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## Reviving the Environmental Justice Agenda

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# REVIVING THE ENVIRONMENTAL JUSTICE AGENDA

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## I. INTRODUCTION

Racial minorities and low-income populations receive an unequal burden of the pollution impacts in the United States, while obtaining fewer benefits of industrial development. Environmental justice (EJ) seeks to remedy this unequal distribution. Although overhaul of environmental laws would be a welcome approach among those advocating for improved environmental protection,<sup>1</sup>

\* Professor of Law, Pacific McGeorge School of Law. The author would like to thank Professor Raquel Aldana for the opportunity to provide a contribution to this symposium, Lilliana Udang, Pacific McGeorge Class of 2017, for helpful research assistance and Ann Motto, Editor in Chief as well as the staff of the Chicago-Kent Law Review for editorial assistance.

1. A vast body of scholarship advocates that different approaches to environmental regulation would improve results, such as a more integrated approach, more reliance on economic incentives, or through a shift in perspectives and focus. Connected most directly to the issue of environmental justice, for an argument that agencies could improve decision-making and build public trust by shifting to a human rights norms mindset, see Rebecca M. Bratspies, *Human Rights and Environmental Regulation*, 19 N.Y.U. ENVTL. L.J. 225, 228 (2012) (explaining how regulatory agents could adopt the view that their decisions have human rights implications and the attendant benefits of this approach). Professor Bratspies argues that the lack of faith in existing government regulation requires a new direction to rebuild confidence. *Id.* Her

use of existing legal tools can make a significant contribution to reducing pollution and risk profiles.<sup>2</sup> Progress through the Obama administration demonstrates that it is feasible to use existing legal tools to promote EJ, regardless of whether Congress adopts more proactive EJ laws in the future.<sup>3</sup>

In the 1960s, social justice activists were successful in securing laws prohibiting discrimination on the basis of race, such as the Civil Rights Act of 1964.<sup>4</sup> Throughout the 60s and 70s, the environmental movement pressed for the adoption of laws prohibiting air and water pollution and proactively addressing hazardous waste disposal. The Clean Air Act (CAA),<sup>5</sup> the Clean Water Act (CWA),<sup>6</sup> and the Resource Conservation and Recovery Act (RCRA)<sup>7</sup> are potent examples of federal regulation aimed toward achieving a healthy environment and minimizing pollution risks.<sup>8</sup>

proposal is that a focus on human rights norms within the decision-making context could improve public trust, and this is true regardless of the continuing debate over a free-standing environmental right in international norms. *Id.*

2. One of the contested unequal burdens on low-income and minority communities is the poor enforcement of environmental regulations. Julianna Maantay, *Zoning, Equity and Public Health*, 91 AM. J. PUB. HEALTH 1033, 1038 (2001).

3. I do not argue that executive action is sufficient in itself to ameliorate environmental justice inequities. For purposes of this symposium, executive action in the face of legislative inaction is the focus. I argue only that environmental justice progress has been made through focus on discretionary executive power. See *infra* Section III for further discussion. For a robust critique of E.O. 12898 and proposals for how the E.O. should be amended to better minimize environmental injustices, see Devon G. Peña, *Toward an Environmental Justice Act*, NEW CLEAR VISION (Mar. 2, 2011), <http://www.newclearvision.com/2011/03/02/toward-an-environmental-justice-act/> (last visited July 29, 2015). In part, Professor Peña's primary critique is central to this symposium on executive action, noting the limits of this approach. Specifically, he states:

The limited discretionary administrative powers of the Executive Order in this case are strictly limited to a politics that can only address the mitigation of environmental harms and risks, regardless of the party in charge. The system is basically designed to try and clean up pollution and other ecological damages after they occur. Industry must have its privilege of profit-making protected; cleaning up and repairing the damage to the air, water, land, people and all other living organisms is second. *Id.*

4. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964). Title VI of the Civil Rights Act requires that federal agencies do not discriminate based on race, color, and national origin, in programs and activities receiving federal funding. Public Health and Welfare Act, 42 U.S.C. §2000d (1964). As many programs of the agencies responsible for implementing environmental laws involve distribution of funds, particularly to states, ensuring Title VI compliance is an important aspect of achieving EJ.

5. Clean Air Act of 1963, 42 U.S.C. §§ 7401–7671q (2012).

6. Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§1251–1338 (2012).

7. Resource Conservation and Recovery Act of 1976, 43 U.S.C. §§ 6901-6992k (2012).

8. Through these laws, the EPA has significant tools to address environmental justice within its permitting programs. See generally Richard J. Lazarus & Stephanie Tai, *Integrating Environmental Justice into EPA Permitting Authority*, 26 ECOLOGY L.Q. 617 (1999).

Beginning in the 1980s, the culmination of social and environmental activists brought about the environmental justice movement.<sup>9</sup> Although the rift between the mainstream environmental movement and the environmental justice movement continues, both movements are concerned with minimizing environmental impacts and health risks of pollution.<sup>10</sup> The EJ movement focuses more on the distributive aspects of environmental impacts. No legislative efforts have been successful in addressing EJ directly, although there are multiple instances of failed efforts that are insightful.<sup>11</sup> For example, Representative John Lewis, a renowned civil rights activist, introduced H.R. 2105, the Environmental Justice Act of 1992, in the House.<sup>12</sup> Senator (and later Vice President) Al Gore sponsored the Environmental Justice Act of 1992 in the Senate, but it did not pass.<sup>13</sup> The law would have restricted the siting of new polluting facilities in locations with the greatest amount of toxic pollution.<sup>14</sup> Likewise, the Environmental Justice Act of 1993<sup>15</sup> and the Public Health Act of 1994<sup>16</sup> were not successful. In the past decade, Representative Hilda Solis introduced H.R. 1103, the Environmental Justice Act of 2007, but it did not come to the floor for a vote.<sup>17</sup> Senator Barbara Boxer introduced the Environmental Justice Renewal Act, but it failed to garner sufficient support to pass Congress in 2008.<sup>18</sup> A proposed amendment to the Constitution in 2011 by Representative Jessie Jackson Jr., H.J. Res. 33, died in Congress. Section 1 of that amendment would have provided that, “All persons

9. ENVIRONMENTAL JUSTICE AND ENVIRONMENTALISM, THE SOCIAL JUSTICE CHALLENGE TO THE ENVIRONMENTAL MOVEMENT 135 (Ronald Sandler & Phaedra Pezzullo eds., 2007).

10. It is important to realize the tensions between the two movements are fundamental, and although beyond the scope of this particular article, the structure of environmental law itself presents perhaps the greatest obstacle to achieving environmental justice. Alice Kaswan, *Environmental Justice and Environmental Law*, 24 *FORDHAM ENVTL. L. REV.* 149 (2013) [hereinafter Kaswan, *Environmental Justice*].

11. Alex Geisinger, *The Benefits of Development and Environmental Injustice*, 37 *COLUM. J. ENVTL. L.* 205, 212–19 (2012) (discussing the patchwork of laws that address distributional impacts and environmental justice issues indirectly).

12. H.R. 2015, 103d Cong. (1992).

13. S. 2806, 102d Cong. § 9 (1992).

14. See *id.* (restricting additional facilities in the top 100 counties impacted by pollution, or “other appropriate geographic unit.”).

15. S. 1161, 103d Cong. (1993). This Senate Bill was introduced by Sen. Max Baucus D-Mont. *Id.*

16. S. 1841, 103d Cong. (1994). This Senate Bill was introduced by Sen. Paul Wellstone D-Minn. *Id.*

17. H.R. 1103, 110th Cong. (2007). This House Bill was introduced by Rep. Hilda Solis D-Cal. *Id.*

18. S. 2549, 110th Cong. (2008); S. REP. NO. 110–498 (2008).

shall have a right to a clean, safe, and sustainable environment, which right shall not be denied or abridged by the United States or any State.”<sup>19</sup> Section 2 stated that Congress had the power to enforce and implement this article by appropriate legislation.<sup>20</sup> As other scholars have noted, it appears that EJ proponents do not have the political strength to move their legislative aspirations through Congress.<sup>21</sup>

In the face of legislative failure, federal activity to remedy unequal environmental impact burdens can be found at the administrative level—with the executive branch prodding federal agencies to use existing environmental and civil rights laws (among other tools) to reduce the environmental risks borne by racial minorities and low-income populations. In this article, I trace the efforts to address environmental justice through executive action, noting several accomplishments of the Obama administration to boost leadership, collaboration, and direct funding to EJ efforts. Notably, President Obama’s acknowledgment of the rights of minority and low-income populations to a healthy living environment is supported by the development of data critically necessary to highlight the existing disparities and bring environmental justice actions to bear where they are necessary.

## II. ENVIRONMENTAL JUSTICE IN THE U.S.

On February 11, 1994, President William Clinton signed Executive Order 12898, “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations.”<sup>22</sup> EJ scholar Professor Alice Kaswan has noted the importance of the E.O. as the most prominent action in addressing the distributional effects of environmental decision-making.<sup>23</sup> Twenty years later, President Barack Obama reaffirmed the mission set forth in that ex-

19. H.R. J. Res. 33, 112th Cong. § 1 (2011).

20. *Id.* at § 2.

21. Some attribute this weakness to the very nature and heart of the EJ movement—which is grassroots and thus more diffuse than others which have been able to amass money and political power. See, e.g., Kaswan, *Environmental Justice*, *supra* note 10, at 158 (noting inability of EJ groups to be influential in key national debates).

22. Exec. Order No. 12,898—Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 Fed. Reg. 7629 (1994).

23. Alice Kaswan, *Environmental Justice: Bridging the Gap Between Environmental Laws and “Justice,”* 47 AM. U. L. REV. 221, 244–45 (1997) [hereinafter Kaswan, *Bridging the Gap*].

executive order.<sup>24</sup> Too little progress was made in those intervening decades. President Obama's reaffirmation couched the mission as a recognized right of Americans to enjoy a healthy environment. President Obama asserted that, "Executive Order 12898 affirmed every American's right to breathe freely, drink clean water, and live on uncontaminated land."<sup>25</sup>

The definition of environmental justice is not uniform, but for purposes of this article the EPA's definition is most salient: "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies."<sup>26</sup>

Fair treatment and meaningful involvement have also been defined by EPA: "Fair treatment means that no group of people should bear a disproportionate share of the negative environmental consequences resulting from industrial, governmental and commercial operations or policies."<sup>27</sup>

Meaningful Involvement means that:

1. People have an opportunity to participate in decisions about activities that may affect their environment and/or health;
2. The public's contribution can influence the regulatory agency's decision;
3. Their concerns will be considered in the decision making process; and
4. The decision makers seek out and facilitate the involvement of those potentially affected.<sup>28</sup>

Taken together, it is clear the EPA's conception of environmental justice is similar to the one the movement has emphasized—the right of communities to be engaged in environmental decision-making. The EJ literature identifies as the galvanizing impetus when activists identified the siting of hazardous waste and toxic industrial facilities disproportionately in African American and Latino communi-

24. President Barack Obama, Proclamation 9082—20<sup>th</sup> Anniversary of Executive Order 12898 on Environmental Justice (Feb. 10, 2014) (on file at <http://www.gpo.gov/fdsys/pkg/DCPD-201400079/pdf/DCPD-201400079.pdf>) [hereinafter Proclamation].

25. *Id.*

26. *Basic Information*, U.S. ENVTL. PROT. AGENCY (May 24, 2012), <http://www.epa.gov/enviornmentaljustice/basics/index.html>.

27. *Id.*

28. *Id.*

ties.<sup>29</sup> For activists, the question of “why” and “how” this inequitable burden was perpetrated arose as a salient issue. Further study has confirmed that the siting of hazardous facilities and more generally the impacts of pollution are indeed correlated with race most strongly.<sup>30</sup> Note the EJ approach of public engagement in decision-making as opposed to agitation for other substantive outcomes. Beyond its historical roots, the approach to public engagement has been identified as both an ethical imperative, as well as a powerful vehicle for achieving fair substantive outcomes. In *Environmental Justice and Federalism*, the authors grapple with the critique that a focus on public participation might be misguided in a time where agency resources are scarce.<sup>31</sup> It is costly from both a financial and resources basis to enable effective citizen participation.<sup>32</sup> But falling back on the deontological bases for public participation as a centrality of EJ, the authors use the examples of permitting decisions to illustrate how procedural rights (such as due process and equal protection—meaningful involvement in siting decisions) can be expected to result in substantive environmental justice (equitable distribution of environmental benefits and burdens).<sup>33</sup>

Given this background, it is significant to the revival of the EJ agenda that the Obama administration focused on breathing new life into E.O. 12898. Although initial efforts by agencies following E.O. 12898 in president Clinton’s administration were substantial in laying foundation, further implementation of E.O. 12898 was largely dormant during the presidency of George W. Bush. From some assessments, the EPA and the overall environmental protection apparatus was under attack, rendering the capacity to move EJ and other

29. See Jonathan C. Augustine, *Environmental Justice in the Deep South: A Golden Anniversary Reflection on Stimulus and Change*, 47 U.S.F. L. REV. 399, 410 (2013) (reflecting on the grassroots origins of the movement).

30. DENNIS C. CORY ET AL., ENVIRONMENTAL JUSTICE AND FEDERALISM 1 (2012); ROBERT D. BULLARD, TOXIC WASTES AND RACE AT TWENTY 1987–2007: A REPORT PREPARED FOR THE UNITED CHURCH OF CHRIST JUSTICE & WITNESS MINISTRIES, 45 (2007); UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES, xii (1987); Vicki Been & Francis Gupta, *Coming to the Nuisance or Going to the Barrios? A Longitudinal Analysis of Environmental Justice Claims*, 24 ECOLOGY L. Q. 3 (1997); Robert D. Bullard, *Environmental Justice in the 21st Century: Race Still Matters*, 49 PHYLON 151, 153 (2001) [hereinafter Bullard, *Race Still Matters*].

31. CORY, *supra* note 30, at 136.

32. *Id.* at 137.

33. *Id.* at 139–45 (discussing three deontological principles of EJ including right of environmental protection, political equality and the difference principle deriving from John Rawls classic work).

environmental quality issues forward a moot point.<sup>34</sup> Rather than supporting forward momentum, there appeared to be effort to remove “race” from the considerations articulated by the E.O. during George W. Bush’s presidency. In 2004, an Office of Inspector General evaluation report was critical of the progress made to ensure environmental justice. The 2004 OIG report noted that EPA had *re-interpreted* the executive order to extend environmental justice to *everyone*, whereas it was clear that the executive order and the focus of environmental justice was to remedy the unequal burden of pollution and environmental impacts on low-income and racial minorities.<sup>35</sup> Beyond 2005 the EPA continued to de-emphasize race, perhaps due to Supreme Court precedent.<sup>36</sup> Yet, this de-emphasis on racial minorities and low-income populations would defeat the entire premise of the need for environmental justice.<sup>37</sup> Environmental and social activists welcomed leadership that would focus attention on this languishing effort. It would seem that President Barack Obama, as the first African-American president, would be uniquely able to focus the national government’s attention on this lack of equal access to the fundamental necessities of a healthy life. Some noted the possibility that President Obama had assembled a dream team for synergistically addressing the social, health, and environmental aspects of EJ—with the likes of Hilda Solis as Labor Secretary and Lisa P. Jackson as EPA administrator—and that environmental justice might see serious attention in this administration.<sup>38</sup>

34. Environmental policy in the George W. Bush administration was strongly influenced by business. The revelations of the Vice President Dick Cheney Energy Task Force and high level access and influence provided to fossil fuels interests has been documented elsewhere. Thomas O. McGarity, *EPA at Helm’s Deep: Surviving the Fourth Attack on Environmental Law*, 24 *FORDHAM ENVTL. L. REV.* 205, 205–06 (2013).

35. OFFICE OF INSPECTOR GEN., EVALUATION REPORT: EPA NEEDS TO CONSISTENTLY IMPLEMENT THE INTENT OF THE EXECUTIVE ORDER ON ENVIRONMENTAL JUSTICE 10 (2004) [hereinafter 2004 OIG Report].

36. David W. Case, *The Role of Information in Environmental Justice*, 81 *MISS. L. J.* 701, 708–09 (2012) (discussing de-emphasis on race for focus on equity).

37. Bullard, *Race Still Matters*, *supra* note 30, at 151–71; see also Bradford C. Mank, *Executive Order 12,898*, in *THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS* 101, 117 (Michael B. Gerrard & Sheila R. Foster eds., 2008) (discussing de-emphasis on “race”).

38. Nannette Jolivet Brown, *The Many Faces of Environmental Justice: Which One Speaks the Truth?* 56 *LA. B. J.* 420, 421 (2009). See also Marjora Carter et al., *Whose Survival? Environmental Justice As a Civil Rights Issue*, 13 *N.Y.U. CITY L. REV.* 257, 278–79 (2010) (noting that the head of CEQ, Lisa P. Jackson and Hilda Solis all come out of the environmental justice movement). The panelist also emphasized that Lisa Jackson had appointed assistant administrators that come from the EJ movement, in addition to other evidence that the administration was making EJ a priority. *Id.* at 279.

The actions to date are fairly described as the expression of interest in reviving the EJ agenda within this presidential administration.<sup>39</sup>

### III. OBAMA ADMINISTRATION EJ ACTIONS

When candidate Barack Obama was on the campaign trail in 2008, he pledged to make environmental justice a priority. Existing laws have not successfully led to rights protections and minorities still endured the unequal burden of pollution. People living in areas where air, water, housing, and land quality contribute to negative health impacts are not receiving the benefits of the prevailing economic structure. While E.O. 12898 provided a sufficient framework for using existing laws to minimize environmental injustice, the executive took too little action to ensure that its requirements were being met. This section details the executive activities moved forward through President Obama's administration.

#### A. Structural Actions

In August 2011, 16 agencies and White House offices and the Environmental Protection Agency signed a Memorandum of Understanding pledging to meet the mission of E.O. 12898.<sup>40</sup> EPA also adopted EJ plan 2014.<sup>41</sup> In 2013, EPA released a progress report noting that many of the EJ 2014 plan goals had been met.<sup>42</sup> The next two sections discuss the content of EJ 2014 and the activities of the re-invigorated Interagency Task Force.

39. Alex Geisinger, *The Benefits of Development and Environmental Injustice*, 37 COLUM. J. ENVTL. L. 205, 215 (2012) (noting that at best the efforts expressed a desire to address EJ issues but that efforts to date had been ineffective to address the problem). The EPA has self-described its progress, in part, as follows "[w]e have also: revitalized environmental justice across the federal family, assembled promising practices from our rich history of working with communities, and initiated the development of a cross-cutting Environmental Justice Research Roadmap." *Draft EJ 2020 Action Agenda*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/environmentaljustice/ej2020/index.html> (last updated Sept. 28, 2015) [hereinafter *Draft EJ 2020*].

40. Memorandum of Understanding on Environmental Justice and Executive Order 12898 (2011) (on file at <http://www3.epa.gov/environmentaljustice/resources/publications/interagency/ej-mou-2011-08.pdf>).

41. U.S. ENVTL. PROT. AGENCY, PLAN EJ 2014 PROGRESS REP. 1 (2014) [hereinafter PLAN EJ 2014 REPORT].

42. *Id.*

## 1. EJ Plan 2014 and EJ Plan 2020

The EPA is the agency most directly responsible for implementing the nation's environmental law; therefore, within the structure of federal environmental laws, it is primarily the responsibility of the EPA to ensure environmental justice.<sup>43</sup> Appointed as EPA administrator by President Obama, Lisa P. Jackson made environmental justice a priority. EPA developed a plan, finalized in 2011, entitled Plan EJ 2014, to serve as a "roadmap for integrating environmental justice (EJ) [concerns] into its programs, policies and activities."<sup>44</sup> Here, it should be emphasized that President Obama beyond his own leadership and visibility on this issue ensured continued priority and leadership by his appointment of Administrator Jackson. The success of any initiative can be thwarted by lack of leadership; it should not be overlooked that among various choices the particular identification of Administrator Jackson ensured that the issue would receive adequate attention during her tenure.

Administrator Jackson stated that she was "committed to making environmental justice an essential part of our decision making."<sup>45</sup> She noted that from the outset of her service she had been meeting with communities to listen to their concerns.<sup>46</sup> EJ 2014 was a manifestation of the EPA's identification in its strategic plan for 2011-2015 to make expanding the conversation on environmentalism and working for environmental justice agency priorities."<sup>47</sup>

Therefore, EJ 2014 was broad and inclusive, an approach that reflects the various ways EPA can further environmental justice objectives. The roadmap approach of EJ 2014 consisted of the development of nine implementation plans. The implementation plans contained "goals, strategies, activities, deliverables, and milestones."<sup>48</sup> The three parts of EJ 2014 divided actions into 1) cross-

43. My point is not that EJ is overall primarily the responsibility of the EPA. Many questions remain including what level of government—local, state or federal—could best ensure an equitable distribution of the burdens and benefits of development and industrialization. Moreover, EJ is broader than pollution control and remediation, including aspects such as housing, transportation and jobs.

44. PLAN EJ 2014 REPORT, *supra* note 41, at 1.

45. *Id.*

46. *Id.*

47. *Id.*

48. When EPA drafted its EJ 2014 plan, it sought input from the Nation Environmental Justice Advisory Council (NEJAC). NEJAC noted that the plan had significant focus on environmentally-just processes, but needed to have more focus on the goal of environmentally-just outcomes. PLAN EJ 2014 REPORT, *supra* note 41, at 2. In part due to the NEJAC's critique that

agency focus areas, 2) tools development areas, and 3) program initiatives.<sup>49</sup>

The cross-agency focus areas included actions EPA would take to incorporate EJ into rulemaking, consider EJ in permitting, and to use compliance and enforcement to advance EJ. Next, EPA would work to support community-based programs. The final area of cross-agency focus of the plan was to engage other federal agencies in implementing E.O. 12898 into their programs.

The tools development focus areas were equally important to the mission of advancing EJ. EPA committed to developing tools related to science, law and information to support EJ objectives. In terms of resources, the EJ plan identified the need for an improved system of delivering financial and technical assistance for communities engaged in EJ work.<sup>50</sup>

Program initiatives among those already ongoing within EPA would be identified for inclusion in EJ Plan 2014. The plan noted that one program initiative already underway was to improve EPA's civil rights program to comply with EPA's obligations pursuant to Title VI of the Civil Rights Act of 1964.<sup>51</sup> EPA's Office of Civil Rights (OCR) is responsible for management of civil rights complaints. As a supplement to EJ 2014, OCR developed a Title VI plan. A specific Title VI progress report published May 4, 2015, outlines the improvements EPA has targeted through 2011–2014 by focusing on case management, successfully resolving complaints, and important settlements.<sup>52</sup>

Thus, with the production and implementation of EJ 2014, Administrator Jackson made clear that the agency would indeed be embarking on “a new era of outreach and protection for communities historically underrepresented in EPA decision-making.”<sup>53</sup> In February 2014, the EJ 2014 progress report identified areas where goals

it needed more specificity, EJ 2014 is organized with identifiable activities, deliverables, and the progress assessment requirements. CORY, *supra* note 30, at 156.

49. PLAN EJ 2014 REPORT, *supra* note 41, at 2.

50. *Id.* at 25.

51. *Id.* at 26.

52. U.S. ENVTL. PROT. AGENCY, FY 2011–FY 2014 TITLE VI OF THE CIVIL RIGHTS ACT PROGRESS REP. (2015). Although the report highlights various success stories, it also identifies that EPA's Title VI implementation regulations are being reviewed for potential revision, in consultation with the Justice Department.

53. Memorandum from Lisa P. Jackson, Adm'r, to All EPA Employees, Seven Priorities for EPA's Future (Jan. 12, 2010) (on file at <http://wren.palww.org/documents/Feb2010Jacksonmemoonpriorities1-2010.pdf>).

have been met and where further progress is required. As discussed in actions below, EPA adopted guidance for considering environmental justice during regulatory actions,<sup>54</sup> developed a legal tools document to better ensure EPA was fully invoking existing laws to promote EJ,<sup>55</sup> and focused on improving its Title VI compliance program. Moreover, as the 2004 OIG report critically identified, EPA had not adequately defined the role of the Office of Environmental Justice (OEJ).<sup>56</sup> But according to the progress report on EJ 2014, the OEJ was now situated to continue the work to implement EJ 2014 plan elements.<sup>57</sup> The EPA expects OEJ to play a leading role in the long-term implementation of EJ tools, and work as the coordinator among various regions and national programs.<sup>58</sup>

There is reason to be hopeful that current momentum will continue. EPA recently released its draft of a further roadmap toward achieving environmental justice through its programming—EJ 2020. Seeking to build on the work it has done and EJ 2014 as a foundation, the new strategy has identified making a “visible difference” in communities a key priority.

“EJ 2020: over the next five years, EPA will focus on

- Deepening environmental justice progress in EPA’s programs to improve the health and environment of overburdened communities
- Collaborating with partners to expand our impact in overburdened communities
- Demonstrating progress on outcomes that matter to overburdened communities”.<sup>59</sup>

There is a plethora of federal agencies that impact the social, health, and environmental well-being of community members. Through the vehicle of planning, the EPA has identified how it can further the EJ agenda as well as work with others—federal agencies and community members—to do the same.

54. U. S. ENVTL. PROT. AGENCY, GUIDANCE ON CONSIDERING ENVIRONMENTAL JUSTICE DURING THE DEVELOPMENT OF REGULATORY ACTION (2015) [hereinafter GUIDANCE ON CONSIDERING ENVIRONMENTAL JUSTICE].

55. U. S. ENVTL. PROT. AGENCY, PLAN EJ 2014 LEGAL TOOLS (2011) [hereinafter PLAN EJ 2014 LEGAL TOOLS].

56. OFFICE OF INSPECTOR GEN., 2004-P-00007, EVALUATION REP.: EPA NEEDS TO CONSISTENTLY IMPLEMENT THE INTENT OF THE EXECUTIVE ORDER ON ENVIRONMENTAL JUSTICE 50 (2004).

57. PLAN EJ 2014 REPORT, *supra* note 41, at 5.

58. *Id.* at 22.

59. *Draft EJ 2020*, *supra* note 39.

## 2. Interagency Working Group

In 1994, E.O. 12898 §1-102 created the Environmental Justice Interagency Working Group (IWG).<sup>60</sup> President Clinton convened heads of agencies to work together to identify disparities and address the unequal burden of pollution. During President Obama's administration there was reinvigoration of the working group model. A cabinet-level meeting, and then the first of its kind White House Forum on Environmental Justice in December 2010, led to the signing of a Memorandum of Understanding ("MOU") by seventeen cabinet members and the white house in August 2011.<sup>61</sup> The forum was an opportunity for more than 100 environmental justice leaders to meet with high-level federal government officials and discuss issues of importance to the EJ community. Following the signing of the MOU, the IWG convened more stakeholder meetings to hear about community success stories, programs that were working, and where priority work was necessary in the view of community activists.<sup>62</sup> Along with the 2011 MOU, the agencies adopted a charter identifying concrete functional strategies for identifying, tracking, and staying on top of EJ work, such as regular meeting requirements, progress reports and creating standing and select committees.<sup>63</sup> The initial IWG was expanded beyond covered agencies to include additional participating agencies and offices.<sup>64</sup> Again, echoing the focus on leadership and capacity, the covered and participating federal agencies were required to provide the IWG with a senior leadership representative and senior staff representative.

60. Exec. Order No. 12,898—Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 Fed. Reg. 7629 (1994).

61. According to the Department of Justice, this was the first convening of the working group in almost a decade. See *Environmental Justice Interagency Working Group Reconvened*, U.S. DEP'T OF JUSTICE (Sept. 22, 2010), <http://www.justice.gov/opa/blog/environmental-justice-interagency-working-group-reconvened>.

62. *Id.*

63. U.S. ENVTL. PROT. AGENCY, CHARTER FOR INTERAGENCY WORKING GROUP ON ENVIRONMENTAL JUSTICE (2014).

64. The agencies included in the IWG pursuant to E.O. 12898 include Department of Agriculture, Department of Commerce, Department of Defense, Department of Energy, Department of Health and Human Services, Department of Housing and Urban Development, Department of Interior, Department of Justice, Department of Labor, Department of Transportation, and the Environmental Protection Agency. Heads of the following offices or their designees are also included: Office of Management and Budget, Office of Science and Technology Policy, Office of the Deputy Assistant to the President for Environmental Policy, Office of the Assistant to the President for Domestic Policy, National Economic Council, and Council of Economic Advisors. *Id.*

As identified in the MOU signed in 2011, the IWG is focused on four areas: (1) NEPA, (2) Goods Movement, (3) Climate Change and (4) Title VI.<sup>65</sup> Each required a separate sub-committee to facilitate progress. NEPA has been a significant area for achieving environmental justice since its enactment, and Title VI is a critical legal vehicle to address EJ. Climate change has become another area the Obama administration has highlighted for its multiplier impact on members of communities already suffering environmental degradation. The IWG and their sub-committees have been able to identify actions within these focus areas and provided input to ongoing federal programming (initiatives, task-forces) that touch on these topics.

The MOU provides that member agencies will post their EJ strategies on public websites and provide the IWG a copy, as well as identifying requirements for annual implementation progress reports.<sup>66</sup> As a sign of the revitalizing efforts of this administration, we can look at the Department of Interior as an example. The DOI is a covered agency under the MOU. It provided a 1995 EJ strategic plan following the issuance of the 1994 E.O. 12898.<sup>67</sup> Following the 2011 MOU, the DOI produced a 2012-2017 EJ strategic plan. The DOI notes in its 2012-2017 strategic plan that its former 1995 plan “did not establish quantitative measures or reporting requirements.”<sup>68</sup> Now it has incorporated these important aspects into its strategic plan, and EJ progress will become easier to measure and more transparent to the public.

### 3. Data Collection

E.O. 12898 required that agencies gather health data to support actions to remedy unequal pollution impacts.<sup>69</sup> Data collection is an essential part of making progress. That which is measured improves.<sup>70</sup> More fundamentally, basic health data is necessary to recognize where impacts are concentrated—the very basis of the

65. PLAN EJ 2014 REPORT, *supra* note 41, at 3.

66. *Id.* at 14.

67. U.S. DEP'T OF THE INTERIOR, ENVIRONMENTAL JUSTICE STRATEGIC PLAN 2012–2017 (2012).

68. *Id.* at 14.

69. Exec. Order No. 12,898—Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations at § 3-302, 59 Fed. Reg. 7629 (1994).

70. This saying is attributed to different sources, known as Pearson's Law originated by Karl Pearson or alternatively originated by Thomas S. Monson. “*That Which is Measured, Improves*”, ENGLISH LANGUAGE & USAGE STACK EXCH. (Feb. 4, 2013), <http://english.stackexchange.com/questions/14952/that-which-is-measured-improves>.

assertion that action must be taken to remedy the unequal burden of pollution.<sup>71</sup> Among other activities, EPA worked to strengthen the basis for EJ actions by focusing on science tools.<sup>72</sup> This would enable the EPA itself, as well as other actors such as states and private parties, to pursue actions to improve environmental conditions. Significant to minority and low-income communities is the potential for exposure to a variety of health stressors. Although still in progress, EPA has focused on the preparation of cumulative risk assessment (CRA) guidelines to measure the synergistic effects of multiple stressors.<sup>73</sup> Moreover, with the launch of the web-based tool EnviroAtlas, EPA will be providing Internet users access to mapping data that identifies a range of ecosystem goods and services, including things like access to parks for exercise.<sup>74</sup> EPA recently released EJSCREEN, which uses mapping data and census demographics to show where higher concentrations of pollution exist and what communities are most impacted.<sup>75</sup> Data collection can serve multiple functions; the focus in EJ 2014 has been assisted by funding experts and community members beyond the EPA and its federal family.

### B. Grant Programming

It is a common practice for the federal government to provide communities with the funding necessary to improve the environment where they live. Following the issuance of the 1994 E.O., the EPA pledged that an inter-agency work group on grants would consider the incorporation of environmental justice actions into its existing grants programs.<sup>76</sup> The EPA recognized that grants must be accessible and that the existing process was a barrier to new entrants. *Plan EJ 2014 Progress Report* identified the goal to improve access.

Grants are also a way for the federal government to gather necessary research. Two important contributions to EJ work include EPA grants in the areas of Community Cumulative Risk and Envi-

71. Case, *supra* note 36, at 705.

72. PLAN EJ 2014 REPORT, *supra* note 41, at 2–3.

73. *Id.* at 17.

74. *Id.* at 18; Press Release, U.S. Envtl. Prot. Agency, EPA Releases EnviroAtlas Ecosystem Mapping Tool (May 7, 2014) (on file at <http://yosemite.epa.gov/opa/admpress.nsf/0/E60F6506773887148527CD100DA741>).

75. Daniel Bloom, *EPA Releases Environmental Justice Software*, CQ ROLL CALL (2015).

76. THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS 113 (Michael B. Gerrard & Sheila R. Foster eds., 2d ed. 1999).

ronmental Health Disparities.<sup>77</sup> These grants produced neighborhood level data, led to the creation of environment and health databases, produced epidemiological studies, and importantly, “spatial analysis of disparities in exposure, risk, and proximity to pollution sources”.<sup>78</sup> Grantees also trained residents in mapping community environmental health, and trained individuals who are expected to become further committed to research on future health disparities.<sup>79</sup> This means of leveraging funding from outside the agency also engages others in the work of environmental justice.

### C. Regulatory and Enforcement Actions

During this administration, agencies have used environmental laws and civil rights avenues to remedy EJ injustices. This section focuses primarily on the use of environmental regulatory frameworks to advance environmental justice during the Obama administration. Proponents of environmental justice criticize the relative lack of civil rights actions<sup>80</sup> to improve the living conditions for racial minorities and low-income communities throughout the past few decades. But an examination of the framework for litigation reveals the often extraordinary hurdles a civil rights litigation strategy entails.<sup>81</sup> The discussion of civil rights remedies is beyond the scope of this paper, but it is useful to note that some EJ advocates identify the tension in the use of litigation as a strategy within the grassroots and community empowerment framework of the EJ movement.<sup>82</sup>

77. PLAN EJ 2014 REPORT, *supra* note 41, at 20.

78. *Id.*

79. *Id.*

80. Kaswan, *Environmental Justice*, *supra* note 10, at 156 (discussing criticisms of EPA's Office of Civil Rights failure to follow up on potential Civil Rights Act of 1964 Title VI violations and rationales for why those failures may exist). Some suggestions include poor management of the office, difficulty in interpretation of “disparate impact,” and the concern that available remedies such as suspending of funding may be seen as overly harsh. *Id.* However, part of the EJ 2014 developed under the leadership of administrator Lisa P. Jackson was to create a task force to better connect agencies implementation of the Civil Rights Act of 1964.

81. This includes issues of successfully pleading standing, gathering sufficient proof of intent to discriminate, and adducing evidence of disparate impact. See, e.g., Bradford C. Mank, *Proving an Environmental Justice Case: Determining an Appropriate Comparison Population*, 20 VA. ENVTL. L. REV. 365 (2001); Bradford C. Mank, *Is There a Private Cause of Action Under EPA's Title VI Regulations?: The Need to Empower Environmental Justice Plaintiffs*, 24 COLUM. J. ENVTL. L. 1 (1999). See THE LAW OF ENVIRONMENTAL JUSTICE, *supra* note 76, at 113 (examining equal rights protection, Title VI and other civil rights titles to pursue environmental justice claims).

82. Marjora Carter et al., *supra* note 38, at 273.

[I]t's not just about addressing a disproportionate environmental burden in certain communities. It's also about building power in those communities, having community-driven decision-

President Obama affirmed the commitment to the enforcement of existing environmental laws as one EJ strategy. “By effectively implementing environmental laws, we can improve quality of life and expand economic opportunity in overburdened communities.”<sup>83</sup> The EPA has produced *Plan EJ 2014 Legal Tools*, a compendium of its legal authorities that can be marshaled to remedy environmental inequities.<sup>84</sup> It is clear that authority under bedrock environmental laws, such as the National Environmental Policy Act (NEPA) and the Clean Air Act (CAA), can be used to address the disparities faced in low-income and minority communities.

In May 2015, the EPA released its final guidance on considering environmental justice during the development of a regulatory action.<sup>85</sup> With the memorandum announcing its final adoption, the agency took the opportunity to emphasize a number of actions furthering environmental justice that occurred in the past few years under the purview of existing laws. The next sections highlight these actions under the CAA, NEPA and RCRA.

### 1. Clean Air Act (CAA)

The EPA’s use of the Clean Air Act to address toxic air pollution can be seen as a strategy to address environmental justice, as President Obama has linked the two explicitly in EJ planning, prioritization of actions, and publicly in speeches and press releases.<sup>86</sup> In his proclamation celebrating the 20<sup>th</sup> Anniversary of E.O. 12989, President Obama first pointed to the limits on mercury and toxic emis-

making and meaningful community involvement. In litigation it’s very difficult to do that due to the inherent power imbalance between attorney and the community, where the role of the attorney is perceived as “decision-maker,” and because the attorney is the one who directly interacts with the power—the courts. But nonetheless, I think litigation can also be a very real opportunity for community lawyers to teach clients about the law, to help organize clients and use the media and to just keep an issue alive so you can do further organizing. *Id.* at 274.

83. Proclamation, *supra* note 24, at 1.

84. PLAN EJ 2014 LEGAL TOOLS, *supra* note 55, at 88 (identifying authorities under Clean Air Act (CAA), Clean Water Act (CWA), Safe Drinking Water Act (SDWA), Marine Protection, Research and Sanctuaries Act (MPRSA), Resource Conservation and Recovery Act (RCRA), and National Environmental Policy Act (NEPA) among others).

85. GUIDANCE ON CONSIDERING ENVIRONMENTAL JUSTICE, *supra* note 54, at 1.

86. For a discussion of the relationship between the environmental justice movement in the U.S. and climate change policymaking see Leslie G. Fields & Royce G. Brooks, *President Obama and the New Politics of Inclusion in the Climate Change Debate*, 9 FLA. A & M U. L. REV. 441, 459 (2014) (noting the lack of full acceptance within the mainstream environmental movement of the role of African-Americans and Latinos and other EJ groups in climate change discussions). The authors note the success of EJ and affiliated groups to create a coalition despite modest financial sources. *Id.* at 461.

sions from power plants set forth under his administration, the Mercury and Air Toxics Standards (MATS). The rule, adopted under section 112 of the Clean Air Act, requires that coal-fired power plants reduce mercury emissions by 90%.<sup>87</sup> The coal industry and supporters, including 23 states, challenged the rule contending that the EPA was required to consider costs in its adoption of the rule.<sup>88</sup> The cost to comply, by either constructing new pollution control infrastructure or by retiring aging coal-fired plants, was estimated by some to be in the range of \$10 billion per year for utilities and their customers.<sup>89</sup> However, EPA estimated that the benefits would be between \$37 and \$90 billion per year in public health cost savings.<sup>90</sup> The pollution control technology used to address mercury is also projected to reduce the emission of acid gases (such as hydrogen chloride) by 88%, and particulate-forming sulfur dioxide by 41%.<sup>91</sup> Petitioners challenged the MATS rule, and in *Michigan v. EPA* the Supreme Court ruled that the agency was required to consider the cost of compliance when making its determination to regulate power plants.<sup>92</sup> The Court noted that the EPA estimated the cost of compliance to be \$9.6 billion, but with quantifiable benefits between \$4-6 million a year. Yet, the Supreme Court ruled that the EPA failed to consider costs when determining that it was “appropriate and necessary” to regulate power plants.<sup>93</sup> The Supreme Court remanded the case to the U.S. Court of Appeals for the District of Columbia Circuit for further proceedings and the EPA has stated that it will re-issue the MATS rule complete with the cost-benefit analysis required by the Supreme Court by April 2016.<sup>94</sup> Although news outlets portrayed the Court’s decision as a significant defeat with the Court blocking President Obama’s power plant limitations, other commen-

87. Clean Air Act of 1963, Pub. L. No. 88-206 § 112 (2004).

88. Glen Hess, *High Court Weighs Mercury Rule*, CHEMICAL & ENGINEERING NEWS (May 4, 2014), <http://cen.acs.org/articles/93/i18/High-Court-Weighs-EPA-Mercury.html>

89. *Id.*

90. *Id.*

91. *Id.*

92. *Michigan v. Env'tl. Prot. Agency*, 135 S. Ct. 2699, 2711 (2015).

93. *Id.*

94. Respondent’s Opposition to the Mot. of Tri-State Generation and Transmission Association Inc. For Suspension of Its Compliance Obligation, *White Stallion Energy Center, LLC v. Env'tl. Prot. Agency*, No. 12-1100 (D.C. Cir. Aug. 10, 2015); Maria Gallucci & Ginger Gibson, *Supreme Court Rules Against EPA Mercury and Air Toxics Standards for US Coal Plants*, INT’L BUS. TIMES (June 29, 2010), <http://www.ibtimes.com/supreme-court-rules-against-epa-mercury-air-toxics-standards-us-coal-plants-1985841>.

tators note that it is more likely that the final rule will be adopted without much trouble, once the EPA conducts the additional work on costs.<sup>95</sup>

A second important action was the EPA's attention to fugitive refinery emissions. Although this issue has less profound legal impacts on the EPA's authority under CAA and has seen less media attention, it has had a profound impact on the lives of minority and low income residents living near these facilities. Among the issues identified during listening sessions, the action to address refinery emissions is connected closely with the aspirations of the EJ movement. There was a perception that EPA was inadequately enforcing refinery regulations.<sup>96</sup> Communities were able to raise the issue with regulators and influence the outcome. For example, improved fenceline monitoring has multiple environmental justice benefits from both a health and risk reduction and economic empowerment perspective.<sup>97</sup> In the United States, communities living within fifty kilometers of a refinery are often disproportionately minority or low-income communities.<sup>98</sup> With additional focus on this issue, it is possible to achieve both the substantive improvement of health from potential reduced exposure and potential property value enhancement from the point of view that surrounding properties are not subject to unlawful emissions.<sup>99</sup>

## 2. The National Environmental Policy Act (NEPA)

NEPA, because of its focus on engaging the public and its function of providing a measure of government transparency, is a focal point for implementing environment justice.<sup>100</sup> Recognizing the significance of the National Environmental Policy Act as a tool to promote EJ, the IAWG created a NEPA sub-committee.

95. Adam Liptak & Coral Davenport, *Supreme Court Blocks Obama's Limits on Power Plants*, N. Y. TIMES (June 29, 2015), [http://www.nytimes.com/2015/06/30/us/supreme-court-blocks-obamas-limits-on-power-plants.html?\\_r=0](http://www.nytimes.com/2015/06/30/us/supreme-court-blocks-obamas-limits-on-power-plants.html?_r=0).

96. Refineries are highly regulated industrial facilities requiring Title V permits pursuant to the Clean Air Act. Many refineries operate in the Gulf states, including Texas and Louisiana.

97. Ralph Smith, *Detect Them Before They Get Away: Fenceline Monitoring's Potential to Improve Fugitive Emissions Management*, 28 TUL. ENVTL. L. J. 433, 450 (2015) (discussing environmental justice benefits of increased fenceline monitoring).

98. Petroleum Refinery Sector Risk and Technology Review and New Source Performance Standards, 79 Fed. Reg. 36,880, 36,938 (June 30, 2014).

99. Smith, *supra* note 97, at 450 (countering arguments by refineries that emissions were already being adequately identified and additional focus was unwarranted).

100. See generally Uma Outka, *NEPA and Environmental Justice: Integration, Implementation, and Judicial Review*, 33 B.C. ENVTL. AFF. L. REV. 601 (2006).

The EPA released a memorandum in April 2011 entitled “Addressing Environmental Justice Through Reviews Conducted Pursuant to the National Environmental Policy Act and Section 309 of the Clean Air Act.”<sup>101</sup> NEPA applies when an agency approves or undertakes a major federal action with a significant impact on the environment.<sup>102</sup> The federal agency must prepare an Environmental Impact Statement (EIS) analyzing alternatives to the proposed action, potential mitigation measures, and a “no action” alternative.<sup>103</sup> If there is uncertainty whether an action may reach the threshold of significance requiring an EIS, the agency can do a curtailed review in an Environmental Assessment (EA) which is a more concise version of the EIS designed to discern the significance of the environmental impacts and whether a full-blown EIS is necessary.<sup>104</sup> Even when NEPA does not apply due to statutory or judicially created exemptions, the agency emphasized that NEPA EJ analysis could be done on a voluntary basis and outlined where that would be appropriate in its Legal Tools memorandum.<sup>105</sup> EPA can prepare EAs or EISs under its “Statement of Policy for Voluntary Preparation of National Environmental Policy Act (NEPA) Documents,” one of the criteria being to expand the opportunity for public participation. Minority communities are often under-engaged in the decision-making process. This creates a sense of disenfranchisement in addition to the potential for an additional health or environmental burden from the action approved by the EPA.<sup>106</sup>

The NEPA sub-committee has also put together a resource compendium for EJ/NEPA listing federal agencies and relevant guidance, EJ strategies, and other pertinent documents to assist

101. Memorandum from Cynthia Giles, Env'tl. Prot. Agency, to Regional Administrators & Assistant Administrators, Addressing Environmental Justice Through Reviews Conducted Pursuant to the National Environmental Policy Act and Section 309 of the Clean Air Act (April 2011) (on file at <http://www2.epa.gov/sites/production/files/2014-08/documents/nepa-environmental-justice-memo-pg.pdf>).

102. Specifically, the statutory trigger is “major Federal actions significantly affecting the quality of the human environment . . . .” 43 U.S.C. § 4332(2)(c) (1975).

103. *Id.*; *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 336 (1989).

104. Ray Vaughan, *Necessity and Sufficiency of Environmental Impact Statements Under the National Environmental Policy Act*, in 38 AMERICAN JURISPRUDENCE PROOF OF FACTS 547, § 4 (3d ed. April 2015).

105. PLAN EJ 2014 LEGAL TOOLS, *supra* note 55, at 84.

106. Sheila Foster has noted the reasons these communities are often unable to adequately participate include necessity to transfer the knowledge and capacity compared with more affluent groups. THE LAW OF ENVIRONMENTAL JUSTICE, *supra* note 76, at 186. She notes that low-income and minority communities have “less time, less information, and less specialized knowledge concerning the legal, technical and economic issues involved.” *Id.*

those participating in, commenting on, or preparing NEPA reviews.<sup>107</sup> NEPA itself does not just apply to EPA, but to federal agencies as well. Thus, incorporation of EJ analysis in NEPA documents is incredibly important to remedy the issue of insufficiently engaging the public in dialogue regarding pending projects as the reach of NEPA across multiple federal agencies is broad.

### 3. Resource Conservation and Recovery Act (RCRA)

Many regulatory actions also provide significant improvement to decrease the risk of exposure to hazardous substances. Under RCRA, the agency refined the definition of solid waste (DSW) to close loopholes that would allow accumulation of hazardous waste for the purpose of later recycling. Pursuant to RCRA, a material is not a hazardous waste unless it is first defined as a solid waste.<sup>108</sup> “Waste” is a term of art, and the line between recycling—which is generally embraced—and where material has become part of the waste problem is an extremely complex policy determination.<sup>109</sup> While on the one hand reducing the amount of hazardous waste may be possible by sustainably recycling some materials, in fact the instances of sham recycling, speculative accumulation, and harms from inadequate pre-recycling activities have raised the stakes in how we define waste. This regulatory action is an example of how through executive encouragement the EPA is able to reduce the risk from accumulating hazardous materials.

## IV. E.O. LIMITS AND TENSIONS OF ENVIRONMENTAL LAW AND JUSTICE

Environmental justice is significantly concerned with the engagement of the public in decision-making and control over their destiny. As one advocate has described,

“One of the movement’s main objectives is to empower residents of a community to gain greater control over the use of land and resources in their neighborhoods. Another is to provide opportunities to benefit from the environment such as access to healthy

107. OFFICE OF ENF’T & COMPLIANCE ASSURANCE, FEDERAL INTERAGENCY WORKING GROUP ON ENVIRONMENTAL JUSTICE NATIONAL ENVIRONMENTAL POLICY ACT (NEPA)/ EJ RESOURCE COMPENDIUM (2013), <http://www.epa.gov/environmentaljustice/resources/publications/interagency/nepa-ej-compendium.pdf>.

108. 43 U.S.C. § 6903 (1976).

109. See *id.*

food, clean air, parks, and jobs in the growing green economy that will help communities survive our deepening economic crisis.”<sup>110</sup>

Given the centrality of control in the hands of community members, it is logical to consider how environmental justice efforts are located at different levels of government. Should we conceive of EJ as an important local and state issue, given that 1) these bodies of government are closer to the people, and 2) the local land use control built into the American legal systems is often the first stage of siting decisions for locally undesirable land uses (LULUs) with both local and sometimes extra-local burdens?<sup>111</sup> Many state governments have been active in adopting EJ laws and strategies of their own.<sup>112</sup> But the federal role remains vital.

Compounding the challenge of achieving distributional environmental equity, such a universal consensus on fairness is not likely among a diversity of individuals in any given location. Professor Alice Kaswan rightly notes that “what some may consider an ‘unfair’ distribution may be a desirable distribution to others. For example, low-income neighborhoods may encourage industrial uses in the hope of increasing jobs. In such instances, the siting decision might serve rather than disserve the poor or minority community.”<sup>113</sup> That said, only recently have scholars begun to grapple with the reality that the promise of jobs and benefits from development can be illusory, and difficult to ensure even when well-intentioned and deliberate actions are taken to address community benefits agreements. Professor Alex Geisinger recently noted that “the perceived benefits of development often do not accrue to local residents. Rather, jobs generally go to workers in other communities, and other benefits are primarily received by economic and political elites.”<sup>114</sup>

Litigation in the form of civil rights or environmental enforcement cases is no doubt a central tenet of the fight to achieve more equita-

110. Marjora Carter et al., *supra* note 38, at 258.

111. A significant body of scholarship advocates that land use control should be shifted from local control when externalities beyond local borders are certain. For an examination of the potential transformation of local land-use control to broader state and regional participation, see FRED BOSSELMAN & DAVID CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROL* 15 (1971); Patricia Salkin, *The Quiet Revolution and Federalism: Into the Future*, 45 J. MARSHALL L. REV. 253, 253 (2012).

112. See California’s Environmental Justice Act, Ca. Pub. Res. Code §§ 71110-71116. Accompanying Regulations are located in CAL. CODE REGS., tit. 2, § 2030, tit. 14, §§17905. 17914, tit. 27, §§ 1050-1056, § 10016.

113. Kaswan, *Bridging the Gap*, *supra* note 23, at 240–41.

114. Geisinger, *supra* note 39, at 207–08 (questioning the assumption that tradeoffs from benefits are accurately communicated).

ble distribution of environmental harms and benefits. Enforcement of civil rights laws and environmental standards vindicate the rights of minority communities. Nonetheless, it is important to recognize how the centrality of power for enforcement of these rights is often located with non-members of the community. By focusing on the rights of community members to engage directly in decision-making, and to have their input be considered relevant and capable of having an influence over the outcome of decision-making, the Obama administration's revitalization of the E.O. framework of public participation provides an important contribution to the struggle.

These realities bring into focus the necessity of a federal role in leadership, collaboration, and funding. Although the federal government may be remote from on-the-ground solutions, strategies within the federal government should ensure that the federal government is not exacerbating the unequal distribution of burdens. Leadership at the federal level lends support to a grassroots movement that otherwise is unfunded or underfunded, and perhaps without means for training or data collection. Grant programs in addition to the creation of legal tools and manuals can help to support community efforts without shifting the ownership and genesis of workable solutions away from those most impacted. Finally, collaboration with both communities and states leverage federal resources to expand the reach of locally-generated solutions that may translate in other places.

Minorities and low-income communities will have a much better chance of achieving environmental equity when legislative efforts are successful in adopting an explicit right to a healthy environment.<sup>115</sup> A rights-oriented framework is not majoritarian, in that it elevates the needs of individuals above those of the majority. Societies are a collection of individuals. The outcome of existing laws that focus on overall health and welfare without due regard to the impact on minority and low-income individuals belies a just society; such laws must continue to be questioned and, ultimately, reworked or abandoned.

115. Several states have adopted such laws, and the right to a healthy environment is protected in the constitutions of several nations. For a further discussion, see James R. May & Erin Daly, *Vindicating Fundamental Environmental Rights Worldwide*, 11 OR. REV. INT'L L. 365 (2009).

## V. CONCLUSION

The Obama administration has used executive action to further the goals of environmental justice. The administration has directed federal agencies to help communities realize their rights to a healthy environment. All individuals in the communities should be able to exercise these rights, not just those in affluent locations. EJ has received more attention in the past decade from both scholars and policymakers. Arguably, it is more difficult to deny the existence of disparities, as federal agencies, acting in a coordinated fashion through the invigorated MOU and inter-agency working group model, have data collection mechanisms now in place to better document and study disparities. Furthermore, the reinvigorated IWG and MOU commitments support activities to reduce EJ disparities.

It is also relevant to identify what EJ is not, and thus what E.O. 12898 and the executive more broadly cannot accomplish. Environmental law structurally is concerned with minimization of aggregate health impacts; whereas, existing law is about the promotion of business interests within a framework that minimizes negative impact. Despite strong rhetoric from the business community, environmental law does not aim to disrupt industry. EJ is concerned with distributional equity that has arisen despite environmental law that is “on the books.” EJ has a broader conception of the type of sustainable living on the planet that citizens might enjoy if we approached economic and land use development differently. The environmental movement and the environmental justice movements can work in harmony; thus, once we identify justice as central to environmentalism, the differences in the two movements are significantly reduced.<sup>116</sup> Environmental law, however, is a compromise between what traditional environmental activists sought to protect (the quality of the environment) and what business interests have been able to ensure based on arguments related to healthy economic conditions. Until legislation in Congress addresses the built-in biases toward industrialization, the executive will be hemmed in to mitigation measures that address potential distributional impacts that harm minority and low-income communities more so than others living in the United States.

116. See, e.g., Dale Jamieson, *Justice: The Heart of Environmentalism*, in ENVIRONMENTAL JUSTICE, *supra* note 9, at 86.

