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ARTICLE

WARREN COUNTY'S LEGACY FOR
FEDERAL AND STATE
ENVIRONMENTAL IMPACT
ASSESSMENT LAWS

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I. INTRODUCTION

In 1978, the Afton community of Shocco Township in Warren County, North Carolina, was like many of its sister environmental justice (“EJ”) communities from all over the country. African Americans made up eighty-four percent of Afton residents, with ninety percent of those living below poverty.¹ In fact, Warren County was so poor, it did not even have a hospital; the closest medical facility was some fifteen miles away, and to get to a hospital, residents had to travel thirty-five miles and cross the state line into Alabama.² The racial and economic makeup of the community set the stage for the environmental injustice that ensued.

Because the targeting of the Afton community for siting of a landfill

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¹ United States General Accounting Office (“GAO”) (subsequently renamed the U.S. Government Accountability Office in July 2004), *Siting of Hazardous Waste Landfills and Their Correction with Racial and Economic Status of Surrounding Communities*, B-211461, App. I, at 7 (June 1983).

² See ROBERT D. BULLARD, *DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY* (Westview Press 1990).

to bury the 60,000 tons of Polychlorinated Biphenyls (“PCB”)-contaminated soil³ seems so reprehensible, it is tempting to conclude that the decision was the result of some reckless failure to conduct the appropriate environmental analysis, or of a lack of environmental protection law altogether. In actuality, the State of North Carolina chose the Afton community only after it conducted an extensive site-selection process during which ninety-three different sites and three different hazardous-waste treatment options⁴ were weighed. As part of the site-assessment process, the North Carolina Department of Environmental and Natural Resources (“DENR”) prepared an environmental impact statement (“EIS”) pursuant to both federal and state laws;⁵ the process was complete with a public hearing and an opportunity for the public to submit oral and written comments to the State and the U.S. Environmental Protection Agency (“EPA”).⁶ Because neither EPA nor the State published an EIS on the State’s landfill application during the review period,⁷ public participation was greatly diminished by the

³ The PCB-laced soil was the result of an illegal dumping operation by a New York-based commercial trucking business. After the PCB contamination was discovered, EPA declared the 210-mile stretch of a state highway on which it was found a Superfund site and ordered it scraped up and disposed of. The midnight dumpers, the business owner Robert Burns and trucker, were convicted and sentenced to prison. BULLARD, *supra* note 2, at 20-32; *see also* N. C. Dep’t on Env’tl. & Natural Res., Warren County PCB Landfill Fact Sheet, http://www.wastenotnc.org/WarrenCo_Fact_Sheet.htm (last visited Jan. 18, 2007).

⁴ The North Carolina Department of Environment and Natural Resources (“DENR”) considered sites in-state as well as in Alabama and Texas. The DENR also considered on-site neutralization, burying PCB material in landfills, and incinerating the PCB-laced soil. Letter from David E. Kelly, Assistant Secretary for Public Safety, North Carolina Department of Crime Control and Public Safety, to Secretary Thomas W. Bradshaw, North Carolina Department of Transportation (Nov. 16, 1978).

⁵ *Warren County v. State of North Carolina*, 528 F. Supp. 276, 280 (E.D.N.C. 1981). Enacted in 1971, the North Carolina Environmental Policy Act (“NCEPA”) required state agencies to review and report on the environmental impacts of enumerated state actions. *See* N.C. GEN. STAT. § 113A-1 *et seq.* The key elements of the environmental review process, like that of the federal statute (the National Environmental Policy Act, *see* 42 U.S.C.A. § 4321 *et seq.* (West 2007)) it was modeled after, were that the lead agency must conduct an environmental impact analysis, publish an EIS describing the anticipated environment impacts of the action, and provide a mechanism for public participation in the decision process. *See* N.C. Gen. Stat. § 113A-4. NCEPA required the State to study the environmental impacts of hazardous waste disposal siting proposals, to publish an environmental impact statement describing potential impacts, and to receive and address public comments on the proposal. EPA had similar mandates under the National Environmental Policy Act. *See* 42 U.S.C.A. § 4332 (West 2007).

⁶ 15 U.S.C. § 2601 *et seq.* (1976). Even though the Toxic Substances Control Act (“TSCA”), the federal statute governing permitting of PCB disposal, did not require EPA to do so, the Agency hosted public hearings and accepted public comments on the North Carolina DENR’s application for the PCB landfill permit.

⁷ Under TSCA, EPA was not required to publish an EIS as part of the site-approval process. *See* 15 U.S.C.A. § 2601 *et seq.* (West 2007). The State of North Carolina did not publish its EIS

absence of the sort of data that a proper EIS would have provided.⁸ So, despite the supposed protections afforded by the explicit examination of the environmental impacts of such a decision, the State approved the dump.⁹ Significantly, it approved the facility in a community that lacked the basic social and medical services necessary to respond to the health risks associated with such a facility.¹⁰

Community leaders immediately mobilized local residents to action, accusing the State of environmental racism for targeting the disenfranchised community.¹¹ The struggles in Warren County gained national attention, and the outrage prompted Delegate Walter Fauntroy¹² and other leaders in the Congressional Black Caucus to request the General Accounting Office (“GAO”) to study the association between toxic facilities and minority and low-income populations.¹³ Not surprisingly, the GAO found a strong, positive relationship between a community’s minority makeup and the likelihood that it hosted a major pollution-generating facility.¹⁴ Since then, numerous studies have confirmed the GAO’s findings and uncovered even greater environmental injustices involving government land-use decisions.¹⁵

either, until after the National Association for the Advancement of Colored People (NAACP) stepped in to support Warren County plaintiffs in filing their NEPA suit in 1982. However, the court found the error cured once the EIS was published. *Warren County*, 528 F. Supp. at 279.

⁸ The Court stated that EPA was not required to publish an EIS under TSCA. *Id.* at 286-287.

⁹ *Warren County*, 528 F. Supp. at 279.

¹⁰ BULLARD, *supra* note 2, at 30.

¹¹ Mass protests were conducted around the facility, including one in which residents formed a human chain spread across an access road to the landfill site and over 500 arrests were made. VA. NATURAL RESOURCES LEADERSHIP INST., *THE RISE OF ENVIRONMENTAL JUSTICE: RECONSIDERING EQUITY, BALANCING BURDENS* 1 (2006), available at http://www.virginia.edu/ien/vnrli_update/docs/briefs/EJ%202006.pdf.

¹² Walter E. Fauntroy served as Delegate from the District of Columbia in the United States House of Representatives.

¹³ United States General Accounting Office, *Siting of Hazardous Waste Landfills and Their Correction with Racial and Economic Status of Surrounding Communities*, B-211461 at 1 (June, 1983).

¹⁴ *Id.*

¹⁵ See BULLARD, *supra* note 2, at 75-112; Robert D. Bullard, *Environmental Justice: It's More Than Waste Facility Siting*, 77 SOCIAL SCIENCE QUARTERLY, 493-99 (1996); Lauretta M. Burke, *Race and Environmental Equity: A Geographic Analysis in Los Angeles*, GeoInfo Systems, Oct. 1993, at 44-50; Cerrell Associates, Inc., *Political Difficulties Facing Waste-to-Energy Conversion Plant Siting*, Prepared for the California Waste Management Board (1984), described in LUKE W. COLE & SHEILA R. FOSTER, *FROM THE GROUND UP: RACISM AND THE RISE OF ENVIRONMENTAL JUSTICE* (“From the Ground Up”) 13 (New York University Press 2001); Rachel Morello-Frosch, Manuel Pastor, & Jim Sadd, *Environmental Justice and Southern California's "Riskscape": The Distribution of Air Toxic Exposures and Health Risks Among Diverse Communities*, 364 URB. AFF. REV. 551 (2001).

As atrocious as the siting decision in Warren County was, it is also tempting to hope that after twenty-five years, its lessons would have prompted policymakers to implement appropriate environmental review laws and regulations to provide adequate protection for disadvantaged and minority communities against pollution-generating facilities. But this may not be the case. The first part of this article discusses the modern environmental-quality review process at the federal and state levels, starting with a summary of the National Environmental Policy Act and then California's and New York's approaches.¹⁶ This is followed by a brief discussion of how each entity addresses environmental justice. The second part describes one community's difficulties in meeting the required evidentiary showing to demonstrate environmental injustice.

II. MODERN FEDERAL ENVIRONMENTAL IMPACT ASSESSMENT REVIEW

A. BACKGROUND OF NATIONAL ENVIRONMENTAL POLICY ACT

Signed into law amid a national momentum in efforts aimed at protecting human health and the environment, the National Environmental Policy Act¹⁷ ("NEPA") was intended to be a tool for infusing environmental wisdom into the federal decisionmaking process.¹⁸ Under NEPA, as implemented by the Council on Environmental Quality ("CEQ"),¹⁹ and later EPA,²⁰ each federal agency must include an EIS in any recommendation or report on any "major

¹⁶ New York's and California's environmental review statutes are used as illustrative examples of state environmental review procedures, because the two are leaders in addressing issues related to environmental justice. N.Y. State Env'tl Qual. Rev. Act (SEQRA), N.Y. ENVTL. CONSERV. LAW § 8-0101 *et seq.*; Cal. Env'tl. Qual. Act (CEQA), CAL. PUB. RES. CODE § 21000 *et seq.* (West 2007).

¹⁷ 42 U.S.C.A §§ 4321-4370d (West 2007).

¹⁸ *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 558 (1978).

¹⁹ The Council on Environmental Quality ("CEQ") was established under NEPA and charged with "formulat[ing] and recommend[ing] national policies to promote the improvement of the quality of the environment." 42 U.S.C.A § 4342 (West 2007).

²⁰ EPA was created by President Nixon's Reorganization Plan 3 (1970) at the recommendation of Roy Ash, an advisor, to create an executive agency that would coordinate enforcement of environmental protection laws and, through research, to identify national policies regarding environmental protection. Jack Lewis, *Birth of EPA*, EPA Journal (1985), available at <http://www.epa.gov/history/topics/epa/15c.htm>59 (last visited Jan. 29, 2007). Later, President Clinton's Executive Order 12898 designated EPA as the coordinator of federal agencies' environmental justice (EJ) policies. Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994).

Federal action significantly affecting the quality of the human environment.”²¹ Failure to conduct the appropriate analyses and disclosures is subject to judicial review;²² the remedies could range in severity from project delay while the proper analyses are conducted to a permanent injunction against the proposed action.²³

As a planning tool, NEPA requires a regulated entity to consult with the relevant federal agencies early, so that environmental impacts can be addressed during the project’s conception.²⁴ NEPA’s environmental review process occurs in four major steps: identification of the lead agency responsible for coordinating the process;²⁵ a triage process to determine the need for either an Environmental Assessment (“EA”) or preparation of an environmental impact statement (“EIS”);²⁶ completion of the EIS with appropriate input from relevant stakeholders, including the public, in order to analyze the impacts;²⁷ and issuance of a Record of Decision (“ROD”) discussing the agency’s decision and issues considered as part of that decision.²⁸

The EA’s primary function is to facilitate the lead agency’s determination of the potential for significant environmental impacts, especially in the face of uncertain consequences of a given action. CEQ recognizes the need for a preliminary analysis to explore the potential for such impacts in order to avoid the full economic and social costs of conducting a full-scale EIS.²⁹ However, although NEPA requires EAs to

²¹ 42 U.S.C. § 4332(C) (2000). “Major Federal actions” are actions that involve the promulgation of policies and regulations; the undertaking or authorizing of federal construction or development projects, issuing federal permits; and any activity that is “potentially subject to Federal control and responsibility,” such as those involving the use of federal funds. 40 C.F.R. § 1508.18 (b) (2005).

²² 40 C.F.R. § 1508.18.

²³ *Coeur D’Alene Lake v. Kiebert*, 790 F. Supp. 998 (D. Idaho 1992).

²⁴ 40 C.F.R. § 1501.2(d) (requiring consultation with regulated entities as soon as federal involvement in private projects can be foreseen); 40 C.F.R. § 1507.3(b) (requiring federal agencies to implement “outreach programs” as a means for regulated community to conduct pre-application consultation with lead and cooperating agencies).

²⁵ 40 C.F.R. § 1501.5.

²⁶ 40 C.F.R. §§ 1501.3, 1501.4. If the lead agency decides it needs to prepare an EIS, the agency will also have to conduct a scoping of the issues to be addressed in the EIS. 40 C.F.R. § 1501.7.

²⁷ 40 C.F.R. § 1502.

²⁸ 40 C.F.R. § 1505.2.

²⁹ CEQ’s regulations require preparation of an EA unless the project involves a categorical exclusion or involves a prior-approved action that does not require an EIS under agency published procedure. 40 C.F.R. § 1501.4. This message is reiterated in CEQ’s assessment of its own progress in implementing NEPA. CEQ, *The National Environmental Policy Act: A Study of Its Effectiveness After Twenty-Five Years (“NEPA Effectiveness”)*, at 19, available at <http://www.nepa.gov/nepa/nepa25fn.pdf> (last visited Apr. 17, 2007).

be made publicly available after their completion, public participation is not a mandated part of the EA process.³⁰

If no significant impact is expected, NEPA authorizes the agency to declare a Finding of No Significant Impact (“FONSI”), ending the environmental review process. A FONSI may be issued after a preliminary analysis, such as during the EA, or as a result of the more thorough review of the EIS.³¹

Alternatively, if significant adverse environmental impacts may result, NEPA requires a full EIS analysis.³² The EIS process is touted as a comprehensive environmental review, entailing a detailed description of the proposed action as well as the full range of environmental impacts that may result, discussion of reasonable alternatives, and exploration of strategies for mitigation.³³ In addition to consideration of the natural environment, CEQ requires an analysis of the direct, indirect, and cumulative impacts on health of an array of social and economic impacts.³⁴ However, under NEPA, examination of socioeconomic and cultural issues is required only as those factors relate to the physical environment.³⁵

As part of the EIS process, the lead agency must solicit comments through a public-participation process.³⁶ Together, the environmental review, public comments, and the agency’s response make up the final EIS (“FEIS”), which serves as the guiding document for environmental considerations in the final decisionmaking process. Upon adopting the FEIS, the lead agency must issue a Record of Decision (“ROD”),³⁷ an “environmental document”³⁸ that must be made available to the public.³⁹ The ROD comprises a concise summary of the alternatives considered, why alternatives were rejected, and the appropriate conditions placed on approval;⁴⁰ such conditions include mitigation requirements as well as

³⁰ CEQ, NEPA Effectiveness, *supra* note 29, at 19.

³¹ 40 C.F.R. § 1501.4(e).

³² 40 C.F.R. § 1501.4.

³³ 40 C.F.R. § 1502.

³⁴ 40 C.F.R. § 1502.16.

³⁵ EPA, Final Guidance for Incorporating Environmental Justice Concerns in EPA’s NEPA Compliance Analyses (“EPA EJ Guidance”) at 6 (1998), *available at* http://www.epa.gov/compliance/resources/policies/ej/ej_guidance_nepa_epa0498.pdf.

³⁶ 40 C.F.R. § 1501.7(a)(1). NEPA regulations require the lead agency to conduct a public participation process that must comprise key elements including proper notice, public hearings, and time for acceptance of public comments on the proposed activities.

³⁷ 40 C.F.R. § 1505.2(a).

³⁸ 40 C.F.R. § 1508.10.

³⁹ 40 C.F.R. § 1506.6(b), although agencies are not required to publish the ROD *per se*.

⁴⁰ 40 C.F.R. § 1505.3.

programs aimed at ensuring compliance, including mechanisms for monitoring and enforcement.⁴¹ Moreover, if the FEIS fails to adopt practicable mitigation measures, the agency must also state its reasons for rejecting them.⁴² The ROD is a legal document to which the issuing agency may be bound, and thus it may be used by opponents to compel agency compliance.⁴³

Because a full-scale EIS process is expensive and time-consuming, federal agencies have, instead, migrated to the EA review model.⁴⁴ A major time saving under the EA is that there is no requirement for public participation in the preparation of the EA,⁴⁵ although the EA itself must be made available to the public once complete.⁴⁶ CEQ has advocated that as part of the EA process, public participation should be solicited early on in the planning of the action.⁴⁷

B. NEPA FOLLOWING EXECUTIVE ORDER 12898

Over a decade after the GAO's and other studies uncovered overwhelming evidence of environmental injustice, particularly in land use and facilities siting, President William Clinton issued Executive Order 12898 ("the Order") regarding Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations.⁴⁸ The Order directed every federal agency to "make achieving environmental justice part of its mission by identifying and addressing . . . disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations."⁴⁹ Under the Order, each

⁴¹ *Id.* CEQ requires that the lead agency also include the specific *details* of the mitigation measures that are part of the conditions for the decisions if the action involved is the issuance of a permit or other approval.

⁴² 40 C.F.R. § 1505.2.

⁴³ CEQ, Guidance Regarding NEPA Regulations (1983), 40 C.F.R. pt. 1500.

⁴⁴ CEQ, NEPA Effectiveness, *supra* note 29, at 19. Some "ninety-nine percent of the actions reviewed by agencies under NEPA each year are reviewed in the context of an EA, rather than an EIS." Stephen M. Johnson, *NEPA and SEPA's in the Quest for Environmental Justice*, 30 LOY. L.A. L. REV. 565, 567-68 (1997).

⁴⁵ *Id.* Federal guidelines require descriptions of the proposed action, alternatives to the action, environmental impacts of the action as well as its alternatives, and a list of agencies and persons consulted in the analysis; however, there is no explicit requirement, as in the case of the preparation of an EIS, that the lead agency implement a public-participation process as part of the preparation of the EA. *See* 40 C.F.R. § 1501.9.

⁴⁶ *See* 40 C.F.R. § 1506.6.

⁴⁷ CEQ, NEPA Effectiveness, *supra* note 29, at 19; *see also* 40 C.F.R. § 1501.7(a)(1).

⁴⁸ Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994).

⁴⁹ *Id.* at 7629 (Feb. 11, 1994); *see* CEQ, Guidance for Federal Agencies on Key Terms in

agency must develop agency-specific environmental justice strategies⁵⁰ and must study, as well as maintain a record of, disproportionate and adverse environmental impacts on minority and low-income populations;⁵¹ importantly, the Order requires agencies to make this information publicly available.⁵²

In an accompanying memorandum to department and agency heads, President Clinton outlined four approaches by which the environmental justice analysis may be fit into the NEPA framework.⁵³ These included an analysis of the environmental effects, including human health, economic and social effects, on targeted populations; identification of mitigation measures that would address significant and adverse environmental effects on targeted populations; provision of opportunities for effective community participation in the NEPA process including consultation with affected communities in the identification of both environmental impacts and mitigation measures to be implemented; and a requirement that review of NEPA compliance include assurance that the lead agency has analyzed appropriately environmental effects on targeted populations.⁵⁴

Although EPA was identified as the agency responsible for coordinating the agencies' compliance with the Order,⁵⁵ CEQ, through its authority to implement NEPA, issued its own guidelines identifying six

Executive Order 12898 ("CEQ EJ Guidance"), Appendix A in Environmental Justice: Guidance Under the National Environmental Policy Act (1997), available at <http://ceq.eh.doe.gov/Nepa/regs/ej/justice.pdf> (last visited Apr. 17, 2007).

⁵⁰ Exec. Order No. 12,898, § 1-103, 59 Fed. Reg. 7629, 7630 (Feb. 11, 1994). Agency-specific environmental justice strategies are not expected to be static policies; rather, individual agencies are also expected to conduct periodic review and revision of their strategies in order to incorporate concerns regarding the types of programs, policies, and activities that may, or historically have, raised environmental justice concerns at the particular agency. *Id.* at 7630 (§ 1-103).

⁵¹ *Id.* at 7631 (§ 3-3). Specifically, the EO commanded agencies to focus their efforts on researching patterns of subsistence consumption of fish, vegetation, or wildlife as they relate to disproportionately high and adverse human health or environmental effects on targeted populations. *Id.* at 7632 (§ 4-4).

⁵² *Id.* at 7632 (§ 5-5).

⁵³ Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994); Memorandum from President Clinton to the Heads of Departments and Agencies, Comprehensive Presidential Documents No. 279 (Feb. 11, 1994).

⁵⁴ Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994); Memorandum from President Clinton to the Heads of Departments and Agencies, Comprehensive Presidential Documents No. 279 (Feb. 11, 1994).

⁵⁵ Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994); Memorandum from President Clinton to the Heads of Departments and Agencies, Comprehensive Presidential Documents No. 279 (Feb. 11, 1994).

general principles to be addressed in the NEPA analysis.⁵⁶ CEQ Guidance advised agencies, as part of their environmental review process, to (1) determine the potential for disproportionately high and adverse human health or environmental effects on targeted populations; (2) review data concerning multiple or cumulative exposure of targeted populations to environmental hazards; (3) identify social, economic and other “factors that may amplify the . . . environmental effects” on targeted populations; (4) develop effective public-participation strategies, including taking appropriate steps to overcome “barriers to meaningful participation”;⁵⁷ (5) ensure representation from “diverse constituencies” within affected communities in the NEPA process; and (6) seek tribal representation with the appropriate recognition of the sovereign powers of federally recognized Native American tribes.⁵⁸

Despite the added rigor, CEQ acknowledges that, although the Order may command examination of issues (e.g., disproportionate impacts) that might not otherwise have been considered, the new requirements did not change the legal thresholds involved in the NEPA decisionmaking process.⁵⁹ Importantly, the CEQ emphasizes that nothing in the Order or the CEQ Guidance creates any additional rights, benefits, or trust obligations for any person or entity with regards to the government.⁶⁰ In short, while the Order requires a more in-depth examination of the potential for disproportionate impacts, it does not add substantive “teeth” to NEPA.

Rather than describing general concepts to be considered, EPA’s Guidance focuses on defining characteristics of EJ communities, determining the presence of EJ communities and likelihood of disproportionate adverse impacts.⁶¹ The Guidance also detailed the analytical steps and tools involved in the EJ analysis as well as approaches aimed at ensuring meaningful public participation in the review process. Importantly, EPA goes beyond the CEQ’s and

⁵⁶ CEQ EJ Guidance, *supra* note 49, at 9.

⁵⁷ “Barriers” include cultural and religious practices that may conflict with the typical public participation approaches, limited English proficiency, and geographic distance or obstacles to meaningful participation. *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 10. For example, agencies must still find that a given proposed action has the potential to cause significant and adverse environmental impacts before it can require preparation of an EIS. Moreover, the Order does not compel disapproval of an action simply because it has disproportionately high and adverse impacts on minority and low-income communities, nor does the Order prescribe methodologies for examining effects on those targeted populations.

⁶⁰ *Id.* at 21.

⁶¹ EPA EJ Guidance, *supra* note 35.

Interagency Work Group on Environmental Justice's ("IWGEJ")'s⁶² guidelines in both the identification of relevant impacts and feasible alternatives.⁶³

Since 1982, NEPA as well as its implementing regulations have evolved into a hyper-technical set of instructions for the environmental review process. However, NEPA remains no more than a disclosure statute with procedures designed to inform decisionmakers of the environmental consequences of an action;⁶⁴ it has no substantive requirement for any of the information gleaned from the technical analysis, whether originating from the agency's information-gathering or public-participation mechanisms, to be incorporated into the final decision.⁶⁵ Moreover, the increased use of pre-review mechanisms such as EAs and mitigated FONSI's⁶⁶ has limited, and threatens to further limit, the effectiveness of NEPA's public-participation requirements.⁶⁷ As CEQ's and EPA's EJ policies reveal, Executive Order 12898 has succeeded in injecting some substantive requirements into the NEPA process. However, the additions are limited in potential effectiveness and vulnerable to policy shifts that inevitably result from changes in executive administrations, because enforcement of the policy depends on the commitment of the executive office.

⁶² The Interagency Work Group on Environmental Justice is an advisory group made up of 17 heads of agencies and departments that was created by Executive Order 12898 to develop federal policy regarding environmental justice. Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994).

⁶³ For example, while IWG defines EJ communities as those in which people of color or low-income people are over 50% of the population living within a narrowly designated geographical area (e.g., a census tract or block), EPA's definition is much more expansive: EJ communities, while geographically disperse, may share common characteristics such as cultural practices or exploitation of similar resources that expose them disproportionately to environmental hazards. EPA EJ Guidance, *supra* note 35, at § 2.1. Additionally, in lieu of the IWGEJ's reliance on secondary sources such as census information, which is collected over artificial geographic boundaries, EPA asks agency analysts to reach out to local communities, including consultation with residents, community advocates, and tribal governments. *Id.* at §§ 2.1.1, 2.1.2.

⁶⁴ See *Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 546 (11th Cir. 1996); *Sierra Club v. U.S. Army Corps of Eng'rs*, 701 F.2d 1011, 1029 (2d Cir. 1983).

⁶⁵ NEPA does require lead agencies to respond to comments from coordinating agencies and the public as part of their EIS certification process. See 40 C.F.R. §§ 1501.6, 1506.6.

⁶⁶ Mitigated FONSI's are determinations that no further review is necessary conditioned on the implementation of stated mitigation measures. 40 C.F.R. §§ 1501.4(e), 1508.13.

⁶⁷ Council on Environmental Quality, *The National Environmental Policy Act: A Study of Its Effectiveness After Twenty-Five Years* (Jan. 1997), available at <http://www.nepa.gov/nepa/nepanet.htm>.

III. CALIFORNIA'S ENVIRONMENTAL IMPACT ASSESSMENT REVIEW

A. BACKGROUND ON CEQA

The California Environmental Quality Act ("CEQA") passed in 1970 as a result of the state's efforts to reinforce and supplement the federal environmental review process as it applies to state actions.⁶⁸ Modeled on NEPA, CEQA's regulatory Guidelines are developed by the executive office,⁶⁹ and the environmental review procedure mirrors that of its federal predecessor.

The California environmental review process begins with a preliminary review⁷⁰ of the project or action, followed by the proponent's consultation with the relevant lead agency.⁷¹ Thereafter, the lead agency conducts an "Initial Study," along the same line as the EA under NEPA,⁷² of the proposal in order to determine whether the potential for significant adverse environmental impacts exists.⁷³ If the lead agency finds substantial evidence that a proposed project, whether individually or cumulatively, "may have a significant effect on the environment," the lead agency must issue a positive declaration and prepare an environmental impact report ("EIR").⁷⁴ However, in the determination of whether a project impact is significant, only effects that result in direct

⁶⁸ CEQA: Frequently Asked Questions About CEQA, *available at* http://www.ceres.ca.gov/topic/env_law/ceqa/more/faq.html (last visited Feb. 2, 2007).

⁶⁹ The Governor's Office of Planning and Research prepares the CEQA Guidelines, and the Secretary for Resources certifies and adopts the Guidelines. CAL. PUB. RES. CODE § 21083(a) (West 2007).

⁷⁰ The preliminary review allows the agency to determine the completeness of the project, whether it is subject to CEQA, and whether it will result in "direct or reasonably foreseeable indirect physical change" to the environment. At this stage, the lead agency can also determine whether an environmental impact report is needed if clear evidence exists for its necessity. CAL. PUB. RES. CODE § 21081(a) (West 2007); CAL. CODE REGS. tit. 14, § 15060(d) (2007).

⁷¹ Although the public agency is required to provide consultation to project applicants, whether private or governmental, project applicants themselves are not required to consult with the lead agency as part of the environmental review process. CAL. CODE REGS. tit. 14, § 15060.5.

⁷² CAL. CODE REG. tit. 14, §§15060-15065 (2007). In fact, the CEQA Guidelines allow and encourage proponents of projects that are subject to both federal and state environmental reviews to submit the environmental assessment completed as part of a NEPA process for consideration in the initial study. CAL. CODE REGS. tit. 14, § 15063(2) (2007).

⁷³ CAL. CODE REGS. tit. 14, § 15063 (2007).

⁷⁴ CAL. CODE REGS. tit. 14, § 15063(1)(A) (2007). Conversely, if no potential exists for significant adverse impacts or if these effects can be mitigated with measures that can be identified without the need for extensive environmental review, the agency may issue a "negative declaration" or a "mitigated negative declaration" and allow the project to go forward without further review. CAL. CODE REGS. tit. 14, § 15063(2) (2007).

physical or reasonably foreseeable indirect physical changes will be considered,⁷⁵ although economic and social effects of the project may be considered if they can cause physical changes to the environment.⁷⁶

Unlike NEPA, which carries no substantive mandate, CEQA specifically requires the lead agency, when the EIR discloses significantly adverse environmental impacts, to issue explicit findings that “specific overriding economic, legal, social, technological, or other benefits of the project outweigh its significant effects on the environment”⁷⁷ in order to approve it. Moreover, if many feasible⁷⁸ alternative scenarios exist for an action, the law requires the lead agency to choose the best alternative—that is, one with the least problematic environmental impacts—to be followed.⁷⁹

CEQA requires the lead agency, as part of its review of the sufficiency of the EIR’s analysis and in determining whether project impacts are significant, to receive and respond to comments on the EIR from responsible agencies⁸⁰ as well as from the public at large.⁸¹ Accordingly, the lead agency in an action must involve responsible agencies and the public at various stages in the preparation of the EIR.⁸² Despite the explicit policy goal of including the public at the “earliest possible time in the environmental review process,”⁸³ CEQA regulations specifically exclude public participation in the most important stage of the process—at the issuance of the Notice of Preparation when the scope of the analysis is determined.⁸⁴ Although the information on identifying

⁷⁵ CAL. CODE REGS. tit. 14, § 15064(2)(d) (2007). In addition to traditionally reviewed environmental impacts such as those on natural resources and the immediate physical surroundings of an action, CEQA requires an explicit review of the project’s impact on archaeological resources within the state. CAL. PUB. RES. CODE § 21083.2 (West 2007).

⁷⁶ CAL. CODE REGS. tit. 14, § 15064(e) (2007).

⁷⁷ CAL. PUB. RES. CODE § 21081(b) (West 2007).

⁷⁸ Feasibility is statutorily defined as the capability of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors. CAL. PUB. RES. CODE § 21061.1 (West 2007).

⁷⁹ CAL. PUB. RES. CODE § 21080.5(d)(2)(D) (West 2007).

⁸⁰ Responsible agencies are those, other than a lead agency, that have the responsibility for carrying out or approving a project. CAL. PUB. RES. CODE § 21069 (West 2007).

⁸¹ CAL. CODE REGS. tit. 14, § 15064(2) (2007).

⁸² The lead agency is required to issue a Notice of Preparation (“NOP”) in order to solicit input from responsible agencies concurrently with its issuance of a positive declaration requiring the preparation of an EIR. CAL. PUB. RES. CODE § 21069 (West 2007); CAL. CODE REGS. tit. 14, § 15082 (2007). The lead agency may not circulate a draft EIR before the time to respond to the NOP has expired. CAL. CODE REGS. tit. 14, § 15082(a)(4) (2007).

⁸³ CAL. PUB. RES. CODE § 21003.1(a) (West 2007).

⁸⁴ The NOP serves as a “scoping” document of sorts, describing the project and defining the environmental issues involved in the EIR, including a description of the relevant alternatives and mitigation proposals. CAL. PUB. RES. CODE § 21069 (West 2007); CAL. CODE REGS. tit. 14, § 15082

mitigation measures and alternatives is required to be in the draft EIR,⁸⁵ at that stage the public is limited to commenting on a closed set of available options, rather than having the opportunity to shape those that must be studied.

B. CALIFORNIA'S ENVIRONMENTAL JUSTICE POLICY

Of the twenty-nine states with explicit EJ policies, California has the most detailed policy, codifying environmental justice into its statutes and mandating that agencies with jurisdiction over activities that affect the environment develop strategies to ensure compliance with the state's environmental justice policy.⁸⁶ The state's approach combines a stringent public land-use review process with a suite of legislative mandates for addressing environmental justice in government action.⁸⁷ However, despite the impressiveness of the existence of codified environmental justice treatment, the statutory requirements paint strokes too broad to address the root causes of environmental injustice.

1. *The Tanner Act*

Although not limited to cases involving environmental justice concerns, the Tanner Act⁸⁸ was passed with the express legislative intent of, among other things, increasing public participation in the siting and permit issuance of hazardous-waste facilities.⁸⁹ The statute increases the rigor with which hazardous-waste-facility siting decisions are reviewed. First, it requires local land-use agencies to form local assessment committees for the purpose of advising decisionmakers in considering applications for hazardous-waste facilities.⁹⁰ Second, it provides opponents of such facilities with the ability to appeal adverse decisions.⁹¹

(2007). The lead agency may not circulate the NOP before the time for responsible agency response has expired. CAL. CODE REGS. tit. 14, § 15082 (2007).

⁸⁵ Once the internal comment period has ended, the lead agency must issue the draft EIR with the same information for public review and comment. CAL. CODE REGS. tit. 14, §§ 15082, 15103 (2007).

⁸⁶ See A.B.A. & HASTINGS LAW SCH., ENVIRONMENTAL JUSTICE FOR ALL: A FIFTY-STATE SURVEY OF LEGISLATION, POLICIES AND INITIATIVES (Steven Bonorris ed. 2004).

⁸⁷ *Id.*

⁸⁸ CAL. HEALTH & SAFETY CODE § 25199 *et seq.* (West 2007).

⁸⁹ CAL. HEALTH & SAFETY CODE § 25199 (West 2007)

⁹⁰ "The membership of the committee shall be broadly constituted to reflect the makeup of the community." CAL. HEALTH & SAFETY CODE § 25199.7(d)(1) (West 2007).

⁹¹ Opponents may petition an appeal board convened by the Governor. CAL. HEALTH & SAFETY CODE § 25199.13 (West 2007). On the other hand, the statute provides proponents with a similar appeal route. CAL. HEALTH & SAFETY CODE § 25199.11 (West 2007).

Finally, it allows local communities to charge a use fee of sorts by assessing operators of hazardous-waste facilities a general tax of up to ten percent of its gross receipts.⁹² Although the Act holds great promise for environmental justice communities to exert real control over local land-use decisions, its implementation has been problematic.⁹³

2. *Environmental Justice Legislation*

California has not required specific actions on the part of government agencies whose function may involve making decisions implicating environmental justice concerns. Rather, beginning with the enactment of Senate Bill 115 (“SB 115”) in 1999, the major thrust of the legislature’s approach has been to issue mandates to the two agencies most responsible for environmental planning, the Governor’s Office of Planning and Research (“OPR”) and California Environmental Protection Agency (“CalEPA”).⁹⁴

SB 115 designated OPR as the agency responsible for coordinating the state’s environmental justice programs within the state agency system as well as local municipalities and the federal government.⁹⁵ After OPR’s director admitted that the agency had no plans to release environmental justice guidelines either for local government’s general plans or for CEQA review but conceded he would respond to legislative mandates,⁹⁶ the legislature passed Assembly Bill 1553 directing OPR to do just that—promulgate guidelines for addressing environmental justice issues in local governments’ development of their general plans.⁹⁷ In addition to its responsibilities in coordinating state environmental justice rules, OPR is also responsible for assembling information from federal agencies regarding their activities in compliance with the Presidential Executive Order 12898.⁹⁸

⁹² CAL. HEALTH & SAFETY CODE § 25173.5(a) (West 2007).

⁹³ See Luke Cole, *The Theory and Reality of Community-Based Environmental Decisionmaking: The Failure of California’s Tanner Act and Its Implications for Environmental Justice*, 25 ECOLOGY L.Q. 733 (1999).

⁹⁴ Ellen M. Peter, *Implementing Environmental Justice: the New Agenda for California State Agencies*, 31 GOLDEN GATE U.L. REV. 529 (2001).

⁹⁵ CAL. GOV’T CODE § 65040.12(a) (West 2007).

⁹⁶ Assemb. B. 2237 (Cal. 2001). Sept. 14, 2000, testimony of the Director of the Department of Toxic Substances Control to the California Select Committee on Environmental Justice. Implementation of SB 115 (Solis): Where Are We? A Hearing of the Senate Select Committee on Environmental Justice, Sept. 14, 2000, State Capitol, Summary Report at 2. See Peter, *supra* note 94.

⁹⁷ CAL. GOV’T CODE § 65040.2 (West 2007).

⁹⁸ CAL. GOV’T CODE § 65040.12(b) (West 2007).

SB 115 required CalEPA to design an EJ mission for its internal programs, policies and standards, and to develop a model EJ mission statement for the other six entities that fall within its jurisdiction.⁹⁹ Subsequent enactments added requirements such as the establishment of an EJ program and the designation of an assistant secretary of EJ;¹⁰⁰ the convening of the interagency Working Group on Environmental Justice (“Working Group”) to assist in the development of an agency-wide strategy for identifying and addressing any gaps in existing programs, policies, and activities that may impede the achievement of environmental justice;¹⁰¹ and the creation of a Working Group advisory group with representation from the public and government agencies.¹⁰² In addition to receiving advice from the advisory group, the Working Group is also required to hold public meetings to solicit input from the public at large.¹⁰³

Although California’s codification of its EJ policy into law, with which executive agencies must comply, to some extent protects the EJ imperative from the political whims of the executive (exercised through executive orders), the law gives administrators too much discretion without guidance on how to achieve the state’s specific EJ goals. Considering that both the OPR Director and Secretary of CalEPA are political appointees of the Governor, the state’s environmental justice programs may well become just as vulnerable to political agendas as executive policies—the approach adopted by both the federal government and the majority of states.¹⁰⁴ Moreover, while CalEPA’s mandate has some clear environmental justice-related goals,¹⁰⁵ no similar demands are made of OPR, whose function is purely advisory—to *propose* general guidelines.

A fundamental problem of California’s approach is the vagueness of the state’s environmental justice goal itself: “the fair treatment of people

⁹⁹ S.B. 115 (Cal. 1998); CAL. PUB. RES. CODE §§ 72000, 72001 (renumbered from §§ 71110 to 71115 and amended by Stats.2001, c. 765 (S.B.828), §§ 3 to 7 and 9; Assembly Bill No. 1740 vetoed).

¹⁰⁰ 2000 Cal. Stats. ch. 52; 2000 Cal Stats. ch. 329; 2000 Cal. Stats. ch. 728.

¹⁰¹ S.B. 89 (Cal. 2000); CAL. PUB. RES. CODE § 72001.5 (West 2007).

¹⁰² CAL. PUB. RES. CODE § 7114 (West 2007).

¹⁰³ S.B. 828 (Cal. 2001); CAL. PUB. RES. CODE § 7113(6) (West 2007).

¹⁰⁴ See AM. BAR ASS’N & HASTINGS LAW SCH., *supra* note 86, at 12-59.

¹⁰⁵ These include requirements for conducting its business so as to effect the state’s EJ goal, ensuring greater public participation, improving research and data collection, and identify differential patterns of natural resources consumption – presumably with the goal of taking these patterns into consideration in developing agency policy. CAL. PUB. RES. CODE §§ 72000 (renumbered §§ 71110-71115 and amended by 2001 Cal. Stat. 765 (S.B. 828), §§ 3-7, 9 (West 2007)).

of all races, cultures, and incomes with respect to the development, adoption, implementation, and enforcement of environmental laws, regulations, and policies.”¹⁰⁶ Glaring is the absence of any reference to perennial EJ issues such as disparate impact and cumulative exposure, not to mention how state agencies are to analyze these problems. If the state’s legislative objective is to be met, lawmakers will have to refine the state’s environmental justice goals and develop more specific mandates for agency action.

IV. NEW YORK’S ENVIRONMENTAL IMPACT ASSESSMENT REVIEW

A. BACKGROUND ON SEQRA

Enacted five years after NEPA, the New York State Environmental Quality Review Act (“SEQRA”)¹⁰⁷ had similar goals “to inject environmental considerations directly into governmental decisionmaking.”¹⁰⁸ Like CEQA, SEQRA carries specific substantive mandates, requiring state agencies implicitly to weigh environmental concerns alongside other key considerations in the review process. Specifically, the law requires that the lead agency, “to the maximum extent practicable, minimize or avoid adverse environmental effects, including effects revealed in the environmental impact statement process.”¹⁰⁹ Moreover, SEQRA explicitly intends that agencies solicit public advice in identifying potential environmental impacts of state actions.¹¹⁰

Reauthorized by the Environmental Conservation Law,¹¹¹ the New York State Department of Environmental Conservation (“DEC”) administers SEQRA.¹¹² Procedurally, SEQRA is very similar to NEPA. Under DEC regulations, a lead agency must make an initial determination as early as possible whether SEQRA applies.¹¹³ Then, it

¹⁰⁶ CAL. GOV’T CODE § 65040.12(e) (West 2007).

¹⁰⁷ N.Y. ENVTL. CONSERV. LAW §§ 8-0101-8-0117 (McKinney 2007).

¹⁰⁸ Akpan v. Koch, 75 N.Y.2d 561, 569 (1990) (quoting Matter of Coca-Cola Bottling Co. v. Board of Estimate, 72 N.Y.2d 674, 679 (1988)).

¹⁰⁹ N.Y. ENVTL. CONSERV. LAW § 8-0109(1) (McKinney 2007).

¹¹⁰ *Matter of Jackson v. N.Y. State Urban Dev. Corp.*, 67 N.Y.2d 400, 414-415 (1986).

¹¹¹ The New York State Department of Environmental Conservation was originally created by Part 140 of the Laws of 1970 and reauthorized by the Environmental Conservation Law in 1975.

¹¹² N.Y. ENVTL. CONSERV. LAW § 8-0113 (McKinney 2007).

¹¹³ See, N.Y. ENVTL. CONSERV. LAW § 8-0109(4) (McKinney 2007). Most government “actions” whether statewide or local, especially those involving discretion approvals, are subject to SEQRA if they are undertaken, funded, or approved by an agency or involve planning, policy

must conduct an environmental assessment (“EA”), a process designed to identify environmental impacts.¹¹⁴ If the EA reveals the need for an EIS, the agency must issue a “positive declaration” and initiate the review process.¹¹⁵ Alternatively, if no significant impact is anticipated, the agency may issue a “negative declaration” and the environmental review ends.¹¹⁶ In determining significance, the agency must identify areas of environmental concern, set these forth in a written statement containing a “reasoned elaboration” along with supporting documentation of the issues, and take a *hard look* at them.¹¹⁷

Before an action may be taken, the lead agency must make the final EIS (“FEIS”) publicly available and issue its findings on the environmental analysis. The findings must meet specific statutory requirements. The lead agency must demonstrate it has considered the environmental impacts and balanced these against other factors associated with the action.¹¹⁸ Additionally, it must certify that the statutory requirements have been met and that the decision is consistent with economic and social policies as well as environmental protection.¹¹⁹

While SEQRA emphasizes a balancing approach, weighing environmental impacts against other considerations, including economic impact, in evaluating a given action, the quest for mitigation is one of the “fundamental objectives of the SEQRA process.”¹²⁰ Therefore, SEQRA

making or enactment of laws. N.Y. ENVTL. CONSERV. LAW §§ 3-0301(1)(b), 3-0301(2)(m), and 8-0113 (2007). However, those that are presumed to have *de minimis* environmental impacts are exempt. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.2(b) (2007).

¹¹⁴ N.Y. COMP. CODES R. & REGS. tit. 6, § 617.6 (a)(2, 3) (2007). SEQRA’s EIS threshold is “relatively low.” See *Chinese Staff v. City of N.Y.*, 502 N.E.2d 106, 179 (N.Y. 1986). An EIS is required if the EA reveals “the potential for at least one significant environmental effect.” N.Y. COMP. CODES R. & REGS. tit. 6, § 617.7 (a)(1) (2007). Cf. NEPA, which requires an EIS only where an action would “significantly affect[]” the environment. 42 U.S.C.A. § 4332(C) (West 2007).

¹¹⁵ N.Y. COMP. CODES R. & REGS. tit. 6, § 617.6 (a)(1) (2007); see *West Branch Assoc. v. Planning Bd. of Ramapo*, 576 N.Y.S.2d 675 (N.Y. App. Div. 1991).

¹¹⁶ N.Y. COMP. CODES R. & REGS. tit. 6, § 617.6 (b)(2) (2007).

¹¹⁷ N.Y. COMP. CODES R. & REGS. tit. 6, § 617.7 (b) (2007).

¹¹⁸ Factors to be weighed include social and economic benefits of the action.

¹¹⁹ The official agency findings must (1) describe the relevant environmental impacts, facts, and conclusions disclosed in the FEIS; (2) weigh and balance relevant environmental impacts with social, economic, and other considerations; (3) provide a rationale for the agency’s decision; (4) certify that the requirements of SEQRA have been met; and (5) certify that consistent with social, economic, and other essential considerations from among the reasonable alternatives available, the action is one that avoids or minimizes adverse environmental effects to the maximum extent practicable, and that adverse environmental impacts will be avoided or minimized to the maximum extent practicable by incorporating as conditions to the decision those mitigative measures that were identified as practicable. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.11(d) (2007); see also N.Y. ENVTL. CONSERV. LAW § 8-0109(8) (McKinney 2007).

¹²⁰ *In re Pyramid Crossgates Co.* (DEC Comm’r Decision, Sept. 18, 1981).

requires project applications to discuss mitigation explicitly,¹²¹ and it requires the lead agency to make a finding as to the adequacy of the mitigation measure¹²² and to demonstrate that adverse environmental effects have been mitigated.¹²³ Consistent with this policy, DEC has rejected EISs that have failed to discuss mitigation adequately.¹²⁴

In 2003, DEC issued Commissioner Policy (“CP”)-29, Environmental Justice and Permitting, which laid out DEC’s EJ policy.¹²⁵ The first and only one of its kind in New York State, CP-29 requires proponents of applications for permits in certain types of projects to conduct an EJ analysis as part of the environmental review process.¹²⁶ The EJ analysis requires an initial assessment of the potential for impact to an EJ community.¹²⁷ If this “screen” reveals such a potential, the project applicant must satisfy a set of additional procedural requirements as part of the environmental process. First, the project applicant must conduct a program of “enhanced public participation,” designed to ensure meaningful public participation in the review process.¹²⁸ Second, the applicant must complete a full environmental assessment form. Third, if an EIS is required,¹²⁹ the document must incorporate an EJ analysis. The EJ analysis must identify the potential EJ area to be affected, describe the existing burden, and evaluate the additional burden that may result from the project.¹³⁰ “The detail and depth of the analysis”

¹²¹ N.Y. COMP. CODES R. & REGS. tit. 6, § 617.9(b)(5)(iv) (2007).

¹²² N.Y. COMP. CODES R. & REGS. tit. 6, § 617.9(a)(4) (2007).

¹²³ N.Y. COMP. CODES R. & REGS. tit. 6, § 617.9(d)(5) (2007).

¹²⁴ See *In re Bouchard* (DEC Comm’r Interim Decision, Jan. 24, 1986) at 2 (“The Applicant acknowledges the loss of eight acres of wetland but proposed no mitigation or in the alternative only minimal mitigation or replacement.” A supplemental draft EIS was ordered); *In re Pyramid Crossgates Co.* (DEC Comm’r Decision, June 25, 1981) at 7 (“While potential mitigation measures have been identified, no recommendations . . . have been offered by the Applicant . . . to enable me to approve the project and fulfill my responsibilities with regard to SEQR.”)

¹²⁵ NYS DEC, CP-29 Environmental Justice and Permitting, DEC Policy (Mar. 2003), available at <http://www.dec.state.ny.us/website/ej/ejpolicy.html>.

¹²⁶ CP-29 applies only to applications for permits involved in air pollution control; state pollutant discharge elimination systems (for water-related activities), solid waste management, industrial hazardous waste management, and siting of industrial hazardous waste facilities. CP-29, *supra* note 125, at § V(A)(1).

¹²⁷ The initial screen is a two-step analysis: identification of the potential adverse impacts and a determination of whether an EJ community will be impacted. CP-29, *supra* note 125, at § V(B).

¹²⁸ DEC’s “enhanced public participation” protocol include the following elements: 1) identification of stakeholders, 2) distribution and posting of written information on the proposed and review process, 3) public information meetings, and 4) establishment of a document repository in or near the potential EJ community. CP-29, *supra* note 125, at § V(D).

¹²⁹ The standards for determining significance are not altered by the presence of an EJ community within an area. CP-29, *supra* note 125, at § V(H).

¹³⁰ CP-29, *supra* note 125, at § V(J).

is left to DEC discretion.¹³¹

DEC's definition of an EJ community incorporates racial and income components.¹³² Because the threshold is fairly high,¹³³ areas where disproportionate adverse impacts affect only pockets of concentrated minority residents may not be identified as EJ communities.

B. CASE STUDY OF A COMMUNITY STRUGGLE WITH EJ ANALYSIS: MANHATTAN BUS DEPOT SITING

The problem of proving disproportionate impact, given the high threshold and arbitrary geographic boundaries, was the problem West Harlem Environmental Action ("WE ACT")¹³⁴ faced in its Title VI complaint to the Federal Transit Authority ("FTA") against the New York City Transit Authority, a subsidiary of the state Metropolitan Transit Authority ("MTA").¹³⁵ Title VI of the Civil Rights Act of 1964¹³⁶ prohibits recipients of federal funding from discriminating "on the basis of race, color, or national origin."¹³⁷ In its complaint,¹³⁸ WE ACT averred, among other things, that MTA targeted communities of color in

¹³¹ CP-29, *supra* note 125, at § V(J).

¹³² CP-29, *supra* note 125, at § V(A). Income-based definition: Low-income EJ communities are those in a "census block group, or contiguous area with multiple census block groups, having a low-income population equal to or greater than 23.59% of the total population." CP-29, § V(A)(3). Low-income populations are those having an annual income that is less than the poverty threshold as established by the U.S. Census Bureau. CP-29, § V(A)(4). Race-based definition: Minority EJ community is a census block group, or contiguous area with multiple census block groups, having a minority population equal to or greater than 51.1% in an urban area and 33.8% in a rural area of the total population. CP-29, § V(A)(6). A minority population is one that is identified or recognized by the U.S. Census Bureau as Hispanic, African-American or Black, Asian or Pacific Islander, or American Indian. CP-29, § V(A)(7).

¹³³ See generally ENVTL. JUSTICE ADVISORY GROUP, RECOMMENDATIONS FOR THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION ENVIRONMENTAL JUSTICE PROGRAM 10 (2002), available at http://www.dec.ny.gov/docs/permits_ej_operations_pdf/ejfinalreport.pdf. See also AM. BAR ASS'N & HASTINGS LAW SCH., *supra* note 104, at 42.

¹³⁴ West Harlem Environmental Action (WE ACT), a community-based environmental justice organization, was formed in 1988 around the West Harlem (New York City) community's struggles to ensure that the North River Sewage Treatment Plant (a city-owned and operated sewage treatment facility located on the shores of the Hudson River in West Harlem) operated in compliance with state and federal permit guidelines intended to protect public health and environmental integrity.

¹³⁵ The MTA is a New York State public benefit corporation charged with the mission of providing mass transit services.

¹³⁶ 42 U.S.C.A. § 2000 *et seq.* (West 2007).

¹³⁷ 42 U.S.C.A. § 2000(d) (West 2007).

¹³⁸ WE ACT filed an administrative complaint in November 2000 with the FTA stating that MTA violated the FTA's Title VI regulation ("WE ACT Title VI Complaint"). Complaint Nos. 2001.0053 and 2001.0062.

Northern Manhattan in bus-depot siting decisions.¹³⁹ WE ACT based its assertion on an analysis of the racial composition and incomes of the depots' nearest neighbors by zip codes and restricted its discussion to depot sitings in Manhattan, not the outer boroughs of New York City, areas with their own special service needs.¹⁴⁰

MTA questioned WE ACT's methodology and instead used census-block data, in a protocol mirroring that of DEC,¹⁴¹ to show that the racial composition and income levels of its depot neighbors did not meet the EJ threshold.¹⁴² MTA also confused the service needs of the NYC's outer boroughs with the depot concentrations in Manhattan.¹⁴³ MTA further contended that it based depot-siting decisions on business considerations of cost-effectiveness of depot locations, ease of vehicle movement through traffic congestion, and service needs within its catchment area.¹⁴⁴

The Manhattan-specific, zip-code-based demographic analysis (a much more fine-grain analysis that captures residents who live closest to the polluting facilities than the broad-stroke census-block approach) revealed that bus depots were overwhelmingly sited in Northern Manhattan, an area with a higher-than-average population of African American and Latino residents.¹⁴⁵ By contrast, the MTA's census-block-

¹³⁹ Bus depots are facilities where transit buses are garaged and maintained. On a daily basis, buses idle as they undergo emission testing and other maintenance procedures. Idling activities cause significant air pollution, including emission of exhaust-associated carcinogens such as Polycyclic Aromatic Hydrocarbons (PAH), asthma triggers such as particulate matter, and smog precursors such as ozone and nitrogen oxides. As a result of the pollution depots, neighboring residents suffer some of the highest rates of asthma and other respiratory ailments (which create vulnerabilities to other diseases such as cardiovascular disease, diabetes, and obesity). P. Kinney, M. Aggarwal, M.E. Northridge, N.A.H. Janssen, & P. Shepard, *Airborne Concentrations of P.M.2.5 and DEP on Harlem Sidewalks: A Community Based Pilot Study* 108 ENVTL. HEALTH PERSP. 213-218 (2000); M.E. Northridge, J. Yankura, P.L. Kinney, R.M. Santella, P. Shepard, Y. Riomas, M. Aggarwal, P. Strickland, and the Earth Crew, *Diesel Exhaust Exposure Among Adolescents in Harlem: A Community-Driven Study*, 89(7) AM. J. PUB. HEALTH 998-1001 (July 1999). However, because the depots do not technically emit air pollution (buses and mobile sources are the actual sources of the emission), most legal consultants WE ACT spoke with advised WE ACT that they would not be subject to state or federal regulation of stationary sources. Ironically, because they do not move, depots are also exempt from mobile source regulations.

¹⁴⁰ WE ACT Title VI Complaint Petitioner's Counterresponse to Complaint Nos. 2001.0053, 2001.0062, at 16 (Apr. 2001).

¹⁴¹ See CP-29 *supra* note 125; MTA Respondent's Opposition to Complaint to Complaint Nos. 2001.0053, 2001.0062, at 14 (Mar. 2001).

¹⁴² MTA Respondent's Opposition to Complaint to Complaint Nos. 2001.0053, 2001.0062, at 14-16 (Mar. 2001).

¹⁴³ *Id.*

¹⁴⁴ MTA Respondent's Opposition to Complaint to Complaint Nos. 2001.0053, 2001.0062, at 14-20 (Mar. 2001).

¹⁴⁵ 27% and 36.8%, respectively, WE ACT Title VI Complaint Petitioner's to Complaint Nos. 2001.0053, 2001.0062, at 16 (Apr. 2001).

based approach showed that depot neighbors were almost as likely to be white as to be minority; in fact, in some areas, the majority of depot neighbors were white.¹⁴⁶ FTA agreed with MTA and dismissed the complaint.¹⁴⁷ Even though FTA conceded that depots in Manhattan were predominantly sited near minority residents, it found for MTA that the benefits of increased service efficiency offset the “inconvenience.”¹⁴⁸

Although WE ACT’s Title VI complaint was not filed as part of an environmental review process,¹⁴⁹ the Harlem community’s failed attempt to demonstrate the ill-defined concept of disproportionate impact to a distant, unfriendly bureaucracy (i.e., the FTA) is a relevant example of how the law skews the environmental quality analysis toward promoting industrial and commercial interests, even if such actions threaten the health of local communities. Harlem’s struggle also exposes the problems implicit in the balancing of the overall “economic and social benefits” of a project against the environmental dangers it poses—provisions that many states proudly tout as the “teeth” of their environmental review—because such balancing will inevitably result in host communities bearing the environmental burden in the pursuit of “the greater good.”¹⁵⁰ Moreover, lack of rigor in agency review of a project proponent’s analytical techniques will lead to a nonsensical menu of methodologies from which savvy lawyers can pick the option that best delivers their client’s desired outcome. The EJ challenge, therefore, is not simply to fold EJ concerns into the environmental review process but to ensure that agencies address these concerns explicitly and rigorously through the development of appropriate analytical tools.

¹⁴⁶ MTA Respondent’s Opposition to Complaint to Complaint Nos. 2001.0053, 2001.0062, at 15 (Mar. 2001).

¹⁴⁷ FTA, Ruling on Complaint Nos. 2001.0053, 2001.0062 (Nov. 2004).

¹⁴⁸ FTA, Ruling on Complaint Nos. 2001.0053, 2001.0062, at 13-16 (Nov. 2004). FTA, relying on MTA’s allegations, misstates the issues. As WE ACT made clear in its counterresponse, Northern Manhattan bore the burden of hosting bus depots without enjoying any benefits because over 50% of the bus lines housed in Northern Manhattan depots have service routes that start below 96th Street, the traditional boundary between the high-income Manhattan neighborhoods and the low-income neighborhoods of East, Central and West Harlem.

¹⁴⁹ In fact, the complaint was filed in part because the Harlem community was denied the opportunity to participate in the decisionmaking process around depot-siting determinations. Under the New York State Public Authorities Law, MTA is exempt from the environmental review process that is usually associated with state or municipal land use decisions.

¹⁵⁰ The EJ literature abounds with examples of why these host communities will overwhelmingly be communities of color and low-income residents. *See, e.g.*, LUKE W. COLE & SHEILA R. FOSTER, *supra* note 15.

V. CONCLUSION

Since the struggles in Warren County first began, environmental justice advocates have made great strides in the effort to address disparate impacts of pollution on communities of color and to achieve government accountability in the creation of environmental injustice. Our leaders have succeeded in placing the achievement of environmental justice on the national agenda and incorporating EJ concerns into the environmental review process at both federal and state levels—in addition to the federal executive orders on the issues,¹⁵¹ forty-one states have at least one program aimed at addressing EJ-related concerns.¹⁵²

However, a fundamental flaw of approaches to addressing EJ concerns at the environmental review level is that the lack of consistency in the tools for identifying the full suite of environmental justice issues (chiefly disparate and cumulative impacts) involved in any government action has given rise to what amounts to the arbitrary use of whatever method of analysis best suits the position government and industry wish to promote. As communities across the country have found, adding EJ issues to the list of concerns to be addressed in an environmental review process is only one piece of the larger plan needed to truly address them. The challenge for future environmental justice leaders is to push decisionmakers to adopt a set of standardized tools that will allow government to identify and address the EJ issues involved in its actions.

¹⁵¹ Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994); Exec. Order No. 13,166, 65 Fed. Reg. 50,121 (Aug. 11, 2000).

¹⁵² See AM. BAR ASS'N & HASTINGS LAW SCH., *supra* note 86, at 12-59.