Environmental Justice: Looking Beyond Executive Order No. 12,898

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I.
INTRODUCTION

In 1982, state officials in North Carolina announced that the predominately African-American community of Afton would host a poly-chlorinated biphenyl (PCB) landfill.[1] The state's siting decision was met by a strong protest with national support.[2] Opponents to the landfill argued that Afton was selected as a result of politics and that scientifically the site was not the most suitable.[3]

The North Carolina demonstration was the first protest attacking the social implications of a hazardous waste facility siting decision to gain nationwide attention. In the 1970s, minority resistance to the imposition of environmental threats upon minority communities was limited to small, local groups. However, minority communities gradually became aware that their neighborhoods were sustaining a disproportionately high burden from

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1. ROBERT D. BULLARD, DUMPING IN DIXIE: RACE, CLASS AND ENVIRONMENTAL QUALITY 35-36 (1990). *See also* Charles Lee, *Toxic Waste and Race in the United States*, in RACE AND THE INCIDENCE OF ENVIRONMENTAL HARZARDS: A TIME FOR DISCOURSE 10, 13 (Bunyan Bryant & Paul Mohai eds., 1992)(hereinafter A TIME FOR DISCOURSE).

2. Locally, citizens formed the organization Warren County Citizens Concerned About PCBs. The group was supported by national civil rights leaders and elected officials. BULLARD, *supra* note 1, at 37.

3. In fact, the site appeared dangerous. Afton residents derive their drinking water from wells a mere five to ten feet below the surface. Because Afton's water supply is so close to the surface it seemed inevitable that the PCB's would contaminate the town's water supply. *Id.* at 36-37 (quoting Ken Geiser & Gerry Waneck, *PCBs and Warren County*, SCI. FOR THE PEOPLE July-Aug. 1983, at 13, 17.

facility siting decisions.[4] Consequently, in the early 1980s, minority groups mobilized to fight against what they perceived to be discriminatory siting decisions.[5]

The mobilization of such groups gave rise to what is now called the environmental justice movement. In short, the movement seeks to remedy the inequitable distribution of environmental harm among communities. However, this goal is not one of achieving an equal distribution of pollution among all communities. Rather, the environmental justice movement's true goal is to achieve equal protection under environmental laws and policies for minority communities.

This comment explores the history of the movement and discusses how President Clinton's Executive Order on environmental justice responds to the movement's demand for justice. Part II of this comment defines environmental justice, breaking the problem into two distinct areas: siting decisions and enforcement of environmental laws. Part III analyzes the American public choice system, noting that its failures ultimately cause minority communities to sustain a disproportionate environmental burden. Part IV discusses the movement's attempt and failure to seek a legal remedy through the equal protection clause of the Fourteenth Amendment. Finally, Part V introduces Executive Order No. 12,898 and argues that the order will not provide any assurance of equal protection for minority communities unless a mandate is made by the President based on existing environmental laws.

II.
MINORITY COMMUNITIES SUSTAIN A DISPROPORTIONATE SHARE OF ENVIRONMENTAL BURDENS

A. *Siting Inequities*

The Afton citizens' challenge to North Carolina's siting decision failed, but not without consequence. After his participation in the Warren County protest, Congressman Walter E. Fauntroy requested that the United States General Accounting Office ("GAO") investigate "the socio-economic and racial composition of the communities surrounding the four major hazardous waste

4. *Id.* at 35.
5. *Id.*

landfills in the South."[6] The GAO responded and in 1983 concluded that a strong relationship existed between the location of hazardous waste facilities and the racial and socio-economic composition of the surrounding community.[7] In fact, three of the four landfills studied were located in communities whose population was predominately African-American and living below the poverty line.[8] Interestingly, although a large number of white communities were located in each region studied by the GAO, the burden was nevertheless placed on the minority communities.[9]

Although the GAO study focused on a limited region,[10] its alarming conclusions prompted the United Church of Christ's Commission for Racial Justice ("Commission") to conduct a nationwide study of the distribution of hazardous waste sites.[11] The

6. Paul Mohai & Bunyan Bryant, *Environmental Injustice: Weighing Race and Class as Factors in the Distribution of Environmental Hazards*, 63 U. COLO. L. REV. 921, 921 (1992).

7. U.S. GENERAL ACCOUNTING OFFICE, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES (1983) (hereinafter referred to as "GAO Siting Study").

8. *Id.* at 3. The siting process has become increasingly complex, "involving a broad range of interests and issues at the federal, state and local levels." James S. Freeman & Rachel D. Godsil, *The Question of Risk: Incorporating Community Perceptions Into Environmental Risk Assessments*, 21 FORDHAM URB. L.J. 547, 551 (1994). Freeman and Godsil outline and break down the decisionmaking process. First, a corporation or government commences the initial search by looking for the "proper location." After a site is deemed appropriate with respect to its physical attributes and cost, administrative agencies review the government's or the corporation's decision to determine whether the initial assessment of the site is reasonable. *Id.* at 551-55.

However, despite the apparent objectivity, certain factors of the decisionmaking process make the disparate figures regarding siting seem predictable. First, decisionmakers have political agendas that disrupt true objectivity. Second, minority communities lack the political resources necessary to insure equal consideration of their interests. *See infra* Part III.

9. *See* Robert D. Bullard, *In Our Backyards*, EPA J., Mar.-Apr. 1992, at 11, 12.

10. The Study focused on the EPA's Region IV, which encompasses Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina and Tennessee. GAO Siting Study, at 2.

11. COMM'N FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES (1987) (hereinafter referred to as "Church of Christ Study"). Many commentators regard the Commission's study as the most critical development for the environmental justice movement. John C. Chambers & Alyssa Senzel, *Our Racist Environment*, LEGAL TIMES, Sept. 12, 1994, at S27, S36. In addition to confirming the results of the GAO Siting Study that siting decisions disproportionately impact minority communities, the Commission identified the racial makeup of the community as "a stronger predictor of the level of commercial hazardous waste activity than

Commission focused on 1980 census data, analyzing both commercial hazardous waste facilities and uncontrolled toxic waste sites ("UTWS")[12] to determine if the facility sitings in the South were indicative of a national siting pattern through which minority communities sustain a disproportionate share of the burden.[13]

After examining 415 operating commercial hazardous waste facilities, the Commission found that, among the factors considered, the strongest relationship existed between race and facility location.[14] In fact, the average percentage of minorities living in areas with an operating hazardous waste site was twice that of the percentage of minorities living in areas without such facilities.[15] Further, in regions hosting two or more commercial hazardous waste facilities, the proportion of minority residents is more than triple the percentage seen in communities not hosting such a facility.[16]

The second part of the Commission's study examined the communities surrounding 18,164 UTWSs and found a similar pattern. The study found that three out of five African-Americans and Hispanic-Americans share their neighborhoods with UTWSs.[17]

1. Race as a Factor

The Commission's most significant conclusion was that race is the single best predictor of where commercial hazardous waste facilities are located, even when accounting for socio-economic factors.[18] The Commission noted "that as the number of a community's racial and ethnic residents increases, the probability that some form of hazardous waste activity will occur also increases."[19]

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was household income, the value of the homes, the number of uncontrolled toxic waste sites or the estimated amount of hazardous wastes generated by industry." Church of Christ Study at 13.

12. UTWSs are closed and abandoned sites on the EPA's list of sites posing a current or potential threat to human health and the environment.

13. *See* Church of Christ Study at 9-12.

14. *Id.* at 13. The Commission discovered "that the group of residential ZIP code areas with the highest number of commercial hazardous waste facilities also had the highest mean percentage of residents who belong to a racial and ethnic group." *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *See id.* The Commission used multivariate statistical techniques that factored socioeconomic characteristics of communities, such as average household income and average value of homes, and accounted for regional differences and urbanization. *Id.* at 15-16.

19. *Id.* at 17.

Since the Commission's conclusions in 1987, numerous studies have tested the claims of the environmental justice movement.[20] In short, the overwhelming majority of studies conclude that race is a strong predictor of the location of hazardous waste sites.[21]

However, environmental justice critics challenge the claim that all disparate impact is a result of discrimination. Some industry and government officials argue that siting decisions are based on race-neutral factors such as low-cost land, sparse populations and favorable geological conditions.[22] They suggest that minority communities and siting decisionmakers choose the same areas in which to live and site facilities for the same reason, the availability of inexpensive land.[23] Thus, critics argue, any disparate burden sustained by minority communities is incidental to objective siting decisions.

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20. *See, e.g.*, PAT COSTNER & JOE THORNTON, GREENPEACE, PLAYING WITH FIRE: HAZARDOUS WASTE INCINERATION (1990). Costner and Thornton concluded that communities hosting hazardous waste incinerators have 89% more minority citizens than the national average. *Id.* at 3.

In addition, The National Law Journal conducted a special report in 1992 on the environmental justice movement. The report focused on the relationship between race and the enforcement of environmental laws, and concluded that in minority communities penalties against polluters were lower and remedial action at toxic-waste sites was slower. *See infra* notes 55-59 and accompanying text.

However, certain studies have produced contrary results. *See* Chambers & Senzel, *supra* note 11, at S36. For example, the Social and Demographic Research Institute compared census tracts surrounding approximately 450 hazardous waste facilities to tracts without such facilities and found that census tracts hosting facilities were predominately white. This study is typically criticized for its focus on urban areas and its exclusion of many rural areas and smaller cities and towns. *See id.*

21. One recent study concluded that a minority citizen has a 47 percent greater chance of living near such a facility than a white citizen. *See 'Environmental Racism' Worsens*, American Lawyer Media, Aug. 25, 1994, at 3, LEXIS.

First, the studies ignore population densities, causing misleading results by not indicating the overall population size impacted. Second, the studies assume there is a risk to living near environmental facilities even though a facility may be technically sound. Christopher Boerner & Thomas Lambert, *Environmental Injustice*, THE PUB. INTEREST, 61, 67-68 (1995). Finally, critics conclude that the studies fail to prove "discriminatory sitings . . . caused present environmental disparities." *Id.*

22. *See* Shiela Foster, *Race(ial) Matters: The Quest for Environmental Justice*, 20 ECOLOGY L.Q. 721, 729 (1993). As a spokesman for Waste Management, Inc. pointed out, "[facility owners] locate [their] sites based on transportation corridors, availability of land, the environmental and geological conditions of the land. The makeup of the community has nothing to do with the siting of any of our sites." David Hoye, *Why Are Toxic Industries Most Often Found In Minorities' Neighborhood?*, THE PHOENIX GAZETTE, Apr. 25, 1993, at G1 (quoting Charles Coughlin).

23. *See* James H. Colopy, *The Road Less Travelled: Pursuing Environmental Justice Through Title VI of the Civil Rights Act of 1964*, 13 STAN. ENVTL L.J. 125, 133 (1994) (citing Joan Z. Bernstein, *The Siting of Commercial Waste Facilities: An Evolution of Community Land Use Decisions*, KAN. J.L. & PUB. POL'Y, 83 (1991).

Some commentators question the correlation between disparate burden and intentional race-based siting decisions.[24] Consequently, they offer several alternative explanations for the apparent disparate impact. Professor Been suggests that a neighborhood selected for a hazardous waste facility may not have been populated by minorities when the siting decision was made.[25] Been argues that imposing such a facility may cause wealthier residents to move to better neighborhoods, leaving behind cheap housing. Because minority residents' mobility is limited by such factors as housing discrimination, a large minority population may be attracted to such an area.[26] Thus, the demographics of the communities is a product of "white flight," not purposeful discrimination.

To illustrate the uncertainty with which current research can predict the cause of the apparent disparate impact sustained by minority communities, Been extended and compared two studies: the GAO Siting Study[27] and a study conducted by Professor Bullard in Houston, Texas.[28] By looking at census data from the time siting decisions were made, the two studies uncovered conflicting results. Extending the GAO Siting Study, Been discovered that market dynamics did not alter the subsequent racial composition of the community.[29] In other words, the four GAO sites were predominantly African-American both at the time of, and after the initial siting. However, events that would occur as a result of market dynamics *were* found in the extended Houston study.[30] For example, while the percentage of African-Ameri-

24. In fact, proving the "intent" to discriminate has been an insurmountable obstacle for the environmental justice movement in litigation. Many groups have brought lawsuits against producers and government agencies to enjoin the siting of projects in predominantly minority neighborhoods, but were unsuccessful as a result of their failure to prove intent. *See infra* section IV.

25. Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 YALE L.J. 1383, 1384-85 (1994). Been criticizes existing studies for focusing on the *current* socio-economic and racial composition of host communities, arguing that such an approach overlooks the possibility that other factors caused the community to subsequently become predominantly minority. *Id.*

26. *See* Vicki Been, *Siting of Locally Undesirable Land Uses: Directions for Further Research*, 5 MD. J. CONTEMP. LEGAL ISSUES 105 (1994).

27. GAO Siting Study, *supra* note 7.

28. Robert D. Bullard, *Solid Waste Sites and the Black Houston Community*, 53 SOC. INQUIRY 273 (1983).

29. Been, *supra* note 25, at 1398-99. Indeed, the percentage of minority residents in neighborhoods hosting the facilities studied actually declined slightly following the facility siting. *Id.*

30. *Id.* at 1403-05.

cans increased in all but one region studied, housing values declined relative to surrounding areas.[31]

2. Minority Communities Targeted

Even though discriminatory intent is not easily proved and market dynamics may contribute to the concentration of hazardous waste facilities in minority communities, the disparate impacts are sufficiently burdensome to raise suspicion that a more fundamental problem exists in environmental siting decisions. The Commission's study concluded that many minority communities are particularly vulnerable given their depressed economies and need for employment.[32] Therefore, producers seeking to reduce costs and minimize resistance to the siting of a potentially hazardous facility look to such communities first.[33] Producers make facilities appear attractive by pointing to the employment and tax benefits. Ultimately, financially struggling communities agree to host dangerous facilities despite health concerns.[34] The community is effectively blackmailed into accepting the facility.

Because industries often take the path of least resistance,[35] minority communities are likely targets for siting proposals. While wealthier communities have the financial and political clout to access the siting decision process,[36] minority communities lack the resources necessary to lobby against a project. Thus, envi-

31. *Id.*

32. Church of Christ Study, *supra* note 11, at 7. *See also* Rachel D. Godsil & James S. Freeman, *Jobs, Trees, and Autonomy: The Convergence of the Environmental Justice Movement and Community Economic Development*, 5 MD. J. CONTEMP. LEGAL ISSUES 25, 26 (1994).

33. In fact, in 1984 a consulting firm advised the California Waste Management Board that political opposition to incinerators would be least in "rural communities, communities with low education levels, communities under 25,000 residents, and communities that were largely employed in . . . agriculture." Luke W. Cole, *The Struggle of Kettleman City: Lessons for the Movement*, 5 MD. J. CONTEMP. LEGAL ISSUES 69-70 (1994)(citing J. STEPHEN POWELL, CERELL ASSOCIATES, POLITICAL DIFFICULTIES FACING WASTE TO ENERGY CONVERSION PLANT SITING, REPORT TO THE CALIFORNIA WASTE MANAGEMENT BOARD (1984)).

34. While such a tradeoff may not seem unreasonable, the offered advantages do not always materialize. First, hazardous waste facilities are capital intensive operations which cause only minimal increases in employment. Second, tax revenues often are not earmarked for return to the burdened community. For example, in Kettleman City, California the tax revenue generated by a toxic waste dump was used in non-burdened cities forty miles from the host city. *Id.* at 76.

35. *See supra* note 33 and accompanying text.

36. As discussed in section III.2 *infra*, government officials try to avoid controversy in order to protect and strengthen their agency and their position within the

ronmental justice critics argue that siting decisions are not made with a discriminatory purpose, but such socio-economic factors as those outlined above show race remains an important factor in the siting of waste facilities. Moreover, the mere absence of an intent to discriminate does not prove that decisionmakers always act in a manner producing equitable results.[37]

B. *The Execution of Environmental Laws and Programs*

Environmental justice advocates typically cite examples of hazardous waste facility sitings to illustrate the injustice caused by the execution of environmental policy. However, they do not seek to remove all such facilities or to distribute the pollution evenly over all communities. One commentator notes that " '[t]he keystone of this quest for justice is equal protection, not equal pollution.' "[38] In virtually every area of environmental law, minority communities bear an unfair share of the burden. Environmental justice advocates argue that the government's failure to give proper consideration of minority communities' interests causes inequities among communities. Thus, the true goal of the environmental justice movement is to achieve *fair consideration* under environmental laws and policies.

Clearly, minority communities sustain a disproportional environmental burden. Moreover, the disproportional exposure to environmental threats necessarily leads to a higher risk to human health.[39] Such exposure may contribute to the poor health of mi-

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agency. Thus, it is inevitable that the interests of powerless minority communities will receive less consideration by decisionmakers.

37. As discussed in section III, *infra* decisionmakers allow their own political agendas to interfere with what should be objective decisionmaking.

38. Colopy, *supra* note 23, at 126 (quoting Deeohn Ferris, *A Challenge to EPA*, EPA J. Mar.-Apr. 1992, at 28).

39. Given the number of environmental risks to which minorities are exposed daily, efforts to detect the actual human health effects of long-term exposure to toxins in minority communities are difficult. *Id.* at 137 n.46 (citing RESPONSES BY THE ENVIRONMENTAL PROTECTION AGENCY TO QUESTIONS BY THE UNITED STATES COMMISSION ON CIVIL RIGHTS ON ENVIRONMENTAL EQUITY AND CIVIL RIGHTS ENFORCEMENT 4-5 (1993)).

Poor diets, high exposure to toxins in the workplace and smoking habits complicate studies attempting to link certain chemicals to health problems. For example, government scientists found inconclusive the evidence suggesting a link between the 500 carcinogenic chemicals emitted in a southeast Chicago region and excessive rates of prostate, bladder and lung cancer. The team of scientists noted that the interference of such factors as work exposure, ethnicity and smoking habits makes finding a link too uncertain. *See id.* at 138 n.47(citing Josh Getlin, *Fighting Her Good Fight*, L.A. TIMES, Feb. 18, 1993, at E2). The limited access to health care by minority communities compounds the problem. *Id.* at 137 n.45.

nority Americans as compared to that of non-minority communities.[40] Despite the risk resulting from cumulative exposure, government action often fails to treat problems adequately. In West Dallas, for example, decades of unregulated pollution left the predominately minority community contaminated by lead.[41] Although the state ordered RSR Corp., one of three companies that spewed lead onto the city for more than 50 years, to clean contaminated communities, the problem lingers.[42] "The cleanup was monitored by the city, the state, and the [EPA]".[43] However, enforcement actions were taken only after personal-injury suits were filed against RSR[44] and Congress held hearings in 1983 to determine why the EPA had not acted earlier.[45] Moreover, the EPA determined that the RSR clean-up was complete despite warnings by the Center for Disease Control ("CDC") that the region's lead levels remained twice that of the acceptable level.[46] As this case and others like it illustrate,[47] equal protection is not achieved merely by *implementing* an environmental program fairly, but rather the subsequent enforcement of the program is critical to protecting human health.

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40. Jane Kay, *Minorities Bear Brunt of Pollution*, S.F. EXAMINER, Apr. 7, 1991, at A1, A12 (noting that minority communities sustain the largest amount of waste discharge).

41. *See* Claudia MachLachlan, *Unto the Third Generation*, NAT'L L.J., Sept. 21, 1992, at S11.

42. *Id.*

43. *Id.*

44. *Id.* In 1985, RSR settled a suit brought against them by 370 children poisoned by lead for $2 million. *Id.*

45. *Id.* Local protests also failed. Luis Sepulveda, leader of the West Dallas Coalition for the Environment, claims that "his group has had to picket EPA offices and disrupt Dallas City Council meetings before action was taken." *Id.* Also, Rev. R.T. Conley, pastor of the New Waverly Baptist Church in West Dallas, claims that state and city officials have denied or not responded to compliants starting in the 1950s regarding the high levels of sickness in the community. *Id.*

46. *Id.* The CDC reported that children living near the RSR plant maintained high levels of lead at the time the EPA announced the project was completed. In fact, CDC recommended more testing to determine the source of the lead. *Id.*

47. The federal government hesitated to respond to the complaints of African-American families in Chicago despite the growing concern that rampant disease was linked to 50 abandoned factory dumps. *See* Marianne LaVelle & Marcia Coyle, *Unequal Protection: The Racial Divide in Environmental Law*, NAT'L L.J., Sept. 21, 1992, at S1, S2.

In Tacoma, Washington paper mills and other industrial polluters contaminated salmon streams and deprived a Native American tribe of "its way of life." Despite this harm, the government did not consider the Native American tribe when analysing the pollution's health effects on residents. *Id.* In another instance, the government failed to take steps to stop the migration of contamination into a water supply of a predominantly Hispanic neighborhood in Tucson, Arizona. *Id.*

Generally, the EPA contends that environmental laws are enforced on a case-by-case basis, considering "science, the size and legal complications particular to each toxic waste site or illegal pollution case."[48] Although environmental justice advocates recognize science as a factor, politics remains a critical component in the execution of environmental programs. Because the EPA lacks the resources necessary to address the multitude of problems that arise, the EPA must prioritize projects.[49]

In 1992 the National Law Journal conducted a special investigation to determine the effectiveness of the EPA's environmental policies.[50] The study found that (1) penalties under hazardous waste laws are up to 500 percent greater in white communities,[51] (2) it takes 20 percent longer for hazardous waste sites in minority communities to be placed on the national priority action list, and (3) clean-up projects in minority communities begin up to 42 percent later than in white communities.[52] The report seems to

48. *Id.*

49. Although Congress has made progress in protecting the environment by developing an ambitious set of programs, it has failed to provide adequate funding for the implementation of its plan. Richard J. Lazarus, *The Meaning and Promotion of Environmental Justice*, 5 MD. J. CONTEMP. LEGAL ISSUES 1, 5 (1994).

In short, government agencies are less responsive to minority communities. Wealthier communities, possessing the resources necessary to access the public choice system, are capable of voicing politically stronger demands. Consequently, minority communities do not receive fair consideration under environmental programs. *See infra* section III.2. Moreover, racial motivation is not necessary to cause a disparate impact. "[F]actors as basic as whether EPA inspectors prefer to spend their time inspecting a facility in the suburbs rather than in poor urban ghettos can skew enforcement efforts." *Id.* at 5. Nonetheless, this approach often neglects the communities in greatest need of assistance.

Thus, the failure of agencies to respond to the needs of the community as a whole over the interests of stronger groups causes injustice in the enforcement of environmental programs. For example, the Department of Energy found that a greater percentage of African-Americans and Hispanics live in regions "where the pollution levels are high enough to violate the standards of the Clean Air Act." *Unequal Protection, supra* note 47, at S4. However, 78.7 percent of the population that have benefitted from CAA cases have been white. *Id.* at S4, S6.

50. *Id.* at S1.

51. *See id.* at S2. Under environmental laws fines are a critical deterrent for hazardous activity. Failures to impose equitable fines encourage developers to target minority communities. *Id.* at S4 (noting that "violators are driven to minority communities because penalties there are low enough to be discounted as a cost of doing business.")(citing Robert D. Bullard). This is problematic, as professor Bullard points out, because " 'companies are trading off [ ] a minuscule part of the profit, . . . [while] residents living in impacted areas are trading off . . . their health.' " *Id.*

52. *Id.* at S2. Events similar to those in West Dallas occurred in Albuquerque, New Mexico. Despite many complaints from local residents over the continuous emissions of formaldehyde laced sawdust into the community, the environmental

indicate that decisionmakers are better prepared to respond to non-monority communities and with a stronger response.

Even when the government does act to clean up hazardous sites, minority communities generally receive less stringent programs. At minority sites, the EPA chooses "containment" more frequently than permanent "treatment," the method preferred under the law.[53] In contrast, the EPA orders treatment 22 percent more often in white communities than in minority communities.[54] Thus, while wealthier communities receive very ambitious cleanup programs, minority communities typically have a cap placed on contaminated sites.

III.
GOVERNMENT DECISIONS

The evidence currently available clearly demonstrates that minority and low-income communities sustain a disproportionate burden, but the reasons for this inequity remain unclear. Although environmental laws are based on technical standards, their implementation requires more than science. Professor Denis Brion attempted to find a more fundamental explanation for this apparent inequity.[55] Brion used the Weston struggle to ar-

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health department refused to respond. *See* Marcia Coyle, *When Movements Coalesce*, NAT'L L.J., Sept. 21, 1992, at S10.

53. *Unequal Protection*, *supra* note 47, at S6. Basically, when the EPA treats a site the hazardous waste, and thus the resulting danger to health, is completely removed. At sites receiving "containment," the waste remains at the site while a cap — essentially an outer layer of material — attempts to prevent the hazardous material from escaping into the environment.

54. *Id.*

55. *See* Denis J. Brion, *An Essay on LULU, NIMBY, and the Problem of Distributive Justice*, 15 B.C. ENVTL. AFF. L. REV. 437 (1988).

Brion appropriately began his analysis by detailing the political struggle between Boston communities over a solid waste facility. In 1983, after debating the most acceptable methods for disposing of solid waste, Boston officials planned to locate a solid waste incinerator near the densely populated, moderate income area of South Boston. *Id.* at 439 (citing Larry Tye, *No Easy Task to Find Site for Trash Facility*, BOSTON GLOBE, July 22, 1987, at 1, col. 4). Shortly before the project was to begin, however, William Bulger, the politically powerful president of the Massachusetts Senate and South Boston's representative, won senate passage of a bill that would prevent the construction of the incinerator. *Id.*(citing Bruce Mohl, *Bulger Stuns HUB Officials by Opposing Incinerator*, BOSTON GLOBE, July 16, 1987, at 1, col. 1). In September 1987 Bulger proposed locating the incinerator at a site in the highly affluent suburban community of Weston, an area far superior in engineering criteria like size, site characteristics, zoning, and transportation access. *Id.*(citing Bruce Mohl, *Bulger Proposes Weston Trash Site*, BOSTON GLOBE, Sept. 17, 1987, at 1, col. 1). Due to its affluence, however, Weston could protect itself through its political significance. Indeed, only two months following this proposal, the Governor forged

gue, in short, that "there is a large gap between promise and performance in our political structure of participatory democracy."[56] In theory, our public choice processes are open and responsive to everyone. However, experience proves that this theory is more myth than reality. As Brion points out, "[a]ffluent communities do not find themselves [burdened] by waste disposal facilities; modest communities do."[57] But why does our public choice system produce inequitable results? Brion argues that there are two reasons: First, the operation of government precludes groups with lesser resources from receiving fair consideration of their interests, and second, the decisionmakers' personal agenda prevents purely objective action.

1. Unequal Access to Public Choice Process

Generally, our public choice system permits all citizens interested in an issue to participate in the decisionmaking process. Moreover, the intensity of one's interest will be factored in when the government weighs competing interests. Theoretically, "any political decision will account accurately for the variety and intensity of the positions of the citizenry on the matter at issue."[58] Brion argues, however, that to participate adequately in the process, one must possess two types of resources — "those that enable participation and those . . . that provide the substance participation."[59] But these resources are not distributed equally among interested parties.

The first type of resource includes the minimum requirements for participation. A citizen must have time to participate, skills at presentation and negotiation, and a firm understanding of both the public choice process and the operation of the government entities involved in the issue.[60] In theory, these resources are available to everyone. Indeed, no citizen is affirmatively precluded from developing them. However, practically-speaking, the cost of acquiring these resources may prohibit many groups from developing them.[61]

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a compromise to establish a recycling facility at the originally proposed and rejected South Boston site. *Id.* at 440(citing Peter B. Sleeper, *New Plan Reported for HUB Trash*, BOSTON GLOBE, Dec. 20, 1987, at 1, col. 5).

56. *Id.* at 440.
57. *Id.*
58. *Id.* at 444.
59. *Id.*
60. *Id.*
61. *Id.*

Recent events in Kettleman City, California, illustrate how an inequity of this type of resource favors organized and well-funded groups.[62] After negotiating with the Kings County Planning Commission, the owner and operator of the toxic waste dump located in Kettleman City, Chemical Waste, Inc. ("Chem Waste"), proposed to build an incinerator at the dump. Ultimately this would have resulted in an additional 200 million tons of toxic waste being transported to and burned in the city each year. Despite the environmental risk this project would have imposed upon the city, neither the Planning Commission nor Chem Waste informed the people of Kettleman City of the proposal. On the day of the hearing at which the Planning Commission voted on the proposed incinerator, Greenpeace informed the previously unaware residents about the proposal. The residents capable of attending the hearing appeared before the Planning Commission and asked to be heard. The Planning Commission denied their request and instructed the group to move to the back of the room to develop a consolidated statement. The group protested further, but to no avail. Ultimately, the proposal was approved.

Technically the people of Kettleman City participated in the decision process. The group utilized the hearing to present their interests to the decisionmakers. However, Chem Waste's ability to formally negotiate with the Planning Commission made approval of the project inevitable. This close contact enabled Chem Waste to successfully lobby for the Planning Commission's approval.

The events in Kettleman City show how the decisionmaking process does not always reflect the aggregate interest of society.[63] On a particular issue, the aggregated interest of consumers may outweigh the interest of the producers. However, many consumers will not participate individually since the cost of participa-

62. The following events are detailed by Luke Cole, a leading commentator on the environmental justice movement, in a recent law review article. Cole, *supra* note 33.

63. In fact, no interest held by Kettleman City was adequately represented. Chem Waste, a corporation from the East Coast, and the Planning Commission, comprised of members who lived outside of Kettleman City, appeared to have ulterior motives for approving the project. Evidence suggests that the tax revenue gained by the existing dump was not used in Kettleman City, the community which sustained the burden of the dump. Rather, the tax money was spent on programs in the non-burdened, non-minority cities in which the five members of the Planning Commission lived. *Id.* at 76.

tion[64] outweighs the intensity of their individual interests.[65] On the other hand, the potential benefits a single producer would receive from approval of a project are typically greater than those of the individual consumer. Thus, a producer will expend the necessary resources to participate in the public choice process despite the significant costs of doing so.[66] As a result, the inequity of costs and benefits between consumers and producers creates a bias in favor of producers.[67]

The second type of resource described by Brion comprises the substance of the participation.[68] In addition to advocacy, detailed and technical information is often required to affect the decisionmaking process. Most public decisionmakers, both elected officials and bureaucrats, lack expertise on every issue. Therefore, government officials must rely on the information presented to them by interested parties.[69] However, many public decisions involve information which is readily available to producers, but which is prohibitively costly for government and consumers to obtain.[70]

In the case of Kettleman City, there was a scientific element to the decisionmaking process. The interest group opposing the incinerator had little to offer in terms of scientific data. Being comprised mostly of non-English speaking farm workers, the group lacked the expertise necessary to prove the incinerator would have an adverse health effect. Chem Waste, on the other hand, presented detailed pollution mitigation plans.[71] Because the members of the Planning Commission lacked formal scien-

64. This cost may be measured in terms of time, money, or some other resource sacrificed by the participant.

65. *See* Brion, *supra* note 55, at 444(citing RANDALL BARTLETT, THE ECONOMIC FOUNDATIONS OF POLITICAL POWER 59-79 (1973)).

66. *Id.*

67. *Id.* at 445(citing Gregg Easterbrook, *What's Wrong With Congress?*, THE ATLANTIC, Dec. 1984, at 57, 75 (noting that in 1984, there were roughly thirty-seven lobbyists for every member of congress)).

68. *Id.*

69. *Id.*

70. *Id.*

71. Of course, this presents another problem. Independently, proposed projects often safely mitigate adverse effects. However, when a number of "independently safe" activities are conducted in one region, cumulative and synergistic effects arise. A governmental agency can justify its decision by looking at the producer's scientific data, but such an approach overlooks the ultimate health implications of the project. Lauretta M. Burke, ENVIRONMENTAL EQUITY IN LOS ANGELES (National Center for Geographic Information and Analysis Technical Report 93-6, 1993) (drawing a direct relationship between the minority population and the number of polluting facilities in Los Angeles).

tific training, they inevitably relied on the advice of the producers. However, when the government relies solely on producers for information, it loses objectivity. In such a case, the party lacking resources becomes peripheral and, ultimately, the government's reliance becomes dependence on the position advocated by the information provider.[72] Consequently, the government begins to identify with this party's objective.[73]

The central question is *which* groups receive the most intense support of the government. Concentrated interests, organized and capable of mobilizing easily, can communicate precise policy messages to government officials in an effective manner.[74] As a result, "they lavish special attention on the relevant committee and subcommittee members."[75] Decisionmakers know that these groups are more attentive to governmental action and will demonstrate their appreciation or disapproval during election months.[76] Thus, a group with sufficient resources to enable it to reach members will receive the most intense support of its interests.[77]

2. The Standard Model

Brion thus argues that the two types of decisionmakers, elected officials and bureaucrats, each has a personal agenda.[78] First, elected officials conduct business in the manner most likely to lead to re-election,[79] which is to cater to the interests of the constituency that elected them. "Most of what a Member of Congress does amounts to what is euphemistically called 'constituent service,' which in reality is giving specific advantages to individuals in the Member's constituency."[80]

In 1980 for example, John P. Hiler of La Porte, Indiana was a Republican freshman in Congress. Because of Hiler's obsession with macroeconomic and defense issues and his unwillingness to

72. Brion, *supra* note 55, at 445.
73. *Id.*
74. DOUGLAS ARNOLD, THE LOGIC OF CONGRESSIONAL ACTION 3 (1990).
75. *Id.*
76. *Id.*
77. "[L]egislators work hard to identify issues that could be used against them and to discover the safest position on each issue. At times these calculations impel legislators to follow the intense preferences of a small minority . . . ." *Id.* at 267.
78. Brion, *supra* note 55, at 443.
79. *Id.* at 443 (citing Fred Barnes, *The Unbearable Lightness of Being a Congressman*, THE NEW REPUBLIC, Feb. 15, 1988, at 18 (noting that "[n]othing concentrates the mind of a congressman like fear of losing his job.").
80. *Id.*, at 443 n.26.

diverge from a path of Reaganomics, he was characterized by the media as a "Reagan robot."[81] After Hiler's neglect of local issues nearly cost him his seat in the 1982 election,[82] he focused his attention on gaining his districts's support. Although he opposed Urban Development Action Grants ("UDAGs"), Hiler sought actively several such grants for his district. In fact, Hiler attempted to change the rules for UDAGs to make it easier for his district to obtain them.[83]

Bureaucrats also have personal agendas. Although bureaucrats tend to be politically neutral, they are often biased.[84] Brion points out that bureaucrats try to maintain bureaucratic stability and work to strengthen their particular bureau and their position within it.[85] To further this objective, bureaucrats typically avoid making controversial decisions that might disrupt agency activity.[86]

The bureaucratic structure often precludes equal consideration of competing interests. For instance, when implementing or enforcing environmental laws, EPA's programs tend to affect politically powerless minority communities disproportionately. For example, recent studies indicate that communities hosting hazardous waste incinerators have 89% more minorities than the national average.[87] Because minority communities often lack the political and economic resources necessary to participate in the decisionmaking process,[88] more affluent communities can exert their financial and political clout to achieve favorable results.[89] Eager to avoid a clash with such a community, the government, will switche targets and focus on politically powerless minority communities.[90] "Those who complain, who have greater access, who know how to tweak [the government] to do something, are

81. Barnes, *supra* note 79, at 18.

82. *See id.* at 18-19. Among other incidents, Hiler refused to help the United Auto Workers persuade the Bendix Corporation, South Bend's largest employer, to abandon its plans to move out of the region. Hiler explained that "[Bendix] should be allowed to move freely." *Id.*

83. *Id.* at 19.

84. Brion, *supra* note 55, at 443.

85. *Id.* at 443-44.

86. *Id.* at 443.

87. *See*, Costner & Thorton, *supra* note 20.

88. *See supra* section III.1.

89. Harvey L. White, *Hazardous Waste Incineration in Minority Communities*, in A TIME FOR DISCOURSE, *supra* note 1, at 126, 134-35.

90. *See* Conner Bailey & Charles E. Faupel, *Environmentalism and Civil Rights in Sumter County*, in A TIME FOR DISCOURSE, *supra* note 1, at 140, 150-51.

more likely to get the attention of very busy people. And the people with greater know-how are generally those with greater political and economic resources, who tend to be white."[91]

Although minority communities are more often chosen for environmental programs, the EPA offers these communities less attention after the site is completed or the program is in effect. Not only is the EPA slower in responding to problems in minority communities, but fines imposed on producers unlawfully polluting in such regions are substantially lower than in other areas.[92] Moreover, when the EPA responds, it accepts solutions less stringent in minority communities than those recommended by the scientific community.[93]

The lack of resources possessed by minority communities, combined with the biases maintained by government officials at all levels, prevents minority communities from reaching decisionmakers and receiving fair consideration of their interests. Minority communities lack the resources necessary to have a direct impact on decisionmakers' agendas, and therefore receive little response from them.

IV.
JUDICIAL ACTION FAILS TO SOLVE INEQUITIES

Minority communities suffering a disproportionate burden from environmental programs have sought judicial action to remedy the alleged injustice. In the environmental justice context, plaintiffs typically approach the apparent inequities from a civil rights perspective. Arguing that a government decision to site a facility in a minority community was discriminatory, litigants have often brought claims under the Equal Protection Clause of the Fourteenth Amendment.[94]

The major obstacle for environmental justice litigants bringing equal protection claims has been the requirement of proving an intent to discriminate. To prove discriminatory intent, a litigant

91. Richard J. Lazarus, cited in *Unequal Protection, supra* note 47, at S4; *see also supra* note 33.

92. The National Law Journal conducted a special investigation to determine the effectiveness of the EPA's environmental policies. *Unequal Protection, supra* note 47, at S1.

93. *See supra* notes 41-45 and accompanying text.

94. *See, e.g.*, Bean v. Southwestern Waste Management Corp., 482 F. Supp. 673 (S.D. Tex. 1979), *aff'd without op.*, 782 F.2d 1038 (5th Cir. 1986); R.I.S.E., Inc. v. Kay, 768 F. Supp. 1144 (E.D. Va. 1991), *aff'd without op.*, 977 F.2d 573 (1st Cir. 1992).

must prove that the defendant acted with a racially discriminatory purpose. Since the 1970s, the Supreme Court gradually has narrowed its interpretation of intent to exclude cases that infer intent from the apparent discriminatory effects of an act.[95] Thus, for an environmental justice litigant to successfully establish an equal protection claim, the claimant must prove that the government chose a particular environmental program based on race.[96]

Courts consistently reject claims of equal protection violations that fall short of providing clear evidence of intentional discrimination. In *Bean v. Southwestern Waste Management Corp.*,[97] the plaintiffs moved to enjoin the siting of a solid waste disposal facility in a predominantly African-American community.[98] The claimants presented statistical evidence showing the state routinely sited similar facilities in minority communities.[99] The court ruled that although the siting decision seemed "insensitive and illogical", the plaintiffs failed to prove the state acted with a discriminatory intent.[100]

In a more recent case, a district court in Virginia did not find an equal protection violation in spite of alarming circumstances. In *R.I.S.E., Inc. v. Kay*,[101] the plaintiffs sued to prevent the siting of a landfill in a predominantly African-American community. Although the plaintiffs established that a pattern of siting landfills in minority communities existed in the area,[102] and the court itself found that the landfill siting disproportionately impacted African-Americans, the court rejected the plaintiffs' equal pro-

95. This strict rule applies even when the plaintiff presents explicit and unambiguous evidence of racially disproportionate consequences. *See* Colopy, *supra*, note 23, at 146. Commentators find four policy reasons for not adopting a discriminatory impact standard:

(1) the impact standard would be too costly for the government;
(2) under an impact standard, "innocent" people would bear the cost of remedying the harm;
(3) the impact test is inconsistent with traditional equal protection doctrine, since the judicial decisionmaker would need to explicitly consider race; and
(4) it would be inappropriate for the judiciary to remedy the impact of otherwise neutral governmental action at the expense of other legitimate social interests. Colopy, *supra* note 23, at 146.

96. *Id.* at 147

97. 482 F. Supp. 673 (S.D. Tex. 1979).

98. The proposed site was within 1,700 feet of a predominantly African-American high school. *Id.* at 679.

99. *Id.* at 677-78.

100. *Id.* at 681.

101. 768 F. Supp. 1144 (E.D. Va. 1991).

102. The three other landfills in the region were all located in neighborhoods comprised of at least 95% African-American residents. *Id.* at 1148-49.

tection contention,[103] and concluded that they did not substantiate a claim of "intent" to discriminate.[104]

Given the strict judicial requirements for finding intent, it is unlikely that claimants will successfully litigate an environmental justice equal protection claim.[105] Because environmental programs are based on scientific principles, it is easy for the government to justify its decisions as race-neutral.[106] Thus, the difficulty with which plaintiffs can prove intent, coupled with the policy reasons for not adopting a disparate impact test,[107] make it unlikely for environmental justice advocates to make strides toward equity under the equal protection doctrine.[108]

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103. *Id.*

104. *Id.*

105. Nevertheless, environmental justice advocates are not abandoning equal protection claims. In fact, the West Dallas Coalition for Environmental Justice, a grassroots movement, filed a complaint against the EPA in 1992 alleging equal protection violations. *See* Colopy, *supra* note 23, at 150 (citing West Dallas Coalition for Envtl. Justice v. United States, Case No. CA 3-91-2615-R (N.D. Tex., Second Amended Complaint filed Mar. 23, 1992)).

106. In fact, the *Kay* court allowed compliance with environmental laws to refute the equal protection claim. *Kay*, 758 F. Supp. at 1149-50.

107. *See supra* note 95.

108. Although no environmental civil rights case to date has succeeded, some commentators find hope in Title VI of the Civil Rights Act of 1964. *See e.g.* Colopy, *supra* note 23. Title VI regulates the intermediary "recipient" programs that receive federal financial assistance. Soberal-Perez v. Heckler, 717 F.2d 36, 38 (2d Cir. 1983). In short, Title VI prohibits projects causing *unjustified* disparate impacts upon a protected class. Under Title VI a court may rely on inferences as proof of discrimination if the plaintiff proves that a "definite, measurable disparate impact" exists. NAACP v. Medical Ctr., Inc., 657 F.2d 1322, 1331-37 (3d Cir. 1981).

In the context of environmental justice, it is possible for a claimant to meet this standard by offering evidence of the government's lack of consideration under environmental and procedural laws. It is not necessary to show a purposeful design to discriminate. Insted it is sufficient to show disparate impact. *See* Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 Nw. U. L. REV. 787, 834 (1993).

Suits based on Title VI have already been filed in some courts. *See* Viki Reath, *Environmental Justice Gains Legal Status in Texas Case*, ENV'T WEEK, Dec. 15, 1994, at 1, 2 (discussing Title VI as a method of achieving "equal enforcement of environmental laws."). Frank Clifford, *Civil Rights Complaint Targets State's Toxic Dumps*, L.A. TIMES, Dec. 10, 1994, at A41 (detailing a complaint made against the EPA under Title VI alleging discrimination in the operation of the state's three toxic waste dumps).

V.
GOVERNMENT ACTION

A. *Executive Order 12,898*

On February 11, 1994 President William J. Clinton answered the environmental justice movement's cry for governmental action by signing Executive Order No. 12,898, entitled Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations ("Order").[109] Although this was the first time the government has recognized its responsibility for environmental injustice,[110] the results have yet to be seen. The purported goal of the Order is to make minority communities "feel a part of their government."[111] To accomplish this goal, the Order urges federal agencies to evaluate the social implications of its programs and to avoid imposing upon minority and low-income communities an *unfair* burden.

The Order requires all federal agencies to identify and address environmental justice concerns with respect to all relevant agency programs, policies, and activities.[112] The Order created an interagency working group ("Working Group") to assist agencies in understanding and developing an environmental justice strategy.[113] To help agencies attack environmental justice issues, the Working Group will develop criteria for determining "dispro-

109. Exec. Order No. 12,898 3 C.F.R. 859 (1995).

110. *See Correcting Inequity*, NAT'L L.J., Feb. 21, 1994, at 12. For years the government denied having a responsibility to address environmental justice issues. In fact, when the EPA was established, the issue was raised whether it would factor in the social consequences of its programs. In a hearing before the U.S. Civil Rights Commission, William Ruckelshaws, the EPA's first Administrator, testified that the agency is not equipped to judge potential inequities with respect to its programs, pointing to the technical nature of the agency. *See* Marianne LaVelle, *Residents Want 'Justice', the EPA Offers 'Equity'*, NAT'L L.J., Sept. 21, 1992, at S12.

111. Current EPA Administrator Carol M. Browner noted that the "order was meant to help the 'residential communities immediately adjacent to large numbers of industrial facilities . . . who do not feel a part of their government, who do not feel that their concerns have been heard.' " Marianne LaVelle, *Poor Residents Say EPA Hasn't Got the Lead Out*, NAT'L L.J., Oct. 24, 1994, at A1, A24 (quoting Carol Browner).

Federal agencies have demonstrated their willingness to pursue the Order's goal in the drafting of environmental justice strategies. For example, the Department of Transportation ("DOT") solicited comments from a broad range of interested parties while drafting the agency's strategy. Notice, 60 Fed. Reg. 9710 (1995). The agency noted that it is committed to "bringing government decisionmaking closer to the communities and people affected by . . . decisions and ensuring greater public participation . . . ." *Id.*

112. Exec. Order No. 12,898, § 1-1.

113. *Id.* § 1-102(a).

portionately high and adverse human health effects on minority populations and low-income populations"[114] and help guide agencies through the early phases of implementing a strategy.[115] Further, the Working Group will assist in the coordination, colletction, and examination of new research and data collection and review existing studies on environmental justice.[116] To better understand the public's demands, the Working Group will hold public meetings "for the purpose of fact-finding, receiving public comments, and conducting inquiries concerning environmental justice."[117] Finally, the Working Group will develop an interagency model program addressing environmental justice.[118]

The Order challenges each federal agency to recognize the flaws within its programs and work to combat resulting inequities.[119] By improving its research on and analysis of human health effects of environmental problems, federal agencies will be able to identify the ultimate health consequences of their programs.[120] However, understanding the ultimate health consequences of a program is not the last step. To influence decisions, minority communities must have access to the administrative process.[121] The Order attempts to level the playing field for mi-

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114. *Id.* § 1-102(b)(1).

115. *Id.* § 1-102(b)(2). The goal under this section is to achieve government wide consistency with respect to independent strategies.

116. *Id.* § 1-102(b)(3)-(5).

117. *Id.* §§ 1-102(b)(6), 5-5(d). The meetings are designed to encourage discussion among interested parties. Notice, 60 Fed. Reg. 109 (1995). In certain cases, participation is expanded by broadcasting sessions via satellite. *Id.*

118. Exec. Order No. 12,898, § 1-102(b)(7).

119. The U.S. Dept. of Transportation is working to meet this challenge by proposing a DOT Order that will prescribe the procedures to be followed by the Department in implementing the Order. 60 Fed. Reg. at 9712.

120. This analysis should include the effects of multiple and cumulative exposures. Exec. Order No. 12,898, § 3-301(b). A project analyzed independently might be deemed safe when science indicates a certain level of exposure is avoided. However, synergistic and cumulative effects of pollution often reveal that an imposition of a "safe" project will yield hazardous results. *See supra* note 39.

121. In its effort to include minority communities in the decisionmaking process, DOT took the following steps to provide them with access:

(1) held a National Conference on Transportation, Social Equity, and Environmental Justice to identify priority issues;

(2) held an Inter-Departmental Public Meeting to seek the public's advice regarding environmental justice;

(3) planned a meeting with the Environmental Justice Network to determine the best strategy for including minority and low-income communities in the decisionmaking process; and

(4) published in the Federal Register the key components to its environmental justice strategy.

nority communities by improving the availability of resources[122] and access to government.[123]

The Order's approach, empowering minority communities, is consistent with many environmental justice proponents' demands. Many advocates and commentators believe equity can be achieved through political means.[124] Legal approaches, they argue, actually disempower the community, bacause "the power of money often prevails [in court]."[125] In politics, though, burdened minority communities have the power of people. However, before a community can exert this power, the government must open the public choice system in a way that ensures burdened communities effective access and proper and fair consideration of their interests.[126]

Additionally, the Order urges federal agencies to look beyond the implementation of its programs and address enforcement problems.[127] In the development of environmental justice strate-

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60 Fed. Reg. at 9711. DOT will continue to meet with community and business groups, individuals, and local, public, and transportation officials. *Id.* at 9712.

122. *Id.* § 5-5(b). This section allows for documents to be translated into the dominant language of a region. Also, hearings held in limited English speaking communities will be translated.

123. *Id.* § 5-5(a). The public may submit recommendations to federal agencies advocating a particular position with respect to environmental justice concerns.

Arguably, this provision has only a procedural effect. However, proponents of the Order intend for this increased participation to become an integral component to the permitting process. *See* Roliff H. Purrington, Jr., *Putting Justice Into the Calculus*, LEGAL TIMES, Sept. 12, 1994, at S34. Such enhanced participation, while rare, has proven effective. In Kettleman City, California for example, local residents banded together to fight the siting of a hazardous waste incinerator. Although the project was initially approved, the local residents stalled the project with protests and legal battles that ultimately caused the company to withdraw its proposal. Cole, *supra* note 33, at 80.

124. *See* Cole, *supra* note 33, at 77.

125. *Id.*

126. Arguably, the Order is a step in the right direction because it brings minority communities to the negotiating table with government agencies and enables them to express their interests. *See supra* note 121.

127. The government is justified in looking beyond the health implications of a program and weighing its benefits against its costs. However, the proposed benefits do not always materialize. Often, projects seem attractive to minority communities because they are packaged with employment and tax revenue benefits. However, the facilities involved are often capital rather than labor intensive, leaving job prospects bleak for the host community. R. George Wright, *Hazardous Waste Disposal and the Problems of Stigmatic and Racial Injury*, 23 ARIZ. ST. L.J. 777, 779 (1991)(quoting Professor Dan Turlock). With respect to taxes, the advantages are not always real. *Id.* In Kettleman City, for example, the tax revenues were not used in the area burdened by the toxic waste dump. *See* Cole, *supra* note 33, at 76.

Moreover, advantages that do materialize are often dispersed or received by one person. "The social costs associated with hazardous waste facilities fall most heavily

gies, each agency is encouraged to revise its programs in a way that promotes enforcement of all health and environmental statutes.[128] To facilitate this goal, agencies are given discretionary authority to target certain areas and to increase fines and remedial measures.[129]

B. *Moving Beyond the Order*

Although the Order acknowledges the existence of disparate environmental impacts among communities and attempts to level the playing field for politically less powerful communities, many critics are disgruntled over the President's failure to create of an independent cause of action. The Order maintains that its only purpose is "improving the internal management of the executive branch."[130] As such, the Order imposes no substantive, enforceable duties upon government agencies.

However, proponents of the Order argue that existing laws will give effect to the Order's provisions. Under the National Environmental Policy Act ("NEPA"), for example, any project that may substantially impact the environment must be reviewed prior to the commencement of any activity.[131] The purpose of NEPA is to encourage productive and enjoyable harmony between humans and their environment.[132] Moreover, NEPA aims to assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings without compromising human health or safety.[133]

NEPA requires lead agencies to prepare an Environmental Impact Statement ("EIS") that evaluates a proposed project's potential impact to the environment.[134] In addition to considering

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on those who live nearby . . . . By contrast, the dispersed benefits of a hazardous waste facility accrue to the entire region served by the facility." Lawrence S. Bacow & James R. Milkey, *Overcoming Local Opposition to Hazardous Waste Facilities: The Massachusetts Approach*, 6 HARV. ENVTL. L. REV. 265, 268 (1982).

128. Exec. Order 12,898 § 1-103(a).

129. *See id.* at § 103(2). Under CERCLA, for example, the rate of cleanup is intended to be equalized among communities. *Correcting Inequity*, *supra* note 109, at 12.

130. Exec. Order No. 12,898 § 6-609.

131. 42 U.S.C. 4321 (1988).

132. *Id.*

133. *Id.* at 4331.

134. 40 C.F.R. 1502.16 (1993).

technical issues,[135] a government agency must also consider aesthetic and cultural values.[136]

Many argue the Order adds environmental justice to the issues an agency must address in its EIS under NEPA. Gerald Torres, counsel to the Attorney General and co-chairman of the Environmental Justice Interagency Task Force on Definitions and Standards, argues that the Order adds " 'another dimension to the environmental assessment process' by including environmental justice concerns in the 'calculus that agencies make when they come to a decision.' "[137] Although there remains uncertainty over the Order's practical effect, proponents believe it addresses the long-term goal of causing decisionmakers to consider environmental justice concerns when making environmental decisions.[138]

1. The Nature of Executive Orders

Historically, executive orders were issued to address internal administrative matters of the federal bureaucracy.[139] However, since the 1930s, executive orders have become more legislative in character.[140] "Most executive orders are issued pursuant to specific statutory delegations of authority of Congress. Like federal

135. *Id.*

136. *Id.* at 1508.27(b).

137. Purrington, *supra* note 123, at S34 (quoting Gerald Torres counsel to the AG).

138. One federal agency has already acknowledged its responsibility under the Order to include environmental justice issues in its NEPA review. *See* BNA MANAGEMENT BRIEFING, Oct. 25, 1994, LEXIS. The Department of Energy ("DOE") claims that inasmuch as its programs impact environmental justice issues, it is obligated to include such issues in its analysis under NEPA. Ed LeDuc, an attorney adviser in DOE's Office of General Counsel, noted that the Order adds a new layer of socioeconomic analysis to NEPA determinations. *Id.* Peter Brush, principal Deputy Assistant Secretary of Energy for Environment, Safety, and Health, concurred and added that environmental justice issues *must* be incorporated into NEPA analysis. *Id.*

139. *See generally* Steven Ostrow, Note, *Enforcing Executive Orders: Judicial Review of Agency Action Under the Administrative Procedure Act*, 55 GEO. WASH. L. REV. 659 (1987).

140. Executive orders may directly affect the rights and duties of both private parties and governmental officials. *Id.* at 659. For example, President Kennedy used an Executive Order to combat racial discrimination in federally funded housing. *Id.* at 660 n.4 (citing Exec. Order No. 11,063, 3 C.F.R. 652 (1959-63), *reprinted in* 42 U.S.C. § 1982 app. at 6-8 (1982)). Also, in an attempt to advance civil rights, President Lyndon Johnson issued an executive order to prohibit discrimination in the hiring practices of contractors. The order required the contractors to take affirmative steps to achieve equality in employment. *Id.* (citing Exec. Order No. 11,246, 3 C.F.R. 339 (1964-65), *reprinted in* 42 U.S.C. § 2000e app. at 28-31 (1982), *amended*

stautes, such executive orders have the force and effect of law and preempt inconsistent state law."[141] Consequently, violations of an enforceable order are actionable against the government.

In *Independent Meat Packers Association v. Butz*,[142] the Eighth Circuit declared that an executive order creates a valid cause of action where (1) the order was issued pursuant to a statutory mandate or delegation of authority from Congress, and (2) the order's language establishes an intent to create a cause of action.[143] To give effect to such a test, courts consider whether the order imposes obligations and sanctions, determines legal rights, limits agency discretion, and demands immediate compliance.[144] Executive orders failing to establish such guidelines do not create a cause of action and are not reviewable. Thus, agency action is final for purposes of judicial review unless an explicit cause of action is crafted with specific guidelines to direct agency activity.[145]

2. Executive Order 12,898 Risks Failure for Lack of Binding Effect

The manner in which courts treat executive orders makes it difficult for Executive Order No. 12,898 to carry the effect of law.

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by Exec. Order No. 11,375, 3 C.F.R. 684 (1966-70), *superseded by* Exec. Order No. 11,478, 3 C.F.R. 803 (1966-70), *reprinted in* 42 U.S.C. § 2000e app. at 31-33 (1982)).

141. *See* Ostrow, *supra* note 139, at 660-61 (citing R. MORGAN, THE PRESIDENT AND CIVIL RIGHTS: POLICY MAKING BY EXECUTIVE ORDER 5 (1970).

142. 526 F.2d 228 (8th Cir. 1975), *cert. denied*, 424 U.S. 966 (1976).

143. *Id.* at 236. Courts have concluded that absent a direct grant of statutory authority, an executive order may also have a valid legislative effect if there is congressional acquiescence in a consistent executive practice that is well know to Congress. *See, e.g.*, Dames & Moore v. Regan, 453 U.S. 654, 679-82 (1981) (upholding an order suspending claims of American nationals arising out of the Iranian hostage crisis on the basis of Congress' acquiescence in a 180-year executive practice of settling Americans' claims against foreign governments by executive agreement); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610-12 (1952) (Frankfurter, J., concurring) (holding that an executive order authorizing the seizure of steel mills was invalid because such a practice is not a systematic executive practice known to Congress).

144. *See* Ostrow, *supra* note 138, at 660 n.7.

145. *See, e.g.*, Chicago & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 112-13 (1948) (holding that "[executive orders] are not reviewable unless and until they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process.").

Moreover, in regard to executive orders lacking the status of law, courts reason that such executive orders "are merely tools to implement the personal policies of the President. These orders do not legally bind agencies and are enforceable only at the President's discretion. Individuals therefore cannot assert a cause of action to enforce the order's requirements." Ostrow, *supra* note 139, at 660 n.7.

In fact, the Order explicitly rejects creating any "right, benefit, or trust responsibility, substantive or procedural enforceable at law orequity against the United States . . . ."[146] That is not to say the President does not possess such authority,[147] but rather that the President's failure to *impose* certain duties upon federal agencies makes the Order a mere procedural request.[148]

Although certain federal agencies demonstrated a willingness to embrace an environmental justice agenda and incorporate such concerns into NEPA analysis,[149] the procedural nature of the Order causes hope for environmental justice advocates to dwindle. Despite some agencies' prompt response to the Order, any failure to follow its guidelines remains non-reviewable. This lack of reviewability is problematic for two reasons. First, future administrations may disregard President Clinton's environmental justice policies without taking formal steps. Second, minority interests are currently underrepresented in government.

The first problem involves the inevitable change in administration. While it remains uncertain when the Clinton administration will leave office, it is a certainty that it will. As they leave, a new administration will enter, bringing with it a platform of policies that might drastically conflict with those of the current administration. If so, the environmental justice strategies will not likely survive. After all, Executive Order 12,898 merely represents the "tools to implement [Clinton's policies]."[150] Thus, unless the Or-

146. Exec. Order No. 12,898, § 6-609.

147. Arguably, NEPA conveys to the President the authority to establish the requirements of an environmental review. NEPA makes it the continuing responsibility of the Federal Government to:

> . . . use all practicable means . . . to improve and coordinate Federal plans, functions, and resources to the end that the Nation may . . . (2) assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings; (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences; [and] (5) achieve a balance between populations and resource use which will permit high standards of living and a wide sharing of life's amenities . . . .

42 U.S.C. 4331(b).

To further these policies, all agency programs, rules and regulations must promote Congress' intent under NEPA. *Id.* at 4332. Moreover, all agencies of the Federal Government are directed to "utilize a systematic, *interdisciplinary* approach which will insure the integrated use of the natural *and social* sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment . . . . *Id.* at 4332(A) (emphasis added).

148. Also, environmental justice matters are not the type commonly dealt with by the President to which Congress acquiesces.

149. *See supra* note 147.

150. *See supra* note 146.

der imposes obligations upon federal agencies, environmental justice issues need not be addressed by future administrations. If obligations are imposed, a future President may reject the environmental justice strategies only by issuing an executive order reversing Executive Order No. 12,898.

Even where future administrations accept the general concepts of environmental injustice, the Order's failure to impose a duty upon agency officials is especially problematic given the poor representation of minorities in government, particularly at the decisionmaking level. This fact makes it difficult to believe that minority communities will see drastic changes in the government's approach to environmental justice issues. Although minorities are represented to some degree, minority officials are typically clustered in personnel and civil rights departments.[151] It is rare to have minority representation in the areas of substantive environmental law.[152] Michael V. Hernandez, a professor at Regent University Law School, warns that "[i]t's easy to talk about environmental justice. [However], implementing it is almost impossible, because you still have the same entrenched bureaucrats who have already made up their minds, and they are the ones who have been delegated to handle things like this."[153]

To ensure environmental justice issues receive fair consideration, the President should amend Executive Order 12,898 to alter the nature of each agency's responsibility. While the Order's recognition of key environmental justice concerns is commendable, the existing language merely "implement[s] the personal policies of the President."[154]

The Order should be amended to include language explicitly creating a cause of action based upon authority granted by Congress.[155] Existing environmental legislation requires the Federal Government to utilize all available resources and disciplines to protect human health.[156] The President should draw from this legislative authority and impose upon government agencies an affirmative duty to factor environmental justice concerns in envi-

151. *See Residents Want 'Justice,' The EPA Offers 'Equity', supra* note 109, at S12.
152. *See id.*
153. *Minority Residents Say EPA Hasn't Got the Lead Out, supra* note 110 at A24.
154. *See supra* note 145.
155. *See supra* note 143 and accompanying text. Occasionally, no specific statute is cited. Instead, Presidents occasionally refer only to general laws of the United States or the Constitution. *See, e.g.*, Exec. Order No. 12,291; Exec. Order No. 11,246.
156. *See supra* note 147.

ronmental decisionmaking.[157] Also, the Order should include a standard by which an agency's action may be judged.[158]

VI.
CONCLUSION

Minority communities clearly sustain a disproportionate share of environmental harms. To date, much of the environmental justice debate has focused on the cause of the disparity. While the debate addresses potential discrimination, the dispute is endless. Environmental decisionmaking involves a multidisciplinary approach. Neither science nor race can alone govern environmental decisions, making discimination difficult, if not impossible, to prove. The focus of the debate must shift to remedying the injustice. While commentators examine potential discrimination they overlook the fundamental problems with the decisionmaking process that not only allow, but foster unjust results. While decisionmakers are not responsive to well-financed, well-organized interest groups, they often fail to give fair consideration to minority communities' interests. The health interests of all communities must receive proper attention even where a decisionmakers' personal agenda is burdened. President Clinton took a responsible step in recognizing environmental justice problems. Now it is time to take an effective step and make decisionmakers accountable for their actions.

157. For example, President Richard Nixon based Executive Order No. 11,478 on the general policy of equal opportunity in Federal government. Nixon noted, It has long been the policy of the United States Government to provide equal opportunity in Federal employment on the basis of merit and fitness and without discrimination because of race, color, religion, sex, or national origin. Executive Order No. 11,478. To provide equal opportunity, the Order called for "additional steps . . . to strengthen and assure fully equal employment opportunity in the Federal Government." *Id.*

158. For example, in Executive Order No. 11, 478 President Nixon required that

> [t]he Civil Service Commission shall provide for the prompt, fair, and impartial consideration of all complaints of discrimination in Federal employment. [ ]Procedures for the consideration of complaints shall include at least one impartial review within the executive department or agency and shall provide for appeal to the Civil Service Commission.