline was established as a result of the President’s Memorandum on Plain Language, which required every federal agency to draft its rules and policy in language understandable to lay persons. Following this presidential memorandum, EPA established its own plain language guidance to ensure that plain language is used in every proposed and final rule published in the Federal Register effective January 1, 1999.<sup>122</sup>

EPA added that this effort to make EPA documents readable by laypersons is further documented in one of EPA’s major goals for 2000 to 2005, which is “giving the access to educational services and tools that provide for the reliable and secure exchange of quality environmental information.”<sup>123</sup> To achieve this goal, EPA has produced a document titled “Lessons Learned About Designing, Developing, and Disseminating Environmental Information Products.”<sup>124</sup> This document summarizes common issues that EPA staff encounter when developing environmental information products and has formed the foundation for a “best practices” series.<sup>125</sup>

EPA also reports that it is working with the Office of Management and Budget to comply with OMB’s guidelines requiring all federal agencies to promulgate agency guidelines ensuring the qual-

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<sup>119</sup> Ibid.

<sup>120</sup> EPA, Response to Interrogatory Question 21.

<sup>121</sup> Ibid.

<sup>122</sup> Peter Robertson, acting deputy administrator, U.S. Environmental Protection Agency, memorandum, Dec. 31, 1998.

<sup>123</sup> Ibid.

<sup>124</sup> EPA, Response to Interrogatory Question 21.

<sup>125</sup> Ibid.

ity and accuracy of the information they produce or disseminate.<sup>126</sup> In fact, EPA issued “Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Dissemination by the Environmental Protection Agency” in 2002.<sup>127</sup> OMB guidelines require all federal agencies to promulgate their own guidance ensuring “quality, objectivity, utility, and integrity of information” they produce.<sup>128</sup> While this policy is positive on its face, and public policy should be based on the best available information, the Commission is concerned that OMB’s guidelines may create new challenges for environmental advocates. Under the policy, before a federal regulation, study, or report supported by data can be published, the “affected persons” may challenge the objectivity and the accuracy of the data underlying the proposed regulation.<sup>129</sup> The problem with this new policy is twofold for environmental justice advocates:

- Minority and low-income communities will be disadvantaged in that they lack the money and resources needed to challenge data underlying proposed agency regulations.
- Administrative challenges to government data could be used as a tool by industry to delay the implementation of the proposed forward-leaning or more restrictive environmental regulations.

As to the first point, in order for “affected persons” to challenge any government data, they must hire their own experts to conduct the necessary scientific research on the accuracy of the government information or have access to data from other sources.<sup>130</sup> Critics argue that this gives a tremendous advantage to industry groups over community groups and environmental advocates who are less well funded and have limited access to technical resources.<sup>131</sup> As to the second point, the administrative policy places a burden on the government agency implementing regulations to invest increased amounts of time defending the reliability and accuracy of its underlying scientific data even when objections are raised for political or tactical reasons. In the environmental context, this burden may delay or prevent government agencies from using limited available environmental and health data to implement regulations that would potentially help minority and low-income communities. Nonetheless, the health risks associated with environmental hazards are real and the responsible federal agencies must implement aggressive policies regulating environmental hazards to protect vulnerable populations. Therefore, the implementation and impact of information quality guidelines drafted by federal agencies must be carefully monitored to prevent abuse and unnecessary delays in rule-making.

EPA has stated a commitment to making scientific and technical data accessible by translating it into plain, understandable, and not overly technical terms. HUD, however, has made limited efforts in this area.<sup>132</sup> Much of HUD’s education effort consists of leaflets and brochures that provide very basic information on understanding lead problems. The brochures do not provide scientific and technical

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<sup>126</sup> Ibid. See Treasury and General Government Appropriations Act of 2001, Pub. L. No 106-554, 114 Stat. 2763, 2763A-154, § 515(b)(2)(A) (2000); Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, Office of Management and Budget, 67 Fed. Reg. 8452 (Feb. 22, 2002).

<sup>127</sup> Karen Higginbotham, director, Office of Civil Rights, U.S. Environmental Protection Agency, letter to Office of the General Counsel, U.S. Commission on Civil Rights, Aug. 22, 2003, p. 15; U.S. Environmental Protection Agency, *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the Environmental Protection Agency*, EPA/260R-02-008, October 2002 (hereafter cited as EPA, *Information Quality Guidelines*).

<sup>128</sup> 67 Fed. Reg. at 8452.

<sup>129</sup> EPA, *Information Quality Guidelines*, p. 15.

<sup>130</sup> Ibid., pp. 30–31.

<sup>131</sup> Rebecca Adams, “Federal Regulations Face Assault on Their Foundation,” *Congressional Quarterly*, Aug. 10, 2002, pp. 2182–83.

<sup>132</sup> HUD, Response to Interrogatory Question 45.

information in lay terms that allow community groups to make informed decisions and participate in environmental decision-making that affects their health.<sup>133</sup> The Department of Transportation reported participating in the government's "plain English" initiative and undertaking efforts to make technical and scientific data accessible and understandable.<sup>134</sup> DOT, in the guidance that the Federal Highway and Federal Transit Administrations provide to the states, emphasizes the importance of making technical data understandable to nontechnical audiences.<sup>135</sup> These two offices have published the "FHWA/FTA Questions and Answers on Public Involvement in Transportation Decision Making," a booklet with 14 questions and answers regarding public involvement in the DOT process.<sup>136</sup> It does not provide technical or scientific data that assists communities in understanding possible adverse health risks associated with FHWA/FTA programs and activities.<sup>137</sup> No other offices or bureaus at DOT report efforts or policies for making scientific and technical information more accessible by using terms and language more easily understood by a lay audience.

The Bureau of Indian Affairs at the Department of the Interior makes limited efforts to ensure that technical and scientific data is presented in a format accessible to tribes.<sup>138</sup> These efforts include consulting with tribes on BIA activities and drafting regulations and guidance in plain English.<sup>139</sup> BIA, however, does not have policies and guidelines to ensure that its consultations are conducted in a manner that ensures that any technical and scientific data presented is understood by the tribal representatives. BIA, nonetheless, expressed that its efforts to ensure that technical and scientific data is accessible to tribes also include hiring Native American staff to serve Native Americans.<sup>140</sup> While having Native American staff at BIA is important, these staff members must also be properly trained on the technical and scientific data and must be able to provide technical assistance to the communities they serve. The Bureau of Reclamation at DOI has developed a draft policy for the civil rights program that includes a requirement for complying with Section 508 of the Rehabilitation Act of 1973. Section 508, however, governs federal agencies' use of electronic and information technology to make information accessible to people with disabilities and does not address translating technical and scientific data into language more easily understood by tribes and adversely affected communities.<sup>141</sup> This draft policy is currently undergoing organizational review and has not yet been issued. This policy to make translating technical and scientific information into language understandable by a lay audience is commendable and should be considered for agencywide implementation. The U.S. Geological Survey explained that, to date, it has not received any requests for translation of technical information.<sup>142</sup> The efforts to make technical information accessible and understandable by affected communities should not be based on requests an agency receives. It should be an affirmative step taken by the agency to address environmental justice concerns.

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<sup>133</sup> Ibid. These leaflets include a joint HUD/EPA/CPSC brochure "Protect Your Family From Lead in Your Home," a Lead Paint Safety Field Guide, a leaflet for parents on lead safety, question-and-answer leaflets for parents, landlords, and painters and remodelors, a community outreach kit, "Danger in the Home," and "Help Yourself to a Healthy Home." Ibid.

<sup>134</sup> DOT, Response to Interrogatory Question 34.

<sup>135</sup> Ibid.

<sup>136</sup> Ibid.

<sup>137</sup> Ibid.

<sup>138</sup> DOI, Response to Interrogatory Question 27.

<sup>139</sup> Ibid.

<sup>140</sup> Ibid. BIA explained that over 90 percent of BIA's employees are Native American. Ibid.

<sup>141</sup> Charette facsimile, p. 5. See also Rehabilitation Act of 1973, 29 U.S.C. § 794d (1998).

<sup>142</sup> Charette facsimile, p. 5.

## PARTICIPATORY ROLE FOR COMMUNITIES IN RESEARCH AND DATA COLLECTION

Increasingly, communities of color and low-income communities are demanding that they play a “participatory role in defining, analyzing, and prescribing solutions to improve the conditions they face.”<sup>143</sup> Overall, it is important that public health research include community involvement and newer and more creative methods of data collection and analysis.<sup>144</sup> It is important that communities are recruited to participate in research and to provide “a collaborative community response to environmental risks [to] help detect, limit, and prevent environmental insults and their harmful health effects.”<sup>145</sup> This collaborative community response requires that (1) health care professionals be able to diagnose and distinguish between environmental and other diseases, (2) the public be able to understand these risks to the health of their community, and (3) “that governmental and industrial leaders use the strength of the community while being responsive to their needs.”<sup>146</sup>

Many communities that advocate for more involvement in environmental health research and decision-making note that “their experience, contextual and local knowledge should be considered local expertise about the multiple hazards and chronic diseases afflicting their communities.”<sup>147</sup> According to Professor Hynes, some community organizations routinely work with researchers to gather and use substantive scientific information.<sup>148</sup> Environmental justice and community organizations primarily use this scientific research in two ways: (1) to help them understand environmental health risks, and (2) in collaboration with researchers to generate new or additional scientific information.<sup>149</sup> One way communities get involved in scientific research is through a process called “community-based participatory research” (CBPR).<sup>150</sup> Community members partner with scientists to define problems, collect information, and analyze data.<sup>151</sup>

In an article exploring the use of community-based research by one community, the Greenpoint/Williamsburg neighborhood of Brooklyn, New York, the author concluded that communities of color are starting to recognize that to ensure that public research accurately address the environmental hazards and health problems they face, the communities themselves must be involved in defining problems, and working with scientists in gathering and analyzing data.<sup>152</sup> Having the benefit of local knowledge allows the experts to “identify gaps in expert assumptions, improve professional understanding of local practices, and identify locally relevant health promoting interventions.”<sup>153</sup> The author acknowledges that CBPR can help achieve environmental justice but that the process is not without limitations and cannot alone remedy persistent underlining inequalities.<sup>154</sup>

<sup>143</sup> Jason Corburn, “Combining Community-Based Research and Local Knowledge to Confront Asthma and Subsistence-Fishing Hazards in Greenpoint/Williamsburg, Brooklyn, New York,” *Environmental Health Perspective*, vol. 110, supp. 2, April 2002, p. 241 (hereafter cited as Corburn, “Combining Community-Based Research and Local Knowledge”).

<sup>144</sup> Institute of Medicine, *Toward Environmental Justice*, p. 6.

<sup>145</sup> *Ibid.*, p. 7.

<sup>146</sup> *Ibid.*, pp. 7–8.

<sup>147</sup> Corburn, “Combining Community-Based Research and Local Knowledge,” p. 241.

<sup>148</sup> Hynes interview.

<sup>149</sup> *Ibid.*

<sup>150</sup> *Ibid.*

<sup>151</sup> *Ibid.*

<sup>152</sup> Corburn, “Combining Community-Based Research and Local Knowledge,” p. 247.

<sup>153</sup> *Ibid.*

<sup>154</sup> *Ibid.*

Nonetheless, this type of participatory research empowers communities affected by environmental hazards by providing them with resources.<sup>155</sup> For example, the Healthy Public Housing Project funds community partners.<sup>156</sup> This project teaches local organizations to conduct standardized surveys of housing conditions and environmental samplings of evidence of respiratory health conditions.<sup>157</sup> The analysis of this data is performed at a university. The outcome of the analysis is then presented to the community partners for their interpretation. Therefore, the resulting public policy is based on workable solutions to the environmental health issue, by involving nonprofit groups and other stakeholders in the research.<sup>158</sup>

Criticism that scientific research on adverse health impacts caused by environmental hazards is tainted by the involvement of community groups and environmental organizations is unfounded. The involvement of community groups is being recognized as an important aspect of scientific research. The current trend at federal agencies is to require that Requests for Proposals for conducting environmental justice research work include evidence of partnerships with community organizations, nonprofit groups, local residents, and area universities.<sup>159</sup> The objective of this partnership is to design studies that link causation of environmental problems with public health.<sup>160</sup> Moreover, this collaboration enhances the relevance of studies by establishing community partners who actually experience the particular environmental justice problem that is being examined through research.<sup>161</sup> Community collaboration in scientific research is not only legitimate but an important part of overall comprehensive scientific research on the adverse human health effects of environmental hazards.

## CONCLUSION

In general, there is inadequate literature on the relationship between environmental factors and health status. More specifically, there is insufficient data examining the relationships among the environmental, racial, ethnic, and other socioeconomic determinants of adverse health outcomes. More research clarifying these relationships and closer collaboration between health and environmental communities are needed.

This collaboration is necessary if adverse health risks in minority and poor communities are to be identified and addressed. One of the factors limiting collaboration is inadequate funding for research and the lack of involvement of these communities in the research that is being done.

While scientific and health research, collection of data, and dissemination of health hazard information to the affected communities are necessary for the public to participate fully in the environmental decision-making process, the four federal agencies reviewed by the Commission do not have measures in place to provide technical assistance or technical assistance grants to allow the public to participate more meaningfully in decision-making processes.

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<sup>155</sup> Ibid.

<sup>156</sup> Ibid. The Department of Housing and Urban Development and other private organizations fund the Healthy Public Housing Project.

<sup>157</sup> Ibid.

<sup>158</sup> Ibid.

<sup>159</sup> Ibid.

<sup>160</sup> Ibid.

<sup>161</sup> Ibid.

Finally, with the exception of EPA, the agencies reviewed by the Commission have expended little or no effort to make scientific and technical information accessible by using plain language and providing information in languages other than English.

To resolve concerns about sufficient research and data collection on the nexus between environmental factors and health, community and researcher access to technical assistance grants, and community access to scientific and technical information that is translated into nonscientific terms, the Commission makes the following recommendations for agencies and their technical assistance grant recipients:

- Federal agencies should create and support a closer relationship between the health policy community and the environmental community through increased availability of technical assistance grants.
- Federal agencies should conduct, and support others in conducting, more scientific research on the relationship between the levels and types of exposures to environmental pollutants/hazards and human health status/outcomes in communities of color and poor communities.
- Federal agencies conducting research on human health and the environment, and their technical assistance grant recipients, should also include the development of interventions to reduce or prevent health risks for all people, but especially overburdened minority and poor communities.
- Federal agencies conducting research on human health and the environment, and their technical assistance grant recipients, should consider race, national origin, age, gender, and income when examining the environmental, human health, and economic effects of environmental decisions.
- Federal agencies conducting research on human health and the environment, and their technical assistance grant recipients, should give priority to the health impact of environmental hazards on minority and low-income communities, as they experience disproportionate exposure to environmental hazards.
- Federal agencies conducting research on human health and the environment, and their technical assistance grant recipients, must include a participatory role in research and data collection for communities.
- Federal agencies should develop and adopt, based on the best currently available scientific research, formal cumulative impact standards to assess adverse health impacts related to multiple and long-term exposure to various environmental hazards and pollutants.
- Federal agencies should develop and adopt, based on the best currently available scientific research, formal cumulative impact standards that account for social, behavioral, and other factors that increase susceptibility to environmental hazards and pollutants.
- Federal agencies should create, based on the best currently available scientific research, a presumption of the existence of an adverse health impact based on multiple and long-term exposure to various environmental pollutants.
- Federal agencies should make providing technical assistance to affected communities a priority by earmarking funds for technical assistance programs.

- Federal agencies should administer their technical assistance programs in such a way as to avoid unnecessarily complex application processes and delays in awarding funding. Timely access to scientific and technical information is essential to providing minority and low-income communities an equal opportunity to influence environmental decisions that present concerns about adverse health consequences.
- Federal agencies should take great steps to ensure that scientific information and technical data relating to their environmental decisions be made accessible to the affected populations by translating this information into lay terms, when doing so does not compromise the integrity of the information.

## Chapter 7

# Establishing Goals, Creating Evaluation Criteria, and Building Accountability in Environmental Justice Programs and Management

Executive Order 12,898 was intended to ensure that federal agencies incorporate the principles of environmental justice into their missions. To do so, agencies must integrate environmental justice into the core design of their programs, and rigorously evaluate the success of these programs in meeting their aims. Agencies must develop accountability standards and evaluation criteria that would measure the success, or lack thereof, their programs have in implementing the goals of the Executive Order.

A major focus of the Commission's investigation is to determine, for each agency being reviewed, to what extent environmental justice issues are being treated as a central element of that agency's mission. In order to do so, the Commission examined (1) the extent to which the agency has proposed and undertaken environmental justice initiatives and programs; and (2) the extent to which the agency has drawn up and implemented outcome expectations, goals, and accountability measures surrounding those initiatives and programs.

As will be discussed below, while each agency has developed and implemented its own policies and programs, critically, none of these agencies report any current agencywide, comprehensive assessments or accountability measures for their environmental justice activities. Without assessments, it is difficult to determine how well agencies are incorporating the Executive Order into their missions.<sup>1</sup> Meaningful evaluation criteria need to be implemented for agencies to assess their efforts, and more specifically, for agencies to measure if their environmental justice initiatives are linked to success in reducing health and environmental concerns for affected communities.

## ENVIRONMENTAL PROGRAM REVIEW BY AGENCY

Section 1-103 of the Executive Order requires federal agencies to adopt environmental justice strategies that address enforcement of health and environmental statutes in minority and low-income populations.<sup>2</sup> The programmatic impacts of the Executive Order vary by agency, as does the extent to which the agencies have incorporated the order into their missions. For example, EPA's Office of Environmental Justice (OEJ) is responsible for integrating environmental justice initiatives into

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<sup>1</sup> Denis Binder et al., *A Survey of Federal Agency Response to President Clinton's Executive Order No. 12898 on Environmental Justice*, 31 ENVTL. L. REP. 11139 (2001) (hereafter cited as Binder et al., *Federal Agency Response to President Clinton's Executive Order No. 12898*). For example, while EPA has evaluated grant programs, GAO has criticized EPA for failing to require grant recipients to report adequate information about the success of Brownfields projects. See U.S. Environmental Protection Agency, Office of Environmental Justice, *Environmental Justice Small Grants Program: Emerging Tools for Local Problem Solving*, EPA 200-R-99-001, 1999; see also U.S. Government Accounting Office, *Brownfields: Information on the Programs of EPA and Selected Sites*, GAO-01-52, December 2000.

<sup>2</sup> Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, Exec. Order No. 12,898, 3 C.F.R. 859 (1995), reprinted as amended in 42 U.S.C. § 4321 at 72-73, § 1-103 (1994 & Supp. IV 1998) (hereafter cited as Exec. Order No. 12,898).

EPA's programs, policies, and activities, and is responsible for providing direction and constructive feedback to the regional and headquarters offices on their implementation strategies and measurable results. HUD has integrated environmental justice concerns into its existing programs in four areas:

- Empowerment Zones and Enterprise Communities.
- Childhood lead-paint poisoning.
- Brownfields redevelopment.
- Colonias, involving impoverished areas along the U.S.-Mexico border.<sup>3</sup>

DOT has issued a departmentwide order incorporating Title VI as part of its official policies, which emphasizes incorporating environmental justice concerns into the planning process as a preventative measure.<sup>4</sup> At DOI, however, there are very few consistent agencywide environmental justice policies and significant variation exists in the way each bureau approaches environmental justice concerns.<sup>5</sup>

## The Environmental Protection Agency

### *EPA's Environmental Justice Initiatives and Programs*

Carol Browner, EPA administrator during the Clinton administration, made the advancement of environmental justice part of the mission of the agency. In 1994, the Office of Environmental Equity became the Office of Environmental Justice. OEJ oversees the integration of environmental justice into EPA's policies, programs, and activities, and serves as the agency's central point of contact as part of EPA's decentralized environmental justice program.<sup>6</sup> OEJ conducts outreach and education activities, and helps set EPA's environmental justice priorities and policies.<sup>7</sup> In addition to OEJ, EPA also has an Office of Civil Rights (OCR), which addresses discrimination claims brought under Title VI. Moreover, as will be discussed below, EPA, pursuant to the Executive Order, convenes the Interagency Working Group on Environmental Justice (IWG), and is its chair.<sup>8</sup>

In 1993, EPA established environmental justice as one of the seven guiding principles in its Strategic Plan.<sup>9</sup> In 1994, EPA created the National Environmental Justice Advisory Council (NEJAC) to provide advice and recommendations to the administrator on environmental justice matters and their integration into EPA's core programs.<sup>10</sup> And in April 1995, EPA issued its first Environmental Justice Strategy to implement President Clinton's Executive Order. It contained five major focus areas:

<sup>3</sup> Binder et al., *A Survey of Federal Agency Response to President Clinton's Executive Order No. 12898*, p. 11137.

<sup>4</sup> U.S. Department of Transportation, DOT 5610.2, Order to Address Environmental Justice in Minority Populations and Low-Income Populations, 62 Fed. Reg. 18,377 (Apr. 15, 1997) (hereafter cited as DOT Order 5610.2).

<sup>5</sup> Binder et al., *A Survey of Federal Agency Response to President Clinton's Executive Order No. 12898*, p. 11146.

<sup>6</sup> National Environmental Justice Advisory Council, *Integration of Environmental Justice in Federal Agency Programs* (report developed from NEJAC Meeting, Dec. 11–14, 2000), p. 22 (hereafter cited as NEJAC, *Integration of Environmental Justice*); see also Karen D. Higginbotham, director, Office of Civil Rights, U.S. Environmental Protection Agency, letter to Office of the General Counsel, U.S. Commission on Civil Rights, Aug. 22, 2003, p. 16 (hereafter cited as Higginbotham letter).

<sup>7</sup> Higginbotham letter, p. 16.

<sup>8</sup> Exec. Order No. 12,898, § 1-102.

<sup>9</sup> NEJAC, *Integration of Environmental Justice*, p. 22.

<sup>10</sup> See National Academy of Public Administration, *Environmental Justice in EPA Permitting: Reducing Pollution in High-Risk Communities Is Integral to the Agency's Mission*, December 2001, pp. 19, 30 (hereafter cited as NAPA, *Environmental Justice in EPA Permitting*) (citing National Environmental Justice Council Charter, July 29, 1999). EPA also

- Public participation and accountability, partnerships, outreach, and communication with stakeholders.
- Health and environmental research.
- Data collection, analysis, and stakeholder access to public information.
- American Indian and Indigenous environmental protections.
- Enforcement, compliance assurance, and regulatory reviews.<sup>11</sup>

Each of EPA's 10 regions also has a regional environmental justice program that serves as the primary resource for environmental justice issues for that geographic area and integrates environmental justice into EPA's activities within its programs.<sup>12</sup>

In August 2001, former EPA Administrator Whitman affirmed the new administration's "firm commitment to the issue of environmental justice and its integration into all programs, policies, and activities."<sup>13</sup> In a memorandum to her staff, Administrator Whitman required EPA employees to incorporate environmental justice considerations in their programs, the regional offices, and partnership agreements with the states.<sup>14</sup> She explained that "it shall be the continuing responsibility of the federal government to assure all Americans safe, healthful, productive and aesthetically and culturally pleasing surroundings."<sup>15</sup> Following up on the administrator's instructions, the agency has begun to incorporate environmental justice concerns into its activities. For example, in response to her memorandum, each headquarters and regional office has developed, or is currently completing, environmental justice action plans.<sup>16</sup> Each organization began deploying these "Action Plans to Integrate Environmental Justice" in FY 2003. While "flexible" in nature, according to EPA, the key elements of the action plans are management accountability, internal/external stakeholder involvement, data collection/management, training, environmental justice assessment, and evaluation.<sup>17</sup> The plans,

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began to offer technical and financial support to communities to address their environmental justice concerns. U.S. Environmental Protection Agency, Office of Enforcement and Compliance Assurance (OECA), *Small Grants Program Application Guidance FY 2000*, October 2001. In 1994, OEJ implemented the Environmental Justice Small Grants Program. Between 1994 and May 2003, EPA provided grants totaling over \$16.4 million to 973 recipients who have implemented community-based projects to address environmental justice problems and to promote education and outreach on avoiding or reducing environmental hazards. See U.S. Environmental Protection Agency, Office of Environmental Justice, "Environmental Justice Fact Sheet, EPA's Commitment to Environmental Justice," EPA/300-F-03-003, May 2003 (hereafter cited as EPA, "Environmental Justice Fact Sheet"); see also U.S. Environmental Protection Agency, Office of Environmental Justice, *Environmental Justice Small Grants Program: Emerging Tools for Local Problem-Solving*, 1999, <[www.epa.gov/compliance/resources/publications/ej/ej\\_smgrants\\_emerging\\_tools.pdf](http://www.epa.gov/compliance/resources/publications/ej/ej_smgrants_emerging_tools.pdf)> (last accessed July 11, 2003) (describing 46 successful environmental justice small grants awarded between 1994 and 1997).

<sup>11</sup> NEJAC, *Integration of Environmental Justice*, p. 22. Following up on its 1995 plan, in April 1996, EPA released its Environmental Justice Implementation Plan. See U.S. Environmental Protection Agency, Office of Environmental Justice, *1996 Environmental Justice Implementation Plan*, EPA/300-R-96-004, April 1996.

<sup>12</sup> NEJAC, *Integration of Environmental Justice*, p. 22.

<sup>13</sup> Christine Todd Whitman, administrator, U.S. Environmental Protection Agency, memorandum to Assistant Administrators et al., "EPA's Commitment to Environmental Justice," Aug. 9, 2001.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

<sup>16</sup> U.S. Environmental Protection Agency, "Action Plans to Integrate Environmental Justice," <[www.epa.gov/compliance/resources/reports/actionplans/ej/index.html](http://www.epa.gov/compliance/resources/reports/actionplans/ej/index.html)> (last accessed July 31, 2003) (providing links to each available headquarters and regional action plan).

<sup>17</sup> *Ibid.*

however, are “strategic in nature,” representing the commitments of each office over the next one to five years.<sup>18</sup>

Currently, in response to Administrator Whitman’s memorandum, OEJ is scheduled to launch an Environmental Justice Collaborative Problem Solving Grant Program for 15 nonprofit community-based organizations.<sup>19</sup> The goal of this \$1.5 million grant program is to support community-based organizations utilizing EPA tools to find viable solutions for their communities’ environmental justice concerns.<sup>20</sup> In addition, EPA has developed a workshop called the “Fundamentals of Environmental Justice,” which teaches, according to the agency, “(1) the analytic skills necessary to identify and address issues of environmental justice and (2) communication skills that allow individuals to have greater confidence and ability in discussing the sometimes complex and controversial aspects of the issue.”<sup>21</sup> The workshop is a product of the Environmental Justice Training Collaborative, and led by OEJ.<sup>22</sup> According to EPA, over the past two years, the workshop has trained more than 1,500 people, with participants from federal, state, and local governments, grassroots organizations, business, and academia.<sup>23</sup> OEJ is preparing additional environmental justice training modules for permit writers and inspectors.<sup>24</sup>

Each regional office and several headquarters offices also offer this environmental justice training course to staff. According to EPA, in many offices, training for all new employees is mandatory.<sup>25</sup> In early 2002, EPA reported that each program office within the agency will have trained personnel capable of delivering the workshop by late spring 2002.<sup>26</sup> With the exception of two regional offices, which are using a different training course, all regional offices have the capacity to present this training.<sup>27</sup> Three regional offices have committed to training all personnel using the course, sometime in 2003.<sup>28</sup> The regional offices have also agreed to conduct Regional Listening Sessions to engage the community, in partnership with federal, state, tribal, and local governments, on their environmental, health, and quality of life concerns.<sup>29</sup>

Finally, in 2002, President Bush signed the Small Business Liability Relief and Brownfields Revitalization Act into law, which authorizes up to \$250 million a year for Brownfields grants.<sup>30</sup> Brownfields are abandoned or underutilized industrial or commercial properties where redevelopment is

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<sup>18</sup> Ibid.

<sup>19</sup> EPA, “Environmental Justice Fact Sheet.”

<sup>20</sup> Ibid.

<sup>21</sup> U.S. Environmental Protection Agency, Response to the Commission’s Interrogatory Question 18, April 2002 (hereafter cited as EPA, Response to Interrogatory Question).

<sup>22</sup> See EPA, “Environmental Justice Fact Sheet.”

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

<sup>25</sup> EPA, Response to Interrogatory Question 34.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid.

<sup>28</sup> The agency also made clear that it is in the process of developing additional training courses specifically geared toward the permitting personnel for the Resource Conservation and Recovery Act, the Clean Water Act, and the Clean Air Act. EPA, Response to Interrogatory Question 34.

<sup>29</sup> EPA, “Environmental Justice Fact Sheet.”

<sup>30</sup> See Pub. L. No. 107-118, 115 Stat. 2356 (2002) (codified at 42 U.S.C.S. §§ 9601–9675 (2003)) (the law expands the definition of what has been considered a Brownfields, and now includes \$50 million for the assessment and cleanup of low-risk petroleum contaminated sites).

hindered by possible environmental contamination.<sup>31</sup> EPA estimates that there are between 500,000 and 1 million Brownfields, typically in urban areas.<sup>32</sup> EPA, with over 20 other agencies, has developed the Brownfields Federal Partnership Action Agenda, through which the agencies work together to help communities prevent, assess, safely clean up, and sustainably reuse Brownfields.<sup>33</sup> In the memorandum of understanding, EPA has committed to providing as much as \$850 million for Brownfields over the next five years through assessments, cleanups, revolving loan funds, job training, and state/tribal grants.<sup>34</sup>

The act also amends the Superfund law by removing liability for prospective purchasers, contiguous property owners, and “innocent” landowners of Brownfields sites.<sup>35</sup> These provisions provide exemptions under the Superfund law for small businesses to avoid fines when, for example, sending waste or trash to waste sites. According to the Bush administration, these exemptions provide an incentive for businesses to redevelop Brownfields without fear of liability.<sup>36</sup> The act provides greater assurances to the states that the federal government will not override Brownfields cleanup decisions under state programs.<sup>37</sup>

While taking further steps to revitalize Brownfields in minority and poor communities is of utmost importance, it is still too soon to tell if this new legislation will remove hindrances to the economic development of these sites, or if removing responsibility from companies will merely remove legal remedies available to those most hurt by contamination. Moreover, an important challenge in the act’s implementation will be to ensure that state Brownfields cleanup standards adequately protect public health and the environment in the long run.<sup>38</sup> States must also maintain records, accessible to the public, on sites where toxic substances have not been completely removed after cleanup actions have been completed.<sup>39</sup>

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<sup>31</sup> U.S. Environmental Protection Agency, “President Signs Legislation to Clean Environment and Create Jobs,” Jan. 11, 2002, <[www.epa.gov/epahome/headline\\_011102.htm](http://www.epa.gov/epahome/headline_011102.htm)> (last accessed July 3, 2003) (hereafter cited as EPA, “President Signs Legislation to Clean Environment and Create Jobs”).

<sup>32</sup> *Ibid.*

<sup>33</sup> U.S. Environmental Protection Agency, *Brownfields Federal Partnership Action Agenda*, EPA 500-F-02-151, November 2002.

<sup>34</sup> U.S. Newswire, “EPA May 29 Latest Developments,” *Environmental Reporter*, May 29, 2003. The act authorizes a \$50 million grant program to establish and enhance state and tribal Brownfields response programs, which address the assessment, cleanup, and development of Brownfields sites and other contaminated sites. U.S. Environmental Protection Agency, *Grant Funding Guidance for State and Tribal Response Programs*, EPA 500-F-01-152, November 2002. In addition, on June 20, 2003, EPA announced \$73.1 million in Brownfields funds for a variety of grants made available under the act. EPA selected 176 applicants from 37 states and tribes. U.S. Environmental Protection Agency, “Environmental News,” press release, June 20, 2003, <[www.epa.gov/newsroom](http://www.epa.gov/newsroom)> (last accessed June 30, 2003). The act also continued EPA’s Brownfields job training grant program, which is used to teach environmental cleanup skills to individuals living in low-income areas near Brownfields sites. Since the program began in 1998, EPA has awarded 56 job training pilots totaling \$10.7 million. On May 16, 2003, EPA awarded 20 communities in seven states \$200,000 each to provide environmental job training at Brownfields sites. U.S. Environmental Protection Agency, EPA Newsroom, “EPA Awards \$2 Million to Seven States for New Brownfields Job Training Grants in Ten Communities,” May 16, 2003, <[www.epa.gov/newsroom/headline\\_051603.htm](http://www.epa.gov/newsroom/headline_051603.htm)> (last accessed June 27, 2003).

<sup>35</sup> EPA, “President Signs Legislation to Clean Environment and Create Jobs.”

<sup>36</sup> *Ibid.*

<sup>37</sup> See Natural Resources Defense Council, “Congress Passes Brownfields Cleanup Legislation,” press release, Dec. 20, 2001.

<sup>38</sup> See *ibid.*

<sup>39</sup> *Ibid.*

### ***EPA's Accountability Mechanisms and Measures of Progress***

In December 2001, the National Academy of Public Administration (NAPA) issued a report titled *Environmental Justice in EPA Permitting: Reducing Pollution in High-Risk Communities Is Integral to the Agency's Mission*, in which it was recommended that EPA set clear expectations for producing results that are linked to the agency's mission, and that staff be given clear performance measures.<sup>40</sup> The academy's panel stressed that EPA should establish clear accountability for results and ensure that its managers and staff are receptive to, and willing to execute fully, their responsibilities for achieving environmental justice.<sup>41</sup> Administrator Whitman's August 2001 statement is a good example of strong language and expectations, but there are no concrete, agencywide measures of accountability to ensure the success of EPA's environmental justice programs. The panel found that despite the commitment of EPA leadership, EPA had not fully integrated environmental justice considerations into the agency's core mission or its staff functions.<sup>42</sup> NAPA identified several reasons for this deficiency, including EPA leadership's failure to establish goals for specific outcomes, to adopt methods for measuring progress toward EPA's commitment, or to develop accountability measures to ensure that EPA managers and staff work toward implementing environmental justice policies.<sup>43</sup> According to NAPA, the existing agency culture remains a barrier to incorporating environmental justice into EPA's programs, as do inadequate tools and training, workload burdens, and a lack of understanding by EPA staff that environmental justice concerns matter.<sup>44</sup>

NAPA also noted that, with regard to EPA's 1995 Environmental Justice Strategy, EPA has not established any performance or accountability measures for its five goals, making it difficult to assess the degree to which, if any, the agency has made progress in implementing the goals since their inception.<sup>45</sup> NAPA noted that EPA has committed to and published biennial reports on its environmental justice activities, but that those reports merely outline EPA's activities, not whether they were linked to, or successful in, achieving their earlier enunciated environmental justice goals.<sup>46</sup> Similarly, NEJAC reported that EPA, among other agencies, provided no evidence of evaluations of progress in environmental justice program implementation.<sup>47</sup> It is this lack of accountability which, despite leadership's statements professing a commitment to environmental justice, sends a message to managers and staff that the agency does not place sufficient importance on these issues to require that EPA's employees be held accountable for their implementation. Leadership must set expectations that staff not treat environmental justice as an optional exercise.

NAPA recommended, among other things, that EPA should:

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<sup>40</sup> NAPA, *Environmental Justice in EPA Permitting*, p. 5.

<sup>41</sup> *Ibid.*, p. 2.

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*, p. 17.

<sup>45</sup> *Ibid.*

<sup>46</sup> See, e.g., U.S. Environmental Protection Agency, *Environmental Justice 2000 Biennial Report: Continuing to Move Toward Collaborative and Constructive Problem-Solving*, EPA/300-R-01-005, October 2001; U.S. Environmental Protection Agency, *1998 Environmental Justice Biennial Report: Moving Towards Collaborative and Constructive Problem-Solving*, EPA/R-00-004, July 2000. As of this writing, the next report, *Environmental Justice Biennial Accomplishments Report (2001–2002): Constructive Engagement and Collaborative Problem-Solving*, has not yet been released, but is expected in 2003.

<sup>47</sup> NEJAC, *Integration of Environmental Justice*, p. 35.

- Establish an accountability process that includes clear performance measures for establishing how well EPA managers and staff are able to incorporate environmental justice into their work, especially into air, water, and waste permits.
- Set clear expectations for producing results that are linked to the agency's mission.
- Provide training for staff to fully understand how environmental justice issues have a direct relationship to the agency's mission.
- Provide adequate time and resources so staff can carry out their responsibilities for protecting public health for disproportionately affected communities.
- Link rewards and performance reviews to how fully staff incorporate environmental justice into their work.<sup>48</sup>

In conjunction with its environmental justice hearings, the Commission posed interrogatories to the various agencies regarding their implementation of the Executive Order. When asked if EPA had implemented accountability and performance measures consistent with the NAPA recommendations, the agency responded that it had “implemented no new environmental justice accountability and performance measures since the NAPA issued the above referenced report.”<sup>49</sup> EPA stated, however, that its Environmental Justice Executive Steering Committee, composed of deputy assistant administrators of various major program offices and the deputy regional administrators of three regions, met on January 24, 2002, to discuss the NAPA report, among other things.<sup>50</sup> The Executive Steering Committee has formed an Accountability Workgroup to “explore further some of the NAPA's recommendations”<sup>51</sup> and to “establish mechanisms to better track and evaluate progress toward achieving environmental justice objectives.”<sup>52</sup>

EPA did report that, since the issuance of the NAPA report, it has continued to enhance its capacity to train personnel on environmental justice issues.<sup>53</sup> While at least one EPA region reports that it has sought feedback from training participants,<sup>54</sup> EPA, itself, has not published comprehensive information assessing such training or provided information on how, or if, the training is successfully linked to the integration of environmental justice concepts into its initiative and programs.<sup>55</sup> While the training is a laudable and important effort, without this information, the effect of the training for minority communities cannot be assessed.

Although it is the director of OEJ who is responsible for agencywide environmental justice policy, the agency reports that “the issues of environmental justice are decentralized, being the responsibility

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<sup>48</sup> NAPA, *Environmental Justice in EPA Permitting*, pp. 5, 18.

<sup>49</sup> EPA, Response to Interrogatory Question 15.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

<sup>52</sup> EPA, Response to Interrogatory Question 28.

<sup>53</sup> EPA, Response to Interrogatory Question 18.

<sup>54</sup> *See, e.g.*, U.S. Environmental Protection Agency, Region 10 Office of Civil Rights, Enforcement and Environmental Justice, *Environmental Justice Strategies and Activities*, Sept. 26, 2002, p. 9 (stating that formal written evaluations are distributed to all training participants and that the results are discussed during “lesson learned” meetings and maintained in a database).

<sup>55</sup> EPA recently reported that at the conclusion of each Fundamentals Workshop, it distributes an evaluation to participants. EPA states that the average headquarters score is 9.2/10 and 8.8/10 in the regions. Higginbotham letter, p. 17. EPA, however, did not explain the nature or substance of the evaluation, provide information on the types of questions included, or even provide the topic areas upon which the workshop is “evaluated.”

of each office within the Agency.”<sup>56</sup> Indeed, “[e]very office within the Agency is responsible for implementing and enforcing environmental justice to the extent of that office’s mandate.”<sup>57</sup> This lack of centralized responsibility for environmental justice implementation makes it difficult to create agencywide goals, to oversee goals when, and if, they are implemented, or to hold persons and/or offices accountable when the goals are not achieved. Most importantly, it signals that environmental justice is not a priority of the agency’s mission. For example, EPA headquarters and regional offices have, on a decentralized basis, recently adopted environmental justice action plans that recognize the need for program accountability. If the plans are carried out, they signal an important beginning.<sup>58</sup> Several of these plans, however, are generally prospective in nature, or provide little detailed or concrete measures that will ensure the successful implementation of environmental justice programs or ensure that agency employees are held responsible for the implementation.<sup>59</sup>

EPA’s stated commitment to environmental justice must be followed by measures that have teeth. EPA leadership could signal its commitment by fully implementing current environmental laws and policies. For example, pursuant to § 309 of the Clean Air Act, EPA reviews all environmental impact statements (EISs) prepared by other federal agencies.<sup>60</sup> Pursuant to President Clinton’s memorandum accompanying the Executive Order, EPA should use its review authority to ensure that the other agencies are analyzing the environmental impacts on minority and low-income populations.<sup>61</sup> While EPA cannot force another agency to rewrite an EIS, it could issue a negative review of the EIS if it does not address the environmental justice concerns of these communities.<sup>62</sup> In addition, EPA could request additional environmental justice funding,<sup>63</sup> or withdraw funding to states without adequate

<sup>56</sup> EPA, Response to Interrogatory Question 32.

<sup>57</sup> EPA, Response to Interrogatory Question 33.

<sup>58</sup> See, e.g., U.S. Environmental Protection Agency, *Region 4 Action Plan to Integrate Environmental Justice*, January 2003, pp. 11–12 (detailing a multi-tier approach to program evaluation and accountability, including recognition of employees’ efforts through the agency’s award program); U.S. Environmental Protection Agency, *Region 6 FY 2003 Environmental Justice Action Plan*, p. 16 (requiring program divisions to regularly furnish the deputy regional administrator with accountability information regarding, for example, permitting issues resolved in environmental justice communities; increased outreach efforts in environmental justice communities; and enforcement, cleanups, and corrective actions in environmental justice communities); U.S. Environmental Protection Agency, Office of Enforcement and Compliance Assurance, *FY 2003 Action Plan to Integrate Environmental Justice*, June 30, 2003, pp. 3–4 (stating that in March 2003, the principal deputy assistant administrator for OECA established the Environmental Justice Action Council, a management-level group that is responsible for developing strategic approaches for the incorporation of environmental justice into OECA programs; the principal deputy assistant administrator will also lead the efforts to ensure accountability).

<sup>59</sup> See, e.g., U.S. Environmental Protection Agency, *Region 5 Environmental Justice Action Plan for Fiscal Years 2003 and 2004*, October 2002, p. 9 (noting that the regions’ environmental justice efforts will be evaluated annually based on “self-identified measures,” and on measures that will be developed through OEJ and the agency strategic planning process); U.S. Environmental Protection Agency, *Region 7 Environmental Justice Work Plan FY 2003—Narrative*, p. 13 (noting that regional staff continue to work toward effectively identifying methods to measure success for action; “challenges” have arisen regarding measure of success in areas such as community outreach, education, and public involvement); U.S. Environmental Protection Agency, Office of Air and Radiation, *2002 Action Plan to Integrate Environmental Justice*, p. 33 (noting that “[s]uccess with OAR Environmental Justice initiatives is measured by the extensive number of ongoing projects and their effectiveness in meeting targeted goals and addressing far reaching issues which are critical to the environmental justice community”).

<sup>60</sup> 42 U.S.C. § 7609 (1994).

<sup>61</sup> See Presidential Memorandum Accompanying Executive Order 12,898, 30 WEEKLY COMP. PRES. DOC. 279, 280 (Feb. 11, 1994); see also Binder et al., *A Survey of Federal Agency Response to President Clinton’s Executive Order No. 12898*, p. 11138.

<sup>62</sup> Binder et al., *A Survey of Federal Agency Response to President Clinton’s Executive Order No. 12898*, p. 11138.

<sup>63</sup> On March 20, 2003, Administrator Whitman testified before the Senate Appropriations Subcommittee on VA/HUD and Independent Agencies regarding the agency’s FY 04 budget request for \$7.6 billion, which is less than the \$8.1 billion appropriated for FY 2003. See Susan Bruninga, “EPA Criticized by Senators for Cuts to Clean Water State Revolving

enforcement of environmental laws.<sup>64</sup> It could also review its penalty policies and enhance penalties for willful, repeated noncompliance by any facility located in an environmental justice community.<sup>65</sup> EPA could condition approval of permits on environmental justice grounds, but has chosen not to interpret its authority as broadly as federal environmental laws would allow it.<sup>66</sup>

## The Department of Housing and Urban Development

### *HUD's Environmental Justice Initiatives and Programs*

As discussed above, Executive Order 12,898 states that designated federal agencies prepare environmental justice strategies. To fulfill the mandate, HUD issued *Achieving Environmental Justice: A Departmental Strategy* in March 1995. The statement identified four environmental justice priority areas:

- Revitalizing central cities through Brownfields redevelopment.
- Fighting childhood lead-based paint poisoning.
- Creating healthy, viable environments through Empowerment Zones and Enterprise Communities.
- Improving fundamental living conditions in the Colonias.<sup>67</sup>

Under each of the initiatives, HUD's objective was to "integrate environmental justice principles and concerns into existing programs."<sup>68</sup> More recently, HUD has developed an environmental strategy based on three principles:

- Environmentally sound housing policies that preserve affordability and promote economic growth and investment.

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Fund," *Environmental Reporter* (BNA), vol. 34, no. 13, Mar. 28, 2003, p. 710 (stating that Senate appropriators "chastised" the EPA administrator for a proposed \$500 million cut in state revolving funds administered under the Clean Water Act).

<sup>64</sup> National Environmental Policy Commission, *Report to the Congressional Black Caucus & Congressional Black Caucus Foundation Environmental Justice Braintrust*, Sept. 28, 2001, p. 96 (hereafter cited as NEPC, *Report to the Congressional Black Caucus*).

<sup>65</sup> EPA reported that its Title VI regulations delineate the actions available to obtain compliance. See 40 C.F.R. § 7.130 (2002). Specifically, 40 C.F.R. § 7.130 states that the agency's Office of Civil Rights may deny, annul, suspend, or terminate EPA assistance for instances of noncompliance. The regulations also state that EPA may use any other means authorized by law to get compliance, including a referral of the matter to the Department of Justice. *Id.* In addition, according to DOT, the major disincentive to the agency's recipients of federal financial assistance is "the desire to avoid a finding of violation of Title VI on its record." U.S. Department of Transportation, Response to the Commission's Interrogatory Question 25, April 2002 (hereafter cited as DOT, Response to Interrogatory Question). The agency states, however, that "DOT uses no special incentives with such recipients other than to encourage partnerships and good relations to foster compliance with the law." *Ibid.*

<sup>66</sup> See, e.g., Mary M. O'Lone, Lawyers' Committee for Civil Rights Under Law, "Remarks Before the National Academy of Public Administration," Aug. 30, 2001, <[www.lawyerscomm.org/projects/environmentalspeech2.html](http://www.lawyerscomm.org/projects/environmentalspeech2.html)> (last accessed June 30, 2003). For example, Ms. O'Lone notes that EPA could place conditions or deny permits that have an adverse disparate impact on communities of color. *Ibid.*

<sup>67</sup> U.S. Department of Housing and Urban Development, "A Commitment to Communities: Achieving Environmental Justice, An Implementation Report," March 1996, Introduction, pp. 1–2, <<http://www.hud.gov/offices/cpd/energyenviron/environment/subjects/justice/acommitmenttocommunities.pdf>> (last accessed July 11, 2003) (hereafter cited as HUD, "A Commitment to Communities").

<sup>68</sup> *Ibid.*, p. 2.

- Safe and healthy public housing that promotes greater self-sufficiency.
- A redesign of current programs and services, within an environmental justice framework, to empower citizens to take action in their communities.<sup>69</sup>

Despite the fact that HUD has not assigned personnel to work full time on environmental justice matters,<sup>70</sup> HUD reports that it has made progress in implementing the principles of environmental justice and Executive Order 12,898. This progress includes the Brownfields Economic Development Initiative, a 10 percent set-aside for Colonias in the states' Community Development Block Grant program,<sup>71</sup> and extensive policies and procedures for implementing NEPA.<sup>72</sup> In a 1996 report on implementing the Executive Order, HUD stated that "it will promote sound environmental considerations in community development and housing policies that, at the same time, will preserve housing affordability and encourage rural and urban economic growth and private sector investment."<sup>73</sup>

As discussed in its 1995 strategy, HUD has primarily integrated environmental justice considerations into four of its existing programs. The first area incorporating environmental justice concerns is HUD's Brownfields cleanup and redevelopment programs. As described above, many minority and

<sup>69</sup> U.S. Department of Housing and Urban Development, Environmental Justice Web site, <[www.hud.gov/offices/cpd/energyenviron/enviornment/subjects/justice/index.cfm](http://www.hud.gov/offices/cpd/energyenviron/enviornment/subjects/justice/index.cfm)> (last accessed July 14, 2003); *see also* NEJAC, *Integration of Environmental Justice*, p. 31.

<sup>70</sup> As discussed in Chapter 1, at HUD, one person in the Office of Community Viability, part of the Community Planning and Development Office, spends approximately 20 percent of his time on environmental justice policy, training, and public affairs. Binder et al., *A Survey of Federal Agency Response to President Clinton's Executive Order No. 12898*, p. 11139. In addition, HUD has approximately 20 staff members responsible for completing NEPA environmental reviews, who devote about 5 percent of their time on environmental justice concerns. In the Office of Fair Housing and Equal Opportunity, five to six staff members spend 20 percent of their time working on environmental justice complaints. *Ibid.*

<sup>71</sup> U.S. Department of Housing and Urban Development, Response to the Commission's Interrogatory Question 15, April 2002 (hereafter cited as HUD, Response to Interrogatory Question). The FY 2003 budget proposed a new \$16 million allocation for a Colonias Gateway Initiative, to improve coordination, facilitate partnerships, and build capacity in support of U.S. Colonias communities in the U.S.-Mexico border states. *See* HUD, Response to Interrogatory Question 16. The \$16 million for the Colonias Gateway Initiative requested by HUD, however, was not appropriated. Carole W. Wilson, associate general counsel, Office of Litigation, U.S. Department of Housing and Urban Development, e-mail to Office of the General Counsel, U.S. Commission on Civil Rights, Aug. 15, 2003, p. 2 (hereafter cited as Wilson Aug. 15, 2003, e-mail).

<sup>72</sup> Other examples of progress in HUD's implementation of the Executive Order include the following activities. First, the underlying regulatory framework for implementing NEPA in internal policies and procedures is contained in HUD's environmental regulations, 24 C.F.R. pts. 50, 58, both of which include compliance with Executive Order 12,898 as part of the environmental review. Second, environmental justice is included among HUD's project selection factors for Brownfields project applications. Third, the agency's Notices of Funding Availability (NOFAs) include references to environmental requirements, which include Executive Order 12,898. Finally, the agency prepares and issues Environmental Compliance NEPA Notices for specific programs, including, for example (1) HUD Notice CPD-99-01, Field Environmental Review Processing for HUD Colonias Initiative (HCI) Grants, effective January 1999–January 2000; (2) HUD Notice CPD-99-07, Field Environmental Review Processing for the HUD Urban Empowerment Zones (EZ) Program (Round II), effective September 1999–September 2000; (3) Protocol for Environmental Review for HUD Rural Housing and Economic Development (RHED) Program, July 1999; (4) HUD Notice CPD-01-11, Environmental Reviews and the HOME Investment Partnerships Program; (5) Multifamily Accelerated Processing (MAP) Guide, Chapters 1 and 9; (6) HUD Notice PIH-99-37, Indian Housing Block Grant Guide to Procedures if Tribes Do Not Assume Environmental Review Responsibilities Under 25 C.F.R. pt. 58; and (7) HUD Handbook 4590.01 Rev-1, Housing Finance Agency (HFA) Risk-Sharing Pilot Program. *See* HUD, Response to Interrogatory Question 21.

<sup>73</sup> HUD, "A Commitment to Communities," Introduction, p. 1. Although not specifically earmarked for environmental justice initiatives, recently, for example, HUD announced that more than \$2.3 billion is available to assist homeless people, produce affordable housing, stimulate economic develop, and protect children from the danger of lead poisoning under its FY 2003 SuperNOFA (Notification of Funding Availability) funding program. U.S. Department of Housing and Urban Development, "HUD Unveils Simplified 'SuperNOFA,'" news release, Apr. 21, 2003, <[www.hud.gov/news/release.cfm?content=pr03-047.cfm](http://www.hud.gov/news/release.cfm?content=pr03-047.cfm)> (last accessed June 30, 2003).

poor communities reside near abandoned and contaminated sites.<sup>74</sup> Cleanup efforts are vital to the health and economic development of these communities. HUD and EPA have worked together on various projects to clean up and redevelop Brownfields and to provide assistance to communities on financial, technical, and environmental issues.<sup>75</sup> In addition, in 1997, former Vice President Gore announced the Brownfields National Partnership Action Agenda, in which HUD and EPA partnered with more than 15 federal agencies to address local cleanup issues.<sup>76</sup> In 1998, the program facilitated environment cleanup and economic development and designed 16 “Brownfields Showcase Communities” to serve as models.<sup>77</sup> In 2000, the partnership selected 12 additional communities.<sup>78</sup> These designated communities received technical and financial assistance from HUD, as well as the time of a HUD staff member to assist in the coordination of the cleanup.<sup>79</sup> Subsequently, the Bush administration developed a new program, the Brownfields Federal Partnership, in which HUD is a partner with more than 20 other federal agencies.<sup>80</sup> The President’s FY 2003 budget request included \$25 million for urban redevelopment and Brownfields cleanup through HUD.<sup>81</sup>

HUD has also developed environmental justice-related financing and grant programs as part of its Brownfields project. The Brownfields Economic Development Initiative is intended to stimulate and promote economic and community development by making grants available to assist in the financing of Brownfields secured by § 108 loan guarantees.<sup>82</sup> Section 108 is the loan guarantee provision of HUD’s Community Development Block Grant program, which since 1998, has allocated funds for the cleanup and economic redevelopment of Brownfields.<sup>83</sup> According to HUD, all selected Brownfields projects must meet at least one of the following objectives: benefit to low- and moderate-income persons, elimination of slums and blight, or ability to address “imminent threats and urgent needs.”<sup>84</sup>

HUD’s second main environmental justice project area is its lead-based paint initiative. To combat lead-paint poisoning, HUD is working to fulfill the requirements of both Executive Order 12,898 and the Residential Lead Hazard Reduction Act of 1992.<sup>85</sup> HUD’s goal is to ensure lead-free homes

<sup>74</sup> Binder et al., *A Survey of Federal Agency Response to President Clinton’s Executive Order No. 12898*, p. 11145.

<sup>75</sup> Ibid.

<sup>76</sup> U.S. Environmental Protection Agency, “Showcase Community Fact Sheet,” EPA 500-F-00-240, October 2000 (hereafter cited as EPA, “Showcase Community Fact Sheet”).

<sup>77</sup> Ibid. See also Binder et al., *A Survey of Federal Agency Response to President Clinton’s Executive Order No. 12898*, p. 11145.

<sup>78</sup> EPA, “Showcase Community Fact Sheet.”

<sup>79</sup> Binder et al., *A Survey of Federal Agency Response to President Clinton’s Executive Order No. 12898*, p. 11145.

<sup>80</sup> See U.S. Environmental Protection Agency, “Brownfields Partnerships and Outreach,” <[www.epa.gov/swerosps/bf/partnr.htm](http://www.epa.gov/swerosps/bf/partnr.htm)> (last accessed Aug. 24, 2003); U.S. Department of Housing and Urban Development, “HUD to Play Key Role in Administration’s Brownfield Clean Up Effort,” press release, No. 02-011, Jan. 11, 2002.

<sup>81</sup> EPA, “President Signs Legislation to Clean Environment and Create Jobs.”

<sup>82</sup> U.S. Department of Housing and Urban Development, “Brownfields Economic Development Initiative (BEDI),” <[www.hud.gov/offices/cpd/economicdevelopment/programs/bedi/index.cfm](http://www.hud.gov/offices/cpd/economicdevelopment/programs/bedi/index.cfm)> (last accessed June 30, 2003) (hereafter cited as HUD, “Brownfields Economic Development Initiative”); see also Binder et al., *A Survey of Federal Agency Response to President Clinton’s Executive Order No. 12898*, p. 11145. In FY 2002, HUD granted \$29 million in BEDI funds, capped at \$2 million per award. HUD, “Brownfields Economic Development Initiative.”

<sup>83</sup> See HUD, “Brownfields Economic Development Initiative.”

<sup>84</sup> See Wilson Aug. 15, 2003, e-mail, p. 3. All Brownfields grant applications are rated and awarded points based on the level of distress, which includes poverty rate, in both the applicant’s location and the surrounding area that will benefit from the project. Ibid.

<sup>85</sup> See Binder et al., *A Survey of Federal Agency Response to President Clinton’s Executive Order No. 12898*, p. 11145; see also Wilson Aug. 15, 2003, e-mail, p. 3.

without jeopardizing the availability of, or driving up the cost of, affordable housing. HUD has tested 95 percent of the nation's public housing built before 1978 for lead paint.<sup>86</sup> HUD has also established a grant program, the Lead Hazard Control Grant Program, which since its inception has made 245 grants totaling \$703 million to state and local governments in 36 states and the District of Columbia to assist in lead education, testing, and abatement in private low-income housing.<sup>87</sup>

The third project incorporating environmental justice considerations is HUD's Initiative for Renewal Communities, urban Empowerment Zones and urban Enterprise Communities (RC/EZ/EC).<sup>88</sup> This program encourages development in neighborhoods with high unemployment and poverty. Designated communities receive federal funding designed to encourage private investment. In 1994, HUD designated six EZs and 66 rural ECs, and in 1999, 20 urban EZs and 20 rural ECs.<sup>89</sup> In December 2001, HUD re-energized the program by designating an additional eight EZs and 40 urban and rural RCs.<sup>90</sup> These new designees will use a \$22 billion tax incentive to provide jobs, open businesses, and rehabilitate and build new houses nationwide.<sup>91</sup> Through a program called Healthy Communities Environmental Mapping, or HUD E-MAPS, HUD provides maps of these RC/EZ/EC communities that indicate the location, type, and performance of the HUD-funded activities, as well as some select EPA information on Brownfields, hazardous wastes, air pollution, and water discharges.<sup>92</sup>

Finally, the Colonias program at HUD is designed to provide housing and development needs to impoverished areas along the U.S.-Mexico border. These communities suffer from high poverty, a lack of sewer and water systems, and proper housing. Pursuant to federal statutes, HUD has mandated that Arizona, California, New Mexico, and Texas designate a certain percentage of their Community Development Block Grants (CDBG) to address the infrastructure problems in the Colonias.<sup>93</sup> In addition, some grants provided by HUD's Rural Housing and Economic Development Grant Program, for

<sup>86</sup> HUD, "A Commitment to Communities," Section I, Making Strides in the Four Priority Areas, p. 3.

<sup>87</sup> U.S. Department of Housing and Urban Development, Office of Healthy Homes and Lead Hazard Control, Memorandum for Grantees from David E. Jacobs, director, re: Grant Programs Progress Report, Apr. 8, 2003. In addition, FY 2003 SuperNOFA provides \$125 million for the Healthy Homes and Lead Hazard Control Programs. U.S. Department of Housing and Urban Development, "Office of Healthy Homes and Lead Hazard Control Highlights," <[www.hud.gov/offices/lead/index.cfm](http://www.hud.gov/offices/lead/index.cfm)> (last accessed June 30, 2003).

<sup>88</sup> U.S. Department of Housing and Urban Development, "Welcome to the Community Renewal Initiative," <[www.hud.gov/offices/cpd/economicdevelopment/programs/rc/index.cfm](http://www.hud.gov/offices/cpd/economicdevelopment/programs/rc/index.cfm)> (last accessed July 29, 2003).

<sup>89</sup> Binder et al., *A Survey of Federal Agency Response to President Clinton's Executive Order No. 12898*, p. 11144. In November 2001, HUD published a report on the progress of six urban EZs and 12 urban ECs through the first five years of the program titled *Interim Assessment of the Empowerment Zone and Enterprise Communities (EZ/EC) Program: A Progress Report and Appendices*. HUD, Response to Interrogatory Question 28; see also <[www.huduser.org/publications/econdev/ezec\\_rpt.html](http://www.huduser.org/publications/econdev/ezec_rpt.html)> (last accessed Aug. 26, 2003).

<sup>90</sup> U.S. Department of Housing and Urban Development, "Welcome to the Community Renewal Initiative," <[www.hud.gov/offices/cpd/economicdevelopment/programs/rc/index.cfm](http://www.hud.gov/offices/cpd/economicdevelopment/programs/rc/index.cfm)>.

<sup>91</sup> *Ibid.*

<sup>92</sup> See *ibid.* See also U.S. Department of Housing and Urban Development, "Environmental Maps," <[www.hud.gov/offices/cio/emaps/index.cfm](http://www.hud.gov/offices/cio/emaps/index.cfm)> (last accessed June 30, 2003).

<sup>93</sup> Binder et al., *A Survey of Federal Agency Response to President Clinton's Executive Order No. 12898*, p. 11145; see also U.S. Department of Housing and Urban Development, "Colonias Set-aside Provision (State Community Development Block Grant Program)," <[www.hud.gov/progdesc/colonias.cfm](http://www.hud.gov/progdesc/colonias.cfm)> (last accessed June 30, 2003) (hereafter cited as HUD, "Colonias Set-aside"). The CDBG program is authorized under Title I of the Housing and Community Development Act of 1974. 42 U.S.C. §§ 5301 *et seq.* (1994). Program regulations are at 24 C.F.R. pt. 570. The FY 1997 Appropriations Act made the Colonias Set-Aside Provision a permanent part of the CDBG program. The Office of Block Grant Assistance in HUD's Office of Community Planning and Development administers the program. See HUD, "Colonias Set-aside."

job creation and housing needs, go to assist Native American communities, including some in the Colonias.<sup>94</sup>

In 2000, as part of the HUD/DOJ Title VI training of HUD's field equal opportunity specialists, instructors provided guidance on environmental justice.<sup>95</sup> Training sessions were held in four cities throughout the country and involved approximately 30 to 35 HUD equal opportunity specialists who work in field offices.<sup>96</sup> Furthermore, over 1,000 other HUD employees received training in environmental justice and Executive Order 12,898.<sup>97</sup> For its Native American programs, HUD has also offered training on how to conduct environmental reviews as stipulated under the Native American Housing and Self-Determination Act of 1996.<sup>98</sup>

### ***HUD's Accountability Mechanisms and Measures of Progress***

Under the Clinton administration, HUD demonstrated a commitment to integrating environmental justice into the agency's mission. HUD had directed substantial federal environmental resources at minority and low-income communities, especially in the Brownfields development and the lead-paint abatement programs.<sup>99</sup> Despite integration of environmental justice into a variety of HUD programs, HUD admits that it has not created any outcome expectations and goals for its environmental justice initiatives.<sup>100</sup> Nor has HUD developed a central mechanism for communicating specific environmental justice goals and expectations to staff or managers.<sup>101</sup> The agency also admits to having no specific methods for measuring staff or manager progress toward achieving specific environmental justice goals.<sup>102</sup> This precludes the agency, therefore, from using expectations and goals in evaluating the impact or success of a given initiative or program.<sup>103</sup> Recently, however, HUD did state in a press release that as part of its notice of funding (SuperNOFA) application process, HUD will place "a greater emphasis on measuring performance and demonstrating results. . . . HUD's application process require[s] applicants to establish clear goals and create methods for measuring how they are meeting them."<sup>104</sup> This is an important first step, but must be followed up with concrete measures.

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<sup>94</sup> Binder et al., *A Survey of Federal Agency Response to President Clinton's Executive Order No. 12898*, p. 11145.

<sup>95</sup> HUD, Response to Interrogatory Question 14.

<sup>96</sup> Ibid. (stating that training sessions were held in Philadelphia, PA, Fort Lauderdale, FL, Fort Worth, TX, and San Francisco, CA).

<sup>97</sup> Ibid.

<sup>98</sup> See NEJAC, *Integration of Environmental Justice*, p. 31; Wilson Aug. 15, 2003, e-mail, p. 3. See also 25 U.S.C.S. §§ 4101 et seq. (2003).

<sup>99</sup> Binder et al., *A Survey of Federal Agency Response to President Clinton's Executive Order No. 12898*, p. 11149.

<sup>100</sup> HUD, Response to Interrogatory Question 17.

<sup>101</sup> HUD, Response to Interrogatory Question 19. According to the agency, however, "there is considerable information available to staff and managers on the Official HUD Web site on Environmental Justice . . . , including the Department's EJ Strategy and Implementation Reports." Ibid.

<sup>102</sup> HUD, Response to Interrogatory Question 19. HUD comments, however, "the achievement of such environmental goals, as with any other goals, is taken into account in rating the performance of employees, managers and executives." Ibid.

<sup>103</sup> HUD, Response to Interrogatory Question 18.

<sup>104</sup> U.S. Department of Housing and Urban Development, "HUD Unveils Simplified 'SuperNOFA,'" news release, Apr. 21, 2003, <[www.hud.gov/news/release.cfm?content=pr03-047.cfm](http://www.hud.gov/news/release.cfm?content=pr03-047.cfm)> (last accessed June 30, 2003). Through its FY 2003 SuperNOFA program, HUD is making available \$2.3 billion in program funds covering 43 funding opportunities by HUD offices. See Super Notice of Funding Availability (SuperNOFA) for HUD's Discretionary Programs for Fiscal Year 2003, 68 Fed. Reg. 21,002 (Apr. 25, 2003).

## The Department of Transportation

### *DOT's Environmental Justice Initiatives and Programs*

DOT asserts that achieving environmental justice is an “undeniable mission of the agency.”<sup>105</sup> For several years, DOT has had an environmental justice element in its Performance Plan under the Government Performance and Results Act.<sup>106</sup> In June 1995, DOT published its Environmental Justice Strategy.<sup>107</sup> And in 1997, in order to expand upon Executive Order 12,898, DOT issued a departmentwide order titled *DOT Order to Address Environmental Justice in Minority Populations and Low-Income Populations*, which among other things, incorporates Title VI in its official policy and practices.<sup>108</sup> The order describes how DOT and its operating administrations will integrate the goals of environmental justice in their daily operations.<sup>109</sup> The order also mandates the consideration of environmental justice principles throughout the planning and NEPA processes.<sup>110</sup>

Section 8 of the DOT order, “Actions to Address Disproportionately High and Adverse Effects,” requires, as part of the normal NEPA process, that the head of each DOT administration determine whether DOT programs will have a disproportionately high adverse impact on minority communities.<sup>111</sup> Importantly, if such adverse impact is found, then the proposed activity cannot move forward unless mitigation or less discriminatory alternatives (LDAs) that could avoid or reduce the problem cannot be practically implemented.<sup>112</sup> For the agency to implement the program, it would have to first prove that the less discriminatory alternatives would impose other adverse health impacts or involve increased costs of an “extraordinary magnitude” for them to be rejected.<sup>113</sup> Placing this burden of proof on the agency serves to protect communities that can propose LDAs since the agency has to show that the alternative practice has adverse health effects or is too costly to implement.

The order also instructs DOT administrations to use existing authorities to collect data and conduct research associated with environmental justice concerns.<sup>114</sup> According to DOT:

Steps are to be taken to provide members of minority and low-income populations access to information about environmental impacts of programs and seek public involvement. In planning DOT operations, operating administrations are instructed to propose measures to avoid, minimize [and/or] mitigate disproportionately high adverse environmental and public health effects. Where potential disproportionately high and adverse effects are identified, special considerations apply.<sup>115</sup>

<sup>105</sup> U.S. Department of Transportation, “An Overview of Transportation and Environmental Justice,” May 2000, <[www.fhwa.dot.gov/environment/ej2000.htm](http://www.fhwa.dot.gov/environment/ej2000.htm)> (last accessed July 14, 2003).

<sup>106</sup> DOT, Response to Interrogatory Question 20.

<sup>107</sup> U.S. Department of Transportation, Strategy on Environmental Justice, 60 Fed. Reg. 33,896 (June 25, 1995).

<sup>108</sup> This order, DOT 5610.2, 62 Fed. Reg. 18,377 (Apr. 15, 1997), integrated the agency’s 1995 Environmental Justice Strategy, 60 Fed. Reg. 33,896 (June 29, 1995).

<sup>109</sup> *Id.*

<sup>110</sup> DOT, Response to Interrogatory Question 27.

<sup>111</sup> DOT Order 5610.2, § 8.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> DOT Order 5610.2, § 5.

<sup>115</sup> DOT, Response to Interrogatory Question 27.

DOT established the Environmental Justice Coordinating Council, an environmental justice committee that includes senior DOT leadership, to coordinate the issue agencywide and to review the effect of transportation decisions on minority communities.<sup>116</sup>

The council has encouraged other operating administrations of DOT to incorporate environmental justice issues into their work.<sup>117</sup> Various units, including the Federal Highway Administration (FHWA), the Federal Aviation Administration (FAA), the U.S. Coast Guard (USCG), and the Maritime Administration (MARAD), have also issued their own environmental justice orders or the equivalent for their operating administrations.<sup>118</sup> In 1998, the FHWA and the Federal Transit Administration (FTA) issued guidance to their respective staffs regarding environmental justice and Title VI considerations in the recertification of metropolitan planning organizations.<sup>119</sup> FHWA and FTA have also published outreach assistance material, developed a joint Web site, and created a case study booklet to educate federal transportation agency staff, state transportation departments, metropolitan planning organizations, transit providers, and the public about environmental justice.<sup>120</sup> MARAD has worked on environmental justice issues in the disposal of surplus ships.<sup>121</sup> The USCG has worked with the Department of Justice on using software to identify communities that may be at risk.<sup>122</sup>

With regard to training staff, DOT reports that it has incorporated environmental justice issues into education and training programs “for appropriate employees, including senior officials.”<sup>123</sup> FHWA and FTA have conducted extensive environmental justice training, including the training of transportation staff in 50 states and Puerto Rico since June 2000.<sup>124</sup> FHWA’s Office of Civil Rights has a training program titled “Preventing Discrimination Initiative” for responsible state staff members that addresses, for example, forms of discrimination, case studies in highway planning and program impacts, and public participation.<sup>125</sup> In addition to the training conducted mostly by FHWA and FTA

<sup>116</sup> DOT, Response to Interrogatory Question 20; *see also* Marc Brenman, senior policy advisor, Office of the Secretary, U.S. Department of Transportation, e-mail to Office of the General Counsel, U.S. Commission on Civil Rights, Aug. 15, 2003 (hereafter cited as Brenman Aug. 15, 2003, e-mail); Binder et al., *A Survey of Federal Agency Response to President Clinton’s Executive Order No. 12898*, p. 11147. DOT also reports in its responses to the Commission’s interrogatories that it is currently establishing a “civil rights directors leadership council,” although provides no further information on the role of this new council. *See* DOT, Response to Interrogatory Question 20.

<sup>117</sup> Binder et al., *A Survey of Federal Agency Response to President Clinton’s Executive Order No. 12898*, p. 11147.

<sup>118</sup> DOT, Response to Interrogatory Question 20.

<sup>119</sup> *Ibid.* For example, on December 2, 1998, FHWA issued its own environmental justice order modeled on DOT’s order. *See* U.S. Department of Transportation, *FHWA Actions to Address Environmental Justice in Minority Populations*, Order 6640.23 (1998), <[www.fhwa.dot.gov/legregs/directives/orders/6640\\_23.htm](http://www.fhwa.dot.gov/legregs/directives/orders/6640_23.htm)> (last accessed June 30, 2003). This order requires the FHWA to implement the principles of the DOT Order 5610.2 and Executive Order 12,898 by incorporating environmental justice principles in all FHWA programs, policies, and activities.

<sup>120</sup> *See* U.S. Department of Transportation, *Transportation and Environmental Justice Case Studies*, FHWA-EP-01-010, December 2000, p. iii.

<sup>121</sup> *Ibid.* In addition, MARAD participates with the Office of the Secretary in reviewing applications for the national Brownfields Showcase Communities Project. Applicants are asked to describe the extent to which low-income, minority, and other disadvantaged communities would participate in and benefit from community Brownfields redevelopment. According to DOT, MARAD will continue efforts to (1) disseminate information encouraging investment by the maritime industry in areas listed as Brownfields; (2) provide urban and rural communities with port and marine environmental information that is used in promoting the development of EZs and ECs as it relates to environmental justice; and (3) participate in a DOT working group that is focusing on how to involve the transportation industry in state/local economic development. *See* DOT, Response to Interrogatory Question 21.

<sup>122</sup> DOT, Response to Interrogatory Question 20.

<sup>123</sup> DOT, Response to Interrogatory Question 19.

<sup>124</sup> DOT, Responses to Interrogatory Questions 19 and 20.

<sup>125</sup> *See* Brenman Aug. 15, 2003, e-mail.

staff,<sup>126</sup> DOT states that “these [environmental justice] matters have generally been discussed in periodic civil rights directors meetings, attended by civil rights directors of all the operating administrations, coordinated by DOOCR [the Departmental Office of Civil Rights].”<sup>127</sup> DOT also reports that FTA has sponsored conferences on environmental justice, the FAA has conducted environmental training for its staff, and the Federal Motor Carrier Safety Administration (FMCSA) has developed a training course titled “Preventing Discrimination in the Federally-Assisted Motor Carrier Safety Programs.”<sup>128</sup> Environmental justice concepts are integrated into FMCSA’s training, which was provided four times in 2001 and once in 2002 to FMCSA and grantee staff nationwide.<sup>129</sup>

### ***DOT’s Accountability Mechanisms and Measures of Progress***

As Dr. Robert Bullard has written, air pollution caused by vehicular emissions is an “ongoing environmental justice challenge.”<sup>130</sup> He has noted that 65 and 80 percent of African Americans and Hispanics, respectively, compared with just 57 percent of whites, live in counties with substandard air quality, largely caused by vehicle emissions.<sup>131</sup>

DOT’s efforts will be critical in alleviating this and other transportation-related concerns. The agency has indicated that it prioritized environmental justice at the highest levels.<sup>132</sup> DOT’s Environmental Justice Coordinating Council, composed of senior officials, promotes sustained leadership attention to DOT activities, including environmental justice concerns.<sup>133</sup> According to NEJAC, however, it is not clear to what extent these officials have the ability to influence positive implementation of environmental justice into DOT’s key activities.<sup>134</sup> Their active participation is critical.

DOT stated in its interrogatory responses that the agency “has not created separate outcome expectations and goals for each [environmental justice] initiative and program it has undertaken or proposes.”<sup>135</sup> Moreover, the agency “has not adopted methods for measuring staff or manager progress toward achieving specific environmental justice goals.”<sup>136</sup> In regard to training, like the other agencies, DOT and some of its operating administrations have made progress in the implementation of training courses to promote the integration of environmental justice principles into their programs,

<sup>126</sup> See DOT, Response to Interrogatory Question 19. See also U.S. Department of Transportation, “FWHA and FTA Environmental Justice Training,” <[www.fhwa.gov/environment/ejustice/train/index.htm](http://www.fhwa.gov/environment/ejustice/train/index.htm)> (last accessed June 30, 2003).

<sup>127</sup> DOT, Response to Interrogatory Question 19. DOOCR has called meetings on environmental justice, especially in order to set up an Environmental Justice Council. The operating administrations and Office of the Secretary representatives both from inside and outside the civil rights offices have attended these meetings. *Ibid.*

<sup>128</sup> DOT, Responses to Interrogatory Questions 19 and 20.

<sup>129</sup> DOT, Response to Interrogatory Question 19. See also Brenman Aug. 15, 2003, e-mail. DOT also reports that MARAD has added language related to environmental justice considerations into the ship financing application process for vessel construction and shipyard modernization. In addition, key MARAD headquarters personnel have received training from the U.S. Department of Justice on environmental justice issues and the Civil Rights Act of 1964. DOT, Response to Interrogatory Question 19.

<sup>130</sup> Dr. Robert D. Bullard, “New Civil Rights Battleground,” *Blue Ridge Press*, Nov. 25, 2002, <[www.blueridgepress.com](http://www.blueridgepress.com)> (last accessed July 30, 2003).

<sup>131</sup> *Ibid.*

<sup>132</sup> Binder et al., *A Survey of Federal Agency Response to President Clinton’s Executive Order No. 12898*, p. 11149, n. 133.

<sup>133</sup> NEJAC, *Integration of Environmental Justice*, p. 35.

<sup>134</sup> *Ibid.*

<sup>135</sup> DOT, Response to Interrogatory Question 22.

<sup>136</sup> DOT, Response to Interrogatory Question 24.

but those courses lack critical assessments necessary to determine the impact or success of the trainings. FHWA recently reported that it has a “Preventing Discrimination Initiative” for relevant state staff, but it did not provide any supporting data critically assessing the training program or its impact on environmental justice communities.

Finally, while having its own environmental justice order is evidence of progress, without critical assessments or comprehensive accountability measures in place, it is difficult to track or review positive steps in environmental justice program implementation. DOT did report, however, that each external civil rights staff member and manager is “evaluated according to a performance plan that incorporates [environmental justice] among more general objectives.”<sup>137</sup>

## The Department of the Interior

### *DOI's Environmental Justice Initiatives and Programs*

In August 1994, then Secretary of the Department of the Interior Bruce Babbitt initiated activities to support the Executive Order and to work with EPA in achieving an environmental justice strategy that would benefit minority and low-income communities.<sup>138</sup> One of these initiatives was to include environmental justice considerations in NEPA. Accordingly, the director of DOI's Office of Environmental Policy and Compliance (OEPD) mandated that “all environmental documents should specifically analyze and evaluate the impacts of any proposed projects, actions or decisions on minority and low-income populations and communities, as well as the equality of the distribution of the benefits and risks of those decisions.”<sup>139</sup>

In 1995, DOI published its Strategic Plan on Environmental Justice. The plan outlined four goals for implementing the Executive Order:

- Involve minority and low-income communities in environmental decision-making and ensure access to information.
- Provide environmental justice training to DOI employees.
- Use and expand research and data collection on new solutions to environmental justice concerns.
- Partner with grassroots, community, business, labor, tribal, and governmental groups to advance environmental justice.<sup>140</sup>

DOI has a decentralized structure, and each of its eight bureaus implements DOI's strategy independently.<sup>141</sup> The plan outlines what each bureau is doing to comply with the Executive Order and

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<sup>137</sup> Ibid.

<sup>138</sup> Bruce Babbitt, secretary, U.S. Department of the Interior, “Memorandum to All Assistant Secretaries, Inspector General, Heads of All Bureaus and Office,” Apr. 17, 1994, p. 3, <<http://www.doi.gov/oepe/ECM/ECM95-3.pdf>> (last accessed Aug. 1, 2003).

<sup>139</sup> Ibid., p. 1.

<sup>140</sup> U.S. Department of the Interior, “Strategic Plan on Environmental Justice,” 1995, <[www.doi.gov/oepe/ej\\_goal1.html](http://www.doi.gov/oepe/ej_goal1.html)> (last accessed Aug. 28, 2003).

<sup>141</sup> The bureaus are the Bureau of Land Management (BLM), Office of Surface Mining (OSM), Minerals Management Service (MMS), Bureau of Reclamation (BOR), U.S. Fish and Wildlife Service (FWS), National Park Service (NPS), Bureau of Indian Affairs (BIA), and U.S. Geological Survey (USGS). For more information on the bureaus' activities, see U.S. Department of the Interior Web site, <[www.doi.gov/bureaus.html](http://www.doi.gov/bureaus.html)> (last accessed June 30, 2003).

other federal regulations and policies, as well as each bureau's own efforts to solve environmental problems and increase public participation.<sup>142</sup>

Within DOI, the director of the Office of Environmental Policy and Compliance is responsible for environmental justice oversight and initiatives, including implementation of the Executive Order. OEPC facilitates the discussion among DOI's bureaus on environmental issues and formulates DOI's environmental policy after consulting the appropriate bureaus and offices.<sup>143</sup> No one person at DOI, however, has environmental justice compliance as his or her sole responsibility.<sup>144</sup> Environmental justice responsibility is decentralized in each of the eight bureaus, and each bureau is responsible for environmental justice oversight in each of its jurisdictions.<sup>145</sup>

Because of the decentralized responsibility, each bureau has a coordinator who ensures that environmental justice is incorporated into the mission of the bureau.<sup>146</sup> Some bureaus have created offices or other programs related to environmental justice.<sup>147</sup> Examples of programs at the bureau level include efforts by MMS to gather information on the effects of its offshore oil and gas program on affected communities in Alaska.<sup>148</sup> The Office of Surface Mining (OSM) is trying to provide notice of all mining projects on tribal lands to Native tribes.<sup>149</sup> Since 1993, BLM has had a formal policy of identifying minority, tribal, or low-income communities that may be affected during the preliminary NEPA process, assessing the impacts on these populations, and trying to include them in the public participation process.<sup>150</sup> The National Park Service (NPS) has worked to involve potentially affected communities in the NEPA process, including scoping, the development of alternatives, analysis of impacts, and public review of NPS-proposed activities.<sup>151</sup> In urban areas, NPS has programs that introduce minority and low-income children and young adults to environmental and conservation issues.<sup>152</sup> In 1998, FWS issued an environmental justice policy for implementing the Executive Order, calling upon FWS' regions to identify and address adverse health and environmental effects of their programs and activities affecting minority and low-income populations.<sup>153</sup>

In addition, the Executive Order directs that DOI consult with tribes and the Interagency Working Group on Environmental Justice (IWG) to coordinate steps to address environmental justice issues for federally recognized tribes.<sup>154</sup> BIA is an active participant in the IWG and its tribal subgroup.<sup>155</sup> BIA, EPA, HUD, and the Indian Health Service meet to address tribal health and environmental con-

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<sup>142</sup> U.S. Department of the Interior, Response to the Commission's Interrogatory Question 12, May 2002 (hereafter cited as DOI, Response to Interrogatory Question).

<sup>143</sup> DOI, Response to Interrogatory Question 10.

<sup>144</sup> NEJAC, *Integration of Environmental Justice*, p. 19.

<sup>145</sup> Binder et al., *A Survey of Federal Agency Response to President Clinton's Executive Order No. 12898*, p. 11146.

<sup>146</sup> NEJAC, *Integration of Environmental Justice*, p. 19; see also U.S. Department of the Interior, "Environmental Justice at DOI," <[www.doi.gov/oepc/ej\\_examples.html](http://www.doi.gov/oepc/ej_examples.html)> (last accessed at June 30, 2003).

<sup>147</sup> More detailed information about DOI's activities on environmental justice is available on the department's Web site at <[www.doi.gov/oepc](http://www.doi.gov/oepc)> (last accessed June 30, 2003).

<sup>148</sup> Binder et al., *A Survey of Federal Agency Response to President Clinton's Executive Order No. 12898*, p. 11146.

<sup>149</sup> *Ibid.*

<sup>150</sup> NEJAC, *Integration of Environmental Justice*, p. 19.

<sup>151</sup> *Ibid.*, p. 21.

<sup>152</sup> *Ibid.*

<sup>153</sup> DOI, Response to Interrogatory Question 14.

<sup>154</sup> Exec. Order No. 12,898, § 6-606.

<sup>155</sup> DOI, Response to Interrogatory Question 15.

cerns, and BIA has prepared a memorandum of understanding with the groups.<sup>156</sup> In August 2000, BIA participated in the Environmental Justice Roundtable in Albuquerque, New Mexico, and, in February 2001, BIA also participated in a similar roundtable held at the Alaska Forum on the Environment in Anchorage, Alaska.<sup>157</sup>

DOI reports that it has begun the integration of environmental justice into its training programs. For example, in May 2003, DOI held a conference on the environment in Phoenix, Arizona.<sup>158</sup> The conference included training on environmental justice concerns, tailored to tribal issues, and was open to and attended by federal government officials, local residents, and tribal members.<sup>159</sup> In compliance with FWS' own mandate to implement the Executive Order into its programs, in 1999, FWS Region 5 conducted a one-day training course in Hadley, Massachusetts, for all employees working on environmental justice issues.<sup>160</sup> All members of the Regional Environmental Justice Team were required to attend.<sup>161</sup> FWS Region 5 also conducted an NEPA training workshop in February 2002, which addressed environmental justice and tribal issues.<sup>162</sup> The region plans on offering additional training workshops.<sup>163</sup>

### ***DOI's Accountability Mechanisms and Measures of Progress***

As discussed above, EPA, HUD, and DOT have made progress on implementing environmental justice programs, while progress at DOI has been less extensive.<sup>164</sup> Due in part to DOI's decentralized structure, no agencywide process exists for identifying and tracking environmental justice matters.<sup>165</sup> Other than its Strategic Plan, there are very few consistent, centralized environmental justice policies, and significant variation exists in the way each bureau approaches environmental justice concerns.<sup>166</sup>

In response to the Commission's interrogatory regarding the creation of outcome expectations for DOI programs, DOI submitted responses by office and bureau. Not one of the responding entities had developed or implemented any specific performance assessments, outcome expectations, or accountability measures with regard to any of its environmental justice initiatives, programs, or trainings.<sup>167</sup>

While the Executive Order gives little guidance on how environmental justice can be integrated into environmental programs, all the federal agencies subpoenaed to attend the Commission hearings

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<sup>156</sup> Binder et al., *A Survey of Federal Agency Response to President Clinton's Executive Order No. 12898*, p. 11140.

<sup>157</sup> DOI, Response to Interrogatory Question 15.

<sup>158</sup> See Deborah Charette, assistant solicitor, Branch of Personnel Litigation and Civil Rights, Office of the Solicitor, U.S. Department of the Interior, facsimile to Office of the General Counsel, U.S. Commission on Civil Rights, Aug. 20, 2003, pp. 6-7.

<sup>159</sup> *Ibid.*

<sup>160</sup> DOI, Response to Interrogatory Question 14.

<sup>161</sup> *Ibid.* (noting that all of the Northeast Region's Indian tribes and all state directors of natural resources were also invited to attend).

<sup>162</sup> DOI, Response to Interrogatory Question 23.

<sup>163</sup> *Ibid.*

<sup>164</sup> Binder et al., *A Survey of Federal Agency Response to President Clinton's Executive Order No. 12898*, p. 11149.

<sup>165</sup> *Ibid.*, p. 11146.

<sup>166</sup> *Ibid.*

<sup>167</sup> DOI, Response to Interrogatory Question 17. FWS did note that it "has begun developing criteria for evaluating the success of the environmental justice program." DOI, Response to Interrogatory Question 18. It also stated that for all its programs it measures success by "the miles or acres of habitat restored, increased populations, management plans developed, endangered species recovered and enhanced quality of life." *Ibid.*

have, at least, begun incorporating environmental justice concerns into their work. In the last few years, these agencies, however, have not made major investments in promoting and integrating environmental justice into the core design of their programs. And possibly with the exception of HUD's lead-paint remediation efforts, no agency has conducted an evaluation or assessment of its environmental justice efforts or has comprehensively developed standards that would measure the degree of success programs have had on affected communities.<sup>168</sup>

## INTERAGENCY WORKING GROUP

In addition to requiring federal agencies to incorporate environmental justice into their own missions, the Executive Order created the federal Interagency Working Group on Environmental Justice (IWG).<sup>169</sup> The IWG is made up of 11 federal agencies, and chaired by the administrator of EPA. It is designed to provide a mechanism for ensuring that federal agencies meet their objectives under the Executive Order.<sup>170</sup> In 1999, IWG began to develop the concept of an Integrated Federal Interagency Environmental Justice Action Agenda as a way of incorporating environmental justice in all the policies and programs of the federal agencies.<sup>171</sup> As Charles Lee, associate director for policy and interagency liaison for EPA's Office of Environmental Justice, testified at the February 2002 Commission hearing, a collaborative model can be effective in comprehensively and proactively addressing the interrelated environmental, public health, economic, and social community-based concerns of environmental justice.<sup>172</sup> He noted that multidimensional problems are most effectively addressed when all the interested parties are involved in crafting solutions.<sup>173</sup>

In May 2000, the IWG developed and issued its Action Agenda, which identified 15 interagency environmental justice demonstration projects, in which two or more federal agencies work with state, local, tribal, business, and community representatives to address community environmental justice concerns.<sup>174</sup> Mr. Lee stated that the Action Agenda, as exemplified by the demonstration projects, should accomplish the following five goals:

<sup>168</sup> NEJAC, *Integration of Environmental Justice*, p. 35.

<sup>169</sup> Exec. Order No. 12,898, § 1-102.

<sup>170</sup> See generally Exec. Order No. 12,898, § 1-102(b)(1)–(7).

<sup>171</sup> Binder et al., *A Survey of Federal Agency Response to President Clinton's Executive Order No. 12898*, p. 11135.

<sup>172</sup> Charles Lee, associate director for policy and interagency liaison, Office of Environmental Justice, U.S. Environmental Protection Agency, testimony before the U.S. Commission on Civil Rights, hearing, Washington, DC, Feb. 8, 2002, official transcript, pp. 56–57 (hereafter cited as February Hearing Transcript).

<sup>173</sup> Ibid.

<sup>174</sup> See NEJAC, *Integration of Environmental Justice*, p. 40; Binder et al., *A Survey of Federal Agency Response to President Clinton's Executive Order No. 12898*, pp. 11135–36. The first 15 demonstration projects include the following: Greater Boston Urban Resources Partnership: Connecting Community and Environment (Boston, MA); City of Children Partnering for a Better Future (Camden, NJ); New York City Alternative Fuel Summit (New York, NY); Addressing Asthma in Puerto Rico—A Multi-Faceted Partnership for Results (Puerto Rico); Bridges to Friendship Nurturing Environmental Justice in Southeast and Southwest Washington, DC (Washington, DC); Re-Genesis: Community Clean-Up and Revitalization in Arkwright/Forest Park (Spartanburg, SC); Protecting Children's Health and Reducing Lead Exposure Through Collaborative Partnerships (East St. Louis, IL); Bethel New Life Power Park Assessment (Chicago, IL); New Madrid County Tri-Community Child Health Champion Campaign (New Madrid County, MO); Easing Troubled Waters: Ensuring Safe Drinking Water Sources in Migrant Farmworker Communities in Colorado (Colorado); Environmental Justice and Public Participation Through Technology: Defeating the Digital Divide and Building Community Capacity (Savannah, GA, and Fort Belknap Indian Reservation, MT); Protecting Community Health and Reducing Toxic Air Exposure Through Collaborative Partnerships in Barrio Logan (San Diego, CA); Oregon Environmental Justice Initiative (Portland and rural communities, OR); Metlakatla Indian Community Interagency Environmental Management Task Force (Ketchi-

- Promote federal support of solutions that begin in and remain in the communities.
- Coordinate federal, state, local, and tribal governments, with comprehensive community-based planning.
- Coordinate activities and multiple government and private entities to use resources more effectively.
- Develop a template for integrated and holistic local solutions to environmental justice issues.
- Serve as a platform for advocating and demonstrating innovation in government at all levels.<sup>175</sup>

In November 2000, OEJ published a report on the progress and successes of the Action Agenda.<sup>176</sup> Echoing that, Mr. Lee testified that the 15 demonstration projects have accomplished a wide range of successes, including:

- Establishing strong working partnerships of more than 150 organizations and 11 federal agencies.
- Securing commitments of more than \$15 million in public and private funding to address a range of issues.
- Augmenting existing redevelopment initiatives to fully meet the quality of life and economic development needs of diverse communities.
- Using innovative approaches to foster local partnership-building through alliances or community and faith-based organizations, developing community-based planning, and leveraging existing resources.
- Using alternative dispute resolution and consensus-building processes to address, as appropriate, cases of conflict or potential conflict.
- Addressing children's health issues in minority, low-income, and tribal communities.
- Identifying key elements of a systematic model for holistic integrating and collaborative problem-solving.<sup>177</sup>

In discussing some of the successes, Mr. Lee testified that in Puerto Rico, there has been a comprehensive strategy to address asthma.<sup>178</sup> In Barrio Logan, a Mexican American community in San Diego, 20 organizations have come together to address air quality, children's health, and land-use issues.<sup>179</sup> This process resulted in HUD's working with the city of San Diego to secure a \$1 million

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kan, AK); Environmental Justice in Indian Country: A Roundtable to Address Conceptual, Political and Statutory Issues. *See* U.S. Environmental Protection Agency, "Integrated Federal Interagency Environmental Justice Action Agenda," EPA/300-R-00-008, November 2000, p. 11, <[www.epa.gov/compliance/environmentaljustice/interagency/index.html](http://www.epa.gov/compliance/environmentaljustice/interagency/index.html)> (last accessed June 27, 2003) (hereafter cited as EPA, "Integrated Federal Interagency Environmental Justice Action Agenda").

<sup>175</sup> Charles Lee, associate director for policy and interagency liaison, Office of Environmental Justice, U.S. Environmental Protection Agency, Testimony, February Hearing Transcript, p. 59.

<sup>176</sup> *See generally* EPA, "Integrated Federal Interagency Environmental Justice Action Agenda."

<sup>177</sup> Charles Lee, associate director for policy and interagency liaison, Office of Environmental Justice, U.S. Environmental Protection Agency, Testimony, February Hearing Transcript, pp. 59–60. *See also* U.S. Environmental Protection Agency, *Status Report on Environmental Justice Collaborative Model: A Framework to Ensure Local Problem Solving*, EPA 300-R-02-001, February 2002, pp. 3–4. As a follow-up to the Action Agenda, the IWG status report identifies elements of success in the demonstration projects and describes efforts to evaluate them. *Ibid.*, p. iii.

<sup>178</sup> Charles Lee, associate director for policy and interagency liaison, Office of Environmental Justice, U.S. Environmental Protection Agency, Testimony, February Hearing Transcript, p. 60.

<sup>179</sup> *Ibid.*

grant on lead hazard controls for Barrio Logan.<sup>180</sup> In Alaska, the Metlakatla Indian community is undergoing a process of cleaning up contaminated sites and a redevelopment plan that also involves alternative dispute resolution to address the allocation of liability between federal agencies.<sup>181</sup> In New York City, an effort to address the use of alternative fuels led the U.S. Postal System to commit \$1.93 million to alternative fuel and clean natural gas vehicles.<sup>182</sup>

In its report to the Congressional Black Caucus and Congressional Black Caucus Foundation Environmental Braintrust, the National Environmental Policy Commission noted:

The IWG demonstration projects are particularly significant. They point to the potential to problem-solve across stakeholder groups in a constructive, collaborative manner, building relationships, avoiding duplicated efforts, and leveraging instead of wasting resources. This is not an easy task given the history of neglect and resistance, capacity problems, and fragmented agency jurisdiction.<sup>183</sup>

In March 2003, the IWG selected 15 more projects to serve as revitalization projects to showcase the continued interagency and stakeholder partnerships in environmental justice.<sup>184</sup> Like the previous projects, the intent of the new demonstration projects is to develop collaborative models to ensure problem-solving and sustainable solutions to a wide range of environmental justice issues that implicate public health, social, and economic concerns.

The Commission sought to determine how the IWG successes are measured, and against what standard. The Commission also wanted to learn how the successes and lessons of the demonstration projects have been incorporated into federal agency environmental justice policies and decision-making. EPA reported that the IWG demonstration projects have produced “varied and positive” results; however, it also stated that because of the relative newness of the program at the time of its responses “not enough time has elapsed to make final judgments as to the projects’ long-term successes.”<sup>185</sup>

EPA responded that in order to measure success, the IWG will develop an evaluation framework for its demonstration projects.<sup>186</sup> EPA reports there are two phases in developing such a framework. The

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<sup>180</sup> *Ibid.*

<sup>181</sup> *Ibid.*, p. 61.

<sup>182</sup> *Ibid.*

<sup>183</sup> NEPC, *Report to the Congressional Black Caucus*, p. 38.

<sup>184</sup> U.S. Environmental Protection Agency, Office of Environmental Justice, “Environmental Justice Fact Sheet, Interagency Working Group,” EPA/300-F-03-004, May 2003. The second round of demonstration projects include Chelsea Creek Restoration Project (Chelsea and East Boston, MA); Revitalization of the Magic Marker Brownfields Site (Trenton, NJ); Empowering Communities to Secure Drinking Water in Rural Puerto Rico (Puerto Rico); Utilizing Compliance Assistance to Achieve Community Revitalization in Park Heights (Baltimore, MD); Vision 2020: For the Children of Anniston—Children’s Health Environmental Justice Project (Anniston, AL); Glades Area Environmental Justice Training Collaborative (Belle Glade, FL); the Sustainable Redevelopment and Revitalization of Princeville (Princeville, NC); the Arcade-Westside Area Revitalization Project: A Community-Based Collaboration (Rock Hill, SC); Waukegan Cleanup and Revitalization Plan (Waukegan, IL); Project ReGeneration: Building Partnerships for Livability and Sustainability in the Greater Kelly Area (San Antonio, TX); Development of a Cheyenne River Sioux Tribal Park: A Tribal Lands Conservation Partnership (Eagle Butte, SD); Northeast Denver Environmental Initiative (Denver, CO); Tribal Wind Power—A Viable Strategy for Community Revitalization and Capacity (Rosebud Indian Reservation, SD); Effective Solid Waste Management for the Native Village of Selawik (Selawik, AK); and Enhancing Tribal Consultation to Project Cultural and Historic Resources (CO, LA, and NM). See U.S. Environmental Protection Agency, “Interagency Working Group on Environmental Justice,” <[www.epa.gov/compliance/environmentaljustice/interagency/index.html](http://www.epa.gov/compliance/environmentaljustice/interagency/index.html)> (last accessed Sept. 2, 2003).

<sup>185</sup> EPA, Response to Interrogatory Question 16.

<sup>186</sup> *Ibid.*

first phase is to “identify the elements that promote the success of collaborative problem-solving models.”<sup>187</sup> EPA’s Office of Policy Economics and Innovation (OPEI), Evaluation Support Division, has begun an evaluation to identify these elements:

- The Evaluation Support Division has conducted systematic interviews with all groups involved with the demonstration project (e.g., community-based organizations, business and industry, academia, civic and faith-based organizations, and state, tribal and local governments). The interview process involves numerous conference calls, meetings, and multi-stakeholder forums.
- The Evaluation Support Division has also conducted a series of case studies designed to understand better the value of a collaborative model for communities and federal agencies, and elements for success. Division staff developed this part of the evaluation framework after involvement from several dozen persons from all stakeholder groups, in which they discussed the evaluation process, questions, and analyses.
- EPA has conducted direct observations and a review of progress reports on each of the 15 demonstration projects. In February 2002, the Office of Environmental Justice published an analysis of project results thus far titled *The Environmental Justice Collaborative Model: A Framework to Ensure Local Problem Solving*. Besides providing milestones, accomplishments, and lessons learned for each project, the report describes the elements of this emerging model.<sup>188</sup>

EPA reports that the second phase of creating an evaluation framework for IWG’s demonstration projects will be to develop both qualitative and quantitative ways of measuring these elements. EPA notes, however, that “[i]t should not be assumed that this task will be easy, given the fact that finding common definitions of success among divergent stakeholder groups is going to be a major challenge.”<sup>189</sup> It is critical, however, that EPA finalize this evaluation framework and apply it to the projects in order to measure the success of IWG’s efforts. As more is learned through the projects about how success is achieved and measured, IWG’s policies and project development can be better tailored to achieving those ends.

## CONCLUSION

It has been approximately a decade since the promulgation of Executive Order 12,898, and therefore, much is still unknown about the future impact or continuing existence of the Executive Order under current and future administrations. Agencies have begun work in protecting minority and low-income communities, but much more needs to be done, and measures need to be developed to determine what else must be done. Environmental justice will not become a reality as long as the issue remains an optional exercise by agency staff, an afterthought to existing programs, or an abstract policy statement that does not change conditions in affected communities.

As explored at the hearings, the Commission is interested in determining whether the agencies have implemented environmental justice programs or initiatives, whether the agencies have set goals and

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<sup>187</sup> Ibid.

<sup>188</sup> Ibid. Following up on the 2002 report, IWG issued a second status report that documents the development of an environmental justice collaborate model. See U.S. Environmental Protection Agency, *Towards an Environmental Justice Collaborative Model: An Evaluation of the Use of Partnerships to Address Environmental Justice Issues in Communities*, EPA/100-R-03-001 and 002, January 2003.

<sup>189</sup> EPA, Response to Interrogatory Question 16.

expectations for those programs, how those goals and expectations are used to evaluate the programs' impact or success, and what, if any, actions are taken to ensure accountability when goals are not met. Although agencies have begun integrating environmental justice concerns into their programs, generally, they have not put accountability measures into place, nor are expectations linked to ways in which success can be measured.

Without accountability measures, it is difficult to track or review positive steps in environmental justice program implementation. Progress began under the former administration, and commitments have been made under the current administration. It remains to be seen, however, if this administration, and recently confirmed EPA Administrator Michael Leavitt, will maintain those commitments and continue to address environmental justice concerns in minority communities with measures that have teeth.

Congress and federal agencies should undertake several steps to better incorporate the goals of the Executive Order into the agencies' missions. In order to do so, the Commission recommends the following:

- The federal government should implement and fully enforce its existing environmental laws and policies. Oftentimes, federal agencies do not need to significantly change, if at all, their current laws or policies in order to implement the Executive Order and respond to environmental justice concerns. For example:
  - Federal agencies should augment the work they have done in implementing environmental justice at the program level by ensuring that applicable agency rules and regulations include explicit guidance on reducing the risk of adverse impacts on minority communities.
  - Federal agencies should continue to implement environmental justice programs in tribal communities. Where federal responsibilities and oversight for integrating environmental justice programs in tribal communities overlap, agencies should coordinate their efforts in addressing tribal needs.
  - Federal agencies should utilize the NEPA process to its full capacity in order to promote environmental justice for minority communities, by implementing regulations consistent with the intent of the Executive Order.
  - Once an agency determines that an environmental impact statement is necessary, EPA, using its authority under § 309 of the Clean Air Act to review environmental impact statements prepared by other federal agencies, and its authority under the Executive Order to ensure that other agencies are analyzing the environmental impacts on minority and low-income populations, should issue negative reviews if those agencies fail to document any significant disparate impact of proposed projects on these communities.
  - When developing the terms and conditions of federally issued permits, EPA should require that those permits address the concerns of minority communities and the emission exposures in those communities.

- EPA should condition approval of state programs, which administer federal environmental laws, on the states' addressing the concerns of minority communities and the emission exposures in those communities, as part of their permitting processes.
  - Federal agencies should use their current authority to withdraw funding to states that fail to adequately enforce environmental laws.
  - EPA and other federal agencies should assess penalties for willful, repeated noncompliance by any facility located in an environmental justice community.
  - Federal agencies should reassign or devote equitable resources toward achieving environmental justice, which would assist them in integrating environmental justice into all of their programs and their missions.
- To ensure that the federal agencies integrate environmental justice into their core programs and operations, enforcement must be guaranteed in legislation. Either through codification of the Executive Order through an Environmental Justice Act, for example, or amendment or creation of other civil rights laws, there should be federal requirements ensuring that program implementation with performance assessments and accountability measures are put in place. For example:
    - Congress should direct the four agencies, their regional offices, bureaus, and operating administrations to prepare reports annually on their efforts to ensure adequate enforcement in their programs, with emphasis on the incorporation of environmental justice issues into their missions and the development of accountability standards.
    - Federal agencies should encourage states receiving federal funding for, for example, environmental, housing, or transportation programs, to create an Office of Environmental Justice to assess the disproportionate impact of those programs on minority and poor communities. The offices should have accountability measures in place, with reporting obligations back to the federal agencies.
    - Federal agencies should request, and Congress should approve, appropriate levels of environmental justice funding for these and current agency initiatives.
- After program development and implementation, federal agencies should establish clear accountability for implementing environmental justice initiatives. For example:
    - Federal agencies should set clear expectations for producing results in adversely affected communities that are directly linked to the agencies' mission. These expectations should be reinforced by agencywide reporting that tracks their progress.
    - EPA's Accountability Workgroup should make its findings public, implement NAPA's recommendations, and finalize its stated goal of establishing mechanisms to better track and evaluate progress toward achieving environmental justice objectives.
    - Similarly, DOT's Environmental Justice Coordinating Council should make its findings public and establish mechanisms to better track and evaluate DOT's progress in integrating environmental justice into the agency's mission.

- Federal agencies should develop evaluation criteria and have scheduled evaluations of environmental justice programs and initiatives.
- The commitment of senior leadership is critical, and high-level officials must be held accountable for effective program implementation. Appropriate incentives and disincentive measures should be used to inculcate environmental justice principles into agency management.
- Strong leadership must be followed by the requirement of accountability by agency employees. Federal agencies should incorporate environmental justice performance standards into their employees' job descriptions and performance evaluations. For example, where agency personnel do not enforce compliance and fail to provide protection in communities of color and low-income communities, it should be reflected in their performance reviews.
- In addition to the integration of environmental justice into the federal agencies' programs, the agencies should create outcome expectations for their environmental justice initiatives and specific methods for measuring staff or manager progress toward achieving specific environmental justice goals.
- Federal agencies should develop in more detail and implement accountability measures begun at the office and regional levels.
- And while most of the federal agencies have begun some form of environmental justice training, generally, the agencies have not developed evaluation criteria to assess if these courses effectively assist staff in integrating environmental justice concepts into their duties and the agencies' programs. Agencies should ensure that staff can recognize when agency decisions will involve disproportionate impacts on minority communities. All training should be followed up with, for example, critical assessments, surveys, and feedback, both by agency staff who have been trained to assist communities, and ultimately by the communities, who are the intended recipients of staffs' increased knowledge and sensitivity. Specifically, EPA should evaluate the effectiveness of its national workshop, "Fundamentals of Environmental Justice," for both the staff and communities.

The Commission also examined the role of IWG and the ways in which IWG intends to measure success. The Commission recognizes the strides IWG has made during the first few years of its implementation. As the program develops, the Commission recommends the following:

- The Interagency Working Group should be guaranteed and funded in federal legislation, as legislation may be needed to ensure continuing federal interagency cooperation on environmental justice programs.
- EPA and the other federal agencies should support advancement of the Action Agenda and its problem-solving models and continue to select demonstration projects.
- EPA should finalize and implement its evaluation framework in order to measure the success of the projects.

- Once the framework has been implemented, EPA should apply the “lessons learned” in its current and future demonstration projects.
- Since IWG’s collaborative approach may not be appropriate for all situations, policy makers should examine the “lessons learned” as the projects develop, to better inform potential legislative or other proposals.

## Chapter 8

# Recommendations

Clearly, communities of color and low-income communities are disproportionately affected by siting and permitting decisions. The Commission is aware that environmental justice concerns are also raised in the context of other activities that create environmental and human health risks, such as transportation equity and fairness in the placement of sound barriers along freeways, the use of diesel buses in minority and low-income communities, light rail systems running underground in tunnels in affluent suburban communities and at street level in minority and low-income communities, and the placement of bus depots in minority communities.

The Commission examined the implementation of Executive Order 12,898, which incorporates environmental justice into federal agency programs and activities, and the use of Title VI nondiscrimination regulations as environmental justice enforcement tools. In particular, the Commission examined how federal agencies handle Title VI complaints, the impact of court decisions limiting private rights of action under § 602 of Title VI, how agencies provide communities meaningful public participation in environmental decision-making, the use of informal resolution of Title VI complaints, the importance of data collection and scientific research in establishing the causal relationship between environmental factors and adverse human health risks, and federal government accountability and program evaluation criteria. The Commission's findings and recommendations related to these issues are presented below.

### 1. The Title VI Administrative Process as an Environmental Justice Tool

The Commission, based on its examination of the processing of Title VI complaints, finds that while the backlog of Title VI complaints at EPA has decreased, there are still complaints at the agency that have been pending for extended periods of time. The Commission finds that few Title VI complaints are upheld by federal agencies and that most are dismissed for nonsubstantive reasons. The Commission further finds that, when complaints involve several federal agencies, there is a lack of clear guidance that is readily available to stakeholders explaining which agency has jurisdiction, how that decision was made, and who is responsible for notifying the parties in the complaint of the status of the complaint.

The issuance of final Title VI guidance by EPA is still pending. The Commission finds that in the absence of final guidance, many stakeholders remain uncertain about the use and effectiveness of Title VI in protecting minority and poor communities that are disproportionately and adversely affected by environmental decisions.

Finally, the Commission finds that current funding and staffing levels undermine meaningful Title VI enforcement at a time when there are increasing judicial barriers to enforcing Title VI.

Therefore, the Commission makes the following recommendations concerning the effective use of Title VI enforcement programs to ensure that communities adversely affected by environmental decisions have access to a viable administrative remedy:

- 1.1 EPA should avoid any further unnecessary delays and issue a final Title VI guidance on processing complaints and methods to improve permitting programs. When this is accomplished, stakeholders will have a clear understanding of strategies to avoid environmental justice issues that may lead to Title VI complaints, as well as of how EPA's Office of Civil Rights analyzes and resolves these complaints.
- 1.2 In the appropriate circumstances, EPA should conduct independent analyses of adverse disparate impacts to determine if they actually are present in a given community. While the agency should review analyses from recipients and complainants, it should not solely rely on them as a basis for its administrative Title VI decisions.
- 1.3 In its 1975 report, *The Federal Civil Rights Enforcement Effort—1974*, the Commission on Civil Rights supported terminating federal funding in instances of noncompliance with Title VI as an appropriate remedy, when it has been determined that fund termination would not have a detrimental effect on the health of the public. The Commission again urges the federal agencies to use all available tools to protect the precarious health status of the poor and people of color, whose overall lower health status can be exacerbated by exposure to environmental hazards.
- 1.4 EPA's final investigative guidance should eliminate the "authority to consider" provision that applies to state funding recipients because the provision unnecessarily limits EPA's Title VI adverse disparate impact investigations and the ability of communities to establish adverse disparate impact. This is especially a problem where states either create laws and regulations or are shielded by existing state laws and regulations that restrict or limit what is within their "authority to consider" when determining adverse disparate impact in their permitting process.
- 1.5 EPA should establish guidance for its state funding recipients that incorporates an inclusive definition of adverse disparate impact, including socioeconomic, health, and environmental factors that may disproportionately affect minority and low-income communities. The agency must encourage its funding recipients to broadly define what constitutes an adverse impact.
- 1.6 Federal agencies should clarify their requirements for the exercise of shared and sole jurisdictional responsibilities in investigating and resolving Title VI complaints, in instances where Title VI complaints involve two or more federal agencies. Establishing and providing environmental justice stakeholders with easy access to these policies would minimize the amount of time to administratively process complaints.
- 1.7 Federal agencies should establish clear notification requirements to all parties involved in Title VI complaints of the status of those complaints, as well as the shared, transferred, or sole jurisdiction of the federal agencies responsible for investigating and resolving the complaints.
- 1.8 Federal agencies should establish formal appeal procedures for their decisions. Currently, although EPA may reconsider its Title VI decisions, it is uncertain what factors are used to determine when this can occur, as well as what criteria would be considered in the reconsideration. In other federal agencies, no appeal mechanisms exist at all.
- 1.9 Once federal agencies have established procedures for the right of appeal, appropriate mechanisms should be instituted for notifying the parties of when their complaints are ready for appeal and advising the parties on the procedure for filing appeals.

- 1.10 EPA and other federal agencies should enforce or reform their penalty policies to enhance incentives for compliance and assess penalties for willful, repeated noncompliance by any facility located in a low-income and/or minority community.
- 1.11 Federal agencies should implement formal Title VI compliance review programs to ensure nondiscrimination in programs and activities receiving federal funding. These compliance review programs must be provided sufficient staff and funding in order to be most effective.
- 1.12 Similar to EPA's *Draft Revised Investigation Guidance* and *Draft Recipient Guidance*, other federal agencies should develop formal guidance for investigating Title VI administrative complaints and activities of their funding recipients that have implications for human health and the environment. Clear guidance is required if all stakeholders are to understand what actions constitute a violation of Title VI, how complaints will be processed and investigated, and what actions can be taken to prevent or decrease Title VI complaints.

## 2. Judicial Enforcement of Title VI

The Supreme Court in *Alexander v. Sandoval* ruled that there is no private right of action for agency regulations promulgated under § 602 of Title VI. This ruling eliminates a major enforcement tool used by civil rights and environmental justice groups. *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*, a Third Circuit case, ruled that in addition to having no private right of action under § 602, agency disparate impact regulations under § 602 do not create an enforceable private right of action under 42 U.S.C. § 1983. The Supreme Court heightened the standard for § 1983 claims in *Gonzaga* by requiring that congressional intent to create rights under § 1983 be clear and unambiguous.

Based on these judicial limitations, the Commission finds that both civil rights groups and environmental justice groups are left with few legal channels for challenging disparate impact discrimination under Title VI. While § 1983 is a tool that can be utilized in federal courts that have not barred this enforcement, much of these groups' civil rights enforcement attempts must be at the administrative level. Therefore, the Commission makes the following recommendations:

- 2.1 In light of the *Sandoval*, *South Camden*, and *Gonzaga* decisions, Congress should pass a Civil Rights Restoration Act to clearly and unambiguously provide for a private right of action for disparate impact claims under § 602 of Title VI and § 1983.
- 2.2 In light of the currently limited legal enforceability of disparate impact discrimination regulations promulgated under § 602 of Title VI, federal agencies providing financial assistance to state and local agencies must vigorously enforce their existing nondiscrimination regulations by assuming greater oversight responsibility, implementing effective policy and guidelines for administrative enforcement of Title VI violations, and imposing appropriate penalties when violations of Title VI occur.

## 3. Meaningful Public Participation

Meaningful public participation by affected communities in the decision-making process is one of the cornerstones of environmental justice. The input of communities of color and low-income communities is integral to decision-making, planning, monitoring, problem-solving, and implementation and evaluation of environmental policies and practices.

Most of the federal agencies reviewed by the Commission have made some progress conducting outreach and engaging minority and poor communities in meaningful public participation and, to a lesser extent, in decision-making processes, but more work remains to be done. In this regard, the Commission finds that minority and low-income communities still do not fully participate in the process because of language and cultural barriers and lack of access to information. The Commission also finds that stringent enforcement of public participation requirements is not guaranteed in legislation, and that agencies continue to operate decentralized public participation programs, resulting in poor coordination, oversight, and accountability. Therefore, the Commission makes the following recommendations to enhance and strengthen agencies' meaningful public participation efforts:

- 3.1 Stringent enforcement should be guaranteed in legislation with federal requirements ensuring that all affected parties are at the table with adequate public support. Such legislation could, for example, specifically provide for increased public comment periods or mandate public hearings in situations where there are major projects near minority communities.
- 3.2 Federal agencies should develop where needed, and reform where necessary, centralized agencywide and programwide public participation policies to promote more meaningful and binding requirements for "early and often" participation. These should provide communities with a basic right to be an integral part of decision-making, planning, monitoring, problem-solving, and implementation and evaluation of environmental policies and practices.
- 3.3 Federal agencies and their funding recipients should integrate early public participation into agency programs and activities, including permitting and siting. This affords the community the ability to identify concerns early and to avoid the mistrust communities may normally feel by being excluded from early decision-making processes.
- 3.4 Federal agencies should not waive or limit environmental reviews or reduce the time periods for public comment under NEPA for proposed projects that could affect minority communities.
- 3.5 Federal agencies should translate relevant government and industry information into multiple languages other than English to ensure that communities are able to participate effectively in the decision-making process.
- 3.6 For notices or other information pertaining to proposed projects that affect specific minority communities, federal agencies should undertake additional efforts to ensure that the information is translated into the native languages of those communities.
- 3.7 Meaningful participation also means that all public meetings should be conducted in a manner that is more accessible to the affected community, in both location and timing of the meetings.
- 3.8 Federal agencies should advertise the meetings by using media and other forms of communication, but especially media serving communities of color. When utilizing print media, the agencies should prominently publish the information.
- 3.9 Resources should be available for outreach workers and translation services when English is not the primary language in the affected community. Community members should not bear the burden of providing these translations.

- 3.10 Federal agencies should involve tribal membership in the identification and prioritization of environmental issues.
- 3.11 Once communities are able to secure more meaningful public participation, federal agencies should be more willing to use the communities' environmental justice concerns as a basis for altering the course of decision-making.
- 3.12 Federal agencies and their funding recipients should conduct assessments to determine to what extent their programs and initiatives result in increased public participation and to emphasize accountability.
- 3.13 Agency representatives should be given mandatory training in encouraging effective public participation, and then be held accountable for effective program implementation and incorporation of meaningful public participation into the programs.
- 3.14 Environmental justice performance standards should be incorporated into government officials' job descriptions and performance evaluations, in order to measure both their obligations to ensure early public participation, but also to require that they complete follow-up work after the communities have voiced their concerns.
- 3.15 In order to signal a commitment to requiring meaningful public participation, EPA should reinstate, implement, and enforce the portion of its 1981 public involvement policy that included a provision for withholding grant funds from grantees whose public involvement activities are insufficient.

#### **4. Alternative Dispute Resolution**

During the last two decades, agencies and some environmental justice advocates have shown increasing support of alternative dispute resolution (ADR) as a way of resolving environmental conflicts with communities. EPA's Title VI regulations, for example, require that complaints be resolved through ADR whenever possible. The Commission finds that agencies still have not fully recognized the unique needs of those communities in the ADR process. As a result, ADR, at least in its current form, does not safeguard against the unequal power differential that exists between industry and communities.

Therefore, the Commission recommends that federal agencies undertake the following measures to ensure that ADR is an effective enforcement and complaint management tool:

- 4.1 Study different approaches to ADR and implement one that accounts for inequalities in bargaining power between the agency, industry, and the complainant.
- 4.2 Develop clear procedures for the ADR process that take those inequalities into account.
- 4.3 Focus on eliminating and remedying systemic discrimination, not just reaching consensus in individual cases.
- 4.4 Provide for more formal methods of discovery and other procedural safeguards, such as enforcement authority for the third-party neutral, which is needed to level the playing field and ensure equal access to information.

- 4.5 Require that the ADR process and outcomes be more accessible to public scrutiny (e.g., limit the use of confidentiality or nondisclosure agreements as to the ADR's findings and outcomes).
- 4.6 Provide technical expertise to the affected communities and not require communities to bear significant mediation costs.
- 4.7 Develop a system of precedence so that communities and industry can rely on previous decisions.
- 4.8 Ensure that all parties for whom the ADR would substantially affect be involved in the process.
- 4.9 Be aware of historic cultural sensitivities and not use ADR where such beliefs could be substantially compromised (e.g., siting facilities on sacred burial grounds).

## **5. Interagency Working Group**

Executive Order 12,898 created a federal Interagency Working Group on Environmental Justice (IWG). The IWG, through its Action Agenda, created demonstration projects to tackle community environmental justice concerns. The Commission finds that demonstration projects can successfully involve communities in environmental problem-solving including, but not limited to, community redevelopment, quality of life, and health issues. The Commission, however, also finds that there are no established evaluation criteria for measuring the outcomes of these programs.

The proposed Environmental Justice Act would abolish the IWG and constitute a new working group. This new working group, in addition to assuming the functions of the IWG, would be required to hold public meetings and actively seek meaningful public participation. The Commission, while it recognizes the strides IWG has made during the first few years of its implementation, finds that the creation of a new working group as proposed in the Environmental Justice Act would provide the public greater access to environmental decision-making and strengthen enforcement of discrimination complaints. Should the proposed Environmental Justice Act not become law, the Commission continues to see value in the interagency approach.

Therefore, the Commission recommends that:

- 5.1 The Interagency Working Group should be guaranteed and funded in federal legislation, as legislation may be needed to ensure continuing federal interagency cooperation on environmental justice programs.
- 5.2 EPA and the other federal agencies should support advancement of the Action Agenda and its problem-solving models and continue to select demonstration projects.
- 5.3 EPA should finalize and implement its evaluation framework in order to measure the success of the projects.
- 5.4 Once the framework has been implemented, EPA should apply the "lessons learned" in its current and future demonstration projects.

- 5.5 Since IWG's collaborative approach may not be appropriate for all situations, policy makers should examine the "lessons learned" as the projects develop, to better inform potential legislative or other proposals.

## 6. Data Collection and Technical Assistance

Executive Order 12,898 realizes the importance of gathering scientific and technical data. There is, however, inadequate literature on the relationship between environmental pollutants and health status. The Commission finds that more research clarifying this relationship and closer collaboration between health and environmental communities are needed. The need for more research, however, should not be used as an excuse for agency inaction or to deny that there is any relationship between the environmental factors and human health.

Clearly, successfully challenging decisions administratively and in the courts under Title VI is related to having access to and understanding scientific research on the environmental factors and human health. The Commission finds that the federal agencies it reviewed do not sufficiently collect, maintain, and analyze environmental and human health data. Most importantly, available data must be disaggregated by race, ethnicity, income, geographic location, and other socioeconomic factors because this information is critical to making informed policy decisions and enforcing the civil rights of minority and low-income populations.

The Commission also finds that agencies do not make sufficient use of technical assistance grants, or similar grant programs, to provide scientific and technical information to communities. In addition, efforts to make the information accessible by providing it in plain language or nonscientific language must be increased.

Therefore, the Commission recommends the following measures:

- 6.1 Federal agencies should create and support a closer relationship between the health policy community and the environmental community through increased availability of technical assistance grants.
- 6.2 Federal agencies should conduct, and support others in conducting, more scientific research on the relationship between the levels and types of exposures to environmental pollutants/hazards and human health status/outcomes in communities of color and poor communities.
- 6.3 Federal agencies conducting research on human health and the environment, and their technical assistance grant recipients, should also include the development of interventions to reduce or prevent health risks for all people, but especially overburdened minority and poor communities.
- 6.4 Federal agencies conducting research on human health and the environment, and their technical assistance grant recipients, should consider race, ethnicity, national origin, age, gender, and income when examining the environmental, human health, and economic effects of environmental decisions.
- 6.5 Federal agencies should disaggregate data on risks and exposures by race, ethnicity, gender, age, income, and geographic location if communities are to have the tools they need to defend environmental and human health and if agencies are to fulfill their obligations under Executive Order 12,898 and Title VI.

- 6.6 Federal agencies conducting research on human health and the environment, and their technical assistance grant recipients, should give priority to the health impact of environmental hazards on minority and low-income communities, as they experience disproportionate exposure to environmental hazards.
- 6.7 Federal agencies conducting research on human health and the environment, and their technical assistance grant recipients, should include a participatory role for communities in research and data collection.
- 6.8 Federal agencies should develop and adopt, based on the best currently available scientific research, formal cumulative impact standards to assess adverse health impacts related to multiple and long-term exposure to various environmental hazards and pollutants.
- 6.9 Federal agencies should develop and adopt, based on the best currently available scientific research, formal cumulative impact standards that account for social, behavioral, and other factors that increase susceptibility to environmental hazards and pollutants.
- 6.10 Federal agencies should create, based on the best currently available scientific research, a presumption of the existence of an adverse health impact based on multiple and long-term exposure to various environmental pollutants.
- 6.11 Federal agencies should make providing technical assistance to affected communities a priority by earmarking funds for technical assistance programs.
- 6.12 Federal agencies should administer their technical assistance programs in such a way as to avoid unnecessarily complex application processes and delays in awarding funding. Timely access to scientific and technical information is essential to providing minority and low-income communities an equal opportunity to influence environmental decisions that present concerns about adverse health consequences.
- 6.13 Federal agencies should take great steps to ensure that scientific information and technical data relating to their environmental decisions are accessible to the affected populations by translating this information into lay terms, when doing so does not compromise the integrity of the information.

## **7. Integrating Environmental Justice into Agencies' Core Missions**

Executive Order 12,898 was intended to ensure that federal agencies incorporate the principles of environmental justice into their missions. In order to evaluate how well the federal agencies responded to the Executive Order requirement, the Commission examined the extent to which the agency has proposed and undertaken environmental justice initiatives and programs, and the extent to which the agency has drawn up and implemented outcome expectations and goals surrounding those initiatives and programs.

The Commission finds that there is inconsistency and unevenness in the degree to which agencies achieved integration of environmental justice into their core mission. While the four agencies have all begun implementing environmental justice concepts into their programs, generally, the agencies do not view environmental justice as a priority. In order to accomplish full agency integration, the Commission recommends the following actions:

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- 7.1 Congress should direct the four agencies, their regional offices, bureaus, and operating administrations to prepare reports annually on their efforts to ensure adequate enforcement in their programs, with emphasis on the incorporation of environmental justice issues into their missions and the development of accountability standards.
  - 7.2 Federal agencies should encourage states receiving federal funding for, for example, environmental, housing, or transportation programs, to create an Office of Environmental Justice to assess the disproportionate impact of those programs on minority and poor communities. The offices should have accountability measures in place, with reporting obligations back to the federal agencies.
  - 7.3 Federal agencies should request, and Congress should approve, appropriate levels of environmental justice funding for current and future agency initiatives.
  - 7.4 The federal government should implement and fully enforce its existing environmental laws and policies. Oftentimes, federal agencies do not need to significantly change, if at all, their current laws or policies in order to implement the Executive Order and respond to environmental justice concerns.
  - 7.5 Federal agencies should augment the work they have done in implementing environmental justice at the program level by ensuring that applicable agency rules and regulations include explicit guidance on reducing the risk of adverse impacts on minority communities.
  - 7.6 Federal agencies should continue to implement environmental justice programs in tribal communities. Where federal responsibilities and oversight for integrating environmental justice programs in tribal communities overlap, agencies should coordinate their efforts in addressing tribal needs.
  - 7.7 Federal agencies should utilize the NEPA process to its full capacity in order to promote environmental justice for minority communities, by implementing regulations consistent with the intent of the Executive Order.
  - 7.8 Once an agency determines that an environmental impact statement (EIS) is necessary, EPA, using its authority to review all EISs prepared by other federal agencies, and its authority under the Executive Order to ensure that agencies analyze environmental impacts on minority populations, should issue negative reviews if the other agencies fail to document any significant disparate impact on these communities relating to the proposed agency projects.
  - 7.9 When developing the terms and conditions of federally issued permits, EPA should require that those permits address the concerns of minority communities and the emission exposures in those communities.
  - 7.10 EPA should condition approval of state programs, which administer federal environmental laws, on the states' addressing the concerns of minority communities and the emission exposures in those communities, as part of their permitting processes.
  - 7.11 Federal agencies should require state and local zoning and land-use authorities, as a condition for receiving and continuing to receive federal funding, to incorporate and implement the principles of environmental justice in their zoning and land-use policies. This approach would start to address the disparity in the distribution of environmental and health burdens.

- 7.12 Federal agencies should use their current authority to withdraw funding to states that fail to enforce environmental laws adequately.
- 7.13 Federal agencies should reassign or devote equitable resources toward achieving environmental justice, which would assist them in integrating environmental justice into all of their programs and their missions.

## **8. Program Evaluation Criteria and Accountability**

The Commission sought to determine whether the agencies have implemented environmental justice programs or initiatives, whether the agencies have set goals and expectations for those programs, how those goals and expectations are used to evaluate the programs' impact or success, and what, if any, actions are taken to ensure accountability when goals are not met. The Commission finds that although agencies have begun integrating environmental justice concerns into their programs, generally, they have not put accountability measures into place, nor are expectations linked to ways in which success can be measured.

The Commission also finds that without accountability measures, it is difficult to track or review positive steps in environmental justice program implementation. The Commission finds that while most of the agencies have begun some form of environmental justice training, generally, the agencies have not developed evaluation criteria to assess if these courses assist staff in integrating environmental justice concepts into their duties and the agencies' programs.

Therefore, the Commission makes the following recommendations to increase and improve the evaluation of programs, and to create accountability for results:

- 8.1 Federal agencies should set clear expectations for producing results in adversely affected communities that are directly linked to the agencies' mission. Agencywide reporting that tracks their progress should reinforce these expectations.
- 8.2 EPA's Accountability Workgroup should make its findings public, implement NAPA's recommendations, and finalize its stated goal of establishing mechanisms to better track and evaluate progress toward achieving environmental justice objectives.
- 8.3 DOT's Environmental Justice Coordinating Council should make its findings public and establish mechanisms to better track and evaluate DOT's progress in integrating environmental justice into the agency's mission.
- 8.4 Federal agencies should develop evaluation criteria and have scheduled evaluations of environmental justice programs and initiatives.
- 8.5 The commitment of senior leadership is critical, and high-level officials should be held accountable for effective program implementation. Appropriate incentives and disincentive measures should be used to inculcate environmental justice principles into agency management.
- 8.6 Strong leadership should be followed by the requirement of accountability by agency employees. The agencies must incorporate environmental justice performance standards into their employees' job descriptions and performance evaluations. Failure of employees to appropriately consider the environmental and health impact of agency actions on minority and low-income communities, and to provide protections, should be reflected in their performance reviews.

- 8.7 In addition to the integration of environmental justice into the agencies' programs, the agencies should create outcome expectations for their environmental justice initiatives and specific methods for measuring staff or manager progress toward achieving specific environmental justice goals.
- 8.8 Federal agencies should develop in more detail and implement accountability measures begun at the office and regional levels.
- 8.9 Federal agencies should ensure that staff can recognize when agency decisions will involve disproportionate impacts on minority communities. All training should be followed up with, for example, critical assessments, surveys, and feedback, both by agency staff who have been trained to assist communities, and ultimately by the communities, who are the intended recipients of staffs' increased knowledge and sensitivity. Specifically, EPA should critically evaluate the effectiveness of its national workshop, "Fundamentals of Environmental Justice."

## 9. Superfund and Brownfields Redevelopment

The Brownfields Revitalization and Environmental Restoration Act of 2001, signed by President George W. Bush in January 2002, is laudable in that it seeks to bring economic development to areas by cleaning up abandoned, contaminated sites and redeveloping them for commercial or residential use. The Commission finds, however, that there are inequities in the enforcement and cleanup of Brownfields that leave communities of color and poor communities at a disadvantage. In addition, Brownfields programs do not always result in beneficial reuse of properties in minority and poor communities.

The Commission also finds that the Superfund program is a valuable environmental tool. The Superfund program targets some of the worst hazardous sites in the country for environmental cleanup, many in communities of color and low-income communities. The Commission finds that changes in future funding of this program, specifically, the elimination of the "polluter pays" tax will adversely affect the needed cleanup activities. Furthermore, the Commission finds that the elimination of the tax comes at a time when Superfund spending is projected to increase.

Therefore, the Commission makes the following recommendations for the Superfund and Brownfields redevelopment programs:

- 9.1 Congress should review the funding scheme for the Superfund program to ensure that the program is effectively funded and administered. Reinstatement of the "polluter pays" tax would ensure that the Superfund program is appropriately funded and administered.
- 9.2 Congress should exercise its oversight authority to ensure that cleanup and redevelopment under the Brownfields program are implemented promptly and fairly so that sites in communities of color are not inadequately cleaned or the last to receive attention.
- 9.3 Federal agencies should create incentives for industry to use newer and cleaner technologies.
- 9.4 Federal agencies should work with communities, as well as state and local authorities, to assist these stakeholders in attracting "clean" industry to Brownfields areas.

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## Statement of Chairperson Mary Frances Berry, Vice Chairperson Cruz Reynoso, and Commissioners Christopher Edley, Jr., and Elsie Meeks

This carefully researched report sheds light on the continuing environmental inequities faced by low-income communities and communities of color. The executive order signed by President Clinton in 1994 recognized the disproportionate exposure of poor and minority populations to hazardous environments and mandated federal agencies to incorporate environmental justice principles into their work and programs. *Not in My Backyard: Executive Order 12,898 and Title VI as Tools for Achieving Environmental Justice* methodically analyzes and substantiates the failure of EPA, HUD, DOT, and DOI to fully implement that order. The report furthers the Commission's commitment to the ideals of environmental justice and to its position that environmental statutes and regulations must be carefully implemented to protect communities of color and low-income neighborhoods in the environmental decision-making process.

The report benefited from hearings held by the Commission in January and February 2002. Experts at the hearings presented evidence that communities of color and the poor suffer disproportionately from environmentally related diseases, and from greater exposure to toxic chemicals released by the hazardous waste sites and facilities in their neighborhoods. It represents a culmination of testimony and contributions by advocates, researchers and scientists, community representatives, business and industry representatives, policy analysts and academics, as well as officials from the four federal agencies under review. Although the report observes progress in environmental justice, it also documents the failure of federal agencies to incorporate the principles of environmental justice into their core missions, to establish accountability and performance outcomes for programs and activities, and to provide solid leadership in these areas. The report raises concerns about the federal government's commitment to identifying and addressing the role of race and socioeconomic status in decisions affecting the health and safety of whole communities.

*Not in My Backyard* comes to the unfortunate conclusion that more than 10 years after the first environmental justice cases brought in Texas and North Carolina, race still plays a significant role in the siting of polluting facilities such as landfills and toxic dumps. Low-income residents, and people of color to an even greater extent, continue to endure disproportionate exposure to a variety of environmental toxins in their neighborhoods, schools, homes, and workplaces. The report adds to the list of at least "76–80 studies" cited by the EPA, "that have consistently said that minorities and low-income communities are disproportionately exposed to environmental harms and risks." It corroborates an early study by the U.S. General Accounting Office, which found people of color are burdened with a disproportionate amount of environmental risk. The findings and conclusions of *Not in My Backyard* are carefully cited and documented throughout, crediting almost 20 years—from the early 1980s to the present time—worth of reliable studies on the distribution of environmental risks. The report's recommendations flow directly from its findings and conclusions.

In addition, the report persuasively rebuts the market dynamics theory that people of color and low-income individuals routinely locate near hazardous and toxic facilities for economic benefit, specifically, cheap housing and the expectation of jobs. It notes zoning practices that on their face appear race neutral, but which routinely and disproportionately allow the neighborhoods of people of color

and the poor to be zoned for industrial use. These communities then suffer increased exposure to health risks as heavy industry moves down the street from their homes.

Degraded environments cause increased rates of environmentally related disease, such as asthma and childhood lead poisoning. Yet the report also finds that the burden of locating waste and toxic facilities in low-income neighborhoods and communities of color is not counterbalanced by economic benefit, since many facilities fail to hire local residents. The report illustrates the devastating position of these communities, which are forced to choose between good health and the dim hope of economic opportunity. For many, it is in effect a Hobson's choice, because their options for relocating are inhibited by racism, housing discrimination, and limited resources.

*Not in My Backyard* thoroughly analyzes the issues and documents the problems that make enforcement of environmental justice almost nonexistent. Executive Order 12,898, which created a right to environmental justice, has yet to be fully realized or enforced. As a result of judicial decisions limiting the ability of individuals to file disparate impact cases under § 602 of Title VI and § 1983 of the Civil Rights Act, communities have been forced to rely even more on what should be—but often is not—vigorous agency enforcement to remedy environmental justice complaints. In view of this reality, the report recommends that Congress and federal agencies provide the means for private plaintiffs to achieve relief in environmental justice cases. The report urges the following: congressional passage of a Civil Rights Restoration Act to conclusively provide for a private right of action for disparate impact claims under § 602 of Title VI and § 1983; vigorous enforcement of existing state and local agency nondiscrimination regulations through greater federal oversight; implementation of effective policy and guidelines for administrative enforcement of Title VI violations by federal agencies; and federal agency imposition of appropriate penalties for Title VI violations.

We endorse those recommendations and the findings on which they are based. For the above reasons, we believe this report will further the important civil rights goals of environmental justice, and we thank the staff for their professional and conscientious work.

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## Statement of Commissioners Jennifer C. Braceras, Peter N. Kirsanow, Russell G. Redenbaugh, and Abigail Thernstrom

We write separately to explain why we cannot sign on to this report, *Not in My Backyard: Executive Order 12,898 and Title VI as Tools for Achieving Environmental Justice*. To begin with, this report and its recommendations are based upon a misguided application of federal antidiscrimination law to complex environmental and public health problems. In addition, this report fails to meet the standards of balance and academic rigor that taxpayers expect from an ostensibly independent federal agency. For these reasons, and the reasons outlined more fully below, we do not think that this report should be permitted to bear the seal of government approval.

### I. Background

The terms “environmental justice” and “environmental racism” refer to the belief that poor and minority communities shoulder an unfair portion of environmental burdens and that the law should seek to rectify this imbalance.<sup>1</sup> More specifically, “environmental racism” refers to the belief that environmental and public health risks faced by minority communities are the result of discriminatory public policies, while “environmental justice” refers to efforts to reallocate the risks more equitably.<sup>2</sup>

Community leaders are right to be concerned about the health and safety of those who reside near environmental hazards. These concerns are the province of environmental law and policy-making. In addition, our federal civil rights laws appropriately forbid policy-makers and other recipients of federal funds from considering the ethnic or racial composition of a neighborhood when making siting, permitting, or environmental enforcement decisions. Environmental justice activists, however, are not content to let environmental law sort out problems of risk assessment and to let federal civil rights law prevent and punish intentional environmental discrimination. To the contrary, environmental justice activists seek to create a federal civil rights claim every time an environmental or public health problem affects minorities.

Although we recognize that there are times when environmental problems raise important civil rights questions, generally the two issues are—and should remain—conceptually distinct. This report purposefully conflates the two, and it relies upon three fundamentally flawed premises to do so.

**First**, this report takes at face value claims that industrial and public waste management facilities are disproportionately sited in minority neighborhoods and that such siting decisions necessarily impact these communities negatively.

**Second**, this report accepts, without critical analysis, arguments that racial discrimination can be blamed for concentrations of environmental and public health risks in poor and minority communities.

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<sup>1</sup> See, e.g., Michael Steinberg, Kate McGloin, and Heather Keith, *Environmental Justice: No Easy Answers* 1, 3 (September 2000) (defining the terms “environmental justice” and “environmental racism”).

<sup>2</sup> *Id.*

*Third*, the conclusions and recommendations contained in this report assume that federal antidiscrimination law provides a useful tool for weighing the costs and benefits of economic development and for allocating environmental and public health risks.

We explain in turn why each of these assumptions lacks merit.

## II. There Is Insufficient Evidence of Disparate Negative Impact.

### A. *The evidence of disproportionate impact is mixed.*

To begin with, this report fails to undertake a fair and balanced review of the literature on the demographic impact of industrial and environmental decisions. For example, it credits without critical analysis the results of studies conducted in the 1980s that purportedly demonstrate the racially disproportionate impact of facility siting decisions.<sup>3</sup> Yet the report virtually ignores studies conducted in the 1990s that contradict these findings outright,<sup>4</sup> as well as those studies that demonstrate mixed results.<sup>5</sup> Similarly, this report credits claims that minorities are disproportionately affected by air pollution while ignoring studies that find no correlation between various types of pollutants and race.<sup>6</sup>

In truth, the evidence of any correlation between environmental hazards and race is mixed. Results inevitably depend upon numerous variables, including, *inter alia*: the size of the study, the definition of “minority community,”<sup>7</sup> the aggregation or disaggregation of urban and rural communities, and controls for income level.<sup>8</sup> Yet, despite the complex web of evidence that exists with respect to the

<sup>3</sup> The report refers to a 1983 General Accounting Office study of the four offsite hazardous waste facilities in the EPA’s Region IV (the southeastern U.S.). See Report at 14. The 1983 study found that populations in three of the four surrounding areas were majority black. *Id.*; U.S. General Accounting Office, *Siting of Hazardous Waste Landfills and Their Correlation with Racial and Economic Status of Surrounding Communities* (1983). Similarly, the Commission’s report credits a 1987 United Church of Christ study that purports to reveal a correlation between the number of commercial waste facilities in a given community and the percentage of minority residents in that community. See Report at 14; see also Commission for Racial Justice of the United Church of Christ, *Toxic Wastes and Race in the United States* (1987). The Commission’s report cites both of these studies with approval without exploring the methodological weaknesses of these studies, which have been widely discussed in the academic literature. See, e.g., Thomas Lambert, Christopher Boerner, and Roger Clegg, *A Critique of Environmental Justice*, National Legal Center White Paper (1996) (explaining the technical problems with these and other studies purporting to demonstrate evidence of environmental racism).

<sup>4</sup> For example, in 1995 GAO released a new study that appears to contradict its earlier findings. The 1995 study reports that minority and low-income populations across the country are not subjected to disproportionately higher siting of municipal solid waste landfills. See U.S. General Accounting Office, *Hazardous and Nonhazardous Waste: Demographics of People Living Near Waste Facilities* (June 1995). See also Henry Payne, “Green Redlining,” *Reason* at 31 (October 1998) (discussing studies conducted in the 1990s by EPA of the communities surrounding 1,234 Superfund sites that turned up no evidence of disparate impact on minorities); Steinberg et al., *supra* note 1, at 1, 6 (discussing a study of hazardous waste treatment, storage, and disposal facilities by census tract conducted by the Social and Demographic Research Institute at the University of Massachusetts which found that such sites are located predominantly in white, working-class neighborhoods.)

<sup>5</sup> See Steinberg et al., *supra* note 1, at 7 (summarizing one of the more comprehensive studies of facility siting decisions which found no aggregate disparate impact, but which found disparate impact when rural communities were looked at in isolation).

<sup>6</sup> Studies demonstrate that residents of urban areas, regardless of race or income, are more likely to live with higher levels of pollutants than residents of rural areas with high concentrations of minority residents. See, e.g., Jim F. Couch, Peter M. Williams, Jon Halvorson, and Keith Malone, “Of Racism and Rubbish: The Geography of Race and Pollution in Mississippi,” *The Independent Review*, vol. 8, no. 2, 240 (Fall 2003) (reviewing the literature and finding that in Mississippi counties with higher black populations suffered less air pollution than those with majority white populations, and concluding that “charges of environmental racism are highly exaggerated).

<sup>7</sup> Several scholars have noted that studies define “minority community” in varied and, sometimes illogical, ways. See, e.g., Lambert et al., *supra* note 4, at 5.

<sup>8</sup> *Id.*

question of disparate environmental impact, this report presents the statistical data as if it were crystal clear. Indeed, this report does not even attempt to explain why it credits certain studies over others. As such, it fails to lay an intellectual predicate for all that follows.

***B. Disproportionate impact is not synonymous with negative impact.***

This report not only uses data selectively, it also makes an intellectual leap that cannot withstand scrutiny: it assumes that all disproportionate impacts are negative impacts. This is not always the case. A particular policy or decision may affect one demographic group more than others, but that does not necessarily mean that it creates a danger for that group. Even where a policy increases the risk to a particular community, that risk may be accompanied by certain economic benefits to the community—benefits such as increased employment opportunities, increased social services made possible by a larger tax base, and lower housing costs and real estate prices.

Thus, even assuming *arguendo* that industrial facilities are (for whatever reason) disproportionately located in communities of color, such a presumption standing alone points nowhere. It tells us nothing about the level of danger posed by such decisions—levels that can range from insignificant to major; it tells us nothing about the level of economic benefit that results from such development; and it tells us nothing about whether the costs outweigh the benefits. In short, it tells us nothing about risk assessment.

**III. Environmental and Public Health Problems in Minority Communities Are Generally Not the Result of Racist Decision-Making.**

The Commission's report views the existence of environmental hazards in minority communities as proof positive that the hazards were placed in those communities because of their racial or ethnic composition.<sup>9</sup> In truth, the decision to locate a facility in a particular neighborhood often occurs long before significant numbers of racial and ethnic minorities become residents of that community. As environmental expert Christopher Foreman has noted, "the current demographic pattern in a given area may be misleading; the local ethnic mix at the time a facility was constructed may have differed considerably, undermining the argument that racism underlay the original siting decision."<sup>10</sup> Indeed, studies have revealed that poor and minority populations sometimes cluster around existing industrial facilities, possibly due to lower property values.<sup>11</sup> In other words, it is often the housing market itself—and not intentional discrimination—that creates a concentration of poor or minority residents in environmentally undesirable locations. Although the Commission's report acknowledges that market dynamics help to define the demographic makeup of communities,<sup>12</sup> it nevertheless reflexively assumes that the market is motivated by racism.<sup>13</sup>

Similarly, this report blames discrimination for the many public health problems facing communities of color, including asthma and lead paint exposure.<sup>14</sup> The report ignores evidence which suggests that the

<sup>9</sup> For example, the report states that race and ethnicity are the "most significant factors in deciding where to place waste facilities, landfills, and other environmental hazards." See Report at 14; see also Report at 27 ("Clearly, race . . . play[s] a significant role in environmental decision-making").

<sup>10</sup> Christopher H. Foreman, Jr., *The Promise and Peril of Environmental Justice* at 19 (1998).

<sup>11</sup> See Payne, *supra* note 5, at 31 (citing a study conducted by Washington University).

<sup>12</sup> See Report at 17.

<sup>13</sup> *Id.* (stating, without explanation, that market dynamics are themselves "influenced by race").

<sup>14</sup> See Report at 20–22.

higher incidence of disease and other medical problems in heavily minority communities is the result, not of racism, but of a multitude of factors, including poverty, substance abuse, family instability, poor nutrition, and low participation rates in preventative care programs.<sup>15</sup> By assuming, rather than proving, that discrimination is the cause of this particular set of public ills, the report deflects attention away from the real public policy issue—improving the health and safety of all communities—and thus does a disservice to people of all races who are affected by environmental hazards.

#### **IV. Antidiscrimination Law Is an Improper Vehicle for Reducing Environmental and Public Health Disparities.**

Title VI rightly prohibits intentional discrimination in the siting, permitting, and enforcement process. But the Commission's report goes further, urging the use of federal antidiscrimination law as a means of addressing complex environmental problems, even in the absence of discriminatory intent. This report thus adopts the view that disparate impact analysis—born of Title VII as a means of rooting out covert employment discrimination—should be applied to all environmental and public health decisions.

The disparate impact model seeks to block decisions and eliminate policies that, while neutral on their face, affect minorities disproportionately. Under a disparate impact analysis, motive is irrelevant—policies are considered “discriminatory” simply because they have a disproportionate adverse impact on a protected group. Although the disparate impact model may provide a useful mode of analysis in some areas of the law, the Supreme Court has cautioned that disparate impact should not be applied reflexively to all areas of antidiscrimination law.<sup>16</sup> Unfortunately, this report makes no attempt to explain why the disparate impact model proves meaningful in the environmental and public health context. It, therefore, provides no intellectual support for its recommendations.

Unlike the authors of this report, we reject the use of disparate impact theory for resolving environmental and public health problems. We believe that in this context the disparate impact model needlessly pits two vital needs of disadvantaged communities—health and economic prosperity—against each other. That is because in the environmental arena, notions of harm and benefit are less clear-cut than in other areas of the law that utilize the disparate impact approach. For example, in the employment context one can plausibly argue that the use of a screening criteria which eliminates a disproportionate number of minority applicants serves to entrench societal inequality. Employment discrimination law thus prohibits the use of such devices unless an employer can demonstrate that the challenged criterion is relevant to the job in question and necessary to the successful operation of the business.<sup>17</sup> The environmental context is clearly different. Unlike private employment, where a policy with a disparate racial impact can reasonably be said to disadvantage the minority group as a whole, environmental problems may impact different segments of a minority group differently. Thus, the decision to site a waste treatment facility in a majority black neighborhood might be harmful to those residents who live right next to the facility, but it might benefit other members of the community who do not live close enough to the facility to experience an increased health risk, but who will

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<sup>15</sup> See Foreman, *supra* note 10, at 70.

<sup>16</sup> See *Washington v. Davis*, 426 U.S. 229, 246–48 (1976); see also Jennifer C. Bracer, *Killing the Messenger: The Misuse of Disparate Impact Theory to Challenge High-stakes Educational Tests*, 55 VAND. L. REV. 1111, 1142 (2002) (discussing the uses and misuses of disparate impact theory); Thomas A. Lambert, *The Case Against Private Disparate Impact Suits*, 34 GA. L. REV. 1155 (2000) (explaining why private lawsuits alleging discrimination on the basis of disparate impact are inappropriate in the environmental context); Todd B. Adams, *Environmental Justice and the Limits of Disparate Impact Analysis*, 16 T.M. COOLEY L. REV. 417 (1999) (similar).

<sup>17</sup> The precise statutory language is “job related for the position in question and consistent with business necessity.” See 42 U.S.C. § 2000e-2(k)(1)(A)(ii) (Title VII).

benefit from an increase in job opportunities, the increased tax base, and/or the lower housing costs. Indeed, environmental decisions might simultaneously impact the same people both positively and negatively. In other words, it is possible for the same resident to suffer increased risk of danger while at the same time reaping the economic benefits of the siting decision. Thus, in contrast with the employment context, the notion that a particular environmental decision will inevitably entrench social inequality is by no means obvious or universally accepted.

In the environmental context, any determination as to whether the costs of development outweigh the benefits necessarily involves both empirical predictions and value judgments. The empirical analysis involves measuring the type and extent of the dangers posed by development as well as the type and extent of any benefits that might flow to the community from development. The value judgment involves deciding which negative externality—the increased health and safety risk of living in a community exposed to certain levels of pollution or the forbearance of the economic benefits that flow from the development of an industrial facility—constitutes the greater evil. Such determinations form the basis of all environmental policy-making. Absent evidence of intentional discrimination, the racial composition of the affected community should not alter this analysis.

## V. The Report's Recommendations

Several of this report's recommendations are particularly disturbing to us—in particular the recommendation that the federal government use the disparate impact model to determine whether or not to grant permits; the recommendation that the government utilize all available penalties, including termination of federal funding, when federal bureaucrats determine that minority communities have been disproportionately subjected to environmental burdens;<sup>18</sup> and the recommendation that Congress clearly and unambiguously create a private right of action for disparate impact lawsuits under Title VI.<sup>19</sup> If implemented, the effect of these recommendations will be to increase lawsuits, thwart plans to revitalize economically depressed areas, and deny each community the right to decide what is in its own best interest.

## VI. Concluding Thoughts

We agree with this report in one respect: We believe that empowering local communities and involving residents in environmental decision-making is good public policy. But our agreement with this report ends there.

Although this report was more than a year and a half in the making, the final product is nevertheless incomplete, one-sided, and academically unsound. Indeed, if adopted, many of the recommendations contained in this report will undermine public and private efforts to revitalize economically depressed areas to the detriment of minority residents. For these reasons, and the reasons stated above, we cannot support the publication of this document.

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<sup>18</sup> See Report at 168–69 (Recommendations 1.1–1.12).

<sup>19</sup> See *id.* at 169 (Recommendation 2.1).