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ARTICLE: REVIEW OF ACTIONS UNDER PRESIDENT CLINTON'S EXECUTIVE ORDER ON ENVIRONMENTAL JUSTICE

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SUMMARY:
... The National Environmental Policy Act of 1969 (NEPA) subjects major actions having significant environmental impacts substantially involving federal agencies to environmental impact review. ... In *Puerto Rico Electric Power Authority (Cambalache Combustion Turbine Project)*, EPA Region II made an affirmative effort to comply with the Executive Order's environmental justice policy in a permit review of a combustion turbine electric generating station in Arecibo, Puerto Rico, under the Clean Air Act. In addition to "ensuring public participation in the permitting process," the Agency "performed a comprehensive environmental justice analysis" that included a costly "merging and analysis of data from three data bases in the Region's Geographic Information System (GIS) data library." ... "Implementation" of the Executive Order was restricted by the *CWM* Board to providing "early and ongoing public participation in those cases where environmental justice is an issue." ... This would be true even without a finding of disparate impact. ... The *CWM* approach appears to elevate the Executive Order's facial urging of discretionary action to promote environmental justice to a legal duty, where the procedural requirements for public participation result in a compelling empirical case, included in the record of administrative review, of disproportionate adverse environmental impacts on either a low-income or a minority community. ...

TEXT:

[*79] [*80] I. Introduction

The National Environmental Policy Act of 1969 (NEPA) [1] subjects major actions having significant environmental impacts substantially involving federal agencies to environmental impact review. This review must include opportunities for public participation, public disclosure of interagency comments and communications, [2] and meaningful agency response to public comments. [3]

However, NEPA case law establishes that results that are more or less protective of the

environment are not mandated by the Act. [4] Rather, NEPA's mandate to decision makers is to afford the public access to information and opportunities to inject evidence and analysis regarding adverse impacts into the decision making process for their consideration. Achieving environmental protection by guaranteeing meaningful opportunities for public participation in the environmental decision making process is an approach also adopted in most major federal environmental statutes. [5] State statutes inspired **[*81]** by NEPA adopt the same approach to environmental protection, often extending the range of actions covered by NEPA's public participation mandate. [6]

Unsatisfied with the limitations imposed by the public participation approach of current environmental law, activists in the national environmental justice movement, together with legal advocates and academic proponents of environmental justice, have looked for ways to mandate substantive standards that will extend the law's reach. Application of equal protection analysis to claims of environmental racism, a subset of those inequities addressed under the environmental justice theme, provides a theoretically clear basis for a substantive approach. However, in reality little or no success has been achieved this way. [7] A large part of the difficulty is the proof of **[*82]** intent to discriminate required under equal protection analysis, coupled with the complex and still debatable empirical basis for environmental racism. [8] However, disparate impact analysis under Title VI, and the use of Title VIII's prohibition of housing discrimination, neither of which require proof of intentionality, have not fared any better. [9] Finally, neither constitutional equal protection **[*83]** approaches or other substantive approaches using civil rights statutes address the need for "remedies that could be used by poor people, as poor people." [10]

Because of the limited reach of NEPA and the limited success of civil rights approaches to remedying environmental inequity, environmental justice advocates greeted President Clinton's 1994 Executive Order on Environmental Justice [11] directing federal agencies to use environmental justice criteria in applying NEPA with great enthusiasm. [12] However, this enthusiasm has been based on hopes that the Executive Order will authorize new substantive standards for review of actions raising environmental justice concerns.

This paper looks at the few attempts made to seek judicial review of an agency action under the Order, arguing that the most powerful effects of the Order will come from its expansion of the public participation approach of existing environmental law rather than from further advocacy of a substantive approach. Attempts to utilize a substantive environmental justice approach under color of the Order are precluded both by the text of the Order itself and by emerging Executive Order case law. [13] However, the EPA Environmental **[*84]** Appeals Board (EAB) has developed an environmental justice analysis in response to such attempts that may extend the reach of the Order, within narrows limits, beyond its own expressed limitations. [14]

II. The Executive Order

Under President Bush, the EPA in November, 1992, established an Office of Environmental Justice (OEJ) whose mission is to coordinate environmental justice concerns among the EPA's policies relating to air, land, and water pollution. [15] In 1994 President Clinton issued an Executive Order directing "each federal agency [to] 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." [16]

The Order directs each agency to "develop an agency-wide environmental justice strategy" [17] within 12 months of the date of the Order [18] to "ensure greater public participation . . . among minority populations and low-income populations" [19] and to specifically **[*85]** implement the Order's mission in the areas of enforcement, public participation, and research. [20] While most agencies failed to meet the 12-month deadline, by now "EJ Strategies" have been developed

by all federal agencies. [21]

The Order created an Interagency Working Group on Environmental Justice to coordinate the efforts of the agencies to implement the Order and to provide guidance for agency development of EJ Strategies. [22] In addition, the Council on Environmental Quality (CEQ), with responsibility for reviewing and appraising programs and policies of the federal government in light of NEPA's policies, [23] issued draft guidance in June, 1996, on implementing the Executive Order under the Act. [24] While CEQ **[*86]** regulations do not require public participation in the environmental review process until after the initial environmental assessment and decision as to whether an EIS will be prepared, [25] "because public participation is so important to the spirit of the NEPA, most, if not all agencies have incorporated public-review criteria at this initial stage of review." [26] As a result, the Order has the potential [27] to extend the OEJ's mission to all areas of federal regulation.

Although a number of commentators have recently argued that the Order should have specific effects on government and the bar, [28] Section 6-609 of the Order specifically states its intention "only to improve the internal management of the executive branch and . . . not . . . to create any right to judicial review involving the compliance or noncompliance of the United States, its agencies, its officers, or any **[*87]** other person with this order." [29] This provision of the Order seems to leave untouched the discretion enjoyed by agency decision makers who comply with the procedural requirements of existing environmental law. [30] However, notwithstanding Section 6-609, whether an action may be reviewed for its compliance with the "mission" embraced by the Executive Order has been tested by environmental justice advocates.

III. Challenges to Federal Agency Actions Under the Executive Order

Agency actions challenged on various theories presuming the Executive Order establishes new substantive rights have predictably crashed on the rocks of the Order's Section 6-609. In *New River Valley Greens v. U.S. Dept.*, [31] local environmental groups and the Sierra Club argued that a major highway construction project should be enjoined because the Department of Transportation (DOT) failed to consider disproportionate impacts on low-income and minority populations pursuant to the Order which, if found, would require completion of a supplemental EIS under NEPA, and because DOT's conclusory statement of no disproportionate impact on low-income and minority populations violated NEPA's duty to ". . . make a reasoned determination whether [new information] is of such significance as to require implementation of formal NEPA filing procedures." [32] Both arguments failed because under Section 6-609 "plaintiffs may not use the courts to force defendants to comply with **[*88]** the Order's commands." [33] The *New River Valley Greens* court specifically rejected the theory that the Order broadens the scope of review under NEPA. [34]

In *Chemical Waste Management of Indiana, Inc.*, [35] a RCRA permit modification was challenged in part because the EPA made an attempt to respond to environmental justice concerns raised by the challengers during the comment period provided by the agency, but at a time when the EPA had failed to develop an EJ Strategy pursuant to the 12-month timetable under the Executive Order. The challenge therefore asserted that without national guidance or criteria the EPA's efforts to implement the Order were clearly erroneous. However, the bar to judicial review under the Order's Section 6-609 proved fatal to this challenge. [36]

Implementation of its underlying policy has also been demanded under the Order. In *Puerto Rico Electric Power Authority (Cambalache Combustion Turbine Project)*, [37] EPA Region II made an affirmative effort to comply with the Executive Order's environmental justice policy in a permit review of a combustion turbine electric generating station in Arecibo, Puerto Rico, under the Clean Air Act. [38] In addition to "ensuring public participation in the permitting process," [39] the Agency "performed a comprehensive environmental justice analysis" that included a costly "merging and **[*89]** analysis of data from three data bases in the Region's

Geographic Information System (GIS) data library." [40]

The challenger's inability to bring any alternative evidence to bear was fatal to their complaint that the agency's analysis lacked an epidemiology study, which they argued was mandated by the Executive Order. [41] However, the EAB went further to show that the Order's mandate to undertake such a study "relates to federal agencies' research activities[, rather than] the type of activity (permit issuance) undertaken by the Region in this case." [42]

In *Envotech, L.P. Milan, Michigan*, [43] the EAB took up an environmental justice challenge to EPA Region V's decision to issue **[*90]** two Class I Underground Injection Control (UIC) permits under the Clean Water Act. At issue was a hazardous waste landfill operator's proposal to dispose of leachate from the landfill by injection into underground wells in the vicinity of the landfill. The challenge alleged that because the area was already overburdened with undesirable and potentially polluting land uses the permit should be denied under the Executive Order. [44]

In response to environmental justice concerns raised during the public comment period the agency held a two-day hearing, imposed additional monitoring requirements on the permits, and undertook a demographic analysis of a two-mile radius around the facility. [45] The demographic analysis found that because within this area low-income or minority population concentration was 20 percent or less there would be minimal or no disparate impacts to underground drinking water supplies (UDWSs) of low-income or minority communities. [46] The agency's demographic analysis was challenged as inadequate because the size of the area studied was too small and because census tracts identifying discrete minority or low-income populations should be analyzed. [47] The Board did not reject these arguments. The Board found, however, that because the disparate impacts alleged were "unrelated to the protection of USDWs" [48] it could not review the permit decision.

The Board did not reach this result without a lengthy analysis. In both *Envotech* [49] and *Puerto Rico Electric Power Authority*, [50] the **[*91]** EAB applied, sometimes verbatim, the environmental justice analysis it developed in *Chemical Waste Management* (CWM). [51] In *Envotech* the EAB gave notice that the *CWM* analysis set forth an approach valid in a variety of environmental statutory and regulatory contexts, suggesting the Board will use this approach in future challenges brought under the Executive Order. [52]

IV. The EAB's Environmental Justice Analysis

The *CWM* analysis may extend the reach of the Executive Order on Environmental Justice beyond the apparent bar to judicial review of agency actions created by the Order's Section 6-609. At a minimum, aggrieved parties to agency decision making can achieve administrative review of the decision when opportunities for public participation, broadened pursuant to the Order, cause compelling evidence to be entered into the record regarding an action's direct disparate impacts to the health or environment of low-income or minority communities.

CWM involved a RCRA permit renewal and Class 3 modification [53] of Chemical Waste Management's Adams Center hazardous waste landfill in Fort Wayne, Indiana, permitting an **[*92]** expansion of the landfill. The Environmental Appeals Board declined to review the permit decision on the basis of the permitting agency's failure to comply with the Order.

At issue was whether the EPA (Region V) could restrict its evaluation of potential adverse effects to a one-mile radius around the landfill, where submissions at a public hearing established that a significant minority and low-income population resided in the immediate area of the landfill outside the one-mile radius and would bear the environmental and socioeconomic impacts of the facility disproportionately. The petitioners, the City of New Haven and two residents, [54] also argued that because the Executive Order's mandate to the Agency to prepare an EJ strategy had not yet been complied with, the Agency's permit

decisions constituted an abuse of discretion.

In order to reach its result, the Board could have relied on Section 6-609. The EPA invited the Board to do so by arguing that this section of the Order precluded review of a permit decision as a "matter of policy or exercise of discretion." [55] The Board rejected the Agency's argument.

While holding that in this case the petitioners had failed to carry their burden of showing that restricting impact analysis to a one-mile radius was clearly erroneous, and so declining to review the Agency's decision, the Board nevertheless also held that it could review agency "efforts to implement the Executive Order in the course of determining the validity or appropriateness of the permit decision at issue." [56] However, a demand for implementation of the Executive **[*93]** Order can have effect only where an agency fails to comply with statutory or regulatory requirements in environmental decision making independent of the Order's commands. [57]

"Implementation" of the Executive Order was restricted by the *CWM* Board to providing "early and ongoing public participation in those cases where environmental justice is an issue." [58] The Board noted that this procedural duty under the Order has no necessary substantive effect on a permit determination, consistent with the role of public participation in the RCRA permitting process generally. [59] Nevertheless, the Board urged the Agency in *CWM* to focus impact assessment on a low-income or minority segment of the community upon inclusion of any plausible claim of disproportionate impacts into the record:

> we hold that when a commenter submits at least a superficially plausible claim that operation of the facility will have a disproportionate impact on a minority or low-income segment of the affected community, the Region should, as a matter of policy, exercise its discretion under section 3005(c)(3) to include within its health and environmental impacts **[*94]** assessment an analysis focusing particularly on the minority or low-income community whose health or environment is alleged to be threatened by the facility. [60] . . . We hold [additionally] . . . that when the Region has a basis to believe that operation of the facility may have a disproportionate impact on a minority or low-income segment of the affected community, the Region should, as a matter of policy, exercise its discretion to assure early and ongoing opportunities for public involvement in the permitting process. [61]

However, apart from this urging by the *CWM* Board that the agency alter its procedures "as a matter of policy," [62] the Board also found that if compelling evidence of disparate impacts were provided as a result of public participation, under RCRA the agency would have a duty to act on that information, for the following reasons.

RCRA Section 3005(c)(3) contains an "omnibus clause" to which the Board pointed as an "area in which the Region has discretion to implement the Executive Order within the constraints of RCRA." [63] The Section directs the Agency to include "such terms and conditions as the Administrator (or the State) determines necessary to protect human health and the environment." [64] According to the Board,

> **[*95]** under the omnibus clause, if the operation of a facility would have an adverse impact on the health or environment of the surrounding community, the Agency would be required to include permit terms or conditions that would ensure that such impacts do not occur. Moreover, if the nature of the facility and its proximity to neighboring populations would make it impossible to craft a set of

> permit terms that would protect the health and environment of such populations, the Agency would have the authority to deny the permit. In that event, the facility would have to shut down entirely. Thus, under the omnibus clause, if the operation of a facility truly poses a threat to the health or environment of a low-income or minority community, the omnibus clause would *require* the Region to include in the permit whatever terms and conditions are necessary to prevent such impacts. This would be true even without a finding of disparate impact. [65]

The *CWM* holding requires a compelling showing of disparate impacts on low-income or minority communities before any duty to act is imposed on agency environmental decision making. [66] **[*96]** However, once a clear finding of disparate impacts is in the record, the *CWM* holding imposes a duty to affirmative action by an agency. A clear showing of disparate impacts of an action on an identifiable low-income or minority community segment would take away the agency's discretion by triggering the RCRA Section 3005(c)(3) duty to either impose "permit terms" that actually "would protect the health and environment of such populations" or, if such terms would not actually achieve this result, "deny the permit." [67]

The *CWM* approach appears to elevate the Executive Order's facial urging of discretionary action to promote environmental justice to a legal duty, where the procedural requirements for public participation result in a compelling empirical case, included in the record of administrative review, of disproportionate adverse environmental impacts on either a low-income or a minority community. Because the Board may review agency implementation of the Order "in the course of determining the validity or appropriateness of [a] permit decision at issue," [68] this substantive **[*97]** effect of the Order will be felt in any area coming under EAB jurisdiction. [69]

V. Potential Effects of the Executive Order on Environmental Justice

In contrast to equal protection and other civil rights approaches, the public participation approach to environmental justice is already mandated by NEPA and its state counterparts. [70] The effect of the President's Executive Order on Environmental Justice in broadening the public participation approach aims to reduce both the "democratic deficit" and the "legitimacy deficit" in administrative law. [71] To the extent that it succeeds in achieving this goal, added reflexivity in environmental decision making will improve the efficiency of those decisions. [72]

It is not hard to see how the Executive Order's effects on expanding public participation might lead to broader effects in implementing the substantive mission of the Order. This suggests a quite different and perhaps more effective approach to achieving environmental justice than the effort by the national environmental **[*98]** justice movement to enact further legislation, [73] or by environmental justice attorneys and advocates in particular cases seeking to enforce the substantive standards implied in the President's Executive Order.

The effects of each federal agency's EJ Strategy are only now receiving full consideration inside and outside the agencies. [74] Further development of the public - participatory aspects of environmental review such as expansion of the Community Right To Know Act, [75] the debate over the methodology of risk assessment, [76] and the increasing administrative and judicial focus on cumulative impacts and synergistic effects of potentially polluting facilities and activities [77] all may take the approach to environmental justice **[*99]** embodied in the Executive Order significantly further. To the degree that these efforts significantly increase public participation in siting, permit review, and policy formation it is likely that environmental justice goals will be achieved much sooner than by means of the top-down methods of the most prominent proponents of environmental justice among the academic and activist communities.

FOOTNOTES:

n1 42 U.S.C. §§ 4321-4370(d) (1994).

n2 FREEDOM OF INFORMATION ACT OF (FOIA) 1966, 5 U.S.C. § 552 (1994). The exemption to disclosure of agency records mandated by FOIA provided under the Act for privileged internal communications, FOIA § 552(b)(5), does not extend to purely factual material if such material is "severable without compromising the private remainder of the documents." EPA v. Mink, 410 U.S. 73, 91, 93 S. Ct. 827, 838 (1973).

n3 NATIONAL ENVIRONMENTAL PROTECTION ACT (NEPA) OF 1969, 42 U.S.C. §§ 4332(C), 4368; EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW ACT (EPCRA), 42 U.S.C. §§ 9617, 9659 (1994).

n4 Melany Earnhardt, *Using the National Environmental Policy Act to Address Environmental Justice Issues*, 29 CLEARINGHOUSE REVIEW: J. POVERTY LAW 436, at 443 n.59 (1995) (citing Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 351, 109 S.Ct. 1835, 1846 (1989) ("NEPA merely prohibits uninformed -- rather than unwise -- agency action")).

n5 Luke W. Cole, *Legal Services, Public Participation, and Environmental Justice*, 29 CLEARINGHOUSE REVIEW: J. POVERTY LAW 449, 450 (1995) (citing the COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT (CERCLA), 42 U.S.C. §§ 9617, 9659; the CLEAN WATER ACT (CWA), 33 U.S.C. §§ 1365, 1344(o), 1342(j); the TOXIC SUBSTANCES CONTROL ACT (TSCA), 15 U.S.C. §§ 2619-2620; the COASTAL ZONE MANAGEMENT ACT, 16 U.S.C. § 1270). To this should be added the RESOURCE CONSERVATION AND RECOVERY ACT (RCRA), 40 C.F.R. §§ 124.11, 124.12 (1994) (requiring that a draft permit for a hazardous waste facility be subject to public comment followed by a public hearing). *See infra* note 69.

n6 *See, e.g.*, NEW YORK ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA), N.Y. ENVTL. CONSERV. LAW §§ 8-0101 to 8-0117 (McKinney's 1997), was enacted in 1975 pursuant to NEPA. Under SEQRA, NEPA's requirement that an environmental impact statement (EIS) be prepared by governmental agencies, 40 C.F.R. § 1506.5(b), is imposed on private applicants. N.Y. ENVTL. CONSERV. LAW, § 8-0109(2). In addition, SEQRA defines "environment" much more broadly than does NEPA, to include "the physical conditions which will be affected by a proposed action, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance, *existing patterns of population concentration, distribution or growth, and existing community or neighborhood character." Id.*, § 8-0105(6) (emphases added). *See also* Cole, *supra* note 5, at 451 (noting that fourteen states, the District of Columbia and Puerto Rico have state laws based on NEPA).

n7 Cole, *supra* note 5, at 449 (noting that "the few reported cases that alleged discrimination in environmental decision making under civil rights constitutional theories have been unsuccessful"); Ralph Santiago Abascal, *Tools for Combating Environmental Injustice in the 'Hood: Title VII of the Civil Rights Act of 1968*, 29 CLEARINGHOUSE REVIEW: J. OF POVERTY LAW 345, 345 nn.1 and 2 (1995) (noting that these unsuccessful cases have provided the focus for environmental justice law review articles).

n8 *See* Vicki Been, *Coming to the Nuisance or Going to the Barrios? A Longitudinal Analysis of Environmental Justice Claims*, 24 ECOLOGY L.Q. 1 (1997). This important article reports the results of an EPA funded study of demographics of the 544 communities nationwide hosting active commercial hazardous waste treatment storage and disposal facilities (TSDFs) in 1994, immediately before they became hosts and in each subsequent decade, using multivariate statistical methods designed to isolate race and class, which are highly correlated with one another. Been found no evidence that African American population concentration was linked

with initial siting decisions. A high level of poverty is negatively correlated with siting decisions, but Hispanic population concentration is positively correlated with siting decisions. However, "tracts with both the lowest and the highest percentages of minorities escape sitings." *Id.* at 34. "Instead, it is working class or lower middle class neighborhoods that bear a disproportionate share of facilities." *Id.* More specifically, communities with such class concentration that also possess a high population density are most likely to host TSDFs. Data limitations prevented Been from drawing conclusions about whether the initial siting decision puts a host community at disproportionate risk of further sitings. *See, e.g.*, Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787, 811 (1993) (suggesting that "once a particular geographic area becomes the locus for activity presenting a heightened set of risks, that has historically been a reason favoring, not opposing, the siting of more such activities in that area. The existing activities provide a surface 'neutral' reason for subsequent siting determinations"). Been's findings are therefore consistent with the theory that environmental decision makers engage in distributional reasoning that is superficially neutral but in fact discriminatory. One aspect of the potential power of the Clinton Executive Order is to broaden the concept of discrimination to reach lower-class and working-class communities of all races.

n9 Abascal, *supra* note 7, at 345 n.2 (noting that Title VI has been used occasionally in environmental cases, complaining that the academic literature "perversely concentrates on equal protection, to a lesser degree adverts to Title VI, and oddly, barely touches upon Title VIII, the statute with perhaps the broadest reach," and setting forth the utility of Title VIII claims for achieving environmental justice).

n10 Cole, *supra* note 5, at 449-50.

n11 Executive Order No. 12,898, 3 C.F.R. § 859 (1995), Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations, 59 Fed. Reg. 7629-33 (Feb. 11, 1994).

n12 Cole, *supra* note 5, at 451 n.9 (claiming that the executive order was "a direct result of community mobilization at the grassroots level"). However among some dozen active grassroots citizen groups involved in solid waste siting disputes in western New York issuance of the Executive Order in 1994 came as a surprise (from the author's experience of involvement in the Western New York Garbage Coalition).

n13 *See infra* parts 2 and 3. For theoretical reasoning reaching similar conclusions, and in contrast to the dominant view in the environmental justice literature, *see* Anne K. No, Note, *Environmental Justice: Concentration on Education and Public Participation as an Alternative Solution to Legislation*, 20 WM. & MARY ENVTL. L. & POL'Y REV. 373, 375 (Summer 1996), and passim (arguing that the Executive Order has "potential positive benefits of changes in permitting policy" that, in contrast to "the failures of previous legislative proposals concerning environmental justice issues," "are the most efficient method for achieving the goals of the environmental justice movement" if coupled with "grassroots education programs").

n14 *See infra* part 4.

n15 *See* Office of Enforcement and Compliance Assurance, US-EPA, EPA ENVIRONMENTAL JUSTICE FACT SHEET, PUB. NO. EPA/300-F-96-002, <http://es.inel.gov/oeca/oej.html> (last visited May 3, 1997).

n16 Exec. Order No. 12,989, 59 Fed. Reg. 7629, § 1-101.

n17 *Id.* at 7630, § 1-103.

n18 *Id.* § 1-103(e).

n19 *Id.* § 1-103. *See, e.g.*, EPA, ENVIRONMENTAL JUSTICE STRATEGY: EXECUTIVE ORDER 12898, PUB. NO. EPA/200-R-95-002, at 8 (April 1995) (calling for "early and ongoing public participation in permitting and siting decisions").

n20 59 Fed. Reg. 7629, 7630 § 1-103 (setting forth four "minimum" tasks to be achieved by EJ Strategies); §§ 3-3, 4-4, and 5-5 of the Order, *id.* at 7631, further specify actions to be taken by agencies in human health and environmental data collection and analysis, identification of patterns of subsistence consumption of fish and wildlife, and provision of opportunities for public participation and access to information regarding environmental justice fact-finding and policy formation.

n21 *See* US-EPA PUB. NOS. EPA/200-R-95-900 (Agriculture), -908 (Commerce), -901 (Defense), 002 (EPA), -903 (Health and Human Services), -904 (Housing and Urban Devel.), -905 (Interior), -906 (Justice), -909 (Labor), -910 (NASA), -907 (NRC), -911 (Transportation), -902 (Energy). These are available from the National Center for Environmental Publications and Information, P.O. Box 42419, Cincinnati, OH 45202; (513) 489-8190 (voice); (513) 489-8695 (fax), set up by the Interagency Working Group on Environmental Justice pursuant to the Order. In addition, offices within the EPA have developed their own EJ Strategies; *see also* US-EPA, Office of Solid Waste and Emergency Response, EJ TASK FORCE DRAFT REPORT, PUB. NOS EPA/540-R-94-003 (April 25, 1994).

n22 59 Fed. Reg. 7629-30, § 1-102.

n23 Section 202 of NEPA created the CEQ "to review and appraise the various programs and activities of the Federal government in the light of the policy set forth in [NEPA]." 42 U.S.C. § 4344(3). CEQ regulations are entitled to substantial deference in the courts, Andrus v. Sierra Club, 442 U.S. 347, 358, 99 S.Ct. 2335, 2341 (1979).

n24 CEQ, Draft Guidance for Addressing Environmental Justice Under the National Environmental Policy Act (May 24, 1996). The final guidance has not been issued as of the publication of this article. *See* Wilson Dizard III, *Staff Fends Off Binding Language on Environmental Justice*, INSIDE N.R.C., June 9, 1997 *available in* LEXIS, Nexis file.

n25 40 C.F.R. § 1501.4(b)(1996). However, a finding of no significant impact (FONSI) must be made available for public review and comment for 30 days prior to approval when the proposed action is similar to one which normally requires an EIS or when the nature of the proposed action is without precedent. 40 C.F.R. § 1501.4(e)(2).

n26 Earnhardt, *supra* note 4, at 439 (citing an interview with Ray Clark, Associate Director for NEPA Oversight at CEQ (May 1, 1995)).

n27 Because the CEQ guidance encourages, but does not require, agencies who are required to undertake environmental assessment under NEPA, to establish outreach to potentially impacted minority and low-income populations through non-traditional notice methods, *id.* at 10-11, the CEQ guidance falls far short of a mandate to apply Environmental Justice principles to such agencies. *See also* CEQ's regulations, requiring that agencies "involve environmental agencies, applicants, and the public, to the greatest extent practicable, in preparing assessments." 40 C.F.R. § 1501.4(b).

n28 *See, e.g.*, Olga L. Moya, *Adopting an Environmental Justice Ethic*, 5 DICK. J. ENV. L. POL. 215, 246-62 (1996); Stephen M. Johnson, *NEPA and SEPA's in the Quest for Environmental Justice*, 30 LOYOLA L.A. L. REV. 564 (1997); Abascal, *supra* note 7, at 347 n.7 (noting that "no law review article has yet analyzed the executive order").

n29 59 Fed. Reg. at 7632-33, § 6-609.

n30 *See also id.* at 7632, § 6-608 ("Federal agencies shall implement this order consistent with, and to the extent permitted by, existing law"). *See also supra* note 4.

n31 No. 95-1203-**R, 1996 U.S. Dist. LEXIS 16547 (W.D.Va. 1996)**, *aff'd by* The New River Valley Greens v. U.S. Dept. of Trans., 129 F.3d 1260, 1997 WL 712887 (4th Cir. (Va.)).

n32 *Id.* at * 16-17 (quoting Warm Springs Dam Task Force v. Gribble, 621 F.2d 1017, 1024 (9th Cir. 1980)).

n33 *Id.* at * 19.

n34 *Id.* at * 18 ("plaintiffs are attempting to do indirectly under NEPA what cannot be done directly under the Order").

n35 RCRA APPEAL NOS. 95-2 & 95-3, 1995 RCRA LEXIS 16 (EAB, June 29, 1995), *appealed on other grounds sub. nom.*, RCRA APPEAL NO. 95-4, 1995 RCRA LEXIS 2 (EAB, August 23, 1995).

n36 *Id.* at * 23.

n37 PSD Appeal No. 95-2, 1995 PSD LEXIS 1 (EAB, December 11, 1995).

n38 *Id.* at * 10 n.4 (quoting the Agency's Response to Petition). The Agency's assertion that it addressed environmental justice issues in an "appropriate manner" in accordance with Chemical Waste Management of Indiana was accepted by the EAB. On the standards for compliance set forth in Chemical Waste Management of Indiana, *see infra*, part 4.

n39 *Id.* at * 9.

n40 *Id.* The specific analysis performed was described in the Agency's response to the petition:

> The following data were utilized: (1) per capita income from the 1990 Census Summary Tape files; (2) source location data contained in the 1990 Toxic Release Inventory; and (3) source location data contained in the Permit Compliance System (PRASA facilities). These data were subsequently geographically plotted for the Arecibo Municipality and for the Island of Puerto Rico as a whole. The location of the proposed facility, maximum emission impact data and monitored meteorological data were then plotted on maps to determine: (1) if the proposed facility was located in a lower income area; and (2) if the maximum emission impacts occurred in areas that were either lower than the Island's or the Arecibo Municipality's per capita income average.

Id. at * 9-10 (quoting the Agency's Response to Petition). For Been's recent study, *supra* note 8, use of GIS data was prohibited due to cost.

n41 *Id.* at * 11 ("Because petitioner has provided no other basis for reviewing the Region's analysis, review of this issue must be denied.").

n42 *Id.* at * 7 (citing Exec. Order No. 12,898, 59 Fed. Reg. at 7631, P 3-301(a), ("Environmental human health research, whenever practicable and appropriate, shall include diverse segments of the population in epidemiological and clinical studies . . . .")).

n43 UIC Appeal Nos. 95-2 through 95-37, 1996 UIC LEXIS 1, (EAB. February 15, 1996).

n44 *Id.* at * 37-38. Among the 36 petitioners the United Auto Workers Region 1A Toxic Waste Squad argued that these undesirable uses would result in a cumulative negative economic impact on "lower level white collar workers and blue collar laborers" and "largely ethnic and racially based neighborhoods." *Id.* at * 38 (quoting the Squad's petition).

n45 *Id.* at * 39.

n46 *Id.* at * 39-40.

n47 *Id.* at * 40.

n48 *Id.* at * 52.

n49 *Id.* at * 40-51.

n50 1995 PSD LEXIS 1, at * 4 n.2.

n51 RCRA APPEAL NOS. 95-2 & 95-3, *supra* note 35. The EPA in Puerto Rico Electric Power Authority argued it was guided by *CWM* in the manner in which it addressed the environmental justice concerns raised in that case. *See* 1995 PSD LEXIS 1, at * 10 n.4.

n52 "We note that the Board recently addressed environmental justice issues at length in the permitting context in [*CWM*]. While that case involved a permit under [RCRA] rather than the Safe Drinking Water Act, the principles articulated in *CWM* are nonetheless instructive here since both statutes use similar permitting processes." Envotech, 1996 UIC LEXIS 1 at * 41. "Both the opportunities for, and limitations on, implementation of the Executive Order in the UIC permitting context are essentially the same as we articulated in *CWM*." *Id.* at * 45.

n53 *See* 40 C.F.R. § 270.42 (1997) ("Class 2" or "Class 3" permit modifications require prior notice to the public, an opportunity for public comment, and a public meeting, whereas "Class 1" modifications involve less-significant changes that may be implemented without prior public notice).

n54 The EAB also received amicus briefs from a local Congressman, a local Councilman for Fort Wayne, the local County Zoning Administrator, and representatives of the local branch of the NAACP. Chemical Waste Management, 1996 UIC LEXIS 1 at * 5, n.3.

n55 *Id.* at * 12.

n56 *Id.* at * 23-24 "While the Region is correct that section 6-609 precludes judicial review of the Agency's efforts to comply with the Executive Order, it does not affect implementation of the Order within an agency. More specifically, it does not preclude the Board, in an appropriate circumstance, from reviewing a Region's compliance with the Executive Order as a matter of policy or exercise of discretion to the extent relevant under [40 C.F.R.] section 124.19(a) [procedures for appeal of RCRA, UIC, and PSD permits]. Section 124.19(a) authorizes the Board to review any condition of a permit decision (or as here, the permit decision in its entirety). Accordingly, the Board can review the Region's efforts to implement the Executive Order in the course of determining the validity or appropriateness of the permit decision at issue."

n57 "Thus, the Agency has no authority to deny or condition a permit where the permittee [sic.] has demonstrated full compliance with the statutory and regulatory requirements." *Id.* at * 45.

n58 *Id.* at * 42 (quoting EPA ENVIRONMENTAL JUSTICE STRATEGY, *supra* note 19).

n59 *Id.* at * 13 (citing section 124).

n60 *Id.* at * 44-45. Note that the Board's focus on a community "segment" raises the important methodological question whether census tract data or more general demographic data covering a radius around a site should be chosen in the factual analysis of disparate impact. On this, *see further infra* note 66.

n61 Chemical Waste Management, 1996 UIC LEXIS 1 at * 44.

n62 *Id.* at * 44.

n63 1996 UIC LEXIS 1 at * 48.

n64 42 U.S.C. § 6925(c)(3)(1997). In *Envotech* the EAB applied the following analysis to a UIC regulation that mirrors this clause, 40 C.F.R. s114.52(a)(9). 1996 UIC LEXIS 1 at * 47 (citing the UIC regulatory "omnibus authority" to prevent endangerment of drinking water sources).

n65 1996 UIC LEXIS 1 at * 18-19 (citation omitted, emphasis added).

n66 While the holding provides only a recommendation for altering risk assessment methods to reach the required showing, it lifts the burden for such a showing considerably compared to previous holdings regarding application of disparate impact analysis in environmental justice cases, by directing the analysis to a protected "segment" of the impacted "community":

> There is nothing in section 3005(c)(3) to prevent the Region from taking a more refined look at its health and environmental impacts assessment, in light of allegations that operation of the facility would have a disproportionately adverse effect on the health or environment of low-income or minority populations. Even under the omnibus clause some judgment is required as to what constitutes a threat to human health and the environment. It is certainly conceivable that, although analysis of a broad cross-section of the community may not suggest a threat to human health and the environment from the operation of a facility, such a broad analysis might mask the effects of the facility on a disparately affected minority or low-income *segment of the community*. (Moreover, such an analysis might have been based on assumptions that, though true for abroad cross-section of the community, are not true for the smaller minority or low-income *segment* of the community.) A Region should take this under consideration in defining the scope of its analysis for compliance with [section] 3005(c)(3).

Id. at * 19-20 (emphasis added).

n67 *Id.* at * 18

n68 *Supra* note 56.

n69 *See* US-EPA, 57 Fed. Reg. 5320 (Feb. 13, 1992) (establishing the EAB). *See also* EAB, EAB Formal Opinions Issued Since 1992, <http://www.epa.gov/boarddec/opinions.htm> (last visited May 9, 1997) (listing permit and penalty appeals under the CLEAN AIR ACT; FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT; MARINE PROTECTION, RESEARCH, AND

SANCTUARIES ACT; NATIONAL POLLUTION DISCHARGE ELIMINATION SYSTEM; SPILL PREVENTION CONTROL AND COUNTERMEASURE PROGRAM; UNDERGROUND INJECTION CONTROL PROGRAM; CWA; CERCLA; EPCRA; TSCA; and RCRA).

n70 *See supra* notes 2-6 and accompanying text.

n71 *See* Eric W. Orts, *Reflexive Environmental Law*, 89 NW. U.L. REV. 1227 (1995), at 1259 and 1274-75 (discussing the adverse effect of the democratic deficit and the legitimacy deficit in administration on efficiency in environmental decision making).

n72 *Id.* at 1275 (arguing that while the ". . . NEPA is problematic, [. . .] NEPA's public participation provisions may encourage reflexive practices within citizens' groups and other 'affected parties'").

n73 *See* Anne K. No, *supra* note 13.

n74 In addition to the ongoing regulatory change implementing the Order being developed for EPA by CEQ, *see further, e.g.*, National Environmental Justice Advisory Council (NEJAC), THE MODEL PLAN FOR PUBLIC PARTICIPATION (Nov. 1996) <http://www.es.inel.gov/oeca/oej.html>. NEJAC is a federal advisory committee to the EPA that has held eight meetings around the country since being established in 1993. The Ninth Meeting was held May 12-16, 1997, at Wabeno, Wisconsin. Executive summaries of the meetings are published electronically. *See* NEJAC, EXECUTIVE SUMMARY, EIGHTH MEETING OF NEJAC, Baltimore, MD (Dec. 10-12, 1996) <http://www.prcemi.com/80/nejac/pdf/es1296.pdf>, at p. 3b (recognizing "the lack of guidance on integrating environmental justice into the environmental impact statement process conducted to meet the provisions of NEPA").

n75 *See* White House Press Release, April 22, 1997 (reporting that seven categories of industrial chemical uses were added under the Community Right To Know Program, and noting that 286 chemicals were added to the Toxic Release Inventory in 1994 under executive order) <http://www.library.whitehouse.gov/library.html> (last visited May 5, 1997).

n76 *See* James S. Freeman and Rachel D. Godsil, *The Question of Risk: Incorporating Community Perceptions into Environmental Risk Assessments*, 21 FORDHAM URB. L.J. 547, 563-66 (Spring 1994) (analyzing the difference between scientific exactness and the qualitative measures of risk utilized by the public).

n77 *See, e.g.*, Letter from Norm Thomas, Chief, Federal Activities Branch, EPA Region 6, to John W. N. Hickey, Chief, Enrichment Branch, Office of Nuclear Material Safety and Safeguards, NRC, 1995 LEXIS ELI No. AD-827 (n.d.) (declining to accept an EIS for the construction and operation of a uranium enrichment facility near Homer, Louisiana, pursuant to EPA responsibilities under the Clean Air Act and NEPA, because environmental justice concerns raised in EPA's comments on the DEIS were inadequately addressed by parish-level demographic analysis, and suggesting instead that "city or community census data for the population surrounding the facility would be more appropriate in this case," and because "cumulative impacts occurring in the area to which this project could add additional environmental burden (i.e., other polluting industries in or near the affected communities) were not considered in the Final EIS").