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Jon A. Mueller

Taylor Lilley

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FORTY YEARS OF ENVIRONMENTAL JUSTICE: WHERE IS THE JUSTICE?

Jon A. Mueller & Taylor Lilley***

* Jon A. Mueller, a T.C. Williams School of Law '82 graduate, is Vice President for Litigation for the Chesapeake Bay Foundation. From 1987-2004 he was a Senior Attorney at the US Dept. of Justice, Environment and Natural Resources Division, Environmental Enforcement Section and was an associate in what is now McGuireWoods from 1982-1987. Mr. Mueller has been an adjunct professor at the University of Maryland, Francis King Carey School of law since 2011.

** Taylor Lilley is an Environmental Justice staff attorney with the Chesapeake Bay Foundation. Ms. Lilley earned her J.D. from the University of Maryland Francis King Carey School of Law in 2018, along with a certificate of concentration in Environmental Law. Ms. Lilley also served as the Public Interest Law Fellow at the Environmental Law Institute from 2018-2019. Ms. Lilley works with Environmental Justice communities and grassroots advocates throughout the Chesapeake Bay watershed to address environmental injustices, and where possible, partner on litigation designed to address those issues.

ABSTRACT

Environmental Justice (or “EJ”) has been recognized as a concept since at least 1982. After decades of incremental and ineffective efforts by the federal government, it has become clear that EJ must evolve beyond the concept stage if it is to be an effective vehicle for social and legal change. At its heart, EJ is a function of social inequities and environmental harms, and the disproportionate correlation between those components can no longer be ignored by state and federal actors. The way forward must be paved with practical legal solutions and affirmative application of regulatory authority. This article examines the history of EJ primarily through the lens of the U.S. Environmental Protection Agency and the White House, and evaluates the progress made in terms of regulations and permitting. The article also examines recent administrative and judicial decisions addressing EJ claims and, in conclusion, provides recommendations for ways in which EJ issues can be better presented and addressed.

INTRODUCTION

Everywhere you turn, from the media, state and federal agencies, conferences, law journals, the legal trade press, and podcasts, Environmental Justice (or “EJ”) is being discussed.¹ Numerous recent articles recount the history of the EJ movement and the need for providing justice to underserved communities in environmental permitting, enforcement, facility siting, and regulatory review. However, when the movement’s history is examined, it becomes clear that low-income and racial minority communities are not receiving complete justice.² For decades, the federal government and some states have promised to give these communities more meaningful public

¹ See, e.g., Juliet Eilperin & Darryl Fears, *Deadly Air Pollutant “Disproportionately and Systematically” Harms Americans of Color, Study Finds*, WASH. POST (Apr. 21, 2021), <https://www.washingtonpost.com/climate-environment/2021/04/28/environmental-justice-pollution/>; Margaret Badding, *Operationalizing Environmental Justice: The Justice 40 Initiative*, ENV’T L. INST. (Nov. 29, 2021), <https://www.eli.org/vibrant-environment-blog/operationalizing-environmental-justice-justice40-initiative>; *Environmental Justice*, VA. DEQ, <https://www.deq.virginia.gov/get-involved/environmental-justice> (last visited Apr. 7, 2022); *National Environmental Justice Conference and Training Program*, NAT’L ENV’T JUST. CONF. & TRAINING PROGRAM, <https://thenejc.org/conference/national-environmental-justice-conference-and-training-program/> (last visited Apr. 7, 2022); Kendra S. Sherman, *Update on Environmental Justice Initiatives Under the Biden Administration*, LEXOLOGY (Feb. 8, 2022), <https://www.lexology.com/library/detail.aspx?g=f78f4c9b-2b6f-4bde-84b2-d5a883712d78>; *7th Annual UMD Environmental Justice and Health Disparities Symposium*, UNIV. OF MD. SCH. OF PUB. HEALTH, <https://sph.umd.edu/events/7th-annual-umd-environmental-justice-and-health-disparities-symposium> (last visited Apr. 7, 2022).

² Numerous federal and state agencies consider EJ in their rulemaking, enforcement, and permitting pursuant to environmental law. Examining all federal and state policies and decisions is beyond the scope of this article. The focus of this article is primarily on the actions of the United States Environmental Protection Agency (EPA) with a limited review of actions by the White House, the Council on Environmental Quality, the Federal Energy Regulatory Commission, and the Commonwealth of Virginia. See, e.g., *Environmental Justice and National Environmental Policy Act*, EPA, <https://www.epa.gov/environmentaljustice/environmental-justice-and-national-environmental-policy-act> (last updated Mar. 29, 2022).

engagement and protection from disproportionate harm and cumulative impacts related to the application of environmental laws. While these communities are being given more fulsome opportunities to participate in the regulatory process, governmental and judicial permitting decisions rarely protect these communities.³

Section I of this article briefly reviews the concepts surrounding EJ and the history of its development. Section II examines the progress of EJ as a program primarily within the United States Environmental Protection Agency (“EPA” or “the Agency”). Section III considers whether the federal government’s existing environmental regulatory policies and processes are sufficient to protect EJ communities. Section IV examines the need for a fixed definition of the phrase “disproportionate impact.” Section V provides recommendations for how EJ analysis by Federal and State governments can be improved.

I. HOW IS ENVIRONMENTAL JUSTICE DEFINED AND WHERE WAS IT FIRST RECOGNIZED?

EPA defines “environmental justice” as “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation and enforcement of environmental laws, regulations and policies.”⁴ For more than twenty-five years, the federal government has observed this concept as a policy objective.⁵ However, it has only been recently that the concept has governed the outcome of federal agency and judicial decisions. Surprisingly, many of those decisions have been based upon state, not federal, laws.⁶ Unfortunately, as discussed below, efforts to challenge pollution permits or facility siting using federal law have been largely ineffectual.

There is some dispute as to when and where the concept of EJ began. Most writers point to the community protest of a proposed hazardous waste landfill

³ Exec. Order No. 14008, 86 Fed. Reg. 7619 (Feb. 1, 2021); Exec. Order No. 13985, 86 Fed. Reg. 7009 (Jan. 25, 2021); Exec. Order No. 12898, 59 Fed. Reg. 7629 (Feb. 16, 1994).

⁴ *Environmental Justice*, EPA, <https://www.epa.gov/environmentaljustice> (last updated Mar. 23, 2022); *EJ 2020 Glossary*, EPA, <https://www.epa.gov/environmentaljustice/ej-2020-glossary> (last updated Sept. 7, 2021).

⁵ See Exec. Order No. 12898, 59 Fed. Reg. 7629 (Feb. 16, 1994); *Environmental Justice*, *supra* note 4. “To the greatest extent practicable and permitted by law, and consistent with the principles set forth in the report on the National Performance Review, each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States....”

⁶ See *Friends of Buckingham v. State Air Pollution Control Board*, 947 F.3d 68, 79 (4th Cir. 2020); S. 232, 2020 Leg., Reg. Sess. (N.J. 2020); Va. Code § 10.1-1307(E); 9 Va. Admin. Code § 5-170-170.

in Warren County, North Carolina, in 1982.⁷ There, North Carolina chose a poor, predominantly African American community as the site of a toxic waste landfill to dispose of polychlorinated biphenyls illegally dumped along the roadways of fourteen counties.⁸ African Americans mobilized a national, nonviolent sit-in protest against the placement of the landfill.⁹ Over five hundred environmentalists and civil rights activists were arrested.¹⁰ While the protest did not stop the landfill from being constructed, the protest has been identified as the beginning of the EJ Movement.¹¹

However, recognition that non-white and low-income communities were being exposed to environmental dangers in greater proportion than their white and affluent counterparts began earlier during the Civil Rights Movement.¹² In 1968, garbage workers in Memphis, Tennessee, went on strike to protest unequal pay and hazardous working conditions for African American employees.¹³ This was the first time Black Americans organized nationally to oppose environmental injustices.¹⁴

In 1979, the Northeast Community Action Group, a group of African American homeowners in Houston, Texas, filed a class-action lawsuit to block the construction of a sanitary landfill within 1500 feet of a public school.¹⁵ Although the lawsuit failed to stop the landfill, it was significant because it was the first time civil rights claims were brought on the basis of environmental discrimination involving the siting of a waste facility.¹⁶ The lawsuit spurred a 1983 study by Dr. Robert Bullard, which established a direct correlation between race and the siting of toxic waste sites, garbage dumps and incinerators, and landfills in Houston.¹⁷ Dr. Bullard's research was validated by a General Accounting Office study that reached a similar

⁷ See, e.g., Alejandra Borunda, *The Origins of Environmental Justice—and Why It's Finally Getting the Attention It Deserves*, NAT'L GEOGRAPHIC (Feb. 24, 2021), <https://www.nationalgeographic.com/environment/article/environmental-justice-origins-why-finally-getting-the-attention-it-deserves>.

⁸ Office of Legacy Mgmt., *Environmental Justice History*, U.S. DEP'T OF ENERGY, <https://www.energy.gov/lm/services/environmental-justice/environmental-justice-history> (last visited Apr. 9, 2022).

⁹ *Id.*

¹⁰ *Id.*

¹¹ Borunda, *supra* note 7.

¹² *Environmental Justice Timeline*, EPA, <https://www.epa.gov/environmentaljustice/environmental-justice-timeline> (last updated Aug. 3, 2021).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*; *Bean v. Southwestern Waste Management Corp.*, 482 F. Supp. 673, 681 (S.D. Tex. 1979).

¹⁷ Robert D. Bullard, *Solid Waste Sites and the Black Houston Community*, 53 SOCIO. INQUIRY 273, 273 (1983). Dr. Bullard later published a book examining the same issue. ROBERT D. BULLARD, *DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY* (Routledge 3d. 2000) (1990).

conclusion when reviewing census data and landfill information from states within EPA Region IV.¹⁸

This conclusion was further confirmed by a study commissioned by the United Church of Christ that examined the siting of hazardous waste landfills throughout the country.¹⁹ Released in 1987, the study found that the siting of toxic waste landfills in minority and low-income communities was an “insidious form of racism.”²⁰

Following these reports, Congress pressed EPA to address EJ concerns. In April 1990, The Congressional Black Caucus, a bipartisan coalition of academics, social scientists, and political activists, met with EPA to discuss its findings that environmental risk was higher for minority and low-income populations.²¹ The caucus alleged that EPA's inspections were not addressing the communities' needs.²²

II. EPA’S EVOLVING APPROACH TO ENVIRONMENTAL JUSTICE

A. *Environmental Equity Workgroup Report*

In July 1990, EPA established an Environmental Equity Workgroup to “review evidence that racial minority and low-income communities bear a disproportionate burden of environmental risk.”²³ In response, the Workgroup issued a two-volume report finding: “evidence indicates that racial minority and low-income populations are disproportionately exposed to lead, selected air pollutants, hazardous waste facilities, contaminated fish tissue and agricultural pesticides in the workplace.”²⁴ The report reviewed several scientific studies identifying inequity in environmental decision-making in those areas based on race and income.²⁵ The report authors concluded that “Black males and females die from cancer at all [locations evaluated] at rates (33% and 16%, respectfully (sic)) greater than Whites.”²⁶

¹⁸ U.S. GOV’T ACCOUNTABILITY OFF., GAO-83-168, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITY (1983).

¹⁹ UNITED CHURCH OF CHRIST, COMM’N FOR RACIAL JUSTICE, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES (1987).

²⁰ *Id.* at x.

²¹ *Environmental Justice*, AVOICE, <http://www.avoiceline.org/environmental/history.html> (last visited Apr. 8, 2022).

²² *Id.*

²³ EPA, ENVIRONMENTAL EQUITY—REDUCING RISK FOR ALL COMMUNITIES VOLUME 1: WORKGROUP REPORT TO THE ADMINISTRATOR COVER LETTER (1992) [hereinafter WORKGROUP REPORT].

²⁴ *Id.*

²⁵ *Id.* at 1.

²⁶ *Id.* at 6.

The Workgroup identified a myriad of concerns that the Agency needed to address both in its application of administrative and environmental laws and external factors such as socioeconomics that created risks to EJ communities. For example, the report noted ways EPA could alleviate that risk in the implementation and enforcement of hazardous waste laws.²⁷ However, the Workgroup did not recommend that the Agency deny permits if an EJ community would suffer disproportionate harm or adverse cumulative impacts associated with pollution sources. Instead, it proposed the imposition of conditions or limitations on the siting of hazardous waste facilities or issuance of pollution permits. Several of the Workgroup's recommendations and observations are described below as a means of determining whether EPA has, since 1992, taken a more active role in protecting minority and low-income communities through setting standards, enforcement, and permitting.

The Equity Workgroup authors identified several impediments to addressing the acknowledged disparity in the siting of hazardous waste facilities, including the need for managerial environmental equity awareness workshops.²⁸ In an effort to deflect responsibility for exercising their legal authority to condition or deny permits, managers from the Office of Solid Waste and Emergency Response ("OSWER"), which manages the CERCLA and RCRA programs, expressed the view that people who objected to the siting of hazardous waste facilities in their communities ("NIMBYs"²⁹) were causing those facilities to be moved to EJ communities because they had the "least ability to mount a protest."³⁰ OSWER managers recognized that their ability to control this reaction was limited as siting decisions were mostly made at the local and state level before EPA was presented with a permit to review. To overcome this problem, they recommended that EPA provide "enhanced leadership" to the states to correct these problems and "exercise increased oversight in the siting and permitting of hazardous and solid waste management facilities."³¹ In addition, the managers recommended that permit writers should receive equity training. Further, EPA could provide Technical

²⁷ *Id.* at 17–26. These laws included the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA" or "Superfund,"), the Resource Conservation and Recovery Act ("RCRA") and the Clean Air Act ("CAA"). RCRA has been amended and is now identified as the Solid Waste Disposal Act, 42 USC § 6901, et seq. For ease of reference, the amended act is referred to herein as RCRA.

²⁸ *Id.* at 17–20.

²⁹ NIMBY is an acronym for "Not In My Backyard." See Peter D. Kinder, *Not in My Backyard Phenomenon*, BRITANNICA, <https://www.britannica.com/topic/Not-in-My-Backyard-Phenomenon> (last visited Apr. 21, 2022).

³⁰ *Id.* at 18.

³¹ *Id.*

Assistance Grants to EJ communities so they could hire experts to explain the proposed facility's risk to the community.³²

Turning to address disparate impacts from air pollution sources, the Workgroup believed that the Clean Air Act's "strict non-attainment provisions should result in improved air quality for low-income and racial minority communities."³³ Since the publication of the report, progress has been made to reduce air pollution for many areas of the nation; however, in many cities and even rural areas, it has not.³⁴ This can be attributed to EPA's failure to fully assert its authority to set stricter National Ambient Air Quality Standards ("NAAQS") or to require permits for facilities impacting EJ communities to be more protective than the NAAQS.³⁵

The Workgroup noted that while the CAA did not grant the Agency the ability to consider equity in its rulemaking, EPA had the authority to object to CAA permits if they increased environmental risk to EJ communities.³⁶ Moreover, the statute's permitting provisions give EPA the right to object to any permit on the basis of other requirements of the Act related to increased environmental risks associated with exposed communities.³⁷ Also, the pre-construction review provision of the CAA, section 173(a)(5), gives EPA direct authority to examine "social costs imposed as a result of ... [a new major source in non-attainment area] location, construction, or modification."³⁸ If

³² *Id.* at 17–26; *Environmental Justice Grants, Funding and Technical Assistance*, EPA, <https://www.epa.gov/environmentaljustice/environmental-justice-grants-funding-and-technical-assistance> (last updated Jan. 13, 2022). EPA has been administering such grants since 2015 in a variety of contexts. See *Environmental Justice Program Funded Projects*, EPA, <https://www.epa.gov/environmentaljustice/environmental-justice-program-funded-projects> (last updated Nov. 16, 2021). While important, it does not appear that any grants have been made to EJ communities so they could hire experts to review and challenge a proposed permit. Some grants have been made to assist in identifying violations of environmental laws. *EPA and Camden, New Jersey Tackle Illegal Dumping*, EPA (Oct. 4, 2018), <https://archive.epa.gov/epa/newsreleases/epa-and-camden-new-jersey-tackle-illegal-dumping.html>.

³³ WORKGROUP REPORT, *supra* note 23 at 26. "Nonattainment" refers to those areas that do not meet national primary (human health) or secondary (natural resources) standards called National Ambient Air Quality Standards (NAAQS). *NAAQS Designations Process*, EPA, <https://www.epa.gov/criteria-air-pollutants/naaqs-designations-process> (last updated Nov. 26, 2021).

³⁴ See Christopher W. Tessem et al., *PM2.5 Polluters Disproportionately and Systemically Affect People of Color in the United States*, 7 SCI. ADVANCES 1, 1 (2021); *Current Nonattainment Counties for All Criteria Pollutants*, EPA, <https://www3.epa.gov/airquality/greenbook/ancl.html> (last updated Feb. 28, 2022); *Death by Dirty Diesel*, CLEAN AIR TASK FORCE, <https://www.catf.us/deathsbydiesel/> (last visited Mar. 24, 2022).

³⁵ The Clean Air Act requires EPA to set primary (human health) and secondary (environmental) air pollution standards. 42 U.S.C. § 7409(a)(1); *Process of Reviewing the National Ambient Air Quality Standards*, EPA, <https://www.epa.gov/criteria-air-pollutants/process-reviewing-national-ambient-air-quality-standards> (last updated Nov. 15, 2021).

³⁶ WORKGROUP REPORT, *supra* note 23 at 23.

³⁷ See 42 U.S.C. § 7661d (CAA section 505(b)) ("If any permit contains provisions that are determined by the Administrator as not in compliance with the applicable requirements of this Act ...the Administrator shall ...object to its issuance").

³⁸ 42 U.S.C. § 7503(a)(5) (CAA § 173(a)(5)).

EPA were to set standards for evaluating the equitable impacts of air permits, it could use these sections to raise equity concerns.³⁹

EPA's ability under the Act to set NAAQS, which are meant to provide an adequate margin of safety to protect public health, was also cited as fertile ground for the Agency to expand EJ concerns. Thus, if an identifiable portion of the population is more susceptible to health effects associated with NAAQS pollutants, that information should be incorporated when the standards are set or revised.⁴⁰ However, even though such populations have been identified in the setting, for example, of fine particulate matter health standards, EPA has failed to set those standards at a level sufficient to protect vulnerable citizens who live in EJ communities.⁴¹ The group advised EPA that it could promote research to determine whether such communities are subject to a higher degree of residual risk, which is a risk that remains after setting technology-based standards for hazardous air pollutants.⁴² If so, those standards could be adjusted to protect EJ communities. The Workgroup noted that, at that time, there were no published, peer-reviewed Agency guidelines for risk management decision-making.⁴³

In sum, the Workgroup found that "racial minority and low-income populations experience higher than average exposures to selected air pollutants, hazardous waste facilities, contaminated fish and agricultural pesticides in the workplace."⁴⁴ Further, although exposure to pollution does not always result in an immediate health effect, high exposures, and the possibility of chronic effects, were a clear cause for health concerns. Through existing authority, EPA could effectively address disproportionate risk and should "increase the priority it gives to issues of environmental equity."⁴⁵ To address these concerns, the Equity Workgroup advised the Agency to review and revise its permitting, monitoring, and enforcement procedures to address "high concentrations of risk" in EJ communities.⁴⁶ Unfortunately, no suggestions were made as to how the Agency could work to recognize these opportunities

³⁹ WORKGROUP REPORT, *supra* note 23 at 24.

⁴⁰ *Id.*

⁴¹ WORKGROUP REPORT, *supra* note 23 at 17–26. *See also* Letter from Indep. Particulate Matter Rev. Panel to Andrew Wheeler, Administrator of U.S. Env't Prot. Agency (Oct. 22, 2019), <https://ucs-documents.s3.amazonaws.com/science-and-democracy/IPMRP-FINAL-LETTER-ON-DRAFT-PA-191022.pdf>.

⁴² WORKGROUP REPORT, *supra* note 23 at 24.

⁴³ *Id.* at 30.

⁴⁴ EPA, EPA230-R-92-008A, ENVIRONMENTAL EQUITY: REDUCING RISK FOR ALL COMMUNITIES, VOLUME 2, SUPPORTING DOCUMENT 3 (1992).

⁴⁵ *Id.* at 3–4.

⁴⁶ *Id.* at 4. Following the Workgroup's recommendation, EPA's Office of Environmental Equity was established in November of 1992. Decohn Ferris, *A Challenge to EPA: An Environmental Justice Office Is Needed*, 18 EPA J. 28, 28 (1992). It later became the Office of Environmental Justice. EPA, OFFICE OF ENVIRONMENTAL JUSTICE IN ACTION 1 (2017), https://www.epa.gov/sites/default/files/2017-09/documents/epa_office_of_environmental_justice_factsheet.pdf.

or how EJ communities could best present evidence of disproportionate or cumulative harm. As discussed below, this recommendation has not been realized in a meaningful way in the subsequent thirty years.

B. EPA Response to the Equity Workgroup Report

Even before it was publicly available, the Equity Workgroup report generated Agency-wide interest and reflection. In the March/April 1992 edition of the EPA Journal, Administrator William Reilly wrote an article explaining EPA's position on environmental equity and the findings of the Workgroup.⁴⁷ It appears that his decision to commission the Workgroup had been spawned by "talk of environmental racism at EPA" and how those claims infuriated him.⁴⁸ He vowed to "get to the bottom of these charges" and either "refute or respond to them."⁴⁹ The Administrator went on to explain that he had directed the Equity Workgroup to make "certain that the consequences of environmental pollution ... [were not] borne unequally by any segment of the population."⁵⁰ Touting the Workgroup's efforts, the Administrator stated that it could find "only one instance of environmental contamination that correlates with race: high blood lead in African American children."⁵¹ This statement ignored the Workgroup's unequivocal finding that minorities and the poor live with higher levels of air pollution than whites and that Black Americans suffer higher incidences of respiratory ailments like asthma than other Americans.⁵² In fact, Administrator Reilly had recognized these problems in a speech given two years earlier, as did the article immediately preceding his in the same journal.⁵³ This omission highlighted one thing the Workgroup had failed to do: examine the then-available data establishing the connection between air pollution and health impacts based upon race and economic status.⁵⁴ As explained below, this omission and EPA's failure to fully address it continues to adversely affect EJ communities.

Administrator Reilly went on to observe that "lasting progress" would only be achieved if the Agency had "the right people in the right place," which meant "having more representatives from minorities making decisions

⁴⁷ William Riley, *Environmental Equity, EPA's Position*, 18 EPA J. 18, 20–21 (1992).

⁴⁸ *Id.* at 18.

⁴⁹ *Id.*

⁵⁰ *Id.* at 19–21. The Administrator's article was accompanied by the findings and recommendations of the Workgroup. One of the recommendations noted above was repeated: EPA should review and revise its permit and enforcement procedures to address concentrated risk in EJ communities.

⁵¹ *Id.* at 19.

⁵² WORKGROUP REPORT, *supra* note 23 at 11, 21.

⁵³ Bunyan Bryant & Paul Mohai, *The Michigan Conference: A Turning Point*, 18 EPA J. 9, 10 (1992); D.R. Wernette & L.A. Nieves, *Breathing Polluted Air*, 18 EPA J. 16, 16 (1992).

⁵⁴ Lawrence S. Wissow et al., *Poverty, Race, and Hospitalization for Childhood Asthma*, 78 AM. J. PUB. HEALTH 777, 777–82 (1988).

and managing programs.”⁵⁵ He noted that at the time only 4% of EPA executive staff and only 10% of those in managerial positions were minorities.⁵⁶ Since that time, there have been many people from various minority groups appointed to executive positions and hired in managerial positions within EPA.⁵⁷ However, there has only been one minority appointed to the Agency’s Environmental Appeals Board (“EAB”), the administrative tribunal that evaluates the actions of the Agency.⁵⁸ Those actions include EPA’s handling of EJ issues in enforcement and permitting under all major environmental statutes administered by the Agency.⁵⁹ A review of EAB decisions over the last 20 years reveals that the EAB has never recommended on the basis of EJ concerns the denial or conditioning of a permit or regulation issued by EPA.⁶⁰

The Administrator’s article was accompanied by the findings and recommendations of the Equity Workgroup. One recommendation is particularly relevant here: “EPA should selectively review and revise its permit, grant, monitoring, and enforcement procedures to address high concentrations of risk in racial minority and low-income communities. Since state and local governments have primary authority for many environmental programs, EPA should emphasize its concerns about environmental equity to them.”⁶¹ As discussed below, this refrain has been repeated for three decades but with little success.

C. EJ in the 1990s: National Environmental Justice Advisory Council, Executive Order 12898, and Legal Advice to EPA

In 1993, EPA Administrator Carol Browner established the National Environmental Justice Advisory Council (“NEJAC”), which was designated pursuant to the Federal Advisory Committee Act.⁶² NEJAC provides a nationwide public forum for the discussion of EJ issues.⁶³ The Council’s major objectives are to provide advice and recommendations to the Agency on several efforts, including integrating EJ considerations into EPA programs, improving public health in disproportionately burdened communities, and

⁵⁵ Riley, *supra* note 46 at 20.

⁵⁶ *Id.* at 21.

⁵⁷ *Id.*

⁵⁸ See *About the Environmental Appeals Board*, EPA, https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/General+Information/About+the+Environmental+Appeals+Board?OpenDocument (last updated May 2, 2022).

⁵⁹ EPA, *Environmental Protection—Has It Been Fair?*, 18 EPA J. 1, 63 (1992).

⁶⁰ Press Release, EPA, Report on Environmental Equity: Reducing Risk for All Communities (Jul. 22, 1992), <https://archive.epa.gov/epa/aboutepa/report-environmental-equity-reducing-risks-all-communities.html>.

⁶¹ *Id.*

⁶² EPA, NATIONAL ENVIRONMENTAL JUSTICE ADVISORY COUNCIL 20-YEAR RETROSPECTIVE REPORT 9 (2021).

⁶³ *Id.*

ensuring meaningful involvement in EPA decision-making.⁶⁴ Over almost three decades, NEJAC has provided recommendations to EPA management, several of which address environmental equity in permitting decisions.⁶⁵ Over time, the approach and scope of the NEJAC grew.⁶⁶ However, the Agency did not always adopt the Council's recommendations.⁶⁷

In recognition of the uncontroverted evidence of racism in environmental decision-making, President Clinton issued Executive Order ("E.O.") 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, in 1994.⁶⁸ The E.O. states:

To the greatest extent practicable and permitted by law, ... each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States⁶⁹

Much like Administrator Reilly had directed the EPA Equity Working Group four years earlier, the Executive Order directed the Administrator of EPA to head an Interagency Working Group on EJ.⁷⁰ The interagency group was to provide guidance to federal agencies "on criteria for identifying disproportionately high and adverse human health or environmental effects on minority populations or low-income populations."⁷¹ In turn, those agencies were to develop strategies that identified and addressed those impacts.⁷² The strategies were to, among other things, list programs, policies, and rule-makings that should be revised to promote enforcement of environmental statutes in EJ areas, ensure greater public participation, and improve research on health effects specifically related to EJ populations.⁷³ While an important policy statement, the Executive Order does not recognize that federal agencies are authorized to condition or deny the issuance of air, water, or hazardous waste pollution permits to protect EJ communities from disproportionate

⁶⁴ *Id.* at 10.

⁶⁵ *Id.* at 12.

⁶⁶ *Id.* at 26.

⁶⁷ *Id.* at 27.

⁶⁸ Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 Fed. Reg. 7629, 7269 (Feb. 16, 1994).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 7630.

⁷² *Id.*

⁷³ *Id.*

or cumulative health impacts. Moreover, the Executive Order does not provide a private right of action to sue and enforce its terms.⁷⁴

On the heels of the Executive Order and the findings of EPA's Equity Workgroup, the EAB issued an opinion that initially undercut the Agency's efforts to address EJ in permitting. In 1993, the EAB considered *In the Matter of Genesee Power Station Limited Partnership*.⁷⁵ In its initial opinion, the EAB refused to consider claims of discrimination and EJ, asserting they were beyond its purview.⁷⁶ In response, EPA's General Counsel moved to have those portions of the Board's decision stricken but still deny review, essentially excising portions of the original opinion addressing EJ issues.⁷⁷ The General Counsel urged that these issues were still developing within the EPA regional offices and required a broader, national evaluation.⁷⁸ Thus, the General Counsel argued, the Board should defer ruling on EJ matters until that evaluation could occur.⁷⁹ After review, the EAB granted the motion agreeing that the concept of EJ in permitting was evolving at EPA in the wake of the President's Executive Order and needed to be resolved by EPA nationally before the EAB could effectively consider the issue in reviewing administrative appeals.⁸⁰

In 1995, EPA adopted a "strategy" that "[n]o segment of the population, regardless of race, color, national origin, or income, as a result of EPA's policies, programs, and activities, suffers disproportionately from adverse human health or environmental effects, and all people live in clean, healthy and sustainable communities."⁸¹ The guiding principle of the "[s]trategy is to ensure the integration of EJ into the Agency's programs, policies, and activities consistent with the Executive Order."⁸² The object of the strategy was to

⁷⁴ *Id.* at 7632–33. *See also* *Sur Contra la Contaminacion v. EPA*, 202 F.3d 443, 449 (1st Cir. 2000) (stating that the Executive Order on Environmental Justice was intended only to improve the internal management of the executive branch and that there is no right to judicial review of agency decisions pursuant to the order); *Sierra Club v. FERC*, 867 F.3d 1357, 1376 (D.C. Cir. 2017) (stating that agency decisions may be challenged if the agency fails to take a "hard look" at environmental justice issues); *New River Valley Greens v. U.S. Dep't of Transp.*, No. 95-1203-R, 1996 U.S. Dist. LEXIS 16547, at *19 (W.D. Va. Oct. 2, 1996); *Cmtys. Against Runway Expansion, Inc. v. FAA*, 355 F.3d 678, 688–89 (D.C. Cir. 2003) (holding that although there is no direct right to enforce the terms of the Executive Order against a federal agency, courts have held that an agency decision can be challenged as arbitrary and capricious under the Administrative Procedure Act if it unjustifiably deviates from the order's directives); *Chem. Waste Mgmt.*, 6 E.A.D. 66, 76 (1995) (Section 6-609 does not affect implementation of the Order within an agency).

⁷⁵ *In re Genesee Power Station Ltd. P'ship*, 4 E.A.D. 832, 832 (1993).

⁷⁶ *Id.* at 839 n.8.

⁷⁷ *Id.* at 832.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ EPA, THE ENVIRONMENTAL PROTECTION AGENCY'S ENVIRONMENTAL JUSTICE STRATEGY 3 (1995).

⁸² *Id.*

“bring justice to Americans who are suffering disproportionately....”⁸³ This included a focus on EJ issues in enforcement, compliance, and regulatory review.⁸⁴ In addition, EPA was to implement Title VI of the Civil Rights Act,⁸⁵ the National Environmental Policy Act, and Section 309 of the Clean Air Act and identify and respond to any regulatory gaps in the protection of covered populations.⁸⁶

As a means of ensuring compliance, EPA and state partners were encouraged to obtain Supplemental Environmental Projects (“SEPs”) when negotiating settlements.⁸⁷ Such projects would promote pollution prevention, remedy environmental damage, and collect adequate monetary fines with the goal of reducing long-term exposures within EJ communities.⁸⁸ These were laudable goals, and for many years, EPA did press settling parties to undertake SEPs in EJ communities. However, because this strategy was just a policy of the Agency, in 2020, the U.S. Department of Justice was able to eliminate such settlements for matters referred from EPA by simply issuing a policy directive.⁸⁹

⁸³ *Id.*

⁸⁴ *Id.* at 6.

⁸⁵ *Id.* at 13. The Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, or national origin in any program or activity that receives federal funds or other federal financial assistance. 42 U.S.C. § 2000e-2(a) (2021). EJ citizen groups have attempted to use Title VI to block projects receiving federal financing that could harm them or their environment. *See* Guardians Ass’n v. Civil Serv. Comm’n, 463 U.S. 582, 586 (1983). Unfortunately, Title VI of the Civil Rights Act has been largely ineffective in addressing Environmental Justice issues due to the requirement of having to establish intentional discrimination in agency decision-making. *See* Alexander v. Sandoval, 532 U.S. 275, 280 (2001); Albert Huang, *Environmental Justice and Title VI of the Civil Rights Act: A Critical Crossroads*, AM. BAR ASS’N (Mar. 1, 2021), https://www.americanbar.org/groups/environment_energy_resources/publications/trends/2011_12/march_april/environmental_justice_title_vi_civil_rights_act/. In February 1998, EPA published draft guidelines for citizens and EPA concerning allegations of Title VI violations in permitting. *See generally* EPA, INTERIM GUIDANCE FOR INVESTIGATING TITLE VI ADMINISTRATIVE COMPLAINTS CHALLENGING PERMITS (1998); June M. Lyle, *Reactions to EPA’s Interim Guidance: The Growing Battle for Control over Environmental Justice Decisionmaking*, 75 IND. L.J. 687, 696 (2000). EPA’s guidance established parameters for filing a properly pleaded Title VI complaint; however, the guidance did not create any rights enforceable in court against the United States. Further, EPA did not have to follow the guidance depending on the specific facts of a complaint. *See generally* EPA, INTERIM GUIDANCE FOR INVESTIGATING TITLE VI ADMINISTRATIVE COMPLAINTS CHALLENGING PERMITS (1998). EPA has created the External Civil Rights Compliance Office (ECRCO) to enforce its own Title VI regulations. *External Rights Compliance Office (Title VI)*, EPA, <https://www.epa.gov/ogc/external-civil-rights-compliance-office-title-vi> (last visited Apr. 1, 2022). Unfortunately, the majority of the complaints lodged with ECRCO remain unresolved. *See generally* EPA, COMPLAINTS RECEIVED BY EPA, ECRCO IN FISCAL YEAR 2022 TO DATE (2022).

⁸⁶ EPA, *supra* note 80 at 13.

⁸⁷ *Id.* at 14.

⁸⁸ *Id.*

⁸⁹ U.S. Dep’t of Just., Environment & Natural Resources Div., Memorandum on Supplemental Environmental Projects (“SEPs”) in Civil Settlements with Private Defendants 18 (Mar. 12, 2020). This directive has since been rescinded. U.S. Dep’t of Just., Environment & Natural Resources Div., Memorandum on Withdrawal of Memoranda and Policy Statements (Feb. 4, 2021).

In July 1996, Professor Richard Lazarus, as a member of the NEJAC's Enforcement Subcommittee, authored and submitted to EPA a memorandum questioning the assumption that EPA did not have the ability to condition or deny permits in the face of EJ concerns.⁹⁰ The memorandum was “concerned exclusively with whether EPA possesses *authority* that it has not yet chosen to exercise.”⁹¹ The findings of the memorandum were meant to be the “opening salvo” in NEJAC’s effort to push EPA to more “systematically use its considerable permitting authority to promote EJ.”⁹² Professor Lazarus described the factors that may raise EJ concerns and permit conditions EPA might impose, surveyed recent EAB decisions addressing the issue, and reviewed federal environmental laws for such authority.⁹³ In conclusion, Professor Lazarus argued that EPA had far more authority in conditioning and denying permits to address issues of EJ than it had recognized.⁹⁴ Moreover, EPA could condition permits to require the permittee to help the exposed community develop an enforcement capability to oversee the regulated facility.⁹⁵

At its December 1996 meeting, NEJAC adopted a resolution asking EPA to undertake a comprehensive survey of its existing statutory and regulatory authority to promote EJ.⁹⁶ This resolution echoed the recommendation of the Equity Workgroup in 1992.⁹⁷ The resulting memoranda identified opportunities under seven statutes and their implementing regulations.⁹⁸ Nevertheless, NEJAC observed that EPA may need to issue regulations and guidance to address instances of environmental injustice through the implementation of the existing statutes and regulations.⁹⁹

In 1997, three years after President Clinton’s Executive Order directed federal agencies to act, the White House Council on Environmental Quality (“CEQ”) and EPA developed “Environmental Justice Guidance Under the National Environmental Policy Act.”¹⁰⁰ As the title suggests, the guidance,

⁹⁰ Nat’l Env’t Just. Advoc. Comm., Draft Memorandum on Integrating Environmental Justice Authority at 2 (July 18, 1996).

⁹¹ *Id.*

⁹² *Id.* at 23.

⁹³ *Id.* at 2; Richard J. Lazarus & Stephanie Tai, *Integrating Environmental Justice into EPA Permitting Authority*, 26 *ECOLOGY L.Q.* 617, 625–26 (1999).

⁹⁴ Nat’l Env’t Just. Advoc. Comm., *supra* note 89 at 23.

⁹⁵ *Id.*

⁹⁶ Executive Summary, Nat’l Env’t Just. Advisory Council, Eight Meeting of the National Environmental Justice Advisory Council at ES-3 (Dec. 10–12, 1996).

⁹⁷ *Id.*

⁹⁸ National Environmental Justice Advisory Council; Notification of Meeting and Public Comment Period(s); Open Meetings Notice, 64 *Fed. Reg.* 60,191, 60,192 (Nov. 4, 1999).

⁹⁹ *Id.*

¹⁰⁰ COUNCIL ON ENVTL. QUALITY, ENVIRONMENTAL JUSTICE: GUIDANCE UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT 1 (1997).

which is still operative, was designed to inform federal agencies on how to incorporate the Executive Order's Environmental Justice directives into their review of projects for compliance with the National Environmental Policy Act ("NEPA").¹⁰¹ The Guidance directs federal agencies conducting NEPA reviews to address significant and adverse environmental effects on EJ communities,¹⁰² analyze and assess human health, social, and economic effects on minority communities,¹⁰³ and consider EJ issues at each step of the process.¹⁰⁴

Federal agencies are to adhere to six "General Principles" such as determining if there is an EJ community near the proposed action and whether it may be exposed to any disproportionately high adverse health or environmental effects or cumulative impacts.¹⁰⁵ Cumulative effects must be considered even if they "are not within the control or subject to the discretion of the agency proposing the action."¹⁰⁶ Despite these directives, the guidance states that if such impacts are found, federal agencies are not prevented from allowing a project to go forward nor required to presume that a "proposed action is environmentally unsatisfactory."¹⁰⁷ Such a finding should only "heighten agency attention to alternatives (including alternative sites), mitigation strategies, monitoring needs, and preferences expressed by the affected community or population."¹⁰⁸ Moreover, these directives, like the EO, are not "justiciable in any proceeding for judicial review of Agency action."¹⁰⁹

Despite the need to evaluate whether a federal agency action will cause disproportionate or cumulative harm, CEQ does not direct agencies to recommend that the proposed action not be taken or altered in a way to prevent such harm. According to CEQ, the agency should simply "encourage" affected communities "to help develop and comment on possible alternatives to the proposed agency action as early as possible in the process."¹¹⁰ In addition, agencies should determine "the *environmentally* preferable alternative," not one that avoids or minimizes harm to humans living in EJ communities.¹¹¹

¹⁰¹ *Id.*

¹⁰² *Id.* at 1–2.

¹⁰³ *Id.* at 5.

¹⁰⁴ *Id.* at 8; 40 C.F.R. § 1508.8 (2002) (CEQ regulations define "effects" or "impacts" to include "ecological...aesthetic, historic, cultural, economic, social or health, whether direct, indirect or cumulative."); 40 C.F.R. § 1508.14 (2012).

¹⁰⁵ COUNCIL ON ENVTL. QUALITY, *supra* note 99 at 9.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 10.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 23.

¹¹⁰ *Id.* at 15.

¹¹¹ *Id.* (emphasis added).

CEQ does not explain how impoverished communities or those lacking technical expertise should undertake such an analysis. Thus, the guidance provides agencies with unrealistic solutions for citizens who are low-income or who lack the ability to challenge technical agency decisions effectively. For example, EJ communities are ill-equipped to challenge federal actions affecting air quality under the Clean Air Act. They do not have the expertise or financial ability to address statutory requirements like how much air pollution will fall on their neighborhoods or provide a statistical analysis of how many people are likely to be harmed by that pollution, nor can they identify which air pollution control technology is likely to provide the most protection from a specific air pollutant and how much it will cost to install and operate.¹¹²

In the wake of CEQ's guidance, federal agencies have required alternatives to protect sensitive species or habitats and examined whether an EJ community exists, but they have not required alternatives to avoid harm to such communities. For example, in 2017, the Federal Energy Regulatory Commission ("FERC") conducted an Environmental Impact Statement ("EIS") for the proposed 467-mile Atlantic Coast Pipeline, which was to transport natural gas from West Virginia, through Virginia, into North Carolina.¹¹³ Several compressor stations would be necessary to move the gas south.¹¹⁴ While not identified in its draft EIS, due to numerous public comments, FERC later identified an EJ community near a compressor station slated for Buckingham, Virginia.¹¹⁵ The community is comprised primarily of African Americans, many of whom are descendants of formerly enslaved people.¹¹⁶ FERC noted the potential harm air pollutants from the station would inflict on that community, given its special sensitivity to air

¹¹² When a new or increased source of air pollution is proposed a New Source Review permit may be required. 40 C.F.R. § 52.21 (2021). If so, one aspect of obtaining such a permit is determining what level of control technology must be installed on the proposed facility to limit emissions. *RACT/BACT/LAER Clearinghouse: Basic Information*, EPA (Feb. 2, 2016), <https://www3.epa.gov/ttnecat1/rblc/htm/welcome.html>. Determining the proper control technology is dependent upon several factors including the kind and amount of pollution being emitted as well as the cost and efficiency of relevant control technologies available. *Id.* This is a complex analysis requiring specialized expertise and is beyond the ability of the average citizen.

¹¹³ FERC, ATLANTIC COAST PIPELINE AND SUPPLY HEADER PROJECT: FINAL ENVIRONMENTAL IMPACT STATEMENT, VOL. I, DOCKET NOS. CP15554-000, CP15-554-001, CP15-555-000, AND CP15-556-000 FERC/EIS-0274F ES1–ES2 (2017) [hereinafter FINAL EIS].

¹¹⁴ *Id.* at ES-1. The Atlantic Coast Pipeline has since been abandoned but has had to develop a restoration plan for parts of the pipeline under construction at the termination date. Lisa Sorg, *Monday Numbers: A Close Look at What's Next Now That the Atlantic Coast Pipeline Has Been Canceled*, NC POL'Y WATCH (Aug. 9, 2021), <https://ncpolicywatch.com/2021/08/09/monday-numbers-a-close-look-at-whats-next-now-that-the-atlantic-coast-pipeline-has-been-canceled/>.

¹¹⁵ FINAL EIS, *supra* note 112 at 5-30.

¹¹⁶ *Id.*; Ben Paviour, *A Historically Black Town Stood in the Way of a Pipeline - So Developers Claimed it Was Mostly White*, VPM (Sept. 15, 2021), <https://vpm.org/news/articles/25485/a-historically-black-town-stood-in-the-way-of-a-pipeline-so-developers-claimed>.

pollution.¹¹⁷ However, the alternative of moving the compressor station to a distance more remote from the community was rejected because it would have required moving the pipeline one mile.¹¹⁸ FERC believed that the move was unnecessary because the station would comply with NAAQS, so all communities would be protected.¹¹⁹ The Commission reached this conclusion although it recognized the community's sensitivity to air pollution below NAAQS levels.¹²⁰ Moreover, FERC had no qualms about moving the pipeline in several locations to protect sensitive geologic features and natural resources.¹²¹ It is hard to understand, especially for affected communities, how a federal regulatory agency that is charged with stimulating "the health and welfare of man" can require the protection of inanimate objects but not humans.¹²² Such decision-making only heightens the belief that government, at any level, does not value minority and low-income individuals.

In 1999, Professor Lazarus was the lead author of a law review article predicated upon his 1996 NEJAC memorandum to EPA.¹²³ The article identified various environmental laws and regulations that EPA could use to insert EJ concepts into its permitting of air, water, and land polluting facilities.¹²⁴ The authors highlighted how the EAB had shaped the Agency's perspective on Environmental Justice since its inception.¹²⁵ They noted that over the prior ten years, the Board had evolved from being "reflexively skeptical" of EJ claims and automatically deferring to the Agency decision-makers.¹²⁶ The authors believed that as of 1999, the EAB evaluated those claims based upon the facts of each case.¹²⁷ Hence, citizen challenges to permitting decisions on EJ grounds could be successful if citizens could provide expert evidence controverting the basis of EPA's decision.¹²⁸ Even then, judicial challenges would be difficult because courts traditionally defer to the expertise of the Agency.¹²⁹ The authors posited that EPA needed to develop guidelines through which it could appropriately evaluate such claims and evidence on a case-by-case basis.¹³⁰ They suggested that with such guidance, EPA could better evaluate cumulative and disproportionate risk, deny permits,

¹¹⁷ FINAL EIS, *supra* note 112 at 4-514.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² 42 U.S.C. § 4321 (1970).

¹²³ Lazarus & Tai, *supra* note 92 at 617.

¹²⁴ *Id.* at 620.

¹²⁵ *Id.* at 655.

¹²⁶ *Id.* at 676.

¹²⁷ *Id.* at 676-77.

¹²⁸ *Id.* at 637.

¹²⁹ *Id.* at 677.

¹³⁰ *Id.* at 626.

reduce permitted environmental risk, and impose conditions that allow for greater community participation.¹³¹ The article offered a look forward and believed that based on recent progress within EPA headquarters, regional offices, and the EAB, EPA was on the cusp of promoting EJ concerns more heavily in permitting decisions.¹³²

Following a public meeting held in late 1999, NEJAC wrote a report to Administrator Browner asking the Office of General Counsel to clarify EPA's legal authority and provide guidance on the extent to which permit writers "have a mandatory or discretionary authority to deny permits, condition a permit, or require additional procedures on environmental justice grounds."¹³³ The Advisory Council called upon EPA to follow through on its 1997 Strategic Plan to protect all people regardless of race, income, or nationality from "significant risk to human health and the environment where they live, learn and work."¹³⁴

In its report, the Council noted that workshop participants identified 80 policy recommendations EPA should implement.¹³⁵ The group distilled these policy recommendations down to five key policy themes:

- (1) clarification of the legal authority permit writers have to address environmental justice issues in permitting;¹³⁶
- (2) identification of substantive criteria (including cumulative impacts, degree of risk, community demographics, and disproportionality of risk) that should be considered in permits;
- (3) involvement of local communities in the decision-making process;
- (4) enforcement of permits and environmental laws; and
- (5) clarification of the relationship between land use/zoning and environmental decisions.¹³⁷

With respect to clarifying their legal authority to consider EJ, the Council observed that permit writers repeatedly stated that they lacked legal authority to reject projects on EJ grounds or address EJ concerns in permits.¹³⁸ This "confusion" at the federal level was compounded at the state level: "[w]hen federal agencies fail to address environmental justice concerns, essential environmental decisions are left to states and local governments, which, in turn,

¹³¹ *Id.* at 623.

¹³² *Id.* at 620.

¹³³ OFFICE OF ENVTL. JUSTICE, EPA, ENVIRONMENTAL JUSTICE IN THE PERMITTING PROCESS: A REPORT FROM THE PUBLIC MEETING ON ENVIRONMENTAL PERMITTING CONVENED BY THE NATIONAL ENVIRONMENTAL JUSTICE ADVISORY COUNCIL, ARLINGTON, VIRGINIA – NOVEMBER 30-DECEMBER 2, 1999 1 (2020) [hereinafter PERMITTING PROCESS].

¹³⁴ *Id.*

¹³⁵ *Id.* It is unclear from the report why there were so many recommendations. It could reflect an inability of workshop facilitators to focus attendees or the large number of issues attendees believed EPA needed to address.

¹³⁶ *Id.*

¹³⁷ *Id.* at 19–20.

¹³⁸ *Id.* at 9.

fear tackling them because of potential "takings" lawsuits pursuant to the "just compensation" clause of the Fifth Amendment to the U.S. Constitution."¹³⁹ States were looking to EPA for the tools on how to address EJ in permitting.¹⁴⁰

The Council cited a 1996 Office of General Counsel ("OGC") memorandum identifying existing statutory authority for EPA to act in support of its earlier resolution calling upon EPA to use its statutory authority in a more systematic way to address EJ in permitting.¹⁴¹ Unfortunately, in the subsequent three years, EPA had only acted sporadically.¹⁴² Thus, the NEJAC participants observed that the validity of the OGC's recommendations and the degree to which EPA permit writers could honor the suggestions were uncertain.

Community stakeholders noted that EPA's directive to NEJAC – "what factors should be considered ... prior to allowing a new pollution-generating facility to operate" – presumed that, in every instance, the Agency would grant a permit.¹⁴³ As a result of this and other "takeaways" from the two-day meeting, NEJAC asked EPA to resolve a key question: "Are environmental justice-related factors" just factors to be studied in order to improve the quality of decision-making, do they "hold greater weight and require further scrutiny", or can they stop a project or permit outright regardless of whether the project complies with all applicable laws?¹⁴⁴ Given this uncertainty, NEJAC recommended that OGC again provide legal guidance to federal, state, and tribal permit writers on whether they have a discretionary or mandatory duty to condition or deny a permit or require additional procedures due to EJ issues.¹⁴⁵ The Council then identified the various federal laws OGC should consider in providing this advice.¹⁴⁶

As NEJAC had recommended, in 2000, OGC provided EPA permitting and enforcement programs with yet another memorandum explaining how the Agency could address EJ concerns through existing laws.¹⁴⁷ Following much of the argument presented by Lazarus, et al., EPA General Counsel Gary Guzy examined specific provisions within RCRA, the CWA, the CAA, the SDWA, and the Marine Protection, Research, and Sanctuaries Act that

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* The 1996 OGC memorandum has not been located although it was identified earlier by NEJAC in a notice of an upcoming meeting. See 64 Fed. Reg. 60,191, 60,192 (Nov. 4, 1999).

¹⁴² PERMITTING PROCESS, *supra* note 132 at 10.

¹⁴³ *Id.* at 5.

¹⁴⁴ *Id.* at 10.

¹⁴⁵ *Id.* at 11.

¹⁴⁶ *Id.* at 1, 10–16.

¹⁴⁷ GARY S. GUZY, EPA STATUTORY AND REGULATORY AUTHORITIES UNDER WHICH ENVIRONMENTAL JUSTICE ISSUES MAY BE ADDRESSED IN PERMITTING 1 (2000).

could be relied upon to incorporate EJ concerns into Agency permits and enforcement strategies.¹⁴⁸ The memorandum cited the “omnibus” authority granted to EPA in Section 3005(c)(3) of RCRA that each permit “shall contain such terms and conditions as the Administrator (or the State) determines necessary to protect human health and the environment.”¹⁴⁹ The General Counsel noted that the EAB had interpreted this provision to allow EPA to deny a permit if “the facility would pose an unacceptable risk to human health and the environment and that there are no additional permit terms or conditions that would address such risk.”¹⁵⁰

Among other things, the General Counsel suggested that statutory “omnibus” authority could be applied on a permit-by-permit basis to address health concerns posed by “cumulative risks,” “unique exposure pathways” (e.g., subsistence fishing and farming), and sensitive populations such as children associated with hazardous waste management facilities that may affect EJ communities.¹⁵¹ In addition, EPA could require specific permit conditions necessary to protect human health and the environment.¹⁵² EPA could even compel a facility owner or operator to undertake necessary studies so that EPA could establish those permit terms.¹⁵³ The General Counsel observed that most hazardous waste permits were issued by states pursuant to a delegated program that granted EPA permit oversight.¹⁵⁴ Thus, the General Counsel recommended that during the comment period for both new and renewal permits, EPA could notify the state permitting authority of sensitive population risks or other factors necessary to protect human health or the environment.¹⁵⁵ If the state failed to address these issues by adding them as permit terms, EPA could, pursuant to Section 3008(A)(3), either terminate the permit or bring an action against the permit holder and enforce the permit terms EPA sought.¹⁵⁶

Further, EPA could issue location standards necessary to protect human health and the environment.¹⁵⁷ For example, EPA could establish buffer zones between hazardous waste management facilities and sensitive areas such as schools and residential areas or areas where other hazardous waste facilities have been sited. Permit applicants would need to comply with these

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 2; 42 U.S.C. § 6925c(3) (1976).

¹⁵⁰ GUZY, *supra* note 146 at 3.

¹⁵¹ *Id.*

¹⁵² 40 C.F.R. § 270.10(k) (2022).

¹⁵³ 42 U.S.C. § 6934 (2011); 40 C.F.R. § 270.10(k) (2022).

¹⁵⁴ GUZY, *supra* note 146 at 2.

¹⁵⁵ GUZY, *supra* note 146 at 4; 40 C.F.R. § 271.19(a) (2000).

¹⁵⁶ 42 U.S.C. § 6928a(3) (2011); 40 C.F.R. § 271.19(e) (2000).

¹⁵⁷ 42 U.S.C. § 6924o(7) (2011).

requirements to receive a permit.¹⁵⁸ If these options were not effective, EPA could amend its RCRA regulations to incorporate some of the options described so they became part of the federal program that delegated states must adopt.¹⁵⁹

EPA could take similar actions pursuant to the Clean Water Act through its review of state water quality standards designed to preserve or make state waters “fishable and swimmable.”¹⁶⁰ These standards are designed to protect subsistence fishers and their families, many of whom reside in EJ communities.¹⁶¹ If a water pollution discharge permit presented disproportionate harm to such a community, EPA could limit the discharge. EPA could also exercise its authority to comment on, object to, and veto pollution discharge permits.¹⁶²

According to the General Counsel, that oversight is even greater under Section 404 of the Act, which governs the permitting of wetland dredge and fill actions.¹⁶³ There, EPA is authorized “to use these authorities to prevent degradation of ... public resources that may have a disproportionately high and adverse health or environmental effect on a minority community or low-income community.”¹⁶⁴ These effects can be addressed when they result directly from the filling of a waterbody or are the indirect result of the permitted activity, such as the construction of an industrial facility on a filled wetland that will cause polluted water runoff.¹⁶⁵

OGC also cited EPA’s “omnibus” permitting authority under the Safe Drinking Water Act, Underground Injection Control (“UIC”) program as another means to limit risks to minority and low-income communities.¹⁶⁶ Similarly, the Clean Air Act Prevention of Significant Deterioration (“PSD”), New Source Review, Title V, and Solid Waste Incinerator siting statutes and regulations could allow EJ concerns to be addressed by EPA.¹⁶⁷ The General Counsel noted that states have the primary permitting authority, but EPA has an oversight role and, therefore could address EJ concerns.¹⁶⁸ He observed, as had Lazarus, et al., that EPA’s Environmental Appeals Board could also exert influence in the interpretation of EPA regulations.¹⁶⁹

¹⁵⁸ GUZY, *supra* note 146 at 4.

¹⁵⁹ *Id.* at 5.

¹⁶⁰ *Id.*; 33 U.S.C.A. § 1313(c)(1), (3), (4)(A)–(B) (2020).

¹⁶¹ GUZY, *supra* note 146 at 3, 5, 7.

¹⁶² *Id.* at 7.

¹⁶³ *Id.* at 5; *see generally* 33 U.S.C.A § 1344 (2020).

¹⁶⁴ Guzy, *supra* note 146 at 8; *see generally* 33 U.S.C.A § 1342 (2020).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 9; 40 C.F.R. § 144.52(a)(9) (2006).

¹⁶⁷ Guzy, *supra* note 146 at 10–13.

¹⁶⁸ *Id.* at 10–11.

¹⁶⁹ *Id.* at 11–12.

D. Environmental Law Institute Report on EPA EJ Legal Authority

A year after the OGC 2000 permitting memorandum, the Environmental Law Institute (“ELI”) conducted a similar analysis of the principal federal environmental laws administered by EPA that could be used to advance EJ.¹⁷⁰ While the report was designed to provide information to the public, it largely focused on things EPA could do to further EJ. The report examined ten federal environmental statutes from a permitting and a regulatory standard-setting perspective.¹⁷¹ In addition to the statutes reviewed by OGC, ELI considered Superfund (“CERCLA”), FIFRA, Food, Drug and Cosmetic Act, TSCA, and the Emergency Planning and Community Right-to-Know Act.¹⁷² ELI considered these statutes from two perspectives; Agency decision-making designed to remedy and prevent disproportionate impacts, and opportunities for increased and enhanced public engagement by EJ communities.¹⁷³ ELI’s recommendations were geared towards eliminating disproportionate impacts in EPA decision-making and preventing those impacts in the future.¹⁷⁴

The Institute recommended that “[w]here there is scientific or factual uncertainty regarding health and other impacts, environmental justice principles call for adopting a precautionary approach.”¹⁷⁵ As the General Counsel recognized, EPA decisions that could advance EJ include “setting standards that are protective of health and the environment, establishing permit conditions, and taking enforcement actions, as well as carrying out research, conducting monitoring and reporting, and providing financial assistance.”¹⁷⁶

Like OGC, ELI examined several opportunities for the Agency to take advantage of existing laws, including its expansive discretionary authority under several statutes and its ability to set health and environmental standards and pollution limits.¹⁷⁷ ELI also reviewed EPA’s oversight and approval authorities over state issued pollution permits.¹⁷⁸ The Institute recommended

¹⁷⁰ ENVTL. L. INST., OPPORTUNITIES FOR ADVANCING ENVIRONMENTAL JUSTICE: AN ANALYSIS OF U.S. EPA STATUTORY AUTHORITIES 13 (2001); EPA, OFFICE OF ENVIRONMENTAL JUSTICE MILESTONES 1–2 (2017), https://www.epa.gov/sites/default/files/2017-09/documents/epa_office_of_environmental_justice_factsheet.pdf; Jamie Holguin, *Whitman Quits As EPA Chief*, CBS NEWS (May 21, 2003), <https://www.cbsnews.com/news/whitman-quits-as-epa-chief/>; *Environmental Justice Timeline*, EPA, <https://www.epa.gov/environmentaljustice/environmental-justice-timeline> (last visited Apr. 22, 2022); *Environmental Justice*, *supra* note 4.

¹⁷¹ ENVTL. L. INST., *supra* note 169 at iv.

¹⁷² *Id.*; 42 U.S.C.A. §§ 9601–9675 (2020); 7 U.S.C.A. §§ 136–136(y) (2020); 21 U.S.C.A. §§ 301–397 (2020); 15 U.S.C.A. §§ 2601–2692 (2020); 42 U.S.C.A. §§ 11001–11050 (1986), respectively.

¹⁷³ ENVTL. L. INST., *supra* note 169 at v.

¹⁷⁴ *Id.* at iv.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *See id.* at iv–v, 14. “[I]f EPA stays within the language of the statute and its regulations; courts will grant it broad discretion to fashion appropriate permit conditions.”

¹⁷⁸ *Id.* at 22–23.

that EPA delegate some of these same programs to Native American Tribes.¹⁷⁹ Moreover, ELI recognized that EPA is empowered to enforce these environmental laws in a way that provides EJ.¹⁸⁰ ELI observed that the statutory authority granted to EPA over a broad expanse of programs gave the Agency wide-ranging powers to pursue EJ, but that both internal and external factors beyond the law constrained Agency action.¹⁸¹

ELI also examined the EAB's track record on EJ matters over the previous eight years.¹⁸² It acknowledged Professor Lazarus' optimistic view of the EAB's willingness to find omnibus authority for EPA to review permits.¹⁸³ The Institute did not say whether it shared the view that the EAB could be a source of support for EPA permit writers asserting omnibus authority to condition or deny permits because of EJ concerns. In sum, ELI's report further supported the findings of Professor Lazarus and General Counsel Guzy that existing law provided multiple avenues for EPA to address EJ concerns by providing increased public participation, promulgating improved health and pollution standards, and setting tougher pollution limits through rulemaking, enforcement, and permitting.¹⁸⁴

E. Environmental Justice at EPA During the Obama Years

In September 2010, EPA issued its strategic plan for fiscal years 2011–15.¹⁸⁵ After an almost 10-year hiatus from addressing EJ issues, a priority of that plan was to implement Administrator Lisa Jackson's "Expanding the Conversation on Environmentalism and Working for Environmental Justice."¹⁸⁶ The "conversation" would consider EJ issues in addressing "brownfields," enforcement, educating EJ communities on the value of environmentalism, and protecting children.¹⁸⁷ The roadmap for developing this "conversation" was called "Plan EJ 2014".¹⁸⁸ That plan reviewed and identified aspects of the Agency's ability to promulgate regulations and issue and approve permits to foster EJ and included a renewed evaluation of its legal

¹⁷⁹ *Id.* at 21–22.

¹⁸⁰ *Id.* at 27.

¹⁸¹ *Id.* at 3, 27.

¹⁸² *Id.* at 2, 14, 209–10.

¹⁸³ *Id.* at 210.

¹⁸⁴ *See id.* at 67–68 (describing the ways the National Environmental Policy Act to address EJ concerns).

¹⁸⁵ EPA, FISCAL YEAR 2011-2015 EPA STRATEGIC PLAN I (2010) [hereinafter STRATEGIC PLAN].

¹⁸⁶ *Id.* at 29; *see* Lisa P. Jackson, Admin., Remarks to the Conference on Environmental Justice, Air Quality, Goods Movement and Green Jobs (Jan. 25, 2010) (transcript available at https://archive.epa.gov/epapages/newsroom_archive/speeches/59d30f1c468800d5852576b6006bae3d.html).

¹⁸⁷ Properties contaminated with pollutants that could be cleaned up under CERCLA or RCRA and put to use. STRATEGIC PLAN, *supra* note 184 at 15–16, 29–31; EPA, *Overview of EPA's Brownfields Program*, <https://www.epa.gov/brownfields/overview-epas-brownfields-program> (last visited Mar. 23, 2022).

¹⁸⁸ OFFICE OF ENVTL. JUSTICE, EPA, PLAN EJ 2014 i (2011) [hereinafter PLAN EJ 2014].

authorities.¹⁸⁹ To further EJ, Plan EJ 2014 sought to pursue “vigorous, robust, and effective implementation of Title VI of the Civil Rights Act.¹⁹⁰ One of the permitting goals of the plan was to “enable overburdened communities to have full and meaningful access to the permitting process and to develop permits that address environmental justice issues to the greatest extent practicable under existing environmental laws.”¹⁹¹

Plan EJ 2014 suffered from two shortcomings. First, it did not address NEJAC’s questions concerning the relative hierarchy of considering EJ in permitting decisions: Is it just a box-checking exercise or can permits be conditioned and denied due to EJ concerns? Second, while a powerful weapon for rectifying obvious discrimination based on race, Title VI had already proven to be an imperfect tool for addressing EJ in permitting.¹⁹²

Prior to publishing its Plan EJ 2014 rulemaking guidance document, EPA issued an “Interim Guidance on Considering Environmental Justice During the Development of an Action,” in July 2010.¹⁹³ The guidance was directed at Agency workgroups involved in rulemaking. It was meant to further President Clinton’s 1994 Executive Order 12898 and EJ in rulemaking by:

- 1) describing the legal and policy framework ... that requires [staff] ... to consider EJ;
- 2) identifying the information that [staff] ... should consider when determining if there are EJ concerns involved in ... proposed regulations; and
- 3) highlighting the kinds of questions about EJ that [staff] ... should ... address in developing a regulation.”¹⁹⁴

For the first time in 20 years, EPA formally defined EJ as “the *fair treatment* and *meaningful involvement* of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.”¹⁹⁵ The interim guidance also defined the terms “fair treatment” and “meaningful

¹⁸⁹ *Id.* at 34, 43, 147. Plan EJ 2014 also considered advancing environmental justice through enforcement and developing science, informational, and resource tools. *Id.* at 57, 108, 151, 160.

¹⁹⁰ *Id.* at 28.

¹⁹¹ *Id.* at ii.

¹⁹² See *Alexander v. Sandoval*, 532 U.S. 275, 279 (2001) (Title VI only applies to purposeful discrimination); *S Camden Citizens in Action v. N.J. Dep’t of Env’tl. Prot.* 2006 U.S. Dist. LEXIS 45765 (D. N.J. 2006) (same in environmental permitting).

¹⁹³ In March 2011, EPA issued a Draft Implementation Plan Incorporating Environmental Justice into Rulemaking as part of Plan EJ 2014 (aka the “EJ in Rulemaking Guidance”). EPA, PLAN EJ 2014: INCORPORATING ENVIRONMENTAL JUSTICE INTO RULEMAKING DRAFT IMPLEMENTATION PLAN I (2011); EPA, EPA’S ACTION DEVELOPMENT PROCESS: INTERIM GUIDANCE ON CONSIDERING ENVIRONMENTAL JUSTICE DURING THE DEVELOPMENT OF AN ACTION ii (2010) [hereinafter ACTION DEVELOPMENT PROCESS].

¹⁹⁴ ACTION DEVELOPMENT PROCESS, *supra* note 192 at i.

¹⁹⁵ *Id.* at 3.

involvement.”¹⁹⁶ The document instructed Agency staff to not only consider burdens imposed by EPA actions, but to also examine the distribution of benefits such as positive environmental and health consequences from regulation.¹⁹⁷

As past guidance and policy statements had done, the interim guidance identified disproportionate harm to minority and low-income communities as “environmental justice concerns.”¹⁹⁸ The interim guidance went further to identify an EJ concern as “an actual or potential lack of fair treatment or meaningful involvement by an EJ community.”¹⁹⁹ This was new ground for EPA to characterize potential harms as EJ concerns. The interim guidance was replaced with a final guidance in May 2015.²⁰⁰ While the final guidance identified a new Administrator and new Executive Orders applicable to EPA rulemaking, one with respect to children’s health and the other on consultation and coordination with Indian Tribal Governments, there was not much different from what the interim guidance provided.²⁰¹ Some key aspects of the final guidance included examples of disproportionate harm, the Agency’s statutory and policy framework for considering EJ, and the provision of a checklist for EPA rule-writers integrating EJ into regulations.²⁰²

Interestingly, EPA, for the first time, stated that its statutory and regulatory authorities provide *a broader basis* for protecting human health and the environment than E.O. 12898 and *do not require* a demonstration of disproportionate impacts to protect the health or environment of any population, including minority populations, low-income populations, and/or indigenous peoples.²⁰³ These statements should have translated into significant

¹⁹⁶ “*Fair Treatment* means that no group of people should bear a disproportionate burden of environmental harms and risks, including those resulting from the negative environmental consequences of industrial, governmental, and commercial operations or programs and policies. *Meaningful Involvement* means that: 1) potentially affected community members have an appropriate opportunity to participate in decisions about a proposed activity that will affect their environment and/or health; 2) the public’s contribution can influence the regulatory agency’s decision; 3) the concerns of all participants involved will be considered in the decision-making process; and 4) the decision-makers seek out and facilitate the involvement of those potentially affected.” *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 4.

¹⁹⁹ *Id.* at 6.

²⁰⁰ EPA, GUIDANCE ON CONSIDERING ENVIRONMENTAL JUSTICE DURING THE DEVELOPMENT OF REGULATORY ACTIONS 1 (2015) [hereinafter GUIDANCE ON CONSIDERING ENVIRONMENTAL JUSTICE].

²⁰¹ *Id.* at 2.

²⁰² In June 2016, EPA issued “Technical Guidance for Assessing Environmental Justice in Regulatory Analysis.” OFF. OF ENVTL. JUST., EPA, TECHNICAL GUIDANCE FOR ASSESSING ENVIRONMENTAL JUSTICE IN REGULATORY ANALYSIS, JUNE 2016 1 (2016). The guidance was meant to supplement Plan EJ 2014 guidance on Environmental Justice in rulemaking. GUIDANCE ON CONSIDERING ENVIRONMENTAL JUSTICE, *supra* note 199 at 2. Although the document provided further direction on how EPA staff could identify issues and consider EJ in rulemaking it was, again, just guidance and not a formal rule with the force of law. GUIDANCE ON CONSIDERING ENVIRONMENTAL JUSTICE, *supra* note 199 at 4.

²⁰³ Office of Legacy Mgmt., *supra* note 8.

advancement of EJ protections in subsequent rules. The letter transmitting the final rulemaking guidance identified several rules EPA believed provided sufficient consideration of EJ issues while being developed.²⁰⁴ One of those rules, the Mercury and Air Toxics Standards, was designed to reduce mercury emissions from coal-fired power plants in an effort to reduce mercury deposition in aquatic systems and thereby reduce fish consumption advisories for mercury, a neurotoxin.²⁰⁵ However, that rule has been tied up in litigation and additional rulemaking for a decade.²⁰⁶ Thus, it has not been fully implemented and does not provide relief to EJ communities.²⁰⁷

Another rule cited in the guidance concerns the primary and secondary health standards for fine particulate matter (“PM2.5”) emitted by fossil fuel combustion sources.²⁰⁸ Those standards were last changed in 2012.²⁰⁹ It was acknowledged then that the primary health-based standards might not be fully protective of the population, given that research suggested that there was no lower threshold at which harm would not occur.²¹⁰ The body of research supporting the need for a lower PM2.5 threshold has since increased.²¹¹ Moreover, even EPA recognizes that EJ communities are disproportionately affected by particulate matter pollution.²¹² Yet, when the rule came up for revision in 2020, both the primary and secondary standards remained

²⁰⁴ Letter from Jim Jones, et al, to EPA Managers and Staff, Final Guidance on Considering Environmental Justice during the Development of a Regulatory Action (May 29, 2015).

²⁰⁵ National Emission Standards for Hazardous Air Pollutants From Coal And Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial Institutional, and Small Industrial Commercial-Institutional Steam Generating Units, 77 Fed. Reg. 9304 (Feb. 16, 2012) (to be codified at 40 C.F.R. 60 & 63). Those living in EJ communities often support their families by eating fish caught in mercury contaminated waters. See Jerome Nriagu et al, *Environmental Justice: The Mercury Connection*, in *MERCURY IN THE ENVIRONMENT: PATTERN AND PROCESS* 301, 308 (Univ. of Cali. Press 2012).

²⁰⁶ *White Stallion Energy Center, LLC v. EPA*, 748 F.3d 1222 (D.C. Cir. 2014), *rev'd sub nom. Michigan v. EPA*, 576 U.S. 743 (2015); see also Off. of Env'tl. Just., EPA, *Mercury and Air Toxics Standards*, <https://www.epa.gov/stationary-sources-air-pollution/mercury-and-air-toxics-standards#rule-summary> (last visited Mar. 30, 2022).

²⁰⁷ Fish consumption advisories due to mercury continue to plague numerous rivers and streams, e.g., Susquehanna River, Pennsylvania; Kokosing River, Ohio; Seneca River, New York; Monacacy River, Maryland; Dragon Run Swamp, Virginia. See *Historical Advisories Where You Live*, EPA, <https://fishadvisoryonline.epa.gov/General.aspx> (last visited Mar. 30, 2022).

²⁰⁸ GUIDANCE ON CONSIDERING ENVIRONMENTAL JUSTICE, *supra* note 199 at E-2.

²⁰⁹ EPA, *Timeline of Particulate Matter (PM) National Ambient Air Quality Standards (NAAQS)*, <https://www.epa.gov/pm-pollution/timeline-particulate-matter-pm-national-ambient-air-quality-standards-naaqs> (last visited Mar. 30, 2022).

²¹⁰ See National Ambient Air Quality Standards for Particulate Matter, 78 Fed. Reg. 3,086, 3110, 3160 (Jan. 15, 2013) (to be codified at 40 C.F.R. pts. 50, 51, 52, 53 & 58).

²¹¹ CTR. FOR PUB. HEALTH & ENVTL. ASSESSMENT, EPA, INTEGRATED SCIENCE ASSESSMENT FOR PARTICULATE MATTER ES-23 (2019).

²¹² Review of the National Ambient Air Quality Standards For Particulate Matter, 85 Fed. Reg. 82684, 82695–96 (Dec. 18, 2020) (to be codified at 40 C.F.R. pt. 50).

unchanged.²¹³ Thus, EPA missed another opportunity to fully embrace EJ concepts in its rulemaking.

In preparation for issuing similar guidance on permitting, EPA asked NEJAC to provide direction.²¹⁴ EPA recognized NEJAC's and the Office of General Counsel's prior recommendations on this issue but felt more could be done. In addition, the Agency acknowledged its oversight authority of permits issued pursuant to state and tribal delegated programs as well as some other federal agencies but complained that there were too many permits for the Agency to review.²¹⁵ EPA wanted to know how it could more broadly effectuate its oversight role in each of those areas. NEJAC's charge was to provide advice on which permits to focus on first and which permits were "best suited for exploring and addressing the complex issue of cumulative impacts...."²¹⁶

In response, NEJAC issued a report providing advice and recommendations to EPA on those issues.²¹⁷ NEJAC offered five recommendations: (1) cumulative impacts, whether permitted or not, "must be addressed and mitigated" in new permits; (2) all forms of permitting, not just new permits, should provide an opportunity for considering EJ; (3) agreements between EPA and delegated state and tribal authorities need to specifically address EJ; (4) permits related to natural gas hydraulic fracturing and mountain top mining need immediate EJ review; and (5) permits issued by other federal agencies need EJ review from EPA.²¹⁸ Each of those recommendations was explored in detail.

Tellingly, NEJAC noted that over the prior sixteen years, the Council had "repeatedly asked EPA to incorporate environmental justice into its permitting process, and [had] ... provided specific advice as to how it should be done."²¹⁹ The Council admonished EPA to follow the earlier recommendations and to not proceed using a permit-by-permit pollution category approach but to follow a geographic approach to permitting that would evaluate all permits regardless of the media (air, water, waste) in a certain area.²²⁰ In this way, cumulative impacts on EJ communities could be considered and addressed. Further, EPA was, among other things, encouraged to utilize

²¹³ *Id.* at 82684.

²¹⁴ NAT'L ENVTL. JUSTICE ADVISORY COUNCIL, INCORPORATING ENVIRONMENTAL JUSTICE CONCERNS INTO PERMITS UNDER FEDERAL ENVIRONMENTAL LAWS: DRAFT CHARGE 1 (2010).

²¹⁵ *Id.*

²¹⁶ *Id.* at 3–4.

²¹⁷ NAT'L ENVTL. JUST. ADVISORY COUNCIL, ENHANCING ENVIRONMENTAL JUSTICE IN EPA PERMITTING PROGRAMS: A REPORT OF ADVICE & RECOMMENDATIONS 2 (2011).

²¹⁸ *Id.*

²¹⁹ *Id.* at 6.

²²⁰ *Id.* at 8.

Supplemental Environmental Projects (“SEPs”) in the settlement of enforcement cases as a means of furthering EJ.²²¹

EPA issued its Plan EJ 2014 “Considering Environmental Justice in Permitting” guidance in September 2011.²²² The stated goal of the guidance was to provide EJ communities with meaningful access to the permitting process and “to develop permits that address environmental justice issues to the greatest extent practicable under existing environmental laws.”²²³ The guidance acknowledged the recommendations EPA had received from NEJAC and that those practices had not been “widely adopted.”²²⁴ However, the Agency professed the desire to “truly create a culture within EPA – and among other federal, state, local, and tribal permitting agencies – in which engaging on issues of environmental justice more readily translates into greater protections for overburdened communities.”²²⁵

The guidance identified strategies and activities, including developing “tools” to further the Agency’s work to “meaningfully address environmental justice in permitting decisions” and identified prior NEJAC recommendations.²²⁶ The guidance even stated that EPA would explain how EJ could be integrated into actual permit conditions.²²⁷ However, there was no definitive response to the overarching question posed by NEJAC in 2000: “Can permits be denied on the basis of Environmental Justice concerns,” nor was there a strategy or activity identified to provide such an answer.

As a companion to the regulatory and permitting guidance, EPA’s Office of General Counsel issued Plan EJ 2014 Legal Tools which provided an overview of discretionary legal authorities EPA could use to address EJ concerns.²²⁸ General Counsel Scott Fulton prefaced the report by stating that it should be considered the starting point in examining the legal authorities enabling EPA to consider and implement environmental justice priorities.²²⁹ The Legal Tools document relied on the OGC memorandum issued ten years earlier,²³⁰ expanded on the permitting discussion there, and identified other

²²¹ *Id.* at 10–12.

²²² *Plan EJ 2014: Considering Environmental Justice in Permitting*, EPA, <https://www.epa.gov/environmentaljustice/plan-ej-2014-considering-environmental-justice-permitting> (last visited Apr. 28, 2022).

²²³ EPA, CONSIDERING ENVIRONMENTAL JUSTICE IN PERMITTING: IMPLEMENTATION PLAN 2 (2011).

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.* at 5.

²²⁷ *Id.* at 12.

²²⁸ EPA, CONSIDERING ENVIRONMENTAL JUSTICE IN PERMITTING: LEGAL TOOLS 1 (2011).

²²⁹ Scott C. Fulton, *Foreword* to EPA, CONSIDERING ENVIRONMENTAL JUSTICE IN PERMITTING: LEGAL TOOLS CONSIDERING ENVIRONMENTAL JUSTICE IN PERMITTING: LEGAL TOOLS (2011).

²³⁰ PLAN EJ 2014, *supra* note 187 at 1.

EPA authorities.²³¹ In sum, the Legal Tools document continued to provide EPA with the legal basis to deny or condition permits based on EJ concerns.

The following year, EPA issued a draft permitting plan entitled “EPA Activities to Promote Environmental Justice in the Permit Application Process.”²³² A final plan was published in May 2013.²³³ The permitting plan identified actions EPA regional offices were taking to provide EJ communities with meaningful opportunities to engage with the Agency during permitting decisions.²³⁴ The plan recognized that EPA “has the responsibility to lead by example by addressing environmental justice in its permits.”²³⁵ This “responsibility” was cabined by a reference to existing environmental statutes, the Administrative Procedure Act, and anti-discrimination laws.²³⁶ The permitting plan further revealed that Environmental Justice communities would be identified using a new desktop tool called “EJSCREEN.”²³⁷ The tool uses census and other data to describe the age, economic, and racial demographics of an area juxtaposed with information on environmental hazards such as landfills, hazardous waste sites, and sources of air pollution.²³⁸

Commenters asked EPA how it would know if a proposed project would present disproportionate or cumulative harm.²³⁹ Naively, EPA noted that the permit applicant was required to provide that kind of information and that EPA might do its own public health assessment.²⁴⁰ In practice, applicants downplay any possible harm or potential cumulative impacts posed by their projects. Moreover, EPA rarely undertakes its own assessment of harm on a project-by-project basis. Further, for delegated permits, states do not have the resources to routinely undertake such an assessment. Similarly, EPA refused to state whether the Agency would impose stricter pollution limits on a proposed facility if EJSCREEN identified an Environmental Justice community nearby. According to EPA, that was a regional office decision governed by statute and regulation.²⁴¹ Again, EPA failed to address the question asked by NEJAC in 2000; if EJ issues were identified during permit review would the Agency condition or deny a permit.

²³¹ *Id.* at 147.

²³² EPA Activities to Promote Environmental Justice in the Permit Application Process, 77 Fed. Reg. 38,051, 38,051 (proposed June 26, 2012).

²³³ EPA Activities to Promote Environmental Justice in the Permit Application Process, 78 Fed. Reg. 27,220, 27,220 (May 9, 2013).

²³⁴ *Id.* at 27,225.

²³⁵ *Id.* at 27,220.

²³⁶ *See id.* at 27,221.

²³⁷ *Id.* at 27,225.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *See id.*

²⁴¹ *Id.*

That same month, NEJAC reviewed the permitting plan and provided EPA with its recommendations on how it could best be effectuated.²⁴² NEJAC did not hold back. From the outset, the Council observed that it had provided recommendations to EPA on this issue seven years earlier, referring to Professor Lazarus' 1996 memorandum on incorporating EJ into permitting.²⁴³ In the meantime, "EPA ha[d] missed opportunities to consider communities' environmental needs in its development of a range of environmental policy decisions, including permitting."²⁴⁴

NEJAC then made twenty-nine recommendations on how the plan could be improved and fully implemented.²⁴⁵ Importantly, EPA should "systematically ensure that communities' concerns are appropriately considered during its permitting process."²⁴⁶ Those concerns must then be translated into actions related to the permit, such as stronger terms, mitigation, or denial.²⁴⁷ NEJAC observed that EPA's permitting plan was too discretionary.²⁴⁸ As it was, the plan was simply guidance and a "tool in development."²⁴⁹ To be effective, it must be followed by formal rules requiring action, embraced by all regional offices, and staff should be held accountable to meeting plan goals and objectives.²⁵⁰

EPA's Environmental Justice strategic plan cycle began again in 2016 with the release of the EJ 2020 Action Agenda (the "Agenda"), EPA's plan for EJ activities during the next five years.²⁵¹ It consisted of eight priority areas and four significant national Environmental Justice challenges.²⁵² Each EPA national program and region was responsible for co-leading at least one of the Agenda's priority areas.²⁵³ During that period, EPA was to "advance environmental justice to a new level and make a more visible difference in the environmental and public health outcomes for all people in the nation."²⁵⁴

The Agenda's priorities were built around three goals: (1) deepening EPA's environmental justice practice within its programs to improve the

²⁴² NAT'L ENVTL. JUST. ADVISORY COUNCIL, RECOMMENDATIONS REGARDING EPA ACTIVITIES TO PROMOTE ENVIRONMENTAL JUSTICE IN THE PERMIT APPLICATION PROCESS 1 (2013).

²⁴³ *Id.*

²⁴⁴ *Id.* at 2.

²⁴⁵ *Id.* at 2–16.

²⁴⁶ *Id.* at 2.

²⁴⁷ *Id.* at 3–4.

²⁴⁸ *Id.* at 4.

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 4–5.

²⁵¹ EPA, EJ 2020 ACTION AGENDA 1 (2016).

²⁵² *Id.* at iii–iv.

²⁵³ *Id.* at iv.

²⁵⁴ *Id.*

health and environment of overburdened communities;²⁵⁵ (2) working with partners to expand EPA's impact within such communities; (3) and demonstrating progress on significant national environmental justice challenges.²⁵⁶ Achieving these goals by 2020 would improve "results for overburdened communities through reduced impacts and enhanced benefits"; integrate EJ into EPA's decision-making; strengthen the Agency's ability to act on environmental justice and cumulative impacts, and better address complex EJ issues.²⁵⁷

The first goal would focus on four programs; rulemaking, permitting, enforcement, and science.²⁵⁸ With respect to rulemaking, EPA stated that it would continue to rely on the aforementioned Guidance on Considering Environmental Justice During the Development of a Regulatory Action and the Technical Guidance on Assessing for Environmental Justice in Regulatory Analysis.²⁵⁹ Four strategies for achieving the goal were identified.²⁶⁰ As for permitting, the objective was to "consider environmental justice concerns in all appropriate EPA permitting activities. . . ."²⁶¹ Upon consideration of those concerns, no action was directed or recommended.²⁶² Tools would be developed, and training would be provided to help permit writers determine when additional information and analysis might be appropriate to address EJ concerns. However, EPA would only "encourage the use of permit terms" to address those concerns to the extent they were legally supported.²⁶³ The goal was laced with discretionary terms.²⁶⁴

The Agenda used similar qualifying language in the science goals and objectives section directing the development of monitoring, communication, and decision support tools.²⁶⁵ In addition, scientific research would be funded, and findings reported., but no directives were identified.²⁶⁶ The Agenda spoke in more forceful and direct terms with respect to compliance and enforcement. EPA *would*: direct more enforcement resources to address harm to EJ communities due to violations of the law²⁶⁷ and "ramp up"

²⁵⁵ The EPA uses the phrase "minority and low-income communities" just once throughout the report, replacing it with the phrase "overburdened communities." *Id.* at 52.

²⁵⁶ *Id.* at iii–iv.

²⁵⁷ *Id.* at 7–8.

²⁵⁸ *Id.* at 2–4.

²⁵⁹ *Id.* at 13.

²⁶⁰ *Id.*

²⁶¹ *Id.* at 2.

²⁶² *Id.* at 17–18.

²⁶³ *Id.* at 17.

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 23.

²⁶⁶ *Id.* at 26.

²⁶⁷ *Id.* at 19.

consideration of EJ issues in the selection of national enforcement initiatives.²⁶⁸ Further, EPA *would* increase compliance evaluations in EJ communities and “achieve more settlements that benefit overburdened communities impacted by pollution violations.”²⁶⁹ When considering the two EJ Agendas, 2014 and 2020, it is apparent that EPA was far more comfortable directing its energy and resources at obvious violations of existing permits or the law than wading into the murky waters of requiring permit terms or denying permits altogether. The cloak of discretion is far easier to invoke than the power of directive and less likely to provoke Congressional ire or industry lobby litigation.

F. EJ at EPA During 2017-2020

While EPA continued to roll out reports of its EJ “work” during the Trump administration, those reports belied the facts.²⁷⁰ The administration’s first EPA Administrator, Scott Pruitt, claimed to have been aware of “the concept of Environmental Justice,” however, he did little to promote it.²⁷¹ In fact, the Trump administration proposed slashing funding to EPA’s EJ Program and transferred the program from the Office of Enforcement and Compliance Assurance to the Office of Policy.²⁷² This and other actions led to the resignation of EPA’s longtime EJ senior advisor and assistant associate administrator for EJ, Santiago Mustafa Ali.²⁷³ Further, many of the Agency’s regulatory efforts during the period, if implemented, would harm people living in EJ communities by exposing them to higher levels of pollution, including ground-level ozone, particulate matter, and mercury.²⁷⁴ Consider the Safe Affordable Fuel-Efficient Vehicle Rules for Model Years 2021-2026 Passenger

²⁶⁸ *Id.* at 21.

²⁶⁹ *Id.* at 21.

²⁷⁰ See EPA, EPA ANNUAL ENVIRONMENTAL JUSTICE PROGRESS REPORT FY 2018 (2018); EPA, EPA ANNUAL ENVIRONMENTAL JUSTICE PROGRESS REPORT FY 2019 (2019); EPA, EPA ANNUAL ENVIRONMENTAL JUSTICE PROGRESS REPORT FY 2020 (2020).

²⁷¹ Brady Dennis, *EPA Environmental Justice Leader Resigns, Amid White House Plans to Dismantle Program*, WASH. POST (Mar. 9, 2017), <https://www.washingtonpost.com/news/energy-environment/wp/2017/03/09/epas-environmental-justice-leader-steps-down-amid-white-house-plans-to-dismantle-program/>.

²⁷² Juliet Eilperin & Brady Dennis, *White House Eyes Plan to Cut EPA Staff by One-Fifth, Eliminating Key Programs*, WASH. POST (Mar. 1, 2017), <https://www.washingtonpost.com/news/energy-environment/wp/2017/03/01/white-house-proposes-cutting-epa-staff-by-one-fifth-eliminating-key-programs/>; Hannah Perls, *EPA Undermines its Own Environmental Justice Programs*, EPA MISSION TRACKER (Nov. 12, 2020), <https://eelp.law.harvard.edu/2020/11/epa-undermines-its-own-environmental-justice-programs/>.

²⁷³ Dennis, *supra* note 70; Phil McKenna, *Chief Environmental Justice Official at EPA Resigns, With Plea to Pruitt to Protect Vulnerable Communities*, INSIDE CLIMATE NEWS (Mar. 9, 2017), <https://insideclimatenews.org/news/09032017/epa-environmental-justice-mustafa-ali-flint-water-crisis-dakota-access-pipeline-trump-scott-pruitt/>.

²⁷⁴ As discussed above, mercury emitted from the combustion of coal leads to fish consumption advisories. NAT’L ENVTL. JUST. ADVISORY COUNCIL, FISH CONSUMPTION AND ENVIRONMENTAL JUSTICE 11 (2002).

Cars and Light Trucks,²⁷⁵ the Affordable Clean Energy Rule and repeal of the Clean Power Plan,²⁷⁶ and the rollback of the Mercury and Air Toxics Standards.²⁷⁷

G. President Biden's Approach to EJ

In 2021, President Biden issued Executive Order 14008.²⁷⁸ The President also created the White House Environmental Justice Advisory Council (“WHEJAC”).²⁷⁹ In the Executive Order, the President directed the Director of the Office of Management and Budget, the Chair of CEQ, and the National Climate Advisor, in consultation with WHEJAC, to jointly publish guidance on how certain Federal investments might be made toward a goal that forty percent of the overall benefits of such investments flow to disadvantaged communities.²⁸⁰ This program is called Justice40 pursuant to which WHEJAC is to partner with NEJAC and help federal agencies implement Justice40.²⁸¹ Further, WHEJAC must provide recommendations on the distribution of funds to EJ communities and the assessment of potential impacts associated with such funding.²⁸² Neither the executive order nor the Justice40 initiative consider EJ in federal rulemaking or permitting.²⁸³ As of February 2022, no new EJ-centric strategic plans or guidance have been issued.

H. EAB Decisions Have Had Limited Impact on Furthering Environmental Justice.

As noted above, both Professor Lazarus and General Counsel Guzy pointed to EPA’s Environmental Appeals Board as able to shape and promote

²⁷⁵ The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks, 85 Fed. Reg. 24174, 24868, 24871 (Apr. 30, 2020) (to be codified at 40 C.F.R. pts. 86, 600).

²⁷⁶ See Umair Irfan, *Trump's EPA Just Replaced Obama's Signature Climate Policy With a Much Weaker Rule*, VOX (June 19, 2019), <https://www.vox.com/2019/6/19/18684054/climate-change-clean-power-plan-repeal-affordable-emissions>.

²⁷⁷ See Lisa Friedman & Coral Davenport, *E.P.A. Weakens Controls on Mercury*, N.Y. TIMES (Apr. 16, 2020), <https://www.nytimes.com/2020/04/16/climate/epa-mercury-coal.html>.

²⁷⁸ Executive Order 14008, Tackling the Climate Crisis at Home and Abroad, 86 Fed. Reg. 7619, 7620 (Jan. 27, 2021).

²⁷⁹ *White House Environmental Justice Advisory Council*, EPA, <https://www.epa.gov/environmentaljustice/white-house-environmental-justice-advisory-council> (last visited Mar. 31, 2022).

²⁸⁰ Executive Order 14008, *supra* note 277 at 7620, 7632.

²⁸¹ *Id.* at 7631–32; *White House Environmental Justice Advisory Council*, EPA, <https://www.epa.gov/environmentaljustice/white-house-environmental-justice-advisory-council> (last visited Mar. 31, 2022).

²⁸² *Id.*

²⁸³ See generally Shalanda Young et al., *The Path to Achieving Justice40*, THE WHITE HOUSE (Jul. 20, 2021) <https://www.whitehouse.gov/omb/briefing-room/2021/07/20/the-path-to-achieving-justice40/>.

Environmental Justice principles beyond increased public comment.²⁸⁴ Their observations were echoed by NEJAC.²⁸⁵ While the EAB has remanded matters to EPA regional offices for a more thorough Environmental Justice analysis, a review of EAB decisions has not identified a single instance where the Board conditioned or denied a facility siting, pollution permit, or penalty decision based on Environmental Justice grounds.²⁸⁶ In fact, in most instances, the Board denied review on that basis. Professor Lazarus and the General Counsel both saw promise in those EAB decisions. Those 1999 and 2000 “wins” merely recognized *the concept* of Environmental Justice in EPA permitting or required a more thorough analysis of Environmental Justice issues but have not translated into the protection of EJ communities.²⁸⁷ Below is a review of decisions since 1999.

The EAB ruled in *In re Environmental Disposal Systems* that in issuing a permit under the Safe Drinking Water Act Underground Injection Control program, EPA has broad discretion to determine the scope of a demographic study.²⁸⁸ Thus, the EAB denied the community’s request that the Agency use a four-mile radius rather than a two-mile radius around proposed hazardous waste injection wells when determining whether an Environmental Justice community existed.²⁸⁹

In 2002, the EAB denied the Yavapai-Apache Nation’s (“the Nation”) request that EPA reconsider its issuance of a Clean Water Act construction stormwater permit for a 977-acre development upstream from their land.²⁹⁰ The Nation claimed that mine tailings on the site contained high levels of toxic heavy metals that could be washed onto their land and disproportionately harm tribal members.²⁹¹ In response, EPA simply claimed that “the design of the project will ensure that there will be no excessive human health or environmental impacts to minority or low-income communities.”²⁹² The Board ruled that the Nation’s claims were “insufficiently specific” because

²⁸⁴ Lazarus & Tai, *supra* note 92 at 660; Memorandum from Gary S. Cuzy, Off. of Gen. Couns. re: EPA Statutory and Regulatory Authorities Under Which Environmental Justice Issues May Be Addressed in Permitting 12 (Dec. 1, 2000).

²⁸⁵ Lazarus & Tai, *supra* note 92 at 660.

²⁸⁶ *See, e.g.*, *In re Knauf Fiber Glass, GMBH*, 8 E.A.D. 121, 175–76 (EAB 1999) (EPA decision remanded to provide an environmental justice analysis to supplement the Clean Air Act permitting record); *In re AES Puerto Rico, L.P.*, 8 E.A.D. 324, 351 (EAB 1999). *See also* *Sur Contra la Contaminacion v. EPA*, 202 F.3d 443, 445 (1st Cir. 2000) (affirming *In re AES Puerto Rico, L.P.*).

²⁸⁷ Perls, *supra* note 271.

²⁸⁸ *In re Environmental Disposal Systems, Inc.*, 8 E.A.D. 23, 36 (EAB 1998).

²⁸⁹ *Id.*; *see also* *In re Beeland Group*, 2008 EPA App. LEXIS 28, at *5 (2008) (allegation that proposed injection well will disproportionately affect the poor rural community in which the well will be located is unsupported; the challenger failed to establish that area reviewed was clearly erroneous).

²⁹⁰ *In re Phelps Dodge Corp. Verde Valley Ranch Development*, 10 E.A.D. 460, 525 (2002).

²⁹¹ *Id.* at 465, 499.

²⁹² *Id.* at 520.

they did not attempt to rebut EPA's finding.²⁹³ The Board does not explain how the tribe might have done so, but it is assumed that the EAB was looking for scientific evidence from the Nation showing that exposure to cadmium and lead would be harmful to tribal members. EPA openly recognizes that chronic cadmium exposure can damage kidneys and that lead is a developmental neurotoxin.²⁹⁴ Thus, the EAB could have taken judicial notice of those harms and required EPA to review its permit decision. Interestingly, the EAB did require EPA to reconsider its decision because the permitted discharge might harm the habitat of the spikedace, a threatened fish under the Endangered Species Act.²⁹⁵

The EAB declined review of EJ issues related to Alaska Native Villages exposed to air pollution from near offshore oil drilling rigs.²⁹⁶ The petitioners argued that EPA failed to conduct a comparative analysis on the effects of the pollutants emitted by the rigs on the minority population to determine if they would be disproportionately harmed.²⁹⁷ The Board held that because the permits had emission limits for specific pollutants so that the area would continue to attain the NAAQS, the permits were sufficient.²⁹⁸ However, the EAB remanded the permit to the Agency solely for the purpose of determining whether the oil rigs should be treated as a single stationary source under the applicable Clean Air Act regulations.²⁹⁹

In a subsequent Clean Air Act matter involving permitting of oil drilling rigs, *In re Shell Gulf of Mexico*, the EAB did remand the permits for further review on EJ grounds.³⁰⁰ There, EPA had claimed that Native Alaskans would not be disproportionately harmed by air emissions from the rigs because they would meet the NAAQS for nitrogen oxide (NO_x).³⁰¹ However, before the permit was issued, the NO_x standard had been reduced as the Administrator of EPA had determined that the prior standard was not sufficiently protective of human health.³⁰² The Board found EPA's decision to

²⁹³ *Id.* at 496.

²⁹⁴ EPA, CADMIUM COMPOUNDS: HAZARD SUMMARY 1 (2000); *What Are Some of the Health Effects of Lead?*, EPA (Mar. 2021), <https://www.epa.gov/lead/what-are-some-health-effects-lead>.

²⁹⁵ *In re Phelps Dodge Corp. Verde Valley Ranch Development*, 10 E.A.D. 460, 522–25 (2002).

²⁹⁶ *In re Shell Offshore, Inc.*, 13 E.A.D. 357, 404–06 (2007).

²⁹⁷ *Id.* at 404.

²⁹⁸ *Id.* at 404–05; *In re Knauf Fiber Glass, GmbH*, 9 E.A.D. 1, 16 (2000) (given finding of no adverse impact based on conclusion that additional pollutants will not result in exceedance of NAAQS or PSD increment, the Board need not address objections to numerous aspects of EPA's environmental justice analysis); *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 414 (1997) (holding that in light of EPA's determination that minority and low-income populations are outside the area principally impacted by emissions, it was not unreasonable for the EPA to choose not to engage in additional analysis).

²⁹⁹ *In re Shell Offshore, Inc.* at 360.

³⁰⁰ *In re Shell Gulf of Mexico, Inc.*, 15 E.A.D. 103, 105 (2010).

³⁰¹ *Id.*

³⁰² *Id.* at 121 n.78.

rely on the outdated NAAQS and not to undertake any further EJ analysis clearly erroneous.³⁰³ It remanded the permits to EPA to conduct an EJ analysis consistent with E.O. 12898.³⁰⁴ In doing so, the Board noted that it had “encouraged permit issuers to examine any ‘superficially plausible’ claim raised during the public comment period that a minority or low-income population may be disproportionately affected by a particular facility.”³⁰⁵

Despite that admonition, the Board has not required EPA to address ancillary issues unrelated to the program under which the permit is being sought.³⁰⁶ It has also failed to require additional monitoring as a term in a CAA Title V permit even when the operation of a hazardous waste incinerator would pose a cumulative risk to a known EJ community already subject to multiple stressors.³⁰⁷ There, the EAB held that it was powerless to act because the Agency had not yet developed a guidance or regulation to address those risks.³⁰⁸ Apparently, the “tools” to address this issue had not yet been developed under EJ 2020 Agenda.³⁰⁹

As these opinions establish, while it has promoted thorough analysis of Environmental Justice issues, including increased citizen participation, the EAB has repeatedly denied review based on “insufficient evidence” of disproportionate harm placing the “heavy” burden of proof on an economically disadvantaged community. This is due largely to the Board’s view of the extent of its review powers.

As the EAB sees things, its governing regulations significantly limit the Board’s review authorities. By regulation, a hazardous waste, underground

³⁰³ *Id.* at 136.

³⁰⁴ The Board held that in reviewing a CWA NPDES permit for proper EJ analysis that EO 12898 addresses human health and environmental effects, not cost or rate impacts to EJ communities. Thus, a petitioner’s claim that EPA had failed to provide sufficient public notice of the proposed permit to EJ communities was meritless. *In re Upper Blackstone Water Pollution Abatement Dist.*, 14 E.A.D. 577, 577 (May 28, 2010).

³⁰⁵ *In re Shell Gulf of Mexico, Inc. & Shell Offshore, Inc.*, 15 E.A.D. 470, 494 (Jan. 12, 2012). Despite that admonition, in two subsequent matters contesting UIC permits on EJ grounds the Board found the citizen requests for private water well testing subsequent to the installation and operation of the wells as a condition of the permit beyond EPA’s authority. *See also In re Jordan Development Co.*, 18 E.A.D. 1, 13–14 (August 8, 2019) (EO 12898 requires consideration of EJ in permitting and EPA is given omnibus authority under the UIC program to exercise its discretion to protect EJ communities from disproportionate harm but does not include the authority to address impacts that are not related to protection of drinking water supplies, such as negative economic impacts to the community).

³⁰⁶ FED. ENERGY REGUL. COMM’N, FINAL SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT FOR THE ATLANTIC COAST PIPELINE RESTORATION PROJECT AND SUPPLY HEADER RESTORATION PROJECT 4-76 (2021).

³⁰⁷ *In re Veolia ES Technical Solutions, LLC*, 18 E.A.D. 194, 194–97 (July 21, 2020); *see Sheila R. Foster, Meeting the Environmental Justice Challenge: Evolving Norms in Environmental Decisionmaking*, 30 ENVTL. L. REP. 10992, 10992 (2000).

³⁰⁸ 18 E.A.D. at 196.

³⁰⁹ Foster, *supra* note 307 at 10992.

injection, water or air pollution permit decision will not be reviewed unless it is based on a clearly erroneous finding of fact or conclusion of law or involves an important matter of policy or exercise of discretion that warrants review.³¹⁰ The Board has further limited its review by decision. The power of review should be “sparingly exercised,” and “most permit conditions should be finally determined at the Regional level.”³¹¹ Moreover, the citizen petitioner bears the burden of demonstrating that review is warranted.³¹² Thus, the observations and recommendations of Lazarus, et al., and General Counsel Guzy have not been realized and likely will not be without a change in EAB review authority.

i. A Glimmer of Hope

There is scant evidence that EPA has conditioned or denied environmental permits on the basis of EJ concerns. Recently, in the context of a CAA permit review, EPA Region 5 acted to protect an EJ community.³¹³ Michigan’s Department of Environment, Great Lakes, and Energy (“Michigan Environment”) had proposed an air pollution permit for an asphalt plant.³¹⁴ EPA, using EJSCREEN, determined that the community within a one-mile area around the proposed plant was disproportionately low income, people of color, and included people with limited English proficiency.³¹⁵ Moreover, the community exceeded the 90th percentile on eight of the eleven EJSCREEN environmental indicators.³¹⁶ These included exposure to PM2.5, ozone, lead paint, and living in close proximity to a Superfund site.³¹⁷ Even though Michigan Environment had already required the applicant to assess potential air pollution impacts to the community, EPA recommended, among other things, that Michigan Environment consider requiring the use of opacity cameras and other continuous compliance measures to ensure that the applicant met permitted limits; and that the applicant make its future environmental monitoring data publicly available.³¹⁸ EPA also noted that because of the hazards the community already faced and the potential for disproportionate impacts, Michigan Environment should assess its obligations under civil rights laws

³¹⁰ 40 C.F.R. § 124.19(a)(4)(i) (2022).

³¹¹ In re NE Hub Partners, L.P., 7 E.A.D. 561, 567 (EB 1980) (quoting 45 Fed. Reg. 33,290, 33,412 (May 19, 1980)); In re Peabody W. Coal Co., 15 E.A.D. 757, 763 (EAB 2013) (quoting Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,412 (May 19, 1980)).

³¹² See 40 C.F.R. § 124.19(a)(4)(ii) (2022); In re Envotech, L.P., 6 E.A.D. 260, 265 (EAB 1996).

³¹³ Letter from Cheryl L. Newton, Acting Regional Administrator, EPA, to Mary Ann Dolehanty, Air Quality Division, Mich. Dep’t of Env’t., Great Lakes & Energy (Sept. 16, 2021).

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ *Id.*

and policies.³¹⁹ That assessment could lead the state to conclude that the facility should identify an alternative site. Although EPA did not outright deny approval of the proposed permit, it did take affirmative action and provide direction to a delegated state to protect an EJ community. These are the kinds of actions the Office of General Counsel, NEJAC, Professor Lazarus, and ELI had asserted EPA should take two decades earlier.

III. THE IMPACTS OF THE FEDERAL GOVERNMENT'S POLICY OVER PROCESS APPROACH

The Federal government's failure to develop a reliable enforcement mechanism for Environmental Justice issues has only served to delay justice for communities across America. The current system relies on a flexible and unenforceable policy-based approach, which may inform decisions in practice, but fails to produce positive outcomes (i.e., permit denials, timely remediation of toxic sites, advancement of cleaner technologies, alternative siting) for communities. The results of this failure are two-pronged: (1) government actors have become exempt from the consideration of Environmental Justice in practice, and (2) Environmental Justice has not been incorporated into final decisions.³²⁰ Without meaningful reform, the legacy of environmental injustice in the U.S. is likely to persist, leaving affected communities with a dwindling path toward relief.

A. *Legacy Toxic Sites as an Example of EJ Exemption*

As discussed above, a longstanding Environmental Justice issue has been the siting and remediation of hazardous waste (toxic) sites. Despite EPA's understanding of this issue and its importance to EJ communities, remediation of such sites has been painfully slow due, in part, to the ability of government agencies (state and federal) to "exempt" themselves from acting expeditiously. An example can be found in the Hampton Roads area of Virginia.³²¹ The area includes the independent cities of Norfolk, Suffolk, and Portsmouth in Eastern Virginia. With a population of 1.7 million, the region is one of the most vulnerable areas in the country when it comes to sea-level rise.³²² A recent study noted that "[t]he combination of global climate change and relatively significant land subsidence in the region have already contributed to the highest rates of *relative* sea-level rise along the U.S. East

³¹⁹ *Environmental Justice in Your Community*, EPA, <https://www.epa.gov/environmentaljustice/environmental-justice-your-community> (last visited Apr. 23, 2022).

³²⁰ See U.S. COMM'N ON CIVIL RIGHTS, ENVIRONMENTAL JUSTICE: EXAMINING THE ENVIRONMENTAL PROTECTION AGENCY'S COMPLIANCE AND ENFORCEMENT OF TITLE VI AND EXECUTIVE ORDER 12,898-90 (2016).

³²¹ The scenario recounted here has played out in numerous locations across the country.

³²² See MADHAVI KULKARNI, PROTECTING WATER QUALITY IN VIRGINIA: RECOMMENDATIONS TO COMBAT SEA LEVEL RISE AND INCREASED STORM EVENTS 3 (2020).

Coast.”³²³ In addition, Portsmouth, Suffolk, and Norfolk are home to a large African American community.³²⁴ These circumstances alone would lead to a finding that an Environmental Justice community exists in the region. However, the area’s climate vulnerabilities are not the most pressing concerns for local residents. Portsmouth, Suffolk, and Norfolk are also home to a combined *nine* Superfund Sites, all within a fifteen-mile radius.³²⁵ Many of these sites have been allowed to exist in a state of suspended non-compliance, which has turned the toxic burden of these sites into a generational legacy.

The Abex Corporation Site is located in Portsmouth, Virginia.³²⁶ According to EJSCREEN, the surrounding census blocks register between the 71st and the 99th percentile for the percentage of people of color in the area.³²⁷ The census block where the facility is located contains a population that is 93% low-income.³²⁸ The Abex Corporation operated as a brass and bronze foundry from 1928 to 1978.³²⁹ The site was added to the National Priorities List (“NPL”) in 1990 after contaminated soil was discovered at several nearby sites, which included the Washington Park housing complex, the Effingham Playground, the Seventh Street row of homes, and a two square block residential area.³³⁰ After a Remedial Investigation commenced in February 1992, the EPA found that soil in the area was contaminated with lead.³³¹ The first stage of the cleanup was completed in March 2000, and the second stage, “Operable Unit 2,” commenced in 2001.³³² The Agency has estimated that this process will be completed between September and November of 2022.³³³ Assuming this estimate is accurate, the cleanup process at the Abex Site will have taken approximately thirty-nine years.

³²³ *Id.*

³²⁴ *QuickFacts: Norfolk City, Virginia*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/norfolkcityvirginia> (Norfolk, VA has a population that is 40.6% African American and 46.3% White) (last visited Apr. 23, 2022); *QuickFacts: Portsmouth City, Virginia*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/portsmouthcityvirginia> (Portsmouth, VA has a population that is 52.6% African American and 38.9% White) (last visited Apr. 23, 2022); *QuickFacts: Suffolk City, Virginia*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/suffolkcityvirginia> (Suffolk, VA has a population that is 41.4% African American and 50.6% White) (last visited Apr. 23, 2022).

³²⁵ *See List of Superfund Sites in Virginia*, EPA, <https://www.epa.gov/va/list-superfund-sites-virginia> (last visited Apr. 23, 2022).

³²⁶ *Abex Corp. Portsmouth, VA: Cleanup Activities*, EPA, <https://tinyurl.com/2p8kuth9> (last visited Apr. 23, 2022).

³²⁷ *EPA’s Environmental Justice Screening and Mapping Tool (Version 2.0)*, EPA, <https://ejscreen.epa.gov/mapper/> (last visited Apr. 23, 2022) (Report of EJSCREEN Data after inputting the address of the site and selecting the demographic indicators filter – Feb 1, 2022).

³²⁸ *Id.*

³²⁹ *Abex Corp. Portsmouth, VA: Cleanup Activities*, *supra* note 326.

³³⁰ *Id.*

³³¹ *Id.*

³³² *Id.*

³³³ *Id.*

Located in the same community, a half of a mile away from the Abex site along the southern branch of Elizabeth River, is the Norfolk Naval Shipyard. The Shipyard was initially added to the NPL in July 1999.³³⁴ The main activities at the site include metal forming, repair and installation of mechanical and electrical equipment, metal fabrication, metal plating, and painting operations.³³⁵ Historically, the Shipyard engaged in disposal practices that contaminated sediment, surface water, and groundwater.³³⁶ Following a Federal Facilities Agreement between EPA and the Virginia Department of Environmental Quality, nine sites within the Shipyard's property were identified as requiring further action.³³⁷ The facility has completed *three* five-year reviews since the cleanup process was initiated, and no completion date has been identified by EPA.³³⁸ Notably, the Shipyard continues to function and recently applied for and received a permit from the Virginia State Air Pollution Control Board to construct a combined heat and power plant on its property.³³⁹

The Abex Corporation and the Norfolk Naval Shipyard are only two of many listed Superfund ("CERCLA") sites in the Norfolk-Portsmouth-Suffolk area, but they are representative of the delayed justice communities often face. CERCLA, which governs the cleanup of hazardous waste sites, employs an extremely permissive standard for evaluating the government's duty under the Act. Section 113(h) of CERCLA allows citizen suits challenging EPA's actions only if the actions fail to comply with certain procedural requirements provided by the Act.³⁴⁰ Moreover, courts have interpreted §113(h) as barring citizen suit challenges regarding remedial actions until they have been completed.³⁴¹ That bar has further been construed as taking effect as soon as EPA undertakes steps to consider removal or remediation, even if the only concrete action is a preliminary study.³⁴²

The current status of the Superfund program paints a bleak picture for overburdened communities. Facilities are often polluting communities for

³³⁴ *Norfolk Naval Shipyard Portsmouth, VA: Cleanup Activities*, EPA, <https://cumulis.epa.gov/superpad/SiteProfiles/index.cfm?fuseaction=second.Cleanup&id=0302841#Status> (last visited Apr. 1, 2022).

³³⁵ *Id.*

³³⁶ *Id.*

³³⁷ *Id.*

³³⁸ *Id.*

³³⁹ *Virginia Air Board Approves Norfolk Shipyard Gas Plant Permit*, CHESAPEAKE BAY FOUND. (Dec. 4, 2020), <https://www.cbf.org/news-media/newsroom/2020/virginia/virginia-air-board-approves-norfolk-shipyard-gas-plant-permit.html>.

³⁴⁰ 42 U.S.C.A. § 9613(h) (Westlaw through Pub. L. No. 117-102).

³⁴¹ *Razore v. Tulalip Tribes of Wash.*, 66 F.3d 236, 239 (9th Cir. 1995).

³⁴² *Schalk v. Reilly*, 900 F.2d 1091, 1095 (7th Cir. 1990).

years before they are listed on the NPL.³⁴³ When they are listed, the agencies are given the discretion to take as long as is deemed necessary to clean up a site, prolonging exposure to harmful pollutants.³⁴⁴ This leaves communities with few options other than bringing tort claims. If individuals choose this route, they are then faced with an equally high burden of proving causation (i.e., proving that a particular condition is the result of exposure to contaminants from the facility in question). In the Norfolk-Portsmouth-Suffolk region, the causation question is only further abstracted by the presence of several sites in close proximity to each other. Decades of continued exposure to contaminants is not a solution; it is simply the perpetuation of yet another injustice.

B. Reliance on National Standards to Avoid Action in EJ Communities

Even when given the opportunity, government actors still fail to apply Environmental Justice principles. The Equity Workgroup, Lazarus et al., and General Counsel Guzy all noted that EPA has the ability to change pollution standards through regulation as a means of preventing disproportionate harm or cumulative impacts. Yet, EPA has used NAAQS in the context of Environmental Justice as an indicator that Agency action will not result in disproportionately high and adverse human health or environmental effects on minority and low-income populations residing near a proposed facility.³⁴⁵

³⁴³ See, e.g., *Bear Creek Sediments Site in Baltimore Added to Superfund Cleanup List: Bear Creek's Addition to EPA's National Priorities List Elevates Clean-up Plans*, EPA (March 18, 2022) <https://www.epa.gov/newsreleases/bear-creek-sediments-site-baltimore-added-superfund-cleanup-list>.

The Bethlehem Steel Corporation operated the Sparrows Point Steel Mill in Baltimore for more than 80 years, EPA and MDE sued the company in the late 1990s in response to mounting hazardous waste violations. The Chesapeake Bay Foundation filed a lawsuit in 2010 seeking a full investigation of the contamination in the area. In September of 2021, the EPA proposed adding 60 acres of the impacted property to the NPL including an offsite creek. On March 18, 2022, EPA formally listed Bear Creek on the NPL. While this is a step in the right direction, it is not clear why it took EPA 12 years to get to this decision. Moreover, affected residents in the area will now be faced with the possibility of a lengthy remediation process. *Sparrows Point and Bear Creek: Toxic Chemicals in Sediment Continue to Affect the Environment*, CHESAPEAKE BAY FOUND. (last visited Apr. 1, 2022), <https://www.cbf.org/about-cbf/locations/maryland/issues/sparrows-point.html>.

³⁴⁴ See ROBERT BULLARD ET AL., UNITED CHURCH OF CHRIST JUST. & WITNESS MINISTRIES, *TOXIC WASTES AND RACE AT TWENTY 1987–2007: A REPORT PREPARED FOR THE UNITED CHURCH OF CHRIST JUSTICE & WITNESS MINISTRIES* xii (2007) (“Slow government response to environmental contamination and toxic threats unnecessarily endangers the health of the most vulnerable populations in our society. Government officials have knowingly allowed people of color families near Superfund sites, other contaminated waste sites and polluting industrial facilities to be poisoned with lead, arsenic, dioxin, TCE, DDT, PCBs and a host of other deadly chemicals. Having the facts and failing to respond is explicitly discriminatory and tantamount to an immoral ‘human experiment.’”); EPA, *CASE RESOLUTION MANUAL: JANUARY 2021* 47 (2021).

³⁴⁵ See, e.g., *In re Avenal Power Ctr., LLC*, 15 E.A.D. 384, 2 (EAB 2011) (CAA PSD permit, EO does not require a determinative outcome when data is not sufficient – EPA determined what data should be included in EJ analysis and could not determine whether NOx emissions would disproportionately harm EJ community); *In re Knauf Fiber Glass, GmbH*, 9 E.A.D. 1, 1 (EAB 2000); *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 18 (EAB 1997).

For example, in reviewing an EPA permitting decision concerning the siting of two offshore oil rigs near Native Alaskan villages, the EAB upheld the Region's determination that NAAQS are the Agency's standards, designed to protect human health and welfare with an adequate margin of safety.³⁴⁶ The EAB held that E.O. 12898 concerns itself with effects that are "adverse," and because the Region had determined that no such adverse effects as defined by the Clean Air Act PSD permit program would result from the issuance of the Permits, it refused the Native Alaskan's request for an additional comparative impact analysis.³⁴⁷ The Board did require the Region to explain why the two oil rigs were not considered one source for emissions calculation purposes just because they were more than 500 meters from each other.³⁴⁸ However, the NAAQS for fine particulate matter, PM2.5, has been found by experts and by the Fourth Circuit to be an insufficient standard for assessing impacts in environmental justice communities.³⁴⁹ Research has established that there is no threshold concentration below which PM2.5 is harmless.³⁵⁰ Moreover, African Americans suffer from higher rates of asthma and other respiratory ailments, putting them at higher risk of harm from exposure to particulate matter.³⁵¹

As noted above, in considering the impacts of the Atlantic Coast Pipeline, FERC's Final EIS asserted that because emissions from the proposed Buckingham, Virginia, gas compressor station would meet the NAAQS for PM2.5, it would not harm an adjacent EJ community.³⁵² The Virginia Air Board held similarly when it issued an air pollution permit for the facility.³⁵³ Upon review of the air permit, the Fourth Circuit held that despite the NAAQS, the Virginia Air Board "failed to individually consider the potential degree of injury to the local population independent of the NAAQS..."³⁵⁴ Moreover, "[t]he Board's reliance on air quality standards led it to dismiss EJ concerns."³⁵⁵ The Fourth Circuit found this failure and reliance to render the Air

³⁴⁶ In re Shell Offshore, Inc., 13 E.A.D. 357, 34 (EAB 2007).

³⁴⁷ *Id.*

³⁴⁸ *Id.* at 35.

³⁴⁹ Friends of Buckingham v. State Air Pollution Control Board, 947 F. 3d 68, 91 (4th. Cir. 2020).

³⁵⁰ *Id.* at 92. See also Am. Trucking Ass'ns v. EPA, 283 F.3d 355, 360 (D.C. Cir. 2002).

³⁵¹ 947 F.3d at 88.

³⁵² *Id.*

³⁵³ *Id.* at 71.

³⁵⁴ *Id.*

³⁵⁵ *Id.* at 86.

Board's decision to grant the permit arbitrary and remanded the permit for further consideration.³⁵⁶

IV. TO DEFINE OR BE DEFINED: THE FIGHT FOR “DISPROPORTIONATE IMPACT”

As discussed above, Environmental Justice efforts at the federal level have largely been comprised of unenforceable policy measures. This approach has stagnated the progress of Environmental Justice, leaving communities with decades of guidance and few concrete outcomes. Essentially, the government has thoroughly articulated the harm experienced by individuals disproportionately impacted by environmental pollution, but it has declined to make that harm redressable by law.

A consistent barrier to the development of Environmental Justice laws is developing terminology that adequately encompasses the nuances of a particular community without being exclusionary to the detriment of other communities. Advocating for a reliable standard for assessing environmental justice impacts may ultimately exclude a community facing similar issues in differing circumstances. For example, when evaluating EJ Indices in EPA's EJSCREEN tool, some regulators utilize the 80th percentile as a threshold to determine whether an impacted area is overburdened or shows issues of concern.³⁵⁷ This approach has been proposed and upheld by EPA.³⁵⁸ While EPA does not discourage regulators from looking below the 80th percentile, the effect of supplying a bright-line standard as a threshold as opposed to a range is to deter regulators from looking below it. A bright-line standard also creates a narrative that those who fall below the standard are not experiencing a meaningful level of harm. A community is not relieved of adverse environmental impacts by virtue of registering in the 79th percentile or below it, and yet regulators are often relieved of their duty to consider them.

To prevent the creation of a false dichotomy of safe and unsafe communities, regulators and the laws themselves must seek to employ a more comprehensive approach to assessing impacts. The concept of Environmental Justice

³⁵⁶ *Id.* (“This strikingly limited analysis goes hand in hand with the EJ error analyzed above, making the health risk ... analysis all the more important. Instead, the Board accepts without deciding that this area may be an EJ minority community with a high risk for asthma complications, and then does not properly recognize the localized risk of the very particulate matter that exacerbates asthma”).

³⁵⁷ *Frequent Questions About EJSCREEN*, EPA, <https://www.epa.gov/ejscreen/frequent-questions-about-ejscreen> (last visited Apr. 23, 2022) (“EPA identified the 80th percentile filter as that initial starting point. As EPA gains further experience and insight into the performance of the tool and its applicability for different uses, program offices and regions may opt to designate starting points that are more inclusive or specifically tailored to meet programmatic needs more effectively. Read the EJSCREEN Technical Documentation for more information on this topic”).

³⁵⁸ EPA, TECHNICAL GUIDANCE FOR ASSESSING ENVIRONMENTAL JUSTICE IN REGULATORY ANALYSIS 43 (2016).

is predicated on the fact that individuals in vulnerable and marginalized communities are disproportionately affected by environmental hazards. Following the Warren County protests, the authors of the Toxic Waste and Race in the United States Report found that race was the number one factor in determining the proximity to hazardous sites.³⁵⁹ Dr. Robert Bullard further supported this conclusion in his book, *Dumping in Dixie*.³⁶⁰ Because of these findings and those that followed, the term “disproportionate” or “disparate” is frequently applied in the Environmental Justice context to illustrate the proportional harm experienced by communities.

E.O. 12898, which followed *Toxic Wastes and Dumping in Dixie*, described disproportionate effects as “situations of concern where there exists significantly higher and more adverse health and environmental effects on minority populations, low-income populations or indigenous peoples.”³⁶¹ While the terms “disparate impact” and “disproportionate impact” are included in many emerging Environmental Justice laws, very few define them. This makes it difficult, if not impossible, for citizens to establish such harm or for regulators to acknowledge it and act to prevent it. This is borne out in the litany of EAB decisions identified above discussing the issue.

Since its passage in September of 2020, New Jersey’s Environmental Justice Law has been lauded as a rare and comprehensive approach to Environmental Justice.³⁶² However, even the New Jersey law does not strive to define disproportionate impact, despite its reference in the title. The law is self-described as “[a]n Act concerning the disproportionate environmental and public health impacts of pollution on overburdened communities....”³⁶³ The law goes on to state that “[t]he legislature further finds and declares that no community should bear a disproportionate share of the adverse environmental and public health consequences that accompany the State’s economic growth.”³⁶⁴ The Law defines “overburdened community,” but fails to provide guidance on how to determine that a disparate impact exists.³⁶⁵

³⁵⁹ UNITED CHURCH OF CHRIST, *supra* note 19.

³⁶⁰ BULLARD, *supra* note 17 at 50–51.

³⁶¹ Exec. Order No. 12,898, 3 C.F.R. Section 859 (1994).

³⁶² Julius M. Redd & Hilary Jacobs, *New Jersey Passes Landmark Environmental Justice Legislation*, NAT. L. REV. (Sept. 1, 2020), <https://www.natlawreview.com/article/new-jersey-passes-landmark-environmental-justice-legislation> (“The bill’s coverage and requirements are the most far reaching environmental justice legislation in the country”).

³⁶³ N.J. STAT. ANN. § 13:1D-157 (West 2020).

³⁶⁴ *Id.*

³⁶⁵ For a harm to be disproportionate, the level of impact in one area must be compared to another area. Some believe community impacts should be compared to other parts of the same county. Others believe those impacts should be compared with the rest of the state. *See* Friends of Buckingham vs. State Air Pollution Control Bd., 947 F.3d 68, 84 (4th Cir. 2020); U.S. GENERAL ACCOUNTING OFFICE, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES 2 (1983).

This is also true of Virginia's Environmental Justice Act, which sets the promotion of Environmental Justice as the policy of the Commonwealth.³⁶⁶ Adopting EPA's definition, "Environmental Justice" is defined as "the fair treatment and meaningful involvement of every person, regardless of race, color, national origin, income, faith or disability, regarding the development, implementation or enforcement of any environmental law, regulation, or policy."³⁶⁷ "Fair treatment" is further defined as "the equitable consideration of all people whereby no group of people bears a disproportionate share of any negative environmental consequence resulting from an industrial, governmental, or commercial action, program or policy" (emphasis added).³⁶⁸ These laws provide rare opportunities for communities threatened by new polluting sources to protect themselves and advocate their interest before regulators but fail to provide much-needed guidance on the proper approach to determining disproportionate impacts.³⁶⁹

The sticking point for regulators is rarely whether a Black, Indigenous, People of Color ("BIPOC"), low-income, or otherwise marginalized community exists near a proposed facility or project, but whether the proposed activity actually causes disproportionate harm to an identified Environmental Justice community. When this discussion arises, disproportionate impact analyses are the first target of permit applicants. For example, Dr. Bullard detailed an incident in a recent op-ed. He recalled that "[i]n a March [2021] hearing before a federal appeals court on the proposed Rio Grande terminal, an agency lawyer made a logical pretzel of an argument that the project did not disproportionately affect minority and low-income populations."³⁷⁰ The lawyer supported his reasoning by saying that "all of the communities within the affected zone were minority or low-income[,] thus, they were not disproportionately affected."³⁷¹ Atlantic Coast Pipeline representatives made a similar argument before the Virginia State Air Pollution Control Board while advocating for a permit for the then proposed Buckingham Compressor Station.³⁷² Representatives argued that residents in the predominantly minority community of Buckingham in rural Virginia breathed better air than other Virginians such as in Fairfax, Arlington or Norfolk, so they would not be

³⁶⁶ H.B. 704, 2020 Reconvened Sess. (Va. 2020).

³⁶⁷ *Id.*

³⁶⁸ *Id.*

³⁶⁹ See Charles Lee, *Confronting Disproportionate Impacts and Systemic Racism in Environmental Policy*, 51 ENVTL. L. REP. 10207, 10207 (2021); Ana Isabel Baptista, *Just Policies? A Multiple Case Study of State Environmental Justice Policies ii* (May 2008) (Ph.D. dissertation, Rutgers Univ.).

³⁷⁰ Robert Bullard, *I Wrote About This Environmental Justice Decades Ago. It Hasn't Changed*, N.Y. TIMES (June 29, 2021), <https://www.nytimes.com/2021/06/29/opinion/biden-environmental-justice-pipelines.html>.

³⁷¹ *Id.*

³⁷² Sarah Vogel song, *At Compression Station Hearing, Sharp Questions on Environmental Justice*, VA. MERCURY (Oct. 29, 2019), <https://www.virginiamercury.com/blog-va/at-compressor-station-hearing-sharp-questions-on-environmental-justice/>.

disproportionately impacted by the proposed Station.³⁷³ The Fourth Circuit found this argument disingenuous and stated that the comparison should be of people in the neighboring community with other members of the surrounding county.³⁷⁴

As proponents of harmful facilities continue to attempt to exploit the application of the disproportionate impact standards, it has become clear that communities, and the advocates who seek to support them, are in need of a reliable approach to the analysis.³⁷⁵ Several government agencies have attempted to articulate and apply disproportionate impact analyses to permitting decisions.³⁷⁶ For example, in its Final Supplemental Environmental Impact Statement (“sEIS”) for the Atlantic Coast Pipeline Restoration Project and Supply Header Project, the Federal Energy Regulatory Commission (“FERC”) sought to address Environmental Justice concerns.³⁷⁷ The proposed project was intended to restore long swaths of countryside that had been torn down in preparation for the laying of a natural gas pipeline that was later abandoned. In its EJ analysis, FERC provided that “[i]n this sEIS, a disproportionately high and adverse effect on an environmental justice community means the adverse effect is predominately borne by such population or is appreciably more severe or greater in magnitude on the minority or low-income population than the adverse effect suffered by the non-minority or

³⁷³ *Friends of Buckingham vs. State Air Pollution Control Bd.*, 947 F.3d 68, 79 (4th Cir. 2020).

³⁷⁴ Vogel song, *supra* note 372.

³⁷⁵ Oral Argument of Judge Gregory at 30:35–36:42, *Friends of Buckingham v. State Air Pollution Control Board*, 947 F.3d 68 (4th Cir. 2020), <https://www.ca4.uscourts.gov/OAarchive/mp3/19-1152-20191029.mp3>.

³⁷⁶ EPA has used the NAAQS in the context of Environmental Justice as an indicator that Agency action will not result in disproportionately high and adverse human health or environmental effects on minority and low-income populations residing near a proposed facility. *See, e.g.*, In re Avenal Power Ctr., LLC, 15 E.A.D. 384, 393 (2011); In re Shell Offshore, Inc., 13 E.A.D. 357, 383 (2007); In re Knauf Fiber Glass, GmbH, 9 E.A.D. 1, 17 (2000); In re Ash Grove Cement Co., 7 E.A.D. 387, 412 (1997). This is consistent with Board practice, in the context of PSD permit appeals, of upholding a permit issuer’s EJ analysis based on a proposed facility’s compliance with the relevant NAAQS. In re Shell Gulf of Mex., 15 E.A.D. 103, 156 (EAD 2010) (stating that the “Board relies on and defers to the Agency’s cumulative expertise when upholding a permit issuer’s environmental justice analysis based on a proposed facility’s compliance with the relevant NAAQS in a PSD appeal”). The Board has stated that “[i]n the context of an environmental justice analysis, compliance with the NAAQS is emblematic of achieving a level of public health protection that, based on the level of protection afforded by a primary NAAQS, demonstrates that minority or low-income populations will not experience disproportionately high and adverse human health or environmental effects due to exposure to relevant criteria pollutants.” Environmental Appeals Board, 15 E.A.D. 1, 669 (EAB 2013).

³⁷⁷ Sarah Vogel song, *Federal Review Recommends Leaving Canceled Atlantic Coast Pipeline Pipe, Felled Trees in Place*, V.A. MERCURY (Jul. 27, 2021) https://dailyprogress.com/news/local/federal-review-recommends-leaving-canceled-atlantic-coast-pipeline-pipe-felled-trees-in-place/article_aa1cb55e-ef0c-11eb-8e8c-5f7c4b414fbb.html.

non-low-income population” (emphasis added).³⁷⁸ The sEIS also provides its definition of “population:”

... minority populations are defined in this EIS where either: (a) the minority population of the affected area exceeds 50 percent; or (b) the aggregate minority population of the affected area is meaningfully greater (10 percent greater) than the aggregate minority population percentage in the general population or other appropriate unit of geographic analysis... guidance also directs low-income populations to be identified based on the annual statistical poverty thresholds from the U.S. Census Bureau. Low-income populations are identified as census block groups where the low-income populations are greater than or equal to that of the county.³⁷⁹

FERC’s approach to Environmental Justice in this case was uniquely comprehensive, especially in light of its previous assessments discussed above. Under the standard currently articulated by the Commission, both the Rio Grande terminal and the Buckingham compressor station would likely have been found to have a disproportionate impact on surrounding communities.

More liberal approaches to the determination of Environmental Justice impacts have also been proposed by EJ advocates. In the Spring of 2020, Representatives Grijalva (AZ) and McEachin (VA) introduced H.R. 2021, also known as the Environmental Justice for All Act (“EJ Act”).³⁸⁰ The EJ Act’s Statement of Policy states that each Federal agency should –

... seek to achieve environmental justice as part of its mission by identifying and addressing, as appropriate, *disproportionately adverse* human health or environmental effects of its programs, policies, practices, and activities on communities of color, low-income communities, rural communities, and Tribal and indigenous communities in each State of the United States (emphasis added).³⁸¹

The EJ Act then provides the following definitions:

...[t]he term “disparate impact” means an action or practice that, though appearing neutral, actually has the effect of subjecting persons to discrimination because of their race, color, or national origin...[t]he term “disproportionate burden of adverse human health or environmental effects” means situations where there exists higher and more adverse human health or environmental effects on communities of color, low-income communities, rural communities, and Tribal and indigenous communities.³⁸²

These definitions are excellent examples of providing a framework for evaluation without utilizing bright-line standards, like the 80th percentile

³⁷⁸ FED. ENERGY REGULATORY COMM’N, FINAL SUPPLEMENTAL IMPACT STATEMENT FOR THE ATLANTIC COAST PIPELINE RESTORATION PROJECT AND SUPPLY HEADER RESTORATION PROJECT 4-76 (2021).

³⁷⁹ *Id.*

³⁸⁰ *Environmental Justice for All Act*, POPVOX, <https://www.popvox.com/madison/documents/environmental-justice-for-all-act> (last updated Feb. 27, 2020).

³⁸¹ *Id.*

³⁸² *Id.*

threshold, or leaving the concepts open to interpretation like many state Environmental Justice laws. This approach also bears a significant similarity to FERC's analysis. Both definitions make it clear that an analysis of disproportionate impacts is not a matter of comparing *any* sub-group or population, as the proponents of the Buckingham compressor station and the Rio Grande terminal attempted to do. Instead, an accurate analysis requires assessing the characteristics of BIPOC and low-income communities and comparing them to those of their counterparts in light of the likelihood of adverse environmental impacts from proposed projects. In practice, definitions like these could go a long way to ensure that communities are able to present the extent of potential impacts to regulators effectively.

V. RECOMMENDATIONS FOR IMPROVEMENT OF EJ ANALYSIS BY FEDERAL AND STATE AGENCIES

We are past the time for “recognizing” that Environmental Justice is essential or enacting broad policy statements that are never translated into step-wise approaches to EJ in actual permitting programs. Communities, lawyers, scientists, and politicians have worked for decades to contribute to the discourse around environmental racism and persistent, systemic inequities in the application of environmental regulations. The issue has been identified and confirmed. The question now is what we are going to do about it? The environmental movement has long been applauded for its role in encouraging the development and passage of a comprehensive suite of environmental laws. Like the EJ movement, the foundational environmental movement was sparked by an increase in severe localized incidents that demonstrated the seriousness of the issue. That is where the similarities end, and the disparities begin.

Rachel Carson's *Silent Spring*, which is largely credited with sparking discourse on environmental issues, was published as a series of essays in the *New Yorker*.³⁸³ *Toxic Wastes and Race in the United States*, which played a similar role in the Environmental Justice movement, was published independently by the United Church of Christ.³⁸⁴ The protests and advocacy around the environmental movement resulted in the development and passage of a series of environmental laws, creating a comprehensive regulatory framework.³⁸⁵ This framework also included citizen suit provisions which, as a principle, recognize the value of citizen advocacy in supplementing federal

³⁸³ Rachel Carson, *Silent Spring-1*, THE NEW YORKER (June 9, 1962), <https://www.newyorker.com/magazine/1962/06/16/silent-spring-part-1>.

³⁸⁴ UNITED CHURCH OF CHRIST, *supra* note 19.

³⁸⁵ See *Overview: Key Federal Environmental Laws*, FINDLAW, <https://www.findlaw.com/smallbusiness/business-laws-and-regulations/overview-key-federal-environmental-laws.html> (last updated Jun. 20, 2016).

enforcement.³⁸⁶ In comparison, EJ advocacy has resulted in the development of an executive order and numerous federal guidance documents. What is more, disproportionate environmental impacts experienced by individuals are not evidence of harm that is redressable by law in the way that environmental harms are. Instead, Environmental Justice wins have been achieved by creative approaches to state and local laws and applications of environmental and civil rights laws.

For EJ concerns to be addressed, the federal government must revise current environmental laws to prevent communities from bearing disproportionate pollution burdens. The current suite of environmental laws has not been revised since the mid-70s in some cases, and E.O. 12898's blanket directive has not proven sufficient to encourage government actors to take action in favor of Environmental Justice communities on any consistent basis.³⁸⁷ Though applicants and communities share the burden of proof in the regulatory context, they do not share the same resources necessary to generate that proof. What is more, the political realities of regulation often favor the applicant, unofficially shifting the burden of proof to communities and advocates. As it stands, citizens must work to provide specific demographic and scientific information demonstrating potential harm to their communities by proposed projects or facilities. This in return creates a need for NGOs and grassroots advocates to support communities by providing legal and scientific support, oftentimes at considerable expense. Additionally, while state regulators are meant to be neutral arbiters in the permitting process, they are often faced with the dilemma of compiling relevant and reliable data using their own resources, or simply adopting the data and conclusions provided to them by the applicant. By codifying notions of disparate impact and cumulative impact, the government can ensure that environmental laws, and the citizen suit provisions they contain, are accessible to all communities and that regulators are equipped to resolve competing evidence of public health and environmental impacts.

The government can also support communities by cultivating scientific resources and ensuring there are localized alternatives available to generalized national tools like NAAQS and EJSCREEN.³⁸⁸ National tools require averaging where impacts to EJ communities are divergent by nature. Environmental Justice impacts may adhere to a pattern, but issues do not always present the same way in every community. Topography, population

³⁸⁶ ENVTL. L. INST., A CITIZEN'S GUIDE TO USING FEDERAL ENVIRONMENTAL LAWS TO SECURE ENVIRONMENTAL JUSTICE 3 (2002).

³⁸⁷ *Oversight of EPA's Environmental Justice Programs: Hearing Before the Subcomm. on Superfund and Environmental Health of the Committee on Environment and Public Works*, 110th Cong. 13 (2007) (statement of Hon. Hilda L. Solis, U.S. Representative from the State of California).

³⁸⁸ See, e.g., Virginia, MAPPING FOR ENVTL. JUSTICE, <https://mappingforej.berkeley.edu/virginia/> (last visited Mar. 29, 2022).

demographics and health indicators, the size or range of the facility or operation in question, the associated pollutant, and the community's desired outcome all play into the assessment of impacts. In their current form, generalized approaches can only serve as guidance, not as determinants.

CONCLUSION

Historically, the federal government, most notably EPA, has spoken often about addressing Environmental Justice in two ways: (1) improving its communication with overburdened communities and improving their ability to meaningfully participate in the regulatory process and (2) addressing disproportionate harm and cumulative impacts in agency decision making. A review of efforts over the years shows great improvement on the first front – improving public notice and comment, but little progress has been made on taking decisive action to address EJ concerns in developing standards, focusing enforcement, or making permitting decisions.

As several scholars and EPA General Counsel have noted, EPA has the authority to take such actions. EPA has been shown the proverbial watering trough but has refused to drink. This is despite over a century of discriminatory federal, state, and corporate laws, rules, and practices that anchor minority and low-income individuals to communities facing disproportionate and cumulative adverse impacts from pollution.³⁸⁹ Given the breadth of Agency discretion, this reluctance will be hard to overcome without strong leadership both internally and judicially, both at the EAB and the federal judiciary. EJ advocates play a role here too. Where the EAB and other tribunals have noted there is a lack of authority for the government to act, the litany of internal and external legal analyses showing that to be incorrect must be repeated. If more evidence is needed to overcome agency discretion, but community funding is scarce or non-existent, advocates must use the tools available and work with the community to apply for funding from the agencies to develop the evidence and cogently present it to the tribunal.

The current state of Environmental Justice discourse is the result of persistent research, advocacy, and litigation by stakeholders across the nation. The work has been done to prove that environmental injustices exist; now it is time to stop these injustices from happening. Communities have worked to raise awareness of the severity of the issues they face, and activists and advocates have worked to support them. Now is the time for government to go beyond its practice of generating unenforceable policy statements. As discussed above, in order to advance Environmental Justice, federal and state governments must create enforceable regulations designed to address the

³⁸⁹ See Talia Buford, *Has the Moment for Environmental Justice Been Lost?*, PROPUBLICA (Jul. 24, 2017) <https://www.propublica.org/article/has-the-moment-for-environmental-justice-been-lost>.

disproportionate harm experienced by communities and give regulators, judges, and citizens the opportunity to apply them.

Despite the plethora of research available, the fight for EJ is largely a battle of resources and narratives. Harmful environmental facilities and practices are not largely conducted by individuals but by companies and industries. When projects are proposed, communities are asked to respond to an overwhelming amount of scientific analysis prepared by professionals hired by the applicant, who also brings the weight of industry interests and the elusive promise of economic benefits with them. Additionally, the analyses provided by applicants as part of the permitting process are often adopted or accepted by regulators with little resistance. Essentially, these projects have the benefit of being safe until proven toxic. This dynamic places a significant burden on the community to compile sufficient resources and dedicate significant amounts of time, in order to determine the extent of potential impacts and challenge the conclusions put forth. In allowing this pattern to continue, government has left communities vulnerable to continued pollution and increased the likelihood that more areas will reach the 80th percentile EJ standard.

The inclusion of disproportionate impact terminology in environmental laws and regulations would protect communities who have long waited for justice and prevent the creation of new environmental injustices. For too long, government has shirked its responsibility to citizens in EJ communities, providing discourse in place of action. We have fought for environmental protection and civil rights, but as long as environmental injustice persists, we can achieve neither.

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