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EPA at Thirty: Fairness in Environmental Protection

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by Eileen Gauna

Reflecting on the U.S. Environmental Protection Agency's (EPA's) arrival at its 30th birthday, it is difficult not to anthropomorphize. This idealistic love child born of a strange affair between populist zeal and political ambition[1] has developed into a commanding agency whose decisions reverberate through the economy and significantly affect individual lives. Yet it is still difficult for stakeholders who routinely encounter this mature behemoth to grasp its essential "persona." Charged with the unenviable mission of implementing most of the major environmental statutes and administering hundreds of regulatory programs,[2] it should come as no surprise that its character would be complicated, and conflicted. Although this mega-agency's internecine struggles over policy and implementation remain hidden from the outside observer,[3] the contradicting institutional messages subsequently emerging from EPA causes it to appear to have a severe multiple personality disorder. This tendency is particularly acute when the subject of fairness arises, in particular the vexing distributional issues. At that point, an outside observer may see one of the more benevolent alter egos emerging, one insisting that the Agency's priority is to ensure environmental regulation that is protective and equitable.[4] As sincere as this sentiment is for many individuals within the Agency, however, seemingly contradictory actions may issue from this institutional Janus. In some instances, for example, Agency actions evidence greater attention to protecting the Agency politically than addressing the plight of overburdened communities.[5] In addition, high level Agency officials at times articulate an overriding commitment to regulatory relief for industry stakeholders and greater autonomy to state regulators, goals that, when examined closely, potentially undermine the goals of distributional and procedural fairness to heavily impacted communities.[6] In this respect, more is involved than the public relations spin of an agency maneuvering among special interest groups. Rather, these mixed messages reflect deeper institutional conflicts that impede the Agency's ability to provide comparable levels of environmental protection for all communities without depleting institutional resources or causing undue damage to competing interests. At stake in this clash among agency alter egos is the integration of fairness into environmental regulation, in other words, environmental protection for all.

Endeavoring to assess the successes, failures, and limitations of EPA's various attempts to manage fairness claims over the last 30 years would be a formidable task. Fairness and distribution issues in environmental protection are varied. There is an issue of regulatory fairness that arises when some polluting sectors of the economy go virtually unregulated while others are subject to the torturous ratcheting of ever tighter standards. Closely related to this are property rights issues, fairness claims that arise when private property of the few appears to be constructively confiscated, via regulation, for the benefit of the many. There is a fairness issue that arises when environmental laws are enforced by criminal sanctions that effectively negate the types of *mens*

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1. MARC C. LANDY ET AL., THE ENVIRONMENTAL PROTECTION AGENCY, ASKING THE WRONG QUESTIONS FROM NIXON TO CLINTON 22-33 (1994).

2. *See* U.S. EPA, *Alphabetical Listing of Projects and Programs*, *at* http://www.epa.gov/epahome/abcpgram.htm (last modified Nov. 6, 2000).

3. For a collection of fascinating insider accounts, see LANDY ET AL., *supra* note 1.

4. *See* Deputy Administrator Speeches, *EPA Deputy Administrator Fred Hansen's Remarks Prepared for Delivery to the Martin Luther King Tribute 1998 (Jan. 22, 1998)*, *at* http://yosemite.epa.gov/opa/asadspch.nsf/ (last visited Dec. 29, 2000); *see also* U.S. EPA, ENVIRONMENTAL JUSTICE 1994 ANNUAL REPORT: FOCUSING ON ENVIRONMENTAL PROTECTION FOR ALL PEOPLE 3 (1995) (EPA 200-R-95-003).

5. Recently, for example, EPA sources claimed that in the mid-1990s, EPA "buried" memos that outlined a comprehensive plan to use its existing legal authority to better address racially disparate impacts because of anticipated opposition from industry, states, and the Congress. *See* John Stanton, *Special Report, EPA "Buried" 1994 Plans for Major Environmental Justice Roadmap*, INSIDE EPA, 1-2, 24 (Mar. 3, 2000). Industry sources noted that was probably a wise choice given congressional opposition. *Id.* However, if these memos were withheld due to the activism of the 104th Congre s, there is no explanation why the memos did not re-surface after congressional pressure subsided. Perhaps more telling is an internal EPA memo in the early years of the environmental justice movement, which showed a similar wariness and cautioned against a potential coalition between environmental justice activists and conventional environmental organizations. In that memorandum, an official reportedly urges action to allow EPA to gain recognition with such groups before "the people of color fairness issue reache[s] the 'flashpoint'—that state in an emotionally charged public controversy when activists groups finally succeed in persuading the more influential mainstream groups (civil rights organizations, unions, churches) to take ill-advised actions." *See The Real Story Behind EPA's "Environmental Equity" Report*, 2 RACE, POVERTY & ENV'T 5, 18 (California Rural Legal Assistance Found. & Earth Island Inst. Urban Habitat Program, San Francisco, Cal.) (Fall/Winter 1991-1992) (also quoting the EPA official as tating "our goal is to make the agency's substantial investment in environmental equity and cultural diversity an unmistakable matter of record with mainstream groups before activists enlist them in a campaign that could add the agency . . . as a potential target").

6. *See infra* notes 234-373 and accompanying text.

rea requirements familiar to criminal law and theory.[7] Then there is environmental justice, which presents some of the most perplexing fairness and distributional issues to confront the Agency thus far.

Rather than attempt a sweeping treatment of fairness in these various contexts,[8] this Article instead takes a look at how EPA is managing the fairness issue in a discrete but highly charged context: permit issuances that affect heavily impacted communities. This examination could prove helpful for several reasons. First, it is by now fairly well established that environmental risks are disproportionately visited upon the poor and people of color,[9] although pinpointing the interrelating causes of the disparity remains illusive.[10] This is an area where the need for regulatory reform is evident. However, permit challenges often pit the regulatory fairness claims of the facility sponsor against the fairness claims of the community affected by the facility. In some respects, state agencies have their own fairness claims to pursue as well,[11] thus providing a study of EPA's management of these multiple and competing claims. In addition, environmental justice claims in this context reflect various conceptions of justice, providing candidates for what types of fairness-oriented reforms have a better chance of successful implementation. Contemplating fairness in the permit process raises two related questions: whether the Agency is willing and able to undertake aggressive measures solely by resort to its discretionary authority under environmental statutes, or whether constitutional doctrines, the Civil Rights Act, executive orders, or more targeted environmental legislation become indispensable catalysts to support, prompt, or mandate these efforts. Lastly, looking at the permit process provides an interesting peek at the Janus itself, including the multiple agency alter egos that emerge when the goal of environmental justice appears to conflict with other high-priority endeavors within the Agency.[12] This in turn allows us to think about the kinds of programmatic reform that might be necessary for EPA to better manage and resolve these important fairness issues.

This Article first provides a discussion of how fairness-oriented reform might evolve within the permit process. This section also examines permit issuances that were appealed to the U.S. Environmental Appeals Board (EAB) on environmental justice grounds. These cases address the central issue of Agency authority to respond to environmental justice concerns, indicate how several EPA regional offices attempted to resolve these disputes under the authority of environmental statutes, and provide an examination of the emerging role of reviewing bodies in this context. Proceeding one step beyond environmental law, the Article looks at how EPA is responding to claims of disparate impact under Title VI of the Civil Rights Act. However, rather than focus on the intricacies of legal doctrine under Title VI law, this Article instead examines the analytical framework that the Agency devised to investigate disparate impact claims. Because EPA's Title VI regulations are general and open-ended, the Agency enjoyed wide latitude in determin-

7. *See* Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 GEO. L.J. 2407 (1995).

8. For an exploration of these issues, see Richard J. Lazarus, *Fairness in Environmental Law*, 27 ENVTL. L. 705 (1997).

9. INSTITUTE OF MEDICINE, TOWARD ENVIRONMENTAL JUSTICE 6 (1999). People of color and the poor disproportionately live near industrial sites, hazardous waste sites, and other risk-producing land uses and, therefore, are subject to greater environmental risk. *See* 2 U.S. EPA, SUPPORTING DOCUMENT 17 (1992) (discussing income and racially disparate exposure to environmental hazards from contaminated soil, air pollution, and water pollution) [hereinafter SUPPORTING DOCUMENT]. *See also* 1 U.S. EPA, WORKGROUP REPORT TO THE ADMINISTRATION (1992). *See also* RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS: A TIME FOR DISCOURSE 166 (Bunyan Bryant & Paul Mohai eds., 1992) (table summarizing studies indicating exposure to air pollution disproportionate by race and income). For example, African-American children have a significantly higher percentage of unacceptably high blood lead levels. SUPPORTING DOCUMENT, at 9-20. Ethnic minorities are likely to consume more fish caught from waters that are contaminated with pollutants. *Id.* at 12. People of color have disproportionately greater exposure to pesticides because of agricultural work. *Id.* at 10 (using descriptive term "racial minorities, to include Latino," African-Americans, Black Caribbeans, Puerto Ricans, Filipinos, Vietnamese, Laotians, Koreans and Jamaicans, and indicating that as many as 313,000 farm workers experience pesticide-related illnesses each year). *See also* Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787, 792-806 (1993) (discussing evidence regarding disparities).

The issue of racially disproportionate siting near hazardous waste facilities has generated several studies and an ongoing debate about methodology. For studies that conclude there is racial and/or income disparity, *see* U.S. GENERAL ACCOUNTING OFFICE (GAO), SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES (1983) (location of off-site hazardous waste facilities in EPA Region IV); COMMISSION FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES (1987) (finding racial disparities for people living near hazardous waste facilities); BENJAMIN A. GOLDMAN & LAURA FITTON, TOXIC WASTES AND RACE REVISITED 3 (1994) (national study of existing and abandoned hazardous waste sites finding racial disparity); Vicki Been & Francis Gupta, *Coming to the Nuisance or Going to the Barrios? A Longitudinal Analysis of Environmental Justice Claims*, 24 ECOLOGY L.Q. 1, 27 (1997) (concluding that the analysis supports the claim that the siting process was affected by the percentage of Hispanics in potential host communities at the time of the siting); Vicki Been, *Analyzing Evidence of Environmental Justice*, 11 J. LAND USE & ENVTL. L. 1, 21 (1995) (national study of 544 communities indicating that "certain types of neighborhoods—those with median family incomes between $10,001 and $40,000, those with African American populations between 10% and 70%, those with Hispanic populations of more than 20%, and those with lower educational attainment—are being asked to bear a disproportionate share of the nation's facilities"). For contrary findings, see Douglas L. Anderson et al., *Hazardous Waste Facilities: "Environmental Equity" Issues in Metropolitan Areas*, EVALUATION REV., Apr. 1994, at 123 (asserting that prior studies are not definitive and concluding otherwise based upon comparison using different geographical areas). For discussions of methodology used in siting studies, see Michael Greenberg, *Proving Environmental Inequity in Siting Locally Unwanted Land Uses*, 4 RISK: ISSUES IN HEALTH & SAFETY 235 (1993); Been, at 21; Colin Crawford, *Analyzing Evidence of Environmental Justice: A Suggestion for Professor Been*, 12 J. LAND USE & ENVTL. L. 103 (1996). *See also* James T. Hamilton, *Testing for Environmental Racism: Prejudice, Profits, Political Power?* 14 J. POL. ANALYSIS & MGMT. 107 (1995) (refined study of hazardous waste facility expansions to test three economic theories of why distributions may vary by race).

10. *See* Robert W. Collin, *Environmental Equity: A Law and Planning Approach to Environmental Racism*, 11 VA. ENVTL. L.J. 495, 506-10 (1992) (discussing historical zoning practices, such as exclusionary and expulsive zoning, that resulted in the placement of industrial and commercial facilities in minority neighborhoods). *But see* Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?* 103 YALE L.J. 1383 (1994) [hereinafter *Disproportionate Siting or Market Dynamics?*] (questioning assumption of discriminatory siting practices and proposing market dynamics as a potential explanation for existing disparities).

11. *See infra* notes 111-233 and accompanying text (discussing Title VI claims).

12. *See infra* notes 234-373 and accompanying text.

ing the criteria to apply in a Title VI investigation. Equally important is the process by which this framework was developed. It was within this process that EPA had to mediate among the fairness claims presented by communities of color, the regulated community, and subnational regulatory agencies (state, regional, and tribal).

But the Title VI guidance is even more significant when viewed in a broader regulatory context. Proceeding in a temporal lock-step to the development of the Title VI investigatory framework was the development of other high-priority programs within the Agency. This Article briefly examines three of these initiatives, focusing primarily on the point where EPA, its regulated constituency, and the states perceived there to be the potential for Title VI claims to disrupt or even derail these nascent programs. The three areas examined are brownfield initiatives, the "Tier 2 refinery proposal," which is an aspect of implementing the Clean Air Act (CAA) mobile source provisions that necessitate new air permits at refineries, and "White Paper Number 3," a recently proposed guidance that pertains to efforts to reform new source permitting under the CAA.[13] This Article examines the Agency's response to this potential conflict and, ultimately, how its guidance for investigating Title VI claims reveals in part the resolution of this conflict. Although this is a story that is still unfolding at EPA, a few predictions can be made, as well as observations about who appear to be the winners and losers ultimately. The Article then concludes with exploratory suggestions for alternative approaches to fairness-oriented reform in permitting.

Environmental Justice and Permits

At the onset, it is noteworthy that environmental justice issues do not arise only when facilities are first sited, a common assumption when environmental justice issues first garnered national attention.[14] Disparities in environmental protection have also made their appearance in enforcement,[15] cleanup,[16] and standard-setting endeavors[17] and can implicate agency policy throughout all of these institutional functions. However, most environmental justice challenges appear in the permitting context for good reason. First is the immediacy of the adverse impacts. Responding to local conditions that not only affect health but significantly impair an already tenuous quality of life, residents in overburdened communities often view a new facility or a facility expansion as the proverbial straw that breaks the camel's back. In addition, permit proceedings also raise concerns about compliance and potential contamination, as well as the adequacy of the permit conditions and by implication, the associated standards. Therefore, not only questionable siting practices but inadequacies that exist in enforcement, cleanup, and standard setting all come to bear upon the permit process, making permit proceedings the most vigorously contested genre of agency actions by environmental justice activists.

The bottom-up, grass-roots nature of geographically scattered environmental justice challenges has given the environmental justice movement an unwieldy character. Thus, activists involved in this relatively new movement have been criticized for not articulating a clear, consistent conception of justice.[18] By virtue of the movement's concentration on community empowerment and social justice, the argument continues, it is ideologically unable to pursue a focused environmental policy agenda.[19] The empirical obser-

13. For consistency, this Article uses as examples cases and initiatives involving air permits. However, the same sorts of issues arise in other media permitting contexts.

14. The early environmental justice campaigns focused on inequitable siting of hazardous waste facilities, which was the subject of several law review articles on environmental justice. *See, e.g.*, Rachel D. Godsil, *Remedying Environmental Racism*, 90 MICH. L. REV. 394 (1991) (examining reform of siting procedures); Naikang Tsao, *Ameliorating Environmental Racism: A Citizens' Guide to Combating the Discriminatory Siting of Toxic Waste Dumps*, 67 N.Y.U. L. REV. 366 (1992); Lois Marie Gibbs & Brian Lipsett, *The Siting Game: A NIMBY Primer*, 8 F. APPLIED RES. & PUB. POL'Y 36 (1993); Vicki Been, *What's Fairness Got to Do With It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001 (1993) [hereinafter *What's Fairness Got to Do With It?*]; Rodolfo Mata, *Hazardous Waste Facilities and Environmental Equity: A Proposed Siting Model*, 13 VA. ENVTL. L.J. 375 (1994); *Disproportionate Siting or Market Dynamics?*, *supra* note 10. The later articles on the siting include: Michael G. Gerrard, *Demons and Angels in Hazardous Waste Regulation: Are Justice, Efficiency, and Democracy Reconcilable?* 92 NW. U. L. REV. 706 (1998); Christopher Billias, *Environmental Racism and Hazardous Facility Siting Decisions: Noble Cause or Political Tool?*, 4 RACE & ETHNIC ANC. L.J. 36 (1998); Roger C. Field, *Siting, Justice, and the Environmental Laws*, 16 N. ILL. U. L. REV. 639 (1996); Lawrence J. Straw Jr., *Environmental Justice: Racial Gerrymandering for Environmental Siting Decisions*, 14 VA. ENVTL. L.J. 665 (1995).

15. *See* Marcia Coyle et al., *Unequal Protection: The Racial Divide in Environmental Law*, NAT'L L.J., Sept. 21, 1992, at S1-S12 (report on investigation of EPA enforcement activities indicating that for federal air, water, and waste pollution laws, penalties in white communities were 46% higher than in minority communities. Penalties under hazardous waste laws were about 500% higher in predominantly white communities than in predominantly non-white communities) [hereinafter *Unequal Protection*]; *but see* Evan J. Ringquist, *A Question of Justice: Equity in Environmental Litigation 1974-1991*, 60 J. POL. 1148, 1162 (1998); M. Atlas, *Rush to Judgment: An Empirical Analysis of Environmental Equity in U.S. Environmental Protection Agency Enforcement Actions*, 35 LAW & SOC'Y REV. (forthcoming 2001), *See also* Robert R. Kuehn, *Remedying the Unequal Enforcement of Environmental Laws*, 9 ST. JOHN'S J. LEGAL COMMENT. 625 (1994); Eileen Gauna, *Federal Environmental Citizen Provisions: Obstacles and Incentives on the Road to Environmental Justice*, 22 ECOLOGY L.Q. 1, 40-79 (1995) (discussing obstacles communities of color and the poor might have in utilizing private citizen suit provisions to address compliance problems).

16. Valerie J. Phillips, *Have Low Income, Minorities Been Left Out of the Environmental Cleanup?*, 38 ADVOC. (Idaho) 16 (1995); Deeohn Ferris, *Communities of Color and Hazardous Waste Cleanup: Expanding Public Participation in the Federal Superfund Program*, 21 FORDHAM URB. L.J. 671 (1994); Samara F. Swanston, *An Environmental Justice Perspective on Superfund Authorization*, 9 ST. JOHN'S J. LEGAL COMMENT. 565 (1994); James T. Reilly, *Environmental Racism, Site Cleanup and Inner City Jobs: Indiana's Urban In-Fill Incentives*, 11 YALE J. ON REG. 43 (1994); Deeohn Ferris, *An Examination of the Superfund Reform Act of 1994*, 9 ST. JOHN'S J. LEGAL COMMENT. 609 (1994); Vicki Been, *Conceptions of Fairness in Proposals for Facility Siting*, 5 MD. J. OF CONTEMP. LEGAL ISSUES 13 (1993-1994).

17. Catherine A. O'Neill, *Variable Justice: Environmental Standards, Contaminated Fish, and "Acceptable" Risk to Native Peoples*, 19 STAN. ENVTL. L.J. 3 (2000).

18. This position was first articulated by Professor Vicki Been, see *What's Fairness Got to Do With It?*, *supra* note 14, at 1027-28 (noting failure to articulate a specific conception of justice), and later by Christopher Foreman. *See* CHRISTOPHER H. FOREMAN JR., THE PROMISE AND PERIL OF ENVIRONMENTAL JUSTICE 9, 11 (1998) (arguing that fairness is too vague to serve as an actual policy and further noting that academics who write about environmental justice are strikingly unconcerned about the ancient scholarly and philosophical literature on justice).

19. Foreman, *supra* note 18, at 3, 122-26. This book contains a variety of challenges to the studies that support charges of environmental inequities, several criticisms of the environmental justice movement, and advice to the movement to adopt an "epidemiological perspective." *Id.* at 70. Foreman was subsequently criticized for his failure to acknowledge studies with better methodology that supported the (criti-

vations that support these criticisms are fairly accurate. Whether as a matter of deliberate strategy or simply because the movement is a grass-roots one, it has exhibited a consistent resistance to being pigeon-holed into a narrow conception of justice.[20] Robert Kuehn has examined environmental justice claims and explains how they are grounded in different theories of justice, such as distributive, procedural, corrective, and social.[21] Nor does the movement have a targeted policy agenda that is articulated with a high degree of specificity. This could be due in part because there is no hierarchical leadership structure or centralized effort within the movement.[22] Although there are networks of local organizations and activists who are prominent nationally, these activists consistently maintain a position that residents of impacted communities speak for themselves.[23]

The question remains, however, whether these asserted deficiencies belie the need for, or present insurmountable obstacles to, substantive fairness-oriented regulatory reform.[24] The criticism that "justice" is too vague a concept to translate into a policy directive may be misplaced in the environmental context. In this arena, broad principles generate and anchor significant reform. In international environmental law, for example, the precautionary principal has been influential in shaping approaches to decisionmaking, despite the lack of a uniform definition of the term.[25] More specifically, in the domestic environmental regulatory context, the plea for "efficiency" has sheparded significant regulatory initiatives. EPA, without demanding a more precise conception of efficiency has for years pursued efficiency in multiple forms, such as adopting simple goals of cost effectiveness to the development and use of more sophisticated cost-internalizing strategies, cost-benefit analysis, performance-based standards, and market regimes. Leaving to others the issue of whether these measures do in fact result in more efficient regulation, the central point is that the measures originated in fact and are justified on general notions of efficiency, without Agency officials appearing to worry too much about the comparative merit of traditional welfare economics and modern environmental economics,[26] or whether proposed efficiency-oriented proposals are consistent with accepted theoretical models.

Although proponents of efficiency-oriented reform are well organized and have considerable resources to pursue their interests, there is little to suggest that a focused, disciplined, or central policy agenda preceded many efficiency-oriented regulatory reforms. For example, one of the earliest and arguably the most influential market-based reform came directly from the regulatory grassroots. In 1975, the statutory deadline to comply with national ambient air quality standards (NAAQS) had passed and it appeared that new air permits for large industrial facilities could not be issued without further violating the standards.[27] Permit applicants and permit writers devised a way to allow state regulatory agencies to issue permits for newer, cleaner facilities while demonstrating progress in attaining NAAQS. At the margins of statutory authority, the offset strategy of nonattainment new source review (NSR) was born.[28] The regulatory approach was subsequently affirmed by the Congress and codified in the CAA Amendments of 1977.[29] In

cized) seminal studies of environmental inequities, his failure to acknowledge the work of environmental justice scholars who advocate reform (rather than abolition) of risk assessment, and his "indulging in a superficial psychological deconstruction of the movement." Alan Ramo, *Book Review, The Promise and Peril of Environmental Justice*, 40 SANTA CLARA L. REV. 941, 942 (2000). *See also* David Lewis Feldman, LAW & POL. BOOK REV., Feb. 1999, at 2, 66-69 (acknowledging contribution but questioning Foreman's reliance on risk-based studies that are inconclusive and also noting that the use of the emotion-packet rhetoric with which activists have been attributed is commonly heard among a wide range of stakeholders).

20. Kirsten H. Engel, *Brownfield Initiatives and Environmental Justice: Second-Class Cleanups or Market-Based Equity?*, 13 J. NAT. RESOURCES & ENVTL. L. 317, 320 (1998) (notes refusal to be "pigeon-holed"); Ramo, *Book Review*, *supra* note 19, at 941 (noting grass-roots nature of movement).

21. Robert R. Kuehn, *A Taxonomy of Environmental Justice*, 30 ELR 10681 (Sept. 2000).

22. Ramo, *Book Review*, *supra* note 19, at 954-55.

23. In 1991, activists convened and adopted a set of 17 principles, among them the right to participate at every level of decisionmaking. From this principal, environmental justice activists proclaim that residents of impacted communities must have a role in the decisions that affect their environments and speak for themselves. PROCEEDINGS, THE FIRST NATIONAL PEOPLE OF COLOR ENVIRONMENTAL LEADERSHIP SUMMIT, xiii, Oct. 24-27 (Principles of Environmental Justice 1992).

24. Procedural regulatory reform is an important component of the environmental justice initiative, and there have been efforts to expand public participation opportunities. *See* U.S. EPA, Draft Public Involvement Policy, 65 Fed. Reg. 82335-45 (Dec. 28, 2000); U.S. EPA, PUBLIC INVOLVEMENT IN ENVIRONMENTAL PERMITS: A REFERENCE GUIDE (2000) (EPA-500-R-00-007), *available at* http://www.epa.gov/permits/publicguide.htm (last updated Oct. 16, 2000); Public Participation & Accountability Subcommittee of the National Environmental Justice Advisory Council, *Environmental Justice Public Participation Checklist, at* http://es.epa.gov/oeca/main/ej/nejac (last visited Dec. 29, 2000). In some instances, early involvement has even led to the project sponsor's willingness to incorporate protective measures into the design of the facility. *See infra* note 258 and accompanying text (discussing Brownfields Title VI Case Studies). However, the primary focus of this Article is on substantive proposals for more protective measures because these proposals have met with the most resistance and present the fairness conflicts under consideration. For a discussion of the limitations of public participation mechanisms, see Scott Kuhn, *Expanding Public Participation Is Essential to Environmental Justice and the Democratic Decisionmaking Process*, 25 ECOLOGY L.Q. 647 (1999), and Eileen Gauna, *The Environmental Justice Misfit: Public Participation and the Paradigm Paradox*, 17 STAN. ENVTL. L.J. 3 (1998).

25. *See* EDITH BROWN WEISS ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 157-59 (1998). One can see the influence of other broad and vague principles of stewardship and sustainability in the Endangered Species Act (ESA), 16 U.S.C. §§1531-1544, ELR STAT. ESA §§2-18, and other statutes protective of natural resources.

26. *See generally* GLOBAL ENVIRONMENTAL ECONOMICS: EQUITY AND THE LIMITS TO MARKETS (Mohammed H.I. Dore & Timothy D. Mount eds., 1999); A. Dan Tarlock, *City Versus Countryside: Environmental Equity in Context*, 21 FORDHAM URB. L.J. 461, 467 (1994) (discussing modern environmental economics).

27. 1 WILLIAM H. RODGERS JR., ENVIRONMENTAL LAW: AIR AND WATER §3.1B n.1 (1986); RICHARD A. LIROFF, AIR POLLUTION OFFSETS, TRADING, SELLING, AND BANKING 6 (1980) (describing the expansion needs of the steel industry, located mostly in nonattainment areas); *The Steel Industry and Enforcing the Clean Air Act*, in LANDY ET AL., *supra* note 1, at 204.

28. In response, EPA promulgated an "emission offset policy" to allow new sources of significant pollution in noncomplying areas. 41 Fed. Reg. 55525 (Dec. 21, 1976); 41 Fed. Reg. at 55556; LIROFF, *supra* note 27, at 8 n.20.

29. 42 U.S.C. §7503(c)(1), ELR STAT. CAA §173(c)(1). Part D was amended by the CAA Amendments of 1990. 42 U.S.C. §§7470-7515, ELR STAT. CAA §§160-193. The offset approach was also refined in a 1979 offset ruling, 44 Fed. Reg. 3282 (Jan. 16, 1979) (codified as Emission Offset Interpretive ruling, 40 C.F.R. §51, app. S (1979)), in NSR rules promulgated in 1980, 45 Fed. Reg. 52676 (Aug. 7, 1980), and again in a 1986 Emissions Trading Policy Statement. 51 Fed. Reg. 43814 (Dec. 4, 1986). These regulations have undergone revisions from time to time. *See, e.g.*, 46 Fed. Reg. 50766 (Oct. 14, 1981) (netting on a plantwide basis); 49 Fed. Reg. 43202

this case necessity was the mother of invention, and theory later caught up as scholars contemplated the market-oriented nature of the newest member of the family of regulatory tools.[30]

Thus, although proponents of efficiency-oriented reforms did not initially pursue a well-defined agenda, few would seriously argue that the plea for more efficient regulation, vague as it was, had little effect on environmental policy. More to the point, no proponent of efficient regulation would prefer that reform efforts await the consensus of a more precise definition of efficiency. This is a wise choice, for the holding power of efficiency does not lie in any particular formulation of the term. Efficiency-oriented reform enjoys continued public support simply because collectively we dislike wastefulness, and regulation that purports to be "cleaner, cheaper and smarter"[31] has considerable normative appeal.[32] And in lumbering toward efficiency, EPA is surely integrating and institutionalizing efficiency-oriented reforms into environmental regulation to an unprecedented degree.

Similarly, in spite of the vagueness of the terms "justice" or "fairness," EPA should be able to respond to environmental justice claims and pursue fairness-oriented reforms as a policy objective in a comparable fashion, assuming the commitment to environmental justice is at least equivalent to the Agency's commitment to efficient regulation. And just as the effectiveness of efficiency-oriented reforms are often evaluated ex post, fairness-oriented reforms can be evaluated in a similar fashion. The lessons to be learned from regulatory history, if anything, tell us that innovation does not generally originate in the upper strata of an internally consistent theoretical framework or even well-formulated policy, but in the trenches, here, the exigencies and conflicts presented in the course of permit proceedings.

Within this contentious context, the EAB in recent years has addressed environmental justice concerns in 10 cases.[33] These cases involved three federal environmental statutes and four EPA regional offices (Regions II, V, VII, and IX). Six of the cases involved CAA prevention of significant deterioration (PSD) permits.[34] Two cases involved Resource Conservation and Recovery Act permits,[35] and the two others involved Safe Drinking Water Act underground injection control permits.[36] Because Regions may differ in their approaches to environmental justice issues, it would not be fair to generalize from cases involving four regional offices to EPA at large. Nor would it be fair to form conclusions about general environmental justice policy in any particular Region as there may be other Agency initiatives outside the permitting process.[37]

These cases are not irrelevant for purposes of our inquiry, however. Without further legislative action, the ultimate success of fairness-oriented regulatory reform in the permitting context is largely dependent upon three considerations: (a) the scope of authority to address environmental justice issues in existing environmental laws, (b) the willingness of EPA to institute such reforms, either directly or by guidance to delegated state and local agencies; and (c) the level of scrutiny afforded these cases by reviewing bodies. Some tentative generalizations may be made by examining the early development of the environmental justice case law emerging in the EAB decisions.

Since none of the federal environmental statutes explicitly address environmental justice, such authority must lie in more broadly worded provisions. Richard Lazarus and Stephanie Tai have identified several sources of authority presently existing in environmental statutes, regulations, and guidance documents that may provide authority to address environmental justice concerns in permit proceed-

(Oct. 26, 1984) (fugitive emissions in applicability determinations); 54 Fed. Reg. 27274, 27286 (June 28, 1989) (federal enforceability of emissions controls); and 57 Fed. Reg. 32314 (July 21, 1992) (physical or operational changes at electric utility plants and exclusion pollution control projects at utility plants). For recent efforts to reform this air permitting program, see *infra* notes 321-73 and accompanying text.

30. *See generally Emission-Offset Banking: Accommodating Industrial Growth With Air-Quality Standards*, 128 U. PENN. L. REV. 937 (1980); Jorge A. del Calvo y Gonzales, *Markets in Air: Problems and Prospects of Controlled Trading*, 5 HARV. L. REV. 377 (1981); Stephen P. Winslow, *Transplanting Emissions Trading to Interstate Areas: Will It Take Route?*, 5 PACE ENVTL. L. REV. 297 (1987); Robert W. Hahn & Gordon L. Hester, *Marketable Permits: Lessons for Theory and Practice*, 16 ECOLOGY L.Q. 361 (1989); Robert W. Hahn & Gordon L. Hester, *Where Did All the Markets Go? An Analysis of EPA's Emissions Trading Program*, 6 YALE J. ON REG. 109 (1989); Robert W. Hahn & Gordon L. Hester, *Incentive-Based Environmental Regulation: A New Era From an Old Idea?*, 18 ECOLOGY L.Q. 1 (1991).

31. *See* U.S. EPA, *Office of Policy Economics and Innovation Home Page*, *at* http://www.epa.gov/opei (last updated Dec. 21, 2000).

32. This is not to say that the appeal is always a good thing. *Cf.* Gerald E. Frug, *Euphemism as a Political Strategy*, 30 ELR 11189 (Dec. 2000) (critiquing use of "smart growth" rhetoric as obscuring difficult but important issues).

33. *See* U.S. EPA, *Environmental Appeals Board Formal Opinions*, *at* http://www.epa.gov/eab/chrono.htm (last visited Sept. 29, 2000) (EAB slip opinions).

34. The earliest case was from Michigan (Region V): In re Genesee Power Station, L.P., PSD Appeal Nos. 93-1 et al., 1993 WL 484880 (*Genesee I*), *modified by* In re Genesee Power Station, L.P., 4 E.A.D. 832, 1993 EPA App. LEXIS 23, ADMIN. MAT. 40969 (Oct. 22, 1993) (*Genesee II*). Three were from Puerto Rico (Region II): In re Puerto Rico Elec. Power Auth. (Cambalache Combustion Turbine Project), PSD Appeal No. 95-2, 6 E.A.D. 253, 1995 EPA App. LEXIS 38, ADMIN. MAT. 40452 (Dec. 11, 1995); In re EcoEléctrica, L.P., PSD Appeal Nos. 96-8, -13, 7 E.A.D. 56, 1997 EPA App. LEXIS 5, ADMIN. MAT. 40632 (Apr. 8, 1997); In re AES Puerto Rico, L.P., PSD Appeal Nos. 98-29 et al., 1999 EPA App. LEXIS 17, ADMIN. MAT. 41132 (May 27, 1999). Two were from California (Region IX): In re Knauf Fiber Glass, GmbH, PSD Appeal Nos. 98-3 et al., *post remand appeal* EPA App. LEXIS 2, ADMIN. MAT. 41053 (Feb. 4, 1999) (*Knauf I*), In re Knauf Fiber Glass, GmbH, ADMIN. MAT. 41218 (Mar. 14, 2000) (*Knauf II*).

35. One was from Indiana and involved a landfill (Region V). In re Chem. Waste Mgmt. of Ind., Inc., RCRA Appeal Nos. 95-2, -3, 6 E.A.D. 66, 1995 EPA App. LEXIS 25, ADMIN. MAT. 40392 (June 29, 1995). The other was from Kansas and involved hazardous waste combustion (Region VII). In re Ash Grove Cement Co., RCRA Appeal Nos. 96-4, -5, 7 E.A.D. 387, 1997 EPA App. LEXIS 30, ADMIN. MAT. 40732 (Nov. 14, 1997).

36. Both of these cases were out of Michigan (Region V). In re Envotech, L.P., UIC Appeal Nos. 95-2 et al., 6 E.A.D. 260, 1996 EPA App. LEXIS 4, ADMIN. MAT. 40454 (Feb. 15, 1996); In re Envtl. Disposal Sys., Inc., UIC Appeal Nos. 98-1, -2, 1998 EPA App. LEXIS 105, ADMIN. MAT. 41073 (Oct. 15, 1998).

37. *See* U.S. EPA, 1998 ENVIRONMENTAL JUSTICE BIANNUAL REPORT: MOVING TOWARDS COLLABORATIVE/CONSTRUCTIVE PROBLEM SOLVING (1999). For links to environmental justice initiatives at the regional level, see http://www.epa.gov/swerosps/ej/index. Undoubtedly important as many of these programs are, however, it is difficult for any outside observer to assess the true effectiveness of the programs absent an intimate involvement with each program. For a discussion of how the environmental justice movement has effected a "renegotiation" of environmental law and policy and its effect on EPA initiatives in particular, see Richard J. Lazarus, *Symposium: Innovations in Environmental Policy: "Environmental Racism! That's What It Is,"* 2000 U. ILL. L. REV. 255, 263-73 (2000).

ings.[38] In an extensive analysis of the EAB's cases that have addressed this authority, they conclude that the EAB is increasingly willing to find discretionary authority to allow EPA or its state delegates to consider environmental justice when deciding on the issuance of a permit. In the cases decided by the EAB thus far, the authority was contained in broadly worded "omnibus clauses," such as clauses directing the permitting official to consider permit terms necessary to "protect health and the environment."[39] The EAB's approach has been to examine this authority in light of President Clinton's 1994 Executive Order on Environmental Justice.[40] The Executive Order by its terms does not create additional procedural or substantive rights, nor is a federal agency's compliance with the Executive Order subject to judicial review.[41] However, the EAB has taken the position that it has the obligation to review the Regions' compliance with the Executive Order as a matter of policy or exercise of discretion to the extent relevant under the particular environmental statute.[42]

The EAB cases also provide a glimmer of important policy choices underlying some of the Regions' approaches to environmental justice claims. For example, when broadly worded omnibus clauses were used, the permitting authorities tended to be fairly conservative in abiding by constraints plausibly inherent in the language of the omnibus clause, an approach that the EAB affirmed.[43] For example, in *In re Chemical Waste Management of Indiana, Inc.*,[44] the EAB noted that the Region correctly determined that the omnibus clause did not allow the permitting authority to deny a RCRA permit based "solely" upon alleged social or economic impacts. Thus, the permit could be conditioned to prevent adverse health or environmental impacts, but could not be conditioned to "redress impacts that are unrelated or only tenuously related to human health and the environment such as disproportionate impacts on the economic well-being of a minority or low-income community."[45] In so finding, the EAB ignored the fact that the petitioners had also requested a risk assessment because of their concern with exposure to toxic chemicals, a measure that clearly would have fallen within the scope of the omnibus clause.[46] Accordingly, what remains unclear from these decisions is the outer bounds of regulatory discretion to condition or deny a permit based on environmental justice considerations. All of the cases to date involve challenges by environmental justice advocates[47] who claim that the permitting agency did not exercise its discretion in a sufficiently protective manner. However, no cases involve an appeal by the permit applicant contending that the agency exceeded the scope of its authority in responding to environmental justice claims, an appeal that would likely ensue if the omnibus clauses had been used aggressively by the permitting authority.[48] In all

38. Richard J. Lazarus & Stephanie Tai, *Integrating Environmental Justice Into EPA Permitting Authority*, 26 ECOLOGY L.Q. 617 (1999); *see also* Sheila R. Foster, *Meeting the Environmental Justice Challenge: Evolving Norms in Environmental Decisionmaking*, 30 ELR 30992 (Nov. 2000); Memorandum from Gary S. Guzy, U.S. EPA General Counsel (Dec. 1, 2000) (on file with author) (regarding statutory and regulatory authorities under several environmental statutes that are available to address environmental justice). In this memorandum, the Office of General Counsel declines to take an ambiguous policy position, stating "[a]lthough the memorandum presents interpretations of EPA's statutory authority and regulations that we believe are legally permissible, it does not suggest that such actions would be uniformly practical or feasible . . . ." *Id.* at 1.

39. *See, e.g., In re Chem. Waste Mgmt., supra* note 35, at *19, ADMIN. MAT. at 40394 (noting that the administrator had the opportunity to execute the policy behind the Executive Order by using an omnibus clause under the Resource Conservation and Recovery Act (RCRA) that allowed the permit to "contain such terms and conditions as the Administrator (or the State) determines necessary to protect human health and the environment." 42 U.S.C. §6925(c)(3), ELR STAT. RCRA §3005(c)(3)); *In re Envotech, supra* note 36, at *47, ADMIN. MAT. at 40460 (UIC omnibus authority to impose, on a case-by-case basis, permit conditions "necessary to prevent migration of fluids into underground sources of drinking water." 40 C.F.R. §144.52(a)(9)). Lazarus and Tai note this to be an important case because the UIC omnibus authority was contained in the regulations rather than in the statute. Lazarus & Tai, *supra* note 38, at 666.

40. An exception was the *Genesee* litigation, which predated the Executive Order. In the initial case, the EAB narrowly interpreted a provision that non-air quality impacts must be considered in determining the applicable best available control technology (BACT). *Genesee I, supra* note 34. The EAB determined that the BACT provision did not extend to generalized community opposition, even on environmental justice grounds, as the siting decision was a matter involving local land use and zoning decisions. *Id.* at 19-22. In an opinion reissued to respond to a motion for clarification by the EPA's Office of General Council, the EAB excised some of its original order, noting that "[a]ssuming without deciding that Mr. Dick's environmental racism argument is within the scope of the Commission's authority to consider under applicable air quality rules and regulations (for Mr. Dicks does not challenge any of the emissions limitations prescribed for the facility but rather challenges the proposed location of the facility near the Flint/Genesee neighborhood), we conclude that the Commission's action was proper in that there is no basis in the record for concluding that it acted with a racially discriminatory intent." *Genesee II, supra* note 34, at 20, ADMIN. MAT. at 40971. Thus, the BACT provision at issue would be interpreted to allow for the consideration of non-air quality impacts as they pertained to the ultimate emission limit selected. For a discussion of the evolution of the EAB's initial resistance to environmental justice claims to a more accommodating perspective, see Lazarus & Tai, *supra* note 38, at 655-77.

41. *See* Exec. Order No. 12898, 3 C.F.R. 859 (1995), ADMIN. MAT. 45075.

42. *In re Chem. Waste Mgmt., supra* note 35, at 7, *24-25, ADMIN. MAT. at 40395.

43. In a similar vein, see also *In re Envotech*, where the EAB similarly noted that the UIC regulatory omnibus authority did not give the Region the authority "to redress alleged negative economic impacts on the community, diminution in property values, or alleged proliferation of local undesirable land uses." *Supra* note 36, at *48, ADMIN. MAT. at 40460. However, the community was also concerned about poor compliance history, which permit conditions might have addressed with enhanced monitoring. *Id.* at *30, ADMIN. MAT. at 40457. Some petitioners also took the position that the Region could deny the permit on the grounds that there were already numerous land uses. If the Region had wanted to more aggressively use and test the limits of its discretionary authority, it could have decided that the risk of migration posed by the hazardous waste injection wells—although perhaps acceptable in isolation—when combined with the existing aggregated risks presented sufficient grounds for denial of the permit.

44. RCRA Appeal Nos. 95-2, -3, 6 E.A.D. 66, 1995 EPA App. LEXIS 25, 5, ADMIN. MAT. 40392, 40394 (June 29, 1995).

45. *Id.* at 6, ADMIN. MAT. at 40394.

46. *Id.* at 4, ADMIN. MAT. at 40393.

47. I use the term "environmental justice advocates" throughout the Article inclusively to mean primarily residents of impacted communities and community-based organizations, but also including faith groups, public health groups, civil rights groups, and academics whose works support the goals of the environmental justice movement. In one of the EAB decisions, the petitioner that asserted environmental justice claims was a competitor of the permit applicant, but essentially advanced a position that was consistent with one that could have been asserted by a community-based organization. *In re Ash Grove Cement Co., supra* note 35.

48. In *In re Ash Grove Cement Co.*, there was an issue that the Administrator exceeded the scope of its authority in requiring an indirect risk assessment and imposing additional monitoring requirements. However, the requirement was not articulated as one made in response to environmental justice concerns, but was imposed because of higher than benchmark values on the hazard index and under the authority of a guidance document, U.S. EPA, STRATEGY FOR HAZARDOUS

instances, the Regions ultimately concluded that there was no disproportionate adverse impact on the basis of race or income, either due to the results of a demographic analysis or an impact analysis,[49] although in two cases additional conditions appear to have been placed on the permit in response to concerns of the affected communities.[50] Not all of the opinions describe the methodology the regional officials used in the environmental justice analysis, but those that are described appear to follow a basic approach that uses 1990 census data to determine demographics (mean income or ethnic minority), and the use of a one- or two-mile radius to determine the area of maximum impact.[51] The methodology for identifying a potential environmental justice community and determining disparity, which is particularly difficult and vulnerable to complicating factors, is continually changing and evolving.[52] However, the petitioners' objections to methodology often formed the basis for seeking review, thus making the EAB's reviewing role an important consideration in fairness-oriented reform efforts.

As an initial matter, the EAB appears to view an environmental justice analysis in permit proceedings as a minimum requirement of the Executive Order[53] "when a commenter submits at least a superficially plausible claim that operation of the facility will have a disproportionate impact on a minority or low-income segment of the affected community."[54] This duty flows to delegated state and local permitting authorities.[55] Thus, when such a claim has been made, the EAB will look to see if an environmental justice analysis was conducted and will remand when there is insufficient detail in the administrative record to support findings of the analysis.[56] It has also stated its view that when a matter clearly lies within the permitting official's authority, as a matter of policy that discretion should be exercised in a manner that will better implement the Executive Order to the extent practicable.[57]

This does not mean that the EAB's willingness to view existing authorities in light of the Executive Order automatically results in successful appeals. The EAB will reject the claim when it views the petitioner's allegations as overbroad, vague, and not supported by detailed evidence.[58] Additionally, because the Executive Order by its terms does not create rights, the failure to identify a specific source of authority under the environmental statutes has apparently

WASTE MINIMIZATION AND COMBUSTION (1994). *Supra* note 35, at *32, ADMIN. MAT. at 40733. The Petitioner challenged the authority for the Administrator to impose requirements that had been promulgated by guidance rather than by rule. *Id.*

49. In the early *Genesee* cases, the Region found that there would be no adverse impact because the emissions would not result in a NAAQS violation. *Genesee II*, *supra* note 34, at 22, ADMIN. MAT. at 40971. But the EAB also appeared to rest its decision on defenses common to civil rights cases, that there was no discriminatory intent, *id.* at 19-20, ADMIN. MAT. at 40971, and that there was a legitimate, nondiscriminatory reason for denying a permit at an alternative site comprised of a majority white population. *Id.* at 21, ADMIN. MAT. at 40971. *See also In re Puerto Rico Elec.*, *supra* note 34, *and In re Chem. Waste Mgmt.*, *supra* note 35, at *28, ADMIN. MAT. at 40393 (no minority or low income community will face a disproportionate impact within a one-mile radius); *In re Ash Grove Cement Co.*, *supra* note 35 ("low percentage" of minorities in area and per capita income similar to income in surrounding counties); *In re Envotech*, *supra* note 36 (impact on minority or low income populations within two-mile radius minimum); *In re Envtl. Disposal Sys.*, *supra* note 36 (using two-mile radius, concluding that percentage of minority population and low income population was less than the state averages). In *In re EcoEléctrica*, the Region determined that the average median household income of the petitioner's community was higher than in the surrounding area, albeit lower than the commonwealth's average, and that the facility impacts fell below NAAQS. *In re EcoEléctrica*, *supra* note 35, at *30, ADMIN. MAT. at 40635; *see also Knauf I*, *supra* note 34, at *126, ADMIN. MAT. at 41069 (the Region concluded, without further detail, that "it was unlikely that an Environmental Justice issue applied."); *Knauf II*, *supra* note 34 (no adverse impact because no NAAQS violation); *In re AES Puerto Rico*, *supra* note 34 (looking at potential impacts of air emissions from the facility, the Region found that the four criteria pollutants tested fell below NAAQS).

50. *In re Envotech*, *supra* note 36, at *39, ADMIN. MAT. at 40459 (the Region imposed particularly stringent monitoring requirements on the permits, including "daily sampling of the waste stream during the first 90 days of operation and weekly sampling thereafter, expanded monthly and annual sample constituent lists and a full RCRA Appendix IX analysis prior to commending injection."); *In re AES Puerto Rico*, *supra* note 34 (Region required post construction ambient monitoring and a multisource air quality analysis of SO_2).

51. In the cases that describe the methodology in greater detail, the approach typically involves taking per capita income from 1990 census data, source location data from the 1990 toxic release inventory (TRI), and information from the Region's permit compliance database. This data is plotted in the area determined to be the location of the maximum impact from the source's emissions or other facility impacts. *See In re AES Puerto Rico*, *supra* note 34 (Regional officials had performed an environmental justice analysis using the Region's Geographic Information System, comparing per capita income and source location and concluding that there would be no adverse disproportionate health impacts); *In re Chem. Waste Mgmt.*, *supra* note 35 (using census data); *In re EcoEléctrica*, *supra* note 34.

52. *See, e.g.*, REGION 2, U.S. EPA, DRAFT INTERIM POLICY ON IDENTIFYING EJ AREAS (1997); REGION 5, U.S. EPA, REVISED INTERIM GUIDELINES FOR IDENTIFYING AND ADDRESSING A POTENTIAL EJ CASE (1998). The Office of Environmental Justice may soon release a draft *Guide to Assessing and Addressing Allegations of Environmental Justice*.

53. The one case that has remanded on these grounds is *Knauf I*, *supra* note 34, at *127-*129, ADMIN. MAT. at 41069. Lazarus and Tai suggest that the duty to provide an adequate record of an environmental justice analysis might depend in part on whether the Region has developed environmental justice guidelines. Lazarus & Tai, *supra* note 38, at 676-77. Subsequently, on appeal after the environmental justice analysis was prepared, the EAB denied review finding that the petitioners did not show that the emissions would lead to an adverse impact because NAAQS for particulate matter had not been exceeded and because applicable regulatory obligations concerning public participation had been met. *Knauf II*, *supra* note 34, at 23, ADMIN. MAT. at 41223.

54. *In re Chem. Waste Mgmt.*, *supra* note 35, at *19, ADMIN. MAT. at 40394.

55. *Knauf I*, *supra* note 34. Although the Executive Order is directed at federal agencies, the EAB reasoned that the state/local permitting authority stands in the shoes of EPA for purposes of implementing the federal program and the permits issued are federal permits. *Id.* at *125, ADMIN. MAT. at 41218.

56. In *In re Knauf Fiber Glass*, the Shasta County Air Quality Management District in its response to comments on the permit, noted that Region IX reviewed its policies and "did not find a violation of [its environmental justice] guidelines." *Id.* at *126, ADMIN. MAT. at 41218. However, the memorandum was submitted after the permit was issued. The EAB noted that the memorandum merely stated without adequate detail that a Region IX employee concluded that after reviewing the project location and surrounding demographics that it was unlikely that an environmental justice issue applied. *Id.*

57. *In re Chem. Waste Mgmt.*, *supra* note 35, at 6, *23-24, ADMIN. MAT. at 40393; *In re Envotech*, *supra* note 36, *47, ADMIN. MAT. at 40459.

58. In *Puerto Rico Elec. Power*, *supra* note 34, the EAB appeared to view the petitioner's claim as vague and lacking evidentiary support. The EAB also took the position that the permit applicant's alleged poor compliance history did not bear upon the permit conditions. *See also In re EcoEléctrica*, *supra* note 34, at *27, ADMIN. MAT. at 40635 (noting that the petitioner did not explain the basis for its contention that additional modeling should have been required). This is likely a reflection of the limited resources available to community-based environmental justice organizations. Lazarus & Tai, *supra* note 38, at 664.

proven fatal to at least one of the claims.[59] Environmental justice petitioners have had unsuccessful appeals even in cases where the claimants identified specific sources of authority under environmental statutes or regulations, articulated their claims in detail, and provided stronger evidentiary support. The reason for this may lie in the considerable deference given to the permitting agency's view of the limits of its authority, its methodology, and its environmental justice analysis. A recent case involving a PSD permit is illustrative.

In *AES Puerto Rico*,[60] the petitioners, a community organization and several individuals,[61] opposed a major source permit of a 454-megawatt coal-fired power plant in Guayama, Puerto Rico, an area already hosting several pharmaceutical and petrochemical plants.[62] This opinion is rich in detail about the evidence that attended the environmental justice challenges to the permit issuance, and in that respect provides valuable insight into the permitting proceedings. In this case petitioners tied the environmental justice claims to the Administrator's discretionary authority under PSD regulations and guidance documents,[63] arguing that because the affected community was low income and many residents were experiencing health problems, Region II officials should have exercised their discretion in a more protective manner.[64] In particular, the petitioners asked the Region to require a full air quality impact analysis for sulfur dioxide (SO_2)[65] and asserted that the Region should not have relied on what they contended to be an outdated 1983 attainment demonstration for SO_2.[66] In addition, petitioners questioned the accuracy of an impact analysis for particulate matter and the Region's change of an emissions limit in the permit. This discussion will focus on the SO_2 issue, although the EAB took a similar approach to the particulate matter issues.

Basically, the petitioner wanted the Region to require preconstruction multisource modeling and preconstruction ambient monitoring for SO_2, a request that reflects the petitioners' concern with cumulative impacts.[67] Multisource modeling analyzes not only the facility's emissions but the combined impacts of all existing sources in the area,[68] and it is typically required to demonstrate that the proposed source in combination with other sources will not cause or contribute to a violation of any NAAQS or PSD increment.[69] However, because this requirement is "costly and time-consuming," the permitting official may allow the source to avoid this impact analysis using a screening device that compares the results of the source's modeled emissions to significant impact levels (SILs). In this case, the predicted 24-hour SO_2 impact from the proposed facility (4.97 micrograms per cubic meter ($\mu g/m^3$)) was very close to exceeding the corresponding significant impact level (5.0 $\mu g/m^3$).[70] The Region went ahead and exempted the applicant from a full impact analysis. Petitioners objected to this because they were concerned that the combination of three controls selected by the permit applicant would not in fact meet the corresponding emission limit in the permit. They asserted that the only reason the applicant proposed the combination of controls—which had not been previously used in practice—was to avoid a preconstruction air quality analysis.[71] Petitioners also argued that it would be difficult for the applicant to control the sulfur content of the coal, which could potentially increase the base emissions rate and consequently exceed the SILs.[72] On appeal, the EAB denied review, noting that it was the applicant's prerogative to accept lower emission limits to get below the SILs[73] and that, although the applicant did not have much room for error in the sulfur content, the permit required it to avoid errors that would result in a permit violation.[74] In fact, the EAB endorsed the Region's approach, indicating that its decision "breaks new ground on potentially available control options . . . and may be replicated [at other facilities]."[75] The EAB also gave the Region considerable deference on all technical challenges to the methodology used by the Region[76] and declined to consider one petitioner's independently performed multisource analysis because it had not been submitted during the applicable comment period.[77] This multisource analysis disclosed the potential for the combined sources to exceed the applicable NAAQS.[78]

The petitioners also requested preconstruction ambient monitoring and questioned the Region's reliance on a 1983 attainment demonstration based on modeling instead of monitoring.[79] They also questioned the Region's use of data obtained from a facility 18 kilometers from the proposed site instead of the results of modeling performed by the

59. In *Puerto Rico Elec. Power*, the petitioner's claim rested on the authority under President Clinton's Executive Order on environmental justice, and not on authority under the environmental statutes. *Supra* note 34, at *4, ADMIN. MAT. at 40452.

60. PSD Appeal Nos. 98-29 et al., 1999 EPA App. LEXIS 17, ADMIN. MAT. 41132 (May 27, 1999).

61. The petitioners were Dr. Jorge E. Gonzales of the University of Puerto Rico Mayaguez, Sur Contra la Contaminación, a local community organization and Pedro J. Saade Llorens, on behalf of five individuals. *Id.* at 1, ADMIN. MAT. at 41132.

62. *Id.* at 3, 6, ADMIN. MAT. at 41132, 41133.

63. *Id.* at 9, 31, ADMIN. MAT. at 41134, 41139.

64. *Id.* at 11, 21, ADMIN. MAT. at 41134, 41136.

65. The Region did not exempt AES from conducting preconstruction monitoring on particulate matter because the applicable significant impact levels were exceeded. *Id.* at 27, ADMIN. MAT. at 41138.

66. *Id.* at 22, ADMIN. MAT. at 41134.

67. *Id.* at 9-11, ADMIN. MAT. at 41134 (citing 40 C.F.R. §52.21(i)(8)(i), U.S. EPA, EPA NEW SOURCE REVIEW WORKSHOP MANUAL at C.25-.28 (Draft 1990)) [hereinafter NSR MANUAL].

68. More specifically, a full impact multisource modeling is air quality modeling that takes into account the "proposed source, existing sources, and residential, commercial, and industrial growth than accompanies the activities at the new source or modification." NSR MANUAL, *supra* note 67, at C.25.

69. *In re EcoEléctrica*, *supra* note 34, at *24, ADMIN. MAT. at 40635 (citing 40 C.F.R. §52.21(k), (n)(2), and NSR MANUAL, *supra* note 67, at C.24-.25).

70. The Region exempted AES from conducting preconstruction monitoring of SO_2 because the results of modeling showed that anticipated air quality impacts (4.97 micrograms over a 24-hour average) fell below the applicable monitoring de minimis level (5.0 micrograms over a 24-hour average). *In re AES Puerto Rico*, *supra* note 34, at 11, ADMIN. MAT. at 41134.

71. *Id.* at 12-13, ADMIN. MAT. at 41134-35.

72. *Id.* at 18-19, ADMIN. MAT. at 41136.

73. *Id.* at 14, ADMIN. MAT. at 41135.

74. *Id.* at 19, ADMIN. MAT. at 41136.

75. *Id.* at 14, ADMIN. MAT. at 41135.

76. Petitioners claim, among other things, that the model used was not calibrated for tropical conditions and that the combination of BACT controls had previously been used in practice.

77. *In re AES Puerto Rico*, *supra* note 34, at 1, ADMIN. MAT. at 41132.

78. *Id.* at 16, ADMIN. MAT. at 41135.

79. *Id.* at 23, ADMIN. MAT. at 41137.

Puerto Rico Environmental Quality Board in 1990 that predicted concentrations in the Guayama area that exceeded NAAQS.[80] The EAB denied review of this claim as well, noting that attainment is a legal designation and that even if petitioners' suspicions were correct, NAAQS would be threatened even without the emissions from the proposed facility. In addition, noted the EAB, the facility would be able to obtain a permit anyway because the impact was below the threshold for causing or contributing to air quality violations.

The EAB's decision may not appear remarkable, especially when considering the very deferential standard of review often applied in permit proceedings.[81] In earlier cases, however, the EAB had stated quite boldly that as a matter of policy, discretion should be exercised in a manner that will better implement the Executive Order on Environmental Justice.[82] However, in this case every discretionary decision had been exercised by the Region in favor of going forward with the permit, often by adopting the applicant's requests. Instead of questioning the use of discretion in this matter, the EAB instead separated the issue of environmental justice analytically. For example, when discussing the major issues, the EAB often upheld the Region's exercise of discretion by reference to generally applied policy and cases not involving environmental justice.[83]

The review of environmental justice came at the end of the opinion. In discussing the Region's environmental justice analysis, the EAB focused on actions the Region took in response to environmental justice concerns, such as conducting an analysis of mean income (which established the presence of a low-income community),[84] analyzing the distribution of toxic release inventory (TRI) facilities, and engaging in extensive correspondence with the petitioner over the course of the permit process.[85] However, the EAB did not question whether information dissemination was responsive to the community's concerns, instead noting that "[t]he Region further analyzed the distribution of . . . TRI . . . facilities. . . . The TRI analysis pertains primarily to toxic chemicals rather than criteria pollutants (which are the focus of the PSD Program), but the Region's effort to provide meaningful responses on these issues contributes to environmental justice for the Guayama community."[86]

There was one significant condition placed on the permit in response to environmental justice concerns. The Region imposed post-construction ambient monitoring and a post-construction multisource air quality analysis for SO_2.[87] The EAB was clearly impressed by the Region's willingness to place these conditions on the permit, noting:

> [T]his permit contains additional conditions that are not mandated by the PSD regulations but are within the Region's discretion to require. The Region incorporated the conditions into the permit as a tangible response to the community's concerns about air quality and to fulfill the goals of the Executive Order [on environmental justice].[88]

Curiously, however, the EAB did not seriously question the Region's decision to require this costly endeavor post-construction rather than preconstruction, the latter time being better suited to prevent a potential NAAQS violation. Thus, it appears from this case that to a certain degree the EAB is willing to applaud the use of discretion to condition permits in response to environmental justice concerns, but is not inclined to apply more probing scrutiny to the permitting agency's methodology, use of discretion, or ultimate findings.

There are two primary lessons that can be taken from this case. The case indicates the limited role judicial review is likely to play in prompting fairness-oriented reform, but looking slightly beyond the reported decision also provides an insight into the institutional dynamics that hinder the development of this type of reform at the permit-writing level. Looking to the latter issue, it may well have been that Region officials felt they were using their authority aggressively and protectively. Because the SIL had not been technically exceeded, permitting officials might have determined that although they had authority to require preconstruction modeling, imposing that condition would have negated the incentive for the permit applicant to use an innovative combination of controls. However, if the objection to preconstruction modeling is cost (as the EAB suggests), the case does not explain why the permit applicant did not object to multisource modeling after construction of the facility as part of the permit terms.

This curiosity raises the question of credibility. From the community's perspective, there is likely to be a great deal of suspicion, particularly given the history of Agency resistance to environmental justice claims.[89] It would not be uncommon, or even unreasonable, for community members to believe that regional officials might be allowing the permit applicant to avoid preconstruction monitoring and modeling to avoid explaining how the Agency could grant a major source permit (453 tons per year of SO_2)[90] if the analysis disclosed that ambient concentrations already exceeded NAAQS. In the case, the Region apparently argued that if NAAQS violations were later discovered, it would undertake corrective action, including a possible revision of Puerto Rico's state implementation plan (SIP) on an expe-

80. *Id.*

81.

> The Board may grant review of a permit decision if some aspect of the decision was based on either a clearly erroneous finding of fact or conclusion of law, or if the decision involves an important matter of policy or exercise of discretion that warrants review. . . . [P]ower of review should be only sparingly exercised, and most permit conditions should be finally determined at the Regional level.

Id. at 6, ADMIN. MAT. at 41133 (citations omitted).

82. *In re Chem. Waste Mgmt.*, *supra* note 35, at 7, ADMIN. MAT. at 40393.

83. For example, the EAB noted that the exemption from a full impact analysis was validly applied based on established policy and the quality of the modeling. *In re AES Puerto Rico*, *supra* note 34, at 22, ADMIN. MAT. at 41137.

84. *Id.* at 35, ADMIN. MAT. at 41140.

85. *Id.* at 36, ADMIN. MAT. at 41140.

86. *Id.*

87. *Id.* at 35-36, ADMIN. MAT. at 41140.

88. *Id.* at 36, ADMIN. MAT. at 41140.

89. For an anecdotal description of a hostile permit proceeding, see Luke W. Cole, *The Struggle of Kettleman City: Lessons for the Movement*, 5 MD. J. CONTEMP. LEGAL ISSUES 67 (1993-1994) (describing hearing concerning toxic waste incinerator); *see also* Sheila Foster, *Justice From the Ground Up: Distributive Inequities, Grassroots Resistance, the Transformative Politics of the Environmental Justice Movement*, 86 CAL. L. REV. 775, 811-13 (1998) (describing community organization's meetings with industry and government officials in Chester, Pennsylvania).

90. *In re AES Puerto Rico*, *supra* note 34, at 9, ADMIN. MAT. at 41134.

dited basis.[91] However, this is a regulatory action largely beyond the control of the community and does not require public participation. The community would be in the position of having to take the Region at its word that this would be done. To state the dynamic bluntly, it is difficult for a community activist—the quintessential outsider—to tell whether the official is really doing the best she can to protect the community within the constraints of limited authority or, conversely, whether the official is only trying to make it appear so but is actually being unduly conservative because of pressure from the permit applicant or a general lack of commitment to environmental justice. Simply, there is no way to tell.[92] Undoubtedly, this is an area where leadership and guidance from the highest levels of the Agency is crucial so that EPA's rank and file, as well as state and local program administrators, will be confident that they will be supported in their efforts to use existing authorities to protect vulnerable communities.

There is another lesson to be learned from this case, although one has to go beyond the opinion to consider it. Benchmarks generally, and more specifically commonly applied significance levels, systematically work against environmental justice communities. In Puerto Rico, the asthma rates are abnormally high, particularly among children.[93] In addition, because of the tropical climate and open louvered windows common to the area, remaining indoors does not provide protection against episodic high exposures of pollutants.[94] This in turn is problematic because the petitioners had introduced evidence of noncompliance by permitted facilities in the area.[95] So while emissions that may fall below a 5.0 SIL might legitimately be considered "de minimus" in a typical regulatory context, a 4.97 SIL may not be benign in the context of a community with abnormal health vulnerabilities and multiple impacts from diverse sources. As commonly noted, even standards premised upon conservative assumptions have turned out to be inadequate.[96]

Separate from the empirical issues of adequately protective benchmarks and whether agency officials are attempting to be as protective as they can, is the issue of judicial review. Because the Region declined to require a full impact analysis before construction, the case should have raised significant questions on appeal about the adequacy of the Region's approach. Despite the normally deferential standard of review applied by the EAB to permit decisions generally, the Executive Order on Environmental Justice gives the EAB justification to more closely examine Agency discretion once a vulnerable community is identified.[97] Thus, the EAB could have questioned why the Region did not exercise its discretion in a more protective manner in light of the troubling indicators about the ambient concentrations, the health problems in this community (high asthma rates), as well as the vulnerabilities of low-income communities generally, e.g., more restricted access to health care.[98] Indeed, there is a flavor of wishful thinking to EAB's logic in the assumption that violations at existing sources do not necessarily indicate potential NAAQS violations and are enforcement issues not germane to permit issuances.[99] On the contrary, the judicial task should be to review the exercise of discretion with a steady eye toward realistic rather than theoretical conditions.[100] The level of scrutiny need not reach inappropriate heights of judicial micromanagement, but a much stronger message concerning the exercise of discretionary authority in light of the Executive Order may be conveyed while retaining deference to Agency decisions.

But this has proven not to be the case thus far, either at the administrative level or in court. The petitioners in *AES Puerto Rico* sought judicial review of the EAB's decision in the First Circuit.[101] Among other claims, petitioners were concerned that there would be no opportunity to review and comment on post-construction ambient monitoring and the post-construction multisource modeling analysis. The First Circuit rejected petitioners' claim, noting that although there was no legal requirement for public comment of post-construction permit analysis, the analysis would be conducted in accordance with EPA models and protocols.[102] The remainder of the petitioners' challenges were similarly rejected. In the end, the petitioners were left with assurances of protection that they had no way to verify, a result that is more likely to heighten suspicion and skepticism about the process. The *AES Puerto Rico* and other EAB decisions therefore can unwittingly promote more conflict. Because reviewing bodies are likely to be considerably deferential to permitting authorities,[103] there is little pressure from this

91. *Id.* at 26, ADMIN. MAT. at 41138.

92. The suspicion of agency capture is a part of a larger theme of distrust resulting in what Professor Lazarus describes as a "pathological cycle of regulatory failure, crisis and controversy." Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, 54 LAW & CONTEMP. PROBS. 311, 407 (1991).

93. Testimony of Dr. Jose Rodriguez Santana, Program Director of the Pediatric Pulmonology Program, Before the National Environmental Justice Advisory Council (NEJAC), December 12, 2000, Washington, D.C. Transcript, Sixteenth Meeting of the NEJAC, vol. II, pp. 11-125 through 11-132 (Dec. 12, 2000) (on file with author).

94. Testimony of Rosa Hilda Ramos, resident of Puerto Rico, Before the NEJAC Air and Water Subcommittee, October 18, 2000, in New York City, N.Y. (Discussion of noncompliance by another power plant in Puerto Rico. Ms. Ramos additionally noted that at times residents would sit in their automobiles with the windows rolled up in an attempt to escape smoke from power plants) (notes on file with author).

95. *In re AES Puerto Rico, supra* note 34, at 24-25, ADMIN. MAT. at 41137.

96. Robert R. Kuehn, *The Environmental Justice Implications of Quantitative Risk Assessment*, 1996 U. ILL. L. REV. 103, 116; *cf.* Mark Eliot Shere, *The Myth of Meaningful Environmental Risk Assessment*, 19 HARV. ENVTL. L. REV. 409 (1995) (discussing pervasive uncertainties .

97. Some may argue that, given the permitting agency's reticence to find a vulnerable community as a factual matter, stricter scrutiny of the methodology employed to identify an environmental justice community is also warranted. *See infra* notes 159-64 and accompanying text.

98. In *Chemical Waste Management*, the EAB acknowledged that particular vulnerabilities may be relevant and that a "[broad based] analysis might have been based on assumptions that, though true for a broad cross-section of the community, are not true for the smaller minority or low-income segment of the community." *In re Chem. Waste Mgmt., supra* note 35, at *20, ADMIN. MAT. at 40394.

99. *In re AES Puerto Rico, supra* note 35, at 24-25, ADMIN. MAT. at 41137.

100. *Cf.* Daniel A. Farber, *Taking Slippage Seriously: Noncompliance and Creative Compliance in Environmental Law*, 23 HARV. ENVTL. L. REV. 297 (1999) (advocating the concept of slippage to inform environmental doctrine and policy).

101. Sur Contra la Contaminación v. EPA, 202 F.3d 443, 30 ELR 20358 (1st Cir. Feb. 2000).

102. *Id.* at 448, 30 ELR at 20360.

103. In *EcoEléctrica*, the Region II officials also exempted the applicant from conducting multisource modeling of impacts because the source did not exceed applicable significance levels. *In re*

venue to encourage EPA to more aggressively use its discretion to take protective measures during permit issuances.

This could be particularly problematic for communities near heavily industrialized areas where the aggregated risks are more extreme while the pressures to provide relief from regulatory requirements are even more demanding.[104] This unfortunate situation is avoidable. The generic language commonly found in omnibus clauses have considerably more potential than has been used thus far. While clauses such as "protection of health" may include consideration of adverse health effects from permitted emissions, these clauses also may be more liberally interpreted to allow attention to cumulative impacts, safety concerns stemming from increased traffic, or the increased risk of facility accidents and resulting episodic acute exposures that are common occurrences in some communities.[105] Clauses such as "protection of welfare" may be used to allow consideration of quality of life impacts such as increased noise and odors and other facility-related impacts that may not result directly from the permitted releases. Such a clause may even authorize consideration of impacts such as the potential for increased criminal activity and decreased property values, where appropriate.[106]

Still other statutory phrases—such as those directing the permitting authority to consider the "social costs" imposed as a result of the facility's location or processes—can be used to consider a wider range of factors, such as siting and exposure disparities[107] and harm to cultural or religious practices (land-based Native American beliefs). No EAB cases, for example, have considered the nonattainment NSR provisions of the CAA in connection with an explicit environmental justice challenge.[108] These provisions require that "an analysis of alternative sites, sizes, production processes, and environmental control techniques for such proposed source demonstrates that benefits of the proposed source significantly outweigh the environmental and *social costs* imposed as a result of its location, construction, or modification."[109] This phrase, particularly because it is cou-

EcoEléctrica, *supra* note 34, at *25, ADMIN. MAT. at 40635. The Region also performed an environmental justice analysis and concluded that the facility did not have a disproportionate impact to lower income communities because the modeled impacts from the facility's expected emissions fell below the NAAQS. *Id.* at *28, ADMIN. MAT. at 40635. The environmental justice analysis consisted of overlaying per capita income data upon source location data. The Region concluded that the median income of residents near the facility was higher than the median income elsewhere in the municipality and nearby municipalities; however, the median income was lower than the commonwealth's median income. In this case, the EAB noted the Administrator's authority under the CAA, to take into account energy, environmental, and economic impacts and other costs when deciding upon an appropriate BACT emissions limitation, and to determine on a case-by-case basis whether such limitation is achievable for such source or modification through application of production processes or available methods, systems, and techniques. 40 C.F.R. §52.21(B)(12). However, while noting that the Administrator had broad authority and could have required a multisource analysis, the EAB also noted that even if such an analysis had been performed, the exemption was proper because it was based on the source's own projected de minimis air quality impacts. *In re EcoEléctrica*, *supra* note 34, at *23, ADMIN. MAT. at 40634.

104. For it is in these areas that well-funded industrial interests are keen to challenge what they perceive to be oppressive and inefficient command-and-control requirements. *See, e.g., infra* notes 276-320 and accompanying text, discussing clustered refineries in the nonattainment Gulf Coast region where offsets are difficult to obtain for major sources of criteria air pollutants.

105. For example, Professor Kuehn notes that during the period from 1994 to 1997, the area around Convent, Louisiana, experienced 141 reported emergency releases of toxic chemicals. This is an average of three per month and a 500% increase in the average number of accidental releases since 1993. Robert R. Kuehn, *Denying Access to Legal Representation: The Attack on the Tulane Environmental Law Clinic*, 4 WASH. U. J.L. & POL'Y (forthcoming 2001) (manuscript at n.26, on file with author) (citing May 26, 1998, letter from Tulane Environmental Law Clinic to EPA Office of Civil Rights); *see also* Ed Timms, *Racial Patterns: Economics and Segregation Left Minorities Closer to Toxic Sites*, THE DALLAS MORNING NEWS, Oct. 3, 2000, at A1, *available at* 2000 WL 28111045 (describing how accidental releases from refineries force residents in nearby public housing to evacuate or adopt "shelter in place" strategies, i.e., shutting the doors and windows and "hop[ing] for the best").

106. Some regulations may specifically preclude the consideration of decreased property values. In such a case, the specific regulation would override a default assumption that this factor is germane to the welfare of communities impacted by the permit.

107. In particular, these provisions would be helpful where evidence of risk disparity is difficult to obtain because of scientific uncertainty or because of the lack of resources or information to conduct a risk-based analysis.

108. Two recent cases that have discussed the alternatives analysis and social cost criteria of nonattainment NSR are an EAB decision in In re Campo Landfill Project, Campo Bank Indian Reservation, NSR Appeal No. 95-1, 6 E.A.B. 505, ADMIN. MAT. 40526 (June 19, 1996) (order denying review in part and remanding in part), and a Title V case before the Administrator in In re Operating Permit Formaldehyde Plant Borden Chem., Inc. Geismar Ascension Parish, La., Petition 6-01-1, Permit No. 2631-VO (order responding to petitioner's request that the administrator object to the issuance of a state operating permit) (on file with author). Although the *Campo* case involved a Native American tribe and *Borden* involved a low income area, in neither case was the alternative and social cost criteria explicitly tied to an environmental justice challenge. In *In re Campo*, the petitioner claimed that an alternative site should have been chosen because the landfill was situated over a sole-source aquifer. *In re Campo*, at 520, ADMIN. MAT. at 40530. The EAB noted that there were appropriate control measures to reduce the risk to insignificant levels. *Id.* at 524, ADMIN. MAT. at 40531. The EAB also noted that because part of the reason for the project was to develop and diversify the economic base of the tribe, the use of non-tribal land was not a viable alternative. *Id.* at 523, ADMIN. MAT. at 40531. In *In re Borden*, there was an apparent environmental justice challenge in one count that was a Title VI claim, which the Administrator appropriately declined to review it as it was under consideration by the EPA Office of Civil Rights. *In re Borden*, at 51. The contention that the alternatives/social cost analysis was insufficient did not appear to rest upon the demographics of the community but upon more general allegations that the environmental impacts outweighed the "social and economic benefit" of the facility. *Id.* at 35. Thus, the Administrator reasoned that the process and control equipment met and at times exceeded applicable requirements and impacts were minimized or avoided as much as possible. *Id.* at 39. More specifically, the Administrator noted that NAAQS were met at the property line, soil and groundwater were protected by impervious materials, the location near Borden's primary customer would reduce transportation-related risk, there was low risk of off-site emissions, few residences nearby, and no schools, hospitals, estuaries, or historical, cultural, or archeological sites in close proximity to the proposed plant *Id.* at 40-43. In addition, six alternative sites were considered but rejected because they had insufficient space or would cause increased potential impacts. *Id.* at 43-44. The Administrator used the socioeconomic profile of the community to support the site, noting that the area was a designated enterprise zone and construction and operation of the plant would increase employment and tax revenue. *Id.* at 41. Although speculative at this point, the analysis might have differed if the petitioner had argued that a disparate impact (assuming one existed) was itself a social cost to be weighed against the granting of a permit. This would have made the existence of a racially disparate impact relevant to a permit requirement, but the case would likely have resulted in denial of review as the facts indicate that off-site impacts were minimal.

109. 42 U.S.C. §7503(a)(5), ELR STAT. CAA §173(a)(5) (emphasis added). The reference to social costs may allow the permitting authority to consider a wider range of impacts, including nonhealth impacts. *See, e.g.*, Eileen Gauna, *Major Sources of Criteria Pollutants in Nonattainment Areas: Balancing the Goals of Clean Air, Environ-*

pled with a reference to consideration of alternative sites and processes, provides ample authority to develop a substantive alternatives analysis and a more protective permitting framework. Without more probing review, the Agency is left without judicial encouragement or support and, therefore, many permitting officials continue to underutilize these important provisions. Testament to this observation is the fact that EPA has yet to issue guidance on the nonattainment NSR alternatives analysis and social cost criteria.[110]

The issue of deferential review, for a different reason, is significant in considering the interplay between the environmental statutes and the Civil Rights Act, specifically Title VI. State and local regulators often forcefully assert that although they have obligations under Title VI, they do not have the authority to condition or deny permits on environmental justice grounds if the permit applicant otherwise meets all requirements of the applicable environmental statute. The EAB cases refute that central contention to some degree, and this fact raises a host of other issues.

The Title VI Saga

Because of the apparent reticence of environmental agencies—at the local, state, regional, or federal levels—to condition or deny permits on environmental justice grounds, community activists have instead turned to Title VI, a nonenvironmental statute, as a potential redress for long standing racial disparities in environmental burdens.[111] Title VI, first enacted in 1964, was interpreted in 1983 by the U.S. Supreme Court to give federal agencies the authority to promulgate regulations precluding recipients of federal funds from engaging in activities that have a discriminatory "effect,"[112] i.e., regulations that prohibit disparate impacts rather than regulations prohibiting only intentional discrimination. Following the practice of many federal agencies, in 1973, EPA first promulgated regulations aimed at alleviating discriminatory effects.[113] The most recent iteration specifically provides in part that "[a] recipient shall not use criteria or methods of administering its program which have the effect of subjecting individuals to discrimination because of their race."[114]

However, it was not until almost 20 years later, in September 1993, that EPA saw the beginning of a steady stream of administrative complaints alleging Title VI violations by state and local environmental agencies.[115] Most of the complaints involved the permitting process[116] and consequently raised the perplexing issues that are discussed later in this Article. At that time, the EPA Office of Civil Rights had neither the resources nor the analytical framework to begin the task of investigating and deciding the claims. In 1996, the continuing institutional paralysis prompted activists to write a letter to EPA Administrator Carol Browner about the lack of action on the pending complaints.[117] Although EPA

mental Justice, and Industrial Development, 3 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 379 (1996). In addition, the key phrase under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) that grants the Administrator the authority to register pesticide use is that the pesticide will not have "unreasonable adverse effects on the environment," which in turn is defined to require the Administrator to consider the "economic, *social* and environmental costs and benefits of the use of any pesticide." 7 U.S.C. §136(bb), ELR STAT. FIFRA §2(bb) (emphasis added).

110. *In re Borden*, *supra* note 108, at 36.

111. For a discussion of legal doctrine, see Julie H. Hurwitz & E. Quita Sullivan, Using Civil Rights Laws to Challenge Environmental Racism, From Bean to Guardians to Chester to Sandoval (unpublished manuscript on file with author); Bradford C. Mank, *Is There a Private Cause of Action Under EPA's Title VI Regulations?: The Need to Empower Environmental Justice Plaintiffs*, 24 COLUM. J. ENVTL. L. 1 (1999); Gilbert Paul Carrasco, *Public Wrongs, Private Rights: Private Attorneys General for Civil Rights*, 9 VILL. ENVTL. L.J. 321 (1998) (private right of action under Title VI); Wesley D. Few, *The Wake of Discriminatory Intent and the Rise of Title VI in Environmental Justice Lawsuits*, 6 S.C. ENVTL. L.J. 108 (1997); Michael Fisher, *Environmental Racism Claims Brought Under Title VI of the Civil Rights Act*, 25 ENVTL. L. 285 (1995); 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); Lazarus, *supra* note 9. *See also* 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 ELR 11144 (Dec. 2000); Bradford C. Mank, *Reforming State Brownfield Programs to Comply With Title VI*, 24 HARV. ENVTL. L. REV. 115 (2000); Luke Cole, *"Wrong on the Facts, Wrong on the Law": Civil Rights Advocates Excoriate EPA's Most Recent Title VI Misstep*, 29 ELR 10775 (Dec. 1999) [hereinafter *Wrong on the Facts*]; C. Silverman, *EPA's Interim Guidance for Investigating Title VI Complaints Challenging Permits: The Bumpy Road Toward a Federal Environmental–Civil Rights Policy*, 6 ENVTL. L. 35 (1999); NATIONAL ADVISORY COUNCIL FOR ENVIRONMENTAL POLICY & TECHNOLOGY, REPORT OF THE TITLE VI IMPLEMENTATION ADVISORY COMMITTEE: NEXT STEPS FOR EPA, STATE, AND LOCAL ENVIRONMENTAL JUSTICE PROGRAMS (1999) [hereinafter TITLE VI FACA REPORT]; June M. Lyle, *Reactions to EPA's Interim Guidance: The Growing Battle for Control Over Environmental Justice Decisionmaking*, 75 IND. L.J. 687 (2000); Bradford C. Mank, *Environmental Justice and Title VI: Making Recipient Agencies Justify Their Siting Decisions*, 73 TUL. L. REV. 787 (1999); Michael D. Mattheisen, *The U.S. Environmental Protection Agency's New Environmental Civil Rights Policy*, 18 VA. ENVTL. L.J. 183 (1999); Kristen L. Raney, *The Role of Title VI in* Chester Residents v. Seif: *Is the Future of Environmental Justice Really Brighter?*, 14 J. NAT. RESOURCES & ENVTL. L. 135 (1998-1999); Maura Lynn Tierney, *Environmental Justice and Title VI Challenges to Permit Decisions: The EPA's Interim Guidance*, 48 CATH. U. L. REV. 1277 (1999); Jimmy White, *Environmental Justice: Is Disparate Impact Enough?*, 50 MERCER L. REV. 1155 (1999); Richard Monette, *Environmental Justice and Indian Tribes: The Double-Edged Tomahawk of Applying Civil Rights Laws in Indian Country*, 76 U. DET. MERCY L. REV. 721 (1999); Luke W. Cole, *Civil Rights, Environmental Justice, and the EPA: The Brief History of Administrative Complaints Under Title VI of the Civil Rights Act of 1964*, 9 J. ENVTL. L. & LITIG. 309 (1994).

112. Guardians Ass'n v. Civil Serv. Comm'n of the City of N.Y., 463 U.S. 582, 584, 593 (1983).

113. 38 Fed. Reg. 17968, 17969 (July 5, 1973); *see also* 46 Fed. Reg. 2306 (Jan. 8, 1981) and Nondiscrimination in Programs Receiving Federal Assistance From the Environmental Protection Agency, 49 Fed. Reg. 1659 (Jan. 12, 1984) (codified at 40 C.F.R. pt. 7).

114. Nondiscrimination in Programs Receiving Federal Assistance From the Environmental Protection Agency, 40 C.F.R. pt. 7.35(b) (2000). *See also* 40 C.F.R. pt. 7.35(c) (2000) (providing that "[a] recipient shall not choose a site or location of a facility that has the purpose or effect . . . of . . . subjecting [individuals] to discrimination under any program . . . on the grounds of race . . . ."). However this provision is not generally applicable in the permitting context as most recipients (state environmental agencies that have been delegated permitting authority), do not choose the site. Generally the site has been chosen by the project sponsor before the permit application is submitted.

115. *Wrong on the Facts*, *supra* note 111, at 10775.

116. When the *Interim Guidance* was released, 14 of the 18 complaints under investigation involved permitting. *Environmental Justice: Browner Defends Release of Interim Policy on Processing of Civil Rights Complaints*, 29 Env't Rep. (BNA) 233 (May 22, 1998) (comments of Administrator Browner to Title VI FACA Subcommittee). In May 2000, Anne Goode, director of the EPA Office of Civil Rights, noted that three-quarters of the complaints received involve permitting. *Title VI Guidance Offers Predictability, Community Protection, Goode Says*, 31 SOLID WASTE REP., 2000 WL 12746197 (June 29, 2000).

117. *Wrong on the Facts*, *supra* note 111, at 10775.

committed to actively investigate at least five of the pending cases, the next item to come from the Office of Civil Rights was not until February 1998; it was not a ruling on any investigation but rather an 11-page document titled *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits* (*Interim Guidance*).[118] The *Interim Guidance* sparked a firestorm of criticism. Environmental justice activists' tentative endorsement of EPA's effort as "an important first step"[119] was undoubtedly welcomed by the Agency when compared to the stinging criticisms coming from the industry/business sector and state/local regulatory agencies.[120] Many of these stakeholders felt the *Interim Guidance* left too many unanswered questions and complained that the ensuing uncertainty destabilized existing permit programs.[121]

Apparently in response to the strong criticism, in April 1998, EPA established the multi-stakeholder Title VI Implementation Advisory Committee formed under the federal Advisory Committee Act (Title VI FACA).[122] The committee concluded its mission in March 1999, submitting its report to EPA.[123] Although the mission of the Title VI FACA was to help EPA provide guidance to state agencies on how to comply with Title VI, the discussions inevitably clustered around the questions left unanswered by the *Interim Guidance* and, consequently, led to a variety of plausible interpretations of a cognizable claim under Title VI.[124] Given the diversity of stakeholders and their significant differences on fundamental questions, it is not surprising that the committee did not achieve consensus on the majority of issues, with possibly two important exceptions. First, the committee agreed on a set of overarching principles.[125] Second, the committee members agreed that it was more important to explore the complexities of the issues rather than to achieve a series of "innocuous, watered-down" recommendations.[126] In addition to several procedural issues, the committee identified eight crucial substantive issues that EPA needed to address.

The issues identified lead to the very point where, in a manner of speaking, the rubber meets the road. How the Agency would address these questions would more accurately reveal EPA's environmental justice policy than its public statements, and perhaps in a less direct way provide insight as to its institutional ability to address competing fairness claims. The Agency did respond in June 2000, with a 147-page draft revised guidance containing its own internal guidance for investigating Title VI administrative complaints as well as external guidance for EPA fund recipients (*Draft Title VI Guidance*).[127] By focusing on (a) the questions posed by the Committee, and (b) how these questions were answered or left unanswered under the *Draft Title VI Guidance*, the reader may gain a better appreciation of the issues in this politically difficult and technically complex area.

Defining and Evaluating Adverse Effects

The first substantive issue presented by the committee was the difficulty in defining and evaluating effects.[128] At its most narrow, an adverse effect could be construed to mean adverse health effects[129] directly caused by the permitted releases only.[130] A more expansive interpretation of adverse effects would include not only the newly permitted releases, but those changes to the community's well-being that are related to the permit at issue,[131] in light of the aggregate sources of pollutants and other adverse impacts existing at the time the permit is under consideration. This could potentially include not only the cumulative risks posed by all permitted releases, but their possible synergistic effects as well.[132] Also included would be all foreseeable adverse impacts that may befall the community as a result of the permitted operations. These facility-related (rather than solely emission-related) impacts could include increased traffic, odors, and noise. Often, community residents are as concerned with these immediate impacts on their daily lives as they are with the potentially latent effects of permitted releases. Lastly, the scope of impacts recognized under a more expansive interpretation could include other "environmental, economic, cultural, social, or psychological harm[s]," for example, damage to a site that is sacred to a Native American tribe or others with land-based belief systems, or plummeting residential land values, or even prostitution activities encroaching upon residential neighborhoods that would not have occurred but for the facility.[133] Clearly, com-

118. U.S. EPA, INTERIM GUIDANCE FOR INVESTIGATING TITLE VI ADMINISTRATIVE COMPLAINTS CHALLENGING PERMITS (1998) (available from the ELR Document Service, ELR Order No. AD-3660) [hereinafter INTERIM GUIDANCE].

119. Letter from 44 Signatories (representing a coalition of grass-roots activists, community groups, environmental justice networks and resource centers, church and labor leaders, attorneys, and academics) to Anne E. Goode, Director, commenting on the *Interim Guidance*, at 2 (May 5, 1998) (on file with author).

120. TITLE VI FACA REPORT, *supra* note 111, at 3.

121. *Id.* at 4-5.

122. The author was a member of the Title VI implementation subcommittee appointed as a member of the academia stakeholder group. Other stakeholder groups included industry, nongovernmental organizations, and state/local governments. *See* NACEPT FEDERAL ADVISORY COMMITTEE, SUMMARY OF THE TITLE VI IMPLEMENTATION ADVISORY COMMITTEE MEETING (MAY 18-19, 1998) (the list of participants of this initial meeting is at the end of the summary).

123. TITLE VI FACA REPORT, *supra* note 111.

124. *Id.* at 3

125. *Id.* at 11-13.

126. *Id.* at 10-11.

127. U.S. EPA, 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. 39650 (June 27, 2000) (available from the ELR Document Service, ELR Order Nos. AD-4517 (Draft Recipient Guidance) and AD-4516 (Draft Revised Investigation Guidance)) [hereinafter Draft Title VI Guidance].

128. TITLE VI FACA REPORT, *supra* note 111, at 57-65.

129. Bodily impairment, infirmity, illness, or death. *Id.* at 58.

130. *Id.* at 57. In many of the discussions the Agency uses the term "emissions" instead of "releases." This is because many of the permit disputes under consideration involve air permits. However, releases could include the addition of pollutants into the water (effluent) or releases of pollutants into the land by underground injection. Notwithstanding the more broadly applicable term, because most of the examples in this Article involve air permits, the term "emissions" is often used interchangeably with "releases."

131. *Id.*

132. *Id.* at 60.

133. In Chester, Pennsylvania, for example, prostitutes began to frequent the area to solicit the truck drivers who were waiting to unload truckloads of contaminated soils. Testimony of Zulene Mayfield Before the NEJAC Committee, Transcript, In the Matter of the Fourteenth Meeting of the NEJAC, vol. 1, pp. 1-71, 1-72 (Nov. 30, 1999); *see also* TITLE VI FACA REPORT, *supra* note 111, at 60; LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP, ENVIRONMEN-

munity residents see the permit as the gateway to a wide range of undesirable impacts and, additionally, to the attendant risks of accidents at the facility and/or chronic noncompliance. Given the difference between a narrow view of the meaning of "adverse effects" and the more expansive view, it is little wonder that this issue occupied hours of vigorous disagreement among the committee members.[134]

EPA attempted to resolve this contentious issue under the subsequently issued *Draft Title VI Guidance*. Although it is somewhat unclear, the *Draft Title VI Guidance* appears to limit the types of recognized adverse effects to health impacts.[135] First, the guidance explains that in assessing whether an adverse impact exists, background sources of stressors may be considered.[136] The definition of "stressor" in the glossary of terms includes "any substance introduced into the environment that adversely affects the health of humans, animals, or ecosystems."[137] Although noise, odors, and increased traffic are not always "introduced into the environment" by the permittee in the literal sense, the definition specifically lists "noise" as a factor that may adversely affect a receptor.[138] Thus, to a limited degree EPA intends to consider a range of cumulative impacts that affect health. To this baseline, the facility's impacts are added. However, it is less clear whether the Agency will consider facility-related impacts that are not emission-related impacts. Equally surprising is that the guidance does not explicitly address whether nonhealth-related impacts can be the basis of a claim, as it focuses exclusively on health-related impacts. The only clue lies in an oblique reference in an appendix titled "Summary of Key Stakeholder Issues Concerning EPA Title VI Guidance." In that section, which appears to be a general response to comments, the Agency notes that neither the *Interim Guidance* nor the *Draft Title VI Guidance* "require[ ] recipients to address social and economic issues that they are not authorized to address."[139] As omnibus clauses may allow such considerations, the ambiguity remaining in the *Draft Title VI Guidance* with respect to defining adverse impacts is surprising given the repeatedly articulated importance of this issue to all stakeholders.

A question related to evaluating an adverse impact is the type of proof that may be required to establish a violation under complaints grounded on allegations of adverse health effects.[140] The adverse effect might be established only by a strict test of causation similar to tests developed in toxic tort cases.[141] This standard would probably require epidemiological studies demonstrating the presence of actual harm, and other evidence would need to be submitted to show an exposure pathway and the causal link between the demonstrated harm and the permitted activities. An adverse impact could also be established by evidence of differential risk.[142] This standard would account for the potential latent effects of exposure to toxic chemicals but would likely require the use of comparative quantitative risk assessments.[143] Given the number of complaints pending and the limited resources available to investigate the complaints, such a complicated and resource-intensive analysis does not seem feasible.[144] An alternative test would be to infer an adverse effect based on elevated levels of pollutants in the impacted area.[145] The latter is a test essentially using differential exposure as an evidentiary surrogate for differential risk.

Before EPA addressed this issue in the *Draft Title VI Guidance*, it used a differential exposure test—or what it termed a "relative burden analysis"—in the Shintech case. The Shintech case involved a controversial Title VI administrative complaint that was under investigation at the time of the committee deliberations, but the claim based upon the permit was mooted when the permit application was subsequently withdrawn.[146] This investigation was the Agency's first attempt to evaluate an alleged adverse impact. After this portion of the investigation was closed, EPA requested that the Science Advisory Board (SAB) review the methodology the Agency had used.[147] The SAB in its report ob-

TAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT (2000) (describing the Chester residents' campaign)

134. *See supra* note 122 (the author was a member of the Title VI FACA Committee).

135. The glossary definition of "impact" states:

> In the health and environmental context, a negative or harmful effect on a receptor resulting from exposure to a stressor (e.g., a case of disease). The likelihood of occurrence and severity of the impact may depend on the magnitude and frequency of exposure, and other factors affecting toxicity and receptor sensitivity.

Draft Title VI Guidance, *supra* note 127, at 39666.

136. However, in determining whether there is a violation, only "sources of stressors (e.g., facilities), stressors (e.g., chemical or pathogens), and/or impacts (e.g., risk of disease)" within the recipient's authority will be considered. *Id.* at 39670. This latter significant limitation on a Title VI claim is related to another substantive question and will be discussed in greater detail. *See infra* notes 159-64 and accompanying text.

137. The complete definition is: Any factor that may adversely affect *receptors*, including chemical (e.g., *criteria pollutants*, toxic contaminants), physical (e.g., noise, extreme temperatures, fire) and biological (e.g., disease pathogens or parasites). Generally, any substance introduced into the environment that adversely affects the health of humans, animals, or ecosystems. Airborne stressors may fall into two main groups: (a) those emitted directly from identifiable sources and (b) those produced in the air by interaction between chemicals (e.g., most ozone). Draft Title VI Guidance, *supra* note 127, at 39666

138. *Id.*

139. Draft Title VI Guidance, *supra* note 127, at 39691. Although perhaps intended to signal EPA's policy position, it nevertheless begs the question. Lazarus and Tai have made a convincing case that there is considerable authority within the environmental statutes to address a potentially wide range of impacts that raise environmental justice concerns. *See* Lazarus & Tai, *supra* note 38, at 619, 668; *see also* Gauna, *supra* note 109, at 392-95 (social cost criterion).

140. Some complaints allege discrimination in public participation opportunities.

141. TITLE VI FACA REPORT, *supra* note 111, at 58.

142. *Id.* at 59 (industry stakeholders rejecting "circumstantial" evidence of a causal link in favor of risk assessments an epidemiological evidence).

143. In order to prove that the risk at issue is greater than risks posed to other communities that are predominately white or higher income, several risk assessments may have to be prepared and compared. In addition, risk assessments in the permit context can be unreliable indicators of risk. *See* Ashley C. Schannauer, *Science and Policy in Risk Assessment: The Need for Effective Public Participation*, 24 VT. L. REV. 31 (1999).

144. *See, e.g.*, DRAFT REVISED DEMOGRAPHIC INFORMATION REGARDING LOUISIANA DEPARTMENT OF ENVIRONMENTAL QUALITY/PERMIT FOR PROPOSED SHINTECH FACILITY, TITLE VI ADMINISTRATIVE COMPLAINT (1998) (describing investigation findings using an relative burden analysis); *see also infra* note 146 (critique of methodology used in Shintech case by Science Advisory Board (SAB) and proposing a more complicated methodology).

145. Draft Title VI Guidance, *supra* note 127, at 39661.

146. In addition to a claim of disparate impact premised upon the granting of a permit, the Shintech case also alleged a pattern and practice of racial discrimination; the pattern and practice case is still pending.

147. SAB, AN SAB REPORT: REVIEW OF DISPROPORTIONATE IMPACT METHODOLOGIES (1988) [hereinafter SAB REPORT].

jected not only to the descriptive phrase "relative burden" but advised EPA that the consideration of differential exposure was too limited because de minimis risk could not be considered in such an analysis.[148] However, the SAB also identified significant problems with a risk-based analysis as well, noting that both methodologies would tend to underestimate risks.[149]

Ultimately, the *Draft Title VI Guidance* reveals that the Agency has endorsed a differential risk standard by its intent to use risk values as benchmarks for adverse impacts, adopting an acceptable cancer risk of less than one in one million and an acceptable non-cancer risk of less than one on the hazard index.[150] These risks are considered "not adverse,"although risks above these levels are not necessarily presumed to be adverse.[151] However, in also indicating its intent to consider "toxicity-weighted emissions"[152] and "concentration levels,"[153] the Agency does appear to retain the option to rely solely upon differential exposure to determine whether an impact is adverse in some instances.

In declining to adopt the common-law causation standard and in failing to adopt or reject the more expansive definition of "adverse impact," EPA appears to be adhering to a version of risk-based analytical methodology that supports most rulemaking proceedings and other regulatory functions. It remains to be seen, however, how practical this evidentiary standard may be in case-by-case adjudications of Title VI claims, which are likely to increase in number given the continuing perception that federal and state initiatives promote measures that are industry friendly at the expense of the heavily impacted communities.[154] The Agency's refusal to take an explicit stand on other facility-related impacts, in particular nonhealth-related impacts, is telling. Institutionally, EPA has long been hesitant to venture too deeply into the realm of the social sciences,[155] preferring instead the more precise world of engineering and the hard sciences.[156] This hesitancy has come at a price, as the Agency has been criticized for not tackling the more difficult socioeconomic questions and turning a blind-eye to the real world in which environmental laws are enforced.[157] The guidance did little to dispel this criticism. Although expanding the stakeholder process to include environmental justice activists and residents from impacted communities, the Agency's corresponding retreat from an analysis that would require consideration of their social, cultural, political, and economic realities has left participants feeling that they have wasted their time.[158] This unfortunate result might impair the Agency's ability to engage in outreach in subsequent issues where stakeholder participation is indispensable.

148. *Id.* at 2.

149. In discussing both an enhanced relative burden analysis (ERBA) that takes into account dispersion of pollutants, and a risk-based analysis termed Cumulative Outdoor Air Toxics Concentration Exposure Methodology (COATCEM) (dispersion model analyzing outdoor concentrations of hazardous air pollutants), *id.* at 7, the SAB noted that:

> [t]hey do not take into account short-term excursions from steady state levels. As a result there could be acute exposures that may be significantly higher than the calculated steady state levels. Neither ERBA nor COATCEM evaluate deposition transfers to other environmental media of emitted chemicals or subsequent reemission of these chemicals. In addition, both methodologies assume that all emitted chemicals disperse in the same manner. They do not take into account that some emitted chemicals are stable while others are reactive. In addition, they do not address the fact that certain chemicals are released in the vapor phase, while others are associated with particles.

Id. at 17. The SAB also noted serious limitations where the methodologies did not consider or evaluate acute intermittent exposures, the length of residence of persons with the census blocks, and their activity patterns, as well as limitations due to the fact that input data from the TRI was self-reported and based upon estimates. *Id.* Neither take into account exposures from drinking water, soil, or food chain pathways due to air emissions. *Id.* at 16.

In order to address the limitations of the methodology, the SAB recommended that EPA conduct a sequenced analysis that would begin with a site-specific analysis of exposure using the Basic Relative Burden Analysis (annualized emissions from TRI data) to identify the chemicals upon which to focus, or more optimally an Enhanced Relative Burden Analysis (including dispersion modeling) to identify toxicity-weighted exposures. After this basic toxicity-weighted exposure analysis, EPA could supplement it with the use of risk assessments of the chemicals or classes of chemicals of concern. The COATCEM methodology had promise in this regard, but the SAB cautioned that an uncertainty and sensitivity analysis had to be performed for each methodology. Then an impact would be considered "significant" if the calculated risks were both above the de minimis level and the toxicity weighted exposure ratios were larger then the uncertainty factors. Finally, the findings should be validated with site-specific ambient monitoring data.

Two things stand in marked contrast in the SAB report. First is that the methodologies used and proposed by EPA have significant limitations that would be expected to *underestimate* risk. *Id.* at 25, 29. In addition, the SAB appears to suggest that the exposure ratios have to be larger than the uncertainty factors, thus making uncertainty preclude a finding of significant risk. This would mean that use of the methodology proposed by the SAB would systematically work against impacted communities, even though the SAB specifically noted that whether an identified disparity is substantial and whether the impact is at or above a level of concern are policy issues. *Id.* at 6.

150. Draft Title VI Guidance, *supra* note 127, at 39680.

151.

> OCR may make a finding in instances where cumulative risk levels fall in the range of 1 in 1 million (10^{-6}) to 1 in 10,000 (10^{-4}). OCR would be more likely to issue an adversity finding for Title VI purposes where the cumulative cancer risk in the affected area was above 1 in 10,000 (values above 1 cannot be represented as a probability of developing disease or other effect 0^{-4}) . . . .

Id.

152. *Id.* at 39679.

153. *Id.*

154. *See generally* CBE et al. Tier 2 Comments, *infra* note 304.

155. When the issue of environmental racism first surfaced nationally, then-Administrator William K. Reilly took the position that a governmental agency is limited in its capacity to affect larger cultural and social trends, and that the failure to achieve equitable environmental protection was a symptom of a larger pattern of industrial growth and the legacy of inherited poverty and discrimination. *See* William K. Reilly, *Environmental Equity: EPA's Position*, EPA J., Mar./Apr. 1992, at 19-22. In the 1992 Workgroup Report, Agency staff noted that the existence of injustices and socioeconomic factors was beyond the scope of the report as EPA could act upon inequities based only on scientific data. SUPPORTING DOCUMENT, *supra* note 9, at 2-3.

156. *Id.*

157. *See The Draft Civil Rights Guidance: The Controversy Continues*, ENVTL. F., Sept./Oct. 2000, at 46, 51 (interview with Thomas J. Henderson, Deputy Director of Litigation, Lawyers' Committee for Civil Rights, who criticizes "EPA's continuing reticence to accept its responsibilities beyond the comfort of scientific and technical considerations"); *see also* Gauna, *supra* note 15, at 31.

158. *See* Letter to Carol Browner and Anne Goode, from Center for Race, Poverty and the Environment and Other Environmental Justice Organizations and Individuals (Aug. 26, 2000) (on file with author) (concerning the Draft Title VI Guidance) [hereinafter EJ Activists Title VI Comments].

Identifying the Community of Concern

Another question posed by the committee and answered by the *Draft Title VI Guidance* concerned the method of identifying the affected community. This of course is dependent to a large degree on the types of impacts that will be considered in the first instance. Although the committee assumed that the baseline or comparison population would likely be comprised of the jurisdiction of the recipient (typically the state),[159] the *Draft Title VI Guidance* was more detailed. EPA affirmed in the guidance that the reference area would be the recipient's jurisdiction under the relevant environmental statute.[160] However, the comparison population would apparently depend on the allegations of the case and could include either the general population of the reference area or only the non-affected portion of the reference area.[161] In other words, one can compare the affected population with the general population (defined by the Agency's jurisdiction). Alternatively, one can compare the affected population with the unaffected population within the general population of the recipient agency's jurisdiction, or the most likely affected with the least likely affected (by percentage), or even the statistical probability of certain demographic groups within an affected population being affected.[162]

Determining the "affected" population rather than the comparison population was more problematic to some committee members. Some favored the use of monitoring data and computer modeling to determine the communities within the facility's exposure pathway. Environmental justice advocates were more skeptical of this method because of their view that monitor placement is generally inadequate or nonexistent in many environmental justice communities.[163] In the *Draft Title VI Guidance*, EPA endorsed and preferred the use of monitoring data and modeled analysis, but it recognized that the more simple proximity approach may be used where more detailed estimates cannot be developed.[164]

Determining the Degree of Disparity

The third substantive issue concerns how to determine the degree of disparity that is required to establish a violation. The committee discussed alternative descriptive measurements, such as "significant disparity," "substantial disparity," "above generally accepted norms," "appreciably exceeding the risk to (or the rate in) the general population," or "any measurable disparity."[165] A statistical approach using two standard deviations or higher was discussed.[166] Some objected because of a perceived lack of connection between the statistical correlation and the actions of the facility at issue, others because the approach failed to account for communities that may be particularly vulnerable, for example, a community experiencing abnormally high rates of asthma.[167]

159. TITLE VI FACA REPORT, *supra* note 111, at 67-68.

160. Draft Title VI Guidance, *supra* note 127, at 39666.

161. *Id.* at 39681.

162. *Id.*

163. TITLE VI FACA REPORT, *supra* note 111, at 65-66.

164. Draft Title VI Guidance, *supra* note 127, at 39679.

165. TITLE VI FACA REPORT, *supra* note 111, at 71.

166. *Id.* at 69.

167. *Id.* at 70.

Ultimately, EPA adopted a hybrid approach. First, "[m]easures of the demographic disparity between an affected population and a comparison population would normally be statistically evaluated to determine whether the differences achieved *statistical significance* to at least 2 to 3 standard deviations."[168] The Agency will then in some manner account for uncertainties such as population shifts, accuracy of predicted risk levels, population size, demographic composition of a general comparison population, and the proportion of the affected area within the recipient agency's jurisdiction.[169] After a "demographic disparity" is examined, the Agency will turn to examine the disparity in impact, considering other factors such as the level of adverse impact, its severity, and the frequency of occurrence.[170] In one final balancing act, EPA will weigh the demographic disparity against the disparity of impact and make a final determination whether the overall degree of disparity is enough to support a claim.[171] The *Draft Title VI Guidance* cautions that there is no fixed formula or analysis to be applied and no single factor is applicable in all cases.[172]

This convoluted approach is apparently designed to give the Agency wide latitude to address complicated situations, such as where the disparity of impact is large but the disparity in demographics is relatively slight[173] or vice versa.[174] Other demographic complications may arise, for example, where one ethnic minority is disparately impacted within the context of a general population having a relatively high percentage of a combination of ethnic minorities, such as where an African-American community is disparately impacted within an air shed that has a 90% ethnic minority population overall (African American, Hispanic, Native American, and Asian combined).[175]

Although it is understandable why the Agency would want to retain this flexibility, it provides little guidance and, therefore, little predictability as to how the various factors

168. Draft Title VI Guidance, *supra* note 127, at 39682 (emphasis in original).

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. Providing this very scenario, the *Draft Title VI Guidance* states: "For instance where a large disparity (e.g., a factor of 10 times higher) exists with regard to a significant adverse impact, OCR might find disparate impact even though the demographic disparity is relatively slight (e.g., under 20%)." *Id.*

174. The Agency did not address this situation, which may present a more difficult case. This would typically occur in a situation where the adverse impact is slightly above a cognizable threshold of adversity, but the white population is affected just below that threshold, the disparity in impact would be slight.

175.

> For example, state populations may be used as a basis for comparison with the affected population. Recent data show that the proportion of total 'minority' populations (defined as other than white races together with white Hispanics) range from about 4% to 50% of various state populations. In light of that variance, the adoption of a single level of disparity, such as a factor of 2, as the only indicator of significance, would lead to highly inconsistent results. If a complaint alleged discrimination against minorities, as defined above, in some states, a significant disparity would be presumed to exist if less than 10% of an affected population were minority, whereas in other states, the percentage would have to reach 100%.

Id.

will be weighted. For example, if the demographic disparity is relatively low but the community is experiencing elevated blood lead levels (and therefore a larger disparity in impact), would this constitute a disparately impacted community? Conversely, if a community in an air shed is experiencing a hot spot due in part because of the permitted releases, but other communities are similarly exposed to higher than normal levels of pollutants because of their proximity to traffic corridors, is the first community disparately impacted?[176] To determine whether the first, second, or both disparities count necessarily involves an examination as to the cause of the disparities. This in turn may potentially involve EPA in an examination of environmental protection not in isolation, but in the context of a range of considerations common to the social sciences—such as exclusionary zoning practices, white flight in residential patterns, or inadequate access to public services—as well as the recipient agency's role in exacerbating these existing conditions by continuing to issue permits in overburdened communities.

The Role of Existing Environmental Standards

Industry representatives and some state regulators are strong adherents of the view that if a permit applicant complies with all applicable requirements under the relevant environmental standards, there can be no violation of Title VI.[177] The logic supporting this position is that environmental laws are designed to—and in fact do—accomplish an adequate level of protection for all members of society; thus, just because environmental burdens and benefits are not distributed evenly does not constitute illegal discrimination. During the committee deliberations, EPA ruled on a Title VI administrative case that appeared to support this view. In what came to be called the *Select Steel*[178] case, the EPA Office of Civil Rights dismissed a Title VI complaint involving a PSD permit on the rationale that there was no adverse impact because the air shed was in compliance with NAAQS. Apparently a bit wary that too much might be read into the *Select Steel* decision, EPA was quick to point out in the guidance that compliance with environmental laws did not constitute per se compliance with Title VI.[179] Instead, compliance with a health-based standard would raise a presumption that the impact, however disparate, was not adverse, a presumption that could be overcome.[180]

Environmental justice representatives were adamantly opposed to using health-based standards in this manner and criticized the rationale during the committee deliberations and also in response to the *Draft Title VI Guidance*. Such standards, they argued, were often insufficiently protective to begin with, had not been fully implemented, and did not take into account the particular vulnerabilities of a community.[181] Moreover, the health-based ambient standards tended to cover large geographical regions (like an air shed); thus, while the geographical area might comply with the standards overall, toxic hot spots could well occur within those areas.[182] The fact that such a presumption is rebuttable would be of little benefit to communities within the hot spot, as inadequate monitor placement (perhaps itself the result of discriminatory practices, unintentional or otherwise) would prevent the complainant or EPA from obtaining the data necessary to rebut the presumption.[183] Rebutting such a presumption would also conceivably require additional empirical data such as information about home and workplace risks, exposures from other media, and information about atypical health problems the community may be experiencing, data that the Agency is unlikely to gather on its own.

In addition to these criticisms, there may be other more nuanced consequences of creating such a presumption. Although the Office of Civil Rights committed itself to "work closely with recipients" and "provide the recipient with several opportunities to respond,"[184] the claimants role is much more circumscribed. The Office of Civil Rights may request interviews of the claimant or relevant documents in its possession. However, the guidance was clear on the Agency's position that "EPA does not represent the complainants" and the investigation "does not involve an adversarial process between the complainant and the recipient."[185] The only time the claimant is expressly given an opportunity to respond is very late in the administrative appeal process if the *recipient* requests a hearing before an administrative law judge (ALJ) and subsequently files an exception to the ALJ's determination and the EPA Administrator elects to review the determination. In contrast, there are "no appeal rights for the complainant built into EPA's Title VI regulatory process." In practice, the experience of claimants is that after submitting a claim they hear little if anything from the Office of Civil Rights.[186]

This raises an important procedural issue. Since the recipient is not going to rebut a presumption that a health-based standard is protective and the claimant does not have an active role in the administrative investigation, EPA is in the position of having to rebut its own self-imposed presumption. There is little to support a prediction that the Agency will attempt to do so. And even if such a successful rebuttal were to occur, the absence of adequate monitoring in some impacted communities may make the rebuttal finding diffi-

176. The problem may be particularly difficult where there are several disparately impacted communities within the recipient agency's jurisdiction, but the problem is not severe enough to establish a claim based on a pattern and practice of discrimination.

177. TITLE VI FACA REPORT, *supra* note 111, at 72.

178. St. Francis Prayer Ctr. v. Michigan Dep't of Envtl. Quality, EPA File No. 5R-98-R5 (*Select Steel*).

179. Draft Title VI Guidance, *supra* note 127, at 39680.

180. *Id.*

181. TITLE VI FACA REPORT, *supra* note 111, at 72; *see also* EJ Activists Title VI Comments, *supra* note 158, at 50-55; Letter to Carol Browner and Anne Goode, from Golden Gate University School of Law's Environmental Law and Justice Clinic Regarding Draft Title VI Guidance, 9-11 (Aug. 28, 2000) (on file with author); Letter to Carol Browner and Anne Goode, from Professor Alice Kaswan, 6 (Aug. 28, 2000) (on file with author); Letter to Carol Browner and Anne Goode, from Professor Eileen Gauna, 7 (July 27, 2000) (on file with author).

182. TITLE VI FACA REPORT, *supra* note 111, at 72.

183. *Id.* Inadequate monitor placement was also a concern of the NEJAC Air and Water Subcommittee in submitting comments to the Office of Air and Radiation on EPA's Draft Urban Air Toxics Strategy. *See* NEJAC AIR AND WATER SUBCOMMITTEE'S URBAN AIR TOXICS WORKING GROUP, COMMENTS TO THE OFFICE OF AIR AND RADIATION ON THE EPA'S DRAFT URBAN AIR TOXICS STRATEGY 9-13 (1999) (recommending the public have an opportunity to petition the state and EPA for air monitoring changes). The comments are listed as Appendix C to the 1999 NEJAC REPORT ON PERMITTING, *infra* note 356.

184. Draft Title VI Guidance, *supra* note 127, at 39671.

185. *Id.* at 39672.

186. *See* EJ Activists Title VI Comments, *supra* note 158, at 2-4 (stories of frustration).

cult to sustain on appeal. The more troubling scenario, however, is that the presumption will provide the Office of Civil Rights a tempting alternative to the difficulty and expense of conducting a comparative risk-based disparate impact analysis. And the vigor by which the Agency will interrogate its own presumption will be vulnerable to the shifting philosophies and political will that occur from administration to administration.

Agency Jurisdiction

Regulatory officials appear to have a range of views as to the appropriateness of addressing environmental justice issues in the course of issuing permits. However, even those that are open to the idea have expressed two concerns. First, that they may not have authority to condition or deny a permit on environmental justice grounds.[187] After all, none of the federal environmental statutes mention environmental justice or grant explicit authority to go beyond typical requirements to protect heavily impacted communities. Moreover, the associated siting decisions are made in corporate boardrooms long before the recipient regulatory agency is involved and depend in large part on local land use and zoning decisions, also outside the purview of these agencies.[188] The second concern squarely presents a powerful competing fairness claim by the agency: it would be unfair to hold recipient regulatory agencies accountable for impacts over which they have no control.

Responding to the second concern, EPA clearly agreed with the states. This agreement came, apparently, well before the issuance of the *Draft Title VI Guidance*, during a meeting between Administrator Browner and state officials in late 1998.[189] Thus, it was no surprise when the guidance, in unequivocal terms, stated that "in determining whether a recipient is in violation of Title VI or EPA's implementing regulations, [EPA] expects to account for the disparate impacts resulting from source of stressors (e.g., facilities), stressors (e.g., chemicals or pathogens), and/or impacts (e.g., risk of disease) within the recipient's authority."[190] Unfortunately, this unequivocal position taken by the guidance only begged the more central questions. Exactly what impacts are within the recipient agency's jurisdiction? If, as the recent EAB decisions suggest, there exists wide authority under the environmental statutes to undertake an environmental justice analysis during permit proceedings, presumably there must be authority to do something about some of the associated impacts. It would be a curious reading of a statute to presume that Congress granted authority to consider excessive impacts while at the same time precluding the ability to address those very impacts by granting authority to issue only typical permit conditions. Assuming there exists such authority, what is the scope of impacts that may be considered under the environmental statutes? Do agencies have authority to condition permits in order to mitigate or avoid nonemission-related impacts and nonhealth-related impacts? To take it one step further, do agencies have authority to deny a permit on similar grounds? If the answer is yes, then a related and critical question emerges under Title VI law: if a recipient agency fails to exercise this discretionary authority in response to a known significant racial disparity, has it violated its duty under Title VI by using methods of administering its program that has the effect of subjecting individuals to discrimination because of their race?

The *Draft Title VI Guidance* did not answer the scope of authority question, which would have taken EPA down the legal slippery slope and head first into these difficult questions. The Agency may have decided, wisely perhaps, to await the development of case law by the EAB and ultimately the courts. Curiously, however, EPA did take a stand on the issue of permit denial. The Guidance explains that "denial or revocation of a permit is not necessarily an appropriate solution"[191] to a disparate impact, and that EPA will "likely recommend that the recipient focus on other permitted entities and other sources within their authority to eliminate or reduce . . . disparate impacts."[192] Thus, by refusing to explicitly address the scope of authority question while at the same time essentially requiring recipient agencies to spread the required mitigation among the regulated community, it leaves its own Office of Civil Rights in an untenable position. It is possible that this office—underfunded for the task and chronically subjected to congressional interference[193]—will on its own in case-by-case investigations venture to advise recipient agencies of their legal authority under environmental statutes. Alternatively, the Office of Civil Rights would understandably prefer to avoid the untested legal issues. The investigatory framework outlined in the guidance gives it ample opportunity to do so; at that point it may become tempting to use the presumptions created by the guidance or the flexible criteria for determining disparity in a manner that will allow the Office of Civil Rights to dismiss the complaint.

New Versus Renewal Permits

Just as the agency jurisdiction question presented the fairness issue for state regulators, the issue of permit renewal illustrates the potential unfairness to some industry stakeholders. When a project sponsor initially commits substantial capital to build a facility, it likely anticipates a useful life of the facility of at least 30 years. But a permit typically expires in five years. So there is a common understanding that these permits will be serially renewed as long as the facility complies with pollution control permit conditions that typically apply. Title VI destabilizes that compact. Consider, for example, a facility built in 1990, before the advent of permit-related Title VI complaints. It would be unfair to tell this facility owner, who expected routine permit renewals, that her multimillion dollar facility can no longer operate be-

187. TITLE VI FACA REPORT, *supra* note 111, at 72.

188. *Id.* at 76.

189. *Id.* at 78.

190. Draft Title VI Guidance, *supra* note 127, at 39670.

191. *Id.* at 39653, 39683.

192. *Id.* at 39683.

193. *See* Jennifer Silverman & Cheryl Hogue, *Budget: Limits to Civil Rights Guidance Included in Bill Approved by House Funding Panel*, 29 Env't Rep. (BNA) 516 (July 3, 1998) (noting rider on 1999 appropriations bill precluding the use of appropriated funds to investigate civil rights complaints under the *Interim Guidance*); *Environmental Justice: EPA Should Follow Rulemaking Procedures for Title VI Guidance, House Report Says*, 30 Env't Rep. (BNA) 880 (Sept. 3, 1999) (noting house report on EPA fiscal year 2000 appropriations prohibiting the use of funds to investigate pending complaints under the *Interim Guidance* and criticizing EPA for issuing guidance instead of using formal rulemaking procedures).

cause a permit renewal would violate the regulator's Title VI duty by continuing to subject the host community to a racially disparate impact. This unfairness could be exacerbated by the fact that closing the facility would not appreciably redress the community's problems because of multiple contributors to the overall impact, including exempt, grandfathered, and nonpermitted sources. And it is simply unfair, argue some, to "hold a facility hostage to changing demographics."[194]

At the other end of the spectrum is the perspective of environmental justice advocates. They point out that the civil rights laws have been in effect for decades (prior to the building of many of the oldest existing facilities) and facility owners do not have an absolute right to a permit renewal. Moreover, they point out that most renewal situations do not involve changed demographics and that many facilities up for permit renewal have a poor history of compliance or have operated in a discriminatory fashion for years.[195] In fact, permit applicants expect new requirements upon renewal as standards often change over time. Presenting their own fairness claims, they point out that a ton of pollution resulting from a permit renewal is just as harmful as a ton of pollution resulting from an initially granted permit.[196]

In responding to this difficult issue, EPA appears to have studiously steered a middle course. The *Draft Title VI Guidance* rejects the industry position that renewals should be treated differently categorically, affirming that new permits, renewals, and modifications can all support a Title VI claim.[197] However, a potentially important and controversial exception was created in an apparent attempt to mitigate the harshness to some industry constituents. EPA has taken the position that a civil rights investigation will likely be closed if the permit action at issue involves a significant decrease in overall emissions or a decrease in the pollutants of concern.[198] Since newly permitted facilities cannot "decrease" emissions and since by definition modified facilities generally involve emission increases,[199] this exception pertains only to permit renewals. In other words, if an applicant for a renewal agrees to decrease emissions, the applicant may avoid a potential Title VI challenge to the agency based on its permit.

Environmental justice advocates criticized this position, reasoning that a comparatively small decrease in emissions will not help the overburdened community, given the magnitude of the facility emissions overall[200] and the cumulative effect of multiple-source impacts in the area. In addition, this provision disadvantages facilities with better control technology while benefitting older facilities with poor pollution control, as the latter can more easily reduce emissions. Notwithstanding these criticisms, it remains to be seen whether facility operators will respond to this incentive to reduce emissions. In large part, that will depend on whether they perceive Title VI as posing a credible threat to their operations under the new *Draft Title VI Guidance*.

Mitigation

If an investigation should reveal the presence of an "adverse disparate impact," the issue of whether, how much, and how to mitigate raises another set of questions. As an initial procedural matter, industry representatives argue that state officials should be allowed to justify impacts before mitigation is required, and environmental justice advocates maintain that mitigation possibilities should be explored before the issue of legal justification is addressed in the investigation.[201] In other words, environmental justice advocates believe that an agency should always attempt to mitigate adverse effects, even if the disparate impact is otherwise legally justified. In terms of how much mitigation should be required, the possibilities include mitigation sufficient to (a) eliminate the disparity, (b) reduce risk to acceptable levels, or (c) make reasonable progress in eliminating the disparity. The committee also focused on acceptable mitigation strategies, with the committee deliberating primarily on the relationship between the adverse impact and the mitigation undertaken.

At its most narrow interpretation, mitigation could mean only those actions that reduce or eliminate the adverse impact at issue. A more moderate approach would allow mitigation measures that do not reduce the disparity, but address its effects,[202] such as medical monitoring, research into cumulative risks and synergistic effects, or enhanced emergency response systems. The most expansive view of mitigation, termed by the committee "loose nexus" mitigation, would include benefits to the host community that do not otherwise reduce the disparity or mitigate its effects,[203] such as a day care center, for example. Loose nexus mitigation may closely resemble proposals for compensated siting schemes.[204]

A committee workgroup on mitigation achieved a consensus that a moderate to narrow nexus mitigation approach would be best, an approach that essentially requires the mitigation to be as narrowly tailored to the adverse impact as possible but allows some substitute forms of mitigation

194. Comments of Greg Adams, on behalf of a consortium of wastewater agencies in southern California, made at a Title VI Listening Session sponsored by the EPA in Los Angeles, California, on August 2, 2000 (on file with author).

195. TITLE VI FACA REPORT, *supra* note 111, at 81.

196. *Id.*

197. Draft Title VI Guidance, *supra* note 127, at 39677.

198. *Id.*

199. *See, e.g.*, 40 C.F.R. §51.1654(a)(1)(x) (2000) (significant net increases to major sources of criteria air pollutants).

200. The glossary defines significant as "[a] determination that an observed value is sufficiently large and meaningful to warrant some action. (See statistical significance)." Draft Title VI Guidance, *supra* note 127, at 39655. Significant for purposes of regulating criteria air emissions, for example, is typically 40 tons per year of volatile organic compounds (VOCs). 40 C.F.R. §51.1654(a)(1)(x). To place this number in context of some of the more intensive industrial activities, one might compare that amount with the 3 million pounds per year of expected emissions—including 692,200 pounds per year of toxic air pollutants—from the facility at issue in the Shintech investigation. *See* Kuehn, *Denying Access*, *supra* note 105, at 3. Excluding the proposed Shintech facility, there were 127 facilities emitting a total of approximately 44,719,609 pounds per year of air releases within a 3-mile radius of the proposed facility. U.S. EPA, Draft Revised Demographic Information to Title VI Administrative Complaint Re: Louisiana Department of Environmental Quality/Permit for Proposed Shintech Facility (Apr. 1998) (Attachment 1-TRI Facility Counts excluding Shintech) (on file with author).

201. TITLE VI FACA REPORT, *supra* note 111, at 83.

202. *Id.* at 86.

203. The committee acknowledged that what is "loose nexus mitigation" depends on how one defines the scope of an adverse effect. *Id.* at 87.

204. *Compare* Rachel D. Godsil, *Remedying Environmental Racism*, 90 MICH. L. REV. 394 (1991) (examining the reform of siting procedures), *with* Vicki Been, *Compensated Siting Proposals: Is It Time to Pay Attention?*, 21 FORDHAM URB. L.J. 787 (1994).

when reducing or eliminating the facility impacts is not possible.[205] Although reasonable and logical from a health standpoint, the workgroup acknowledged that this recommendation, if adopted, would raise its own set of issues about process.[206] What if, for example, most members of the host community preferred compensatory or loose nexus mitigation? If that were the case and an agreement was negotiated along those lines, should the EPA Office of Civil Rights decline to investigate a claim brought by a community member who was not a party to the mitigation agreement?

Lastly, there were questions about the effect of agency-sponsored or facilitated mitigation measures taken in advance of any particular permit proceeding, termed by the Title VI FACA a "Track 1" approach.[207] This latter pro-active approach was strongly recommended by the committee overall as possibly the best means to address long-standing disparities caused by diverse and multiple sources,[208] as well as addressing the entire range of community concerns, including nonhealth impacts and impacts beyond the jurisdiction of the environmental agency. The Track 1 approach was developed by a subcommittee workgroup charged with developing a template for state agencies to consider, a model approach that would ideally help recipient agencies administer their programs to avoid Title VI claims in the first instance.[209] It was originally envisioned by the workgroup as a preventative approach that would lie outside the confines of any particular permit proceeding or Title VI investigation.[210] However, before the Title VI FACA had been formed, some state regulators had taken the position that similar state environmental justice programs should be an alternative to Title VI compliance.[211] These state agencies were adamant that the states who committed resources to devising such environmental justice programs should be afforded deference in a subsequent Title VI investigation.[212] The issue of deference then itself became vigorously debated.[213]

EPA, under the *Draft Title VI Guidance*, seized upon the Track 1 approach and assigned to it an extraordinary role in a Title VI investigation. Metamorphosed as an "Area Specific Agreement," this approach essentially became the centerpiece of the new *Draft Title VI Guidance*, as well as the means for the Agency to resolve all of the conflicting claims of fairness in one tidy package. The central idea is for the recipient agency to identify overburdened areas and enter into agreements among the residents and other stakeholders to eliminate or reduce adverse impacts "to the extent required by Title VI."[214] The agreement might, for example, establish a ceiling on pollutant releases, with a steady reduction over time, i.e., a declining cap.[215] Ideally, the process of arriving at such an agreement will include state and local governmental agencies, nongovernmental organizations, and other stakeholders with the ability to help solve the identified problems.[216] The guidance explains that if the analysis underlying the agreement supports the conclusions that there will occur "actual reductions over a reasonable time,"[217] the agreement will merit "due weight" in the course of a Title VI investigation and EPA will close the pending investigation.[218] This may occur even if the claimant was not included in the process and was not party to the area-specific agreement.[219] In addition, later-filed complaints concerning other permitting actions in the geographical area covered by the agreement will be similarly dismissed unless the agreement is "no longer adequate" or is "not being properly implemented."[220] In substance, the area-specific agreement categorically constitutes adequate mitigation.

A few observations can be made about this provision. First, it allowed the Agency to avoid directly addressing the issue of whether "loose" or "moderate" nexus mitigation was sufficient by stating that the impacts should be reduced "to the extent required by Title VI." It therefore remains unresolved how closely the mitigation has to be tailored to address the impacts at issue in any permit proceeding. The vagueness of this provision in turn has allowed the Agency to retain the vagueness in its provisions defining the scope of impacts that will support a claim. However, the use of area-specific agreements to dismiss pending actions clearly answered the "how much" question, adopting a reasonable progress standard to suffice instead of requiring a degree of mitigation that will eliminate the disparity or reduce risk to acceptable levels. The provision also excuses the recipient agency from having to consider mitigation strategies in the permit proceeding at issue and, therefore, excuses EPA from having to decide the agency jurisdiction issue, i.e., whether under the environmental statutes there is authority to condition permits beyond normally imposed conditions.

The due weight provision also appears to have a more exceptional role from an evidentiary and a procedural standpoint. Once the due weight threshold is met, due weight effectively operates as a conclusive presumption of compliance with Title VI in the proceeding at issue, thus excusing the Office of Civil Rights from having to determine whether there is a disparate impact to begin with or whether the impact, if it exists, is otherwise legally justified. This is peculiar considering that the strategies in the area-specific agreement may have little connection to the permit conditions at issue and the types of impacts in the Title VI complaint under consideration. Accordingly, there seems to be little justification for such a presumption as an evidentiary matter. Equally remarkable is that the provision also functions as res judicata or collateral estoppel in subsequent Title VI administrative proceedings. Given the exceptional power that this provision has, the strategies that might suffice to support a finding that actual reductions will occur over a reasonable time are critically important components of the

205. TITLE VI FACA REPORT, *supra* note 111, at 86-87.

206. *Id.* at 88-90.

207. *Id.* at 25-31.

208. *Id.* at 10.

209. *Id.* at 9-10.

210. *Id.* at 25-26.

211. *See Environmental Justice: Home-Grown Programs Good Alternatives to EPA Civil Rights Guidance, States Say*, 29 Env't Rep. (BNA) 183 (May 15, 1998).

212. TITLE VI FACA REPORT, *supra* note 111, at 26-29.

213. *Id.*

214. Draft Title VI Guidance, *supra* note 127, at 39675.

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. While noting that informal resolutions may be more successful if recipients work with complainants, EPA notes that reduction plans may be developed without consulting complainants or others. *Id.* at 39674.

220. *Id.* at 39664.

agreement. However, other than a statement that the underlying analysis should have "sufficient depth, breadth, completeness and accuracy,"[221] the guidance does little to elaborate on the reduction strategies that are contemplated or the criteria that will be applied to determine their anticipated efficacy.

In addition to the vagueness concerning the criteria to judge the agreements' reduction plans, the *Draft Title VI Guidance* did not discuss with any specificity EPA's oversight role in ensuring that the area-specific agreements do in fact yield actual reductions in disparate impacts over a reasonable time. Nor did the guidance discuss to what extent emission increases from newly permitted facilities would be allowed to consume the gains made by the proposed reduction strategies. Equating Title VI compliance with the existence of a pollution reduction plan in an area-specific agreement would logically require that a baseline will be established and that strong oversight by EPA will be undertaken, particularly given the problems with measurement, predictability, and enforceability that such agreements present. It remains to be seen, however, how rigorous this oversight will be in practice.

Justification

As noted earlier, the sequence of considering justification was important to committee members. Some believed that legal justification should only be considered after alternative sites and processes had been analyzed and all feasible mitigation efforts had been made.[222] As a practical matter, this approach requires recipient agencies to test the bounds of their legal authority in imposing additional permit conditions. Others on the committee took the position that this step was unnecessary if there was a legally recognized justification for the disparate impact. Other than this important procedural point, there remained the issue of what circumstances justify a racially disparate impact. Proposed justification tests ranged from strict necessity with benefits flowing directly—and perhaps exclusively—to the impacted community, to less stringent tests justifying disparate impacts that would be too costly to mitigate or involve facilities that provide some public benefit.

The *Draft Title VI Guidance* first stated the Agency's seemingly strict position that the recipient would have to demonstrate that the challenged activity was "reasonably necessary to meet a goal that is legitimate, important *and* integral to the recipient's institutional mission."[223] This appears to include only permitted operations that are designed primarily to provide environmental benefits, such as a waste water treatment plant. Anything else, such as a manufacturing facility, is not integral to the mission of an environmental protection agency. Moreover, even if the challenged activity is integral to the recipient's mission and, therefore, justified, such a justification may be rebutted if EPA determines that a less discriminatory alternative exists.[224]

Immediately following this conceptually straightforward test are provisions that call this interpretation into doubt. The guidance states that the Office of Civil Rights will "likely consider broader interests, such as economic development . . . if the benefits are delivered directly to the affected population and if the broader interest is legitimate, important *and* integral to the recipient's mission."[225] Thus, the key to deciphering the twin provisions will lie in whether the Agency really meant to use the word "and" or whether it possibly meant to use a disjunctive for the three qualifiers. It seems odd that a broader interest like "economic development" would ever be an interest that is integral to the mission of an environmental protection agency. The grammatical ambiguity is important; if the *Draft Title VI Guidance* is ultimately implemented to allow goals or broader interests that are legitimate, important *or* integral to the recipient agency's institutional mission, that will justify virtually all disparate impacts. Anything less, however, makes the reference to economic development illogical.

There are several observations to make at this point about EPA, fairness, and the Title VI saga. First is that institutionally the Agency did not confront the competing fairness claims explicitly, calling the shots on who wins and who loses. Nor did EPA explicitly address its own difficult position. If EPA were to actually impose a Title VI administrative remedy, the withdrawal of funds is likely to result in the Agency re-acquiring previously delegated state permitting programs.[226] This will present resource difficulties and have severe political consequences. Whether the investigation framework was intentionally designed to avoid these hard questions is pure speculation. Similarly, it is anyone's guess to what extent the Agency might have been influenced by the fairness claims presented by the different stakeholders. But assuming for a moment that such claims had bearing on the ultimate resolution, which fairness claims prevailed?

The claims by state regulators that they should not have their funding revoked for effects over which they have no control was squarely addressed. They should not. However, there are still no safe harbors because EPA did not take an explicit position on the recipients' scope of authority or whether addressing nonemission and nonhealth impacts was within that scope. The fairness claims of the regulated community were twofold: first, individual permit applicants should not be penalized for the existence of racial disparities caused by a multitude of sources, and second, permit renewal applications should be afforded special consideration because of the sunk costs involved. Both claims gained some ground in terms of remedy. Permit denial was taken off of the table as a potential solution to addressing disparities, but more stringent permit conditions remain a possibility. In the case of renewals, an attractive safe harbor has been created for facility operators who can reduce overall emissions. More importantly, however, the uncertainties created by the still-open questions (scope of adverse impacts and scope of the recipient's legal authority to condition permits

221. *Id.* at 39675.

222. *Id.* at 39683.

223. *Id.* at 39685 (emphasis added).

224. The presence of this "rebuttable presumption" in an investigation where the complainant is not considered an "adverse" party and whose role is limited raises the now familiar question—who will rebut the presumption? *See infra* notes 177-86 and accompanying text.

225. Draft Title VI Guidance, *supra* note 127, at 39683.

226. Recent experience of EPA's oversight of state enforcement of federal environmental statutes illustrates the Agency's willingness to go to great lengths to avoid withdrawal of delegation for failure to follow EPA's enforcement policies. Rena I. Steinzor, *Devolution and the Public Health*, 24 HARV. ENVTL. L. REV. 352, 359 (2000) (noting that although EPA has initiated withdrawal proceedings against states, it has never actually withdrawn a state's delegation) [hereinafter *Devolution and the Public Health*].

beyond typical requirements) may not be of great practical significance given the alternative compliance route possible by devising area-specific agreements. Overall, recipient agencies and industry stakeholders have made significant gains and have expressed greater satisfaction with the *Draft Title VI Guidance*.[227]

The resolution of the fairness claims of impacted communities presents a more complicated picture. The essential thrust of many claims is that it is unfair for communities of color to disproportionately suffer the insults of permitted industrial activity. EPA did respond to that claim by creating an incentive for the development and implementation of pollution reduction strategies. Because these agreements are voluntary and provide for reasonable progress over time, however, it appears that Title VI, as interpreted by EPA, provides no immediate relief for these communities in the near future. In addition, the guidance's suggestion that the recipient agency focus on all permitted entities to reduce the disparate impact may prompt state regulatory officials to test the bounds of their legal authority more aggressively under existing environmental laws. Unfortunately, these potential benefits are dependent upon the commitment by state regulatory agencies to begin with, a commitment that varies from state to state. This bodes badly for the very cases that Title VI was designed to redress, in this context, cases where state and local regulatory agencies neglect ever-increasing environmental degradation in communities of color. In a final ironic twist, the *Draft Title VI Guidance* may have removed the one unintended benefit to such communities that resulted from the earlier *Interim Guidance*: the uncertainty created by the much-maligned *Interim Guidance* made state regulators and industry stakeholders more inclined to bring affected residents into the process earlier and more willing to be flexible and to work out solutions.[228]

In many respects, the competing claims of fairness presented EPA with a zero-sum choice. To the extent that cumulative impacts are attributable to nonpermitted sources, making the regulatory agencies and by extension the permittees somehow accountable for those impacts necessitates winners and losers. In that respect, impacted communities were clearly the losers because these impacts will not be redressed under Title VI. With respect to permit-related impacts, there is a more subtle zero-sum choice presented. To the extent that regulatory agencies have to press legal authority to impose atypical permit conditions or deny permits, agencies stand to lose due to greater pressure from regulated stakeholders and the risk of litigation, and the impacted communities stand to gain. To the extent that permit applicants get their permits denied or conditioned based upon environmental justice considerations, facility sponsors stand to lose and impacted communities stand to gain. EPA attempted mightily to avoid this choice by utilizing an area-specific agreement. If EPA succeeds in this effort, it will accomplish a win-win-win scenario. The regulatory agencies may remain comfortably within the express scope of their authorities under the existing statutes, the facility operators will not have additional enforceable limits and other conditions incorporated into their permits, and impacted communities eventually will gain some measure of relief from adverse impacts. It remains to be seen whether such an alternative compliance strategy, known and criticized in other contexts,[229] will be effective.[230] Unfortunately, the strategy carries a remarkably high risk of regulatory failure, with overburdened communities standing alone to absorb the losses.

If EPA had not devised a way to avoid the win-lose scenario, other interesting approaches to addressing competing fairness claims might have emerged. The Agency might have explored policy-oriented common-law approaches to allocating risk and loss.[231] For example, the Agency could have compared the underlying interests, it could have allocated the potential losses to the class better positioned to absorb the loss, or it could have allocated the potential losses to the least innocent parties. Under an interest-balancing approach, the impacted communities would win because their interests (freedom from racial discrimination and freedom from bodily harm) would likely have outweighed the monetary interests of the recipient agencies (funding) or the monetary interests of the regulated community (costs of mitigation). Indeed, Title VI itself evidences a preexisting congressional determination that these very interests surpass economic considerations in most instances.[232] Allocating the potential loss to the party best positioned to absorb the loss would likely lead to a framework that would require a much higher degree of mitigation, probably to the level of advanced technical capability using individual control strategies. At the point where narrowly tailored mitigation would not be sufficient to reduce the risks to an acceptable level or appreciably reduce the impacts, the resulting loss, e.g., facility shutdowns in the case of permit renewals, may tip the scales in favor of the recipient agency.[233] This is con-

227. *Environmental Justice: Draft Revised Civil Rights Guidance Clarifies Definitions, Addresses State Issues*, 31 Env't Rep. (BNA) 1331 (June 23, 2000) (noting industry source's praise of the guidance); *Environmental Justice: Expanded Version of Civil Rights Guidance Enjoys Broad Support, EPA Official Reports*, 31 Env't Rep. (BNA) 1581 (July 28, 2000) (EPA Office of Civil Rights Director Anne Goode noting support from recipients, but some concerns from industry and environmental groups). *But see Steve Cook, Environmental Justice: States Fault EPA Civil Rights Guidance as Vague, Lacking Definitions, Nonbinding*, 31 Env't Rep. (BNA) 1773 (Aug. 25, 2000); *see also* Environmental Council of States (ECOS), *Comments on Revised Title VI Guidance* (as approved by the Cross-Media Committee on Aug. 14, 2000) (on file with author).

228. *See* Catherine Bridge, *Digging Up Justice*, THE RECORDER, Nov. 24, 1999, at 1 (interviewing several attorneys working on environmental justice cases).

229. *See generally* Clifford Rechtschaffen, *Competing Visions: EPA and the States Battle for the Future of Environmental Enforcement*, 30 ELR 10803 (Oct. 2000); Rena I. Steinzor, *Reinventing Environmental Regulation: The Dangerous Journey From Command to Self-Control*, 22 HARV. ENVTL. L. REV. 103 (1998) [hereinafter *Dangerous Journey*].

230. Russell Harding, director of the Michigan Department of Environmental Quality, told reporters that the *Draft Title VI Guidance* was "a tiger without teeth" and that he was "not going to pay particular attention to it." *Environmental Justice: Draft Revised Civil Rights*, *supra* note 227, at 1331.

231. The use of common-law approaches to fill in the gaps in statutes is not uncommon, particularly in environmental law. For example, strict liability for abnormally dangerous activities was used to relax causation standards under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). *See* PERCIVAL, *infra* note 377.

232. Certain justifications, such as business necessity, cues the point where economic considerations cease to be subordinate. 42 U.S.C. §2000e-2(k)(1)(A)(i) (2000).

233. Although under this approach it could still be argued that the recipient agency and regulated community is still better able to absorb the loss, that argument would necessarily lead to an interest balancing approach in order to account for nonmonetary losses sustained by the impacted community.

sistent with the more protective environmental standards that retain sensitivity to costs, but the approach would not go as far as some cost-blind or technology forcing standards known to environmental law.

Under a least innocent approach common to tort law, a more generalized analysis would likely lead to the conclusion that the regulatory agency and by extension the regulated community are less innocent than the affected communities. The regulatory agencies are less innocent because they contractually undertake to avoid disparate impacts in exchange for federal funding. The regulated community is less innocent because of its practice of externalizing costs by releasing harmful agents into the environment. In contrast, the affected communities neither undertake any specific obligations to perform, nor do they inject harmful agents into the environment nor as a class do they profit from the activity causing the impacts.

A case-by-case inquiry involving interest comparison, loss allocation, and relative innocence might not be as clear. It could be argued, for example, that if the community of color became established after the facility was sited, the impacted community is less innocent than the permit applicant and by extension, the regulatory agency. Yet, even this relatively straightforward "coming to the nuisance" scenario does not end the inquiry. If anything, such a case pulls EPA into an interdisciplinary exploration of circumstances limiting residential options, a phenomenon best explained by the social sciences. Additionally, this approach would allow consideration of a range of equitable factors, such as the facility's compliance history in the case of renewals and the availability of alternative sites in the case of new permits. The method is comparable to a court's use of its equitable powers and might be more responsive to the factual context presenting competing fairness claims. For example, if there is a disparate impact but construction of the facility predated the establishment of the affected community and the facility has a good compliance record, a permit might be renewed on similar terms with off-site mitigation as the primary solution. However, if there is a disparate impact and the host community preexisted the facility and the facility had compliance problems in the past, that would appear to be a good case for more stringent monitoring and control requirements and, in extreme cases, possibly a permit denial. In these cases, the Office of Civil Rights could examine how aggressively the recipient agency used its discretionary authority to protect the impacted community. This approach has the potential to couple the ingenuity of common-law equity and incremental rule refinement with the advantages of agency expertise, while reaping the benefit of newly developed data about localized environmental and health conditions. Such an approach might be better suited to the diversity and complexity of environmental justice scenarios.

Although perhaps speculative at this point, it is nevertheless important to consider the interplay between the guidance and other high-priority initiatives within the Agency, as well as the effect that a more protective interpretation of Title VI might have had on those programs. This might provide an indication of how more protective fairness-oriented approaches can coexist with efficiency-oriented reform.

Environmental Justice and "Reinvention"

In recent years EPA has been experimenting with ways to make environmental regulation more efficient. The sentiment expressed by some in the environmental field is that command-and-control regulation has outlived its usefulness, primarily in addressing the easy environmental problems such as pollution caused by relatively large facilities. However, the second generation of environmental problems, degradation caused by much smaller diverse sources, cannot be solved by this outdated strategy. Proponents of this view adopt a philosophy that rests upon a belief in the superior efficiency of the market and devolution of authority to the local level.[234] In response to this sentiment, the Clinton Administration through EPA pledged to "reinvent" environmental regulation, primarily by affording regulatory relief to heavily regulated sources by promoting a variety of innovations, including performance-based standards, trading regimes, and incentive-based compliance.[235] In the permit context in particular, streamlined permit proceedings and operational flexibility were proposed as a way to decrease complexity and delay. The addition of enhanced public participation and substantive environmental justice criteria in permit proceedings appear to conflict with these particular reinvention strategies. It is this apparent conflict that has to be examined closely and addressed or there is sure to be continued resistance to environmental justice proposals.

In order to assess how a more protective Title VI interpretation or how permitting reforms may potentially conflict with these high-priority initiatives, three discrete programs are examined: brownfields, the Tier 2 refinery proposal, and White Paper Number 3. These discrete initiatives are used primarily because they involve permits as well as illustrate EPA's application of its current reinvention philosophy, which is likely to continue under the Bush Administration, albeit perhaps under different terminology. The brownfield initiative promotes re-use of industrial sites, the Tier 2 refinery proposal involves an aggressive market-based strategy, and White Paper Number 3 involves a "flexible" approach to CAA permitting using the concepts of bubbles and advance approvals. All are designed to respond to the perceived inefficiencies of a command-and-control permitting system. The following discussion is not intended to be an exhaustive treatment of reinvention generally,[236] or a critique of the merits of the three approaches in particular. Rather, the goal is to examine the potential conflict between these programs and environmental justice goals in the permitting context.

234. *See, e.g.*, Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law*, 37 STAN. L. REV. 1333 (1985); Richard L. Revez, *Rehabilitating Interstate Competition: Rethinking the "Race to the Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992).

235. *See* U.S. EPA Office of Policy, Economics & Innovation, *Innovative Programs Across EPA*, *at* http://www.epa.gov/opei/byepa.htm (last visited Feb. 27, 2001).

236. Professor Steinzor has written several articles questioning reinvention initiatives and devolution. *See Devolution and the Public Health*, *supra* note 226; Rena I. Steinzor, *The Corruption of Civic Environmentalism*, 30 ELR 10909 (Oct. 2000); *Dangerous Journey*, *supra* note 229; Rena I. Steinzor, *Regulatory Reinvention and Project XL: Does the Emperor Have Any Clothes?* 26 ELR 10527 (1996); *see also* William Funk, *Bargaining Towards the New Millennium; Regulatory Negotiation and the Subversion of the Public Interest*, 46 DUKE L.J. 1351 (1977); *but see* Jody Freeman, *Collaborative Governance in the Administrative State*, 45 U.C.L.A. L. REV. 1 (1997).

Brownfields

EPA-sponsored brownfield redevelopment was designed to respond to a perceived disincentive resulting from environmental laws.[237] It was widely believed that developers and industrial manufacturers declined to purchase and develop unused industrial sites because of a concern about potential contamination and resulting liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The irony is that many of these sites do not qualify for Superfund action because of more highly contaminated sites on the national priorities list. However, because of the fear of potential liability these sites remain idle, often abandoned by their former owners, thus precluding cleanup and reindustrialization in areas needing economic revitalization. Meanwhile, project sponsors often choose greenfields (nonindustrial sites) to build new industrial facilities, thus promoting urban sprawl. In order to encourage the recycling of these idle industrial sites, EPA devised a brownfield action agenda[238] in the mid-1990s to facilitate redevelopment using a mix of regulatory incentives, including grants to local governments to facilitate brownfield redevelopment and the use of EPA discretion to clarify and limit the CERCLA liability of prospective purchasers.[239] EPA also considers imposing less stringent cleanup standards if the site will be used for industrial instead of residential purposes. State brownfield programs address similar sites that are potentially subject to state cleanup laws.

Given the obvious connection between environmental justice and brownfield development, there has been substantial agency[240] and scholarly attention[241] to the environmental justice implications of brownfield redevelopment. However, it may come as a surprise that EPA has noted that there are no pending Title VI challenges in the brownfield context.[242] Nonetheless, the attention is not misplaced. The environmental justice perspective on brownfield redevelopment is perhaps best described as the good, the bad, and the ambivalent.

On the positive side, brownfield development may result in more clean urban environments and economic development. The idle and often abandoned sites contribute to urban blight, at times become a magnet for drug and criminal activity,[243] may contain unremediated contamination, and generally become a source of community demoralization.[244] From that grim baseline, a project that involves any degree of cleanup and added employment opportunities is attractive, especially if the redevelopment project involves light industrial use or a nonpolluting business. On the negative side, because brownfield sites are often located near communities of color and the poor, the less stringent use-based cleanup standards are problematic when considering the existing pollutant-loadings impacting many host communities. To add to the environmental problems, some developers specifically purchase these sites with plans to return the site to heavy industrial use. In this respect, brownfield redevelopment has the effect of locking in the legacy of past industrial development.[245] Thus, as the project sponsor subsequently applies for the necessary environmental permits to begin operations, developers and local officials worry that

237. *See* U.S. EPA, THE BROWNFIELDS ACTION AGENDA (1996); *see also* U.S. EPA, *Brownfields Assessment Demonstration Pilots, at* http://www.epa.gov/brownfields/pilotlst.htm (last updated May 26, 2000). For a history of this administrative initiative, see Paul Skanton Kibel, *The Urban Nexus: Open Space, Brownfields, and Justice*, 25 B.C. ENVTL. AFF. L. REV. 589 (1998) [hereinafter Kibel, *The Urban Nexus*]; *see also* Heidi Gorovitz Robertson, *One Piece of the Puzzle; Why State Brownfields Programs Can't Lure Businesses to the Urban Cores Without Finding the Missing Pieces*, 51 RUTGERS L. REV. 1075, 1124 (1999) (questioning the accuracy of the assumption that liability is a significant disincentive).

238. *See* U.S. EPA, THE BROWNFIELDS ECONOMIC REDEVELOPMENT INITIATIVE APPLICATION GUIDELINES FOR DEMONSTRATIONS (1995) (EPA 540-R-994-068).

239. Paul Kibel summarizes the regulatory incentives nicely:

> In terms of CERCLA implementation, the EPA Agenda called for several changes in agency policy and operating procedures. These changes included, among other things (1) CERCLIS delisting, in which EPA removed over 25,000 properties from the national tracking list of contaminated sites; (2) prospective purchaser agreements, in which EPA agreed not to sue new owners for environmental remediation costs for contamination that occurred prior to purchase; (3) comfort letters, in which EPA set forth its remediation goals regarding formerly federally owned property; (4) land-use restrictions, in which new owners agreed to limit future use to commercial and industrial purposes in exchange for EPA's release of remediation liability; (5) national and regional brownfields pilots, in which EPA provided grants to states and local governments to help promote environmental cleanup and redevelopment of contaminated properties; and (6) Community Reinvestment Act (CRA) credits, in which federal guidelines were changed to permit banks to fulfill CRA's local-lending obligations by providing loans for environmental remediation and brownfields redevelopment.

Kibel, *The Urban Nexus*, *supra* note 237, at 604 (citations omitted).

240. NEJAC WASTE AND FACILITY SITING SUBCOMM., ENVIRONMENTAL JUSTICE, URBAN REVITALIZATION, AND BROWNFIELDS: THE SEARCH FOR AUTHENTIC SIGNS OF HOPE (1996) (EPA 500-R-96-002) [hereinafter NEJAC, AUTHENTIC SIGNS OF HOPE].

241. Gabriel A. Espinosa, *Building on Brownfields: A Catalyst for Neighborhood Revitalization*, 11 VILL. ENVTL. L.J. 1 (2000); Mank, *Reforming State Brownfield Programs*, *supra* note 111; Lincoln L. Davies, *Working Toward a Common Goal? Three Case Studies of Brownfields Redevelopment in Environmental Justice Communities*, 18 STAN. L.J. 285 (1999); Joel B. Eisen, *Brownfields Policies for Sustainable Cities*, 9 DUKE ENVTL. L. & POL'Y F. 187 (1999); Kirsten H. Engel, *Brownfield Initiatives and Environmental Justice: Second-Class Cleanups or Market-Based Equity?*, 13 J. NAT. RESOURCES & ENVTL. L. 317 (1998) (describing brownfield redevelopment from three perspectives: a rights-based approach, a market-based approach, and a pragmatic approach); E. Lynn Grayson, *An Alliance of Necessity: Envirojustice and Brownfields*, 14 ENVTL. COMPLIANCE & LITIG. STRATEGY 4 (1998); Kibel, *The Urban Nexus*, *supra* note 237 (discussing the brownfield agenda within the context of urban sprawl and failed urban renewal policies); John S. Applegate, *Risk Assessment, Redevelopment, and Environmental Justice: Evaluating the Brownfields Bargain*, 13 J. NAT. RESOURCES & ENVTL. L. 243 (1997-1998); Stephen M. Johnson, *The Brownfields Action Agenda: A Model for Future Federal/State Cooperation in the Quest for Environmental Justice?*, 37 SANTA CLARA L. REV. 85 (1996); Georgette C. Poindexter, *Separate and Unequal; A Comment on the Urban Development Aspect of Brownfields Programs*, 24 FORDHAM URB. L.J. 1 (1996); Douglas A. McWilliams, *Environmental Justice and Industrial Redevelopment: Economics and Equality in Urban Revitalization*, 21 ECOLOGY L.Q. 705 (1994).

242. Paul Connolly, *Environmental Justice: Mayors Rap EPA at Meeting With Browner for Failure to Consult on Interim Guidance*, 29 Env't Rep. (BNA) 658 (July 24, 1998) (Administrator Browner notes that there are no brownfield redevelopment projects delayed because of an environmental justice complaint).

243. NEJAC, AUTHENTIC SIGNS OF HOPE, *supra* note 240, at 33.

244. *Id.*

245. Engel, *Brownfield Initiatives and Environmental Justice*, *supra* note 241, at 318.

the potential for disparate impacts (from less stringent cleanup standards and/or new emissions) and a resulting Title VI claim could either derail a project or result in a challenge at the end of the project after the expenditure of substantial time and capital. EPA, environmental agencies, and local governments are understandably concerned that Title VI would be a strong disincentive for the purchase and development of these sites. Given the potential for good and bad consequences, some environmental justice advocates are ambivalent about brownfield redevelopment. Part of the skepticism may be based on a history of failed urban renewal policies,[246] negative experiences with government environmental regulators,[247] and a concern that the profit motives of the lending and investment stakeholders will dominate the process.[248]

When the brownfield agenda first surfaced, environmental justice advocates quickly recognized that the public policy dialogue was too narrowly focused on removing barriers to real estate and investment transactions. In response, the Waste and Facility Siting Subcommittee of the National Environmental Justice Advisory Council (NEJAC) maintained that "EPA's Brownfields locomotive left the station without a major group of passengers,"[249] and it began a series of public dialogues to allow residents of impacted communities and environmental justice advocates to systematically contribute input into the public policy debate.[250] The public dialogue first served to broaden the issue by placing brownfield redevelopment in the context of an urban ecosystem with four environments that had to be addressed: natural, built, social, and cultural/spiritual.[251] Environmental justice advocates also argued that potential liability was a relatively minor impediment to brownfield redevelopment. Redlining by investment and insurance companies, lack of training, and the poor quality of education, public safety, housing, and transportation all led to the deindustrialization of urban areas,[252] along with the contribution of indirect subsidies for greenfield development.[253] Activists promoted the concept of "urban revitalization"—a community-based approach focused on building capacity, partnerships, and mobilizing resources—as opposed to "urban redevelopment"—a gentrification-driven policy that displaces existing communities.[254] In a report to then-EPA Administrator Browner, the NEJAC offered specific recommendations designed to incorporate environmental justice concerns into the brownfield redevelopment process. In response to the concerns raised during the public dialogues, EPA reportedly revised its criteria for applying for brownfields pilots, for example, by emphasizing community involvement and requiring that participation be verified.[255]

One might think that heavy involvement by the community in a formerly narrow transaction might disrupt the delicate system of incentives designed to entice prospective purchasers to consider brownfields. This involvement is particularly risky when community residents approach the project with skepticism about cleanup remedies, a determination to bring a broader range of concerns to the table, and an insistence that they maintain a direct involvement in land use decisions that affect their communities. As noted in the NEJAC report, however:

> Those who claim that the community will always require the maximum level of cleanup . . . ignore the fact that far better than anyone else, the community recognizes the dangers of losing any cleanup by demanding a full cleanup. Urban revitalization may demand compromises, but these compromises must be supported by those who bear the burdens of incomplete cleanup.[256]

Thus, in a process where both stand to gain and lose significantly, EPA in its pilot program may have set up a different system of incentives that allowed a more nuanced renegotiation to take place.[257]

As enlightening and informative as the 1995 public dialogues were, the report did little to assuage the fears of state and local agencies that environmental justice claims would stifle redevelopment in inner-city areas, particularly in light

246. Kibel, *The Urban Nexus*, *supra* note 237, at 608.

247. The public dialogues disclosed much evidence of lack of communications and distrust between governmental organizations and communities concerned with brownfield programs and that the distrust is a continuing barrier to effective implementation. NEJAC, AUTHENTIC SIGNS OF HOPE, *supra* note 240, at 51.

248. Kibel, *The Urban Nexus*, *supra* note 237, at 612. Lenny Siegel of Pacific Studies in Oakland, Cal., explains:

> One of the first times I heard the notion of Brownfields was from the environmental attorney for one of the nation's largest corporations. She told me that she liked the idea of Brownfields because that meant that they could build factories in communities that were already contaminated rather than going out and threatening the Greenfields, which were pristine. . . . I think there are a lot of people in government who have basically the same attitude. We pollute certain areas of the country; there are certain kinds of people that live there. Let's keep on polluting the same areas. If Brownfields get misused as a concept, it could lead to more of that.

NEJAC, AUTHENTIC SIGNS OF HOPE, *supra* note 240, at 33.

249. NEJAC, AUTHENTIC SIGNS OF HOPE, *supra* note 240, at 67.

250. *Id.* at 1.

251. *Id.* at 10. The subcommittee formulated a more useful characterization of the urban environment as comprising:

> (1) an oversaturation of communities with multiple sources of environmental pollution in highly congested spaces, (2) the co-existence of residential and industrial sites as a result of imprudent land use decisions, (3) a lack of documentation of most environmental health risks in urban communities, (4) the existence of as yet not understood effects of multiple, cumulative, and synergistic risks, (5) the absence of a comprehensive environmental enforcement and compliance activity which results, for some communities, in a virtual non-existence of such activity; (6) the lack of health services and adequate information on environmental risks, (7) the severe decay in the institutional infrastructure, and (8) a high degree of social alienation and decay caused by living in degraded physical environments.

Id.

252. *Id.* 36-39; *see also* Robertson, *One Piece of the Puzzle*, *supra* note 237 (concluding that the failure to address nonenvironmental challenges will continue to hinder brownfield development. Nonenvironmental challenges include infrastructure, site and building configuration, utility costs, crime rates, education issues, and racism).

253. NEJAC, AUTHENTIC SIGNS OF HOPE, *supra* note 240, at 44 (mentioning government-built infrastructure such as roads, water, and sewerage).

254. *Id.* at 13.

255. *Id.* at es-ii. The NEJAC subcommittee cautioned, however, that meaningful public participation is different in many ways from simply holding meetings and getting letters of support. It involves ongoing stakeholder involvement and a recognition that the community brings a wealth of site-specific knowledge to the table. *Id.* at 22.

256. *Id.* at 43.

257. *See generally* Lazarus, *supra* note 37.

of the subsequent Title VI claims and the 1998 *Interim Guidance*. Therefore, in July 1998, then-EPA Administrator Browner promised participants at a mayors' forum held in Detroit that her office would undertake a study to ascertain whether the guidance in fact hindered redevelopment.[258] Thus, a case study of seven EPA Assessment Pilot Projects was undertaken in early 1999. The pilots were chosen based on an objectively high risk of Title VI claims using criteria such as a relatively high affected minority population and involving projects with tentative redevelopment plans for reuse that would require environmental permits.[259] In four of the pilot cities, there was significant environmental justice activism and protests that were anticipated to cause some concern to stakeholders.[260] However, the interviews subsequently disclosed that developers and investors did not perceive Title VI complaints to be a major barrier but were more concerned with other issues such as financing, construction season, and cleanup costs.[261] These concerns turned out to be more prescient, as activities of several sites were delayed by unresolved liability, ownership, and jurisdictional issues.[262] None were delayed by environmental justice disputes.

Other important considerations from the community's perspective were that the redevelopment was an improvement over the existing blight and that the project sponsor was willing to promote job creation for local residents.[263] For example, a stamping press manufacturer in Chicago created 100 new jobs for local residents and a plastic rack manufacturer in Detroit created 30 new jobs with a potential for 70 more.[264] As important as these considerations were, however, they did not override the community's concerns about the cleanup and potential reuse of the property. A more surprising finding of the case study is that despite the selection criteria, typical redevelopment activities of the chosen pilots did not ultimately include pollution-heavy or permit-intensive projects, a finding that may be generalized to a fair number of the EPA-sponsored pilots.[265] Of the three pilots that did involve heavy industrial use,[266] an important component of reducing conflict was "involving the community[, which] allowed potential problems to be identified and solved from the beginning when stakes were lower and design changes could more easily be made."[267] For example, in a Miami project involving a proposed cement processing operation, a neutral toxicologist was hired to explain the emissions.[268] In Camden, the developer described the new, cleaner process and agreed to the community's request that an independent engineering firm conduct on-site monitoring.[269] In Charlotte, the developer lowered the height of planned buildings in response to community concerns about light and tree health.[270]

Although there are undoubtedly many factors that contributed to the ultimate support of the brownfield pilot projects by the affected communities, what is striking is that the "community define[d] the problem from the vantage point of their aspirations,"[271] thus injecting more positive elements into an economic transaction formerly devoid of social responsibility or civic possibility. In the Chicago pilot, for example, stakeholders built on the brownfield-inspired relationship between the city and local communities to subsequently institute a cooperative enforcement program that included brochures in several languages, a hotline for citizens to report illegal dumping in their communities, and heavier penalties for violators.[272] Equally important is the steadfast insistence by the community—and the subsequent cooperation by permitting officials and project sponsors—to expand public participation opportunities and also to attempt in some substantive fashion to mitigate the facility's adverse impacts on health, safety, and quality of life in the host community. These projects reflect a more comprehensive strategy—apparent in the public dialogues of environmental justice activists—of addressing brownfields in its complex social context. This may well be an example of the product of a process of reframing issues and restructuring power relations that Sheila Foster describes as the "transformative politics" of the movement.[273]

Unfortunately, however, the *Draft Title VI Guidance* may unwittingly undermine this transformative process, regardless of the assumptions concerning the connection between brownfields and Title VI. To the extent project sponsors may be concerned about potential Title VI claims, the *Draft Title VI Guidance* eliminated leverage that might have been helpful to these communities to broaden the issues and promote a more responsive negotiation process. In these instances, project sponsors seem more willing to negotiate and accommodate rather than forego the project altogether. Thus, the perception that the *Draft Title VI Guidance* eviscerates Title VI[274] may make brownfield sponsors less willing to solicit community support by undertaking voluntary on-site mitigation measures (this holds true for non-brownfield facility projects as well).

258. U.S. EPA, BROWNFIELDS TITLE VI CASE STUDIES: SUMMARY REPORT (1999) (EPA 500-R-99-003) [hereinafter BROWNFIELDS TITLE VI CASE STUDIES].

259. *Id.* at 2.

260. *Id.* at 7.

261. *Id.* at 7.

262. *Id.* at 9.

263. *Id.* at 8.

264. *Id.* at 10.

265. *Id.* at 8. Three sites included a stamping press operation, a plastic rack manufacturer, and a construction company. Of 20 sites targeted for possible inclusion in the case studies, reuse plans included concrete manufacturing, container-making, parking, residential, retail and office buildings, flex space, and road and bridge improvements. *Id.* at 5. As noted in the report:

> [W]hile in-depth information was only gathered at seven of more than 200 active Pilots, these Pilots were chosen for their high potential for Title VI complaints (e.g., double digit minority rates, active redevelopment and relatively high rate of existing permits). It is logical to assume that if Title VI complaints were not negatively impacting progress at sites chosen for their high likelihood of conflict, remaining sites are not likely to be impacted [sic] than those in this study.

Id. at 6-7.

266. A container manufacturer in Chicago, and cement plants in Miami and Camden. *Id.* at 12.

267. *Id.* at 8. For another study confirming the same advantage of early public participation, see Davies, *supra* note 241, at 285.

268. BROWNFIELDS TITLE VI CASE STUDIES, *supra* note 258, at 10, 18.

269. *Id.* at 12.

270. *Id.*

271. NEJAC, AUTHENTIC SIGNS OF HOPE, *supra* note 240, at 25.

272. *Id.* at 19.

273. Foster, *supra* note 89.

274. *See supra* note 230 (director of a state environmental agency describing the guidance as a "tiger without teeth.")

To the extent that brownfield project sponsors are unconcerned with Title VI liability in the first instance, the Title VI investigatory framework is at best irrelevant. If it is the case, as some believe, that Title VI was weakened to respond to the perception that Title VI would act as a barrier to inner-city redevelopment, that perception is inaccurate in those instances.[275] At worst, the publicity surrounding the *Draft Title VI Guidance* may prompt prospective project sponsors to believe that negotiating with the host community will yield little benefit. Such a powerful misconception is indeed unfortunate because a more protective interpretation of Title VI—one requiring close or moderate nexus mitigation, for example—may not have a chilling effect on brownfield redevelopment as participants seem to voluntarily opt for mitigation measures closely tailored to respond to community concerns.

The Proposed Tier 2 Refinery Proposal

In May 1999, EPA proposed a major program that was designed to reduce emissions from cars and light trucks, primarily nitrogen oxides and volatile organic compounds.[276] Termed the "Tier 2" program, the central idea was to achieve emission reductions by tailpipe controls and low sulfur fuel.[277] Although the program is certain to achieve major reductions overall, it has the potential to increase pollutant levels in areas near refineries. This is because the refineries, in removing sulfur from fuel, must make changes to their facilities that are anticipated to increase significantly emissions in five criteria pollutants[278] unless the facility owner can find a way to contemporaneously reduce emissions in other units within the same facility, thus "netting" out of NSR.[279] When a source nets out of review, overall operations may still result in an emissions increase, but the increase is considered "de minimis" for regulatory purposes. Although an occasional small increase in isolation[280] is not problematic generally, the Tier 2 initiative presents a different scenario. Many of the refineries are clustered in the nonattainment Gulf Coast area of Region VI,[281] the changes have to occur during the same time frame (meeting the new sulfur standard by 2004),[282] and EPA anticipated that many sources in nonattainment areas will not be able to net out of review.[283] Thus, the residents in communities near Gulf Coast refineries—who tend to be predominantly African American and low-income—could be disproportionately affected by the aggregate of both the significant and the de minimis emission increases from several refineries all occurring within the same time frame.[284] Such a scenario is an unfortunate but classic case of distributional inequity.

In the initially proposed Tier 2 rule, EPA did not acknowledge the distributional implications but instead proposed a suite of regulatory relief measures for the refineries, including the use of "plantwide applicability limits" (PALs) to avoid triggering NSR[285]; streamlining approaches to speed up the permit process, including a presumptive uniform technology requirement for lowest achievable emission rate (LAER) and best available control technology (BACT) rather than the typical case-by-case determinations; mobile source offsets; model permit and permit applications; priority processing of permit applications; EPA permitting teams to help permit applicants troubleshoot individual permitting issues; separately issued advance Title V permits for the desulfurization project only; a single emission limit or control requirement to comply with multiple applicable requirements; advance-approved changes in operation; the use of pollution prevention approaches; and less stringent hardship requirements for small refineries during the early years of the program.[286]

From an environmental justice perspective, expedited permits in general tend to disadvantage vulnerable communities because these communities often lack the resources to evaluate technical permit terms and use public participation opportunities effectively, and a shorter time frame magnifies this difficulty. In addition, one approach proved to be particularly problematic: the use of expected reductions from mobile source emissions to "offset" the emission increases at the refineries.[287] This is a significant departure from normal regulatory standards as offsets are typically reductions from other stationary sources (facilities) that are measured and obtained from processes and pollution control technologies rather than diffuse reductions from the tailpipes of an indefinite number of motor vehicles.

EPA received several comments on the proposed rule, and in particular on its proposal to assist the refineries in obtaining the necessary permits.[288] In responding to the comments of various stakeholders, EPA disagreed with commenters who opposed the use of mobile source offsets.[289] In response to stakeholder concerns about potential Title VI claims, the Agency specifically noted that a Title VI

275. *See* U.S GAO, REPORT TO THE CHAIRMAN, COMMITTEE ON COMMERCE, HOUSE OF REPRESENTATIVES, ENVIRONMENTAL PROTECTION: AGENCIES HAVE MADE PROGRESS IN IMPLEMENTING THE FEDERAL BROWNFIELD PARTNERSHIP INITIATIVE (1999).

276. 64 Fed. Reg. 26004 (May 13, 1999) [hereinafter Proposed Tier 2 Rule]. *See also* 65 Fed. Reg. 6698 (Feb. 10, 2000) [hereinafter Final Tier 2 Rule].

277. Proposed Tier 2 Rule, *supra* note 276, at 26004.

278. The technologies typically require the use of a furnace and therefore have the potential to increase nitrogen oxide (NO_x), VOCs, particulate matter, carbon monoxide, and SO_2. *Id.* at 26065.

279. *Id.* at 26064.

280. Twenty-five tons per year of NO_x and VOCs in a severe ozone nonattainment area. *Id.* at 26065.

281. *Id.*

282. *Id.* at 26008.

283. *Id.* at 26065.

284. *See* NATIONAL ASS'N OF MANUFACTURERS, REGION 6 EXECUTIVE SUMMARY: SHOULD EJ BE A TIER 2 PERMITTING ISSUE? (1999), *available at* http://www.nam.org/rer/BNEJ/bnej-tier2.html (last visited Sept. 19, 2000). According to this summary, 25 of the refineries had a high score on the "potential environmental justice index." The method averaged data over a four-mile radius and would miss smaller environmental justice neighborhoods in the study area. *Id.* at 2. The report concluded that based on the demographic information, EPA should consider environmental justice issues as a potential factor in the sulfur rule permitting.

285. Proposed Tier 2 Rule, *supra* note 276, at 26065-66. This would allow the facility operator to make changes without having to evaluate a baseline for each modification and calculate a netting equation. *Id.* at 26066.

286. *Id.* at 26066-69.

287. *Id.* at 26066-67.

288. *See generally* U.S. EPA, TIER 2 MOTOR VEHICLE EMISSION STANDARDS AND GASOLINE SULFUR CONTROL REQUIREMENTS: RESPONSE TO COMMENTS (1999) (EPA 420-R-99-024) [hereinafter TIER 2 RESPONSE TO COMMENTS].

289. Some automobile manufacturers objected to the use of these offsets, noting that the refiners should not be allowed to benefit from the investments being made by the automotive industry. *Id.* at 20-10.

claim should not delay issuance of the permit.[290] To address the environmental justice issues more generally, EPA agreed to institute a stakeholder outreach process and identify areas that may experience local emissions increases as a result of refinery modification.[291] Although the Agency asserted that at the county level benefits were anticipated to outweigh expected emission increases, the Agency conceded that it could not determine the precise local environmental impacts with certainty until the types of modifications and control requirements were determined.[292] EPA agreed to address the environmental justice issue on a case-by-case basis,[293] and it would use the permit teams to address community concerns and conduct educational meetings with affected communities.[294]

The subsequent stakeholder interviews revealed common impediments to the stakeholder process when dealing with environmental justice issues, such as the need for independent technical assistance for affected communities[295] and the fact that the environmental justice activists would not purport to represent the views and speak for the residents of all of the impacted Gulf Coast communities.[296] More generally, environmental justice advocates were concerned about the overwhelming pollutant burdens, streamlined permitting processes, the lack of enforcement at the refineries, and were distrustful of state environmental agencies.[297] All environmental justice organizations noted their lack of input prior to the proposed rule in contrast to EPA's extensive consultation with industry representatives.[298] The refining industry was concerned about the time it would take to process applications, particularly if there was community opposition to the permits.[299] Some state environmental agencies were concerned about their capacity to process the multiple permit applications that were expected, especially in light of existing backlogs.[300] Conventional environmental organizations were particularly concerned that environmental justice communities would press their position and attempt to "scuttle the rules," thereby putting "the national groups in the difficult position of either continuing to support the rules despite local communities' objections or opposing the implementation of rules they have fought hard for."[301] Ultimately, however, they appeared to believe that this potential impasse could be avoided since Tier 2 implementation could be achieved without emission increases, they maintained, because "no refinery is operating with BACT on all equipment."[302]

These concerns notwithstanding, the Agency decided to proceed with a proposal to allow mobile source offsets by guidance,[303] a decision that sparked vehement opposition from the Natural Resources Defense Council (NRDC), Communities for a Better Environment (CBE), and other environmental justice organizations.[304] In addition to discussing the potential impact to vulnerable communities, the comments of these organizations were revealing for another reason. They laid out the extreme degree to which EPA was using its interpretive authority. For example, they pointed out that existing statutes and regulations only allowed the use of stationary source offsets under nonattainment NSR.[305] They particularly questioned the rationale supporting the Agency's positions. For example, offsets must be "surplus," i.e., not otherwise required by the CAA.[306] The proposed guidance stated that because the Tier 2 rule was based upon findings that involved the Administrator's discretion, the mobile source reductions were not "otherwise required" by the CAA.[307] This logic is particularly puzzling because, as noted by the NRDC, "[o]nce the Agency has made this positive finding, and determined that there is a '*need* for further reductions in emissions,' the Administrator is *required* to promulgate emission standards."[308] Thus, the Tier 2 tailpipe reductions are required under the CAA notwithstanding a degree of discretion that the Administrator has in making the finding that triggers the requirement. That being so, the reductions are not surplus and are ineligible for offset purposes. The commenters also pointed out that the mobile source offsets were not quantifiable by usual qualitative criteria[309] and could not be considered "in effect" by the time the refineries commenced operation because the fuel was yet to be produced and sold.[310] The NRDC was particularly concerned that the proposed Tier 2 guidance, if adopted, would be harmful precedent that would lead other

290. *Id.* at 20-13. Ironically, this was six months before EPA issued the *Draft Title VI Guidance* in June 2000. Draft Title VI Guidance, *supra* note 127. The *Interim Guidance* did not explicitly address the issue of whether a Title VI claim could stay a permit.

291. TIER 2 RESPONSE TO COMMENTS, *supra* note 288, at 20-15.

292. *Id.* at 20-20.

293. *Id.*

294. *Id.* at 20-23.

295. *See* PROPOSED TIER 2 GASOLINE RULE, SUMMARY OF THE PHASE I STAKEHOLDER CONVENING ON REFINERY PERMITTING ISSUES 5 (1999) [hereinafter PHASE I STAKEHOLDER REPORT]; *see also* PROPOSED TIER 2 GASOLINE RULE, SUMMARY OF THE PHASE II STAKEHOLDER CONVENING ON REFINERY PERMITTING ISSUES (2000) [hereinafter PHASE II STAKEHOLDER REPORT].

296. PHASE I STAKEHOLDER REPORT, *supra* note 295, at 10.

297. PHASE II STAKEHOLDER REPORT, *supra* note 295, at 1-3.

298. *Id.*

299. *Id.* at 5.

300. *Id.*

301. *Id.* at 4.

302. *Id.* at 3. As one stakeholder noted: "It's a matter of using technologies that may cost more, but will reduce the pollutants." *Id.* (quoting a stakeholder).

303. Notice of Availability; Memorandum, Use of Emissions Reductions From Motor Vehicles Operated on Low-Sulfur Gasoline as New Source Review (NSR) Offsets for Tier 2/Gasoline Sulfur Refinery Projects in Nonattainment Areas, 65 Fed. Reg. 43009 (July 12, 2000) [hereinafter Tier 2 Offset Memo].

304. *See* Comment letter by Natural Resources Defense Council dated August 11, 2000 (on file with author) [hereinafter NRDC Tier 2 Comments], and Comment Letter by Communities for a Better Environment et al., dated August 11, 2000 (this letter, endorsed by approximately 67 organizations and individuals, is on file with the author) [hereinafter CBE et al. Tier 2 Comments].

305. NRDC Tier 2 Comments, *supra* note 304, at 9; CBE et al. Tier 2 Comments, *supra* note 304, at 6. A related criticism was that the Agency, assuming it had authority to allow mobile source offsets, should have proceeded by notice-and-comment rulemaking because the guidance contradicted established regulations. NRDC Tier 2 Comments, *supra* note 304, at 3.

306. 42 U.S.C. §7503(c)(2), ELR STAT. CAA §173(c)(2).

307. Tier 2 Offset Memo, *supra* note 303, attach. at 5.

308. *Id.* at 10 (emphasis in original) (citing 42 U.S.C. §7521(i)(2)(A), (i)(3)(A)(i), & (i)(3)(C)(i), ELR STAT. CAA §202(i)(2)(A), (i)(3)(A)(i), & (i)(3)(C)(i) (emphasis added)).

309. *Id.* at 7-8 (noting that the crude emission estimates used for SIP planning purposes is insufficient); CBE et al. Tier 2 Comments, *supra* note 304, at 5-6.

310. CBE et al. Tier 2 Comments, *supra* note 304, at 5; NRDC Tier 2 Comments, *supra* note 305, at 4-7.

source categories to demand similar treatment[311] and further asserted that the Agency's logic supporting the mobile source reduction could be applied to almost any manufacturing activity that would result in an environmentally beneficial product—bicycle manufacturers, for example, would be in a position to request mobile source offsets and expedited permit processing.[312]

The comment letter from CBE and other environmental justice organizations noted that a similar issue had previously arisen in California, with the refineries advancing similar arguments for an exemption from full review under the California Environmental Quality Act.[313] The California state legislature decided to subject the projects to full review, which resulted in feasible yet protective technologies and control measures.[314] They maintain that feasible technologies exist that will enable refineries to produce the Tier 2 fuel without an increase in emissions, especially considering that the "majority of U.S. refineries are decades old, with ample opportunities to achieve such reductions."[315] Even the national organization of air pollution control officials noted that "such a proposal could discourage refineries from seeking on-site offsets, resulting in emission increases at refineries that will have a disproportionate, negative impact on refinery communities."[316]

It remains to be seen whether the Agency ultimately adopts and allows the use of mobile source offsets for refineries as agency policy or, more broadly, whether the refinery permitting aspect of the Tier 2 rule can be implemented without the dire consequences predicted by these commenters, in particular the harm to populations near refineries. One thing appears certain: should the states in the Gulf Coast region opt to devise area-specific agreements to reduce pollutants in the affected communities, any subsequent Title VI claim based on the aggregated increases at the refineries will likely be dismissed. This would save the Agency from the obvious embarrassment of having to even consider a disparate impact claim based upon a state's compliance with EPA's own guidance.

Title VI aside, other observations can be made about EPA's approach to resolving this distributional issue. First, in its understandable zeal to implement a program that will yield an immense environmental benefit, the Agency first opted to ignore apparent environmental justice consequences. In the initially proposed rule, the Agency did not address the environmental justice implications.[317] When comment letters subsequently forced the issue, the Agency responded, but not by developing a programmatic response by rule or guidance. In the subsequent Tier 2 final rule, the Agency addressed environmental justice only in a general fashion, partly by assuming the issue would not arise at the local level and partly by a commitment to address the issue by guidance at a later date.[318] The second observation is that EPA opted for procedural remedies in this case by belatedly instituting a separate stakeholder process.[319] This process was insufficient for a variety of reasons, the most obvious of which was that the inevitable trade offs that occur in rule development had already been made.[320] What followed in fact was the guidance on mobile source offsets, an action that did not alleviate, but intensified, environmental justice con-

311. NRDC Tier 2 Comments, *supra* note 304, at 2.

312. *Id.* at 7.

313. CBE et al. Tier 2 Comments, *supra* note 304, at 3.

314. *Id.*

315. *Id.* at 2.

316. *Comments of State and Territorial Air Pollution Program Administrators (STAPPA) and the Association of Local Air Pollution Control Officials (ALAPCO)*, 2 (Aug. 17, 2000), *at* http://www.4cleanair.org/members/committee/permit.html (last visited Oct. 25, 2000).

317. The only reference to environmental justice was a passing reference in the cost-benefit section of the proposed rule, where the Agency concluded:

> Finally, when considered along with other important economic dimensions—including environmental justice, small business financial effects, and other outcomes related to the distribution of benefits and costs among particular groups—the direct comparison of quantified economic benefits and economic costs can provide useful insights into the overall estimated net economic effect of the proposed standards.

Proposed Tier 2 Rule, *supra* note 276, at 26078.

318. The rule states:

> [T]he Tier 2/gasoline sulfur rule will achieve environmental benefits in the local areas where refineries are located, due to reductions in tail pipe emissions from vehicles driven in those areas. Although we expect residual emissions increases at some refineries even after installing the stringent level of emissions controls required under the Act, for the vast majority of areas, we believe that these potential refinery emissions increases will be very small compared to the Tier 2 benefits in those same local areas.
>
> We believe it is important to understand and address concerns relating to potential localized emissions increases from refineries that make significant process changes to meet the requirements of the Tier 2 rule. We believe that, among other things, the keys to addressing any potential concerns are as follows:
>
> – Providing meaningful community involvement early and throughout the process;
> – Determining what information and actions would eliminate concerns; and
> – Determining what EPA, States, and industry can do to make the permitting process smoother by ensuring ongoing community involvement in the decision making process and by building trust among stakeholders . . . . [W]e plan to undertake additional actions in the future, including providing education and outreach about the rule and its impacts in local communities, developing permitting guidance through a public process and addressing Title VI petitions if they arise.

Final Tier 2 Rule, *supra* note 276, at 6774.

319. The rule states:

> EPA's Office of Air and Radiation and the Alternative Dispute Resolution Team within EPA's Office of the Administrator implemented a national convening process which was designed to bring together a broad spectrum of stakeholders to explore with them their perceptions and views of issues associated with Tier 2 permitting and to assess the potential for a collaborative process to address specific implementation issues at some time in the future. The convening was carried out by an outside neutral party who conducted interviews with representatives from selected EPA offices, States, industry, environmental groups, and environmental justice organizations. Second, EPA held informational briefings and provided background materials to the National Environmental Justice Advisory Council's (NEJAC) Air and Water Subcommittee and Enforcement Subcommittee to provide an opportunity for them to provide feedback and recommendations to the Agency. Finally, in October 1999, we met with both national environmental groups and environmental justice advocacy representatives, to discuss their views on the permitting aspects of the proposed rule.

Id.

320. Gauna, *supra* note 24.

cems. The third observation is that the Agency ultimately opted to address environmental justice issues on a case-by-case basis, in this case without providing a framework for addressing potential impacts that are fairly predictable. In this respect, the Agency lost an opportunity to test a framework within a discrete and manageable context. The last observation about the Tier 2 refinery proposal is that it illustrates the Agency's expansive interpretation of its authority in providing regulatory relief to refineries in stark contrast to the conservative use of its authority to condition or deny permits on environmental justice grounds. The same liberal approach can be seen in reinvention initiatives with much broader applicability.

Another Draft Guidance—"White Paper Number 3"

One recent agency initiative is illustrative. Perhaps more than any other venue, the reinvention enterprise is at its most aggressive in the area of permitting emissions of criteria air pollutants—usually by large industrial facilities—via a preconstruction permitting program termed NSR. If the EAB decisions, Title VI complaints, and the Tier 2 refinery comments are any indication, this is also an area that routinely raises significant environmental justice concerns.[321] To magnify the difficulty of this conflict, the preconstruction air permitting program under the federal CAA is extraordinarily complex,[322] with separate statutory requirements for permitting major sources of criteria pollutants in attainment areas (termed PSD review)[323] and nonattainment areas (termed nonattainment NSR).[324] Joining these preconstruction permitting programs is the umbrella operating permit program under Title V of the 1990 Amendments.[325] Although a general discussion could not do justice to the breadth and depth of these air permitting programs,[326] this Article hopes to highlight some of the potential difficulties that reinvention in this area may pose to impacted communities.

Since 1993, EPA has been engaged in ongoing dialogues with various stakeholders to reform NSR.[327] The most recent product of this effort is a *Draft Guidance on Design of Flexible Air Permits (Draft Flexibility Guidance)*, also known as "White Paper Number 3,"[328] which partly draws on alternative permitting approaches proposed but never formally adopted by final rule. White Paper Number 3 is interesting in several respects. First, although not finalized, the proposed guidance reveals current Agency thinking on potential alternative permitting strategies under consideration, at least in some quarters of the Agency. However, the proposal contains flexibilities that may be problematic to communities impacted by these large facilities. The guidance is a procedural curiosity that itself illustrates the contradictory institutional messages that tend to confound stakeholders. Shortly before its issuance as proposed Agency guidance, White Paper Number 3—then termed an internal memo— had been leaked to the press.[329] In re-

321. Six out of 10 appeals board decisions concern major source air permitting, and 21 of 61 Title VI administrative complaints presently accepted for investigation or under review similarly involve air permits. *See infra* notes 321-73 and accompanying text; *see also Title VI Complaints Filed With the EPA as of November 30, 2000, at* http://www.epa.gov/civilrights/docs/t6csnov2000.pdf (last visited Jan. 9, 2001) (on file with author).

322. *See generally* Theodore L. Garrett & Sonya D. Winner, *A Clean Air Act Primer: Part I*, 22 ELR 10159 (May 1992).

323. 42 U.S.C. §§7470-7492, ELR STAT. CAA §§160-169B. For a discussion of the mechanics of the PSD program, see Craig N. Oren, *Prevention of Significant Deterioration: Control Compelling Versus Site-Shifting*, 74 IOWA L. REV. 1 (1988).

324. 42 U.S.C. §§7501-7515, ELR STAT. CAA §§171-193. For a discussion of the mechanics of nonattainment NSR, see Gauna, *supra* note 109.

325. 42 U.S.C. §7661, ELR STAT. CAA §501. Title V is procedural and not intended to create new substantive requirements. 57 Fed. Reg. 32250, 32284 (July 21, 1992). However, the regulations for Title V operating permits programs envision the integration of PSD review, nonattainment NSR, the permitting of hazardous air pollutants, and existing EPA-approved state NSR requirements. The existing regulations can be found at 40 C.F.R. pt. 70 (2000); *see also* Proposed Revisions to Part 70, 59 Fed. Reg. 44460 (Aug. 29, 1994); Proposed Revisions to Part 51 and Part 70, 60 Fed. Reg. 45530 (Aug. 31, 1995); Notice of Availability of Draft Rules and Accompanying Information, 62 Fed. Reg. 30289 (June 3, 1997) (draft final rule to Part 51 and Part 70). This Article will focus primarily on major NSR.

326. The current regulations can be found at 40 C.F.R. pt. 51. *See also* NSR MANUAL, *supra* note 67, at 2-3. The *NSR Manual* does not establish binding regulatory requirements nor is it an official statement of policy. *Id.* at 1. The *NSR Manual* is used to generally prescribe the mechanics of the NSR program, but is subject to NSR regulations and variation by state permitting authorities that have been authorized by EPA.

327. The reform effort concerns mainly the permitting of criteria pollutants by large industrial sources. On March 16-17, 1993, and June 4, 1993, EPA held an NSR simplification workshop. *See* U.S. EPA, *New Source Review Simplification Workshop Transcript* (Mar. 17-18, 1993), *at* http://www.epa.gov/ttn/nsr/rule_dev.html (last modified June 29, 2000); U.S. EPA, *New Source Review Simplification Workshop Transcript* (June 4, 1993), *at* http://www.epa.gov/ttn/nsr/rule_dev.html (last modified June 29, 2000). On July 7, 1993, an NSR subcommittee was subsequently established as part of the existing CAA Federal Advisory Committee. 58 Fed. Reg. 36407 (July 7, 1993). The subcommittee has met on several occasions to discuss reform of NSR. *See, e.g.*, U.S. EPA, *New Source Review Subcommittee Meeting Transcript* (July 21-22, 1993); U.S. EPA, *New Source Review Subcommittee Meeting Transcript* (Nov. 8-9, 1993); U.S. EPA, *New Source Review Subcommittee Meeting Transcript* (Jan. 20-21, 1994); U.S. EPA, *New Source Review Subcommittee Meeting Transcript* (Mar. 16-17, 1994); U.S. EPA, *New Source Review Reform Subcommittee Meeting as to New Source Review Reform Rulemaking Transcript* (Sept. 17, 1996) (all transcripts on file with author and available at http://www.epa.gov/ttn/nsr/rule_dev.html (last modified June 29, 2000)). The goal of this ongoing effort, termed NSR reform, is to reduce complexity, speed up review, and, where possible, afford flexibility to regulated entities without sacrificing environmental protection. The deliberations of the workshop and subcommittee contributed to a major reform proposal on July 23, 1996. *See* Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR) EPA Notice of Rulemaking, 61 Fed. Reg. 38250-38344 (July 23, 1996); Notice of Availability of Draft Rules and Accompanying Information, 62 Fed. Reg. 30289 (June 3, 1997) (draft final rule on Part 51 and Part 70); Notice of Availability; Alternatives for New Source Review (NSR) Applicability for Major Modifications; Solicitation of Comment, 63 Fed. Reg. 39857 (July 24, 1998). The rule has yet to be finalized, but *White Paper Number 3* appears to draw upon several proposals outlined in the 1996 proposed rule and subsequent refinements. The reform effort in its entirety is beyond the scope of this Article.

328. *See* Notice of Availability for Draft Guidance on Design of Flexible Air Permits (White Paper Number 3), 65 Fed. Reg. 49803-01 (Aug. 15, 2000) (available at EPA's NSR website, http://www.epa.gov/ttn/nsr/whatsnew.html). The term "White Paper Number 3" indicates that this proposed guidance is part of an ongoing effort to streamline permits as it is the third in a series of white papers. *See* Proposed Tier 2 Rule, *supra* note 276, at 26068 (referring to White Paper for Streamlined Development of Part 70 Permit Applications, Lydia N. Wegman, Deputy Director, Office of Air Quality Planning and Standards, U.S. EPA, July 10, 1995, and White Paper Number 2 for Improved Implementation of the Part 70 Operating Permits Program, Lydia N Wegman, Deputy Director, Office of Air Quality Planning and Standards, U.S. EPA, Mar. 5, 1996).

329. The internal memo was reportedly given to the press by Public Employees for Environmental Responsibility, a Washington-based advocacy group. H. Josef Hebert, *EPA Considers Relaxing Pollution Rules on Industrial Plants*, ASSOCIATED PRESS NEWSWIRES, June 5, 2000, *available at* APWIRES 17:59:00.

sponding to journalists' inquiries, Agency officials characterized the internal memo as "an idea sheet" by mid-level staff members that was "embryonic" and did "not represent much of anything," least of all Agency policy.[330] Approximately two months later, White Paper Number 3 was issued as proposed guidance, a move that departed from the Agency's seven-year effort to accomplish reform of NSR and its eight-year effort to revise the operating permit program regulations by rule. Indeed, the expressed mid-stream change of position—that the changes contemplated by the proposed guidance were authorized by the current regulations all along[331]—provoked a particularly sharp comment by the NRDC, an environmental organization that had significantly and consistently participated in the ongoing rulemaking process.[332] Although the scope of the *Draft Flexibility Guidance* does not encompass the numerous proposals undertaken in the NSR or Title V rulemaking packages, the focus of this guidance is on two concepts that are central to the reform project generally—operational flexibility and permit streamlining. Under the *Draft Flexibility Guidance*, these ideas will be applied in a regulatory context more expansive than the relatively narrow confines of pilot projects, e.g., brownfield redevelopment and facility XLs, and the Tier 2 refinery proposal.[333] And once again, in the proposal we see that EPA is willing to push its interpretive authority to the limits.

One of the central strategies to provide flexibility is the use of a bubble (plantwide or partial) to avoid applicability of new permit proceedings when changes are made subsequent to the initial permit. A PAL allows units to be added and modified, and emissions increased within the PAL level without triggering NSR or without the type of state agency review and approval that is usually required in connection with the change.[334] Although PALs have been allowed, typically they have been granted in connection with a permit pilot project, with the Agency promising to evaluate claims of superior environmental performance and the practical enforceability of the experimental approach before adoption by rule.[335] The NRDC and others noted that the most common permit pilot projects, Project XL, have site-specific rulemakings and opportunities for public participation that have yet to be concluded and evaluated.[336] Yet, in the *Draft Flexibility Guidance*, the Agency has taken the position that PALs are permissible under the current regulations and that previously proposed regulatory language in the pending NSR rulemaking proceeding was intended merely to clarify the PAL approach.[337] Thus, the extent to which a PAL may be approved in practice now depends on a state's current SIP and not on finalization of the pending rulemaking proceedings.

Although PALs may eliminate major NSR/PSD applicability, the addition of new equipment under the PAL might trigger minor source review and Title V requirements. Therefore, the *Draft Flexibility Guidance* contains another strategy that will allow the source to avoid these subsequent permit proceedings as well. This flexibility tool—also asserted to exist under current law—is the advance approval.[338] Under this provision, if the permit applicant anticipates a need to add or modify processing equipment or pollution control devices in the future, the applicant can request advance approval of those changes in the application for the initial flexibility permit.[339] Advance approval can even be obtained when the precise changes are not specifically known at the time of the initial permit application.[340] Under the *Draft Flexibility Guidance*, the family of advance approvals can apply to "a potentially wide spectrum of changes, including the addition of specific new process units, modifications to existing units, or even for the addition or modification of units which are not known but which are within a described category of changes."[341] Advance approvals may also be used in connection with PALs and other strategies that are designed to allow the source to avoid triggering NSR.[342] Conceding that the number of different operating scenarios could be extensive, EPA advised that where it was impractical to describe the operating scenarios in detail, they could be described as a category of advance approved changes.[343]

330. *Id. See also* John J. Fialka, *EPA Is Considering Increased Flexibility in Issuing Industry Air-Pollution Permits*, WALL ST. J., June 5, 2000, at A-3, *available at* 2000 WL-WSJ 3031786; June 5, 2000, Dow Jones Business News 00:43:00.

331. *See, e.g.*, advance approvals are really a form of reasonably anticipated operating scenarios, White Paper Number 3, *supra* note 328, at 11, 16, and PALs are permissible under existing regulations, *Id.* at 31.

332. A comment letter signed by approximately 56 organizations, including the NRDC, stated:

> Adoption of the document's "flexibilities" through guidance rather than rulemaking would circumvent and short circuit pending Agency rulemakings that are addressing many of these same issues. These rulemakings under part 70 and the NSR program are ones in which some of our organizations have been involved as stakeholders for over eight years, and we consider it deplorable that EPA would treat our sustained participation as stakeholders so cavalierly.

Comment letter from NRDC and other organizations addressed to Michael Trutna, U.S. EPA (Sept. 14, 2000) (on file with author) [hereinafter NRDC et al. White Paper Number 3 Comments]. NRDC Senior Attorney David Hawkins consistently had been involved with the ongoing reform efforts. *See* U.S. EPA, *New Source Review Simplification Workshop Transcript*, *supra* note 327, at 18; *see also NSR Reform Stakeholder Members*, *at* http://www.epa.gov/ttn/nsr/rule_dev.html (updated Jan. 20, 1999) (on file with author).

333. For example, the flexibilities provided by guidance not only apply to PSD and nonattainment NSR (new and modified major sources of criteria pollutants), but also to sources of hazardous air pollutants, new source performance standards and SIP requirements, and nonfederal requirements (state/local/tribal) as well. White Paper Number 3, *supra* note 328, at 21-27.

334. *Id.* at 30. Under current regulations, sources can avoid major NSR by a netting transaction, but prior review and approval by the state agency is necessary and Title V permit terms are generated because decreases used to generate netting credit must be made enforceable. *Id.* A use of a PAL avoids this requirement. *Id.* at 31.

335. NRDC et al. White Paper Number 3 Comments, *supra* note 332, at 17.

336. *Id.* at 18.

337. White Paper Number 3, *supra* note 328, at 31.

338. *Id.* at 11.

339. *Id.* at 10-11.

340. *Id.*

341. *Id.* at 10.

342. These include potential-to-emit limits and minor ongoing modifications (MOMs) or "cap and track" strategies. *Id.* at 30-35. MOMs appear to be partial caps that pertain to groups of interrelated changes within the facility, while "cap and track" is a cap that falls just below the applicable significance level that would trigger NSR. *Id.*

343. *Id.* at 19:

> Where the possibilities of these changes are so great that it is practical only to describe the conditions that assure compliance and not each of the scenarios in detail in the permit, these different operating scenarios may, in some instances still be included in title V permits as a described category of changes . . . in a menu format.

To assure permit authorities that the future changes will comply with legal requirements, the facility operator may state in advance a menu of "replicable operating procedures,"[344] mechanical procedures that do not require judgment and would yield identical results regardless of the operator.[345] Anticipating that compliance requirements would necessarily change with a change in operations and equipment, the *Draft Flexibility Guidance* provides for streamlining compliance requirements as well. The source operator can approve significant changes in advance by inserting into the initial flexible permit a menu of compliance requirements (such as monitoring, recordkeeping, and reporting) with a protocol for choosing the appropriate compliance approach.[346] When minor compliance details are missing, it is possible for the source to add the details later through the Title V minor permit modification process, a process that does not require advance notice to the public or public hearing opportunities.[347]

The aggressive use of bubbles, a menu approach (of advance approved changes and compliance requirements), and the Title V minor permit modification process results in significant obstacles to effective public participation. As the Agency acknowledged, advance approved changes can be incorporated into the Title V permit without public review unless the proposed advanced change itself would constitute a major modification.[348] However, since advance approved changes are generally designed specifically to keep the source from subsequently undergoing the type of modifications that trigger Title V proceedings, as a practical matter, all that EPA can do is encourage (but not require) the permitting authority to provide notification to the public at the time of the change.[349] Even for advance approvals of "non-Title V requirements," EPA announced its intent to grant deference to the states in interpreting their own rules and SIPs, thus signaling its endorsement of creative interpretation by the states to allow sources to avoid applicability of NSR/PSD proceedings.

The upshot is that new facilities acquiring a flexible permit can avoid the potential applicability of major NSR or PSD and minor NSR and Title V, and can make any subsequent changes through the minor Title V modification process and avoid public participation. To be sure, there is public review of the initial flexible permit. At that point, however, any concerned member of the public can expect to encounter a dizzying menu of operating procedures, materials, equipment, and compliance protocols designed to cover an array of choices the facility operator may or may not make during the term of the permit. Citizens or community-based organizations on a limited budget might want to forego technical review of all of the proposed advance approvals and turn instead to the compliance provisions, reasoning perhaps that they may obtain adequate assurances if they can effectively monitor compliance of emission limits during the term of the permit (regardless of the operations employed under the PAL or partial cap). In this respect, reports obtained from instrumental continuous emissions monitoring equipment (CEMs) may be the best information available. Unfortunately, however, the *Draft Flexibility Guidance* allows non-instrumental "CEMs-equivalent" monitoring methods, such as "equations for mass balance or stoichiometric calculations or records of fuel or raw material purchases or usage,"[350] an approach that can be confounded by technical problems.[351] Thus, technical review of a menu of these types of proposed compliance methods is likely to be beyond the resource capabilities of ordinary citizen groups. Another potential problem is that, due to strong industry pressure, the use of CEMs-equivalent monitoring may be applied in practice so liberally so as to yield little, if any, verification of compliance.[352] In short, CAA permits are notoriously complex to begin with, and the *Draft Flexibility Guidance* promises to increase that complexity by orders of magnitude without assurances that compliance can be adequately verified.

The flexibilities advanced by this *Draft Flexibility Guidance* pose additional impediments to environmental justice communities that host the facility. First, to the extent that EPA supports and encourages sources to avoid nonattainment NSR, the alternatives analysis and social cost criterion cannot be used to protect vulnerable communities or aid in the development of substantive fairness-oriented permit criteria. In addition, the community is now in the position of having to raise money to obtain the technical expertise to independently evaluate a permit application that has an assemblage of advance approvals and compliance protocols instead of one set of requirements.[353] As noted by the NRDC and others, EPA is "condensing all of the public's opportunities to participate in permitting through minor NSR, PSD, major NSR, and Title V into one fleeting 30-day period every five years."[354] Even an association of air pollution control officials—who strongly support the concept of operational flexibility—expressed concern about the increased complexity and resource burdens that would be required to process flexible permits.[355]

344. *Id.* at 12.

345. "All replicable operating procedures must be scientifically credible and their use must not require judgement [sic]. That is, the 'replicability' requirement means the procedure for the same inputs must be capable of yielding the identical result whether applied by you, the source, a member of the public, or us." *Id.* at 20.

346. For significant changes to monitoring, recordkeeping, or reporting requirements, the Agency proposed several "streamlining techniques" of using a menu of monitoring approaches and protocols for selecting the appropriate monitoring approach. *Id.* at 35-36.

347. *Id.* at 28, 35. This anomaly, which the NRDC contends is illegal, was reportedly due to former President George Bush's intervention on the industry's behalf. *See* NRDC et al. White Paper Number 3 Comments, *supra* note 332, at 13 (citing a news article in the WASH. POST, May 17, 1992, at A1).

348. White Paper Number 3, *supra* note 328, at 28.

349. *Id.* at 29.

350. *Id.* at 38.

351. For example, the choice of emissions factors, correlating emissions with operating range parameters, and missing emissions data, or choice of averaging times may cause emissions to be under or over estimated. *Id.* at 38-41.

352. Professor Steinzor questions the practice, in the name of flexibility, of granting exemptions from precise monitoring requirements that bear no relationship to producing superior performance. *Dangerous Journey*, *supra* note 229, at 194.

353. *See* Letter from Eileen Gauna, to U.S. EPA (Sept. 13, 2000) (on file with author) (containing comments on White Paper Number 3).

354. *See* NRDC et al. White Paper Number 3 Comments, *supra* note 332, at 2.

355. *See* Letter from STAPPA and ALAPCO, to EPA (Sept. 21, 2000) *at* http://www.4cleanair.org/WHITEPAPER3COMMENT-9100.PDF (last visited Dec. 30, 2000) (commenting on White Paper Number 3 and requesting that EPA provide guidance on rejecting sources and noting that Title V fees may be insufficient to meet increased resource demands).

Assuming that these obstacles are overcome, however, others remain. An advance approved change may subsequently occur without anyone considering socioeconomic factors and health indicators at the time of the change. For example, if recent studies document an abnormally high rate of respiratory illnesses or elevated blood lead levels, an emissions increase can occur without notifying the community about the increase, much less giving the community an opportunity to bring the health-related information before the permitting authority. Even though the increases may be considered under the cap (or partial cap) or de minimis for regulatory purposes, the emission increases still may present problems to a vulnerable community when combined with other sources of pollutants. At a time when environmental justice advocates and others are encouraging the Agency to bring the public into the permitting and pre-permitting process as early as possible in order to resolve potential problems,[356] the *Draft Flexibility Guidance* substantially weakens public participation opportunities.[357] This is yet another example of the contradictory messages from the Janus, as EPA has repeatedly endorsed increasing opportunities for public participation, particularly in the environmental justice context.[358] In addition, the use of flexible permits may be at odds with a community's request for mitigation measures that are narrowly tailored to reduce or eliminate facility-related impacts.

Another problem is that the ability of the facility owner to change processes, equipment, and compliance protocols at any time without public notice will impede the ability of the community to monitor operations and use private citizen suit enforcement rights to keep the facility in compliance.[359] The community is in the difficult position of having to discern which set of processes, equipment, materials, and compliance protocols pertain within any given time frame to determine if suspected violations have in fact occurred or are occurring. In particular, correlating and interpreting data to evaluate whether a violation has occurred when non-instrumental compliance protocols are allowed may again lie beyond the resource capabilities of a community-based group. Additionally, as noted by the NRDC and others, the *Draft Flexibility Guidance* raises uncertainty about potential application of the permit shield, a provision that precludes citizen suits in some instances.[360] All of this contradicts EPA's expressed desire to promote private enforcement capacity within environmental justice communities.[361] Indeed, for many of these communities, public enforcement even under a more prescriptive and, therefore, more enforceable regime has proven inadequate.[362] Thus, the *Draft Flexibility Guidance* may well promote an unintended perverse incentive; it appears to benefit well-resourced industries that anticipate compliance problems by allowing them to obtain a flexible permit and to locate in a community that is lacking private enforcement capacity due to the community's inability to obtain expensive technical advice.[363]

In addition to the impediments to public participation and to the development of substantive environmental justice criteria, mitigation measures, and enforcement, the *Draft Flexibility Guidance* once again illustrates the expansive use of EPA's interpretive authority. The NRDC and others derided the Agency's endorsement of untested "replicable operating procedures"[364] and persuasively posit that the Agency's authority to grant the specified flexibilities could not possibly be derived from current regulations.[365] For example, the commenters noted that an advance approval is not authorized under the current regulations' provision for "reasonably anticipated operating scenarios," which only allows the source owner to accommodate different operational states of existing emission units, not future emission units or modification to existing units.[366] They further asserted that it was irresponsible for the Agency to authorize the wholesale use of strategies that had not been proven even in limited pilot projects (such as facility XLs, which often employ PALs), and were particularly concerned that the *Draft Flexibility Guidance* would subvert EPA's prior promises to test and quantify the asserted superior environmental performance of these reinvention strategies before considering their adoption.[367]

As in the proposed Tier 2 rule, the *Draft Flexibility Guidance* similarly neglects to mention environmental justice and the procedural and distributional issues are not addressed. This may not be surprising, considering that the seven-year intensive stakeholder process through the NSR FACA subcommittee did not have an environmental justice representative.[368] Instead, the Agency gave an information briefing session on this complicated guidance to the NEJAC Air and Water Subcommittee during a monthly telephone

356. *See* TITLE VI FACA REPORT, *supra* note 111, at 30; NEJAC, ENVIRONMENTAL JUSTICE IN THE PERMITTING PROCESS; A REPORT FROM THE NATIONAL ENVIRONMENTAL JUSTICE ADVISORY COUNCIL'S PUBLIC MEETING ON ENVIRONMENTAL PERMITTING, ARLINGTON, VIRGINIA, NOVEMBER 30-DECEMBER 2, 1999, at 17 (2000) (EPA 300-R-00-004), *available at* http://epa.gov/occa/main/ej/nejacpub.html [hereinafter 1999 NEJAC REPORT ON PERMITTING] (containing detailed recommendations, largely from environmental justice advocates, aimed at identifying both deficiencies in the current permit process and remedies or alternative approaches to permitting).

357. NRDC et al. White Paper Number 3 Comments, *supra* note 332, at 4.

358. *See* U.S. EPA, EPA'S ENVIRONMENTAL JUSTICE STRATEGY, 6-8 (1995), *available at* http://www.epa.gov/docs/oejpubs/strategy/strategy.txt.html (last visited Jan. 9, 2001).

359. For a discussion of the technical difficulties enforcing blanket emissions limits, see NRDC et al. Comments on White Paper Number 3, *supra* note 332, at 21-27.

360. *Id.* at 10-12.

361. *See* EPA'S ENVIRONMENTAL JUSTICE STRATEGY, *supra* note 358, at 15-16.

362. *See Unequal Protection*, *supra* note 15.

363. This could even extend to the establishment of the flexible permit as well as enforcement. The flexibility guidance specifically notes that "[w]here a concern arises as to whether this guidance is consistent with your EPA-approved rules, we will work with you to make this determination. Sources should be aware, however, that our exercise of discretion does not shield them from a citizen suit." *See* White Paper Number 3, *supra* note 328, at 14.

364. The commenters explain:

> Although the Draft Guidance is tellingly vague as to what qualified as a ROP.... EPA appears to be suggesting that the application of complex regulations and the interpretation of regulatory terms can be distilled to the equivalent of a mathematical formula. This is an absurd proposition... because environmental regulations are not algorithms and applicability determinations (with their embedded legal interpretations) do not proceed according to the "rules" of mathematics.

NRDC et al. White Paper Number 3 Comments, *supra* note 332, at 9.

365. *Id.* at 27-42.

366. *Id.* at 34-35.

367. *Id.* at 16-17.

368. *See supra* note 327 (transcripts containing membership list).

conference shortly before publication of the document.[369] Subsequently, many environmental justice organizations were apparently unable to prepare their own comment letter but opted to co-sign the comments by the NRDC and others that opposed the adoption of the *Draft Flexibility Guidance* on a variety of grounds.[370] Ultimately, this may be a case where, because of the daunting complexity of the permitting program coupled with the relative lack of stakeholder involvement by environmental justice advocates, the full environmental justice implications of this proposal and similar broad-based reinvention initiatives may never be analyzed and voiced prior to ultimate adoption and implementation. This is a serious obstacle considering that these initiatives represent a fundamental shift from a permitting regime founded on public participation and contemporaneous review to one that, while affording flexibility, also reduces public participation and is heavily dependent on source-conducted, after-the-fact verification.[371] This effectively negates the one limited remedy that the Agency has indicated its willingness to adopt in response to environmental justice claims, i.e., enhanced public participation opportunities.

When juxtaposing community concerns about permitted activities with the *Draft Title VI Guidance* and these proposed reinvention initiatives, several contrasting themes become apparent. Community residents in overburdened communities see the permit process as the frontline defense against continuing environmental disparities. Yet permitting officials at the local, state, and federal levels generally resist imposing additional conditions or denying permits on environmental justice grounds, although the lack of support from the upper management levels may make this hesitancy understandable. When environmental justice concerns surface and become unavoidable, the primary response instead has been to enhance public participation opportunities and negotiate voluntary mitigation measures. While this is desirable, it is not likely to appreciably reduce the scope and intensity of impacts that heavily impacted communities experience. And as illustrated, the enhanced public participation that the Agency promises with one hand may be taken away with the other. The only substantive programmatic response to environmental justice permitting concerns has been the relatively crude, unquantifiable, and voluntary off-site mitigation measures proposed by the *Draft Title VI Guidance*, which sit in stark contrast to the more sophisticated and mandated offsets, pollution control requirements, and compliance measures required by traditional regulatory standards.

At the rulemaking or guidance-making level, the regulatory dynamics that impede fairness-oriented reform are even more troubling. In a manner disturbingly reminiscent of historical race relations, environmental justice is rendered invisible by its absence in major rules and guidance documents.[372] During the critical stakeholder-intensive processes that informed attempts to develop efficiency-oriented reform of air permitting programs, environmental justice representatives were absent. In contrast, industry stakeholders, conventional environmental groups, state and local regulatory agencies, and even federal land managers for years engaged in extensive discussions about the technicalities of air permitting in an attempt to understand the constraints of each group and to work out acceptable trade offs. This put environmental justice advocates in the unfortunately reactive position of attempting to understand the dauntingly complex proposals and address the environmental justice implications within a hopelessly short time frame.[373] When environmental justice concerns became unavoidable at the rulemaking level, the Agency responded not by integrating more protective strategies within the framework of the permitting process, but by a combination of assuming away the problem, further study, separate after-the-fact stakeholder processes, or when pressed by agreeing to address the problem on a case-by-case basis. Most disappointing of all is the contrast between the Agency's aggressive use of its interpretive authority—in some instances beyond the constraints of logic—to propose and promote streamlined permits and operational flexibility to help permit applicants, while at the same time declining to explore the potential of existing omnibus clauses to promote on-site mitigation or alternative-site analyses, even in the most heavily impacted areas.

Although these criticisms may seem harsh, it is important to remember that the political pressures on EPA are enormous. Once noted to be a perpetual victim of "battered agency syndrome," the Agency is working against unrelenting pressure from state and local regulators to provide guidance, certainty, and safe harbors in this difficult area, while the industry stakeholders want regulatory relief in the form of streamlined permit proceedings and enhanced operational flexibility. From the perspectives of these powerful stakeholder groups, the types of safeguards and mitigation requested by impacted communities would destabilize and worsen an already cumbersome permit process. As difficult as this conflict is, however, it is also obvious that at present the regulatory strategies to address environmental justice are wholly inadequate. This is unfortunate because even aggressive fairness-oriented reforms in permitting can be designed to co-exist with efficiency-oriented measures and may ultimately provide more certainty by providing a framework within which to address the fundamental concerns of overburdened and disparately impacted communities.

Protective Permitting

While one might conclude that EPA either lacks the desire or is too politically constrained to seriously address environmental justice by reforming the permitting process, the more optimistic, perhaps aspirational, approach would be to view fairness-oriented reform as an inevitable aspect of regulatory evolution. In any event, the continuing conflicts that arise during permit proceedings ultimately may make pro-

369. Aug. 8, 2000, Air and Water Subcommittee monthly telephone conference. The author was invited to participate in the telephone conference as a prospective member of the subcommittee, but could not participate due to prior commitments. The author was subsequently appointed to the NEJAC Air and Water Subcommittee on Aug. 21, 2000.

370. NRDC et al. White Paper Number 3 Comments, *supra* note 332, at 2-3 (Overview of Comments).

371. Telephone Interview with John Walke, NRDC (Nov. 27, 2000).

372. A literary version of "invisibility" as a racial phenomenon is eloquently expressed in Ralph Ellison's 1952 classic novel "The Invisible Man."

373. This is a serious deficiency considering that the President's 1994 Executive Order on Environmental Justice mandated federal agencies to identify and address disproportionate effects of its programs. Exec. Order No. 12898, *supra* note 41, §1-101; *see also* EPA'S ENVIRONMENTAL JUSTICE STRATEGY, *supra* note 358.

grammatic reform the best option from a practical standpoint. Ad hoc resolutions provide no predictability for the regulated community. Because of the differences in resources and political will among the states,[374] this type of programmatic reform is best developed nationally. Should EPA embark on such an endeavor, it should be able to develop and provide a protective permitting framework under the authority of statutory omnibus clauses either by guidance or pending rulemaking proceedings.[375] At present, the Agency already has a suite of recommendations for addressing environmental justice in permit proceedings. At a recent NEJAC meeting, an assortment of stakeholder groups came forward with ideas and suggestions that ran the gambit from broad principles to numerous specific recommendations.[376] EPA, however, lacks a basic framework within which to experiment with, develop, and apply more protective criteria in a systematic or consistent manner. This Article concludes with a few exploratory suggestions on a framework the Agency might consider.

To begin with, two procedural reforms are necessary to promote negotiated solutions in advance of more formal permit proceedings: early public participation opportunities and mechanisms to provide the community independent technical review of the permittee's proposals. When the community is brought into the pre-permitting process and provided the means to independently examine the proposal, the community is able to participate on a more level playing field and the comfort level is likely to increase. As such, the dynamics are more likely to change from an encounter marked by hostility and suspicion to one with greater cooperation and trust, thus providing optimal conditions for collaboration and creative problem solving. The permitting agency can use additional methods to enhance this process, for example by cultivating preexisting relationships with community-based groups.

As important as procedural and capacity-building measures are, however, there will be instances where they do not resolve all conflicts. If pre-permitting negotiations do not yield voluntary commitments acceptable to all, then the Agency needs to have in place a more protective and certain process to address the environmental justice complications. Significantly, the Agency is not only dealing with technical issues—which it is undoubtedly qualified to address—but fairness claims as well. Thus, the common-law tradition of equity is the logical place to look, as a measured use of equitable principles might be particularly well-suited to resolve conflicts over mitigation. It is not unheard of in environmental law and regulation for an agency to use common-law concepts to implement statutory requirements.[377] In addition, the Agency could look beyond the pollution control regime to permit programs that address the preservation of highly protected resources, such as wetland preservation, endangered species protection, and historic building preservation.[378] These permit schemes have potential because the primary objective is not to issue the permit, but to protect the resource.[379] Although these permitting frameworks carry their own brand of conflict, it is important to remember that adopting similar approaches in the environmental justice context will not result in a moratorium on all development activity. To put the matter rhetorically and, admittedly, provocatively, if we can take extraordinary measures to protect wetlands and endangered species, shouldn't we be similarly aggressive in protecting vulnerable communities?

Any framework selected, however, must begin with the difficult issue of assessment, i.e., determining whether the community is an "environmental justice community." Because of the disparate conditions that present these concerns throughout the country, from sparsely populated Native American reservations to congested inner city enclaves, this may be an area best suited for precise definition by the common law's incremental approach, i.e., using a general principal that is refined by case-by-case adjudication. Using Richard Lazarus' formulation, the permitting official could make this determination based on the presence of risk aggregation or risk disproportionality, perhaps directed by EPA-issued guidance.[380] In order to make a realistic assessment of the historic, socioeconomic, political, and cultural context of the host community, a range of factors other than emission-related impacts should be considered.[381] This de-

374. *Devolution and the Public Health*, *supra* note 226.

375. To date EPA has not developed environmental justice guidance on the parameters of the valuable sources of omnibus authority. *See supra* notes 14-110 and accompanying text.

376. 1999 NEJAC REPORT ON PERMITTING, *supra* note 356.

377. *See* ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION LAW, SCIENCE, AND POLICY 280 (2d ed. 1996) (noting that "CERCLA is a direct extension of common law principals of strict liability for abnormally dangerous activities."); *cf.* United States v. Price, 688 F.2d 204, 212, 12 ELR 21020, 21023-24 (3d Cir. 1982) (noting that by enacting the endangerment provisions of RCRA and the Safe Drinking Water Act, Congress "sought to invoke the broad and flexible equity powers of the federal courts in instances where hazardous waste threaten human health.").

378. Many of these ideas were presented in a letter to the NEJAC following the author's presentation on a panel. *See* Letter to NEJAC by Eileen Gauna (Apr. 18, 2000) (copy on file with author); *see also* THE LAW OF ENVIRONMENTAL JUSTICE 473-76 (Michael B. Gerrard ed., 1999) (discussing site-based permit requirements under several statutes).

379. Dredge and fill operations (of wetlands) are regulated under §404 of the Clean Water Act (CWA). 33 U.S.C. §1344, ELR STAT. FWPCA §404. Congress stated that the purpose of the CWA was to "restore and maintain the chemical, physical and biological integrity of the nation's waters." 33 U.S.C. §1251(a), ELR STAT. FWPCA §101(a). The Endangered Species Act (ESA) states that it is the "policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species . . . ." 16 U.S.C. §1531(c)(1), ELR STAT. ESA §2(c)(1). Specifically, the ESA bars federal government agencies from performing, funding, or permitting any activity that will jeopardize the critical habitat of a listed or endangered species. 16 U.S.C. §1536, ELR STAT. ESA §7. *See also* Shi-Ling Hsu, *The Potential and the Pitfalls of Habitat Conservation Planning Under the Endangered Species Act*, 29 ELR 10592, 10593 (Oct. 1999) (discussing how the ESA's powerful prohibitions against the "take" of species listed as endangered or threatened extend to private property and even prohibit private landowners from engaging in actions on their property that adversely modify habitats of listed species). The principal federal legislation in the field of historic preservation is the National Historic Preservation Act, 16 U.S.C. §§470-470w-6, originally enacted in 1966. The Act established the National Register of Historic Places. *See also* DANIEL P. SELMI & JAMES A. KUSHNER, LAND USE REGULATION: CASES AND MATERIALS 800 (1999) (noting that societal benefits, both of a monetary and a psychological kind, accrue from preservation of historic sites, and that these benefits appear to have a societal consensus).

380. Lazarus & Tai, *supra* note 9.

381. In addition to the expected impacts from the new, modified, or expanded facility (including emission-related impacts, additional safety risks or risks of accidents, the compliance record of the permittee at other locations, nonemission-related impacts such as noise, traffic, odor, and foreseeable injury to nontraditional cultural practices), other relevant factors might include the existing pollution load (nonpermitted contributors, permitted contributors, and point and nonpoint sources), the compliance history of the existing permitted sources, the risk of accidental releases, expected, foreseeable de-

termination may be less complicated than in a Title VI investigation because a particular degree of disproportionality is not absolutely required. Risk aggregation alone would justify protective measures, and since regulation is preventative in nature, toxicity weighted exposures should be an adequate indicator. Once a vulnerable community is identified, that should suffice to trigger a range of protective mechanisms.

One mechanism employed could be a substantive alternatives analysis[382] similar to one the U.S. Army Corps of Engineers uses in protecting wetlands. Under the Clean Water Act, the permitting authority determines if there is a practicable alternative to placing fill material in a wetland.[383] If an alternative site is available, the permit is denied without further inquiry into the suitability of the proposed site.[384] Unlike the National Environmental Policy Act, which only directs that alternatives be described in the environmental impact statement and considered by the federal agency,[385] the alternatives analysis in wetland permitting contains a standard and a substantive mandate, a point at which it becomes improper to proceed in light of the alternative offered.

In the environmental justice context, for example, the permitting agency could engage in an analysis of *whether a practicable alternative exists to permitting the emissions in or near a heavily impacted community.* A practicable alternative could exist if the permit involves a new facility and there are alternative locations to site the facility in areas that are not highly impacted. In such a case, the permit would be denied for that site because of the availability of alternative, more suitable sites. Conversely, if the permit involves a simple renewal of a permit at an existing facility that is relatively new and has updated control technology, then there might not exist a practicable alternative to the permitting at the proposed site because of the capital already invested in the existing site. This is not to suggest that a finding of "no practicable alternative" should be applied categorically to all existing facilities. There might be practicable alternatives to renewing permits at existing facilities where, for example, the facility has a poor compliance record, is near the end of its useful life, has pollution control processes and technology that are obsolete, or the facility has been afforded favorable regulatory treatment in the past that has substantially contributed to risk aggregation or disproportionality, e.g., exemptions, variances, grandfathering, or long-expired permits. The practicable alternative standard may offer a greater degree of predictability than currently exists while at the same time removing the counterproductive tendency of older facilities with outmoded technology to remain online longer.[386]

If there is no suitable alternative site, then the permitting officials should adopt the wetland permitting approach, which is to consider whether the impacts can be otherwise *avoided, minimized, or compensated,*[387] *in that order.*[388] For example, the official would not consider compensation of impacts that can be minimized or avoided; likewise, the official would not consider minimizing impacts that can be avoided altogether. The sequencing approach affords more protection to the nearby community by ensuring that the most protective measures are in fact taken. This is an approach similar to the closely tailored mitigation approach recommended by the Title VI FACA Mitigation Workgroup. In the environmental justice context, for example, it might be appropriate to consider whether the emissions-related impacts might be avoided by substitutions of materials, alternative production processes, or more stringent control technology. For nonemissions-related impacts, e.g., noise, odors, traffic, damage to cultural sites, etc., the knowledge and creativity of community residents can be helpful. Because community residents are more intimately aware of the precise effects of the facility, they are in a better position to advise as to appropriate buffer zones, alternative traffic routes, or the like.

Only if it is not possible[389] to completely avoid the impacts should the permitting agency proceed to consider other means to minimize their effects, such as enhanced emergency response systems and ambient monitoring. Again, this presents an opportunity to use the expertise of the community residents, for example, in determining the most advantageous locations of the monitors. The

velopments, demographics, nontraditional cultural practices, the history of land use practices in the area (e.g., expulsive zoning), and health issues currently existing in the community (relatively high cancer rates, asthma, and other particular vulnerabilities).

382. The most obvious candidate omnibus clause would be CAA §173(a)(5) (nonattainment NSR), 42 U.S.C. §7503(a)(5), ELR STAT. CAA §173(a)(5). However, other broadly worded clauses might provide adequate legal grounding as well, such as permit terms "necessary to protect human health and the environment" under RCRA §3005(c)(3), 42 U.S.C. §6925(c)(3), ELR STAT. RCRA §3005(c)(3). The justification would necessarily differ, however, given the scope of omnibus authority. *See supra* notes 14-110 and accompanying text.

383. 40 C.F.R. §230.10(a) (2000).

384. Practical alternatives are presumed if the activity is not water dependant. 40 C.F.R. §230.10(a)(3). The agency looks to whether there were non-wetland sites available at the time the developer entered the market and began looking for suitable locations.

385. This is not to say that the National Environmental Policy Act (NEPA) and its implementing regulations are unhelpful in this effort. The Council on Environmental Quality's (CEQ's) regulations and EPA's own NEPA compliance concerning an agency's consideration of alternatives in an environmental justice context could be used in connection with a substantive standard. *See* U.S. EPA, *Final Guidance for Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analysis* (1998), *at* http://es.epa.gov/oeca/ofa/ejepa.html (last visited Jan. 9, 2001) (available from the ELR Document Service, ELR Order No. AD-3856).

386. *See, e.g.*, comments of David Hawkins regarding the use of "routine maintenance, repair and replacement" exceptions to NSR in order to keep old facilities on line long past their initial useful life. *EPA Action Needed to End Grandfathering*, ENVTL. F., Mar./Apr. 2000, at 44.

387. CEQ regulations define mitigation as avoiding the impact, minimizing the impact, rectifying the impact, reducing or eliminating the impact over time, and compensating for the impact. 40 C.F.R. §1508.20 (2000). In the permitting context, some of the stated regulatory wetland mitigation efforts may not be directly transferable to the environmental justice context. Examples include "rectifying the impact by repairing, rehabilitating, or restoring the affected environment, or reducing or eliminating the impact over time by preservation and maintenance operations" *Id.* The use of pollution control technologies, buffer zones, alternative traffic routes, and other common mitigation measures would tend to avoid the impacts altogether rather than restore the environment or reduce impacts over time.

388. *See* Memorandum of Agreement Between the Environmental Protection Agency and the Department of Army Concerning the Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines, 2 (Feb. 6, 1990), *available at* http://www.usace.army.mil/inet/functions/cw/cecwo/reg/moafe90.htm (sequencing requirement).

389. One workable standard might be "technologically infeasible after using the lowest achievable emissions control technology," in effect requiring LAER-equivalent technology for air pollutants or best available technology for water pollutants.

minimization approach could adapt some of the standards and requirements involved in incidental takings permits[390] issued under the Endangered Species Act, modified to the environmental justice context. In analogous terms, the permit applicant would submit a location-specific plan that establishes that facility operations will not *appreciably reduce the likelihood of a healthy recovery for the impacted community.*[391] Here, government-facilitated area-specific agreements could be used to meet this requirement, albeit utilized in a different manner than that contemplated by the *Draft Title VI Guidance*. Instead of using area pollutant reduction plans to provide unquantified offsets for permitting new activities, the plans could be used as a benchmark to measure progress. A permit should be issued only if there is an existing plan—it could be an area-specific agreement or a community recovery plan—and the impacts from the permittee's proposed project does not substantially interfere with the gains sought to be made under such a plan.[392] For example, closely tailored on-site mitigation as a primary strategy is unlikely to interfere with such a recovery plan assuming unmitigated effects are kept to a minimum. Conversely, using only off-site mitigation may interfere with recovery because the entire emission increases and other facility-related impacts consume gains made by the recovery plan. An added incentive can be designed into the scheme by giving industrial contributors to the recovery plan priority in permit issuances that are able occur in the area, i.e., contributors to the reduction strategies are first in line to get part of the off-site reductions allowed by the plan. This requirement would provide an incentive to governmental and industry stakeholders to design, commit resources to, and implement pollution reduction strategies in advance of any permit because, absent a comprehensive site-reduction plan, an area recovery plan will be required to show that permitted activities will not interfere with real progress in achieving healthy communities.

Compensating for the impact should only be considered as a last resort and only to the extent that adverse effects cannot otherwise be avoided or minimized at or near the facility. This is a particularly sensitive issue because it raises the potential that a vulnerable community may be forced to accept risks and impacts that more affluent communities can avoid. At the same time, however, the potential for positive collaborative problem solving is enhanced when the self-determination and agency of the community is recognized. Thus, because of the potential for abuse, compensatory measures should not be approved without the support of impacted communities after full independent technical review.

One compensation strategy that might directly pertain to the impacts could involve offsetting the new emissions by retiring existing emissions in the same location. There are risks in this approach, however. Environmental justice advocates have been justifiably critical of market-based regimes because these programs have been instrumental in shifting pollution *to* highly impacted communities,[393] although the disproportionate impact has been unintentional. Here, the idea is to use the same approach to strategically pull pollution *away* from the impacted community. Thus, if such an offset strategy is employed, the offset ratio should be greater than 1 to 1 (e.g. 1.5 tons per year of pollutants retired for every ton generated), and the "same location" should be determined conservatively. Ideally, the offsets should come from the same neighborhood to avoid hot spots, but if it is clear that the emissions do not have a localized effect, a wider area may be considered. Here, it is important that the community is given independent technical assistance to determine whether the emissions produce a localized effect. Engineering estimates should be conservative to provide a wide margin of safety. Thus, the permitting agency should remain exceedingly skeptical of point/nonpoint trades and cross-media trades, and should not consider cross-pollutant trades. Generally, these trades have not been proven in practice and are inappropriate in instances involving little or no margin of error. Compensatory measures might be a viable, last resort strategy if they are well designed, if the benefits clearly outweigh the potential risk, and if they do not interfere with gains made under an existing community recovery plan. Implemented in this manner, the compensation strategy is a form of off-site mitigation.

If it becomes necessary to deny a permit at the proposed site because of the availability of a suitable alternative site, the permitting agency can mitigate the burden to the applicant—to the extent discretion allows—by affording favorable regulatory treatment at the alternative site. For example, at the alternative site the permitting official might expedite the permit, facilitate an emissions trade, consider a pilot project, or otherwise waive requirements if appropriate. A local government might facilitate the purchase of an alternative site by imminent domain if the new facility will promote a public purpose. The approach here is analogous to a type of transferrable development right used in resolving the conflicting interests presented by the preservation of historic buildings, open spaces, and other valuable resources.[394] This approach is hardly a radical one, as "site shifting" is inherent in PSD/NSR design[395] and favorable regulatory treatment is a common incentive.[396] Rather, the approach merely reduces the burden on the permit applicant and the potential unfairness of disadvantaging the newest (and possibly cleanest) facility for the existing aggregated or disparate impact, while at the same time addressing that very impact. The success of this approach depends in large part on the commitment to bring all stakeholders into the

390. Primarily, the permit will issue if the plan set forth by the applicant "will not appreciably reduce the likelihood of the survival and recovery of the species in the wild." 16 U.S.C. §1539(a)(2)(B)(iv), ELR STAT. ESA §10(a)(2)(B)(iv).

391. *Id.*

392. *See* Hsu, *supra* note 379, at 10594 (noting that under §10(a)(1) of the ESA: "The [U.S. Fish and Wildlife Service (FWS)] may issue a landowner a permit to 'incidentally take' endangered or threatened species if the landowner submits and agrees to abide by an FWS-approved [Habitat Conservation Plan], which is a long-term plan of mitigation measures aimed at conserving habitat and aiding endangered and threatened species."). The provision was added to the ESA in 1982, H.R. REP. No. 97-835, at 29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2860, 2870.

393. *See, e.g.*, Richard Toshiyuki Drury et al., *Pollution Trading and Environmental Injustice: Los Angeles' Failed Experiment in Air Quality Policy*, 9 DUKE ENVTL. L. & POL'Y F. 231 (1999).

394. *See* SELMI & KUSHNER, *supra* note 379, at 656 (noting that transferable development rights are one of the most promising alternative ways of achieving environmental protection and "avoiding the situation where environmental protection benefits, which accrue to the society as a whole, are achieved by imposing large costs on individual landowners").

395. *See* Oren, *supra* note 323; Gauna, *supra* note 109.

396. *See supra* notes 234-373 and accompanying text (discussing brownfields, Tier 2, and XLs).

pre-permitting process early in order to assess all problems and increase available options.

While there are no painless ways to achieve parity and eliminate troubling aggregated risk and adverse impacts, a more protective permitting scheme is likely to be more efficient in the long run. An aggressive "reasonable progress" approach that promises real benefits would be the least destabilizing to the permit process because it would improve conditions and reduce conflict. Should EPA attempt to continue its current approach, essentially one of attempting to address environmental justice while preserving the permitting status quo, it will in all likelihood fail. As long as there are unaddressed disparities, there will be legal action, direct action, and legislative action wherever possible. Permit proceedings will continue to be contentious and consume considerable agency and economic resources. And the persistence of unequal environmental protection will continue to erode the legitimacy of EPA and its sister permitting agencies. In the end, the permitting approach EPA ultimately devises will be successful only if it appreciably mitigates impacts to nearby communities.

Conclusion

EPA has spent one of its three decades directly addressing the procedural and distributional claims of people of color and poor communities. This has occurred within the time that industrial sectors have pressed their demands for regulatory relief and operational flexibility, demands that have the support of most state and local regulators. These demands have coincided with a philosophical shift to the perceived efficiencies of market regimes and devolution of authority to the local level. The result has been intense conflicting pressures on EPA. In response, the Agency has elected to use its interpretive authority aggressively in promoting regulatory relief measures for industry stakeholders and deference to state regulators, while at the same time using its authority much more conservatively in addressing environmental justice concerns. The Agency appears particularly hesitant to condition or deny permits on environmental justice grounds, preferring instead voluntarily negotiated off-site mitigation measures. The Agency has promoted this approach to such a degree as to effectively eliminate the possibility of a successful civil rights claim premised on the granting of a permit. Given the severity of the problem in many heavily impacted communities, such an alternative compliance approach is not likely to appreciably reduce or eliminate long-standing disparities within the foreseeable future, if at all.

This approach has been particularly frustrating to environmental justice stakeholders, who view a permit not only as exacerbating siting disparities, but as the gateway to further environmental insult caused by inadequate standards, compliance problems, potential contamination, and insufficient cleanup remedies. They are additionally concerned about facility operations that impair quality of life and at times damage cultural or religious resources. The Agency has added to this frustration by promoting regulatory flexibilities such as mobile source offsets, emission caps, and a menu approach to permitted processes, equipment, and compliance protocols. These flexibilities stymie the community's ability to technically evaluate the permit and monitor compliance. The Agency has also promoted methods to keep sources out of permit proceedings—proceedings that not only require public participation but allow development of environmental justice criteria. In short, when juxtaposing EPA's response to environmental justice against its approach to regulatory relief, the difference appears patently unfair. Because this juxtaposition is not visible in any one particular permit proceeding and because of the normal judicial inclination toward agency deference, the courts are not likely to put pressure on EPA to use its discretionary authority under the environmental statutes and regulations to more aggressively promote environmental justice.

All of this is unfortunate because environmental disparities are likely to continue, and as long as communities do not see an improvement in their environments, they will understandably continue to launch campaigns against new and expanded permitted activities. Thus, it is the environmental conditions themselves—and not the Civil Rights Act or any other legal remedy—that will continue to destabilize permit proceedings. EPA has a timely opportunity to institute fairness-oriented reform of the permitting process at this critical time, when many permit programs are under reevaluation and overhaul. If environmental justice protections can be built into regulatory processes at the front end, resulting in a more protective permitting scheme, there will be fewer challenges upon granting the permit and, therefore, more stability over the long run. Meanwhile, the Agency can continue testing the suspected superior environmental performance of alternative compliance approaches, either through pilot projects or application in areas that provide a greater margin of error because of healthier ambient conditions. If it becomes necessary to utilize more flexible permitting approaches in heavily impacted communities, the Agency should do so only after the approaches are proven in practice, and at a minimum it should provide for independent technical review and require compliance protocols that promote rather than frustrate private enforcement. An added benefit to a more protective permitting approach, if adopted, is that EPA will be consistent with its message among all stakeholders, which will reduce stakeholder confusion and mistrust. Merging the alter egos of the Janus can only enhance the Agency's legitimacy. Most importantly, however, EPA now has the opportunity and ability to make healthy and liveable communities for all the legacy of the fourth decade of environmental protection.