

ARTICLES

RACE, ETHNICITY, AND AIR POLLUTION: NEW DIRECTIONS IN ENVIRONMENTAL JUSTICE

BY

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Environmental justice recognizes that low-income, minority communities are disproportionately affected by air pollution, and that this problem should be addressed through environmental law and policy. While it is easy to identify general relationships between poverty, demographic patterns, and air pollution, it is far more difficult to demonstrate that companies build industrial facilities at particular sites based on the racial or ethnic composition of the neighboring community, or even that a minority community would be subject to disproportionate health and welfare impacts from a particular facility. It is even more difficult to prohibit the construction of industrial facilities based on a disproportionate impact on low income, minority communities. This Article reviews the reported cases considering the discrimination-based claims of the environmental justice movement, in the context of permitting and environmental reviews for industrial facilities. It concludes that this approach has not been successful in limiting their construction and operation. Finally, the Article suggests that land use planning restrictions on industrial development based on

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air pollution loading would provide a more direct and viable means of protecting low income, minority communities.

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I. THE PROBLEM OF ENVIRONMENTAL JUSTICE

At a recent Environmental Law Forum presentation in Harrisburg, Pennsylvania, a representative of a natural gas developer generated a flurry of controversy by remarking that when constructing a pipeline, the company tries to avoid big houses with people who might oppose the development.¹

¹ Don Hopey, *Range Resources Exec's Well-Site Remarks Drawing Sharp Criticism: Does Range Avoid Rich Neighborhoods?*, PITTSBURGH POST-GAZETTE, Apr. 18, 2016, <http://power.source.post-gazette.com/powersource/latest-oil-and-gas/2016/04/18/Executive-s-remark-about->

This controversy resulted in a letter from environmental groups to the Pennsylvania Department of Environmental Protection, requesting an investigation into past permits relating to natural gas operations, to evaluate their impacts on environmental justice communities.² This experience and the reaction to it highlight the politically volatile nature of discussions about the siting of industrial facilities, and the sensitive underlying currents of race, ethnicity, and poverty. But it also highlights the relatively primitive state of the law in protecting low-income minority communities from heavily-polluting industrial facilities under principles of environmental justice. The truth of the matter is that the executive's statement falls far short of demonstrating an unlawful siting practice.

Existing legal scholarship has already established that it is debatable whether the siting of industrial facilities is based on demographics, or vice versa.³ In early articles on the subject, Professor Been of New York University concluded that the siting of industrial facilities was more closely correlated with ethnicity than race, without disproportionately impacting the poor.⁴ In response, other academics suggested the need for additional research, due to questions regarding reliability and causation.⁵ Despite

shale-gas-well-sites-prompts-sharp-criticism-calls-for-review/stories/201604180027 (last visited Nov. 19, 2016) ("The Center for Coalfield Justice and the Pennsylvania Chapter of the Sierra Club raised that question after they said Terry Bossert, Range's vice president for legislative and regulatory affairs, told a Pennsylvania Bar Institute gathering in Harrisburg earlier this month, that the company tries to avoid siting its shale gas wells near "big houses" where residents might have that financial resources to challenge the industrial-type developments."). The executive later apologized for the statement. Letter from Terry R. Bossert, Vice President, Range Res. (Apr. 21, 2016), <http://www.rangeresources.com/media/news/2016/04/21/a-driller-s-apology> (last visited Nov. 19, 2016) ("As a newspaper editorial remarked, a Range employee offered a 'quip' at a recent meeting – as the person who made the remarks let me apologize as my attempt to interject dry sarcasm was clearly a mistake.").

² Letter from Patrick Greuter, Exec. Dir., Ctr. for Coalfield Justice et al., to Carl Jones, Jr., Dir. of Env'tl. Justice, Dept. of Env'tl. Prot. Se. Reg'l Office (Apr. 18, 2016), *available at* <https://www.documentcloud.org/documents/2810504-CCJ-CAC-and-Sierra-Club-Letter-to-DEP-Re-ELF.html>.

³ Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 YALE L.J. 1383, 1406 (1994) ("[R]esearch examining the socioeconomic characteristics of host neighborhoods at the time they were selected, then tracing changes in those characteristics following the siting, would go a long way toward answering the question of which came first—the LULU [locally undesirable land use] or its minority or poor neighbors.").

⁴ Vicki Been & Francis Gupta, *Coming to the Nuisance or Going to the Barrios? A Longitudinal Analysis of Environmental Justice Claims*, 24 ECOLOGY L.Q. 1, 9 (1997) ("[W]e found no substantial evidence that the facilities that began operating between 1970 and 1990 were sited in areas that were disproportionately African American. Nor did we find any evidence that these facilities were sited in areas with high concentrations of the poor; indeed, the evidence indicates that poverty is negatively correlated with sitings. We did find evidence that the facilities were sited in areas that were disproportionately Hispanic at the time of the siting.").

⁵ Craig Anthony (Tony) Arnold, *Planning Milagros: Environmental Justice and Land Use Regulation*, 76 DENV. U. L. REV. 1, 26 (1998) ("The evidentiary conception, as reflected mostly in distributional studies, contributes much to both the pursuit and understanding of environmental justice. Nonetheless, it is marked by varying results, controversies over methodologies, and inadequate proof of the causes of the inequities. Much additional study remains to be done.").

extensive studies and articles written on the subject, the best conclusion at present suggests only a correlation between industrial development and race.⁶ But a correlation is far short of the standard of proof of discrimination that is typically required to win a discrimination case in court, or a challenge to a permitting decision before an administrative agency.⁷

The thesis of this Article is that it is not necessary to resolve this academic debate in order to explore opportunities for protecting health and welfare of communities neighboring industrial facilities. Given the pattern of judicial decisions relating to environmental discrimination, environmental assessments, and permitting decisions, the framing of environmental justice as a matter of race and ethnic discrimination has encumbered the movement with an insurmountable burden of proof resulting in few judicial victories.⁸ While creating a meaningful dialogue regarding air pollution, race, and ethnicity, such litigation has not led to strong precedential decisions which restrict the development of heavily-polluting industrial plants.

Due to the limitations of the litigation approach, the best opportunity for meaningful restrictions on heavy industrial development lies in the area of land-use planning.⁹ Environmental justice is primarily a problem of environmental pollution, and secondarily one of race and ethnicity. By addressing the air pollutants that lie at the heart of the problem, municipalities can work to remedy the problem of environmental discrimination, whether real or perceived.

II. TITLE VII AND EMPLOYMENT DISCRIMINATION

A. Statutory Protection Against Discrimination in Employment

To understand the legal protections against environmental discrimination, it is helpful to review federal employment discrimination law. Because environmental discrimination and employment discrimination have a common source—the Civil Rights Act of 1964¹⁰—the empirical experience of the courts and administrative agencies in reviewing employment discrimination claims is helpful in evaluating the viability of legal protections against environmental discrimination.

Title VII of the Civil Rights Act of 1964¹¹ prohibits discrimination in employment “because of” race and ethnicity.¹² In an employment

⁶ Charles Lord & Keaton Norquist, *Cities as Emergent Systems: Race as a Rule in Organized Complexity*, 40 ENVTL. L. 551, 557–58, nn.47–48 (2010) (summarizing studies and concluding that “[t]his body of research overwhelmingly indicates that [locally undesirable land uses] are distributed in patterns that strongly correlate to race”).

⁷ See *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252–55 (1981) (describing the plaintiff’s burden of establishing racial discrimination).

⁸ See *infra* Parts III.B, IV.B, V.B.

⁹ See *infra* Part VIII.

¹⁰ 42 U.S.C. §§ 2000a to 2000h-6, 52 U.S.C. § 10101 (2012).

¹¹ 42 U.S.C. §§ 2000e to 2000e-17 (2012).

discrimination case, a plaintiff's challenge is to prove that an adverse employer action was based on an unlawful reason, rather than a lawful reason (such as job performance or workplace restructuring).¹³

Of course, the line is not always clear. Indeed, employment discrimination law has evolved to reflect the fact that employer actions may sometimes be based on both a lawful reason and an unlawful reason. In such "mixed-motive" cases, the law recognizes that an employer action may be unlawful even if it is based on both an unlawful reason and a lawful reason.¹⁴ While Title VII makes it easier for a plaintiff to prove unlawful discrimination in this instance, it restricts the employee to a remedy of injunctive relief and does not allow monetary damages or reinstatement.¹⁵ This compromise makes it easier to prove a violation in an ambiguous case, but prevents the employee from recovering money damages. In contrast, Title VI does not reflect this nuanced approach, making it an "all or nothing" approach.¹⁶

B. Empirical Success of Employment Discrimination Claims Before Administrative Agencies

Statistics regarding the filing of employment discrimination complaints with employment discrimination agencies demonstrate the difficulty of persuading an agency to proceed with a charge of discrimination based on a

¹² *Id.* § 2000e-2 ("It shall be an unlawful employment practice for an employer — (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.") (noting that the court considers national origin to be the same as ethnicity).

¹³ *See, e.g.,* *Wiley v. Glassman*, 511 F.3d 151, 161 (D.C. Cir. 2007) (ruling that plaintiff had failed to establish an unlawful reason for adverse action); *Canales-Jacobs v. N.Y. State Office of Court Admin.*, 640 F. Supp. 2d 482, 500 (S.D.N.Y. 2009) ("[O]n-the-job misconduct and poor work performance always constitute legitimate and nondiscriminatory reasons for terminating employment, even where the misconduct is caused by an undivulged psychiatric condition.")

¹⁴ *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 96, 101–02 (2003); 42 U.S.C. § 2000e-2(m) (2012) ("Impermissible consideration of race, color, religion, sex, or national origin in employment practices. Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that *race, color, religion, sex, or national origin was a motivating factor for any employment practice*, even though other factors also motivated the practice." (emphasis added)).

¹⁵ 42 U.S.C. § 2000e-5(g)(2)(B) (2012) ("On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court— (i) *may grant declaratory relief, injunctive relief* (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and (ii) *shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment*, described in subparagraph (A).") (emphasis added).

¹⁶ *See* discussion *infra* Part III.B.

finding of “reasonable cause.” In 2014, the United States Equal Employment Opportunity Commission (EEOC) issued a reasonable cause determination in only 2.6% of cases nationwide, and a “no reasonable cause” determination in 64.1% of cases.¹⁷ Over 72% of national race discrimination charges were filed in 15 states, as noted in the table below.

Table 1: Top Fifteen States for Race-Based Discrimination Charges with EEOC¹⁸

Ranking	State	FY 2014 Race
1	Texas	2,913
2	Florida	2,189
3	California	2,176
4	Georgia	1,968
5	Illinois	1,756
6	North Carolina	1,603
7	Alabama	1,466
8	Tennessee	1,361
9	Virginia	1,155
10	Pennsylvania	1,148
11	Ohio	1,049
12	New York	984
13	Maryland	925
14	Indiana	905
15	Michigan	893

With respect to employment discrimination claims filed with state agencies rather than the EEOC, complainants in these states have had a little more success.¹⁹ Nevertheless, state agencies only issue “probable cause”

¹⁷ U.S. Equal Employment Opportunity Commission, *Color-Based Charges FY 1997–FY 2015*, <https://www.eeoc.gov/eeoc/statistics/enforcement/color.cfm> (last visited Nov. 19, 2016).

¹⁸ U.S. Equal Employment Opportunity Commission, *EEOC Charge Receipts by State (includes U.S. Territories) and Basis for 2014*, https://www1.eeoc.gov/eeoc/statistics/enforcement/state_14.cfm (last visited Nov. 19, 2016).

¹⁹ Compare *Color-Based Charges FY 1997–FY 2015*, *supra* note 17 (showing that the EEOC issued a reasonable cause determination in 2.6% of cases nationwide), with FLA. COMM’N ON HUMAN RELATIONS, ANNUAL REPORT 2014-2015: A FISCAL YEAR IN REVIEW 11 (2015), available at http://fchr.state.fl.us/fchr/content/download/9870/55740/file/FCHR_annual%20report%20FINAL%20reduced%20size.pdf (noting “cause” findings in 14.4% of resolved cases), and Div. of Human Rights, N.Y. State, Annual Report: FY2014-15, at 8 (2015), available at http://www.dhr.ny.gov/sites/default/files/pdf/annualreport_2014-15.pdf (noting “probable cause” findings in 12.6% of investigative determinations), and ILL. DEP’T OF HUMAN RIGHTS, ANNUAL REPORT 2015, at 13 (2016), available at http://www.illinois.gov/dhr/Publications/Documents/Annual_Report_FY_2015.pdf (noting “Substantial Evidence/Default” findings in 7.2% of completed investigations), and Ind. Civil Rights Commission, 2014 Probable Cause Findings, <http://www.in.gov/icrc/2842.htm> (last visited Nov. 19, 2016) (listing 42 probable cause findings, representing 4.1% of the 1,018 complaints formalized during that period), IND. CIVIL RIGHTS COMM’N, ANNUAL REPORT: FISCAL YEAR 2014, at 9 (2014), available at http://www.in.gov/icrc/files/FY_2014_Annual_Report.pdf, and OHIO CIVIL RIGHTS COMM’N, ANNUAL REPORT 2015, at 11 tbl.3 (2015), available at <http://www.crc.ohio.gov/Portals/0/Annual%20Reports/>

findings for a small portion of race discrimination complaints. To judge the success of employment discrimination claims from the rate of probable cause findings might appear to underestimate the success of complainants, because complainants may settle their claims favorably. But a complainant might also settle a claim unfavorably. Any number of factors might contribute to settlement of a complaint, regardless of the complaint's degree of merit. Only a probable cause finding constitutes an agency's determination that there is a reason to believe discrimination has occurred.

In all likelihood, the reason that so many race discrimination complaints fail is not that such complaints lack merit, or that people file discrimination complaints fraudulently or in bad faith. Rather, it likely reflects the fact that it is difficult to unequivocally tie an employer action to an unlawful reason, as opposed to a lawful reason.²⁰ Consequently, even with employment discrimination agencies highly skilled in evaluating issues involving race and ethnicity, it is difficult to successfully pursue a claim for discrimination.²¹

Environmental discrimination changes the equation in ways that increase the difficulties for a claimant. In the environmental justice context, an environmental discrimination claim essentially asserts that a company intends to single out a particular community based predominantly on racial or ethnic characteristics. While a discrimination claim in the employment context is based on an alleged harm to a particular individual, in the environmental justice context it is based on an alleged harm to the racial or ethnic community as a whole. In addition, the decision making involved in

2015%20Annual%20Report%20-%20reduced%20size.pdf (noting "probable cause" findings in 3.4% of closed cases). *But see* TENN. HUMAN RIGHTS COMM'N, ANNUAL REPORT: FY2014-2015, at 14 (2015), *available at* https://www.tn.gov/assets/entities/humanrights/attachments/2015_Annual_Report_revised.pdf (noting "reasonable cause" in 2.2% of resolved cases); PENN. HUMAN RELATIONS COMM'N, 2013-2014 ANNUAL REPORT 6 (2014), *available at* <http://www.phrc.pa.gov/About-Us/Publications/Documents/Annual%20Reports/2013-2014%20PA%20Human%20Relations%20Commission%20Annual%20Report.pdf> (noting "probable cause" findings in 1.5% of closed discrimination claims of all types); STATE OF MD. COMM'N ON CIVIL RIGHTS, 2015 ANNUAL REPORT 18 fig.5.2 (2016), *available at* http://mccr.maryland.gov/cgi-script/csNews/news_upload/Publications_2edb.Final%202015%20Annual%20Report.pdf (noting zero "probable cause" findings out of 932 resolved cases). Data on probable cause findings for California, Texas, Georgia, North Carolina, Alabama, Virginia, and Michigan were not available on the Internet.

²⁰ *Riordan v. Kempiners*, 831 F.2d 690, 697-98 (7th Cir. 1987) (Posner, J.) ("Proof of such discrimination is always difficult. Defendants of even minimal sophistication will neither admit discriminatory animus nor leave a paper trail demonstrating it; and because most employment decisions involve an element of discretion, alternative hypotheses (including that of simple mistake) will always be possible and often plausible. Only the very best workers are completely satisfactory, and they are not likely to be discriminated against—the cost of discrimination is too great. The law tries to protect average and even below-average workers against being treated more harshly than would be the case if they were of a different race, sex, religion, or national origin, but it has difficulty achieving this goal because it is so easy to concoct a plausible reason for not hiring, or firing, or failing to promote, or denying a pay raise to, a worker who is not superlative.").

²¹ Julie C. Suk, *Procedural Path Dependence: Discrimination and the Civil-Criminal Divide*, 85 WASH. U. L. REV. 1315, 1321 (2008) ("Employment discrimination cases are difficult to prove, especially since few cases turn up 'smoking-gun' evidence of discrimination.").

developing a site for construction necessarily involves many more considerations than a decision in the employment context. Developers might focus on financial forecasts, the availability of raw materials, the accessibility of markets, and the favorability of local regulations—considerations having nothing to do with race or ethnicity.²²

III. TITLE VI AND ENVIRONMENTAL DISCRIMINATION

A. Statutory Protection Against Discrimination by Recipients of Federal Assistance

Title VI of the Civil Rights Act of 1964²³ is one of the leading authorities underlying the doctrine of environmental justice.²⁴ Beyond federal environmental programs, the statute broadly prohibits discrimination based on race, color, or national origin under any program or activity receiving federal financial assistance.²⁵ In its implementing regulations, the United States Department of Justice (DOJ) specifically prohibits the selection of the location of an industrial site or facility in a discriminatory manner.²⁶ In summary, both the statute and DOJ regulations prohibit discriminatory actions based on race or ethnicity.

Like the DOJ, the United States Environmental Protection Agency (EPA) has a similar prohibition in its implementing regulations.²⁷ It is significant that these prohibitions extend to actions that have the “purpose or effect” of causing discrimination.²⁸ The use of this dual language reflects an assumption that, regardless of the intent behind an action, its discriminatory impact is worthy of legal proscription. Despite these legal

²² See generally CHRIS HENDRICKSON & TUNG AU, PROJECT MANAGEMENT FOR CONSTRUCTION: FUNDAMENTAL CONCEPTS FOR OWNERS, ENGINEERS, ARCHITECTS AND BUILDERS (1989).

²³ 42 U.S.C. §§ 2000d to 2000d-7 (2012).

²⁴ Michael D. Mattheisen, *The U.S. Environmental Protection Agency's New Environmental Civil Rights Policy*, 18 VA. ENVTL. L.J. 183, 186 (1999) (“The principal legal focus of environmental justice at present is Title VI of the Civil Rights Act of 1964.”).

²⁵ 42 U.S.C. § 2000d (2012) (“No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”).

²⁶ 28 C.F.R. § 42.104(b)(3) (2015) (“In determining the site or location of facilities, a recipient or applicant may not make selections *with the purpose or effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination* under any program to which this subpart applies, on the ground of race, color, or national origin; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the Act or this subpart.” (emphasis added)).

²⁷ 40 C.F.R. § 7.35(c) (2015) (“A recipient shall not choose a site or location of a facility that has the purpose or effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination under any program or activity to which this part applies on the grounds of race, color, or national origin or sex; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of this subpart.”).

²⁸ *Id.*

safeguards, commenters have criticized Title VI as being insufficiently protective of communities.²⁹

Two other legal authorities are worth noting. One potential remedy for unlawful environmental discrimination is § 1983.³⁰ Once known as the “Ku Klux Klan” statute, the purpose of this Reconstruction Era statute is to prevent the deprivation of civil rights by state action.³¹ The utility of this statute is that it applies to individuals acting “under color of law,” meaning state actors or people acting at their direction.³² In addition, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution also provides a potential remedy for unlawful environmental discrimination.³³

B. Judicial Case Law

In some respects, a Title VI discrimination claim is like an employment discrimination claim. An employment discrimination dispute essentially involves a contest over the lawfulness of an employer action. The employee alleges that an action was based on an unlawful reason (race, ethnicity, etc.). The employer alleges the action was based on a legitimate nondiscriminatory business reason (a bona fide occupational requirement, or a legitimate performance-based reason).³⁴ Similarly, a Title VI dispute involves a contest over the lawfulness of a permitting or siting decision. The issue is whether the decision was based on a prohibited reason such as race or ethnicity.³⁵ Such a framing of issues presents a significant obstacle to limiting industrial development threatening public health in low-income minority communities.

As in the employment discrimination context, it is possible that an agency’s decision to allow a company to locate an industrial facility in a low-

²⁹ Tseming Yang, *The Form and Substance of Environmental Justice: The Challenge of Title VI of the Civil Rights Act of 1964 for Environmental Regulation*, 29 B.C. ENVTL. AFF. L. REV. 143, 202–03 (2001–2002); Michael Fisher, *Environmental Racism Claims Brought Under Title VI of the Civil Rights Act*, 25 ENVTL. L. 285, 288 (1995).

³⁰ 42 U.S.C. § 1983 (2012).

³¹ See KAREN M. BLUM & KATHRYN R. URBONYA, FED. JUDICIAL CTR., SECTION 1983 LITIGATION 2 (1998), available at [http://www.fjc.gov/public/pdf.nsf/lookup/Sect1983.pdf/\\$file/Sect1983.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/Sect1983.pdf/$file/Sect1983.pdf).

³² 42 U.S.C. § 1983 (2012) (“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress”).

³³ U.S. CONST., amend. XIV, § 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

³⁴ *E.g.*, *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 251 (1981).

³⁵ Civil Rights Act of 1964, 42 U.S.C. § 2000d (2012).

income minority community might be motivated by both an unlawful reason (a desire to subject a racial or ethnic community to a disproportionate burden of air pollution) and a lawful reason (a desire for a convenient location, low property costs, etc.). However, the case law has not evolved to reflect a nuanced “mixed-motive” approach for environmental discrimination with respect to the siting of industrial facilities.³⁶ This is important because judicial claims for intentional discrimination under Title VI have generally been unsuccessful.³⁷

In the late 1990s, the prospects of success for Title VI claimants appeared promising. Community groups brought two challenges to the siting of industrial facilities near Philadelphia, Pennsylvania. The first involved an application by Soil Remediation Systems, Inc. for permits for construction of a waste facility in Chester, Pennsylvania, a predominantly African-American area southwest of Philadelphia.³⁸ A community organization known as Chester Residents Concerned for Quality Living commenced a Title VI action against the Pennsylvania Department of Environmental Protection, alleging both intentional discrimination under section 601 and disparate impact discrimination under section 602, in the granting of the permits.³⁹

The trial court dismissed the claim for intentional discrimination because intent had not been alleged in the complaint, but the dismissal was without prejudice, allowing the plaintiffs to amend their complaint.⁴⁰ However, it dismissed the disparate impact claim with prejudice, holding that there was no implied right of action under the regulations.⁴¹ On appeal, the United States Court of Appeals for the Third Circuit reversed the decision of the lower court, holding that there indeed was an implied right of action under the three-step test developed by the Third Circuit.⁴² After the developer withdrew its permit application, the Supreme Court of the United States vacated the Third Circuit’s decision based on mootness, remanding the case for it to be dismissed.⁴³ The Court also denied the petitioners’

³⁶ No reported decisions could be found applying a mixed-motive approach to the siting of an industrial facility under Title VI. The closest case that could be found was a decision of the United States Court of Appeals for the Second Circuit that affirmed the decision of the United States District Court for the Eastern District of New York that a rezoning decision of Garden City, New York was made with discriminatory intent in violation of the Fair Housing Act. *Mhany Mgmt., Inc. v. County of Nassau*, 819 F.3d 581, 624 (2d Cir. 2016). The Second Circuit affirmed the holding of the lower court that there was a finding of discrimination based on the applicability of the mixed-motive theory of discrimination under the Fair Housing Act. *Id.* at 612–16. But this case was not framed as an environmental justice case.

³⁷ Bradford Mank, *Is There a Private Cause of Action Under EPA’s Title VI Regulation?: The Need to Empower Environmental Justice Plaintiff* 11, 24 *Colum. J. Envtl. L.* 1, 11 (1999).

³⁸ *Chester Residents Concerned for Quality Living v. Seif*, 944 F. Supp. 413, 414 (E.D. Pa. 1996), *rev’d*, 132 F.3d 925 (3d Cir. 1997), *vacated*, 524 U.S. 974 (1998) (mem.).

³⁹ *Id.* at 415–16; 42 U.S.C. §§ 2000d to 2000d-1 (2012).

⁴⁰ *Chester Residents Concerned for Quality Living*, 944 F. Supp. at 417.

⁴¹ *Id.* at 417–418.

⁴² *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925, 937 (3d Cir. 1997), *vacated*, 524 U.S. 974 (1998).

⁴³ *Seif v. Chester Residents Concerned for Quality Living*, 524 U.S. 974 (1998) (mem.).

motion for attorneys' fees.⁴⁴ The legal challenge was a practical, if not a legal success.

Following the success of that case, a second case was commenced by South Camden Citizens in Action against the New Jersey Department of Environmental Protection, seeking a preliminary injunction and a declaratory judgment that the grant of permits to construct and operate a cement producing plant by St. Lawrence Cement Co. was a violation of Title VI.⁴⁵ The District Court for the District of New Jersey granted an injunction to the plaintiffs.⁴⁶

Five days later, the Supreme Court caused a tremendous setback for the environmental justice movement. In a disparate impact challenge to the State of Alabama's English-only administration of driver's licensing examinations, the Supreme Court held that section 602 did not create a private right of action for discrimination based on a disparate impact.⁴⁷ Writing for the 5–4 majority, Justice Scalia reasoned that the text of Title VI does not expressly or impliedly create a private right of action for discrimination based on disparate impact.⁴⁸

In support of his decision, Justice Scalia discussed a prior decision of the Supreme Court which held that a 39-year old woman had an implied right of action to challenge an allegedly discriminatory medical school admissions policy under Title IX, modeled after Title VI.⁴⁹ Justice Scalia distinguished *Cannon v. University of Chicago* on the grounds that it only involved an instance of intentional discrimination and not disparate impact, and he based this reasoning on a concession for the sake of argument by the defendant, rather than on the actual allegations of the plaintiff.⁵⁰

⁴⁴ *Seif v. Chester Residents Concerned for Quality Living*, 525 U.S. 927 (1998) (mem.) (order denying petitioners motion to award costs).

⁴⁵ *S. Camden Citizens in Action v. N.J. Dep't of Env'tl. Prot. (Camden I)*, 145 F. Supp. 2d 446, 450 (D.N.J. 2001), *opinion modified and supplemented*, 145 F. Supp. 2d 505 (D.N.J. 2001), *rev'd*, 274 F.3d 771 (3d Cir. 2001).

⁴⁶ *Id.* at 505. The court based its holding on the decision of the Third Circuit in *Powell v. Ridge*, 189 F.3d 387 (3d Cir. 1999), which affirmed the earlier result in *Chester Residents Concerned for Quality Living*, even though that decision had been vacated by the Supreme Court. *Camden I*, 145 F. Supp. 2d at 473–74.

⁴⁷ *Alexander v. Sandoval*, 532 U.S. 275, 286, 293 (2001).

⁴⁸ *See id.* at 288–93. Justice Scalia was joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Thomas.

⁴⁹ *Id.* at 297 (“We have no doubt that Congress intended to create Title IX remedies comparable to those available under Title VI and that it understood Title VI as authorizing an implied private cause of action for victims of the prohibited discrimination.” (citing *Cannon v. Univ. of Chi.*, 441 U.S. 677, 703 (1979))).

⁵⁰ *Id.* at 282 (“*Cannon* was decided on the assumption that the University of Chicago had intentionally discriminated against petitioner. *See* 441 U.S. at 680 (noting that respondents ‘admitted *arguendo*’ that petitioner’s ‘application for admission to medical school was denied by the respondents because she is a woman’). It therefore *held* that Title IX created a private right of action to enforce its ban on intentional discrimination, but had no occasion to consider whether the right reached regulations.”).

In contrast, in his dissenting opinion Justice Stevens noted that *Cannon* in fact was a disparate impact case.⁵¹ As demonstrated by a footnote in the majority decision in *Cannon*, it was clear that the plaintiff in that case had alleged both intentional discrimination and disparate impact.⁵² But these facts were ignored in the majority's decision in *Alexander v. Sandoval*.

In the South Camden Citizens in Action case, the district court subsequently attempted to avoid the impact of the Supreme Court's decision by holding that a claim for discrimination based on disparate impact could be asserted under § 1983.⁵³ Indeed, in his dissenting opinion, Justice Stevens had made the observation that a claim for discrimination based on disparate impact could be based on § 1983.⁵⁴ But the trial court's decision was reversed by the Third Circuit, which held that plaintiffs could not rely on a mere regulatory prohibition of disparate impact to create a right of action not authorized in a statute.⁵⁵ As a result of this decision, the trial court was forced to dismiss the disparate impact claim under section 602.⁵⁶ But it also held that the plaintiffs had pleaded sufficient facts in support of a claim for intentional discrimination, and therefore granted the preliminary injunction, vacated the air permits, and enjoined the company from further operation, pending disposition of the case.⁵⁷

However, the plaintiffs ultimately lost the case on summary judgment because they could not establish a link between the siting of the facility and any alleged discriminatory permitting decisions by the New Jersey Department of Environmental Protection.⁵⁸ All that the plaintiffs could prove

⁵¹ *Id.* at 298 (Stevens, J., dissenting) ("In providing a shorthand description of her claim in the text of the opinion, we ambiguously stated that she had alleged that she was denied admission 'because she is a woman,' but we appended a lengthy footnote setting forth the details of her disparate-impact claim.").

⁵² *Cannon*, 441 U.S. at 681 n.2 ("These policies, it is alleged, prevented petitioner from being asked to an interview at the medical schools, so that she was denied even the opportunity to convince the schools that her personal qualifications warranted her admission in place of persons whose objective qualifications were better than hers. Because the incidence of interrupted higher education is higher among women than among men, it is further claimed, the age and advanced-degree criteria operate to exclude women from consideration even though the criteria are not valid predictors of success in medical schools or in medical practice. As such, the existence of the criteria either makes out or evidences a violation of the medical school's duty under Title IX to avoid discrimination on the basis of sex." (citations omitted)).

⁵³ *S. Camden Citizens in Action v. N.J. Dep't of Env'tl. Prot.* (*Camden II*), 145 F. Supp. 2d, 505, 549 (D.N.J. 2001).

⁵⁴ *Alexander*, 532 U.S. at 300 (Stevens, J., dissenting) ("Litigants who in the future wish to enforce the Title VI regulations against state actors in all likelihood must only reference §1983 to obtain relief; indeed, the plaintiffs in this case (or other similarly situated individuals) presumably retain the option of re-challenging Alabama's English-only policy in a complaint that invokes §1983 even after today's decision.").

⁵⁵ *S. Camden Citizens in Action v. N.J. Dep't of Env'tl. Prot.* (*Camden III*), 274 F.3d 771, 790 (3d Cir. 2001) ("[W]e hold that a federal regulation alone may not create a right enforceable through section 1983 not already found in the enforcing statute.").

⁵⁶ *S. Camden Citizens in Action v. N.J. Dep't of Env'tl. Prot.* (*Camden IV*), 254 F. Supp. 2d 486, 509 (D.N.J. 2003).

⁵⁷ *Id.* at 499, 509.

⁵⁸ *S. Camden Citizens in Action v. N.J. Dep't of Env'tl. Prot.* (*Camden V*), No. 01-702(FLW), 2006 WL 1097498, at *1, *29 (D.N.J. Mar. 31, 2006) ("Plaintiffs have failed to produce any

was that there was a disparate impact, and they could not prove intentional race discrimination.⁵⁹ Unable to prove a private cause of action for disparate impact, the plaintiffs could not go forward with their action.

Since the time of this setback for the environmental justice movement, there have been a limited number of reported cases involving environmental justice claims under Title VI, and they have not been favorable to environmental justice plaintiffs. One case was a pro se plaintiff's failed attempt to oppose a large development including a solar farm, welcome center, and transmission lines in Fredonia, Tennessee.⁶⁰ The United States District Court for the Western District of Tennessee granted the state agencies' motions to dismiss because the plaintiff did not have standing to challenge the development projects under Title VI.⁶¹ As a white male who was not a member of a protected group, the plaintiff lacked standing to assert a claim for discrimination under Title VI, despite the fact that he was a member of an environmental justice advocacy group.⁶² In addition, under *Alexander v. Sandoval*, the court held that the plaintiff could not maintain a Title VI action for discrimination based entirely on an alleged failure to evaluate the disparate impacts on a minority community.⁶³ In a second decision, the court granted the motions to dismiss the Title VI claims against the federal defendants (including the Federal Highway Administration and the United States Department of Energy) under similar rationales.⁶⁴

In a multi-claim challenge to the Louisville-Southern Indiana Ohio River Bridges Project, the United States District Court for the Western District of Kentucky dismissed Title VI claims because the plaintiff (a volunteer-member charitable organization promoting modern transit planning) failed to establish that decisions of state and federal transportation and highway agencies were made based on race or ethnicity.⁶⁵ In rejecting a series of arguments made by the plaintiff, Judge John G. Heyburn held there was no evidence to support the claims of unlawful discrimination.⁶⁶ The court

evidence of a historical pattern of discriminatory permitting decisions on the part of [New Jersey Department of Environmental Protection].”).

⁵⁹ *Id.* at *29.

⁶⁰ *Bullwinkel v. U.S. Dep't of Energy (Bullwinkel I)*, No. 11-1082, 2013 WL 392466, at *1, *10 (W.D. Tenn. Jan. 31, 2013).

⁶¹ *Id.* at *7-9.

⁶² *Id.* While there is legal authority for a plaintiff to assert standing based on the rights of other individuals, the court held that the plaintiff had not shown why members of minority groups in the community could not file their own claims. *Id.* (holding that requirement of prudential standing was not met).

⁶³ *Id.* at *10 (citing *Alexander v. Sandoval*, 532 U.S. 275, 280-81 (2001)).

⁶⁴ *Bullwinkel v. Dep't of Energy (Bullwinkel II)*, No. 1:11-cv-1082-JDB-egb, 2013 WL 4774769, at *1-3 (W.D. Tenn. Jun. 4, 2013), *report and recommendation adopted in part, rejected in part*, No. 1:11-CV-01082-JDB-egb, 2013 WL 4774766 (W.D. Tenn. Sept. 4, 2013); *Bullwinkel v. Dep't of Energy (Bullwinkel III)*, No. 1:11-cv-01082-JDB-egb, 2013 WL 4774766, at *6-7 (W.D. Tenn. Sept. 4, 2013) (adopting the relevant portions of the Report and Recommendations).

⁶⁵ *Coal. for the Advancement of Reg'l Transp. v. Fed. Highway Admin.*, 959 F. Supp. 2d 982, 1022-23 (W.D. Ky. 2013), *aff'd*, 576 F. App'x 477 (6th Cir. 2014).

⁶⁶ *Id.* at 1023. The court reasoned there was no discriminatory intent to impose a disparate impact based on bridge tolls, and no evidence to support the assertion that there would be

dismissed all other claims, including those indirectly relying on principles of environmental justice reflected in Title VI.⁶⁷

That decision was not made by a judge hostile to civil rights concerns. Judge Heyburn subsequently authored two decisions holding that the Commonwealth of Kentucky's ban on same-sex marriage was unconstitutional.⁶⁸ On appeal, those two decisions ultimately were consolidated with other court decisions on same-sex marriage, finding their way to the Supreme Court, which issued its landmark 2015 decision ruling that state bans on same-sex marriage are unconstitutional.⁶⁹

Judge Heyburn's decision in the Louisville-Southern Indiana Ohio River Bridges Project case was appealed to the United States Court of Appeals for the Sixth Circuit, which affirmed his decision on all accounts, finding no basis for the claims of discrimination.⁷⁰ The Sixth Circuit identified six factors for evaluating Title VI claims: 1) disparate racial impact, 2) historical background of the decision, 3) sequence of events leading up to the challenged decision, 4) departures from the normal procedural sequence, 5) departures from established "substantive" standards, and 6) legislative or administrative history.⁷¹ The only evidence of discrimination was offered on the first factor (disparate racial impact), and it was insufficient to establish a Title VI claim for unlawful discrimination.⁷² The court held that the agency adequately demonstrated the need for the imposition of tolls, and included

significant traffic diversion resulting from the tolls, disproportionately high criminal enforcement for failure to pay tolls, or purposeful elimination of public transit options for minority communities. *Id.* at 1019–23. In addition, there was no evidence that the \$20 million appropriation for the Trolley Barn Rehabilitation Project for the benefit of minority community was discriminatory because it was wasteful. *Id.* at 1023.

⁶⁷ *Id.* at 1017–19.

⁶⁸ *Bourke v. Beshear*, 996 F. Supp. 2d 542, 553 (W.D. Ky. 2014); *Love v. Beshear*, 989 F. Supp. 2d 536, 539 (W.D. Ky. 2014). In the first case, Judge Heyburn held that the discrimination against homosexuals was unconstitutional based on a mere rationality level of review, applicable to nonsuspect classes of individuals. *Bourke*, 996 F. Supp. 2d at 544, 550, 552–53. (state denial of equal recognition and benefits for validly married same-sex couples under Kentucky and federal law violated the Equal Protection Clause of the Fourteenth Amendment of the federal Constitution). In the second case, Judge Heyburn held that the discrimination was unconstitutional based on an intermediate scrutiny level of review applicable to quasi-suspect classes of individuals. *Love*, 989 F. Supp. 2d at 547–50. (finding that homosexual persons constitute a quasi-suspect class necessitating a showing that the state justification was "substantially related to an important governmental objective"). The standard was not met on the facts. *Id.*

⁶⁹ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015) ("This analysis compels the conclusion that same-sex couples may exercise the right to marry. The four principles and traditions to be discussed demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples.").

⁷⁰ *Coal. for the Advancement of Reg'l Transp. v. Fed. Highway Admin.*, 576 F. App'x 477, 495 (6th Cir. 2014). ("In sum after sifting out plaintiff's rhetoric, legal conclusions, and unsupported allegations, the record facts that remain—viewed collectively, and in a light most favorable to plaintiff—do not create a genuine issue of material fact on whether the state defendants intentionally discriminated on the basis of race in connection with the Project.").

⁷¹ *Id.* at 493–94.

⁷² *Id.* at 494.

measures to mitigate the disparate impact, including \$20 million for enhanced bus service in the community.⁷³

Additional cases construing these six factors further demonstrate the great difficulty for plaintiffs alleging claims for discrimination in the siting of industrial facilities. One court dismissed a claim for discrimination under § 1983 and the Equal Protection Clause of the Fourteenth Amendment in the selection of a site for a highway bypass project, where there were no facts showing discriminatory intent, and evidence of discriminatory impact was weak.⁷⁴ Another court affirmed the dismissal of a claim for intentional discrimination against the Metropolitan Transportation Commission for the San Francisco Bay Area, where plaintiffs alleged that an emphasis on rail expansion projects over bus expansion projects in a regional transit expansion plan caused discrimination against minorities.⁷⁵

Sometimes environmental justice plaintiffs are unable to set forth facts sufficient to show a disparate impact because of the uncertainties of science and technology—a fundamental challenge for any environmental plaintiff, regardless of race or ethnicity. Because of scientific uncertainty, one court denied a motion for a preliminary injunction because plaintiffs failed to establish irreparable harm resulting from a decision of the Detroit Public Schools to build the new Beard Elementary School on a contaminated site.⁷⁶

In summary, the evolution of the case law under Title VI has been unfavorable for environmental justice plaintiffs, particularly because of the decision of the Supreme Court in *Alexander v. Sandoval*, ruling that there is no private right of action for disparate impact discrimination under Title VI. The high burden of proving intentional discrimination is a significant barrier for environmental justice plaintiffs in seeking relief from environmental discrimination in the court system.

⁷³ *Id.*

⁷⁴ *Paulk v. Ga. Dep't of Transp.*, CV 516-19, 2016 WL 3023318, at *10–12 (S.D. Ga. May 24, 2016), *appeal docketed*, No. 16-13406 (11th Cir. June 8, 2016). Plaintiffs also alleged a violation of Title VI, which overlapped with the § 1983 and Equal Protection Clause claims. *Id.* at *10. Plaintiffs admitted that nonminority-owned properties that were not impacted were located on a different side of the road and used for an entirely different purpose. *Id.* at *12.

⁷⁵ *Darensburg v. Metro. Transp. Comm'n*, 636 F.3d 511, 518, 520–23 (9th Cir. 2011) (affirming judgment for defendants after trial on plaintiffs' Title VI and Equal Protection Clause claims for intentional discrimination, where plaintiffs “failed to provide statistical evidence that demonstrates the projects . . . will have an adverse impact on minorities”).

⁷⁶ *Lucero v. Detroit Pub. Sch.*, 160 F. Supp. 2d 767, 800, 802, 805 (E.D. Mich. 2001). In support of its holding, the court noted that “[p]laintiffs claim that uncertainties regarding the nature of exposure, specific vulnerability and variability among children, and limited knowledge about the toxicities of chemicals and complex mixtures makes it difficult to determine the extent of links between environmental exposures.” *Id.* at 800.

IV. ADMINISTRATIVE PROCEDURE ACT AND ENVIRONMENTAL JUSTICE

A. Statutory Framework

The fact that it is difficult for plaintiffs to sustain a private right of action under Title VI might suggest that another federal statute—the federal Administrative Procedure Act⁷⁷ (APA)—would be a better alternative. Originally enacted in 1946, this statute provides a form of judicial review for actions of administrative agencies.⁷⁸ The APA would appear to compensate for the inability to bring an environmental justice claim based on disparate impact, because it affords a remedy in federal court for a plaintiff who has no other adequate legal remedy at law.⁷⁹ The statute does not afford judicial review of a claim challenging an action that is committed to the discretion of an agency.⁸⁰ Because courts have held that there is no private right of action to sue for disparate impact under Title VI, it would appear that the lack of an adequate legal remedy at law would allow for a claim of environmental discrimination under the APA.

B. Judicial Case Law

In a recent case, the United States District Court for the Northern District of California rejected an APA challenge involving allegations that the California Department of Pesticide Regulation subjected Latino schoolchildren in California to harmful and discriminatory exposures to toxic pesticides and fumigants.⁸¹ The petitioners asserted claims that EPA violated the APA in its investigation, negotiation, and settlement of an administrative complaint for disparate impact discrimination under Title VI.⁸² Although the litigation was filed under the APA, the underlying complaint had been filed under Title VI.⁸³ Plaintiffs alleged that EPA's settlement with the state agency did not require compliance with EPA's Title VI regulations, and did not address the disparate adverse effects of exposure to toxic pesticides and fumigants (including methyl bromide) to Latino schoolchildren.⁸⁴ The court held that EPA's actions in negotiating, settling, and dismissing the administrative complaint were committed to its

⁷⁷ 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2012).

⁷⁸ Administrative Procedure Act, ch. 324, § 10, 60 Stat. 237, 243 (1946) (prior to 1966 amendment). The modern version of the statute was expanded and recodified in 1966. Administrative Procedure Act, Pub. L. No. 89-554, § 702, 80 Stat. 378, 392 (1966) (codified at 5 U.S.C. § 702 (2012)).

⁷⁹ 5 U.S.C. § 704 (2012) (“Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.”).

⁸⁰ *Id.* § 701(a)(2) (“This chapter applies, according to the provisions thereof, except to the extent that . . . agency action is committed to agency discretion by law.”).

⁸¹ *Garcia v. McCarthy*, No. 13-CV-03939-WHO, 2014 WL 187386, at *1 (N.D. Cal. Jan. 16, 2014), *aff'd*, 649 F. App'x 589 (9th Cir. 2016).

⁸² *Id.* at *1.

⁸³ *Id.*

⁸⁴ *Id.* at *9.

discretion, and that the court was precluded from reviewing it.⁸⁵ In addition, the Title VI regulations were drawn in such a manner that the court had no meaningful standard against which to judge EPA's actions.⁸⁶ The court held that EPA's regulations prohibiting a recipient of assistance from administering a program or activity in such a manner as to have a discriminatory effect did not constrain EPA's enforcement discretion with respect to settlement of an administrative complaint.⁸⁷

On appeal, the United States Court of Appeals for the Ninth Circuit affirmed the holding that Congress did not limit EPA's enforcement discretion with respect to administrative complaints under Title VI.⁸⁸ The holding is significant because after the decision of the Supreme Court in *Sandoval v. Alexander* in 2001, it is EPA and not private plaintiffs who maintains the authority to enforce Title VI for disparate impact claims.⁸⁹ A decision like *Garcia v. McCarthy* makes it even more difficult for private plaintiffs to secure judicial review under Title VI.

Finally, environmental justice petitioners might seek judicial review under APA provisions authorizing claims for unreasonable delay in the performance of a nondiscretionary duty.⁹⁰ But it is difficult to prevail on such claims. A court dismissed an unreasonable delay claim with respect to the processing of a civil rights complaint regarding the siting of a BioSafety Level 4 laboratory by the National Institute of Allergy and Infectious Diseases in the neighborhoods of Roxbury and South End in Boston, Massachusetts, due to the pendency of a related legal challenge to the environmental analysis for the project.⁹¹ In doing so, the Court stated that the delay of 21 months from the filing of the complaint until the commencement of the litigation was not unreasonable.⁹²

⁸⁵ *Id.* at *11 (citing 5 U.S.C. § 701(a)(2) (2012)).

⁸⁶ *Id.*

⁸⁷ *Id.* at *10–11 (agreeing with EPA that laws did not constrain EPA's enforcement discretion). EPA's regulations prohibited programs or activities from having a disparate impact based on race, color, national origin, or sex. 40 C.F.R. 7.35(b) ("A recipient shall not use criteria or methods of administering its program or activity which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program or activity with respect to individuals of a particular race, color, national origin, or sex.").

⁸⁸ *Garcia v. McCarthy*, 649 F. App'x 589, 592 (9th Cir. 2016) ("Congress chose not to cabin EPA's otherwise unreviewable discretion in deciding how to enforce the Act.").

⁸⁹ *See supra* note 48 and accompanying text.

⁹⁰ 5 U.S.C. § 706(1) (2012) (The reviewing court shall "compel agency action unlawfully withheld or unreasonably delayed").

⁹¹ *King v. Office for Civ. Rights of the U.S. Dep't of Health & Human Servs.*, 573 F. Supp. 2d 425, 430–31 (D. Mass. 2008) (granting motion to dismiss complaint alleging that the Office of Civil Rights unlawfully withheld or unreasonably delayed investigation of Title VI complaint alleging discrimination, but requiring the Office of Civil Rights to make a decision within ninety days of the National Institute of Health's final supplemental statement, as opposed to waiting until the outcome of litigation).

⁹² *Id.* at 428, 431.

V. NEPA AND ENVIRONMENTAL JUSTICE

A. Statutory and Regulatory Considerations

On the first day of 1970, Congress passed the National Environmental Policy Act⁹³ (NEPA). Section 102(2)(C)(i) requires that a federal agency prepare a report regarding the environmental impact of a proposed major federal action that significantly affects the quality of the human environment.⁹⁴ But nothing in the statute requires a quantitative balancing of environmental impacts against the benefits of economic development, or prohibit development upon a showing of a certain level or amount of environmental impact.⁹⁵

Over time, environmental justice considerations have become a part of the process of performing an environmental assessment or preparing an environmental impact statement. This is largely attributable to the issuance of an executive order by President Clinton directing federal agencies to incorporate environmental justice considerations into their decision-making.⁹⁶ Specifically, the Executive Order requires each federal agency to develop an agency-wide environmental justice strategy that “identifies and addresses disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations.”⁹⁷ To that end, it also requires the collection, maintenance, and analysis of information on race, national origin, and income level for areas surrounding facilities or sites that are subject to NEPA.⁹⁸ For environmental justice advocates, a notable weakness of the executive order is the fact that it does not create a right of judicial review for

⁹³ National Environmental Policy Act of 1969, Pub. L. 91-190, 83 Stat. 852 (Jan. 1, 1970) (codified as amended at 42 U.S.C. §§ 4331–4370h (2012)).

⁹⁴ NEPA, 42 U.S.C. § 4332(2)(C)(i) (2012) (“[T]o the fullest extent possible . . . all agencies of the Federal Government shall . . . include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on . . . the environmental impact of the proposed action.”).

⁹⁵ See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989) (“Other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed—rather than unwise—agency action.” (footnote omitted)).

⁹⁶ Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, Exec. Order No. 12,898, 3 C.F.R. at 859 (1995).

⁹⁷ *Id.* § 1-103(a), at 860.

⁹⁸ *Id.* § 3-302(b), at 861 (“In connection with the development and implementation of agency strategies in section 1-103 of this order, each Federal agency, whenever practicable and appropriate, shall collect, maintain and analyze information on the race, national origin, income level, and other readily accessible and appropriate information for areas surrounding facilities or sites expected to have a substantial environmental, human health, or economic effect on the surrounding populations, when such facilities or sites become the subject of a substantial Federal environmental administrative or judicial action.”).

any person.⁹⁹ Commenters have criticized the failure to create a right of judicial review, a fundamental shortcoming in protecting communities.¹⁰⁰

A part of the Executive Office of the President, the Council on Environmental Quality is charged with the responsibility of promulgating regulations implementing NEPA.¹⁰¹ As in the case of the statute, nothing in the regulations requires a quantitative balancing of environmental impacts against the benefits of economic development, or prohibit development upon a showing of a certain level or amount of environmental impact.¹⁰² While the regulations do not expressly address the subject of environmental justice by name, they identify social and economic impacts as some of the effects to be considered under NEPA.¹⁰³ If social and economic effects are interrelated with natural or physical environmental effects, they should be considered in the NEPA process.¹⁰⁴

⁹⁹ *Id.* § 6-609, at 863 (“*Judicial Review*. This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any person. This order shall not be construed to create any right to judicial review involving the compliance or noncompliance of the United States, its agencies, its officers, or any other person with this order.”).

¹⁰⁰ *E.g.*, Carolyn Graham & Jennifer B. Grills, Comment, *Environmental Justice: A Survey of Federal and State Responses*, 8 VILL. ENVTL. L.J. 237, 253–58 (1997).

¹⁰¹ Following the passage of NEPA in 1970, executive orders granted authority to the Council to promulgate regulations. Protection and Enhancement of Environmental Quality, Exec. Order No. 11,514, 3 C.F.R. at 531 (1971), *as amended by* Relating to Protection and Enhancement of Environmental Quality, Exec. Order No. 11,991, 3 C.F.R. at 123 (1978).

¹⁰² *See* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 351–52 (1989) (discussing NEPA implementing regulations).

¹⁰³ 40 C.F.R. §1508.8 (2015) (“*Effects* include: (a) Direct effects, which are caused by the action and occur at the same time and place. (b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems. Effects and impacts as used in these regulations are synonymous. Effects includes . . . economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.”).

¹⁰⁴ *Id.* §1508.14 (“*Human environment* shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment. (See the definition of ‘effects’ (§ 1508.8). This means that economic or social effects are not intended by themselves to require preparation of an environmental impact statement. When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.”). *Rochester v. U.S. Postal Serv.*, 541 F.2d 967, 973–74 (2d Cir. 1976) (rejecting argument of the United States Postal Service that the construction of a new postal service facility and transfer of existing employees would not “significantly affect the quality of the human environment”). The court held that “the Postal Service wholly neglected consideration of possibly major environmental effects associated with this project,” including increasing commuter traffic by car to the new job site, loss of job opportunities for inner-city residents who cannot afford to commute by car or bus, and partial or complete abandonment of the downtown main post office which could contribute to an atmosphere of urban decay and blight. *Id.* Although it affirmed the denial of plaintiffs’ request for a permanent injunction, the Second Circuit granted their request for a preliminary injunction, and remanded

Guidance documents of the Council on Environmental Quality and EPA provide specific details on how environmental justice may be considered in the NEPA process.¹⁰⁵ Because guidance documents are not binding on an agency, they inherently provide limited protection for low income minority communities against air pollution.¹⁰⁶

B. Judicial Case Law

Judicial decisions considering challenges to siting of industrial facilities and transportation projects under NEPA demonstrate that this statute provides limited protection to low income minority communities. Consistent with the procedural nature of the law and regulations, judicial decisions typically affirm agency decisions allowing projects to proceed. In a NEPA challenge, the standard of review is whether the lead agency considered the relevant factors, articulated a rational basis for its conclusion, and supported it with evidence.¹⁰⁷ Under this standard, the decisions can be classified into several categories.

the matter to the district court for a consideration of impacts, including socioeconomic impacts. *Id.* at 978–79.

¹⁰⁵ COUNCIL ON ENVTL. QUALITY, ENVIRONMENTAL JUSTICE: GUIDANCE UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT (1997), *available at* http://www.energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/G-CEQ-EJGuidance.pdf; U.S. ENVTL. PROT. AGENCY, FINAL GUIDANCE FOR INCORPORATING ENVIRONMENTAL JUSTICE CONCERNS IN EPA'S NEPA COMPLIANCE ANALYSES (1998), *available at* https://www.epa.gov/sites/production/files/2014-08/documents/ej_guidance_nepa_epa0498.pdf; U.S. ENVTL. PROT. AGENCY, FINAL GUIDANCE FOR CONSIDERATION OF ENVIRONMENTAL JUSTICE IN CLEAN AIR ACT 309 REVIEWS (1999), *available at* https://www.epa.gov/sites/production/files/2014-08/documents/enviro_justice_309review.pdf; Memorandum from Cynthia Giles, Assistant Adm'r for Enforcement & Compliance Assurance, U.S. Env'tl. Prot. Agency, to Reg'l Adm'rs & Assistant Adm'rs, U.S. Env'tl. Prot. Agency (Apr. 19, 2011), *available at* <https://www.epa.gov/sites/production/files/2014-08/documents/nepa-environmental-justice-memo-pg.pdf>.

¹⁰⁶ Guidance documents do not have the force of law, although they may be entitled to a lower form of deference than an agency rule. *See* APA, 5 U.S.C. §553(b)(3)(A) (2012) (notice and comment provisions for rulemakings do not apply to “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice”); *Union Neighbors United, Inc. v. Jewell*, 831 F.3d 564, 579–80 (D.C. Cir. 2016) (rejecting U.S. Fish & Wildlife Service’s request for *Chevron* deference, and holding that only *Skidmore* deference was appropriate for the Service’s 1996 Habitat Conservation Planning and Incidental Take Permit Processing Handbook). “Under *Skidmore*, the court grants an agency’s interpretation only as much deference as its persuasiveness warrants.” *Id.* at 580 (citing *Brown v. United States*, 327 F.3d 1198, 1205 (D.C. Cir. 2003)).

¹⁰⁷ *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). *See, e.g., Bitters v. Fed. Highway Admin.*, No. 1:14-CV-01646-KJM-SMS, 2016 WL 159216, at *12 (E.D. Cal. Jan. 12, 2016) (“Because Caltrans considered the relevant factors and did not make a clear error of judgment in light of the record before it, the court finds Caltrans’ decision was not arbitrary or capricious.”); *Crenshaw Subway Coal. v. L.A. Cty. Metro. Transp. Auth.*, No. CV-11-9603 FMO, 2015 WL 6150847, at *8 (C.D. Cal. Sept. 23, 2015) (“Having analyzed the grade crossings throughout the Metro system as a whole, the agencies’ conclusion that the Metro Grade Crossing Policy does not adversely impact minority and low income communities is supported by substantial evidence.”).

First, courts usually find that the agency took a “hard look” at environmental impacts, including environmental justice, sometimes without much critical analysis of the extent of those impacts.¹⁰⁸ This occurred with respect to the elimination of one dam and authorization of a final dam for the added purpose of providing water supply, in a longstanding project to provide watershed protection, flood prevention, and recreation along the Lost River Watershed in West Virginia.¹⁰⁹ Other examples include; the reintroduction of vehicular traffic to the Fulton Mall in the downtown area of Fresno, California;¹¹⁰ a proposed marine terminal to be built on the Bayport Ship Channel in Galveston Bay;¹¹¹ an environmental challenge to regulations applicable to private transportation providers under the Americans with Disabilities Act;¹¹² a challenge to a grant to revitalize the decaying 1,510-unit St. Thomas Housing Development in New Orleans, Louisiana;¹¹³ a project involving the transportation of nuclear waste from production sources to Yucca Mountain, Nevada;¹¹⁴ a conditional exclusion determination by the Federal Highway Administration for renovation of the Pioneer Street Bridge in Montpelier, Vermont;¹¹⁵ a challenge to the West Eugene Emerald Express, designed to extend Eugene’s Bus Rapid Transit system into West Eugene and link to existing routes in Eugene and Springfield, Oregon;¹¹⁶ and a challenge to a project proposed by the Port

¹⁰⁸ See, e.g., *Webster v. U.S. Dep’t of Agric.*, 685 F.3d 411, 429 (4th Cir. 2012) (affirming grant of summary judgment to defendants, because agency took a “hard look” at environmental impacts, including environmental justice impacts).

¹⁰⁹ *Id.*

¹¹⁰ *Bitters*, 2016 WL 159216, at *1, *14–15 (granting summary judgment to defendants, where the California Department of Transportation’s analysis of community impacts was not unreasonable).

¹¹¹ *City of Shoreacres v. Waterworth*, 332 F. Supp. 2d 992, 996, 1010 (S.D. Tex. 2004) (granting summary judgment to defendants, where the United States Army Corps of Engineers extensively discussed environmental impacts, including environmental justice impacts).

¹¹² *Am. Bus Ass’n v. Slater*, No. 98-2351 (RMU), 1999 WL 986849, at *1, *31 (granting summary judgment to defendants, holding that department took a “hard look” at potentially significant environmental impacts, including impacts on minority and low-income populations), *rev’d on other grounds*, 231 F.3d 1 (D.C. Cir. 2000); *Americans with Disabilities Act of 1990*, 42 U.S.C. §§ 12101–12213 (2012).

¹¹³ *Coliseum Square Ass’n, Inc. v. Dep’t of Hous. & Urban Dev.*, No. Civ.A. 02-2207, 2003 WL 715758, at *1–2, *6 (E.D. La. Feb. 27, 2003) (denying summary judgment to the plaintiff because action was not ripe and granting defendant Department of Housing and Urban Development’s motion to dismiss claims); *Coliseum Square Ass’n, Inc. v. Martinez*, No. Civ.A.02-2207, 2004 WL 551217, at *1, *6–7 (E.D. La. Mar. 17, 2004) (dismissing as moot challenge to initial environmental assessment of Department of Housing and Urban Development, where Court found subsequent environmental review to be adequate).

¹¹⁴ *Nevada v. U.S. Dep’t of Energy*, 457 F.3d 78, 81, 92–93 (D.C. Cir. 2006) (denying petition for review where the Department of Energy analyzed environmental impacts, including environmental justice impacts, in the process of evaluating five rail corridors).

¹¹⁵ *Friends of Pioneer St. Bridge Corp. v. Fed. Highway Admin.*, 150 F. Supp. 2d 637, 640–42, 651–52 (D. Vt. 2001) (granting summary judgment to defendants, where agency adequately addressed environmental impacts, including environmental justice impacts, there were few residences near the bridge, and it was not a low-income neighborhood).

¹¹⁶ *Our Money Our Transit v. Fed. Transit Admin.*, No.C13-1004 TSZ, 2014 WL 3543636, at *1, *8 (W.D. Wash. July 16, 2014) (granting summary judgment to defendants, noting that “with

Authority of New York and New Jersey to raise the height of the Bayonne Bridge to allow larger ships to more readily access the port.¹¹⁷ In some situations, courts have actually concluded that projects would benefit low-income minority communities, despite the fact they were challenging them. This occurred with respect to a challenge to the Central Corridor Light Rail Transit project in the Rondo neighborhood of St. Paul,¹¹⁸ and the challenge to a grant to revitalize the St. Thomas Housing Development in New Orleans, Louisiana.¹¹⁹

Sometimes environmental justice petitioners under NEPA are unsuccessful for reasons that have nothing to do with environmental justice. Because NEPA only applies to federal actions and not state actions, a court rejected an environmental justice challenge to a project involving the closure of Walnut Depot, the transfer of buses to other depots, and the expansion of a neighboring waste transfer facility in the South Bronx, New York.¹²⁰ Similarly, a court dismissed state claims challenging a proposed

regard to minority populations, the [Environmental Assessment] reasonably addresses socioeconomic and environmental justice concerns”).

¹¹⁷ *Coal. for Healthy Ports v. U.S. Coast Guard*, No. 13-CV-5347 (RA), 2015 WL 7460018, at *1, *27 (S.D.N.Y. Nov. 25, 2015) (granting summary judgment to the Coast Guard on plaintiffs’ claim challenging environmental justice analysis, where the “Coast Guard’s determination that the Project would not result in any significant adverse impacts on *any* community, including any disproportionate impact on environmental justice communities, obviated the need for further study of environmental justice impacts.”).

¹¹⁸ *Saint Paul Branch of the Nat’l Ass’n for the Advancement of Colored People v. U.S. Dep’t of Transp.*, 764 F. Supp. 2d 1092, 1108–09 (D. Minn. 2011) (“[T]he Agencies considered the potential adverse impacts of the [Central Corridor Light Rail Transit] project on the Rondo neighborhood and concluded that despite these potential impacts, the [Central Corridor Light Rail Transit] project will provide substantial benefits to the environmental justice community.”). The decision highlights that environmental justice impacts need not be limited to public health, but may extend to economic impacts. While denying the plaintiffs’ request for an injunction against the project, the court required supplementation of the Final Environmental Impact Statement to evaluate the impact of the loss of business revenue that would result from the environmental impacts of the project. *Id.* at 1118–19. The loss of business resulting from an environmental impact is a consideration that should be evaluated under NEPA. *Id.* at 1112 (“The record also supports the conclusion that these environmental impacts will be connected to economic impacts; namely that businesses directly impacted by the environmental effects of constructing the [project] will likely experience a decline in business revenue. . . . The Court also concludes that these impacts must be discussed in the [Final Environmental Impact Statement].”).

¹¹⁹ *Coliseum Square Ass’n, Inc. v. Jackson*, 465 F.3d 215, 232, 250 (5th Cir. 2006) (affirming grant of summary judgment to Department of Housing and Urban Development in a challenge to its failure to require an Environmental Impact Statement, where the court saw “no administrative insensitivity to racial or economic inequality. Instead, we see a project that HUD perceived reasonably as a community effort, endorsed initially by some who now oppose it, to renovate a deteriorating public housing project for the ultimate and enduring benefit of the community.”).

¹²⁰ *S. Bronx Coal. for Clean Air, Inc. v. Conroy*, 20 F. Supp. 2d 565, 571, 573 (S.D.N.Y. 1998) (granting summary judgment to defendants based on lack of federal involvement in a nonfederal project).

extension of Massachusetts Bay Transportation Authority's Green Line light rail transit into Somerville and Medford, Massachusetts.¹²¹

Sometimes environmental justice petitioners are unsuccessful because the underlying substantive statute giving rise to the federal action falls short of protecting the relevant interest. A court rejected an environmental justice challenge to a section 404 fill permit authorizing Leeco, Inc. to mine through and fill unnamed tributaries of Stacy Branch and Yellow Creek in Knott and Perry Counties, Kentucky because the authority of the Clean Water Act¹²² only extends to navigable waters.¹²³ Sometimes the project is not subject to review because of an exemption in the NEPA regulations. A categorical exemption from NEPA review for the management of hazardous waste precluded an environmental justice challenge to the shipment of the product of the hydrolysis of chemical warfare agent VX from Newport, Indiana for incineration in Port Arthur, Texas.¹²⁴

Sovereign immunity barred an environmental justice claim against the Delaware Valley Regional Planning Commission, asserting harm from noise from vehicles on the New Jersey Turnpike and planes using Philadelphia International Airport.¹²⁵ Timeliness barred an environmental justice claim challenging a proposed San Francisco Creek oil and gas well on federally leased minerals south of Del Norte, Colorado.¹²⁶

Sometimes when courts deny environmental justice claims, they emphasize the large amount of time the agency has spent on public participation in order to meet the requirements of NEPA. Presumably, this is intended to demonstrate that the concerns of low-income minority

¹²¹ Wood v. Mass. Dep't of Transp., No. 13-cv-10115, 2013 WL 4010420, at *3-4, *12 (D. Mass. Aug. 2, 2013) (dismissing state claims against state defendants, and issuing order to show cause why federal claims should not be dismissed for lack of standing, where plaintiffs failed to show a particularized injury).

¹²² Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (2012). Section 404 is codified at 42 U.S.C. § 1344 (2012).

¹²³ Kentuckians for the Commonwealth v. U.S. Army Corps of Eng'rs, 963 F. Supp. 2d 670, 682-85, 693 (W.D. Ky. 2013) (granting summary judgment to Corps on the plaintiffs' claim challenging environmental justice analysis, even though Corps failed to include human health studies, where Corps was not required to examine impacts on overall mining operations, only those related to impacts on jurisdictional waters and adjacent riparian areas), *aff'd*, 746 F.3d 698, 707 (6th Cir. 2014) ("The Corps was not required . . . to expand the scope of its review beyond the effects of the filling and dredging activity to the effects of the entire surface mining operation.").

¹²⁴ Sierra Club v. Gates (*Gates II*), No. 2:07-cv-0101-LJM-WGH, 2008 WL 4368531, at *24 (S.D. Ind. Sept. 22, 2008) (granting partial summary judgment to federal agency and operator of incinerator).

¹²⁵ Bellocchio v. N.J. Dep't of Env'tl. Prot., 16 F. Supp. 3d 367, 381-82 (D.N.J. 2014) (granting the defendants' motion to dismiss the plaintiffs' complaint, including environmental justice claim against the Delaware Valley Regional Planning Commission, an entity created under an interstate compact having sovereign immunity under New Jersey law), *aff'd*, 602 F. App'x 876 (3d Cir. 2015).

¹²⁶ San Luis Valley Ecosystem Council v. U.S. Bureau of Land Mgmt., No. 14-cv-00680-RM, 2015 WL 3826644, at *1, *8-9 (D. Colo. June 19, 2015) (denying the plaintiff's motion to amend complaint to add a claim alleging a failure to comply with NEPA at the lease stage, because proposed claim was barred by the statute of limitations).

communities have not been ignored. This happened in the case of a challenge to the selection of a location for an international bridge crossing in the Delray neighborhood of Detroit, an economically depressed community.¹²⁷

As in Title VI cases, sometimes environmental justice petitioners are unsuccessful in their NEPA challenges because they fail to establish that the projects will cause disparate impacts on minority communities. A court rejected a challenge to the funding of the National Emerging Infectious Diseases Laboratories to be constructed in Boston's South End and Roxbury neighborhoods because nonminority workers would be more exposed than local residents.¹²⁸ In rejecting a challenge to the shipment of the product of the hydrolysis of chemical warfare agent VX from Newport, Indiana to Port Arthur, Texas for incineration, the Court noted that the community near the incinerator was relatively affluent.¹²⁹ Another court rejected a challenge to an application by Southern Nuclear Operating Company for licenses to construct and operate new units at the Vogtle Nuclear Power Plant for failure to cite specific information on environmental justice impacts.¹³⁰

Sometimes courts acknowledge a disparate impact but hold that measures proposed by the agency will adequately address the impact, justifying a rejection of the NEPA challenge. This occurred in a challenge to the proposed Longhorn Pipeline Project between Houston and El Paso, Texas;¹³¹ a challenge to the award of a contract for the construction of a Patent and Trademark Office building in Alexandria, Virginia;¹³² and a challenge to the selection of the Mid-City site for building medical facilities

¹²⁷ *Latin Ams. for Soc. & Econ. Dev. v. Adm'r of the Fed. Highway Admin.*, 858 F. Supp. 2d 839, 860, 863 (E.D. Mich. 2012) (granting motion to affirm the decision of the Federal Highway Administration, where "the agency engaged in an extensive [environmental justice] analysis, which incorporated an intensive community involvement effort").

¹²⁸ *Allen v. Nat'l Insts. of Health*, 974 F. Supp. 2d 18, 47, 51 (D. Mass. 2013) (granting summary judgment to agency, because "[w]ith regard to secondary transmissions, those greatest at risk will be the infected lab worker's social contacts, and not necessarily those living closer to the BioLab site").

¹²⁹ *Sierra Club v. Gates (Gates I)*, 499 F. Supp. 2d 1101, 1135–36 (S.D. Ind. 2007) (denying the plaintiffs' motion for preliminary injunction against federal agency and operator of incinerator, where there was no evidence to suggest that EPA and the Texas Commission on Environmental Quality did not consider environmental justice concerns).

¹³⁰ *Blue Ridge Envtl. Def. League v. U.S. Nuclear Regulatory Comm'n*, 716 F.3d 183, 185–86, 192, 198–99 (D.C. Cir. 2013) (denying petition for review, where petitioners alleged environmental justice impacts but failed to cite specific "new and significant" information that was missing from the Environmental Impact Statement).

¹³¹ *Spiller v. Walker*, No. A-98-CA-255-SS, 2002 WL 1609722, at *1, *19, *21 (W.D. Tex. July 19, 2002) (granting summary judgment to federal agency defendants and defendant gas company, where "the agencies did consider the environmental justice impacts of this new pipe and concluded mitigation measures proposed in the [Longhorn Mitigation Plan] for Travis County provide an acceptable level of protection to minority and low-income populations"), *aff'd sub nom. Spiller v. White*, 352 F.3d 235 (5th Cir. 2003).

¹³² *Young v. Gen. Servs. Admin.*, 99 F. Supp. 2d 59, 63, 85 (D.D.C. 2000) (granting summary judgment to General Services Administration, where impacts on minority communities could be mitigated through a phased-move, and EPA was satisfied with the Final Environmental Impact Statement), *aff'd*, 11 F. App'x 3 (D.C. Cir. 2000).

to replace Charity Hospital and Veterans Affairs Medical Center in New Orleans, Louisiana.¹³³

Some courts have denied environmental justice challenges under NEPA under the rationale that plaintiffs may not do under NEPA what they cannot do under the Executive Order—i.e., commence a legal action based on a failure to consider environmental justice. This occurred with respect to a challenge to the Navy's transfer of aircraft from Naval Air Station Cecil Field in Jacksonville, Florida, to Naval Air Station Oceana in Virginia Beach, Virginia;¹³⁴ a challenge to the Los Angeles International Airport (LAX) East Arrival Enhancement Project;¹³⁵ and a challenge to the Lock Replacement and Expansion project at the Inner Harbor Navigational Canal in New Orleans, Louisiana.¹³⁶ Ironically, in a challenge to the proposed Neches River National Wildlife Refuge project, which would interfere with existing plans for local projects, a court held that the failure to include environmental justice analysis was not subject to judicial review, even though the inclusion of such analysis would be subject to judicial review.¹³⁷ The result of such a decision is to create a disincentive for even considering environmental justice impacts.

Another way to reject environmental justice arguments based on the lack of a private right of action under the Executive Order is to hold that petitioners lack standing to make such arguments. This occurred in a challenge to the Jordan Creek Town Center, a super-regional shopping center proposed to be developed in West Des Moines, Iowa,¹³⁸ and in a

¹³³ Nat'l Tr. for Historic Pres. in the U.S. v. U.S. Dep't of Veterans Affairs, No. 09-5460, 2010 WL 1416729, at *1, *19-20 (E.D. La. Mar. 31, 2010) (granting summary judgment to defendants, where agencies adequately studied and considered socioeconomic impacts and rationally determined that mitigation measures would reduce socioeconomic effects to an insignificant level).

¹³⁴ Citizens Concerned About Jet Noise, Inc. v. Dalton, 48 F. Supp. 2d 582, 585-86, 604 (E.D. Va. 1999) (rejecting arguments that the environmental justice analysis for realignment scenarios in the Final Environmental Impact Statement was flawed for being based on population figures that were different from those used for the noise analysis, where NEPA does not require an environmental justice analysis and the requirements of the Executive Order are not subject to judicial review), *aff'd*, 217 F.3d 838 (4th Cir. 2000) (unpublished table decision).

¹³⁵ Morongo Band of Mission Indians v. Fed. Aviation Admin., 161 F.3d 569, 572, 575-77 (9th Cir. 1998) (denying petition for review of agency's Record of Decision, where agency fulfilled its obligation to consider reasonable alternatives, appropriately rejected alternatives that were not feasible, and Indian tribe did not propose a specific feasible alternative that would have bypassed the Reservation and still allowed for the creation of a new sector).

¹³⁶ Ass'n of Cmty. Orgs. for Reform Now v. U.S. Army Corps of Eng'rs, No. Civ.A.00-108, 2000 WL 433332, at *1-2, *8-11 (E.D. La. 2000) (granting summary judgment to defendants, where court could not review Environmental Impact Statement for disproportionately high and adverse impacts on minority and low-income populations, and Corps preferred to locate the project near an African-American neighborhood rather than a white neighborhood because of environmental concerns at the alternate location and the preference for using existing channel at the Inner Harbor Navigational Canal).

¹³⁷ City of Dallas v. Hall, No. 3:07-CV-0060-P, 2007 WL 3125311, at *1, *6, *12 (N.D. Tex. 2007) (granting partial motion to dismiss complaint challenging failure of agencies to prepare an environmental impact statement or environment assessment), *aff'd*, 562 F.3d 712 (5th Cir. 2009).

¹³⁸ One Thousand Friends of Iowa v. Mineta, 250 F. Supp. 2d 1064, 1071-72 (S.D. Iowa 2002) (dismissing the King Irving Park Neighborhood Association as a plaintiff for lack of standing

challenge to the construction of a portion of the “smart highway” in the Ellett Valley area near Blacksburg, Virginia.¹³⁹

Many times courts frame their denials of NEPA challenges around the deferential standard of review applicable to challenges to administrative agency actions. This occurred with respect to a challenge to a joint federal and state decision to approve the Crenshaw/LAX Transit Corridor Project, an 8.5-mile light-rail line connecting the Metro Green Line to the Exposition Line in Los Angeles, California.¹⁴⁰ In evaluating whether there is a disparate impact, courts tend to defer to agencies’ formulations of how to draw the baseline for comparison.¹⁴¹ This is important because there is much room for creativity in arguing what is the baseline for comparison of impacts. This becomes a powerful means for courts to deny environmental justice claims against agencies.

Sometimes the baseline of comparison for exposure to adverse environmental impacts is a geographical area that is not significantly larger than that of the minority community itself. This occurred with respect to the expansion of Boston Logan International Airport.¹⁴² The implication of that

based on lack of redressability, where the plaintiffs framed their harm as “failure of the defendants to assess the environmental justice impact to their community”).

¹³⁹ *New River Valley Greens v. U.S. Dep’t of Transp.*, No. 95-1203-R, 1996 U.S. Dist. LEXIS 16547, at *2, *7–8, *17–19, *34–35 (W.D. Va. 1996) (granting summary judgment to defendants, because plaintiffs did not have standing to challenge conclusory statement that the project would not disproportionately affect minority or low-income populations, as there is no private right of action to challenge the Executive Order).

¹⁴⁰ *Crenshaw Subway Coal. v. L.A. Cty. Metro. Transp. Auth.*, No. CV 11-9603 FMO (JCx), 2015 WL 6150847, at *1, *31, *38 (C.D. Cal. 2015) (granting summary judgment to the Metropolitan Transportation Authority on plaintiffs’ claim challenging environmental justice analysis under NEPA, where “[h]aving analyzed the grade crossings throughout the Metro system as a whole, the agencies’ conclusion that the Metro Grade Crossing Policy does not adversely impact minority and low income communities is supported by substantial evidence”).

¹⁴¹ *E.g.*, *Mass. Port Auth. v. City of Boston*, No. 0102731BLS, 2003 WL 23163109, at *1, *15 (Mass. Super. Ct. Nov. 18, 2003) (dismissing counterclaim of municipality Chelsea in action by Massachusetts Port Authority seeking to dissolve an injunction that arguably prevented construction on the Airside Improvements Planning Project at Logan International Airport). The court reasoned that

[U]nder Massport’s preferred alternative, there are higher percentages of minority and low-income persons within the 65 dB DNL and 60 dB DNL noise contours than the overall percentages of minority and low-income persons in all of the affected communities within those noise contours averaged together. However, these overall percentages are lower than the percentages of minority and low-income persons in Boston or Suffolk County as a whole. Chelsea does not point to any regulation, directive or other source of authority to support the contention that principles of environmental justice require that each affected community be considered individually in relation to all the affected communities or to the political jurisdictions of which the affected communities are a part.

Id. at *14.

¹⁴² *Cmtys. Against Runway Expansion, Inc. v. Fed. Aviation Admin.*, 355 F.3d 678, 681, 689 (D.C. Cir. 2004) (denying petition for review, where “the FAA reasonably concluded that the minority proportion of the population exposed to significant noise impacts as a result of the project would be no greater than if no action were taken.”). The court also deferred to the agency’s narrow comparison of the affected community to the community suffering the most

decision is that additional levels of exposure to low-income minority communities are permissible, provided that the percentage of minorities exposed to significant levels of harm does not change. This also occurred in a challenge to the Ocotillo Wind Energy Facility Project in the Sonoran Desert in Imperial County, California.¹⁴³

Finally, there are a few reported cases demonstrating successes for the environmental justice movement. Some of the successes have been achieved through the use of state law, as opposed to federal law, as occurred in a challenge to the construction of the Anthony Carnevale Elementary School and the Governor Christopher Del Sesto Middle School in Providence, Rhode Island.¹⁴⁴ Other victories have occurred for reasons other than environmental justice. This occurred in a challenge to the construction of segments of the Chittenden County, Vermont Circumferential Highway near Burlington, Vermont;¹⁴⁵ a challenge to the Dakota, Minnesota, and Eastern Railroad's proposal to construct and upgrade hundreds of miles of rail line to reach coal mines in the Wyoming Powder Basin;¹⁴⁶ a challenge to a proposed Williams Pipe Line Company pipeline from Bloomfield, New Mexico to Salt Lake City, Utah;¹⁴⁷ a challenge to forest plans for the Angeles

noise from the airport (Suffolk County), rather than to the greater Boston area (which benefits from the existence of the airport), in reaching its conclusion that the minority community would not be disproportionately impacted. *Id.* at 689.

¹⁴³ Protect Our Cmty. Found. v. Salazar, No. 12cv2211-GPC(PCL), 2013 WL 5947137, at *45-46, 54 (S.D. Cal. Nov. 6, 2013) (granting summary judgment to federal agencies, where "the [Bureau of Land Management] utilized an affected area of one-half mile from the proposed Project site because 'using an affected area of one-half mile for environmental justice impacts, rather than 1 or 2 miles, identifies localized impacts of the project.'"), *appeal docketed sub nom.* Backcountry Against Dumps v. Jewell, No.13-57129 (9th Cir. filed Dec. 19 2013) (the case was argued and submitted to the Ninth Circuit on November 3, 2015). Presumably, the author of the opinion was not necessarily unsympathetic to claims of discrimination. In 2016, United States District Court Judge Gonzalo P. Curiel, nominated by President Obama to the federal bench, was later demonized by President-elect Donald J. Trump for his "Mexican heritage." Alan Rappeport, *Judge Faulted by Trump Has Faced a Lot Worse*, N.Y. TIMES, June 4, 2016, at A12.

¹⁴⁴ See, e.g., Hartford Park Tenants Ass'n v. R.I. Dep't of Envtl. Mgmt., No. C.A. 99-3748, 2005 WL 2436227, at *1, *23, *50 (R.I. Super. Ct. Oct. 3, 2005) (state environmental agency violated the state Industrial Property Remediation and Reuse Act, 23 R.I. Gen. Laws §§ 23-19.14-1 to -19 (2015), in its review of a project involving the construction of public schools on a former landfill, even though plaintiffs had not proven Title VI and Equal Protection Clause claims for intentional discrimination).

¹⁴⁵ Senville v. Peters, 327 F. Supp. 2d 335, 340, 368-70 (D. Vt. 2004) (granting an injunction for failure to evaluate secondary and cumulative impacts). On the issue of environmental justice, the court held that it was reasonable for the Federal Highway Administration to conclude that a difference of less than 1% in future growth rates for the Burlington and suburban areas did not establish "a significant adverse employment effect on poor and minority neighborhoods." *Id.* at 363.

¹⁴⁶ Mid States Coal. for Progress v. Surface Transp. Bd., 345 F.3d 520, 527, 556 (8th Cir. 2003) (vacating decision of Surface Transportation Board giving final approval to the proposal). On remand, the agency was instructed to include an analysis of synergies between noise and vibration, and either enter into a programmatic agreement or complete the alternate National Historic Preservation Act, 54 U.S.C. §§ 300101-307108 (3 Supp. II. 2015), process. Mid States Coal. For Progress, 345 F.3d at 555; 36 C.F.R. § 800.14(a)-(b) (2015).

¹⁴⁷ Hammond v. Norton, 370 F. Supp. 2d 226, 231, 253 (D.D.C. 2005) (remanding dispute to the United States Bureau of Land Management for supplementation of the administrative record

National Forest, Cleveland National Forest, Los Padres National Forest and San Bernardino National Forest;¹⁴⁸ a challenge to the Tongue River Railroad Company's application to build a 130-mile railroad in southeast Montana to mine coal;¹⁴⁹ and a challenge to the Navy's decision to construct an Outlying Landing Field in Washington and Beaufort Counties in North Carolina for the homebasing, operation, and training of new aircraft.¹⁵⁰

Sometimes judicial decisions are based on rules of procedure rather than substantive environmental justice concerns. This happened in a challenge to a decision of the Forest Service to reduce grazing on the Jarita Mesa and Alamosa Grazing Allotments, within the El Rito Ranger District of the Carson National Forest in New Mexico,¹⁵¹ a challenge to the siting of a new highway adjacent to a neighborhood in Jersey Heights, Maryland,¹⁵² and a challenge to a grant to revitalize the St. Thomas Housing Development in New Orleans, Louisiana.¹⁵³

and preparation of a supplemental Environmental Impact Statement addressing the issue whether the proposed project and Equilon pipeline project were "connected actions" as defined in 40 C.F.R. § 1508.25(a)(1) (2015)). However, it was reasonable for the United States Bureau of Land Management not to consider social and economic impacts of the project, where those impacts did not arise out of environmental impacts, but involved economic disruptions that would occur if the pipeline forced closure of local refineries in Salt Lake City. *Id.* at 243.

¹⁴⁸ Cal. Res. Agency v. U.S. Dep't of Agric., No. C 08-1185 MHP, 2009 WL 6006102, at *14-15, *20 (N.D. Cal. Sept. 29, 2009) (holding that the Environmental Impact Statement violated NEPA because the United States Forest Service did not consider cumulative impacts and the interplay of decisions, even though it addressed environmental justice considerations).

¹⁴⁹ N. Plains Res. Council, Inc. v. Surface Transp. Bd., 668 F.3d 1067, 1073, 1080, 1083, 1085-87 (9th Cir. 2011) (holding that the Surface Transportation Board did not take sufficient "hard look" at impacts on plants and wildlife resulting from project, even though Board considered environmental justice impacts).

¹⁵⁰ Washington County v. U.S. Dep't of the Navy, 317 F. Supp. 2d 626, 628-29, 633-37 (E.D.N.C. 2004) (granting preliminary injunction to plaintiffs, based on impacts to wildlife, rather than based on environmental justice).

¹⁵¹ Jarita Mesa Livestock Grazing Ass'n v. U.S. Forest Serv., 140 F. Supp. 3d 1123, 1187-88 (D.N.M. 2015) (denying motion to dismiss as to count 2, alleging a failure to take a "hard look" at environmental justice impacts, because plaintiffs had raised this claim with sufficient clarity in an administrative appeal).

¹⁵² Jersey Heights Neighborhood Ass'n v. Glendening, 174 F.3d 180, 190 (4th Cir. 1999) (reinstating neighborhood association's NEPA and Federal-Aid Highway Act, 23 U.S.C. §§ 101-170 (2012), claims to the extent they challenged the decision not to prepare a Supplemental Environmental Impact Statement in 1995, which had been incorrectly dismissed based on the statute of limitations).

¹⁵³ Coliseum Square Ass'n, Inc. v. U.S. Dep't of Hous. & Urban Dev., No. Civ.A. 02-2207, 2003 WL 715758, at *1, *6 (E.D. La. Feb. 27, 2003) (denying in part motions for summary judgment and motions to dismiss, and staying the action because "[t]his Court agrees with [the United States Department of Housing and Urban Development] that judicial review at this time is inappropriate in light of the reopened reviews"), *aff'd sub nom.* Coliseum Square Ass'n v. Jackson, 465 F.3d 215 (5th Cir. 2006). Ultimately, the plaintiffs lost the case on the merits. Coliseum Square Ass'n, Inc. v. U.S. Dep't of Housing & Urban Dev., No. Civ.A. 02-2207, 2003 WL 1873094, at *1, *4 (E.D. La. Apr. 11, 2003) (granting summary judgment to Department of Housing and Urban Development dismissing claims alleging NEPA violations, because defendants evaluated environmental impacts, including environmental justice issues), *aff'd sub nom.* Coliseum Square Ass'n v. Jackson, 465 F.3d 215 (5th Cir. 2006).

VI. NEW SOURCE REVIEW AND ENVIRONMENTAL JUSTICE

A. Prevention of Significant Deterioration Permits

The Clean Air Act Amendments of 1977¹⁵⁴ created a federal permitting program for new or modified stationary sources constructed after August 7, 1977.¹⁵⁵ There are two parts to this program. The first part is the Prevention of Significant Deterioration (PSD) program, set forth in sections 160–169B of the Clean Air Act.¹⁵⁶ The program applies to a “major emitting facility,” defined as a facility in a specified industrial sector that emits or has the potential to emit 100 tons/year of any air pollutant, or any other facility with a potential to emit 250 tons/year of any air pollutant.¹⁵⁷ The pollutants that are typically considered for these thresholds are the criteria pollutants—common pollutants emitted from numerous and diverse sources.¹⁵⁸ The criteria pollutants are coarse and fine particulates (collectively, particulate matter), ozone, nitrogen oxides, sulfur dioxide, lead, and carbon monoxide.¹⁵⁹ For each of the criteria pollutants, EPA has developed national ambient air quality standards (NAAQS).¹⁶⁰ The PSD program requires a permit for the construction of a new source in an area that is in attainment with any of the national ambient air quality standards.¹⁶¹ Under this program, the main substantive requirement is that a facility must install best available control technology (BACT) for each pollutant regulated under the Clean Air Act.¹⁶²

The second part is the Nonattainment New Source Review (NNSR) program, set forth in Sections 171–179B of the Clean Air Act.¹⁶³ This program requires a permit for the construction of a new “major stationary source” in an area that is in nonattainment with any national ambient air quality standard.¹⁶⁴ A “major stationary source” is defined as a facility with actual or potential emissions of 100 tons per year of any air pollutant.¹⁶⁵ The main substantive requirement is that a facility must meet the lowest achievable emissions rate (LAER) for each nonattainment pollutant, a level of technology control that is considered as stringent or more stringent than

¹⁵⁴ Pub. L. No. 95-95, 91 Stat. 685.

¹⁵⁵ *Id.* § 127, 91 Stat. at 731–42 (codified as amended at 42 U.S.C. §§ 7470–7479 (2012)); *id.* § 129, 91 Stat. at 745–51 (codified as amended at 42 U.S.C. §§ 7501–7509a (2012)).

¹⁵⁶ 42 U.S.C. §§ 7470–7492 (2012).

¹⁵⁷ *Id.* § 7479(1).

¹⁵⁸ *Id.* § 7408(a)(1).

¹⁵⁹ 40 C.F.R. §§ 50.4–.18 (2015).

¹⁶⁰ *Id.*

¹⁶¹ 42 U.S.C. § 7475(a)(1) (2012).

¹⁶² *Id.* § 7475(a)(4).

¹⁶³ *Id.* §§ 7501–7509a.

¹⁶⁴ *Id.* §§ 7502(e)(5), 7503(a).

¹⁶⁵ *Id.* § 7602(j) (“[M]ajor stationary source’ and ‘major emitting facility’ mean any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant.”).

BACT.¹⁶⁶ In addition, a company may not construct or operate a new or modified major stationary source unless the company obtains offsets against its increased air emissions.¹⁶⁷ Those offsets may be obtained by acquiring air emissions credits from other stationary sources in the nonattainment area.¹⁶⁸

Practically speaking, a new or modified facility in any area will have to undergo PSD review, since the terms major emitting facility and major stationary source are defined synonymously, and since every area of the country has been in attainment for at least one criteria pollutant since 1977.¹⁶⁹ In addition, if the facility happens to be in an area that is in nonattainment for any criteria pollutant, it will have to undergo NNSR.

However, there is an additional requirement for the NNSR program, which tends to undermine the interests of environmental justice. EPA has a regulation that limits the applicability of the NNSR program to a facility which is a major stationary source for the nonattainment pollutant.¹⁷⁰ Ironically, this means that a major stationary source in a nonattainment area can avoid NNSR if the pollutants making it a major stationary source are all attainment pollutants. The result is that such a facility avoids the requirement to obtain offsets. This happened in the case of an application for permit under the PSD program for a municipal waste incinerator proposed to be constructed in Arecibo, Puerto Rico.¹⁷¹

Under the PSD program, a major emitting facility may not be constructed in an attainment area unless the company establishes that the facility will not cause or contribute to a violation of an ambient air quality standard.¹⁷² Such a facility must perform an air quality analysis for pollutants that it would have the potential to emit in a significant amount (in the case

¹⁶⁶ *Id.* § 7501(3).

¹⁶⁷ *Id.* § 7503(a)(1)(A), (c).

¹⁶⁸ *Id.*

¹⁶⁹ Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,561 (June 3, 2010) (“[E]very area of the nation was designated attainment or unclassifiable for at least one air pollutant, and that has remained the case to the present time. Accordingly, at all times, PSD has applied in every area of the country.”) EPA made this statement in 2010, and it holds true today. Since 2010, there have not been any carbon monoxide nonattainment areas. U.S. Env’tl. Prot. Agency, *Green Book Carbon Monoxide (1971) Area Information*, <https://www.epa.gov/green-book/green-book-carbon-monoxide-1971-area-information> (last visited Nov. 19, 2016) (“As of September 27, 2010, all Carbon Monoxide areas have been redesignated to maintenance.”). The only regulatory activity with respect to the carbon dioxide standard in 2010 was the redesignation of the Las Vegas Valley area as attainment. U.S. Env’tl. Prot. Agency, *Federal Register Notices Related to Carbon Monoxide (1971) Designations and Classifications*, <https://www3.epa.gov/airquality/greenbook/cfrnrrpt4.html> (last visited Nov. 19, 2016) (listing Approval and Promulgation of Implementation Plans and Designation of Areas for Air Quality Planning Purposes; State of Nevada; Redesignation of Las Vegas Valley to Attainment for Carbon Monoxide Standard, 75 Fed. Reg. 59,090 (Sept. 27, 2010)).

¹⁷⁰ 40 C.F.R. § 51.165(a)(2) (2015).

¹⁷¹ See *Sierra Club de P.R. v. U.S. Env’tl. Prot. Agency*, 815 F.3d 22, 25, 28 (D.C. Cir. 2016) (denying challenge to EPA rule on grounds that petitioners should have challenged the rule in 1980 when it was promulgated, because the equitable tolling doctrine did not apply), *reh’g en banc denied*, 2016 U.S. App. LEXIS 10133 (D.C. Cir. 2016).

¹⁷² Clean Air Act, 42 U.S.C. § 7475(a)(3) (2012).

of new sources) and pollutants that would experience a significant net emissions increase (in the case of a modification).¹⁷³

States may request and obtain authority to administer the PSD and NNSR programs.¹⁷⁴ If EPA has approved the authority of a state, then appeals of those permits may be made through the state courts, depending on applicable state law.¹⁷⁵ Where EPA has not approved the authority of a state, then appeals of PSD permits may be made to the Environmental Appeals Board (the Board).¹⁷⁶ Even in this instance, the Board still does not have authority to review NNSR permits.¹⁷⁷ It also does not have authority to review Title V permits.¹⁷⁸

Case law from the Board is not encouraging for environmental justice petitioners. There are some cases where advocates successfully challenged the failure of the administrative agency to address environmental justice concerns, resulting in a remand by the Board to the EPA regional office.¹⁷⁹ This occurred in a challenge to a permit authorizing the construction of a new fiberglass manufacturing plant to be located in the City of Shasta Lake, California.¹⁸⁰ But after remand, the petitioners eventually lost their challenge, including their environmental justice challenge.¹⁸¹ Similarly, community

¹⁷³ 40 C.F.R. §§ 51.166(m), 52.21(m) (2015).

¹⁷⁴ See 42 U.S.C. § 7410(a)(2)(C) (2012) (requiring state implementation plans to “include a program to provide for the enforcement of the measures described in subparagraph (A), and regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that national ambient air quality standards are achieved, including a permit program as required in parts C and D of this subchapter”); *id.* § 7410(k) (setting forth requirements for EPA review and approval of state implementation plans); 40 C.F.R. § 51.166(a) (2015) (setting forth PSD requirements for state implementation plans); *id.* § 51.165(a) (setting forth NNSR requirements for state implementation plans); *id.* § 52.21(u)(1) (authorizing delegation of authority by EPA of source review under the PSD program, for states whose state implementation plans have been disapproved).

¹⁷⁵ Ivan Lieben, *Catch Me If You Can – The Misapplication of the Federal Statute of Limitations to Clean Air Act PSD Permit Program Violations*, 38 ENVTL. L. 667, 679 (2008); see also 42 U.S.C. § 7410(a)(2)(E) (2012) (requiring “necessary assurances that the State . . . will have adequate personnel, funding, and authority under State (and, as appropriate, local) law to carry out such implementation plan . . .”).

¹⁷⁶ 40 C.F.R. § 124.19 (2015).

¹⁷⁷ Hess Newark Energy Ctr., 2012 WL 5895080, at *3 (EAB Nov. 20, 2012) (citing 40 C.F.R. § 124.19).

¹⁷⁸ See *Tewa Women United*, 2015 WL 2432068, at *1–2 (EAB May 15, 2015) (dismissing appeal—based in part on environmental justice—for lack of jurisdiction to review a petition requesting the Administrator to object to a Title V permit).

¹⁷⁹ See, e.g., *Knauf Fiber Glass, GmbH (Knauf I)*, 8 E.A.D. 121, 175 (EAB 1999) (granting petition for review and remanding to Region 9 on issues of BACT compliance and environmental justice, where there were no details in the administrative record regarding the Region’s determination that it was “unlikely that an Environmental Justice issue applied.”).

¹⁸⁰ *Id.* at 122; see also *Knauf Fiber Glass, GmbH (Knauf II)*, 1999 EPA App. LEXIS 45, at *4–11 (EAB Feb. 4, 1999) (denying company’s motion for reconsideration of remand on BACT and environmental justice issues).

¹⁸¹ *Knauf Fiber Glass, GmbH (Knauf III)*, 9 E.A.D. 1, 17–18 (EAB 2000) (denying petitions for review of revised permit, following remand). The Board rejected the environmental justice arguments because “[n]one of the petitioners . . . have shown that the Region’s conclusion regarding the lack of adverse impacts from PM₁₀ emissions is clearly erroneous.” *Id.* at 17.

advocates secured a remand of a permit authorizing the Frontier Discoverer drillship for the purpose of oil exploration in the Chukchi and Beaufort Seas under the Outer Continental Shelf program.¹⁸² On remand, a petition for review challenging the supplemental environmental impact statement was denied.¹⁸³ Accordingly, these were pyrrhic victories.

Sometimes environmental justice advocates have secured favorable decisions, but not for reasons of environmental justice. Petitioners secured a remand of a permit issued by the Bay Area Air Quality Management District [BAAQMD] for operation of a 600-megawatt (MW) natural gas-fired power plant in the City of Hayward, Alameda County, California.¹⁸⁴ Following the remand, the Board denied the subsequent petition for review.¹⁸⁵ In another instance, the petitioners secured remands of permits of two Outer Continental Shelf minor source permits authorizing Shell to mobilize and operate two drilling vessels for placement and anchoring in the Beaufort Sea Outer Continental Shelf sea floor, off the North Slope of Alaska, for the purpose of oil exploration.¹⁸⁶

¹⁸² Shell Gulf of Mex., Inc. (*Shell I*), 15 E.A.D. 103, 106, 109 (EAB 2010) (granting petition to review, where Region 10 relied solely on demonstrated compliance with the then-existing annual nitrogen oxide national ambient air quality standard as sufficient to find that the Alaska Native population would not experience disproportionately high and adverse human health or environmental effects, where the Administrator had proposed a rule to supplement the annual standard with a 1-hour standard).

¹⁸³ Shell Gulf of Mex. (*Shell II*), 15 E.A.D. 470, 523 (EAB 2012) (denying petition for review). The Board rejected the environmental justice challenge because the Region established that all areas accessible to the public would meet the one-hour nitrogen oxide standard, and the air modeling was a matter of the agency's expertise. *Id.* at 493–504.

¹⁸⁴ Russell City Energy Ctr. (*Russell City Energy I*), 14 E.A.D. 159, 161–62 (EAB 2008) (granting petition for review and remanding). The Board did not remand for reasons of environmental justice, but rather for failure to provide sufficient notice of the draft permit, among other things. *Id.* at 177–78.

¹⁸⁵ Russell City Energy Ctr., LLC (*Russell City Energy II*), 15 E.A.D. 1, 7 (EAB 2010) (denying petition for review, following issuance of permit on remand), *aff'd sub nom.* Chabot-Las Positas Cmty. Coll. Dist. v. U.S. Env'tl. Prot. Agency, 482 F. App'x. 219 (9th Cir. 2012). The Board held that the environmental justice arguments were moot because the redesignation of the area as a nonattainment area for fine particulates meant that the Board did not have jurisdiction to hear environmental justice arguments framed around fine particulates. *Id.* at 94–95 (“Because the Bay Area was designated nonattainment for 24-hour PM_{2.5} at the time BAAQMD issued the Final Permit, BAAQMD properly concluded that it was no longer required to address 24-hour PM_{2.5} in the PSD permit. Consequently, all of the College District challenges to the substance of BAAQMD's analysis of 24-hour PM_{2.5} have essentially been rendered moot by EPA's designation.”). In a footnote, the Board noted that mootness also applied to the environmental justice objections. *Id.* at 95 n.116 (“This includes the College District's challenge to BAAQMD's environmental justice analysis, which, as noted above in the text, was premised on the College District's underlying assertion that the PM_{2.5} analysis was erroneous, thereby leading to a faulty environmental justice analysis.”).

¹⁸⁶ Shell Offshore, Inc., 13 E.A.D. 357, at 359–60 (EAB 2007) (granting petition for review solely on the issue of whether Region 10 properly determined the 500-meter perimeter around the site to be the boundary of a single stationary source). The Board rejected the environmental justice argument. *Id.* at 404–05 (“Given [the Region's] determination that emissions under the terms and conditions of the final Permits in this case would not result in a violation of the NAAQS, the Region concluded that there would be no adverse impact on minority and low-

Often, petitioners obtain remands of permits because the EPA Region simply does not follow its own rules requiring hearings. This occurred with respect to a challenge to a permit authorizing a new biomass and natural gas boiler in the City of Anderson in Shasta County, California,¹⁸⁷ and in a challenge to a permit issued by the Illinois Environmental Protection Agency for the construction of a 1500-MW coal-fired electric generation facility in Washington County, Illinois.¹⁸⁸ It may also happen due to a change in law, such as when the United States Court of Appeals for the District of Columbia vacated EPA's Deferral Rule for greenhouse gases, necessitating the incorporation of permit terms and conditions relating to greenhouse gases.¹⁸⁹

But most of the cases involve unfavorable decisions denying petitions for review. The fundamental obstacle for environmental justice advocates is that EPA takes the litigation position that there will be no adverse impacts at all, let alone disproportionate adverse impacts, if the company demonstrates through air modeling that the facility will not cause nonattainment with the national ambient air quality standards.¹⁹⁰ This occurred in a challenge to a

income communities.... Nothing in NSB's petition convinces us that the Region's determination in this regard was clearly erroneous.").

¹⁸⁷ *Sierra Pac. Indus.*, 2013 WL 3791510, at *2, *30, *42 (EAB July 18, 2013) (granting petition requesting a public hearing under the mandatory public hearing provision). But the Board denied the objection that the Region did not adequately consider environmental justice impacts, where comments on the draft permit contained only unsupported assertions that Shasta County was an environmental justice community. *Id.* at *31–32.

¹⁸⁸ *Prairie State Generation Station*, 12 E.A.D. 176, 177, 180 (EAB 2005) (remanding permit because "[the Illinois Environmental Protection Agency] violated the requirements of 40 C.F.R. sections 124.17 and 124.18 by issuing the permit decision without having the response to comments in the record before it."). But following remand, the Board denied a subsequent petition for review. *Prairie State Generating Co.*, 13 E.A.D. 1, 123–25 (EAB 2006) (rejecting contention that the Illinois Environmental Protection Agency failed to demonstrate that the proposed Facility would not have a disproportionate impact on residents of East St. Louis, where petitioners did not show any error in the agency's conclusion that "the proposed plant's emissions do not pose a concern for disproportionate impact because such impacts, if any, are so small as to be trivial"), *aff'd sub nom. Sierra Club v. U.S. Env'tl. Prot. Agency*, 499 F.3d 653 (7th Cir. 2007).

¹⁸⁹ *Ctr. for Biological Diversity v. U.S. Env'tl. Prot. Agency*, 722 F.3d 401, 412 (D.C. Cir. 2013); *see also Energy Answers Arecibo, LLC*, 2014 WL 1260977, at *4, *19–20, *55 (EAB Mar. 25, 2014) (granting petition for review in part and remanding permit for a new resource recovery facility in Arecibo, Puerto Rico, utilizing two 1,050 tons per day (each) refuse-derived fuel municipal waste combustors, only for the limited purpose of including regulation of biogenic greenhouse gas emissions). But the Board rejected the claim that Region 2 did not adequately consider environmental justice, where the Region determined the facility would not cause disproportionate or adverse health impacts. *Id.* at *32.

¹⁹⁰ *Pio Pico Energy Ctr.*, 2013 WL 4038622, at *26 (EAB Aug. 2, 2013) ("Because NAAQS are health-based standards, the Agency often uses compliance with 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."). In that case, the Board panel granted a petition for review for a limited remand for the Region to correct the record inconsistencies regarding the BACT analysis for particulate matter, but denied the objection that the Region should require mitigation for environmental justice impacts where the permitting action would not result in disproportionately high and adverse human health or environmental effects on minority populations and low-income populations. *Id.* at *23, *66.

permit authorizing construction of a 454-MW coal-fired power plant in Guayama, Puerto Rico.¹⁹¹ Relying on this principle of law, the Board held that the agency took a “hard look” at air impacts and denied a petition for review of a National Pollutant Discharge Elimination System permit¹⁹² issued to the Three Affiliated Tribes, composed of the Mandan, Hidatsa, and Arikara Nation, allowing wastewater discharges from a petroleum refinery on the Fort Berthold Indian Reservation in North Dakota.¹⁹³

The problem is particularly daunting for environmental justice plaintiffs when the Board gives deference to a Region’s technical determination that a project will not cause an adverse environmental impact, which effectively overcomes the environmental justice objection. This occurred in a challenge to a permit authorizing construction of the Cambalache Combustion Turbine Project, a 248-MW combustion turbine simple cycle electric generating station in the municipality of Arecibo, Puerto Rico;¹⁹⁴ and a challenge to a permit authorizing the construction of the Wanapa Energy Center, a combined cycle electric generating facility on land held in trust by the United States Government for the Confederated Tribes of the Umatilla Indian Reservation near Umatilla, Oregon.¹⁹⁵

Ironically, the fact that an area is a nonattainment area might make the situation even more difficult rather than less difficult for environmental justice petitioners. While it might appear to help them prove their case that air modeling will demonstrate nonattainment with national ambient air quality standards, the Board disclaims jurisdiction over nonattainment

¹⁹¹ AES P.R. L.P., 8 E.A.D. 325, 352 (EAB 1999) (denying petitions for review). The Board rejected the environmental justice arguments of the petitioners under the rationale that “[n]ot only were all maximum predicted concentrations of these pollutants below the corresponding NAAQS, the maximum predicted concentrations of carbon monoxide, sulfur dioxide, and nitrogen dioxide were all below the [significant impact levels] as well.” *Id.* at 351. In addition, “the Region took steps to require that many elements of the air quality analyses performed during the permit process be reconfirmed after the permit is issued. . . . These permit conditions are a testament to the role of public participation in the permit process.” *Id.*

¹⁹² Clean Water Act, 33 U.S.C. § 1342 (2012).

¹⁹³ MHA Nation Clean Fuels Refinery, 15 E.A.D. 648, 649–50, 664 (EAB 2012). The Board noted that “[t]he Agency 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.” *Id.* at 668, n.56; Shell Offshore, Inc., 13 E.A.D. 357, 404–05 (EAB 2007); *Knauf III*, 9 E.A.D. 1, 16–17 (EAB 200); Ash Grove Cement Co., 7 E.A.D. 387, 413–14 (EAB 1997). While not a Clean Air Act case, the Board had occasion to review air impacts under a NEPA analysis. *Id.* at 666–76.

¹⁹⁴ P.R. Elec. Power Auth., 6 E.A.D. 253, 253–54, 256–57 (EAB 1995) (denying petition for review). EAB rejected the environmental justice arguments because “the Region concluded that the [project] would cause no disproportionate adverse health impacts to lower-income populations,” and nothing compelled the preparation of an epidemiological study, as suggested by petitioner. *Id.* at 256–57.

¹⁹⁵ Diamond Wanapa I, 2006 EPA App. LEXIS 12, at *2–3, *10–11 (EAB Feb. 9, 2006) (denying petition for review). The EAB panel rejected the unsupported argument of the petitioner that in addressing environmental justice impacts on minority populations, Region 10 ignored impacts on the general population (apparently, majority communities, rather than minority communities). *Id.* at *7–11.

issues. The result is that the Board might not hear environmental justice arguments relating to nonattainment pollutants. This occurred in a challenge to an integrated PSD permit and NNSR Permit issued by the New Jersey Department of Environmental Protection to Hess Newark Energy Center for the construction and operation of a 655-MW natural gas fired combined cycle power plant in Newark, New Jersey.¹⁹⁶

Sometimes the lack of success of environmental justice petitioners arises out of a rule of procedure which does not necessarily have anything to do with environmental justice. For example, a legal challenge might be barred due to lack of ripeness (a live case or controversy). This occurred with respect to a challenge to a denial of a request for a public hearing on a proposed (rather than final) permit modification for a cogeneration plant in Anderson, California.¹⁹⁷ In addition, the Board does not have jurisdiction over permits granted by states with approved authority under the PSD program. For this reason, it dismissed the appeal of a state permit issued by the Louisiana Department of Environmental Quality for the construction and operation of a polyvinyl chloride production complex in Convent, St. James Parish, Louisiana.¹⁹⁸

Finally, environmental justice petitioners may be barred from raising arguments for the first time before the Board, if they have not raised them during the public comment period for the permit application. This occurred in a challenge to a permit issued by the Bay Area Air Quality Management District to Calpine Corporation and Bechtel Enterprises for the construction of a new electrical power plant in San Jose, California.¹⁹⁹

Environmental justice petitioners do not fare well before the Board on issues relating to the framing of the baseline for evaluating whether there are disparate impacts.²⁰⁰ This is particularly a problem in Puerto Rico, which

¹⁹⁶ Hess Newark Energy Ctr., 2012 WL 5895080, at *1, *3 (EAB Nov. 20, 2012) (denying petition for review, where “the only challenge Petitioners raise pertain to statutory and regulatory requirements applicable in nonattainment areas” over which the Board does not have authority).

¹⁹⁷ Sierra Pac. Indus., 2012 WL 6764202, at *1, *3–4 (EAB Dec. 21, 2012) (denying petition for review, because “regulations do not permit a challenge to the Region’s denial until the Region has had an opportunity to consider and respond to public comments and a final permit decision has been issued.”).

¹⁹⁸ Shintech, Inc., 1997 EPA App. LEXIS 52, at *2–3 (EAB Aug. 12, 1997) (citing 40 C.F.R. § 124.1(e)) (dismissing petition and explaining that the Board lacks authority to review PSD permits issued by states). “Part 124 does not apply to PSD permits issued by an approved State.” *Id.* at *2.

¹⁹⁹ Metcalf Energy Ctr., 2001 EPA App. LEXIS 39, at *1–2, *63–64 (EAB Aug. 10, 2001) (denying petition for review for failure to raise environmental justice issues during the public comment period, among other reasons), *aff’d sub nom.* Saint Teresa Citizen Action Grp. v. Evtl. Appeals Bd. 51 F. App’x 702 (9th Cir. 2002).

²⁰⁰ EcoEléctrica, L.P., 7 E.A.D. 56, 57–59 (EAB 1997) (denying review of petition challenging PSD permit granted by Region 2 for installation and operation of a 461-MW cogeneration plant on Punta Guayanilla Bay in Peñuelas, Puerto Rico). The Board held that the petitioner failed to show clear error in the Region’s environmental justice analysis, given “median household income lower than the Commonwealth average but higher than the median household income elsewhere in Peñuelas or in nearby Guayanilla and Ponce,” and modeled concentrations of pollutants that were less than national ambient air quality standards). *Id.* at 67–69.

has a median household income of approximately one-half of the poorest state (Mississippi), and is 99% Hispanic or Latino.²⁰¹ Applying objective census data, the entire island of Puerto Rico is an environmental justice community. But this has not prevented the granting of permits for construction and operation of large polluting facilities in the Commonwealth under the new source review program.

B. Nonattainment New Source Review Permits

As indicated above, the Board generally has acquiesced to EPA's litigation position that if air modeling for a major emitting facility under the PSD program demonstrates attainment with the national ambient air quality standards, then there is no adverse impact on poor minority communities, let alone a disproportionate one. The irony is that the Board only has appellate jurisdiction over issues relating to PSD in attainment areas, and does not have jurisdiction over nonattainment pollutants.²⁰² Therefore, to the extent that an area is an existing nonattainment area for a particular pollutant, environmental justice issues cannot be raised before the Board.

For communities, their recourse is to attempt to persuade the state permitting authority (or the EPA, where the state does not have permitting authority), to conduct an environmental justice analysis in the context of NNSR. Two reported cases demonstrate that environmental justice arguments have not been successful in this context. The First Circuit Court of Appeal of Louisiana rejected a challenge to a permit issued to Exxon Chemical Americas for the construction of a new polypropylene plant adjacent to its existing facility in East Baton Rouge Parish.²⁰³ In addition, the court affirmed state permit decisions granting major air permit modifications to Dow Chemical's Louisiana Operations Complex in Plaquemine, Louisiana, and approving Dow's Volatile Organic Compound Emission Reduction Credit application.²⁰⁴

²⁰¹ AMANDA NOSS, U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, HOUSEHOLD INCOME: 2013, AMERICAN COMMUNITY SERVICE BRIEFS 3 tbl.1 (2014), *available at* <http://www.census.gov/content/dam/Census/library/publications/2014/acs/acsbr13-02.pdf> (listing median annual household income of \$37,963 for Mississippi in 2013, and \$19,183 for Puerto Rico in 2013); U.S. CENSUS BUREAU, PUERTO RICO: 2010, SUMMARY POPULATION AND HOUSING CHARACTERISTICS 90 tbl.3 (2012), *available at* <https://www.census.gov/prod/cen2010/cph-1-53.pdf> (listing a total Hispanic and Latino population of 3,688,455, out of a total population of 3,725,789, representing an Hispanic and Latino population of 98.997%).

²⁰² *See supra* note 177 and accompanying text.

²⁰³ *N. Baton Rouge Env'tl. Ass'n v. La. Dep't of Env'tl. Quality*, 805 So. 2d 255, 257, 263 (La. Ct. App. 2001) (rejecting the challenge to the permit where "[t]he Exxon facility at issue is situated in an industrially zoned area adjacent to a state highway, a railroad, and the Mississippi River. We conclude, as did the district court, that it is unfortunate that the Alsen community is also situated in this general area; however, this fact alone does not constitute environmental racism.").

²⁰⁴ *Dow Chem. Co. v. Reduction Credits*, 885 So.2d 5, 7–8, 15 (La. Ct. App. 2004) ("[F]or each application, we note that the [Louisiana Department of Environmental Quality] painstakingly conducted and documented its thorough analysis, which considered . . . social and economic benefits, and environmental justice/civil rights Title IV issues.").

VII. TITLE V OPERATING PERMITS AND ENVIRONMENTAL JUSTICE

A. Statutory and Regulatory Framework

In the Clean Air Act Amendments of 1990,²⁰⁵ Congress created the Title V operating permit program, a federal permitting program to be implemented by the states, with the approval of EPA.²⁰⁶ Title V requires a permit for facilities that are subject to applicable requirements of the Clean Air Act.²⁰⁷

Congress provided a procedure for EPA to object to the granting of Title V operating permits by approved state permitting authorities. States must submit “a copy of each permit proposed to be issued and issued as a final permit” to EPA for review.²⁰⁸ If EPA determines that the proposed permit is not in compliance with applicable requirements, or the requirements of the federal part 70 regulations, it must object to the permit within 45 days.²⁰⁹

If EPA does not object in writing to the issuance of a permit, any person may petition EPA within 60 days after the expiration of the 45-day review period.²¹⁰ As a condition for filing such a petition, the petitioner must have raised the objection “with reasonable specificity during the public comment period provided by the permitting agency,” unless the petitioner demonstrates in the petition that it was impracticable to raise the objection, or unless the grounds for objection arose after the period.²¹¹ In response, EPA must issue an objection if the petitioner demonstrates to EPA that the permit is not in compliance with the requirements of the Clean Air Act.²¹² If EPA objects to a permit that has already been issued, EPA or the permitting authority may terminate, modify, or revoke and reissue the permit.²¹³

²⁰⁵ Pub. L. No. 101-549, §§ 501–507, 104 Stat. 2399.

²⁰⁶ *Id.* §§ 501–507, 104 Stat. at 2635–48 (codified at 42 U.S.C. §§ 7661–7661f (2012)).

²⁰⁷ Clean Air Act, 42 U.S.C. § 7661a(a) (2012) (“[I]t shall be unlawful for any person to violate any requirement of a permit issued under this subchapter, or to operate an affected source (as provided in subchapter IV–A of this chapter), a major source, any other source (including an area source) subject to standards or regulations under section 7411 or 7412 of this title, any other source required to have a permit under parts C or D of subchapter I of this chapter, or any other stationary source in a category designated (in whole or in part) by regulations promulgated by the Administrator (after notice and public comment) which shall include a finding setting forth the basis for such designation, except in compliance with a permit issued by a permitting authority under this subchapter.”).

²⁰⁸ 42 U.S.C. § 7661d(a)(1)(B) (2012); *see also* 40 C.F.R. § 70.8(a)(1) (2015).

²⁰⁹ 42 U.S.C. § 7661d(b)(1) (2012); *see also* 40 C.F.R. § 70.8(c)(1) (2015).

²¹⁰ 42 U.S.C. § 7661d(b)(2) (2012); *see also* 40 C.F.R. § 70.8(d) (2015).

²¹¹ 42 U.S.C. § 7661d(b)(2) (2012).

²¹² *Id.*

²¹³ 40 C.F.R. §§ 70.7(g)(4)–(5), 70.8(d) (2015).

B. EPA Decisions on Petitions for Objections to Title V Permits

While environmental justice groups have raised environmental justice arguments in their petitions for objections to Title V operating permits, these arguments have not been successful. The challenge for environmental justice groups is that EPA takes the position that environmental justice considerations alone are not a sufficient basis for EPA objecting to the grant of a Title V operating permit. Rather, for such considerations to form a basis for objection, they must cause a violation of an applicable requirement of the Clean Air Act.²¹⁴ This position is consistent with the premise that the purpose of the Title V program is to impose a permit requirement for those facilities that are subject to applicable requirements of the Clean Air Act.²¹⁵ By turning the question of environmental justice into a question of whether there is a violation of an applicable requirement of the Clean Air Act, EPA's position precludes environmental justice arguments from having independent legal significance.²¹⁶

Although the availability of a Title VI remedy does not appear to have any legal significance in EPA's decisions on these petitions, EPA often notes the availability of such a remedy when it rejects petitions grounded in environmental justice arguments.²¹⁷ By pointing to the potential applicability of a Title VI remedy, EPA apparently intends to convey the impression that the law is not unreceptive to the concerns of environmental justice.

EPA has typically rejected environmental justice arguments in petitions for objections to Title V operating permits. It rejected such arguments in response to a petition challenging a Title V permit for a steel manufacturing plant in Pueblo, Colorado;²¹⁸ a petition challenging a Title V permit for a

²¹⁴ *Shintech Inc.*, 1997 EPA CAA Title V LEXIS 8, at *16–17 (EPA Sept. 10, 1997) (“Under section 505(b)(2) of the Act, however, a petitioner must demonstrate that a permit is not in compliance with applicable requirements of the Act. While there may be authority under the Clean Air Act to consider environmental justice issues in some circumstances, Petitioners have not shown how their particular environmental justice concerns demonstrate that the Shintech Permits do not comply with applicable requirements of the Act.”); 42 U.S.C. § 7661d(b)(2) (2012).

²¹⁵ See U.S. Env'tl. Prot. Agency, *Operating Permits Issued under Title V of the Clean Air Act*, <https://www.epa.gov/title-v-operating-permits> (last visited Nov. 19, 2016) (explaining the purpose of Title V permit program).

²¹⁶ On the facts of *Shintech Inc.*, EPA granted in part a petition for objection to Title V permits issued by the Louisiana Department of Environmental Quality for the operation of a chlor-alkali production plant, a polyvinyl chloride production plant, and a vinyl chloride monomer production plant in Convent, Louisiana, St. James Parish. *Shintech Inc.*, 1997 EPA CAA Title V LEXIS 8, at *2, *40–42. However, EPA rejected petitioners' environmental justice arguments. *Id.* at *17.

²¹⁷ *Id.* at *14–15 (noting that EPA had accepted the petitioners' Title VI complaint for investigation).

²¹⁸ *CF&I Steel, L.P.*, 2012 WL 11850455, at *1, *26 (EPA May 31, 2012) (granting petition to object to issuance of Title V permit to operate certain steelmaking processes, for failure to assure compliance with applicable requirements). EPA rejected the environmental justice argument because the petitioner's comments on the draft permit did not identify any disproportionately high and adverse human health or environmental effects. *Id.* at *26.

recycling and ethanol production facility in Middletown, New York;²¹⁹ a petition challenging a Title V permit for a coke production, coke oven gas by-products recovery, and iron and steel production and finishing plant in Madison County, Illinois;²²⁰ and a petition challenging a Title V permit for a petroleum refinery in Martinez, California.²²¹

VIII. LAND-USE PLANNING AND ENVIRONMENTAL JUSTICE

There is an important consideration that may contribute to the difficulty of establishing unlawful discrimination, whether in a Title VI case, a PSD permit challenge, a NEPA challenge, or any other environmental justice challenge. Framing the debate in terms of race and ethnicity tends to transform the nature of the challenge. Race and ethnicity are politically and emotionally charged terms on both sides of any environmental dispute. Agencies and companies do not necessarily accept accusations of racism in a gracious manner, and they may naturally become defensive in response. But the environmental justice movement does not need to take on the monumental task of proving that facility siting decisions or permit decisions are racially discriminatory, in order to advance its goals.

A. Clean Air Act and Land-Use Planning

Land-use planning may present a more promising opportunity for environmental justice, than the traditional litigation-oriented approach. Although the federal Clean Air Act is silent on the subject of environmental justice, it contains two sections that preserve the authority of state and local

²¹⁹ Orange Recycling & Ethanol Prod. Facility (*Orange I*), 2001 WL 36294221, at *1, *31 (EPA May 2, 2001) (granting in part petition for objection to Title V permit issued by New York State Department of Environmental Conservation). EPA rejected the petitioner's environmental justice argument because the federal Executive Order on environmental justice does not apply to state agencies. *Id.* EPA also noted that petitioners could file a complaint under Title VI. *Id.* at *31 n.41. Upon the issuance of a revised permit, petitioners filed another petition for objection, which was denied in its entirety. Orange Recycling & Ethanol Prod. Facility (*Orange II*), 2002 WL 34594855, at *1, *12 (EPA Apr. 8, 2002) (denying petitions for objections to revised permit, where petitioners failed to demonstrate that Title V permit did not properly identify and comply with applicable requirements of the Act, and the record did not indicate that concerns about environmental justice were raised during the comment period on the revised permit). Again, EPA noted that petitioners could file a complaint under Title VI. *Id.* at *12 n.12.

²²⁰ U.S. Steel Corp., 2012 WL 11850462, at *1-2, *5 (EPA Dec. 3, 2012) (granting in part petition for objection to Title V permit issued by Illinois Environmental Protection Agency). EPA rejected the petitioner's environmental justice arguments where the petitioner did not raise any specific claim regarding environmental justice, and did not identify any distinct environmental justice-related duty or responsibility applicable to state agency. *Id.* at *4-5.

²²¹ Tesoro Ref. & Mktg. Co., 2004 WL 5917578, at *1, *44-45 (EPA Mar. 15, 2005) (granting in part petition for objections to state Title V operating permit issued by the Bay Area Air Quality Management District). EPA rejected the petitioner's environmental justice arguments because the petitioner provided no legal or factual basis to conclude that the Agency must object to the permit on the grounds of environmental justice. *Id.* at *44. Again, EPA noted that the petitioners could file a complaint under Title VI. *Id.* at *44 & n.34.

governments to pass laws and regulations that are more protective of public health. First, under the preemption section of the Clean Air Act, nothing prohibits states and local governments from adopting air pollution requirements that are more stringent than federal requirements.²²² The first clause of the section extends this preservation of authority to “any standard or limitation respecting emissions of air pollutants,” which typically would mean a numerical emissions limitation or a work practice standard tailored as a substitute for a numerical emissions limitation.²²³ The second clause is broader, referring to “any requirement respecting control or abatement of air pollution.”²²⁴ This clause reflects that control of air pollution may be obtained through means other than an emissions limitation. Abatement refers broadly to a remedy for reducing or eliminating air pollution.²²⁵ The remedy of abatement evolved at common law, in the context of legal actions to address nuisances, either public or private.²²⁶ The retention of such authority in the states is consistent with a fundamental premise of the Clean Air Act—that states and local governments have primary responsibility for the prevention and control of air pollution.²²⁷

²²² Clean Air Act, 42 U.S.C. § 7416 (2012) (“Except as otherwise provided . . . nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 7411 or 7412 of this title, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.”).

²²³ *Id.*; see, e.g., *id.* § 7411(f) (authorizing promulgation of new source performance standards); *id.* § 7411(h) (authorizing promulgation of a design, equipment, work practice, or operational standard in place of a standard of performance, where the latter is not feasible); *id.* § 7412(d) (authorizing promulgation of new emission standards for hazardous air pollutants); *id.* § 7412(h) (authorizing promulgation of a design, equipment, work practice, or operational standard in place of a new emission standard for hazardous air pollutants, where the latter is not feasible).

²²⁴ *Id.* § 7416.

²²⁵ *Abatement*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“1. The act of eliminating or nullifying. . . . 3. The act of lessening or moderating, diminution in amount or degree.”); see, e.g., U.S. Env’tl. Prot. Agency, *Evaluating and Eliminating Lead-Based Paint Hazards*, <https://www.epa.gov/lead/evaluating-and-eliminating-lead-based-paint-hazards> (last visited Nov. 19, 2016) (“Lead abatement is an activity designed to permanently eliminate lead-based paint hazards.”).

²²⁶ *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 422–24 (2011) (summarizing federal common law of nuisance and stating that “[w]e hold that the Clean Air Act and the EPA actions it authorizes displace any federal common-law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants.”).

²²⁷ 42 U.S.C. § 7401(a)(3) (2012) (“The Congress finds . . . that air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments.”); *id.* § 7407(a) (“Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.”).

Second, the Clean Air Act does not infringe on the authorities of counties and cities over land-use planning.²²⁸ Land-use planning has always been a subject more appropriate for regulation at a state or local level, as opposed to a national level. Attempts to federalize land use planning in the 1970s never came to fruition.²²⁹ One of the potential obstacles to the federalization of land use planning is the need for authority in the Federal Constitution. For example, parcels of land do not move in interstate commerce sufficient to trigger the applicability of the Commerce Clause.²³⁰ Moreover, under the dormant Commerce Clause doctrine, states and local governments may regulate local commercial activities under their police powers, even if the regulation imposes an incidental burden on interstate commerce. However, as stated by the Supreme Court, the regulation is unconstitutional if “the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”²³¹

B. Framing Environmental Justice as an Air Pollution Problem

Based on the outcome of reported judicial decisions, the Title VI framework of addressing the problem of environmental justice like an employment discrimination problem has not resulted in a meaningful limitation on the construction and operation of industrial facilities.²³² The use of Title VI as the focus of environmental justice is based on the flawed assumption that a legal proscription against discrimination will be sufficient to improve air quality.

There are other, more direct ways to address the problem of air pollution in low-income minority communities. The problem of environmental justice is primarily a problem of air pollution, and secondarily

²²⁸ *Id.* § 7431 (“Nothing in this chapter constitutes an infringement on the existing authority of counties and cities to plan or control land use, and nothing in this Act provides or transfers authority over such land use.”).

²²⁹ See Morris K. Udall, *Land Use: Why We Need Federal Legislation*, 1975 BYU L. REV. 1, 3 (1975) (recommending federal legislation to address land use planning); *Land Use Bill Killed*, 31 CONG. Q. ALMANAC 196, 196 (1975) (“The House Interior Committee July 15 refused, 19-23, to report out a broad land use planning bill (HR 3510) which it had been drafting for more than a month. The unfavorable vote effectively killed land use planning legislation for the first session of the 94th Congress. A similar measure was killed by the House in 1974 when it rejected the rule providing for floor consideration of the measure.”).

²³⁰ See U.S. CONST. art. I, § 8, cl. 3 (granting Congress the power “[t]o regulate Commerce . . . among the several States”).

²³¹ *Pike v. Bruce Church Inc.*, 397 U.S. 137, 142 (1970). See also *Gallenthin Realty Dev., Inc. v. BP Prods. of N. Am., Inc.*, 163 F. App’x 146, 151 (3d Cir. 2006) (quoting *Pike*, 397 U.S. at 142). *Gallenthin Realty Development* involved an action for a declaratory judgment seeking a determination that an ordinance of a Borough approving the designation of the plaintiff’s property as an “area in need of redevelopment” was a violation of the dormant Commerce Clause. *Id.* at 148. In an unpublished opinion, the Third Circuit affirmed the dismissal of the action, because there was no evidence demonstrating an undue burden on interstate commerce. *Id.* at 151. (“Plaintiffs have alleged no facts to suggest that the Borough’s designation of the Plaintiffs’ property as an ‘area in need of redevelopment’ unduly burdens or materially affects interstate commerce.”).

²³² See discussion *supra* Part III.B.

a problem of discrimination. It makes sense to address the problem at a fundamental level. Assuming constitutional limitations are respected, there is no reason why a municipality or local government could not impose conditions to restrict the addition of heavily-polluting industries into low-income minority communities based on the air pollution load in the community.

C. Air Pollution Loads

The idea of limiting heavy industrial development based on total air pollutant loading is based on principles that are already familiar under existing environmental laws. Under the Clean Water Act, states are directed to identify impaired waters, or those that do not meet water quality standards.²³³ For those water bodies that are identified as impaired, states must develop Total Maximum Daily Loads (TMDLs), or loads that are limited on a daily basis to avoid impairment.²³⁴

In a general sense, that process is comparable to the process of determining attainment with the National Ambient Air Quality Standards, although the structure of the air and water programs is quite different.²³⁵ Moreover, an airshed is analogous to a watershed. Because agencies can regulate water pollution based on a loading approach, they can also regulate air pollution based on a loading approach. The fact that air is inherently more complex to model might make such an approach appear difficult, but it is not impossible.²³⁶

²³³ Clean Water Act, 33 U.S.C. § 1313(d)(1)(A) (2012) (“Each State shall identify those waters within its boundaries for which the effluent limitations required by section 1311(b)(1)(A) and section 1311(b)(1)(B) of this title are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.”).

²³⁴ *Id.* § 1313(d)(1)(C) (“Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.”).

²³⁵ Compare *id.* 33 U.S.C. § 1313(d)(1), with Clean Air Act, 42 U.S.C. § 7407 (2012) (setting forth provisions for attainment determinations, attainment designations, and attainment redesignations, based on cooperation between the EPA and the states).

²³⁶ ORRIS C. HERFINDAHL & ALLEN V. KNEESE, *QUALITY OF THE ENVIRONMENT: AN ECONOMIC APPROACH TO SOME PROBLEMS IN USING LAND, WATER, AND AIR* 32 (Routledge 2015) (1965) (“The notion of an air shed may be a useful concept for analysis and control of air pollution, but the problems in its use should not be minimized. In the case of water pollution, the stochastic character of streamflow presents difficulties in measuring associated costs and in designing and operating optimum systems for water quality control. The air shed adds more dimensions to this problem. It may be likened to a stream which varies its course rapidly (within defined boundaries), changes specific gravity, and from time to time decides to flow uphill. We must learn to understand and, at least in a probabilistic sense, forecast these phenomena.”).

In fact, EPA already has extensive data on air pollution loading for industrial facilities throughout the country. In 1986, Congress enacted the Emergency Planning and Community Right-to-Know Act (EPCRA).²³⁷ This is an information disclosure statute for owners and operators of industrial facilities. It requires companies to file with EPA and state and local governments an emergency planning notification for extremely hazardous substances,²³⁸ material safety data sheets or lists of hazardous chemicals,²³⁹ and hazardous chemical inventory forms.²⁴⁰ More important for environmental justice communities, it requires companies to file Toxic Release Inventory reports for toxic chemicals released into the air, water, and land.²⁴¹ This requirement applies to industrial facilities that manufacture or process toxic chemicals in amounts greater than 25,000 pounds per year, or otherwise use toxic chemicals in amounts greater than 10,000 pounds per year.²⁴²

Standing alone, these laws and regulations themselves do not impose any limitation on construction or operation of an industrial facility. But EPCRA could be made more meaningful if the data it generated were used for the purpose of effectuating environmental justice. Extensive empirical evidence of releases of toxic chemicals from industrial facilities throughout the United States is freely accessible from EPA's website.²⁴³ By limiting searches by zip code or geographical location, one can easily gather information regarding the total emissions of toxic air pollutants from industrial facilities in a particular geographical area.

The strategy of identifying air pollution loads in particular airsheds is nothing new. Quantifying pollution in communities has long been a tool for environmental groups, even beyond the cause of environmental justice.²⁴⁴ The challenge for such groups is transforming such data into a useful tool that can provide meaningful protection for a low-income minority community.

Ironically, Clean Air Act programs do not follow the approach of tailoring regulation of industrial plants to air pollution loads, at least not directly. While the New Source Review program (both PSD and NNSR) requires major sources to perform air modeling to evaluate impacts on air

²³⁷ Emergency Planning and Community Right-to-Know Act of 1986, Pub. L. No. 99-499, §§ 300–330, 100 Stat. 1613, 1728–58 (codified as amended at 42 U.S.C. §§ 11001–11050 (2012)).

²³⁸ EPCRA, 42 U.S.C. § 11002 (2012).

²³⁹ *Id.* § 11021.

²⁴⁰ *Id.* § 11022.

²⁴¹ *Id.* § 11023. For a discussion of the mechanics of the statute, see generally Arnold W. Reitze, Jr. & Steven D. Schell, *Self-Monitoring and Self-Reporting of Routine Air Pollution Releases*, 24 COLUM. J. ENVTL. L. 63 (1999).

²⁴² 40 C.F.R. § 372.25(a), (b) (2015).

²⁴³ U.S. Env'tl. Prot. Agency, *Envirofacts*, <https://www3.epa.gov/enviro/> (last visited Nov. 19, 2016).

²⁴⁴ *E.g.*, JEFF INGLIS & ADAM GARBER, FRONTIER GRP. & PENNENVIRONMENT RESEARCH & POLICY CTR., TOXIC TEN: THE ALLEGHENY COUNTY POLLUTERS THAT ARE FOULING OUR AIR AND THREATENING OUR HEALTH 1–5 (2015) available at <http://pennenvironment.org/sites/environment/files/reports/Toxic%20Ten%20vWeb.pdf> (discussing loads of air pollutants from large industrial facilities in and near Pittsburgh, Pennsylvania).

quality, they do not expressly take into account the aggregation of total air pollution loading.²⁴⁵ The air dispersion modeling approach inherently underestimates exposures in communities, because it tends to calculate air pollutant exposures at particular points in space and time.²⁴⁶ The models are limited in representing the personal exposure of human beings, who move throughout the airshed.²⁴⁷

Commenters have criticized the shortcomings of the EPCRA program, focusing on the flaws in reported information and the challenges of communicating reported information to poor communities.²⁴⁸ Still, companies self-report the information on releases from their facilities, effectively under penalty of perjury, which provides some assurance of the reliability of the information contained in the reports.²⁴⁹

While some commenters have suggested the use of community impact statements relating to impacts of proposed projects on affected

²⁴⁵ See generally 40 C.F.R. § 51.165 (2015) (NNSR permit requirements); *id.* §§ 51.166, 52.21 (PSD permit requirements).

²⁴⁶ U.S. Env'tl. Prot. Agency, *Dispersion Modeling*, <https://www3.epa.gov/scram001/dispersionindex.htm> (last visited Nov. 19, 2016) ("Dispersion modeling uses mathematical formulations to characterize the atmospheric processes that disperse a pollutant emitted by a source. Based on emissions and meteorological inputs, a dispersion model can be used to predict concentrations at selected downwind receptor locations.").

²⁴⁷ Stéphanie Gauvin et al., *Relationships Between Nitrogen Dioxide Personal Exposure and Ambient Air Monitoring Measurements Among Children in Three French Metropolitan Areas: VESTA Study*, 56 ARCHIVES OF ENVTL. HEALTH 336, 340 (2001) ("In conclusion, the results of our study confirm that ambient air concentrations of NO₂ are poor predictors of children's personal exposures. Proximity of highly trafficked roads to house and/or school and indoor sources of NO₂ emissions are important predictors of personal exposure. Consecutively, these markers of local outdoor or indoor emission sources should be accounted for whenever the impact of NO₂ exposures on health is assessed, unless direct personal exposure measurements are used. In epidemiological studies in which indirect exposure assessment is followed, investigators should pay special attention to the full characterization of the close outdoor environment of the house, the school, or both, along with indoor sources of NO₂ emissions.").

²⁴⁸ Kathryn E. Durham-Hammer, *Left to Wonder: Reevaluating, Reforming, and Implementing the Emergency Planning and Community Right-to-Know Act of 1986*, 29 COLUM. J. ENVTL. L. 323, 325–26 (2004); Gary D. Bass & Alair MacLean, *Enhancing the Public's Right-to-Know About Environmental Issues*, 4 VILL. ENVTL. L.J. 287, 301–02 (1993).

²⁴⁹ EPA regulations require a certification from a senior management official that the completed form is true and accurate. 40 C.F.R. § 372.85(b)(2) (2015) (requiring the "[s]ignature of a senior management official certifying the following: 'I hereby certify that I have reviewed the attached documents and, to the best of my knowledge and belief, the submitted information is true and complete and that amounts and values in this report are accurate based upon reasonable estimates using data available to the preparer of the report'"). Federal law imposes civil and criminal fines for willful misrepresentations to administrative agencies of the executive branch, which includes EPA. 18 U.S.C. § 1001(a) (2012) ("Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully— (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; (2) makes any materially false, fictitious, or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both.").

communities,²⁵⁰ a NEPA-style approach to industrial development still falls short of preventing industrial projects from going forward. NEPA and its implementing regulations do not impose substantive limitations on development; they only require a review of environmental impacts and alternatives to a project.²⁵¹

In short, the challenge for environmental justice communities is to go beyond the information-gathering focus of the NEPA and EPCRA programs, and use the information generated by them to impose legal restrictions on industrial development in low income minority communities.

IX. CONCLUSIONS

Despite the best efforts of the environmental justice movement, the law and policy of environmental justice has not evolved to become sufficiently protective of low-income minority communities. Significantly restricted by the Supreme Court's holding that there is no private right of action for discrimination based on disparate impact, litigants in Title VI court cases face the formidable task of attributing company siting decisions and agency permitting decisions to intentional discrimination based on race or ethnicity. This has not resulted in meaningful judicial victories because the standard of proof has been virtually impossible to meet. In the context of permitting under the PSD program and environmental reviews under NEPA, environmental justice arguments have been largely unsuccessful in restricting or limiting projects.

A recurring theme from administrative agencies is that petitioners have not supported their claims with evidence of discrimination, or that the evidence they have provided has not amounted to discrimination. Agencies have told petitioners that their concerns for exposure to air pollutants are unfounded where air modeling demonstrates that proposed facilities will not result in nonattainment with the national ambient air quality standards. Courts have gone along with this, applying a policy of deference to administrative agencies. These administrative and judicial approaches are fundamentally flawed because they ignore the problem of hotspots and the fact that human beings themselves move from place to place, at different times. They are inhabitants of an airshed, which should be a relevant framework of analysis.

Rather than approaching the problem of environmental justice like an employment discrimination problem, the environmental justice community would be better served focusing on using land use planning to restrict the development of heavily-polluting industrial facilities. Reports filed under EPCRA provide empirical data that could form the basis for limiting the

²⁵⁰ Sara Pirk, *Expanding Public Participation in Environmental Justice: Methods, Legislation, Litigation and Beyond*, 17 J. ENVTL. L. & LITIG. 207, 234-35 (2002).

²⁵¹ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989) ("Other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed—rather than unwise—agency action." (footnote omitted)).

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construction or operation of industrial facilities based on air pollution loads in an airshed, in a low-income minority area.