Toxins Targeted at Minorities: The Racist Undertones of Environmentally-Friendly Initiatives

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TOXINS TARGETED AT MINORITIES: 
THE RACIST UNDERTONES OF 
"ENVIRONMENTALLY-FRIENDLY" INITIATIVES

I. INTRODUCTION

In the small, suburban, working-class town of Kennedy Heights, Texas, hundreds of individuals complain of rashes, headaches, and a water supply contaminated with oil and toxins. More serious health issues also plague these unsuspecting residents, such as cancerous brain tumors, cancer, lupus, birth defects, menstrual problems, and even death. As one resident described, "people are dropping like flies, getting sick." Homebuyers purchased newly built homes within the town several decades ago, but at that time no one informed them the properties were located on top of an oil dump, abandoned since the 1920s. The homeowners are now left in a precarious situation, as they "can't sell [their] houses and [they] can't afford to leave." The sheer number of Kennedy Heights residents impacted by the toxic oil dump's adverse effects has drawn national attention, but this particular town "attracted even wider attention because of the accusations of environmental racism."

The small town of Kennedy Heights, located outside of Houston, Texas, is comprised mostly of African-American residents. Unfortunately, the adverse health and environmental effects that the Kennedy Heights residents now experience are not uncommon.

1. Sam Howe Verhovek, Racial Rift Slows suit for 'Environmental Justice', New York Times (Sept. 7, 1997), available at http://www.nytimes.com/1997/09/07/us/racial-rift-slows-suit-for-environmental-justice.html?pagewanted=all&src=pm (explaining ailments Kennedy Heights residents experience). Kennedy Heights residents instituted a lawsuit alleging toxic hazards were concealed when the residents purchased homes atop the abandoned oil dump, and oil seeping from the toxic oil dump is the cause of the residents' ailments. Id.

2. Id. (indicating more serious health ailments, such as resident Helen Hin- son who is "fighting breast cancer and has undergone radiation for two brain tumors.").

3. Id. (illustrating resident James W. Jacob's reaction to impending fate of many Kennedy Heights residents).

4. See id. (explaining lack of communication about abandoned oil pits).

5. Id. (highlighting residents' lack of plausible options after purchasing homes atop abandoned oil pits).

6. Verhovek, supra note 1 (hinting pollution may disproportionately harm minorities).

7. See id. (describing Kennedy Heights).
among racial minority communities. In fact, many studies reveal that toxic waste sites are typically located adjacent to, or within, communities primarily populated with racial minorities. Another such community is Chester, Pennsylvania.

"Environmental racism" is the term often used to link federally funded environmental programs to discriminatory impacts. Although this Comment focuses on environmental racism and the deliberate placement of noxious facilities in certain communities, environmental racism encompasses a broad array of discriminatory practices. These practices include: (1) the increased likelihood of exposure to environmental dangers; (2) the differential cleanup rate of environmental contaminants in communities with various racial groups; (3) the concentration of ethnic minority workers in dangerous and unsanitary jobs; (4) the deficient upkeep of environmental amenities, such as parks and playgrounds; and (5) the incomparable provision of environmental services, such as garbage removal and transportation.

Environmental racism gained national attention in the mid-1980s after the United States Government Accountability Office (GAO) and the United Church of Christ explored the issue in two influential studies. Each study concluded that owners of hazardous waste sites are more likely to build next to communities with a

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8. See id. (noting Kenney Heights case should be a monumental step for "claims that racial minorities are disproportionately subjected to pollution hazards.").
10. See id. (recognizing adverse impacts of air pollution from waste management facilities on Chester residents).
12. Id. (mentioning scope of issues environmental racism encompasses).
13. Id. (listing specific topics and issues covered).
dense minority population than non-minority populations. Specifically, the United Church of Christ study explicitly connected race with an increased likelihood of exposure to hazardous wastes.

The term "environmental justice" describes the corrective responses taken to address the disparate impacts of certain environmental programs. The environmental justice movement focuses on two kinds of justice: distributive justice, the equitable distribution of costs and benefits to individuals; and corrective justice, the assessment of the treatment of individuals in a social transaction. While distributive justice identifies and corrects past racial injustice, corrective justice focuses on "corporate-worker community relations and government-local community interactions."

Part II of this Comment explains environmental racism and the environmental justice movement in greater depth. Part III traces the historical evolution of environmental racism, discusses relevant studies conducted, and explores measures taken to address the issue. Part IV describes federal government responses to environmental racism, focusing in part on the efficacy of Executive Order 12,898. Part V examines the litigation of environmental justice claims under the Civil Rights Act and explores the case study of Chester, Pennsylvania. Finally, Part VI addresses what federal environmental policies can and should do to further the environ-


18. See id. (focusing on distinct aspects of environmental justice).

19. See id. (explaining scope of corrective justice).

20. For further discussion of environmental racism and environmental justice movement, see infra notes 25-46, and accompanying text.

21. For further chronicle of evolution of "environmental racism," its studies, and corrective measures, see infra notes 47-77, and accompanying text.

22. For further description of federal government responses to environmental racism, see infra notes 78-100, and accompanying text.

23. For further exploration environmental justice litigation under Civil Rights Act, see infra notes 101-190, and accompanying text.
mental justice movement and ensure equitable treatment of individuals.24

II. DEFINING ENVIRONMENTAL RACISM

Generally, environmental racism is the "disproportionate impact of environmental hazards on people of color."25 The term also addresses the issue of fairness in regulating and distributing environmental dangers across different races.26 For purposes of this Comment, the discussion of environmental racism focuses on the inequitable distribution of adverse health risks from exposure to toxic substances among various racial, ethnic, and socio-economic groups.27

Conversely, environmental justice describes the response to social injustices created by environmental racism.28 The Environmental Protection Agency (EPA) defines environmental justice as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies."29 The EPA further defines "meaningful involvement" as:

(1) [p]otentially 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 concerns 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.30

24. For further discussion on the furthering of the environmental justice movement to ensure equitable treatment under federal environmental policy, see infra notes 191-213, and accompanying text.
27. Id. (chronicling history of environmental justice).
28. See Web Resources for Environmental Justice Activists, supra note 25 (differentiating between environmental justice and environmental racism).
Environmental justice concerns came into focus in the 1980s through social movements raising awareness of discriminatory environmental practices.\textsuperscript{31} The GAO and the United Church of Christ Commission for Racial Justice conducted studies confirming this phenomenon.\textsuperscript{32} Both reports documented a positive correlation between the number of minority community residents and the frequency of waste dumping in those communities.\textsuperscript{33}

Since the evolution of environmental racism, researchers attempted to determine the causes behind this occurrence.\textsuperscript{34} Studies focus on two significant contributory factors: race and income.\textsuperscript{35} The United Church of Christ revealed in its 1987 study that the ethnic background of a community's residents was a stronger indicator for predicting hazardous waste locations than a community's income level.\textsuperscript{36} This finding suggests the selection of sites for toxic waste disposal is at least partially racially driven.\textsuperscript{37} The United Church of Christ conducted a follow-up study in 2007 which found that, "Not only are people of color differently impacted by toxic wastes and contamination, they can expect different responses from the government when it comes to remediation."\textsuperscript{38} The follow-up study also indicated that polluting companies "follow the path of

\begin{itemize}
\item See Taylor, \textit{supra} note 11 (documenting evolution of environmental racism and discussing adverse health impacts of federally funded programs).
\item See \textit{id.} (noting response of federal government and other agencies to claims of environmental racism in 1980s).
\item See \textit{Comm'n for Racial Justice, supra} note 14, at xv (illustrating example of early study exploring this phenomenon). For a discussion of the GAO study and the correlation between adverse environmental impacts, race and income, see infra note 35 and accompanying text.
\item See \textit{Comm'n for Racial Justice, supra} note 14, at xiii (indicating race as most significant factor in predicting location of toxic waste landfills).
\item See \textit{id.} at xv (explaining government's failure to respond to claims of environmental injustice).
\end{itemize}
least resistance,” and vulnerable communities tend to see the least regulation.39

In 2007, scientists at the University of Colorado at Boulder conducted a study in sixty-one cities across the nation to compare levels of environmental inequality to race and income.40 The race component of the study evaluated environmental impacts in cities with significant racial segregation, and the income component evaluated environmental impacts in areas with racial income inequality.41 The study found African-American and Caucasian environmental inequality levels were highest in Orlando, Florida; Norfolk, Virginia; Louisville, Kentucky; and Portland, Oregon, and lowest in Baltimore, Maryland; Las Vegas, Nevada; Boston, Massachusetts and Nassau/Suffolk, New York.42 Surprisingly, “there was so little correlation between what would be predicted by the two explanations of environmental racial inequality and the actual results of the study that the study ‘contradicts the residential segregation and income inequality hypotheses.’”43

The results of the University of Colorado at Boulder study, however, do not entirely discount residential racial segregation as contributing to environmental racial inequality.44 Instead, the study suggests racial segregation in communities is not necessarily the cause of environmental racial inequality.45 The study further

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39. See id. at xii (discussing economic vulnerability of racial minority groups in communities hosting toxic waste site). Responsible entities have failed to adequately address the associated problems racial minorities face when toxic waste sites are constructed in their communities. Id.


41. Id. (discussing methodology of study). The University of Colorado at Boulder study concluded, “although the average black or Hispanic resident of a major U.S. city lives in a more polluted part of town than the average white person, the levels of inequality vary widely between cities and defy simple explanation.” Id.

42. Id. (illustrating array of results suggesting source of environmental racism is less clear than once thought).

43. Id. (noting that while race and income continue to be contributing factors to environmental racism, definitive causation remains unclear).

44. See Environmental Racism Study, supra note 40 (opining that environmental racial inequality could not exist if blacks, Hispanics, and Caucasians were equally represented in all neighborhoods).

45. See id. (explaining racial segregation does not necessarily cause environmental racial inequality).
demonstrates the source of environmental racism may be more complex than originally thought.  

III. THE EVOLUTION OF ENVIRONMENTAL RACISM

The Council of Environmental Quality's Second Annual Report on Environmental Quality (CEQ Report) was the first report to suggest a relationship between income and risk of exposure to pollutants. The CEQ Report focused on the need for improved pollution control initiatives in urban areas. In its revolutionizing proposition, the CEQ Report opined that, "the inadequate services provided by city governments generally can be traced to the inadequate tax base which provides the city’s revenues." This suggests an underlying circular causation theory to environmental racism. Specifically, when middle class residents relocate as a result of their deteriorated environment, the community experiences a decline in income from property taxes, which ultimately yields fewer resources to combat pollution.

The environmental justice movement gained further momentum in the mid-1980s. One of the first cases to address environmental racism was a case decided by the Houston Division of the District Court for the Southern District of Texas: Bean v. Southwestern Waste Management Corp. (Bean). Southwestern Waste Management selected Harris County, Texas, a predominantly African-

46. See id. (concluding sources of environmental racism are less clear than once originally believed).

47. COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY: THE SECOND ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY, No. 4111-0005, 207 (Aug. 1971), available at http://www.slideshare.net/whitehouse/august-1971-the-first-annual-report-of-the-council-on-environmental-quality (noting, "The experience of the past 10 years in trying to deal with inner city problems has demonstrated the need for an approach that fully takes into account the interrelationship among many varied factors").

48. See id. (describing environmental strife suffered by individuals living in urban areas).

49. Id. (blaming, in part, inadequate tax revenue for adverse pollution effects).

50. See id. (suggesting environmental pollution is highest in communities with lower tax incomes).

51. See Rinne & Dinkins, supra note 30, at 3 (describing origins of environmental justice movement).

52. See Bean v. Sw. Waste Mgmt. Corp., 482 F. Supp. 673, 674 (S.D. Tex. 1979) (concerning environmental racism). "Plaintiffs filed their complaint and Motion for Temporary Restraining Order and Preliminary Injunction contesting the decision by the Texas Department of Health to grant Permit No. 1193 to defendant Southwestern Waste Management to operate a Type I solid waste facility in the East Houston-Dyersdale Road area in Harris County." Id.
American county, as a disposal site for large amounts of toxic soil. In response, the plaintiffs sought a temporary restraining order and preliminary injunction against the Texas Department of Health's (TDH) permit, which allowed Southwestern State Management to operate a waste facility in Harris County. The plaintiffs claimed the decision to grant the permit was motivated, at least in part, by racial discrimination in violation of 42 U.S.C. § 1983.

The plaintiffs in Bean presented two arguments. First, the plaintiffs argued TDH's approval of the permit for Southwestern Waste Management was part of a larger pattern of discrimination in the placement of waste sites. Second, the plaintiffs contended TDH's approval of this specific permit constituted discrimination. In denying injunctive relief, the trial court determined that while "the decision to grant the permit was both unfortunate and insensitive," the plaintiffs failed to establish that the decision "was motivated by purposeful racial discrimination in violation of 42 U.S.C. [§] 1983."

While the Houston Division of the District Court for the Southern District of Texas was deciding Bean, political and civil leaders spearheaded massive protests in a rural, African-American community in North Carolina. Protestors contested a proposed plan to establish a hazardous waste dumping site in their community. The protestors believed the location was selected based on the high percentage of African-American residents, and their poor economic status. Although the protestors were ultimately unsuccessful...

53. See id. (discussing grounds for plaintiffs' complaint).
54. Id. (describing relief sought by plaintiffs in instant action).
55. See id. at 675 (establishing basis for plaintiffs' environmental racism claim).
56. See generally id. at 677-78 (noting insufficiency of data provided by plaintiffs to support finding of discrimination).
57. Bean, 482 F. Supp. at 677 (elaborating on necessity of focus on approved sites to determine presence of discrimination against minority populations).
58. Id. at 678 (noting failure to show discriminatory intent).
59. See id. at 680 (stating evidence provided by plaintiffs did not meet burden required by prior Supreme Court precedent to establish finding of discrimination). Data provided failed "to approach the standard established by [prior Supreme Court precedent] and, even when considered with supplementary proof... fails to establish a likelihood of success in proving discriminatory intent." Id. at 678.
60. See Rinne & Dinkins, supra note 30, at 3 (illustrating nature of protests during early 1980s spurring demand for sounder and safer environmental policies directed towards minority and low-income communities).
61. See id. (documenting political unrest surrounding environmental justice activism).
62. Id. (explaining residents felt landfill location was selected due to high percentage of African-Americans and low economic status of residents).
ful, they heightened national awareness of environmental injustice and compelled a federal government investigation.63

Both the Bean decision in 1979 and the North Carolina protests garnered national attention for the environmental justice movement.64 These events prompted a federal investigation into claims that minority and low-income communities experienced disproportionate toxicity levels and waste dumping.65 In 1983, the GAO conducted a study and issued a report on its conclusions, entitled Siting of Hazardous Waste Landfills and Their Correlation with Racial and Economic Status of Surrounding Communities (GAO Report).66 The study found three of the four toxic waste sites surveyed in southeastern United States were located in predominantly African-American communities.67 In all four of the communities surveyed, at least 26% of the residents' incomes were below the poverty level.68

In 1987, the United Church of Christ's Commission for Racial Justice published a study entitled Toxic Wastes and Race in the United States.69 The study examined the correlation between the prevalence of minorities and waste facility locations.70 After analyzing race, household income, home value, and the estimated amount of hazardous waste generated by industry, the final report indicated race was the most significant factor in determining the location of commercial hazardous waste facilities in the United States.71

The United Church of Christ's study revealed numerous other alarming statistics concerning the impact of pollution on minority

63. Id. (noting despite protests, 60,000 tons of toxic soil was dumped into landfill).
64. Id. (tracing progression of environmental justice movement).
66. See id. at 3-4 (correlating race and income with toxic waste dumping).
67. Id. (finding “[b]lacks make up the majority of the population in three of the four communities where the landfills are located”).
68. See Rinne & Dinkins, supra note 30, at 3 (recounting results of GAO study).
69. See COMM'N FOR RACIAL JUSTICE, supra note 14, at xiii-xiv (comparing race composition and toxic waste dumping throughout United States).
70. See id. at xiii (noting report presented findings on demographic patterns associated with commercial hazardous waste facilities and uncontrolled toxic waste sites).
71. See id. (indicating incomes and home values substantially lower when comparing communities with commercial facilities with communities in surrounding counties without facilities).
and low-income communities.\textsuperscript{72} For example, three out of every five African-Americans and Hispanic-Americans living in the United States reside in communities contaminated with toxic waste.\textsuperscript{73} Equally disturbing, approximately half of all Asian/Pacific Islanders and American Indians in the United States live in polluted communities.\textsuperscript{74} The study also found that, “in communities with two or more [hazardous waste] facilities or one of the nation’s five largest landfills, the average minority percentage of the population was more than three times that of communities without facilities.”\textsuperscript{75} Finally, the study determined three of the five communities containing the largest commercial landfills in the United States had a predominantly African-American or Hispanic racial composition.\textsuperscript{76} These three landfills alone constituted 40\% of the United States’ total commercial landfill capacity.\textsuperscript{77}

IV. Federal Responses to Demands for Environmental Justice

In 1990, former EPA Administrator William Reilly established the EPA’s Environmental Equity Workgroup (Workgroup).\textsuperscript{78} The Workgroup evaluated and audited EPA initiatives to determine whether minority and low-income communities faced a disproportionate risk of exposure to environmental contamination.\textsuperscript{79} The Workgroup’s efforts revealed that racial minority and low-income communities faced “higher than average exposure to selected air pollutants, hazardous waste facilities, contaminated fish, and agricultural pesticides.”\textsuperscript{80}

\textsuperscript{72.} See \textit{id.} (documenting results of GAO study).
\textsuperscript{73.} See \textit{id.} at xiv (noting demographic characteristics of communities with uncontrolled waste sites).
\textsuperscript{74.} See \textit{Comm’n for Racial Justice, supra} note 14, at xiv (stating percentages of various minorities located in areas near uncontrolled toxic waste sites).
\textsuperscript{75.} \textit{Id.} at xiv (noting average minority population percentage in communities with hazardous waste facilities was 24\%, whereas average minority population percentage in communities without hazardous waste facility was 12\%).
\textsuperscript{76.} See \textit{id.} at xiv (summarizing findings of study).
\textsuperscript{77.} \textit{Id.} at xiii-xiv (noting concentration of pollution in racial minority communities).
\textsuperscript{78.} See Rinne & Dinkins, \textit{supra} note 30, at 3-4 (clarifying Workgroup’s report also found opportunity existed for EPA to improve communication about environmental problems with members of low-income and racial minority groups).
\textsuperscript{79.} \textit{Id.} at 3 (explaining goals of Workgroup).
In response to the Workgroup's study, the EPA implemented additional environmental justice initiatives. President George H.W. Bush established the Office of Environmental Equity in 1992 as a branch of the EPA. The purpose of the Office of Environmental Equity was to oversee the EPA in environmental justice matters. In 1993, the EPA created the National Environmental Justice Advisory Council (NEJAC) "to advise the EPA on environmental justice matters and to promote communication concerning environmental justice issues." Also in 1993, the EPA's Office of Solid Waste and Emergency Response Environmental Justice Task Force reviewed environmental justice concerns stemming from various programs, such as the Resource Conservation and Recovery Act (RCRA), the Superfund program, the Oil Pollution Act, and the cleanup and regulation of underground storage tanks.

On February 11, 1994, President Bill Clinton issued Executive Order (EO) 12,898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, which reinforces Title VI of the Civil Rights Act of 1964, which prohibits discriminatory practices in federally funded programs. EO 12,898 develops strategies to address the disproportionately adverse effects of federal programs and policies that negatively influence low-income populations. Specifically, to evaluate the adverse racial impact of environmental policies, EO 12,898 requires better methods for assessing and collecting data. Following the issuance of EO

81. See Rinne & Dinkins, supra note 30, at 4 (identifying EPA responses to environmental justice concerns).
82. See id. at 4 (describing executive branch responses to need for improved environmental justice responses).
83. See id. at 3-4 (noting responses to environmental justice concerns following findings of EPA's Workgroup).
84. See id. at 4 (describing NEJAC's membership includes representatives from various communities, academia, industry, environmental and indigenous groups, and state, local, and tribal governments).
85. See id. (stating expansive response of EPA to environmental justice concerns in early 1990s).
86. See Exec. Order No. 12,898, 59 Fed. Reg. 7,629 (Feb. 11, 1994) (referencing further executive action taken to address issues of environmental racism). "Federal agencies, whenever practicable and appropriate, shall work in a coordinated manner to publish guidance reflecting the latest scientific information available concerning methods for evaluating the human health risks associated with the consumption of pollutant-bearing fish or wildlife. Agencies shall consider such guidance in developing their policies and rules." Id. at 7632.
87. See id. at 7,629 (stating "[f]ederal agencies shall make achieving environmental justice part of its mission.").
88. See id. at 7,629-30 (ordering Administrator to convene interagency Federal Working Group within three months of issuance of Order). Executive Order 12,898 directs federal agencies to:
12,898, the Interagency Working Group on Environmental Justice (IWG) was established with a focus on integrating environmental justice concerns across federal agencies. Moreover, in 1995, the EPA narrowed its implementation of EO 12,898 by targeting five environmental justice missions: (1) public participation and outreach; (2) health and environmental research; (3) data collection and analysis; (4) American Indian and indigenous environmental protection; and (5) enforcement, compliance assurance, and regulatory review.

While the objectives of EO 12,898 aim to mitigate the adverse impact of environmental policies on minorities, it is unclear whether it has been successful. First, critics agree that one of the largest faults of EO 12,898 is its failure to adequately define several terms, including “environmental justice communities.” Under the EO, to qualify as an environmental justice community, the community must experience environmental impacts “disproportionate” to other communities. This vague standard qualifies communities that experience a “disproportionate” environmental impact based on minority status.

(1) Promote enforcement of all health and environmental statutes in areas with minority populations and low-income populations; (2) ensure greater public participation; (3) improve research and data collection relating to the health of and environment of minority populations and low-income populations; and (4) identify differential patterns of consumption of natural resources among minority populations and low-income populations. In addition, the environmental justice strategy shall include, where appropriate, a timetable for undertaking identified revisions and consideration of economic and social implications of the revisions.

Id. at 7630.

89. Id. at 7,629 (ordering, “[w]ithin 3 months of the date of this order, the Administrator ... shall convene an interagency Federal Working Group on Environmental Justice.”).

90. See Exec. Order No. 12,898, supra note 86 (documenting EPA’s progress in field of environmental justice). “Thereafter, EPA created the Environmental Justice Small Grants Program and the Environmental Justice Achievement Awards program and then began preparing Environmental Justice Action Plans to establish measurable commitments that address the agency’s national environmental justice priorities.” Rinne & Dinkins, supra note 30, at 4.

91. See Protecting Public Health and the Environment by the Stroke of a Presidential Pen: Seven Executive Orders for the President’s First 100 Days, CENTER FOR PROGRESSIVE REFORM 18 (Nov., 2008), available at http://www.progressivereform.org/CPR_Exec_Orders_Stroke_of_a_Pen.pdf (stating, “[e]ven cursory reflection reveals that Executive Order 12898 has failed to live up to its promise, and needs an overhaul”).

92. See id. at 19 (discussing pending issues with Executive Order 12,898).

93. See id. at 19-20 (enumerating deficiencies in EO 12,898). EO 12,898 merely requires “each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations.” Exec. Order 12,898, 59 Fed. Reg. 7,629, 7,629 (Feb. 11, 1994).
on an undefined benchmark.\textsuperscript{94} EO 12,898 should adopt a better method to identify an environmental justice community.\textsuperscript{95} The requirements should identify discrete, measurable factors that comprise an environmental justice community, and include communities disproportionately impacted, as well as communities with high exposure to pollutants.\textsuperscript{96}

Second, EO 12,898 fails to provide an affirmative environmental justice agenda.\textsuperscript{97} Instead, it focuses primarily on eliminating current and past practices that affect communities in disproportionate ways.\textsuperscript{98} The EO offers little direction to federal agencies on how to incorporate environmental justice concerns into their missions.\textsuperscript{99} It does not measure progress nor does it hold agencies accountable for failing to comply with EO 12,898.\textsuperscript{100}

V. RAISING CLAIMS OF ENVIRONMENTAL RACISM UNDER TITLE VI AND INTERPRETING THE EPA'S INTERIM GUIDANCE

A plaintiff claiming environmental discrimination by a federally funded program may file a complaint with the EPA under Title VI of the Civil Rights Act of 1964.\textsuperscript{101} Title VI offers administrative assistance, and provides a statutory basis for relief from discrimina-

\textsuperscript{94}. See Center for Progressive Reform, supra note 91, at 19 (noting constructive action may be stymied as result of vagueness in definition of terms).

\textsuperscript{95}. See id. at 20 (suggesting possible improvements to responses to environmental justice concerns). A more appropriate framework suggested would include consideration of the following factors: 1) A broad list of factors that allow for the identification of areas of concern without excluding disadvantaged communities; 2) a requirement that agencies consider both communities that are disproportionately impacted and those that face unacceptably high risks or exposures; and 3) language that is carefully phrased to avoid giving rise to debates about causation.

\textsuperscript{96}. See id. (elaborating on ways to make Executive Order 12,898 more effective).

\textsuperscript{97}. See id. at 21 (promoting affirmative environmental action agenda focusing on development of "green-collar" jobs, job training, and new green businesses in traditionally disadvantaged environmental justice communities).

\textsuperscript{98}. See id. at 19 (emphasizing retroactive nature of EO 12,898).

\textsuperscript{99}. See Center for Progressive Reform, supra note 91, at 19 (describing lack of guidance fatal to effective implementation of goals of EO 12,898).

\textsuperscript{100}. See id. at 20-22 (proposing amended order holds agencies individually accountable for failure to adhere to objectives of EO 12,898).

\textsuperscript{101}. See John Chambers, The Supreme Court has Agreed to Take Up an Issue that has Stymied Regulators and Judges: Waste Facilities Planned for Construction in Minority Areas, 20 Nat'l L. J. 12 (1998) (discussing ways in which plaintiffs have challenged federally funded programs having adverse environmental impacts); see also 42 U.S.C. § 2000d (2003) (prohibiting discrimination under federally funded programs).
A plaintiff can find relief either through the revocation or amendment of a granted permit, or by the withholding of federal funds from permitting authorities. Section 601 of Title VI states, "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 assistance."

In addition, §602 of Title VI directs agencies distributing federal funds to issue regulations guiding the implementation of §601. It also mandates those agencies to create a mechanism for processing complaints of alleged racial discrimination. It provides in part:

Each federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract...is authorized and directed to [issue] rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.

Typically, to establish discrimination under §601 of Title VI, a plaintiff must prove the decision to dump waste in a community was

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103. See id. (clarifying specific nature of remedies provided to environmental justice claimants).


105. See 42 U.S.C. § 2000d-1 (2003) (ensuring each federal agency does not discriminate in issuing funds to programs). It states:

Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.

106. See id. (indicating racial discrimination is major policy concern for administering federal financing); see also 40 C.F.R. § 7.35(b) (2011) (prohibiting use of funds in way which has effect of subjecting individuals to discrimination).

motivated by intentional discrimination.\textsuperscript{108} This high burden of proof has been difficult to meet.\textsuperscript{109} Proof of discrimination under § 602, however, is satisfied by showing unintentional discrimination or a disparate impact—a less stringent burden of proof.\textsuperscript{110} As a result, the burden of proof is significantly lessened for most complaints alleging environmental racism claims under both §§ 601 and 602 of Title VI.\textsuperscript{111} Additionally, the EPA’s regulations require only a showing of discriminatory effect to support an administrative finding of discrimination.\textsuperscript{112} Courts, therefore, tend to favor the “disparate impact test,” instead of requiring a showing of discriminatory intent, to establish the presence of environmental racism.\textsuperscript{113}

In 1998, the EPA issued \textit{Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Interim Guidance)}, which provided a mechanism for the EPA to implement and enforce regulations regarding Title VI.\textsuperscript{114} The EPA’s regulations implementing Title VI outline the procedure by which the EPA must investigate complaints of Title VI violations.\textsuperscript{115} After the EPA establishes a Title VI violation, the regulations require the EPA to seek voluntary compliance from the violating agency, and also urge the EPA to consider terminating an agency’s funding if the violating agency does not voluntarily comply with the EPA’s regulations.\textsuperscript{116}

The \textit{Interim Guidance} provides direction for the investigation of Title VI complaints, and the analysis of disparate impact allegations.
under § 602.117. It also instructs a plaintiff on the components of a proper pleaded Title VI complaint.118 Although the Interim Guidance does not create any enforceable rights and grants the EPA discretion to disregard its own guidance, it imposes new obligations on state agencies beyond those contemplated under the existing regulations.119 For example, it establishes a time period for the adjudication of Title VI complaints.120 This allows ample time for factual investigations and opportunities for state agencies to present mitigation, justification, and rebuttal arguments.121 The Interim Guidance also provides for a 230-day adjudication period from the date a complaint is filed to its resolution, which is not required under EPA regulations.122

To assess Title VI complaints alleging disparate impact, the Interim Guidance provides a five-step analysis.123 The first step identifies the population affected by the facility’s permit.124 The second step determines the racial or ethnic composition of this population.125 The next measure examines other permitted facilities, which are included in the analysis based on the facts of the particular case, and the racial and ethnic makeup of the populations affected by those permits.126 The fourth step conducts a disparate

117. See Interim Guidance, supra note 114, at 8-11 (discussing process for evaluating disparate impact claims for determination of environmental justice claims).

118. Id. at 6 (noting complaint requirements). It states:
A complete or properly pleaded complaint is: 1) in writing, signed, and provides an avenue for contacting the signatory . . . 2) describes the alleged discriminatory act(s) that violates EPA’s Title VI regulations . . . 3) filed within 180 calendar days of the alleged discriminatory act(s); and 4) identifies the EPA recipient that took the alleged discriminatory act(s).

Id. (citations omitted).

119. See id. at 1-5 (stating procedure for investigation of Title VI complaint processing includes: acceptance of complaint, investigation/disparate impact assessment, rebuttal/mitigation, justification, preliminary finding of non-compliance, formal determination of non-compliance, voluntary compliance, and informal resolution).

120. See id. at 11 (discussing additional obligations).

121. See id. (describing specific requirements under Interim Guidance).

122. See Chambers, supra note 101 (explaining obligations imposed by EPA Interim Guidance considerations).

123. See Interim Guidance, supra note 114, at 8-11 (commenting that analysis of disparate impact allegations should be based on facts and totality of circumstances on case-by-case basis).

124. See id. at 8 (noting proximity to facility will often be reasonable indicator of concentration of impacts).

125. See id. at 9 (explaining that Office of Civil Rights uses demographic mapping technology including Geographic Information Systems).

126. See id. (indicating Office of Civil Rights will determine appropriate universe of facilities based on allegations and facts of particular case).
impact analysis, which includes analyzing the racial or ethnic factors of the population and comparing the racial characteristics of the affected population with those of an unaffected population.\textsuperscript{127} The final step uses statistical methods to determine the significance of the disparity.\textsuperscript{128}

If the EPA concludes that a permit creates a disparate impact, the permitting authority must mitigate the disparate impact or justify the “decision to issue the permit notwithstanding the disparate impact, based on the substantial legitimate interests of the recipient.”\textsuperscript{129} The permitting authority can either rebut the EPA’s findings by providing evidence that the benefits of the proposed facility outweigh the severity of the disparate impact, or the permitting authority can submit an alternative plan for approval that confers a less discriminatory impact.\textsuperscript{130} An apt example demonstrating litigation of an environmental discrimination claim occurred in Chester, Pennsylvania.\textsuperscript{131}

A. Private Action Claims Under § 602 of Title VI and the Case of Chester, Delaware County

The city of Chester, located in Delaware County, Pennsylvania, provides ideal case study demographics due to the disproportionately high African-American population relative to the rest of the county.\textsuperscript{132} Delaware County has a population of about 550,000, which is comprised of a 72.5% white population, 19.7% black population, and 3% Hispanic or Latino population.\textsuperscript{133} Delaware County’s median annual household income is $61,848; and 9.3% of the population lives below poverty.\textsuperscript{134} In comparison, the city of

\begin{itemize}
\item \textsuperscript{127} See id. at 10 (noting, “EPA generally would expect the rates of impact for the affected population and comparison populations to be relatively comparable”).
\item \textsuperscript{128} See \textit{Interim Guidance}, supra note 114, at 10 (stating trained statisticians evaluate disparity calculations done by investigators and provide an expert opinion from which Office of Civil Rights may make prima facie disparate impact finding).
\item \textsuperscript{129} See id. at 10-11 (discussing both mitigation and justification processes when determination of disparate impact or unintentional discrimination).
\item \textsuperscript{130} See id. (suggesting finding of discrimination may be rebutted in multiple ways).
\item \textsuperscript{131} For a discussion of the demographics in Chester, Pennsylvania, see \textit{infra} notes 132-173 and accompanying text.
\item \textsuperscript{132} For an analysis of U.S. Census Bureau statistics, see \textit{infra} notes 133-137 and accompanying text.
\item \textsuperscript{134} See id. (showing income statistics across Delaware County).
\end{itemize}
Chester has a population of 36,800. Chester's population is approximately 18.9% white, 75.7% black, and 5.4% of Hispanic or Latino origin. The median annual household income is $25,703; and 27.2% of the Chester population lives below poverty.

Chester hosts four hazardous municipal waste treatment facilities, including the nation's largest infectious medical waste treatment facility and the nation's fourth largest trash-to-steam incinerator. These waste facilities handle more than two-thirds of the county's total waste and harbor medical waste from Pennsylvania, Ohio, Virginia, Maryland, Delaware, New York, and New Jersey. As a result of the facilities generating considerable pollution, Chester residents have complained for years of constant headaches, sore throats, skin disorders, and asthma.

In 1994, the EPA conducted a six-month cumulative risk assessment of Chester to evaluate the disproportionate environmental impacts on the residents. Instead of publishing the full results of the report, the EPA curiously released, even to high-ranking government officials, only an abbreviated summary of the findings. The limited results released indicated that over 60% of the children's blood samples exhibited lead levels above the Center for Disease Control's (CDC) recommended maximum level. The EPA also determined Chester had the highest infant mortality rate in the state. In addition, carcinogenic risks and non-cancer threats at

136. Id. (illustrating racial composition of community).
137. Id. (showing relatively poorer incomes than cities in larger Delaware County).
139. Id. (illustrating Chester hosts waste from multiple states, not limited solely to Pennsylvania).
140. See id. (noting vast array of health issues experienced by Chester residents resulting from pollution in community).
142. Id. at 2 (mentioning report released is condensed version of larger risk assessment study).
143. Id. at 5 (finding children in Chester have blood lead exposures which are substantially higher than U.S. average).
144. Id. at 7 (determining presence of unsafe cumulative carcinogenic risks in Chester City).
several locations in Chester exceeded levels considered safe.\textsuperscript{145} Notably, several Chester-based businesses contributed significantly to the increased risk of cancer in the city.\textsuperscript{146}

Chester residents took action in the mid-1990s in \textit{Chester Residents Concerned for Quality Living v. Seif (Seif)}.\textsuperscript{147} The plaintiffs brought an action under both Title VI and the EPA's regulations against the Pennsylvania Department of Environmental Protection (DEP).\textsuperscript{148} The plaintiffs challenged the waste facility operating permit issued to Soil Remediation Services, Inc.\textsuperscript{149} The primary issue was whether the EPA's regulations conferred a private right of action; and if so, what was the required burden of proof.\textsuperscript{150}

The Third Circuit Court of Appeals specified that Title VI plaintiffs alleging a § 602 violation need only show a disparate impact under the EPA regulations.\textsuperscript{151} The court held the EPA regulations plainly provided for the discriminatory effect standard.\textsuperscript{152} Furthermore, the Third Circuit determined that environmental justice claims under the EPA regulations and Title VI may be heard

\begin{itemize}
\item \textsuperscript{145} \textit{Id.} (describing increased risk of cancer experienced by Chester residents resulting from excess pollution exposure).
\item \textsuperscript{146} \textit{ENVIRONMENTAL RISK STUDY FOR CITY OF CHESTER, PENNSYLVANIA, supra note 141, at 10 (suggesting companies, including Delcora and Sun, contribute to increased carcinogenic risk and “DuPont and Westinghouse account for approximately 80% of the non-cancer risk”).}
\item \textsuperscript{148} \textit{See Chester Residents Concerned for Quality Living,} 132 F.2d at 927-28 (discussing theories of action underlying plaintiffs’ complaint).
\item \textsuperscript{149} \textit{Id. at 927} (noting non-profit corporation, CRCQL, sued Pennsylvania Department of Environmental Protection and James M. Seif, Secretary of DEP).
\item \textsuperscript{150} \textit{Id. at 933} (outlining legal standards when considering claims against EPA). The Third Circuit created a three-prong test to determine when private rights of action to enforce regulations can be implied:
\begin{itemize}
\item The test requires a court to inquire: (1) whether the agency rule is properly within the scope of the enabling statute; (2) whether the statute under which the rule was promulgated properly permits the implication of a private right of action; and (3) whether implying a private right of action will further the purpose of the enabling statute.
\end{itemize}
\textit{Id.} (citations and internal quotation marks omitted).
\item \textsuperscript{151} \textit{Id. at 936-37} (holding “private plaintiffs may maintain action under discriminatory effect regulations promulgated by federal administrative agencies pursuant to § 602 of Title VI of Civil Rights Act of 1964”).
\item \textsuperscript{152} \textit{Id. at 933} (opining “there is no question that the EPA’s discriminatory effect regulation satisfies the first prong”); \textit{see also} \textit{40 C.F.R. § 7.35(b)} (stating recipient of EPA assistance may not discriminate against individuals based on race, color, national origin, or sex).
\end{itemize}
directly in federal court instead of proceeding through the lengthy administrative procedures provided by the EPA's regulations. The court reasoned the regulations only terminate the offending agency's federal funding; they do not offer a remedy to the victim of the discriminatory conduct.

The Supreme Court of the United States granted certiorari in June 1998. On appeal, the DEP claimed the Third Circuit erred in finding a private right of action to enforce § 602 of the 1964 Civil Rights Act. The Supreme Court dismissed the case at the request of the plaintiffs after the DEP revoked the permit for the proposed facility at the request of the permittee.

Chester nevertheless found remedial help through the State Environmental Justice Cooperative Agreement (SEJCA). The EPA's Office of Environmental Justice developed the SEJCA to focus on promoting environmental justice in state government activities, and to advance strategies that will improve the public health and the environment. The SEJCA supports projects aimed at addressing environmental and public health issues in communities experiencing disproportionate exposure to environmental harms and risks. To further its efforts to promote environmental justice, in 2009 the SEJCA "selected five state projects to receive funding of up to $160,000 each," including the Chester Home Asthma Prevention Program.

Under the direction of the DEP, the Chester Environmental Partnership, and the Crozer-Keystone Health System, the Chester

153. Chester Residents Concerned for Quality Living, 132 F.3d at 933 (providing that claimants can bring action in federal court and avoid EPA's procedures).
154. Id. at 935-36 (explaining purpose of procedural requirements "is not as significant in private lawsuits, where the potential remedy does not include the result (i.e. termination of funding) at which Congress directed the requirements").
156. See Chambers, supra note 101 (discussing further reasoning behind Third Circuit's holding).
157. See id. (explaining reason for dismissal of case).
159. Id. (describing reason for SEJCA creation). The following four states have state projects: Alaska, California, Illinois, and South Carolina. Id.
160. Id. (stating program will target issues of asthma triggers, solid waste disposal, and children's environmental health).
161. Id. (indicating $800,000 given in grants; $160,000 given to five separate communities under SEJCA program).
Home Asthma Prevention Program addresses asthma triggers, solid waste disposal, and children’s environmental health. The program endeavors to educate Chester residents about methods to reduce exposure to air pollution and solid waste through in-home remediation, education, and community-based strategies. The Chester Home Asthma Prevention Program aims to educate and reduce asthma triggers surrounding homes. The program is implemented in three phases: “(1) in-home assessments and baseline evaluations; (2) asthma education and remediation through peer educators and counselors; and (3) remediation of improperly disposed of solid waste in the community.”

Through the Chester Home Asthma Prevention Program, children in Chester suffering from asthma can receive an initial in-home visit from the program director and a peer counselor, information about asthma, and follow-up visits. To qualify for care under the program, the child must have visited the emergency room due to asthma or experienced frequent asthma attacks. Eligible children must also have directly contacted or received a referral to the Community Health Education Department.

Once enrolled in the Chester Home Asthma Prevention Program, the program coordinators arrange an initial home visit to introduce the family and the child to the program, educate them about asthma signs and symptoms, and conduct evaluations. Following the initial visit, a peer counselor conducts four additional one-hour in-home visits to discuss various ways to reduce environ-

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162. State Environmental Justice Cooperative Agreements (SEJCA), supra note 158 (discussing specific program goals).
163. Id. (explaining how program will be implemented).
165. State Environmental Justice Cooperative Agreements (SEJCA), supra note 158 (stating program will be executed in three phases).
166. See New Home Asthma Prevention Program Provides On-Site Education and Support to Chester Families, supra note 164 (discussing logistics of Chester Home Asthma Prevention Program).
167. Id. (outlining qualifications for program eligibility).
168. Id. (explaining foundational requirements to be treated under program).
169. Id. (noting program provides children with referrals to medical care and monitoring, access to appropriate asthma medications, patient and family education and tools for asthma management).
mental asthma triggers in the home. Qualifying families also receive an asthma trigger remediation kit, which includes an allergen-proof pillow, mattress encasings, and non-toxic cleaning products and cleaning supplies. The program manager conducts bi-monthly in-home follow-up visits for the first six months and quarterly visits for the following six months to determine the program’s effectiveness for that particular family. Despite the admirable aims of the Chester Home Asthma Prevention Program and similar other programs, the Supreme Court has largely thwarted individuals’ claims of environmental injustice.

B. A Setback for Environmental Justice Claimants: Alexander v. Sandoval

Three years after dismissing Seif as moot, the Supreme Court provided further clarity on the private right of action in claims of environmental justice in Alexander v. Sandoval (Sandoval). The Court revisited litigation of Title VI claims when considering an amendment to the Alabama Constitution mandating driver’s license applicants to pass examinations administered only in English. In a five to four decision, with Justice Scalia writing for the majority, the Court held, “it is beyond dispute that private individuals may sue to enforce § 601” claims based on intentional discrimination.

The Court, however, decided that an “implied” right of private action does not exist under § 602 of Title VI to enforce disparate impacts. Looking to legislative intent, the Court held Congress did not intend to create an implied right of action to enforce Title

170. See id. (explaining importance of in-home visits to effectuation of program).
171. See New Home Asthma Prevention Program Provides On-Site Education and Support to Chester Families, supra note 164 (describing tools and resources provided to families to combat asthma symptoms and educate on prevention).
172. Id. (describing prevention program).
173. For a discussion of Alexander v. Sandoval and the Supreme Court’s reluctance to grant relief for claims of environmental injustice, see infra notes 175-186 and accompanying text.
175. Id. at 293 (holding no private right of action exists to enforce disparate-impact regulations under § 602).
176. Id. at 278-79 (recognizing Alabama amended state Constitution in 1990 to declare English official language of state).
177. Id. at 280 (adding “it is similarly beyond dispute . . . that § 601 prohibits only intentional discrimination.”).
178. See id. at 287-89 (discussing Congressional intent in enacting § 602 and providing individuals with private right of action).
VI's disparate impact regulations because § 602 did nothing more than authorize federal agencies to issue regulations. The Court opined that the language in a regulation may invoke a private right of action only when it is congressionally created through a statute. The Court elaborated:

[W]hen a statute has provided a general authorization for private enforcement of regulations, it may perhaps be correct that the intent displayed in each regulation can determine whether or not it is privately enforceable. But it is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress. Agencies may play the sorcerer's apprentice but not the sorcerer himself.

A regulation, therefore, cannot confer a private cause of action that Congress does not explicitly authorize. The disparate impact regulations were rendered unenforceable through an implied right of action because § 602 created no enforceable rights.

As the dissent noted, private parties might still be able to sue under 42 U.S.C. § 1983. Three circuit courts have addressed the enforceability of the EPA's disparate impact regulations since Sandoval, however, and "all have held that no cause of action is available even under § 1983 to enforce Title VI's disparate-impact regulations."

Id. (citations omitted).

179. Alexander, 532 U.S. at 289 (explaining limit imposed by § 602).

180. Id. at 286 (opining that like substantive federal law, private rights of action to enforce federal law must be created by Congress).

181. Id. at 291 (describing need to examine statutory intent to ascertain creation of private cause of action).

182. Id. at 287 (citing Lampf v. Gilbertson, 501 U.S. 350, 365 (1991)). "Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals." Lampf, 501 U.S. at 365.

183. See id. at 290 (noting restrictions on agency enforcement contained in § 602 tend to contradict congressional intent to create privately enforceable rights through § 602); see also § 602 (2003) (containing language that does not explicitly confer private right of action).

184. Alexander, 532 U.S. at 300 (opining that litigants wishing to enforce Title VI regulations against state actors "must only reference § 1983 to obtain relief").
Lower courts have thus relied on Sandoval to hold that the regulations did not contain enforceable rights and cannot be enforced through § 1983.\textsuperscript{186}

In April 2008, congressional bills proposed to codify the right of individuals to bring private disparate impact claims.\textsuperscript{187} The Civil Rights Act of 2008 would have amended Title VI to add the following text:

\begin{quote}
(b) (1) (A) Discrimination (including exclusion from participation and denial of benefits) based on disparate impact is established under this title only if – (i) a person aggrieved by discrimination on the basis of race, color, or national origin. . . demonstrates that an entity subject to this title. . . has a policy or practice that causes a disparate impact on the basis of race, color, or national origin and the covered entity fails to demonstrate that the challenged policy or practice is related to an necessary to achieve the nondiscriminatory goals of the program or activity to have been operated in a discriminatory manner.\textsuperscript{188}
\end{quote}

Such an amendment would have enabled private lawsuits under § 602 to challenge government programs by showing their disparate impact on covered groups.\textsuperscript{189} Unfortunately, this proposal expired at the end of the summer of 2008 and Congress has not reintroduced the bill.\textsuperscript{190}


\textsuperscript{186} See id. (noting this interpretation has led to ending private litigation seeking remedies to wide range of racially discriminatory practices).

\textsuperscript{187} See id. (stating new legislation “simply dispenses with a regulatory approach to racially disparate impact practices”).


Section 602 of Title VI would be amended to include the following: “Any person aggrieved by the failure of a covered entity to comply with this title, including any regulation promulgated pursuant to this title, may bring a civil action.” \textit{Civil Rights Act of 2008}, S. 2554, § 105(b) 110th Cong. (2008).

\textsuperscript{189} See Suthammanont, \textit{supra} note 188, at 48 (stating this language creates private right of action to enforce regulations under § 602 of Title VI, directly overruling result in \textit{Alexander v. Sandoval}).

\textsuperscript{190} See Dunn, \textit{supra} note 185 (suggesting legislation may be reintroduced, although it has not yet been passed); see also \textit{S. 2254: Civil Rights Act of 2008}, GovTrack.US, \url{http://www.govtrack.us/congress/bill.xpd?bill=s1\}10-2554} (last visited Nov. 19, 2011) (indicating that legislation has been referred to committee).
VI. CONCLUSION: WHAT ELSE CAN BE DONE TO ACHIEVE ENVIRONMENTAL JUSTICE?

On the federal level, Congress should codify EO 12,898 to "strengthen compliance and enforcement of environmental justice initiatives." By codifying the EO, Congress would create federal responsibility for achieving environmental justice and provide a means of accountability for federally funded programs that fail to comply. Another federal remedy is to enact legislation granting individuals a private right of action in environmental justice claims. Such a statute would supersede Sandoval, which denies individuals a private right of action in cases of disparate impact discrimination under § 602 of the Civil Rights Act. Until private action is restored in disparate impact cases, "private advocacy organizations will have to fight many discrimination battles with one hand tied behind their backs." Congress should also enact legislation promoting clean production and waste reduction, and require comprehensive safety data for all chemical manufacturing companies.

The EPA should also take further steps to effectuate the implementation of environmental justice. First, it should undertake particularly aggressive action in areas where low-income and minority populations are at the greatest risk. Second, the EPA should require cumulative risk assessments for these especially sensitive

191. See Bullard, supra note 38, at 147-148 (proposing that mandatory EO would ameliorate effectuation of environmental justice initiatives).
192. See id. at 148 (indicating codification of EO establishes legal mandate and imposes federal responsibility in ways that advance equal protection under law in communities of color and low-income communities).
193. See id. (urging Congress to restore status quo that existed prior to Sandoval).
194. See id. (explaining need for legislation to restore private right of action under disparate impact analysis).
195. Id. (noting importance of allowing individuals to bring claims of environmental justice under § 602).
196. See Bullard, supra note 38, at 148 (indicating suggested aims of legislation). Additional federal remedies included: 1) holding congressional hearings on EPA response to contamination in environmental justice communities; 2) convening congressional Black caucus and congressional Hispanic caucus policy briefings; and 3) requiring comprehensive safety data for all chemicals. Id.
197. For a discussion of the EPA's potential activities to effectuate the implementation of environmental justice, see infra notes 198-203 and accompanying text.
198. See Bullard, supra note 38, at 148 (highlighting that EPA's own inspector general concedes that EPA has not developed clear vision or comprehensive strategic plan regarding environmental justice issues).
populations. The risk assessments provide essential guidance when issuing permits to pollution emitting industries. Third, the EPA and individual states should require safety buffers in communities with permits for industrial facilities. The EPA can establish safety buffers by adopting site location standards that require a minimum “safe” distance between residential populations and industrial facilities. If states exempt the safety buffer, the EPA should ensure recovery resources, such as performance bonds, are available for individuals living within the safety buffer affected by a potential chemical calamity.

In addition to federal measures, states and local communities should also take precautions to protect their populations. States may choose to perform annual environmental justice assessments to analyze the current progress and possible areas of improvement. States should also require individual industries to adopt clean production methods. Industries emitting hazardous wastes should focus on waste reduction by using safer chemicals and nontoxic materials, while simultaneously phasing out unsafe toxins. The states should mandate that these industries negotiate with affected communities and set performance standards. These standards may include: “community access to information, environmental and health monitoring, the right to inspect the facility, accident

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199. Id. at 149 (emphasizing importance of cumulative risk studies to ensure safer environment).
200. See id. (noting that these risk assessments should also be used to implement clean-up plans).
201. Id. (discussing importance of required minimum distance standards from hazardous waste facilities).
202. Id. (suggesting higher safety standards in environmental justice communities).
203. Bullard, supra note 38, at 149 (proposing method of ensuring compensation to individuals harmed by adverse environmental impacts).
204. See id. at 149-150 (reiterating importance of state and local action in addition to federal measures to remedy environmental hazards experienced by communities inhabited primarily by racial minorities).
205. Id. at 149 (presenting actions states may take to verify implementation of environmental justice measures).
206. See id. at 151 (illustrating that meaningful measures taken by industries can optimize results).
207. Id. (urging industries to promote use of renewable energy, nontoxic materials, safer chemical practices and sustainable product design).
208. Bullard, supra note 38, at 151 (listing further actions industries may take in conjunction with local communities to ensure implementation of safe environmental practices).
preparedness, pollution prevention, support for local jobs, and means for dispute resolution.\textsuperscript{209}

With more attention focused on environmental concerns and the candid disclosure of information, individuals and communities may be better prepared to respond to negative environmental impacts.\textsuperscript{210} Information disclosure enables citizens to respond preemptively to an issue that may raise environmental justice claims.\textsuperscript{211} At the same time, it would save private industries and local governments or governmental entities the cost of litigating subsequent claims against environmental justice claimants.\textsuperscript{212} A general respect for the environment and the people who reside in it promotes an optimal long-term business strategy, and ensures the health and wellbeing of innocent citizens who may be unfairly exposed to disproportionate environmental hazards.\textsuperscript{213}

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209. \textit{Id.} (stating that informed public, workers, and communities must have access to information about industries' use and release of toxic chemical and industries' product chains).

210. \textit{See Not in My Backyard, supra note 102, at 169-70} (suggesting meaningful participation by affected communities is integral to environmental justice).

211. \textit{See id.} at 170-71 (explaining ways to make information more available to individuals). This includes enacting legislation requiring disclosure of information to affected communities and holding public meetings at a time and location convenient for members of the community. \textit{Id.}

212. \textit{See id.} at 169-170 (noting value in preemption of environmental justice claims).

213. \textit{See id.} at 174 (finding incorporation of environmental justice into agencies' core missions will ultimately result in sounder and safer environmental practices).

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