



Nondiscrimination in Environmental Regulation: A Legal Analysis

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Summary

The enactment of various conservation and environmental protection statutes in the 1960s and 1970s created a new awareness of environmental harms. At the same time, the civil rights initiatives also secured nondiscrimination in a number of legal rights, including education, employment, housing, voting, etc. Over the following decades, the development of these movements eventually converged, raising concerns that minority groups face disproportionate exposure to environmental risks and harms.

Individuals and communities claiming to be disproportionately and adversely affected by how an agency implements environmental regulations may seek legal relief under a variety of federal laws, including equal protection under the U.S. Constitution and nondiscrimination requirements under Title VI of the Civil Rights Act of 1964. However, in many cases, these laws require proof of discriminatory intent, which can make success under these claims difficult because individuals and communities generally allege that they are subject to disproportionate adverse environmental effects as a consequence of how an agency implements environmental regulations, but not that the regulation itself is discriminatory. Alternatively, relief may be available in some circumstances under the National Environmental Policy Act (NEPA) or statutory authorities for specific agencies' actions related to the environment.

Congress has never enacted generally applicable legislation on the subject, but concerns regarding disproportionate impacts arising from environmental regulation have been addressed administratively over the past two decades. Federal agencies are required by Executive Order 12898 to incorporate environmental justice into their mission and operations, and a number of agencies have reiterated their commitment to these goals in recent years.

This report will examine the relevant legal authorities that may be asserted to address disproportionate impacts that result from how an agency implements environmental regulations, including the Equal Protection Clause of the U.S. Constitution, Title VI of the Civil Rights Act of 1964, and various environmental and conservation statutes. It will discuss administrative efforts to address “environmental justice,” a term used by some advocates to refer to the distribution of environmental quality across various demographic groups, including the Environmental Protection Agency’s (EPA’s) Plan EJ 2014. It will also analyze the use of these authorities to prevent such impacts and the likelihood of success for future challenges under each legal theory.

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The enactment of various conservation and environmental protection statutes in the 1960s and 1970s created a new awareness of environmental harms.¹ At the same time, the civil rights initiatives also secured nondiscrimination in a number of legal rights, including education, employment, housing, voting, etc.² Over the following decades, the development of these movements eventually converged, raising concerns that minority groups face disproportionate exposure to environmental risks and harms. Although Congress has not enacted generally applicable legislation on the issue, concerns regarding disproportionate adverse environmental impacts that result from how an agency implements environmental regulations have been litigated under a number of legal theories and have been addressed administratively for several decades.

This report will examine the relevant legal authorities that may be asserted to address disproportionate environmental impacts that result from how an agency implements environmental regulations, including the Equal Protection Clause of the U.S. Constitution,³ Title VI of the Civil Rights Act of 1964,⁴ and selected environmental and conservation statutes. It also will analyze the use of these authorities to prevent such impacts and the likelihood of success for future challenges under each legal theory. The report also will discuss administrative efforts to address “environmental justice,” a term used by some advocates to refer to the distribution of environmental quality across various demographic groups, including the Environmental Protection Agency’s (EPA’s) Plan EJ 2014.

Background

Many commentators have used the term environmental justice to describe concerns that racial, ethnic, or low-income minority groups are affected disproportionately by environmental harm.⁵ EPA has defined environmental justice as “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.”⁶ In environmental protection debates, the question of siting potential environmental hazards often leads to disputes over whose proverbial backyard will be affected. Many communities often resist the placement of various industrial facilities and waste disposal sites within their boundaries.

Several studies that first drew awareness to the potential correlation between environmental hazards and minority communities are cited regularly in debates about environmental justice.⁷ A

¹ See, e.g., Clean Air Act, 42 U.S.C. §7401 *et seq.*; Clean Water Act, 33 U.S.C. §1251 *et seq.*; Resource Conservation and Recovery Act, 42 U.S.C. §6901 *et seq.*; Wild and Scenic Rivers Act, 16 U.S.C. §1271 *et seq.*

² See, e.g., Civil Rights Act of 1964, P.L. 88-352, 78 Stat. 241; Voting Rights Act of 1965, 42 U.S.C. §1973 *et seq.*

³ U.S. Const. amend XIV.

⁴ 42 U.S.C. §2000d *et seq.*

⁵ See, e.g., Gerald Torres, *The Future Environmental Regulation: Environmental Justice: The Legal Meaning of Social Movement*, 15 J.L. & Com. 597 (1996).

⁶ *Environmental Justice*, U.S. Environmental Protection Agency, available at <http://www.epa.gov/environmentaljustice/>.

⁷ See U.S. General Accounting Office (now the U.S. Government Accountability Office), *Siting of Hazardous Waste Landfills and Their Correlation with Racial and Economic Status of Surrounding Communities* (June 1, 1983) (GAO/RCED-83-166); Commission for Racial Justice, UCC, *Toxic Wastes and Race in the United States: A National Report on the Racial and Socio-Economic Characteristics of Communities with Hazardous Waste Sites* (Public Data Access, Inc. 1987), cited in Barry E. Hill, *Environmental Justice: Legal Theory and Practice*, Environmental Law (continued...)

number of factors may explain why these communities might be affected more often than others. Aside from the possibility that the harms are directed purposely at certain communities, factors such as costs, community involvement, political clout, economic status, and education—which may or may not be related to racial or ethnic status—may contribute to any correlation. For example, because property values may be lower in minority communities, siting authorities may choose inexpensive land near these communities.⁸ These communities also may lack the educational background or civic involvement that other communities may use to counteract proposals that would result in disproportionate environmental harm.⁹ If a siting decision that caused environmental hazards to the community depended solely on economic benefits and cost-efficiency, it may be difficult to justify an environmental justice claim. On the other hand, if the decision factored in the unlikely opposition of a minority community, the decision might be alleged to be discriminatory against that community.

Legal Authority to Prevent Disproportionate Environmental Harm

Individuals and communities seeking legal protection against perceived or alleged disproportionate environmental harms have relied on a number of legal theories. Although basing such claims on equal protection provisions in the U.S. Constitution appears reasonable, litigants have had little success with this approach, which requires proof that the government intended to discriminate. For the same reason, Title VI of the Civil Rights Act of 1964, which prohibits discrimination in federally funded programs, has proven troublesome for litigants to enforce in courts. Those who wish to challenge the effect of environmental harms also may seek relief under the National Environmental Policy Act (NEPA) or the discretionary authority of agencies under their statutory mandates.

Equal Protection Under the U.S. Constitution

Alleged disproportionate impacts resulting from environmental regulation by government agencies inevitably raise questions regarding whether constitutional protections may apply to protect affected communities. Legal claims of discrimination by government agencies generally are governed by principles of equal protection. The Equal Protection Clause of the Fourteenth Amendment prevents states from denying any person under their jurisdiction “the equal protection of the laws.”¹⁰ This constitutional requirement is made applicable to the federal government through the Due Process Clause of the Fifth Amendment.¹¹ When a government entity treats similarly situated individuals or communities differently, those people may have been

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Institute (Washington, DC 2009).

⁸ Paul Mohai and Bunyan Bryant, *Environmental Injustice: Weighing Race and Class Factors in the Distribution of Environmental Hazards*, 63 U. Colo. L. Rev. 921, 923 (1992).

⁹ Regina Austin and Michael Schill, *Black, Brown, Poor, and Poisoned: Minority Grassroots Environmentalism and the Quest for Eco-Justice*, 1 Kan. J.L. & Pub. Pol’y 69, 70 (Summer 1991).

¹⁰ U.S. Const. amend XIV.

¹¹ U.S. Const. amend. V (“No person shall ... be deprived of life, liberty, or property, without due process of law ...”). See *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Washington v. Davis*, 426 U.S. 229 (1976).

denied equal protection.¹² However, to succeed in a legal challenge, litigants must show that the government intended to discriminate, not merely that litigants experienced discriminatory impacts.¹³

A court's review of equal protection claims depends on the nature of the discriminatory treatment. As a general rule, statutory classifications—those which distinguish between groups of people or between types of conduct—are permissible under the U.S. Constitution if there is a rational basis for the government establishing that distinction.¹⁴ If, however, the classification targets a “suspect class,” courts will apply a heightened review known as strict scrutiny that requires the government to have a compelling reason to justify such treatment. Suspect classifications generally may arise with laws targeting race, religion, or national origin, as well as laws affecting fundamental rights like speech, or voting.¹⁵

If a governmental action explicitly identifies a suspect classification, the requirement of discriminatory intent is satisfied. However, it is more likely that environmental justice claims result from laws or actions that appear to be neutral but disproportionately affect a particular community that qualifies for heightened constitutional protection. The Supreme Court has explained that a disproportionate effect on such a community does not mean that the community's constitutional right to equal protection has been denied.¹⁶ When reviewing whether there was an intent to discriminate, courts may consider a variety of factors, including whether there is a significant disparate impact; evidence of departure from normal procedures; legislative history; or administrative history (e.g., actions or statements during the decision-making process).¹⁷ Such intent also may be evidenced through discriminatory enforcement.¹⁸

The following examples illustrate that, as a general rule, litigants asserting disproportionate environmental harms have not been successful when claiming denial of equal protection. In one of the first cases to consider such claims, a federal district court recognized that a state health agency's permit allowing placement of a solid waste facility in a community “will affect the entire nature of the community [sic] its land values, its tax base, its aesthetics, the health and safety of its inhabitants ...”¹⁹ Foreshadowing the difficulties of future environmental justice claims, the court held that there was insufficient evidence of an intent to discriminate based on race, despite extensive statistical data.²⁰ The court noted that the site being challenged was located in a community with roughly 60% minority population, but that about half of all of the sites in the area were located in communities with less than 25% minority population.²¹ It also rejected assertions based on the concentration of solid waste sites in particular areas, explaining that it was reasonable to “expect solid waste sites to be placed near each other and away from concentrated

¹² See *Plyler v. Doe*, 457 U.S. 202, 216 (1982).

¹³ See *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979).

¹⁴ See, e.g., *Railway Express Agency v. New York*, 336 U.S. 106 (1949).

¹⁵ See *United States v. Carolene Products*, 304 U.S. 144, n. 4 (1938).

¹⁶ See *Washington v. Davis*, 426 U.S. 229 (1976) (a notable disparity in test performance by individuals based on race was insufficient to sustain an equal protection claim). As discussed later in this report, Congress may provide that nondiscrimination statutes require only disparate impact analysis, not discriminatory intent.

¹⁷ *Village of Arlington Heights v. Metropolitan Housing Development Co.*, 429 U.S. 252, 266-68 (1977).

¹⁸ See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

¹⁹ *Bean v. Southwestern Waste Management Corp.*, 482 F.Supp. 673, 677 (S.D. Tex. 1979).

²⁰ *Id.*

²¹ *Id.*

population areas.”²² The court also recognized that the sites were concentrated in areas where industry was located, not necessarily because minority populations were located nearby. Noting that it did not find the siting decision wise, the court explained that though the permit was “unfortunate and insensitive,” there was insufficient proof to demonstrate “purposeful racial discrimination.”²³

Other courts have treated the issue similarly, finding that a history of disproportionate impacts does not translate to discriminatory intent.²⁴ One court noted that although there may be an alleged history of “locating undesirable land uses in black neighborhoods,” the challenged siting must be compared to other decisions by the agency, which had placed the only other site in a mostly white neighborhood.²⁵ The court recognized that the siting agency did not “actively solicit” any landfill applications and showed no improper discriminatory motivations.²⁶

Although equal protection claims in these cases generally have not been successful, some litigants may pursue constitutional claims. In one example, a court denied summary judgment for the city in a case brought by residents of a neighborhood with a 99% minority population.²⁷ After reviewing evidence of discriminatory treatment related to flood protection, zoning, nuisances, landfills, and funding, the court recognized that there were questions as to whether the city had discriminated against the residents based on their race in some instances and permitted the case to go to trial, though it was settled before a final decision was rendered.²⁸

Nondiscrimination in Federal Programs Under Title VI of the Civil Rights Act of 1964

Title VI of the Civil Rights Act of 1964 generally prohibits discrimination in federally funded programs or activities.²⁹ Section 601 states that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”³⁰ Section 602 directs federal agencies that administer federally funded programs to implement the nondiscrimination provision through the promulgation of regulations and related enforcement proceedings.³¹ Agencies have issued regulations under Section 602 that prohibit actions with a discriminatory intent as well as actions with a discriminatory effect (also referred to as disparate impact).³²

²² *Id.* at 678.

²³ *Id.* at 680.

²⁴ *See also* R.I.S.E. v. Kay, 768 F. Supp. 1144 (E.D. Va 1991).

²⁵ East Bibb Twiggs Neighborhood Association v. Macon-Bibb County Planning and Zoning Commission, 706 F.Supp. 880, 885 (M.D. Ga. 1989).

²⁶ *Id.*

²⁷ Miller v. Dallas, 2002 U.S. Dist. LEXIS 2341 (N.D. Tex. 2002).

²⁸ *See id.* at 29-30.

²⁹ 42 U.S.C. §2000d *et seq.*

³⁰ 42 U.S.C. §2000d.

³¹ 42 U.S.C. §2000d-1. *See also* 28 C.F.R. §42.104.

³² *See, e.g.*, 28 C.F.R. §42.104(b)(2) (prohibiting recipients of federal funds from using “criteria or methods of administration which have the effect of subjecting individuals to discrimination”); 40 C.F.R. §7.35 (prohibiting discriminatory practices in programs or activities receiving EPA funding). *See also* Guardians Association v. Civil (continued...)

Individuals who believe they are victims of discrimination under Title VI may file a complaint with the federal agency that provides the funding, or, in some cases, they may file a lawsuit in federal court. State and local environmental agencies generally receive funding from EPA, which subjects those agencies to Title VI, and some individuals and communities have relied on that basis when claiming they have been disproportionately affected by environmental regulation. However, following several Supreme Court decisions, litigants have had limited success when challenging certain types of discrimination under Title VI in federal courts.

On one hand, the Court has recognized a private right of action under Section 601, meaning that individuals or communities may file a lawsuit claiming discrimination in violation of Title VI.³³ To have a private right of action, however, the claimants must show that there was a discriminatory intent behind the challenged action.³⁴ As discussed in the previous section, discriminatory intent is required in equal protection claims as well, and has proven to be a challenge for many litigants seeking relief for disproportionate environmental harms. On the other hand, despite recognizing agencies' authority to issue Section 602 regulations to prevent disparate impact discrimination, the Court held that there was no private right of action under these regulations.³⁵ Thus, since 2001, legal claims of discriminatory *effect* have been limited to the administrative complaint process.

With the difficult standards required under Section 601 and without a private right of action under Section 602, it is generally the agency's responsibility to enforce its regulations in response to administrative complaints. Consequently, if an agency does not pursue or resolve complaints, there is little recourse for those claiming disproportionate harm. Commentators have noted that there has been a significant backlog of complaints at EPA, tracing the issue to an early study which found that EPA had concerns that enforcing antidiscrimination provisions would conflict with its primary goal of environmental improvement.³⁶ Because of these delays, groups with administrative complaints have sought court orders compelling agency action. For example, a community organization claiming that city officials were not addressing environmental problems in vulnerable communities filed multiple complaints with EPA under its Title VI regulations.³⁷ EPA's Office of Civil Rights (OCR) did not accept or reject the complaints within the regulatory deadlines and still had not made any response two years later, leading the organization to file a lawsuit in federal court. Within weeks, the agency accepted the complaints, and the lawsuit was dismissed.³⁸ After an additional two years passed without any additional response, the organization filed a second lawsuit. The U.S. Court of Appeals for the Ninth Circuit noted that the group's "experience before the EPA appears, sadly and unfortunately, typical of those who appeal

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Service Commission, 463 U.S. 582, 619 (1983) (Marshall, J., dissenting) (observing that "every Cabinet Department and about 40 federal agencies adopted standards interpreting Title VI to bar programs with a discriminatory impact").

³³ *Guardians Association*, 463 U.S. 582.

³⁴ *Id.* at 597.

³⁵ *Alexander v. Sandoval*, 532 U.S. 275, 287-89 (2001). See also CRS Report RL31077, *Private Actions to Sue for Civil Rights Violations in Federally Assisted Programs After Alexander v. Sandoval*.

³⁶ See James H. Colopy, *The Road Less Traveled: Pursuing Environmental Justice Through Title VI of the Civil Rights Act of 1964*, 13 *Stan. Envtl. L.J.* 125, 180-85 (1994) (citing U.S. Comm'n on Civil Rights, *The Federal Civil Rights Enforcement Effort—1974*, Vol. VI (1975)).

³⁷ *Rosemere Neighborhood Association v. U.S. Environmental Protection Agency*, 581 F.3d 1169 (9th Cir. 2009).

³⁸ *Id.*

to OCR to remedy civil rights violations.”³⁹ Citing “a consistent pattern of delay” by EPA, which responded to complaints only after lawsuits were filed, the court held the organization could seek a court order forcing EPA to process the organization’s complaints.⁴⁰

The Court’s 2001 decision prohibiting a private right of action under Title VI for disparate impact claims raised questions regarding whether affected individuals or communities may assert similar claims under a different civil rights provision, commonly referred to as Section 1983.⁴¹ Section 1983 allows individuals to sue government officials—or others acting pursuant to law—for “deprivation of any rights, privileges, or immunities” provided under U.S. law.⁴² Thus, individuals who are precluded from enforcing Section 602 regulations arguably could claim that the rights afforded under those regulations have been infringed in violation of Section 1983.⁴³ However, courts have appeared to limit the applicability of Section 1983 in later decisions.⁴⁴ In one example, residents of a largely minority neighborhood sought to enforce disparate impact regulations after a state environmental agency approved the construction of an industrial facility in the neighborhood which already included a number of the city’s other contaminated sites.⁴⁵ Initially, the federal district court held in favor of the residents and ordered the state to review their Title VI complaint, but the court’s reasoning was no longer valid after the Supreme Court’s decision finding no private right of action under Section 602.⁴⁶ The residents amended their lawsuit, seeking enforcement of their Section 602 claim under Section 1983, and the court again held in their favor.⁴⁷ Ultimately, however, the U.S. Court of Appeals for the Third Circuit overturned the decision, holding that “an administrative regulation cannot create an interest enforceable under section 1983 unless the interest already is implicit in the statute authorizing the regulation.”⁴⁸ Because Title VI does not create a right of action for disparate impact claims, the court held that the residents could not pursue such a claim under Section 1983 either. It is notable that other federal appellate courts have disagreed on the scope of Section 1983, leaving open the possibility that litigants in other courts may pursue such claims.⁴⁹

³⁹ *Id.* at 1175 (stating that “EPA failed to process a *single* complaint from 2006 or 2007 in accordance with its regulatory deadlines” (emphasis in original)).

⁴⁰ *Id.*

⁴¹ *See Sandoval*, 532 U.S. at 299-300 (Stevens, J., dissenting).

⁴² 42 U.S.C. §1983.

⁴³ Section 1983 requires that a state actor commit the violation, meaning that it arguably could be invoked for state and local entities receiving funds, but not private entities.

⁴⁴ After holding that Section 602 did not provide a private right of action in 2001, the Supreme Court held that statutory provisions that do not create a private right of action cannot be enforced under Section 1983. *Gonzaga University v. Doe*, 536 U.S. 273, 283-84 (2002) (“it is *rights*, not the broader or vaguer ‘benefits’ or ‘interests,’ that may be enforced under the authority of [Section 1983]”). The Court did not address the scope of Section 1983 in the context of regulations, though.

⁴⁵ *South Camden Citizens in Action v. N.J. Department of Environmental Protection*, 145 F.Supp.2d 446 (D.N.J. 2001).

⁴⁶ *Id.*

⁴⁷ *South Camden Citizens in Action v. N.J. Department of Environmental Protection*, 145 F.Supp.2d 505 (D.N.J. 2001).

⁴⁸ *South Camden Citizens in Action v. N.J. Department of Environmental Protection*, 374 F.3d 771, 774 (3rd Cir. 2001).

⁴⁹ *Compare* *Samuels v. District of Columbia*, 770 F.2d 184 (D.C. Cir. 1985) (allowing tenants to seek enforcement of housing regulations by asserting a Section 1983 claim) *with* *Save Our Valley v. Sound Transit*, 335 F.3d 932 (9th Cir. 2003) (holding that litigants could not sustain a Section 1983 claim because regulations did not create a right enforceable under Section 1983).

National Environmental Policy Act (NEPA)

The National Environmental Policy Act of 1969 (NEPA) establishes national environmental policies, including encouraging “harmony between man and his environment” and promoting efforts to “prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man.”⁵⁰ Congress enacted NEPA in recognition “that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.”⁵¹

To achieve these policies, NEPA established a federal responsibility “to use all practicable means ... to improve and coordinate Federal plans, functions, programs, and resources” in order to reach a number of goals.⁵² Many of these goals reflect principles of preventing disproportionate environmental harm, including assuring “for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings” and attaining “the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable or unintended consequences.”⁵³

NEPA requires federal agencies to follow a particular process to ensure that the statutory goals inform their decisions, but it does not dictate the outcome of the agencies’ considerations of a particular action.⁵⁴ The process requires federal agencies to provide detailed statements of the environmental impacts of agency actions (e.g., permitting, operations, etc.) that “significantly [affect] the quality of the human environment.”⁵⁵ The statements must identify any adverse environmental effects and available alternatives.⁵⁶ NEPA reviews serve both to inform the agency in its deliberative process and to inform the public of the agency’s actions and considerations.⁵⁷

Individuals affected by an agency’s action may challenge the agency’s NEPA review under the Administrative Procedure Act, which provides a private right of action for judicial review of agency actions or inaction.⁵⁸ Claims of insufficient review of environmental impacts have been asserted in both administrative and judicial courts, and indeed is one of the most prolific genres of environmental litigation. Both forums have emphasized that NEPA does not require agencies to eliminate or minimize the environmental effects of a particular action.⁵⁹ Instead, the agency is required to adequately identify and evaluate the adverse effects before making its decision.⁶⁰ In one example, an administrative board of appeals ruled that the U.S. Bureau of Land Management (BLM) had failed to meet its obligations under NEPA regarding the effects of constructing a new

⁵⁰ 42 U.S.C. §4321.

⁵¹ 42 U.S.C. §4331(c).

⁵² 42 U.S.C. §4331(b).

⁵³ *Id.*

⁵⁴ For a discussion of the procedures required under NEPA, see CRS Report RS20621, *Overview of National Environmental Policy Act (NEPA) Requirements*.

⁵⁵ 42 U.S.C. §4332(2)(C).

⁵⁶ *Id.*

⁵⁷ See 40 C.F.R. §1506.6(b).

⁵⁸ 5 U.S.C. §500 *et seq.* See CRS Report R41546, *A Brief Overview of Rulemaking and Judicial Review*.

⁵⁹ See, e.g., *In the Matter of Louisiana Energy Services*, 47 N.R.C. 77 (1998) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989)).

⁶⁰ *Id.*

visitor center on federal lands.⁶¹ American Indian communities had raised concerns about the increased visitation to the area that would result and potentially harm cultural resources. Noting that BLM “expressly decided not to address [this] possibility,” the board explained that it could affirm the agency’s finding of no significant impact only if the agency could show that it “took a ‘hard look’ at the environmental impacts.”⁶²

Although litigants cannot use NEPA to achieve a desired outcome in light of their concerns about the disparate impact of an agency’s decision, requiring agencies to consider various options and alternatives, including the cumulative effect that a proposed action may have on vulnerable communities, may be helpful to those communities nonetheless.⁶³ The outcome of such a lawsuit may delay the implementation of a decision with an adverse environmental effect on a particular community, or it may cause the agency to reconsider its decision in light of any additional findings after further review.

Agency Discretionary Authority and Citizen Suits in Environmental Laws

In addition to these constitutional and statutory provisions that may be invoked to prevent disproportionate exposure to environmental harms, agencies may act under general discretionary authority. Congress often authorizes agencies to undertake actions related to their missions, but allows the agencies discretion in choosing how to implement those authorities. If Congress has not given the agency explicit instruction, courts generally defer to the agency’s interpretation, assuming it is reasonable.⁶⁴ Under Executive Order 12898 (discussed in detail below), federal agencies are required to identify and address “disproportionately high and adverse human health or environmental effects of [their] programs, policies, and activities on minority populations and low-income populations.”⁶⁵ To do so, they must act under these existing discretionary authorities because Congress has not enacted general legislation toward this purpose.⁶⁶

Many agencies have broad authority to promulgate regulations that they consider necessary to exercise the functions authorized by Congress.⁶⁷ Congress also may direct the agency to exercise its authority “to protect human health and the environment.”⁶⁸ The agency may do so through setting pollution standards, issuing permits, or implementing enforcement mechanisms. For example, the Clean Water Act authorizes EPA to establish guidelines specifying factors that the agency considers when deciding pollution control limitations.⁶⁹ EPA may consider such “factors as the Administrator deems appropriate”⁷⁰ and “any more stringent limitation ... established

⁶¹ Southern Utah Wilderness Alliance, 150 I.B.L.A. 158 (1999).

⁶² *Id.* at 167.

⁶³ See also *Morongo Band of Mission Indians v. Federal Aviation Administration*, 161 F.3d 569, 580-81(9th Cir. 1998).

⁶⁴ *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

⁶⁵ Exec. Order No. 12898 (February 11, 1994), available at <http://www.archives.gov/federal-register/executive-orders/pdf/12898.pdf>.

⁶⁶ Although Congress has not enacted legislation, a number of bills have been proposed in previous Congresses. See, e.g., H.R. 5326 (102nd Cong.); S. 2806 (102nd Cong.); H.R. 1103 (110th Cong.); S. 642 (110th Cong.).

⁶⁷ See, e.g., 42 U.S.C. §6912(a)(1).

⁶⁸ See, e.g., 42 U.S.C. §§6922-24.

⁶⁹ 33 U.S.C. §1314.

⁷⁰ 33 U.S.C. §1314(b).

pursuant to ... any other Federal law or regulation.”⁷¹ Additionally, EPA may have discretion under the enforcement authority provided by an array of environmental laws to consider the environmental impact of a particular action. The penalty provisions of these statutes often permit the agency or courts to consider “such other matters as justice may require” in addition to factors such as the nature of the violation, the history of similar violations, etc.⁷² These broadly worded provisions allow agencies flexibility in their exercise of delegated authority, such that they may be able to incorporate nondiscrimination principles or considerations in decision making and other agency actions.

Although these environmental statutes allow agencies to consider the impacts of environmental harms, the discretionary nature of these authorities generally means that individuals and communities alleging disproportionate impacts likely cannot succeed in a legal claim based solely on these authorities. Communities claiming to be affected by a particular environmental harm may seek to avail themselves of the citizen suit provisions included in various environmental statutes, which essentially allow individuals to file lawsuits to enforce the respective laws.⁷³ However, statutory authorizations for citizen suits do not apply to claims related to an agency’s discretionary duties, and enforcement decisions generally are regarded as discretionary.⁷⁴

Administrative Actions to Support Environmental Justice

Following the heightened study of the effects of environmental hazards on minority communities in the 1980s, EPA assembled a working group to study the issue in 1990, under the direction of President George H. W. Bush.⁷⁵ The focus on environmental justice expanded under President Bill Clinton, who directed federal agencies to incorporate environmental justice into their mission and operations.⁷⁶ This directive has been reiterated by various federal agencies in recent years under President Barack Obama.⁷⁷ These actions have not provided an independent legal basis for enforcing nondiscrimination principles related to environmental harms. However, they remain pertinent because they require agencies to apply relevant existing authorities that may achieve the same goal.

⁷¹ 33 U.S.C. §1311(b)(1)(C).

⁷² See 33 U.S.C. §1319(d). See also 15 U.S.C. §2615(a); 42 U.S.C. §9609(a).

⁷³ See, e.g., 33 U.S.C. §1365; 42 U.S.C. §9659.

⁷⁴ See 33 U.S.C. §1365(a)(2). See also *A Citizen’s Guide to Using Federal Environmental Laws to Secure Environmental Justice*, Environmental Law Institute (Washington, DC 2002).

⁷⁵ See U.S. Environmental Protection Agency, *Environmental Equity: Reducing Risk for All Communities* (1992), available at http://www.epa.gov/environmentaljustice/resources/reports/annual-project-reports/reducing_risk_com_voll.pdf.

⁷⁶ Exec. Order No. 12898.

⁷⁷ Memorandum of Understanding on Environmental Justice and Executive Order 12898, available at <http://www.epa.gov/environmentaljustice/resources/publications/interagency/ej-mou-2011-08.pdf>.

Executive Order 12898

In 1994, President Clinton issued Executive Order 12898 (E.O. 12898) to expand the goals of environmental justice beyond EPA.⁷⁸ E.O. 12898 required each federal agency to “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, and activities on minority populations and low-income populations ...”⁷⁹ Individually, agencies were directed to develop an agency-wide strategy that would identify programs, policies, processes, and enforcement in need of revision to ensure equitable enforcement of health and environmental statutes; to improve public participation; and to improve access to information identifying environmental effects among minority and low-income populations.⁸⁰

E.O. 12898 also called for a coordinated approach to addressing the goal of environmental justice and established an interagency working group.⁸¹ The group was directed to provide guidance to and coordinate consistency among the individual agencies and offices as they developed their respective environmental justice strategies.⁸²

Under E.O. 12898, federal agencies are responsible to undertake a number of measures to promote environmental justice. For example, agencies must

conduct [their] programs, policies, and activities that substantially affect human health or the environment, in a manner that ensures that such programs, policies, and activities do not have the effect of excluding persons (including populations) from participation in, denying persons (including populations) the benefits of, or subjecting persons (including populations) to discrimination under, such programs, policies, and activities, because of their race, color, or national origin.⁸³

It also directs agencies “whenever practicable and appropriate” to gather and analyze data on environmental and health impacts across a range of demographic groups in order to identify potential disparities among populations.⁸⁴

E.O. 12898 directs agencies to encourage public participation and awareness on issues considered by the agencies and the interagency working group.⁸⁵ However, it creates no specific obligations for disclosure or other action by the agency. As such, E.O. 12898 may be thought of as an internal

⁷⁸ Exec. Order No. 12898.

⁷⁹ *Id.* at §1-101.

⁸⁰ *Id.* at §1-103(a).

⁸¹ The group included representatives from various federal agencies and offices, including the Department of Defense; Department of Health and Human Services; Department of Housing and Urban Development; Department of Labor; Department of Agriculture; Department of Transportation; Department of Justice; Department of the Interior; Department of Commerce; Department of Energy; Environmental Protection Agency; 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 the Council of Economic Advisors. *Id.* at §1-102(a).

⁸² *Id.* at §1-102(b).

⁸³ *Id.* at §2-2.

⁸⁴ *Id.* at §3-3. E.O. 12898 also provides specific direction to gather and analyze information related to the subsistence consumption of fish and wildlife across populations. *Id.* at §4-4.

⁸⁵ *Id.* at §5-5.

guidance document for the executive branch. It is binding on executive agencies and offices, but does not create or implement generally applicable rules or obligations that could be enforced against the government, its officials, or other individuals.⁸⁶ In other words, E.O. 12898 may not be used as an enforcement mechanism for environmental justice claims.

In 2011, the agencies originally included in the interagency working group established by E.O. 12898 agreed to a Memorandum of Understanding on Environmental Justice and Executive Order 12898 (EJ MOU) that reiterated the agencies' commitment to the goals of E.O. 12898.⁸⁷ EJ MOU also expanded the opportunity for participation by other federal agencies, noting that E.O. 12898 "applies to covered agencies, [but] does not preclude other agencies from agreeing to undertake the commitments in the Order."⁸⁸ It also imposed requirements on public reporting by participating agencies of their environmental justice strategies and progress.⁸⁹

Plan EJ 2014

In 2011, EPA introduced a strategic plan known as Plan EJ 2014 to help integrate environmental justice into its programs, policies, and activities.⁹⁰ The plan marks 20 years since the issuance of E.O. 12898 and manifests EPA's intent to set a standard for other agencies to address environmental justice.⁹¹ Plan EJ 2014 outlines several methods through which EPA can promote environmental justice, including rulemaking, permitting, compliance and enforcement, community-based action programs, and interagency support programs.⁹² EPA intends to report its progress toward achieving goals set in the plan in 2014.⁹³

EPA has issued guidance with specific instructions on recommended procedures to incorporate environmental justice into its rule-writing process, providing suggestions on when to consider environmental justice and questions to ask in order to successfully address the relevant issues that arise.⁹⁴ Under the guidance, EPA analysts are instructed to "[incorporate] environmental justice into the development of risk assessment, economic analysis, and other scientific input and policy choices during the development of a rule."⁹⁵ With respect to its initiative to incorporate

⁸⁶ *Id.* at §6-609 ("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 non-compliance of the United States, its agencies, its officers, or any other person with this order."). See also CRS Report RS20846, *Executive Orders: Issuance, Modification, and Revocation*.

⁸⁷ Memorandum of Understanding on Environmental Justice and Executive Order 12898, available at <http://www.epa.gov/environmentaljustice/resources/publications/interagency/ej-mou-2011-08.pdf>.

⁸⁸ *Id.* at 2. Six additional agencies and offices agreed to participate, including the Department of Education; Department of Veterans Affairs; Department of Homeland Security; Council on Environmental Quality; General Services Administration; and Small Business Administration.

⁸⁹ *Id.* at 3.

⁹⁰ U.S. Environmental Protection Agency, *Plan EJ 2014* (Washington, DC 2011) (hereinafter *Plan EJ 2014*), available at <http://www.epa.gov/environmentaljustice/resources/policy/plan-ej-2014/plan-ej-2011-09.pdf>.

⁹¹ *Id.*

⁹² *Id.* at 8.

⁹³ *Id.* at vi.

⁹⁴ *Id.* at 34-35.

⁹⁵ *Id.* at 35.

environmental justice into the permitting process, EPA has endeavored “to develop and implement tools to better enable overburdened communities to have full and meaningful access to the permitting process.”⁹⁶

To advance environmental justice through its compliance and enforcement actions, EJ Plan 2014 provides for the enhanced use of enforcement and compliance tools “to address the needs of overburdened communities.”⁹⁷ In other words, as EPA determines where to pursue enforcement actions, it will give priority to cases that affect communities which may be particularly vulnerable.⁹⁸ EPA also intends to improve its communications with communities that may be at risk of environmental harms.⁹⁹

Similarly, EJ Plan 2014 continues EPA’s community programs to “support community empowerment and provide community benefits at all levels.”¹⁰⁰ It provides for improvement of these programs, with particular emphasis on minority and low-income communities (including tribal and indigenous communities) that have been identified as lacking “capacity to affect environmental conditions.”¹⁰¹ In particular, the agency’s efforts focus on expanding partnerships with communities, building capacity within communities to organize community-based efforts, and coordinating with other agencies and entities that affect the community.¹⁰²

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⁹⁶ *Id.* at 46.

⁹⁷ *Id.* at 59.

⁹⁸ *See id.* at 61.

⁹⁹ *Id.* at 59.

¹⁰⁰ *Id.* at 79.

¹⁰¹ *Id.*

¹⁰² *Id.* at 79-86.