BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

IN THE MATTER OF:	)	
	)	
PROPOSED NEW 35 ILL. ADM. CODE 204	)	
PREVENTION OF SIGNIFICANT	)	
DETERIORATION, AMENDMENTS TO 35	)	R19-1
ILL. ADM. CODE PARTS 101, 105, 203, 211,	)	(Rulemaking – Air)
AND 215	)	
	)	

NOTICE OF FILING

To: Don Brown, Clerk
Illinois Pollution Control Board
100 West Randolph St., Suite 11-500
Chicago, IL 60601

And Attached Service List

Please take notice that on the 26th day of February, 2019, I filed electronically Motion to Admit Care Exhibits A, B, and C on behalf of Citizens Against Ruining the Environment with the Office of the Clerk of the Illinois Pollution Control Board.

A copy of this filing is hereby served upon you.

Respectfully submitted,

By: _____
Daryl Grable, Chicago Legal Clinic, Inc.

Dated: February 26, 2019

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CERTIFICATE OF SERVICE

I, Daryl Grable, the undersigned attorney, hereby certify that I served upon the individuals named on the attached Service List a true and correct copy of the forty-six page document-

Motion to Admit Exhibits A, B, and C on behalf of Citizens Against Ruining the Environment

-by email on February 26th, 2019, before the hour of 5:00 p.m., from my email address (dgrable@clclaw.org) at the email address provided on the attached Service List.

Daryl Grable, Chicago Legal Clinic, Inc.

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

IN THE MATTER OF:	)	
	)	
PROPOSED NEW 35 ILL. ADM. CODE 204	)	
PREVENTION OF SIGNIFICANT	)	
DETERIORATION, AMENDMENTS TO 35	)	R19-1
ILL. ADM. CODE PARTS 101, 105, 203, 211,	)	(Rulemaking – Air)
AND 215	)	
	)	

MOTION TO ADMIT CARE EXHIBITS A, B, and C

I, Daryl Grable, on behalf of Citizens Against Ruining the Environment ("CARE"), pursuant to the direction of the Hearing Officer at the February 26th, 2019 Hearing in this case[1], hereby file this motion to admit CARE Exhibits A (the "In Re Chemical Waste Management of Indiana, Inc." Environmental Appeals Board decision), B (the "Guzy Memorandum"), and C (the Martin R. Castro "Letter of Transmittal") into the Record.

Respectfully submitted,

By: _____
Daryl Grable, Chicago Legal Clinic, Inc.

Dated: February 26, 2019

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[1] In addition to the direction of the Hearing Officer in this case, these exhibits should also be admitted as evidence as they meet requirement that evidence be "material, relevant, and would be relied upon by prudent persons in the conduct of serious affairs, unless the evidence is privileged." 35 Ill. Adm. Code 101.626(a).

EXHIBIT A

IN RE CHEMICAL WASTE MANAGEMENT OF INDIANA, INC.

RCRA Appeal Nos. 95-2 & 95-3

ORDER DENYING REVIEW

Decided June 29, 1995

Syllabus

U.S. EPA Region V issued the federal portion of a permit to Chemical Waste Management of Indiana, Inc. ("CWMII") for its Adams Center Landfill Facility in Fort Wayne, Indiana. This permit was issued pursuant to the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.* The Environmental Appeals Board has received three petitions for review of the Region's permit decision, two of which (one filed by the City of New Haven, Indiana, and the other filed jointly by Cheryl Hitzemann and Deanna Wilkirson) are consolidated for purposes of this opinion. During the comment period on the draft permit, these and other commenters raised "environmental justice" concerns, more specifically, concerns as to whether the operation of CWMII's facility will have a disproportionately adverse impact on the health, environment, or economic well-being of minority or low-income populations in the area surrounding the facility. In an effort to address such concerns, the Region held an informal meeting, subsequent to the public hearing and the close of the comment period, to promote an exchange of information and opinions on the issue among persons who had expressed concerns about the issue during the comment period and other interested parties. The Region also performed a demographic analysis of the surrounding populations to determine whether the facility would create a disproportionate risk to human health and the environment for minority and low-income populations.

Petitioners' challenge to the Region's permit decision raises a number of points, all of which may be consolidated into the following three arguments: (1) The Agency has failed to promulgate a national environmental justice strategy, as it is required to do under an Executive Order dealing with environmental justice, and the Region's efforts to implement the Executive Order in the absence of such a strategy or other national guidance and criteria was clearly erroneous and an abuse of discretion; (2) The Region's demographic study, the scope of which was restricted to a one-mile radius around the facility, was clearly erroneous and ignored evidence presented during the comment period concerning the racial and socio-economic composition of, and the facility's impact on, the community living both within and outside of the one-mile radius; (3) The Region based its decision on information obtained at the August 11 meeting, but the information was not part of the administrative record and the meeting did not conform to the rules in 40 C.F.R. part 124 governing public hearings.

Held: (1) While the Executive Order does not purport to, and does not have the effect of, changing the substantive requirements for reviewing a permit under RCRA and its implementing regulations, the RCRA permitting process nevertheless offers certain opportunities for the Region to exercise discretion, within the constraints of that process, to implement the Executive Order, and as a matter of policy, the Region should exercise those opportunities to the greatest extent practicable; (2) The Board will review the Region's efforts to implement the Executive

Order insofar as those efforts have an effect on the permit decision; (3) Petitioners have not demonstrated, as they were required to do, how the absence of a national environmental justice strategy or the absence of some other kind of nation-wide criteria and guidance has led to an erroneous permit decision; (4) Petitioners have not demonstrated that the Region clearly erred in restricting the scope of its demographic study to a one-mile radius or in concluding that there would be no disproportionate adverse impact on low-income or minority populations within a one-mile radius; and (5) The August 11 meeting was not a public hearing and thus was not subject to requirements of part 124 governing such hearings; comments made at the August 11 meeting were properly incorporated into the administrative record; and in any event, Petitioners have given the Board no reason to conclude that the Region based its decision on information obtained during the meeting. Review of the petitions is therefore denied.

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge Reich:

On March 1, 1995, U.S. EPA Region V issued a final permit decision approving the application of Chemical Waste Management of Indiana, Inc. ("CWMII") for the renewal of the federal portion[1] of a Resource Conservation and Recovery Act ("RCRA") permit and a Class 3 modification of the same permit for its Adams Center Landfill Facility in Fort Wayne, Indiana.[2] The Environmental Appeals Board has received three petitions challenging the Region's permit decision, one filed by the City of New Haven, one filed jointly by Cheryl Hitzemann and Deanna Wilkirson, and one filed by CWMII.[3] The first two petitions were filed by the same law firm and raise identical issues, and have been consolidated for purposes of this opinion. (The City of New Haven, Cheryl Hitzemann and Deanna Wilkirson will hereafter be collectively referred to as "Petitioners.") The CWMII peti-

[1] The State of Indiana has received authorization to administer its own RCRA program, pursuant to section 3006 of RCRA, 42 U.S.C. § 6926. Indiana has not, however, received authorization to administer the requirements contained in the Hazardous and Solid Waste Amendments to RCRA ("HSWA"). Consequently, when a RCRA permit is issued in Indiana, the State issues the part of the permit relating to the non-HSWA requirements and EPA issues the part of the permit relating to the HSWA requirements.

[2] On October 5, 1989, CWMII applied to EPA and Indiana for a Class 3 modification to its permit, authorizing it to expand its landfill capacity ("the Phase IV expansion"). In June of 1992, the State issued the non-HSWA portion of the modification, but the permit expired on October 30, 1993, before the Agency had acted on the federal HSWA portion of the modification. Consequently, in these proceedings, CWMII seeks both a Class 3 modification and a renewal of the HSWA portion of the permit. *See* 40 C.F.R. § 270.42(c) (regulations governing Class 3 modifications).

[3] The Board has also received amicus briefs filed by the following persons: Mark Souder, U.S. Congressman, 4th District, Fort Wayne, Indiana; Archie Lunsey, Councilman, First District, Fort Wayne, Indiana; Dennis Andrew Gordon, Allen County Zoning Administrator; Elizabeth Dobynes, President, Fort Wayne Indiana Branch, NAACP; and Charles Redd, Chairman, Political Action Committee, NAACP. Also, CWMII filed a brief in opposition to the Petitions.

tion will be addressed in a separate opinion. On May 8, 1995, at the request of the Board, the Region filed a brief (joined by EPA's Office of the General Counsel as "of counsel") responding to the two petitions addressed in this opinion. Region's Response to Petition for Review.[4]

During the comment period on the draft permit and draft modification (collectively the "draft modified permit"), Petitioners and other commenters raised what the parties refer to as "environmental justice" concerns.[5] More specifically, issues were raised as to whether the operation of CWMII's facility will have a disproportionately adverse impact on the health, environment, or economic well-being of minority or low-income populations in the area surrounding the facility.[6] The gist of Petitioners' challenge is that the measures taken by the Region to address the environmental justice concerns failed to conform to the rules governing the permitting process, violated an Executive Order relating to environmental justice, resulted in factual and legal errors and an abuse of discretion, and raised an important policy issue warranting review. For the reasons set forth in this opinion, we conclude that Petitioners have failed to demonstrate that either the Region's permit decision or the procedures it used to reach that decision involved factual or legal errors, exercises of discretion, or policy issues that warrant review. Accordingly, we are denying review of the petitions.

I. *BACKGROUND*

The Region issued the HSWA portion of the draft modified permit on May 23, 1994. The public comment period began on that date and extended through July 13, 1994. On June 29, 1994, the Region held a public hearing in accordance with the procedures set out in 40 C.F.R.

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[4] On May 22, 1995, the Region filed a separate brief addressing the petition filed by CWMII. On May 4, 1995, CWMII also filed a response to the two petitions addressed in this opinion. CWMII's brief also asked for expedited consideration of the two petitions. On May 9, 1995, the Board denied CWMII's request for expedited consideration. On May 23, Petitioners filed a reply to the Region's May 8 response brief and to CWMII's May 4 response brief. On May 26, 1995, CWMII filed a reply to Petitioners' May 23 brief.

[5] It has been asserted that Petitioners do not in fact represent minority or low-income interests that would be affected by environmental justice concerns. *See, e.g.*, the amicus brief filed by Councilman Archie Lunsey. We express no opinion on this point and these contentions play no role in our decision.

[6] Petitioners do not allege any "discriminatory or other invidious animus" and they state, therefore, that their appeals do not involve "environmental racism" claims based on such animus. Response of Petitioners to Submission by U.S. EPA Region V at 4-5.

§ 124.12.[7] On March 1, 1995, the Region issued a response to comments and its final permit decision, including the requested Class 3 modification allowing CWMII to increase the capacity of its landfill ("the Phase IV Expansion").

During the pendency of CWMII's permit application, Executive Order 12898, relating to environmental justice, was issued. The Order mandates that:

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

Section 1-101. 59 Fed. Reg. 7629 (Feb. 16, 1994). The Order also requires that:

> Each Federal agency shall conduct its programs, policies, and activities that substantially affect human health and the environment, in a manner that ensures that such programs, policies, and activities do not have the effect of * * * subjecting persons (including populations) to discrimination under, such programs, policies, and activities, because of their race, color, or national origin.

Section 2.2. *Id.* at 7630-31.

In response to the environmental justice concerns raised during the comment period on the draft modified permit, the Region held what was billed as an "informational" meeting in Fort Wayne, Indiana, on August 11, 1994. The meeting was attended by concerned citizens, and representatives of CWMII, the Indiana Department of Environmental Management, and the Region. The purpose of the meeting was to "allow representatives of all parties involved to freely discuss Environmental Justice and other key issues, answer questions and gain understanding of each party's concerns." Exhibit

[7] Petitioners have not disputed that this hearing fully conformed to the requirements of 40 C.F.R. § 124.12.

I, Region's Response to Petitions (letter from Region inviting a citizen to attend the meeting). The Region also performed a demographic analysis of census data on populations within a one-mile radius of the facility. The Region ultimately concluded that the operation of the facility would not have a disproportionately adverse health or environmental impact on minority or low-income populations living near the facility.

It is the Region's efforts to address the environmental justice concerns raised during the comment period that Petitioners challenge on appeal. As more fully set forth below, Petitioners argue that: (1) The Region clearly erred in attempting to implement the Executive Order without national guidance or criteria; (2) The Region's demographic study, the scope of which was restricted to a one-mile radius around the facility, was clearly erroneous and ignored evidence presented during the comment period concerning the racial and socio-economic composition of, and the facility's impact on, the community living both within and outside of the one-mile radius; and (3) The Region based its permit decision on information obtained at the August 11 meeting, but such information was not a part of the administrative record and the Region did not follow the procedures governing public hearings.

II. *DISCUSSION*

Under the rules governing this proceeding, the Regional Administrator's permit decision ordinarily will not be reviewed unless it is based on a clearly erroneous finding of fact or conclusion of law, or involves an important matter of policy or exercise of discretion that warrants review. *See* 40 C.F.R. § 124.19; 45 Fed. Reg. 33,412 (May 19, 1980). The preamble to section 124.19 states that "this power of review should only be sparingly exercised," and that "most permit conditions should be finally determined at the Regional level * * *." *Id.* The burden of demonstrating that review is warranted is on the petitioner. *See Ross Incineration Services, Inc.*, 5 E.A.D. 813, 816 (EAB 1995); *In re Metalworking Lubricants Company*, 5 E.A.D. 181, 183 (EAB 1994). For the reasons set forth below, we conclude that Petitioners have not carried their burden in this case.

We believe it is useful to begin by considering the precise nature of Petitioners' environmental justice claim in the context of this RCRA proceeding and the effect, if any, the issuance of Executive Order 12898 should have on the way in which the Agency addresses such a claim.

"Environmental justice," at least as that term is used in the Executive Order, involves "identifying and addressing, as appropriate,

disproportionately high and adverse human health or environmental effects of [Agency] programs, policies, and activities on minority populations and low-income populations * * *." 59 Fed. Reg. at 7629. Some of the commenters also believe that environmental justice is concerned with adverse effects on the *economic* well- being of such populations. Thus, when Petitioners couch their arguments in terms of environmental justice, they assert that the issuance of the permit and the concomitant operation of the facility will have a disproportionately adverse impact not only on the health and environment of minority or low-income people living near the facility but also on economic growth and property values.[8] The main support in the record for this assertion is an environmental impacts study submitted by the City of New Haven. *See* Stephanie Simstad and Dr. Diane Henshel, "Exposure Pathway Analysis and Toxicity Reviews for Selected Chemicals Present at the Adams Center Treatment, Storage, and Disposal Facility," at 8 (June 24, 1994), Exhibit E, CWMII's Response to Petition. That study purports to "evaluate the potential for human exposure to toxic chemicals derived from the treatment and disposal of chemicals at the Adams Center." *Id.* at 1. It identifies "exposure pathways" by which citizens living near the facility may be exposed to pollutants from the facility, but its central conclusion is that more risk assessment needs to be done before the extent and probability of such exposure can be determined accurately.[9]

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[8] *See, e.g.*, paragraph 5.J. of the Hitzemann/Wilkirson Petition.

[9] Some of the conclusions reached in the study are as follows: (1) The chemicals disposed at the facility can be extremely hazardous to human health when not properly contained within the landfill; (2) There is reason to believe that these chemicals are not being contained within the site itself; (3) The most obvious evidence of exposure of adjacent areas to waste materials from the site are the visible dust clouds that form during stabilization of incoming wastes; (4) Since the facility began handling hazardous waste in 1985, numerous problems in landfill management of groundwater and leachate have occurred; (5) The individuals most likely to be affected by emissions from this site live in the low income residential areas near the landfill; (6) The sediments in a nearby river watershed are moderately to heavily polluted and the fish in the river have pollutant elevations above expected background levels; and (7) Before a decision can be made as to whether a human health risk exists to the neighboring population from operation of the Adams Center Facility, additional contaminant monitoring information must be obtained. Study at 36-38. An unpaginated abstract appearing at the beginning of the study concludes that:

> Due to the fact that many of the nearby residents are low income and/or minority, they are likely to have significantly higher exposures than that of the general population. In order to adequately protect this subpopulation, special consideration in the risk assessment process must occur to determine if a threat to human health exists. More extensive monitoring should be pursued to determine ambient air concentrations of metals and other particulate matter as well as volatile organic

Continued

Although it is not made explicit in the petitions, it is nevertheless clear that Petitioners do not believe that the threats posed by the facility can be addressed through revision of the permit. Rather, it is apparent that Petitioners believe that their concerns can be addressed only by permanently halting operation of the facility at its present location or, at a minimum, preventing the Phase IV Expansion of the facility. Thus, Petitioners challenge the permit decision, including the modification, in its entirety, rather than any specific permit conditions.

At the outset, it is important to determine how (if at all) the Executive Order changes the way a Region processes a permit application under RCRA. For the reasons set forth below, we conclude that the Executive Order does not purport to, and does not have the effect of, changing the substantive requirements for issuance of a permit under RCRA and its implementing regulations. We conclude, nevertheless, that there are areas where the Region has discretion to act within the constraints of the RCRA regulations and, in such areas, as a matter of policy, the Region should exercise that discretion to implement the Executive Order to the greatest extent practicable.

Permit Issuance Under RCRA: While, as is discussed later, there are some important opportunities to implement the Executive Order in the RCRA permitting context, there are substantial limitations as well. As the Region notes in its brief, the Executive Order by its express terms is to be implemented in a manner that is consistent with existing law. Section 6-608. 59 Fed. Reg. at 7632 ("Federal agencies shall implement this order consistent with, and to the extent permitted by, existing law.") (*cited in* Region's Response to Petition at 12). The Region correctly points out that under the existing RCRA scheme, the Agency is *required* to issue a permit to any applicant who meets all the requirements of RCRA and its implementing regulations. Region's Response to Petition at 12. The statute expressly provides that:

> Upon a determination by the Administrator (or a State, if applicable), of compliance by a facility for which a permit is applied for under this section with the require-

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compounds at these residential areas. Soil samplings should also be undertaken to determine the cumulative past exposure to these contaminants. An accurate risk assessment needs to be performed that recognizes the unique exposure pathways of these individuals as there is not enough monitoring data to determine their actual exposure levels. Currently, it is known that there are releases from the site and there are potential pathways that are completed to human receptors.

> ments of this section and section 3004, the Administrator (or the State) *shall issue* a permit for such facilities.

RCRA § 3005(c)(1), 42 U.S.C. § 6925 (emphasis added). Thus, as the Region observes:

> Under federal law, public support or opposition to the permitting of a facility can affect a permitting decision if such support or opposition is based on issues relating to compliance with the requirements of RCRA or RCRA regulations or such support or opposition otherwise relate to protection of human health or the environment. RCRA does not authorize permitting decisions to be based on public comment that is unrelated to RCRA's statutory or regulatory requirements or the protection of human health or the environment.

Region's Response to Petition at 12. The Region correctly observes that under RCRA and its implementing regulations, "there is no legal basis for rejecting a RCRA permit application based solely upon alleged social or economic impacts upon the community." Region's Response to Petition at 11. Accordingly, if a permit applicant meets the requirements of RCRA and its implementing regulations, the Agency *must* issue the permit, regardless of the racial or socio-economic composition of the surrounding community and regardless of the economic effect of the facility on the surrounding community.

Implementing the Executive Order: Nevertheless, there are two areas in the RCRA permitting scheme in which the Region has significant discretion, within the constraints of RCRA, to implement the mandates of the Executive Order. The first of these areas is public participation. *See* "Environmental Justice Strategy: Executive Order 12898," EPA/200-R-95-002, at 8 (April 1995)(calling for "early and ongoing public participation in permitting and siting decisions."). Part 124 already provides procedures for ensuring that the public is afforded an opportunity to participate in the processing of a permit application. The procedures required under part 124, however, do not preclude a Region from providing other opportunities for public involvement beyond those required under part 124. *See In re Waste Technologies Industries*, 5 E.A.D. 646, 653 n.10 (EAB 1995) ("[A] Regional office can always offer more procedural safeguards than it is legally obligated to provide."). We hold, therefore, that when the Region has a basis to believe that operation of the facility may have a disproportionate impact on a minority or low-income segment of the affected community, the Region should, as a matter of policy,

exercise its discretion to assure early and ongoing opportunities for public involvement in the permitting process.

A second area in which the Region has discretion to implement the Executive Order within the constraints of RCRA relates to the omnibus clause under section 3005(c)(3) of RCRA. The omnibus clause provides that:

> Each permit issued under this section shall contain such terms and conditions as the Administrator (or the State) determines necessary to protect human health and the environment.

42 U.S.C. § 6925(c)(3). Under the omnibus clause, if the operation of a facility would have an adverse impact on the health or environment of the surrounding community, the Agency would be required to include permit terms or conditions that would ensure that such impacts do not occur. Moreover, if the nature of the facility and its proximity to neighboring populations would make it impossible to craft a set of permit terms that would protect the health and environment of such populations, the Agency would have the authority to deny the permit. *See In re Marine Shale Processors, Inc.*, 5 E.A.D. 751, 796 n.64 (EAB 1995) ("[T]he Agency has traditionally read [section 3005(c)(3)] as authorizing denials of permits where the Agency can craft no set of permit conditions or terms that will ensure protection of human health and the environment."). In that event, the facility would have to shut down entirely. Thus, under the omnibus clause, if the operation of a facility truly poses a threat to the health or environment of a low-income or minority community, the omnibus clause would require the Region to include in the permit whatever terms and conditions are necessary to prevent such impacts. This would be true even without a finding of disparate impact.

There is nothing in section 3005(c)(3) to prevent the Region from taking a more refined look at its health and environmental impacts assessment, in light of allegations that operation of the facility would have a disproportionately adverse effect on the health or environment of low-income or minority populations. Even under the omnibus clause some judgment is required as to what constitutes a threat to human health and the environment. It is certainly conceivable that, although analysis of a broad cross-section of the community may not suggest a threat to human health and the environment from the operation of a facility, such a broad analysis might mask the effects of the facility on a disparately affected minority or low-income segment of the community. (Moreover, such an analysis might have

been based on assumptions that, though true for a broad cross-section of the community, are not true for the smaller minority or low-income segment of the community.) A Region should take this under consideration in defining the scope of its analysis for compliance with § 3005(c)(3).

Of course, an exercise of discretion under section 3005(c)(3) would be limited by the constraints that are inherent in the language of the omnibus clause. In other words, in response to an environmental justice claim, the Region would be limited to ensuring the protection of the health or environment of the minority or low-income populations.[10] The Region would not have discretion to redress impacts that are unrelated or only tenuously related to human health and the environment, such as disproportionate impacts on the economic well-being of a minority or low-income community. With that qualification in mind, we hold that when a commenter submits at least a superficially plausible claim that operation of the facility will have a disproportionate impact on a minority or low-income segment of the affected community, the Region should, as a matter of policy, exercise its discretion under section 3005(c)(3) to include within its health and environmental impacts assessment an analysis focusing particularly on the minority or low-income community whose health or environment is alleged to be threatened by the facility. In this fashion, the Region may implement the Executive Order within the constraints of RCRA and its implementing regulations.

Petitioners' Challenge to the Region's Efforts to Implement the Executive Order. It is the Region's efforts to implement the Executive Order, described above, that are the basis of the Petitioners' challenges. Petitioners raise a number of points, all of which may be consolidated into the following three arguments: (1) The Agency has failed to promulgate a national environmental justice strategy, as it is required to do under the Executive Order, and the Region's effort to implement the Order in the absence of such a strategy or other national guidance and criteria was erroneous;[11] (2) The Region's demographic study, the scope of which was restricted to a one-mile radius

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[10] *See In re Sandoz Pharmaceuticals Corporation*, 4 E.A.D. 75, 80 (EAB 1992) ("[B]y its own terms, § 3005(c)(3) authorizes only those permit conditions necessary to protect human health or the environment. Accordingly, the Region may not invoke its omnibus authority unless the record contains a properly supported finding that an exercise of that authority is necessary to protect human health or the environment.")

[11] *See infra* n.12.

around the facility, was clearly erroneous and ignored evidence presented during the comment period concerning the racial and socioeconomic composition of, and the facility's impact on, the community living both within and outside of the one-mile radius; (3) The Region based its decision on information obtained at the August 11 meeting, but the information was not part of the administrative record and the meeting did not conform to the rules in 40 C.F.R. part 124 governing public hearings.

Reviewing Challenges Based on the Executive Order: As a threshold matter, the Region suggests that claims relating to the implementation of the Executive Order are not subject to review. In support of this argument, the Region points out that the Executive Order itself expressly provides that it does not create any substantive or procedural rights that could be enforced through litigation. More specifically, the Order states in § 6-609 that:

> This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any person. This order shall not be construed to create any right to judicial review involving the compliance or noncompliance of the United States, its agencies, its officers, or any other person with this order.

59 Fed. Reg. at 7629. However, while the Region is correct that section 6-609 precludes *judicial* review of the Agency's efforts to comply with the Executive Order, it does not affect implementation of the Order *within* an agency. More specifically, it does not preclude the *Board*, in an appropriate circumstance, from reviewing a Region's compliance with the Executive Order as a matter of policy or exercise of discretion to the extent relevant under section 124.19(a). Section 124.19(a) authorizes the Board to review any condition of a permit decision (or as here, the permit decision in its entirety). Accordingly, the Board can review the Region's efforts to implement the Executive Order in the course of determining the validity or appropriateness of the permit decision at issue. With that in mind, we turn to the specific challenges raised by Petitioners in this case.

The Absence of National Guidance and Criteria: Petitioners first argue that the Agency has failed to promulgate a national environmental justice strategy, as it is required to do under the Executive

Order.[12] Petitioners contend that in the absence of a national strategy or other national guidance and criteria for implementing the Order, it was erroneous for the Region to attempt to implement it.[13] For the following reasons, however, we reject this argument.

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[12] Section 1-103 of the Executive Order provides as follows:

> *Development of Agency Strategies.* (a) Except as provided in section 6-605 of this order, each Federal agency shall develop an agency-wide environmental justice strategy, as set forth in subsections (b)-(e) of this section that identifies and addresses disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations. The environmental justice strategy shall list programs, policies, planning, and public participation processes, enforce ment, and/or rulemakings related to human health or the environment that should be revised to, at a minimum: (1) promote enforcement of all health and environmental statutes in areas with minority populations and low-income populations; (2) ensure greater public participation; (3) improve research and data collection relating to the health of and environment of minority populations and low-income populations; and (4) identify differential patterns of consumption of natural resources among minority populations.

59 Fed. Reg. at 7629.

[13] Petitioners make the following specific arguments concerning the absence of national guidance, criteria, or strategy for implementing the Executive Order:

> In reaching its final decision, Region 5 admits that its decision as to environmental justice ("EJ") concerns was made in the absence of any "national guidance or criteria" available to evaluate such concerns, contrary to the requirements of Executive Order 12898 signed February 11, 1994.

Petition at 3.

> Contrary to section 1-103 of Executive Order 12898, U.S. EPA has failed to finalize an environmental justice strategy. In reaching its final decision prior to finalization of such strategy, Region 5 has purported to resolve EJ concerns without any standards for its decision making.

Id.

> In addition, even if these proceedings and the findings and conclusions of Region 5 were not clearly erroneous, the purported "implementation" of Executive Order 12898 by Region 5, in the absence of any criteria whatsoever, and through proceedings and procedures which are not authorized by regulation, represents a clear abuse of agency discretion. Moreover, whether or not to countenance the enforcement of Executive Order 12898, in the absence of any criteria and

Continued

Petitioners have not demonstrated how the absence of a national environmental justice strategy or the absence of some other kind of nation-wide criteria and guidance has led to an erroneous permit decision. Absent such a demonstration, we have no basis for reviewing Petitioners' claims.

Even assuming Petitioners could raise such a challenge, we would reject it. There is nothing in the Executive Order to suggest that the Region should have refrained from issuing RCRA permits until the Agency issued its environmental justice strategy or other national guidance or criteria. The absence of such guidance in no way prevents the Agency from addressing environmental justice issues in the meantime on a case-by-case basis, as occurred here. In any event, during the pendency of this case, the Agency issued "Environmental Justice Strategy: Executive Order 12898" EPA/200-R-95-002 (April 1995), and it is clear that it does not provide detailed guidance and criteria to the Regions in the RCRA permitting context. Rather, it underscores the importance of early and ongoing public participation in those cases where environmental justice is an issue. There is clearly no inconsistency between the strategy and the Region's permit decision that warrants review.

The Region's Demographic Study: Petitioners also question the Region's efforts to determine whether operation of the facility will have a disproportionate impact on a minority or low-income community. To assess whether there would indeed be a disproportionate impact on low-income or minority populations, the Region performed a demographic study, based on census figures, of the racial and socio-economic composition of the community surrounding the facility. The Region concluded that no minority or low-income communities will face a disproportionate impact from the facility. Petitioners argue that, in arriving at this conclusion, the Region erred by ignoring available census and other information submitted during the comment period that allegedly demonstrate a disproportionate impact of the facility on minority or low-income populations, particularly those at distances greater than one mile.[14]

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through such unauthorized procedures represents an important policy consideration which the Environmental Appeals Board should review.

Id.

[14] Petitioners specifically argue that:

> (1) The Region ignored written comments submitted by New Haven and others, including a scientific study describing the
> Continued

Petitioners particularly criticize the Region's decision to restrict the focus of its study to the community living within a one-mile radius of the facility. Petitioners contend that the facility adversely affects citizens who live further than one mile away from the facility. In its response to the petitions, the Region defends its decision to focus on a one-mile radius for its demographic study, as follows:

> [T]he Region 5 office of RCRA has chosen a one-mile radius for demographic evaluation of disproportionately high and adverse human health or environmental impacts of RCRA facilities upon minority populations and low-income populations, based upon a Comprehensive Environmental Response, Compensation and Liability Act, * * * guidance (Hazard Ranking System Guidance Manual, November 1992, EPA 9345.1-07) developed for CERCLA sites without groundwater contamination; however, the demographic evaluation did not exclude the population located outside of the one-mile radius.

Response to Petition at 16.[15]

> potential disproportionate impact of the facility in question on low-income and minority populations, submitted by New Haven on July 13, 1994; (2) The Region chose to look only at data relating to low-income and minority populations within a one-mile radius of the facility, despite the fact that there is no evidence to support this criteria and despite the fact that an African American Fort Wayne City Councilman testified on the public record that some 13,500 of his African American constituents were adversely affected, beyond the one-mile radius because of the facility's negative impact on economic growth and housing; (3) The Region ignored its own census data which demonstrates that within two miles of the facility there are areas of the community that are 40-80% minority and that within three miles of the facility there are areas of the community that are 80-100% minority; (4) The Region ignored its own census data demonstrating that the vast majority of the minority population lives in areas within five miles of the facility; (5) The Region ignored census data demonstrating that even within a one-mile radius of the facility, 40-60% of the population is at a low income level.

Petition at 3-4.

[15] The Region's demographic analysis was in addition to the ambient air impact analysis that the Region had already performed in 1990. *See* Response to Comments at 45, Exhibit J, Region's Response to Petition.

As explained above, the Region can and should consider a claim of disproportionate impact in the context of its health and environmental impacts assessment under the omnibus clause at section 3005(c)(3) of RCRA. The proper scope of a demographic study to consider such impacts is an issue calling for a highly technical judgment as to the probable dispersion of pollutants through various media into the surrounding community. This is precisely the kind of issue that the Region, with its technical expertise and experience, is best suited to decide. *See In re General Electric Company*, 4 E.A.D. 358, 375 (EAB 1992) ("The Region's selection of a method is the kind of technical decision that is best decided on the Regional level, and absent some compelling circumstance, we are inclined to defer to it."). In recognition of this reality, the procedural rules governing appeals of permitting decisions place a heavy burden on petitioners who seek Board review of such technical decisions. To carry that burden in this case, Petitioners would need to show either that the Region erred in concluding that the permit would be protective of populations within one mile of the facility, or that, even if it were protective of such close-in populations, it for some reason would not protect the health or environment of citizens who live at a greater distance from the facility. We believe that Petitioners have failed to demonstrate that the Region erred in either of these respects.

The petition mentions two parts of the administrative record in support of its claim. First, it refers to the comments of Fort Wayne City Councilman Cletus Edmonds, who contends that the facility will adversely affect the economic growth and housing of some 13,500 of his African-American constituents. Petition at 4. As noted above, however, neither RCRA nor its implementing regulations requires the Agency to consider the economic effects of a facility.[16]

Second, the petition mentions an environmental impact study submitted by the City of New Haven (described above in the introductory section of this discussion). That study indicates that particu-

[16] Petitioner's comments suggest that the community surrounding the facility unanimously opposed continued operation of the facility. In fact, community opposition to the facility is by no means unanimous. Many in the minority community support continued operation of the facility. *See* Amicus Brief filed by Archie Lunsey, Councilman, First District, Fort Wayne, Indiana, at 2 ("Environmental Justice is a serious problem — but it is not a problem connected with Chemical Waste Management of Indiana."); Amicus Brief filed by Elizabeth Dobynes, President, Fort Wayne Indiana Branch, NAACP, at 2 ("In summary, I believe that CWMI should be required to follow the regulations of the Environmental Protection Agency and so long as they do so, I believe the facility on Adams Center Road should be allowed to continue to manage waste coming from business and industry in Indiana and neighboring states.").

lates from the facility "could" affect an African-American community living as far as two miles away from the facility:

> Since the predominant direction of the wind is westerly, residential areas may be exposed to high levels of particulates from the site. There is currently an Afro-American community approximately 2 miles west of the landfill site and they could be exposed to higher levels of particulates.

Stephanie Simstad and Dr. Diane Henshel, "Exposure Pathway Analysis and Toxicity Reviews for Selected Chemicals Present at the Adams Center Treatment, Storage, and Disposal Facility," at 8 (June 24, 1994). This conclusion, however, is stated in a very tentative fashion and provides no indication of the probabilities involved or the adverse effects, if any, increased exposure might cause. It does not show why the Region's conclusions as to the protectiveness of the permit were erroneous or why, if the population within one mile of the facility is protected (as the Region concludes), there would nonetheless be impacts beyond one mile cognizable under section 3005(c)(3). We conclude, therefore, that Petitioners have failed to carry their burden of demonstrating that the Region's technical judgment in this case does not deserve the same deference that the Board normally accords to such judgments. Review of this issue is therefore denied.

The August 11 Meeting: Petitioners' third argument is that the Region based its permit decision on information obtained during the August 11 meeting. Petitioners argue that this resulted in an erroneous decision because the information was never incorporated into the administrative record, as required under part 124, and because the meeting was a public hearing under part 124, but did not conform to the part 124 rules governing public hearings. Because the Region's permit decision failed to comply with part 124, Petitioners contend that the permitting process must be conducted over again from the beginning. The Region, however, rejects Petitioners' argument, contending that: (1) The meeting was not a public hearing under part 124 and was therefore not subject to the part 124 procedures governing public hearings; (2) The information obtained at the August 11 meeting was made part of the administrative record; and (3) In any event the Region did not base its decision on the information that was provided at the meeting. Region's Response to Petition at 9. For the reasons set forth below, we agree with the Region.

As the Region correctly points out, by the time of the August 11 meeting, the Region had already satisfied the public participation

requirements of part 124 by opening a comment period and by holding a public hearing on June 29, 1994, which fully comported with part 124. Region's Response to Petition at 9. The Region's purpose in holding the August 11 meeting was not to take more evidence for its permitting decision. Region's Response to Petition at 14 ("[I]t has never been EPA's position that the purpose of the August 11 meeting was to take evidence."). Rather, the purpose was to:

> [H]ear from some of the stakeholders in the community about their concerns regarding environmental justice, and provide an informal forum to respond to questions that had been raised by the citizens about the federal RCRA permitting process.

Region's Response to Petition at 10. These conclusions are confirmed by the letters of invitation that the Region sent out to announce the meeting. In those letters, the meeting is billed as a less formal "informational meeting." Region's Response to Petitions, Exhibit I (copy of letter from the Region inviting a citizen to the meeting).[17] The letters explain that the purpose of the meeting is to:

> [A]llow representatives of all parties involved to freely discuss Environmental Justice and other key issues, answer questions and gain understanding of each party's concerns.

Id. We conclude, therefore, that the Region accurately characterizes its activities when it states that: "U.S. EPA satisfied the statutory and regulatory requirements, and then went a step further by providing an additional opportunity to hear concerns raised by the community." Region's Response to Petition at 12.

Petitioners suggest that there is no provision in RCRA or the regulations authorizing the Region's "step further." As noted earlier, however: "[A] Regional office can always offer more procedural safeguards than it is legally obligated to provide." *See In re Waste Technologies Industries*, 5 E.A.D. 646, 653 n.10 (EAB 1995) (*quoted in* Region's Response to Petition at 11).

The Region also asserts (Response to Comments at 42), and Petitioners have not disputed, that the Region kept notes of the comments made at the August 11 meeting and that such information was incor-

[17] We note that this exhibit includes invitation letters to both Cheryl Hitzemann and Deanna Wilkirson.

porated into the administrative record. *See In re Masonite Corporation*, 5 E.A.D. 551, 560 n.10 (EAB 1994) (comments made at informal meeting between Region and citizens group were part of the administrative record because a Regional employee recorded the comments in a memorandum and submitted the memorandum to the administrative record). We accept the Region's undisputed assertion and conclude that whatever information the Region obtained at the August 11 meeting was incorporated into the administrative record.

The Region also argues that, in any event, it did not base its decision on any comments made during the August 11 meeting. We also accept this assertion, for Petitioners have offered us no reason to believe that the Region did base its permit decision on information gathered at the August 11 meeting. In support of their position, Petitioners point to the Region's description of the meeting in the Region's response to comments, as follows:

> The consensus of the minority stakeholders attending the meeting ranged from neutrality on the issue to the opinion that issuing the Phase IV permit would place no environmental injustice. Most of the minority stakeholders supported the permitting of the CWMI facility.

Response to Comments at 42. Based on the quoted statement, Petitioners charge that:

> Region 5 purports to base the decision upon a consensus of speakers at the informal meeting, while ignoring statements made by public officials and others at the publicly noticed and recorded hearing held on June 29, 1994, pursuant to section 124.12.

Petition at 2-3. The Region's statement quoted above, however, provides scant support for Petitioners' argument. The Region's statement does nothing more than report on the Region's impressions of the August 11 meeting. There is nothing in the Region's report to indicate that the Region based its permit decision on what it heard at the meeting.

Moreover, the comments made at the August 11 meeting would be relevant only to the extent they bear on the facility's impact on human health and the environment, but the Region argues, and Petitioners have not given us any reason to doubt, that:

> The substance of the environmental justice issues discussed during the August 11, 1994 meeting had previ-

> ously been raised during the public comment period, at the June 29, 1994 public hearing, and through written comments received during the public comment period.

Region's Response to Petition at 10. Thus, to the extent that the Region obtained any relevant information at the August 11 meeting, it was information that has already been received at the public hearing or through written comments. In light of these considerations, we are not convinced that the Region based its permit decision on the August 11 meeting.

III. *CONCLUSION*

For all the foregoing reasons, we conclude that Petitioners have failed to carry their burden of demonstrating that either the Region's decision or the procedures it followed to reach that decision, involved a clear error, or an exercise of discretion or important policy consideration warranting review. Review of the petitions is therefore denied.

So ordered.

EXHIBIT B

Dec. 1, 2000

MEMORANDUM

SUBJECT: EPA Statutory and Regulatory Authorities Under Which Environmental Justice Issues May Be Addressed in Permitting

FROM: Gary S. Guzy *//signed//*
General Counsel
Office of General Counsel (2310A)

TO: Steven A. Herman
Assistant Administrator
Office of Enforcement and Compliance Assistance (2201A)

Robert Perciasepe
Assistant Administrator
Office of Air and Radiation (6101A)

Timothy Fields, Jr.
Assistant Administrator
Office of Solid Waste and Emergency Response (5101)

J. Charles Fox
Assistant Administrator
Office of Water (4101)

This memorandum analyzes a significant number of statutory and regulatory authorities under the Resource Conservation and Recovery Act, the Clean Water Act, the Safe Drinking Water Act, the Marine Protection, Research, and Sanctuaries Act, and the Clean Air Act that the Office of General Counsel believes are available to address environmental justice issues during permitting. The use of EPA's statutory authorities, as discussed herein, may in some cases involve new legal and policy interpretations that could require further Agency regulatory or interpretive action. Although the memorandum presents interpretations of EPA's statutory authority and regulations that we believe are legally permissible, it does not suggest that such actions would be uniformly practical or feasible given policy or resource considerations or that there are not important considerations of legal risk that would need to be evaluated. Nor do we assess the relative priority among these various avenues for addressing environmental justice concerns. We look forward to working with all your offices to explore these matters in greater detail.

I. Resource Conservation and Recovery Act (RCRA)

RCRA authorizes EPA to regulate the generation, transportation, treatment, storage, and disposal of hazardous wastes and the management and disposal of solid waste. EPA issues guidelines and recommendations to State solid waste permitting programs under RCRA sections 1008(a), 4002, or 4004 and may employ this vehicle to address environmental justice concerns. The primary area where environmental justice issues have surfaced, however, is in the permitting of hazardous waste treatment, storage, and disposal facilities (e.g., incinerators, fuel blenders, landfills). Pursuant to RCRA section 3005, EPA is authorized to grant permits to such facilities if they demonstrate compliance with EPA regulations.

Upon application by a State, EPA may authorize a State's hazardous waste program to operate in lieu of the Federal program, and to issue and enforce permits. The State's program must be equivalent to the Federal program to obtain and retain authorization. When EPA adopts more stringent RCRA regulations (including permit requirements), authorized States are required to revise their programs within one year after the change in the Federal program or within two years if the change will necessitate a State statutory amendment. 40 CFR § 271.21(e). EPA and most authorized States have so-called "permit shield" regulations, providing that, once a facility obtains a hazardous waste permit, it generally cannot be compelled to comply with additional requirements during the permit's term.

The scope of EPA's authority to address environmental justice issues in RCRA hazardous waste permits was directly addressed by the Environmental Appeals Board (EAB) in Chemical Waste Management, Inc., 6 E.A.D. 66, 1995 WL 395962 (1995) **<http://www.epa.gov/eab/disk11/cwmii.pdf>**The Board found "that when the Region has a basis to believe that operation of the facility may have a disproportionate impact on a minority or low-income segment of the affected community, the Region should, as a matter of policy, exercise its discretion to assure early and ongoing opportunities for public involvement in the permitting process." Id. at 73. It also found that RCRA allows the Agency to "tak[e] a more refined look at its health and environmental impacts assessment in light of allegations that operation of the facility would have a disproportionately adverse effect on the health or environment of low-income or minority populations." Id. at 74. Such a close evaluation could, in turn, justify permit conditions or denials based on disproportionately high and adverse human health or environmental effects, while "a broad analysis might mask the effects of the facility on a disparately affected minority or low-income segment of the community." Id. However, while acknowledging the relevance of disparities in health and environmental impacts, the Board also cautioned that "there is no legal basis for rejecting a RCRA permit application based solely upon alleged social or economic impacts upon the community." Id. at 73.

Consistent with this interpretation, there are several RCRA authorities under which EPA could address environmental justice issues in permitting:

A. **Hazardous Waste Treatment, Storage and Disposal**

1. RCRA section 3005(c)(3) provides that "[e]ach permit issued under this section shall contain such terms and conditions as the Administrator (or the State) determines necessary to protect human health and the environment." EPA has interpreted this provision to authorize denial of a permit to a facility if EPA determines that operation of the facility would pose an unacceptable risk to human health and the environment and that there are no additional permit terms or conditions that would address such risk. This "omnibus" authority may be applicable on a permit-by-permit basis where appropriate to address the following health concerns in connection with hazardous waste management facilities that may affect low-income communities or minority communities:

a. Cumulative risks due to exposure from pollution sources in addition to the applicant facility;

b. Unique exposure pathways and scenarios (e.g., subsistence fishers, farming communities); or

c. Sensitive populations (e.g., children with levels of lead in their blood, individuals with poor diets).

2. RCRA section 3013 provides that if the Administrator determines that "the presence of any hazardous waste at a facility or site at which hazardous waste is, or has been, stored, treated, or disposed of, or the release of any such waste from such facility or site may present a substantial hazard to human health or the environment," she may order a facility owner or operator to conduct reasonable monitoring, testing, analysis, and reporting to ascertain the nature and extent of such hazard. EPA may require a permittee or an applicant to submit information to establish permit conditions necessary to protect human health and the environment. 40 CFR § 270.10(k). In appropriate circumstances, EPA could use the authority under section 3013 or 40 CFR § 270.10(k) to compel a facility owner or operator to carry out necessary studies, so that, pursuant to the "omnibus" authority, EPA can establish permit terms or conditions necessary to protect human health and the environment.

3. RCRA provides EPA with authority to consider environmental justice issues in establishing priorities for facilities under RCRA section 3005(e), and for facilities engaged in cleaning up contaminated areas under the RCRA corrective action program, RCRA sections 3004(u), 3004(v), and 3008(h). For example, EPA could consider factors such as cumulative risk, unique exposure pathways, or sensitive populations in establishing permitting or clean-up priorities.

4. EPA adopted the "RCRA Expanded Public Participation" rule on December 11, 1995. See 60 Fed. Reg. 63417. RCRA authorizes EPA to explore further whether the RCRA

permit public participation process could better address environmental justice concerns by expanding public participation in the permitting process (including at hazardous waste management facilities to be located in or near low-income communities or minority communities).

5. In expanding the public participation procedures applicable to RCRA facilities, EPA also would have authority to expand the application of those procedures to the permitting of: (a) publicly owned treatment works, which are regulated under the Clean Water Act; (b) underground injection wells, which are regulated under the Safe Drinking Water Act; and (c) ocean disposal barges or vessels, which are regulated under the Marine Protection Research and Sanctuaries Act. These facilities are subject to RCRA's permit by rule regulations, 40 CFR § 270.60, and are deemed to have a RCRA permit if they meet certain conditions set out in the regulations. 40 CFR § 270.60.

6. EPA's review of State-issued permits provides additional opportunities for consideration of environmental justice concerns. Where the process for a State-issued permit does not adequately address sensitive population risks or other factors in violation of the authorized State program, under the regulations EPA could provide comments on these factors (in appropriate cases) during the comment period on the State's proposed permit on a facility-by-facility basis. 40 CFR § 271.19(a). Where the State itself is authorized for RCRA "omnibus" authority and does not address factors identified in EPA comments as necessary to protect human health and the environment, EPA may seek to enforce the authorized State program requirement. 40 CFR § 271.19(e) Alternatively, if the State is not authorized for "omnibus" authority, EPA may superimpose any necessary additional conditions under the "omnibus" authority in the federal portion of the permit. These conditions become part of the facility's RCRA permit and are enforceable by the United States under RCRA section 3008 and citizens through RCRA section 7002.

7. RCRA section 3019 provides EPA with authority to increase requirements for applicants for land disposal permits to provide exposure information and to request that the Agency for Toxic Substances and Disease Registry conduct health assessments at such land disposal facilities.

8. RCRA section 3004(o)(7) provides EPA with authority to issue location standards as necessary to protect human health and the environment. Using this authority, EPA could, for example, establish minimum buffer zones between hazardous waste management facilities and sensitive areas (e.g., schools, areas already with several hazardous waste management facilities, residential areas). Facilities seeking permits would need to comply with these requirements to receive a permit.

9. RCRA-permitted facilities are required under RCRA section 3004(a) to maintain "contingency plans for effective action to minimize unanticipated damage from any treatment, storage, or disposal of . . . hazardous waste." Under this authority, EPA could require facilities to prepare and/or modify their contingency plans to reflect the needs of

environmental justice communities that have limited resources to prepare and/or respond to emergency situations.

10. RCRA additionally provides EPA with authority to amend its regulations to incorporate some of the options described in 1 through 6 above so they become part of the more stringent federal program that authorized States must adopt.

II. Clean Water Act (CWA)

The CWA was adopted "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." To achieve this goal, Congress prohibited the discharge from a point source of any pollutant into a water of the United States unless that discharge complies with specific requirements of the Act. Compliance is achieved by obtaining and adhering to the terms of an NPDES permit issued by EPA or an authorized State pursuant to section 402, or a dredge and fill permit issued by the Army Corps of Engineers or an authorized State pursuant to section 404.

NPDES permits must contain: (1) technology-based limitations that reflect the pollution reduction achieved through particular equipment or process changes, without reference to the effect on the receiving water and (2) where necessary, more stringent limitations representing that level of control necessary to ensure that the receiving waters achieve water quality standards. Water quality standards consist of (1) designated uses of the water (e.g., public water supply, propagation of fish, or recreation); (2) criteria to protect those uses including criteria based on protecting human health and aquatic life; and (3) an antidegradation policy. EPA requires that States designate all waters for "fishable/swimmable" uses unless such uses are not attainable. EPA issues water quality criteria guidance to the States pursuant to CWA section 304(a).

Permits issued under CWA section 404 authorize the discharge of "dredged or fill material" to waters of the United States. The types of activities regulated under section 404 include filling of wetlands to create dry land for development, construction of berms or dams to create water impoundments, and discharges of material dredged from waterways to maintain or improve navigation. Section 404 permits issued by the Corps of Engineers must satisfy two sets of standards: the Corps' "public interest review" and the section 404(b)(1) guidelines promulgated by EPA. The public interest review is a balancing test that requires the Corps to consider a number of factors, including economics, fish and wildlife values, safety, food and fiber production and, public needs and welfare in general. 33 CFR § 320.4(a). The section 404(b)(1) guidelines provide that no permit shall issue if: (1) there are practicable, environmentally less damaging alternatives, (2) the discharge would violate water quality standards or jeopardize threatened or endangered species, (3) the discharge would cause significant degradation to the aquatic ecosystem, or (4) if all reasonable steps have not been taken to minimize adverse effects of the discharge. 40 CFR § 230.10.

There are several CWA authorities under which EPA could address environmental justice issues in permitting:

A. State Water Quality Standards

States are required to review their water quality standards every three years and to submit the results of their review to EPA. CWA section 303(c)(1). EPA Regional offices must approve or disapprove all new or revised State water quality standards pursuant to section 303(c)(3). EPA will approve State standards if they are scientifically defensible and protective of designated uses. 40 CFR § 131.11. If a State does not revise a disapproved standard, EPA is required to propose and promulgate a revised standard for the State. Section 303(c)(4)(A). The Administrator is also required to propose and promulgate a new or revised standard for a State whenever she determines that such a standard is necessary to meet the requirements of the Act and the State does not act to adopt an appropriate standard. CWA section 303(c)(4)(B).

1. State water quality standards currently are required to provide for the protection of "existing uses." 40 CFR § 131.12(a)(1). These are defined as uses actually attained in the water body on or after November 28, 1975. 40 CFR § 131.3(e). To the extent that minority or low-income populations are, or at any time since 1975 have been, using the waters for recreational or subsistence fishing, EPA could reinterpret the current regulations to require that such uses, if actually attained, must be maintained and protected. The CWA provides EPA with authority to require, through appropriate means, that high rates of fish consumption by these populations be considered an "existing use" to be protected by State water quality standards. Under the current regulations, existing uses cannot be removed.

2. EPA regulations provide that all waters must be designated for the protection and propagation of fish, shellfish, and wildlife and for recreation in and on the water ("fishable/swimmable") unless the State documents to EPA's satisfaction that such uses are not attainable. 40 CFR §§ 131.6(a), 131.10(j).

   EPA interprets "fishable" uses under section 101(a) of the CWA to include, at a minimum, designated uses providing for the protection of aquatic communities and human health related to consumption of fish and shellfish. In other words, EPA views "fishable" to mean that not only can fish and shellfish thrive in a waterbody, but when caught, can also be safely eaten by humans (stated in 10/24/00 "Dear Colleague" letter from Geoffrey H. Grubbs, Director Office of Science and Technology, and Robert H. Wayland, III, Director Office of Wetlands, Oceans and Watersheds). Therefore, EPA currently recommends that in setting criteria to protect "fishable" uses, that the State/Tribe adjust the fish consumption values used to develop criteria to protect the "fishable" use, including fish consumption by subsistence fishers (USEPA 2000, Methodology

for Deriving Ambient Water Quality Criteria for the Protection of Human Health, EPA-822-B-00-004, Chapter 2.1). For example, in deriving such criteria, states or tribes could select their fish consumption value based on site-specific information or a national default value for subsistence fishing (Chapter 4).

In the future, EPA could reinterpret it regulations to mean that any human health use must have a criterion that would protect consumption by subsistence fishers unless there is a showing that water is not used for subsistence fishing.

3. The CWA provides EPA with authority to recommend that State CWA section 303(c)(1) triennial reviews of water quality standards consider the extent to which State criteria provide for protection of human health where there exists subsistence fishing. EPA Regional offices may disapprove a criterion that does not provide protection to highly-exposed populations. The Administrator further has the discretionary authority to determine that such criteria are necessary to meet the requirements of the CWA and then must promptly propose and promulgate such criteria.

4. Consistent with CWA section 101(e), EPA could encourage States to improve public participation processes in the development of State water quality standards through greater outreach and by translating notices for limited English speaking populations consistent with Executive Order 12898 on environmental justice.

B. Issuance of NPDES Permits

1. Assuming EPA adopts the interpretation described in paragraph A.1., above, NPDES permits issued for discharge to waters where a high level of fish consumption is an "existing use" should contain limitations appropriate to protect that use. The CWA provides EPA authority to take this approach when it issues NPDES permits in States not authorized to run the NPDES program, and to object to or ultimately veto State-issued permits that are not based on these considerations. CWA section 402(d).

2. Consistent with CWA section 101(e), where EPA issues NPDES permits, environmental justice concerns can also be taken into account in setting permitting priorities and improving public participation in the permitting process (greater outreach to minority communities and low-income communities including translating notices for limited English speaking populations consistent with Executive Order 12898 on environmental justice).

3. CWA section 302 authorizes EPA to propose and adopt effluent limitations for one or more point sources if the applicable technology-based or water quality-based requirements will not assure protection of public health and other concerns. This determination requires findings of economic capability and a reasonable relationship between costs and benefits. The Agency has never used this authority, but could evaluate whether this authority could be used with respect to pollutants of concern to minorities or

low-income communities. Prior to adopting such limitations by regulation, EPA could use its authority under CWA section 402(a)(1) to incorporate such limitations in specific NPDES permits issued by EPA. The Clean Water Act does not appear to provide any general authority to impose conditions on or deny permits based on environmental justice considerations that are unconnected to water quality impacts or technology-based limitations.

4. Pursuant to CWA section 104 and other authorities, EPA may provide technical assistance to Indian Tribes, where appropriate, in the development of water quality standards and the issuance of NPDES permits.

C. CWA Section 404

1. The broadest potential authority to consider environmental justice concerns in the CWA section 404 program rests with the Corps of Engineers, which conducts a broad "public interest review" in determining whether to issue a section 404 permit. In evaluating the "probable impacts . . . of the proposed activity and its intended use on the public interest," the Corps is authorized to consider, among other things, aesthetics, general environmental concerns, safety, and the needs and welfare of the people. 33 CFR § 320.4(a). This public interest review could include environmental justice concerns.

2. EPA has discretionary oversight authority over the Corps' administration of the section 404 program (i.e., EPA comments on permit applications, can elevate Corps permit decisions to the Washington, D.C. level, and can "veto" Corps permit decisions under section 404(c) that would have an unacceptable adverse effect on "municipal water supplies, shellfish beds and fishery areas, wildlife, or recreational areas"). The CWA thus authorizes EPA to use these authorities to prevent degradation of these public resources that may have a disproportionately high and adverse health or environmental effect on a minority community or low-income community. Such effects can be addressed when they result directly from a discharge of dredged or fill material (e.g., the filling of a waterbody), or are the indirect result of the permitted activity (e.g., the fill will allow construction of an industrial facility that will cause water pollution due to runoff).

III. Safe Drinking Water Act (SDWA)

The SDWA includes two separate regulatory programs. The Public Water Supply program establishes requirements for the quality of drinking water supplied by public water systems. This program contains no federal permitting. The Underground Injection Control (UIC) program establishes controls on the underground injection of fluids to protect underground sources of drinking water.

Under the UIC program, the Administrator must establish requirements for State UIC programs that will prevent the endangerment of drinking water sources by underground injection.

EPA has promulgated a series of such requirements beginning in 1980. The SDWA also provides that States may apply to EPA for primary responsibility to administer the UIC program. EPA must establish a UIC permitting program in States that do not seek this responsibility or that fail to meet the minimum requirements established by EPA.

There are several SDWA authorities under which EPA could address environmental justice issues in UIC permitting:

A. EPA-issued Permits

Underground injection must be authorized by permit or rule. The SDWA provides that EPA can deny or establish permit limits where such injection may "endanger" public health. "Endangerment" is defined to include any injection that may result in the presence of a contaminant in a drinking water supply that "may...adversely affect the health of persons." 40 CFR § 144.52(b)(1). As a result, in those States where EPA issues permits and an injection activity poses a special health risk to minority or low-income populations, the SDWA provides EPA with authority to establish special permit requirements to address the endangerment or deny the permit if the endangerment cannot otherwise be eliminated. As in its Chemical Waste Management RCRA permit appeal decision discussed in Part I above, the EAB has addressed EPA's authority to expand public participation and to consider disproportionate impacts in the UIC permitting program. Envotech, 6 E.A.D. 260, 281, 1996 WL 66307 (1996) <http://www.epa.gov/eab/disk10/envotech.pdf>.

B. Pending regulatory action

The Office of Water is currently revising the regulations under this program governing "Class V" injection wells (i.e., shallow wells where nonhazardous waste is injected). In determining which wells to regulate and the standards for those where EPA determines regulations are necessary to prevent "endangerment," the SDWA provides EPA with authority to take into account environmental justice issues such as cumulative risk and sensitive populations.

C. Other regulatory actions

Likewise, the SDWA provides EPA with authority to address environmental justice issues related to potential endangerment of drinking water supplies by injection for all types of wells. For example, EPA could revise its regulatory requirements for siting Class 1 (hazardous waste) wells to address cumulative risk and other risk-related environmental justice issues.

IV. Marine Protection, Research, and Sanctuaries Act (MPRSA)

The MPRSA, commonly known as the Ocean Dumping Act, 33 USC § 1401 ff., establishes a permitting program that covers the dumping of material into ocean waters. The ocean disposal of a variety of materials, including sewage sludge, industrial waste, chemical and biological warfare agents, and high level radioactive waste, is expressly prohibited.

EPA issues permits for the dumping of all material other than dredged material. 33 U.S.C. § 1412(a). The Army Corps of Engineers issues permits for the dumping of dredged material, subject to EPA review and concurrence. 33 U.S.C. § 1413(a). (As a practical matter, EPA issues very few ocean dumping permits because the vast majority of material disposed of at sea is dredged material.) EPA also is charged with designating sites at which permitted disposal may take place; these sites are to be located wherever feasible beyond the edge of the Continental Shelf. 33 U.S.C. § 1412(c)(1).

When issuing MPRSA permits and designating ocean dumping sites, EPA is to determine whether the proposed dumping will "unreasonably degrade or endanger human health, welfare, amenities, or the marine environment, ecological systems, or economic potentialities." 33 USC § 1412(a), (c)(1). EPA also is to take into account "the effect of... dumping on human health and welfare, including economic, esthetic, and recreational values." 33 U.S.C. § 1412(a)(B), (c)(1). Thus, in permitting and site designation, EPA has ample authority to consider such factors as impacts on minority or low-income communities and on subsistence consumers of sea food that would result from the proposed dumping. In addition, the MPRSA provides specifically that EPA is to consider land-based alternatives to ocean dumping and the probable impact of requiring use of these alternatives "upon considerations affecting the public interest." 33 U.S.C. § 1412(a)(G). This authorizes EPA to take impacts on minority populations or low-income populations into account in evaluating alternative locations and methods of disposal of the material that is proposed to be dumped at sea.

V. Clean Air Act (CAA)

There are several CAA authorities under which EPA could address environmental justice issues in permitting:

A. New Source Review (NSR)

NSR is a preconstruction permitting program. If new construction or making a major modification will increase emissions by an amount large enough to trigger NSR requirements, then the source must obtain a permit before it can begin construction. The NSR provisions are set forth in sections 110(a)(2)(C), 165(a) (PSD permits), 172(c)(5) and 173 (NSR permits) of the Clean Air Act.

Under the Clean Air Act, states have primary responsibility for issuing permits, and they can customize their NSR programs within the limits of EPA regulations. EPA's role is to

approve State programs, to review, comment on, and take any other necessary actions on draft permits, and to assure consistency with EPA's rules, the state's implementation plan, and the Clean Air Act. Citizens also play a role in the permitting decision, and must be afforded an opportunity to comment on each construction permit before it is issued.

The NSR permit program for major sources has two different components–one for areas where the air is dirty or unhealthy, and the other for areas where the air is cleaner. Under the Clean Air Act, geographic areas (e.g., counties or metropolitan statistical areas) are designated as "attainment" or "nonattainment" with the National Ambient Air Quality Standards (NAAQS)–the air quality standards which are set to protect human health and the environment. Permits for sources located in attainment (or unclassifiable) areas are called Prevention of Significant Deterioration (PSD) permits and those for sources located in nonattainment areas are called NSR permits.

A major difference in the two programs is that the control technology requirement is more stringent in nonattainment areas and is called the Lowest Achievable Emission Rate (LAER). On the other hand, in attainment or PSD areas, a source must apply Best Available Control Technology (BACT) and the statute allows the consideration of cost in weighing BACT options. Also, in keeping with the goal of progress toward attaining the national air quality standards, sources in nonattainment areas must always provide or purchase "offsets"–decreases in emissions which compensate for the increases from the new source or modification. In attainment areas, PSD sources typically do not need to obtain offsets. However, PSD does require an air quality modeling analysis of pollution that exceeds allowable levels; this impact must be mitigated. Sometimes, these mitigation measures can include offsets in PSD areas.

1. Under the Clean Air Act, section 173(a)(5) provides that a nonattainment NSR permit may be issued only if: "an analysis of alternative sites, sizes, production processes, and environmental control techniques for such proposed source demonstrates that benefits of the proposed source significantly outweigh the environmental and social costs imposed as a result of its location, construction, or modification." For example, this provision authorizes consideration of siting issues. Section 165(a)(2) provides that a PSD permit may be issued only after an opportunity for a public hearing at which the public can appear and provide comment on the proposed source, including "alternatives thereto" and "other appropriate considerations." This authority could allow EPA to take action to address the proper role of environmental justice considerations in PSD/NSR permitting.

2. In addition to these statutory provisions, EPA directly issues PSD/NSR permits in certain situations (e.g., in Indian country and Outer Continental Shelf areas) and, through the EAB, adjudicates appeals of PSD permits issued by States and local districts with delegated federal programs. In such permit and appeal decisions, it is possible to consider environmental justice issues on a case-by-case basis, without waiting to issue a generally applicable rule or guidance document. EPA already considers environmental

justice issues on a case-by-case basis in issuing PSD permits consistent with its legal authority.

3. The EPA Environmental Appeals Board (EAB) has addressed environmental justice issues in connection with PSD permit appeals on several occasions. The EAB first addressed environmental justice issues under the CAA in the original decision in Genessee Power (September 8, 1993). In that decision the EAB stated that the CAA did not allow for consideration of environmental justice and siting issues in air permitting decisions. In response, the Office of General Counsel filed a motion for clarification on behalf of the Office of Air and Radiation (OAR) and Region V. OGC pointed out, among other things, that the CAA requirement to consider alternatives to the proposed source, and the broad statutory definition of "best available control technology" (BACT), provided ample opportunity for consideration of environmental justice in PSD permitting. In an amended opinion and order issued on October 22, 1993, the EAB deleted the controversial language but did not decide whether it is permissible to address environmental justice concerns under the PSD program. 4 E.A.D. 832, 1993 WL 484880, <http://www.epa.gov/eab/disk4/genesee.pdf>. However, in subsequent decisions, Ecoeléctrica, 7 E.A.D. 56, 1997 WL 160751 (1997) <http://www.epa.gov/eab/disk11/ecoelect.pdf>, and Puerto Rico Electric Power Authority, 6 E.A.D. 253, 1995 WL 794466 (1995) <http://www.epa.gov/eab/disk9/prepa.pdf>, the EAB stated that notwithstanding the lack of formal rules or guidance on environmental justice, EPA could address environmental justice issues. In 1999 in Knauf Fiber Glass, 8 E.A.D. PSD Appeal Nos. 98-3 through 98-20, 1999 WL 64235 (Feb. 4, 1999) <http://www.epa.gov/eab/disk11/knauf.pdf>, the EAB remanded a PSD permit to the delegated permitting authority (the Shasta County Air Quality Management District) for failure to provide an environmental justice analysis in the administrative record in response to comments raising the issue.

4. In the 1990 CAA Amendments, Congress provided that the PSD provisions of the Act do not apply to hazardous air pollutants (HAPs), see CAA section 112(b)(6), so the role of hazardous air pollutant impacts as environmental justice issues in PSD permitting is not straightforward. Thus, BACT limits are not required to be set for HAPs in PSD permits. However, the Administrator ruled prior to the 1990 Amendments that in establishing BACT for criteria pollutants, alternative technologies for criteria pollutants could be analyzed based on their relative ability to control emissions of pollutants not directly regulated under PSD. EPA believes that the 1990 Amendments did not change this limited authority, and EPA believes it could be a basis for addressing environmental justice concerns. In addition, EPA may have authority to take into account – and to require States to do so in their PSD permitting – effects of HAPs that are also criteria pollutants, such as VOCs.

B. Title V

Title V of the CAA requires operating permits for stationary sources of air pollutants and prescribes public participation procedures for the issuance, significant modification, and renewal of Title V operating permits. Unlike PSD/NSR permitting, Title V generally does not impose substantive emission control requirements, but rather requires all applicable requirements to be included in the Title V operating permit. Other permitting programs may co-exist under the authority of the CAA, such as those in State implementation plans (SIPs) approved by EPA.

1. Because Title V does not directly impose substantive emission control requirements, it is not clear whether or how EPA could take environmental justice issues into account in Title V permitting – other than to allow public participation to serve as a motivating factor for applying closer scrutiny to a Title V permit's compliance with applicable CAA requirements. EPA believes, however, that in this indirect way, Title V can, by providing significant public participation opportunities, serve as a vehicle by which citizens can address environmental justice concerns that arise under other provisions of the CAA.

2. Under the 40 CFR Part 70/71 permitting process, EPA has exercised its CAA authority to require extensive opportunities for public participation in permitting actions. State permitting authorities also have the flexibility to provide additional public participation.

3. Other permitting processes under the CAA such as SIP permitting programs can include appropriate public participation measures, and these can be used to promote consideration of environmental justice issues. For example, EPA regulations require that "minor NSR programs" in SIPs provide an opportunity for public comment prior to issuance of a permit (40 CFR § 51.161(b)(2)). (Note, however, that many state programs do not at present meet this requirement.)

C. Solid Waste Incinerator Siting Requirements

The CAA provides specific authority to EPA to establish siting requirements for solid waste incinerators that could include consideration of environmental justice issues. CAA section 129(a)(3) provides that standards for new solid waste incinerators include "siting requirements that minimize, on a site specific basis, to the maximum extent practicable, potential risks to public health or the environment." These would be applicable requirements for Title V purposes. The new source performance standards (NSPS) for large municipal waste combustors (40 CFR part 60, subpart Eb) and hospital/medical/infectious waste incinerators (40 CFR part 60, subpart Ec) both currently contain such requirements. In the large municipal waste combustor NSPS, the specific requirement in section 129(a)(3) was incorporated and requirements for public notice, a public meeting and consideration of and response to public comments were added. However, to reduce the burden on the much smaller entities which typically own and operate hospital/medical/infectious waste incinerators, that NSPS only incorporates the specific section 129(a)(3) requirement. EPA is subject to a court ordered deadline for

taking final action on NSPS for commercial/industrial waste incinerators, and has proposed to follow the approach to the siting analysis adopted in the hospital/medical/infectious waste NSPS in that rule.

D. 40 CFR Part 71 Tribal Air Rule

The Part 71 federal operating permit rule establishes EPA's Title V operating permits program in Indian country. Where sources are operating within Indian country, and Tribes do not seek authorization to implement Title V programs, the Part 71 rule clarifies that EPA will continue to implement federal operating permit programs. These Title V permit programs are limited to Title V and other applicable federal CAA requirements and are not comprehensive air pollution control programs. Thus, the opportunities for addressing environmental justice issues may be similar to those discussed in section B above.

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EXHIBIT C

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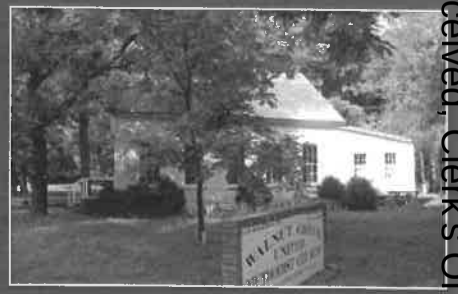
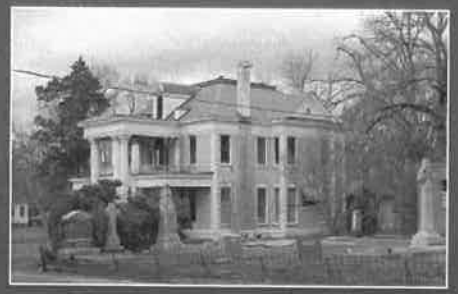
Environmental Justice:

Examining the Environmental Protection Agency's Compliance and Enforcement of Title VI and Executive Order 12,898

September 2016





U.S. Commission on Civil Rights

The U.S. Commission on Civil Rights is an independent, bipartisan agency established by Congress in 1957. It is directed to:

- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, disability, or national origin, or by reason of fraudulent practices.
- Study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
- Appraise federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin.
- Submit reports, findings, and recommendations to the President and Congress.
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Environmental Justice: Examining the Environmental Protection Agency's Compliance and Enforcement of Title VI and Executive Order 12,898

A Briefing Before
The United States Commission on Civil Rights
Held in Washington, DC

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UNITED STATES COMMISSION ON CIVIL RIGHTS

1331 Pennsylvania Ave., NW • Suite 1150 • Washington, DC 20425 www.usccr.gov

Letter of Transmittal

President Barack Obama
Vice President Joe Biden
Speaker of the House Paul Ryan
Senator Mitch McConnell

On behalf of the United States Commission on Civil Rights ("the Commission"), and pursuant to Public Law 103-419, I am pleased to transmit our 2016 Statutory Enforcement Report: *Environmental Justice: Examining the Environmental Protection Agency's Compliance and Enforcement of Title VI and Executive Order 12,898*. This report is also available in full on the Commission's website at www.usccr.gov.

This report examines whether the Environmental Protection Agency ("EPA") is complying with its environmental justice obligations. The Commission heard testimony from the EPA, experts and scholars in the field, and a majority of the Commission made findings and recommendations. Some of the findings are:

1. EPA's definition of environmental justice recognizes environmental justice as a civil right, fair treatment and meaningful involvement of all people regardless of race, color, notional origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations and policies.

2. Racial minorities and low income communities are disproportionately affected by the siting of waste disposal facilities and often lack political and financial clout to properly bargain with polluters when fighting a decision or seeking redress.

3. The EPA has a history of being unable to meet its regulatory deadlines and experiences extreme delays in responding to Title VI complaints in the area of environmental justice.

4. EPA's Office of Civil Rights has never made a formal finding of discrimination and has never denied or withdrawn financial assistance from a recipient in its entire history, and has no mandate to demand accountability within the EPA.

5. While lacking formal research on links to cancer, it is known that the heavy metals contained in coal ash are known as "hazardous substances" and can potentially damage all major organ systems. Not only do the toxic substances found in coal ash become absorbed up the food chain, but they also contaminate the environment (humans and animals) through spills, dam leaks, and sewage pipe breaks.

6. Whether coal ash facilities are disproportionately located in low-income and minority communities depends on how the comparison is done, but the EPA did find the percentage of minorities and low income individuals living within the catchment area of

coal ash disposal facilities is disproportionately high when compared to the national average. The EPA did not fully consider the civil rights impacts in approving movement and storage of coal ash.

7. The EPA's Final Coal Ash Rule negatively impacts low-income and communities of color disproportionately, and places enforcement of the Rule back on the shoulders of the community. This system requires low-income and communities of color to collect complex data, fund litigation and navigate the federal court system - the very communities that the environmental justice principles were designed to protect.

Highlights of the recommendations include:

1. The EPA should not eliminate the deadlines related to processing and investigating Title VI complaints, nor should it adopt a phased-approach to conducting post-award compliance reviews. The EPA should include affected communities in the settlement process.

2. The EPA should bring on additional staff to meet current and future needs, and to clean up its backlog of Title VI complaints. EPA should empower and support the efforts of the Office of Civil Rights (and Deputy Officers), continue sharing expertise among regions, and provide the Office with the necessary tools to hold accountable other EPA entities in minority jurisdictions.

3. Coal Ash should be classified as "special waste" and federal funding should be provided for research on health impact of coal ash exposure to humans. The EPA should provide assistance to affected communities to help enforce the Coal Ash Rule. In addition, the EPA should test drinking water wells, and assess high-risk coal-ash dams and coal ash disposal sites.

4. EPA should provide technical assistance to minority, tribal, and low-income communities to help enforce the Coal Ash Rule and should promulgate financial assurance requirements for coal ash disposal as soon as possible under RCRA or CERCLA authority.

5. EPA should prohibit its state partners, and any recipients of EPA funds, from allowing industrial facilities in their jurisdiction to operate without the appropriate permits and the EPA should enforce permitting requirements and re-evaluate remediation fund reserve guidelines.

The Commission is pleased to transmit its views in order to inform the government and ensure that all Americans' right to a clean and safe environment and that minority and low-income communities' environmental justice rights are protected.

For the Commission,

Martin R. Castro
Chairman