

Just Policy?:

The Limitations of the U.S. Environmental Protection Agency's Environmental Justice Strategy during the Clinton Administration

Kimberly Harn

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Sandwiched between the Port of Los Angeles and the highly industrialized Alameda Corridor, the primarily Latino neighborhood of Wilmington has been home to a grassroots movement alleging that residents' high rates of cancer, birth defects and chronic illness are the result of the neighborhood's exposure to an alarming number of polluting facilities.¹ In Wilmington resident Maria Palos' 1998 testimony on the public health and environmental conditions in her community, directed towards local and national government officials, she concludes with the following question: "I would like to ask what kind of help you can offer us, and who in our government will accept the responsibility of helping us?"² In many ways the Clinton Administration addressed this very question in the 1994 Executive Order 12,898 on Environmental Justice which required all Federal agencies to incorporate environmental justice for low-income and minority populations into their core missions, and designated the United States Environmental Protection Agency (US EPA) as the lead agency on environmental justice (EJ) concerns. However, what remained to be seen was to what extent the measures taken by the US EPA in the next seven years would fulfill the hopes of Palos, and thousands of advocates throughout the nation, for a more responsive government reply to environmental injustices.

The Clinton Administration US EPA's environmental justice policy, examined through a variety of government documents and secondary critical sources, represents a remarkable recognition of the problem of environmental injustice, within the greater context of agency reform

¹ For more information see Marc Cooper, "Cancer Land," *New Times Los Angeles*, May 21-27, 1998.

² Maria Palos, personal history, trans. Irene Gonzales, found in documents compiled for the White House Council on Environmental Quality, Los Angeles Environmental Justice Meeting, July 10, 1998, William J. Clinton Presidential Library, President's Advisory Board on Race, Meetings, Box 70, Folder 2.

towards a more inclusive environmental protection model. However, the extent to which the US EPA's environmental justice policy effected meaningful change during Clinton's two terms was limited by external pressure, political factors and, more problematically, by a disconnect between environmental justice aims and the systemic forces controlling environmental protection.

Environmental justice is defined by the US EPA 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.”³ The US EPA's recognition and definition of environmental justice was born from the encounter between a grassroots social movement, the environmental justice movement, and the institutional power of the United States Government. The momentum garnered by the activists and other advocates of the environmental justice cause propelled a change in national public policy. Although environmental justice had entered the mainstream political discourse beginning in the final years of the George H.W. Bush's Administration, and reached an apex with the President William J. Clinton's Executive Order, understanding the environmental justice policy during the Clinton years requires a closer examination of the history and development of the movement itself.

In one critical assessment of the environmental justice movement, the history of the movement is summarized in the following manner: “Beginning in the late 1970s and the early 1980s, a powerful social force -- environmental justice movement – emerged from within communities of color and poor and working-class white communities around the United States [that] have been disproportionately burdened with a range of toxic and hazardous pollution and

³ Environmental Protection Agency, Environmental Justice Homepage, <http://www.epa.gov/environmentaljustice/> (accessed July 8th, 2010).

other environmental harms[... it is] a political response to the deterioration of the conditions of everyday life as society reinforces existing social inequalities while exceeding the limits to growth.”⁴ At its core it was a grassroots social justice movements advocating for equitable and just distribution of harmful environmental factors throughout society, or distributive justice. More radically, the movement also called the elimination of environmental injustice at the source, or source justice, through reform of the institutional structures which perpetuate patterns of environmental discrimination towards people of color and the poor.⁵ Re-envisioning commonly held notions of environment, environmental justice proposed an essentially anthropocentric understanding of the link between nature and humans, seeing environment (in the words of what would become the motto of the movement) as the places “where we live, work and play.”

By the 1990s, the movement began to articulate its goals in the language of rights, advocating among other things, that people of color have the right to equal participation in environmental decisions, to the formation of non-discriminatory public policy, to adequate compensation for instances of environmental injustice and to the ability to hold governments accountable and punishable for environmental justice violations.⁶ As Robert D. Bullard, the movement’s leading scholar and spokesperson adds, “the environmental justice framework incorporates other social movements that seek to eliminate harmful practices (discrimination harms the victim), in housing, land use, industrial planning, health care, and sanitation

⁴ David Naguib Pellow and Robert J. Brulle, Introduction to *Power, Justice and the Environment: Toward critical Environmental Justice Studies* (Cambridge, MA: MIT Press, 2005), 2-3.

⁵ Julian Agyeman, Robert D. Bullard and Bob Evans, “Joined-up Thinking: Bringing Together Sustainability, Environmental Justice and Equity,” in *Just Sustainabilites: Development in an Unequal World* (Cambridge, MA: MIT Press, 2003), 7; for an in-depth discussion and critique of the concepts of distributive and source justice as they relate to environmental justice see Davis Schlosberg’s *Defining Environmental Justice: Theories, Movements and Nature* (New York: Oxford UP, 2007).

⁶ See First National People of Color Environmental Leadership Summit, *Principles of Environmental Justice*, October 24-27, 1991, <http://www.ejnet.org/ej/principles.html> (last accessed July 8th, 2010)

services.”⁷ While environmental justice has many antecedents, a brief consideration of the environmental movement of the 1960s and 1970s (and the resulting ensuing environmental regulation reform of the 1970s) and the civil rights movement is essential to understand the social and political climate of the US EPA environmental justice reforms in the 1990s.

Beginning in the 1960s the modern environmental movement represented the transition of traditional notions of conservation and preservation of nature to the new realities of the increasingly industrialized postwar world. It was an overwhelmingly white and middle-class movement, linking concerns for protection and expansion of wilderness and species protection, and demands for environmental quality from pollution and industry with the promotion of “more democratic control and regulation of environmental amenities.”⁸ However, it was “not a movement for social reconstruction: it does not seek to subvert the social order to bring about the type of transformation needed beyond policy change focused on regulation or containment.”⁹ By the mid-1970s, environmentalism was a mass-movement with an estimated 20 million people as donating members of environmentally-minded groups throughout the nation, and had “institutionalized in the proliferation of legal-scientific groups [...] using an insider strategy based on litigation, lobbying, and technical evaluation.”¹⁰ The pressure exerted by these groups on the government resulted in the passage of a remarkable amount of environmental legislation in the early 1970s, including the National Environmental Policy Act (1969), the Clean Air Act (1970), the Clean Water Act (1972), and the Research Conservation and Recovery Act (1976).

⁷ “Environmental Justice in the 21st Century,” *Phylon* 46, no. 3/4 (Autumn-Winter 2001), 153, accessed online in JSTOR, <http://www.jstor.org/pss/3132626> (last accessed July 22, 2010).

⁸ Daniel Faber and James O’Connor, “Capitalism and the Crisis of Environmentalism,” in *Toxic Struggles: The Theory and Practice of Environmental Justice*, ed. Richard Hofrichter (Philadelphia, PA: New Society, 1993), 12-13.

⁹ *Ibid.*, 7.

¹⁰ Luke Cole and Sheila Foster, “A History of the Environmental Justice Movement,” in *From the Ground Up: Environmental Racism and the Rise of the Environmental Justice Movement* (New York: NYU Press, 2000), 29.

The creation of the Council on Environmental Quality as per the National Environmental Policy Act (NEPA) and the foundation of the United States Environmental Protection Agency both in 1970, the same year the first Earth Day would be celebrated, were similarly part of the wave of activity which would lead some to title the 1970s the “Environmental Decade.” These laws, councils and the regulatory bodies formed in the early 70s, constitute a remarkable achievement for the day, creating comprehensive and relatively stringent guidelines for environmental regulation in the United States.

The Environmental Protection Agency consolidated the nation’s environmental regulation into a single federal agency; the new agency was initially entrusted with the task of making “a coordinated attack on the pollutants which debase the air we breathe, the water we drink, and the land that grows our food.”¹¹ Headquartered in Washington D.C., the US EPA regulates 10 regional EPA offices covering all 50 states and territories. Although established amongst a spirit of optimism and increased environmental consciousness fomented by the environmental movement, the young agency was soon beleaguered by the complicated and controversial task of environmental protection. Facing “a seemingly never-ending onslaught of impossible agency tasks” fueled by the nation’s overly-optimistic ambitions for environmental quality, the US EPA was severely limited by “congressional appropriations committees which rarely “shared the zeal of those on the committees who drafted the laws.”¹² Paralyzed by intense scrutiny on all sides, many aspects of environmental decision making were driven underground

¹¹ President Richard Nixon, Special Message to the Congress About Reorganization Plans to Establish the Environmental Protection Agency and the National Oceanic and Atmospheric Administration,” July 9, 1970, <http://www.presidency.ucsb.edu/ws/index.php?pid=2575&st=Environmental+Protection+Agency&st1=>.

¹² Richard J. Lazarus, “The Tragedy of Distrust in the Implementation of Federal Environmental Law,” in Clifford Rechtschaffen, Eileen Gauna and Catherin A. O’Neill, *Environmental Justice: Law, Policy & Regulation*, 2nd ed. (Durham, NC: Carolina Academic Press, 2009), 141.

within the agency, away from the public eye.¹³ This de facto system of regulation developed by the EPA, coupled with the already complicated web of environmental laws created a highly “complex administrative processes” which excluded “those without expertise from much of environmental decision making.”¹⁴ Exclusion of affected communities, especially already marginalized poor and minority communities, from the very environmental regulation process which should have protected them was one of the major points of conflict for the environmental justice movement in the 1980s and 90s, and furthermore, sets the scene for the attempts for reform which would occur after Clinton’s Executive Order on Environmental justice.

Nevertheless, the voices of these marginalized communities were not entirely absent or unheard. As early as the 1972 Council on Environmental Quality’s second annual report which specifically addressed race, economic status and environmental inequity in inner cities, the linking of environmental, social and economic concerns that would later coalesce into the Environmental Justice movement was already present in the national dialogue, albeit marginally.¹⁵ Although these “inner-city” concerns were of secondary significance for both the US EPA and the mainstream environmentalism discourse, and “failed to enter the national decision making agenda,”¹⁶ concerns with environmental inequity for poor and minority communities lingered in academic sphere until the issue began to garner national attention following the highly publicized 1982 protests of African Americans in Warren County, North Carolina, against a highly toxic waste dump located in their community. In the years following Warren County the relationship between these environmental justice and mainstream

¹³ Ibid, 141.

¹⁴ Luke Cole and Sheila Foster, “A History of the Environmental Justice Movement,” in *From the Ground Up: Environmental Racism and the Rise of the Environmental Justice Movement* (New York: NYU Press, 2000), 30.

¹⁵ James P. Lester, David W. Allen and Kelly M. Hill, *Environmental Justice in the United States: Myth and Realities* (Boulder, CO: Westview Press, 2001).

¹⁶ Ibid, 25-26.

environmentalism grew increasingly hostile, with EJ activists regarding the environmental movement as a culprit in the unjust and unequal protection of poor and minority people from environmental harms. A strongly worded January 16th, 1990 letter from the Gulf Coast Tenant Leadership Development Project accuses mainstream environmental groups of “ignorance, ambivalence, and complicity with the environmental exploitation of communities of color.”¹⁷ Perhaps even more significant than the antagonism between environmental justice and environmentalism is the causes underlying their tumultuous relationship.

Looking in greater detail at the language of the National Environmental Policy Act (1969), reveals to a great extent the ideological conflict between mainstream environmentalism, the environmental protection model and the environmental justice movement. Among NEPA’s stated purposes are “to declare a national policy which will encourage productive and enjoyable harmony between man and his environment” and “to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man.”¹⁸ Present is the conception of the natural environment and the human environment as separate, albeit interrelated, spheres. Human health and welfare is one component of this conception of environmental protection, but more prominent is the idea of the government as the “trustee of the environment,”¹⁹ meaning that protection of the natural world, not only its human inhabitants, is inherently valuable. Environmental justice on the other hand is an anthropocentric discourse, focused principally on human health and welfare. As one critic remarks: “The environmental justice movement seems, stubbornly, to be much more about human justice rather

¹⁷ Phaedra C. Pezzullo and Ronald Sandler, “Revisiting the Environmental Justice Challenge to Environmentalism” in *Environmental Justice and Environmentalism: The Social Justice Challenge to the Environmental Movement* ed. Ronald Sandler and Phaedra C. Pezzullo (Cambridge, MA: MIT Press, 2007), 3.

¹⁸ *National Environmental Policy Act*, 42 USC § 4331, <http://ceq.hss.doe.gov/nepa/regs/nepa/nepaeqia.htm> (last accessed July 16, 2010).

¹⁹ *Ibid.*

than about the natural environment – or rather , it is only about the natural environment in as much as it (the natural environment) can be seen in terms of human justice.”²⁰ Thus, at the heart of the dispute is the conflict of two related, but ultimately distinct, sets of values, one of which was integrated into the institutional power controlling environmental regulation, and one which was not.

A focus on human justice is one of the most important factors linking environmental justice with the second major antecedent to civil rights movement; scholars attribute much of the environmental justice movement’s success with its “ability to tap into the discourse and rhetoric of the civil rights movement.”²¹ Although what exactly is meant by the civil rights movement is itself a topic of debate, environmental justice drew on the legacy of the primarily African American struggle against legalized segregation and discrimination in the south which rose to national prominence in the 1950s and 1960s, offering a profound racial critique of institutional power in the United State. Based on a “collective action frame,” promoting the values of “individual rights, equal opportunities, social justice, human dignity and self-determination,” the civil rights movement provided the framework for the articulation of environmental racism and injustice claims.²² Much like the environmental movement, pressure from the civil rights movement would also prompt legislative activity, resulting in the Civil Right Act of 1964, a statue which outlawed segregation and discrimination the public sphere, including in schools, employment, voting access, and federally funded agencies and programs. In the early 1980s, what would later become the environmental justice movement designated race, more so than

²⁰ Andrew Dobson, *Justice and the Environment: Conceptions of Environmental Sustainability and Theories of Distributive Justice* (Oxford: Oxford UP, 1998), 24.

²¹Robert Benford, “The Half-Life of the EJ Frame,” in *Power, Justice and The Environment: A Critical Appraisal of the Environment Justice Movement*, ed. David Naguib Pellow and Robert J. Brulle (Cambridge, MA: MIT Press, 2005), 44.

²² Julian Agyeman, Robert D. Bullard and Bob Evans, “Joined-up Thinking: Bringing Together Sustainability, Environmental Justice and Equity,” in *Just Sustainabilities*, 7.

class or any other factor, as the root cause behind “special health and environmental vulnerabilities,”²³ which were exploited by government, industry and mainstream environmentalists. The term “environmental racism”, coined in 1982 by civil rights leader Reverend Benjamin F. Chavis, then Director of United Church of Christ’s Commission for Racial Justice, and future director of the National Association for the Advancement of Colored People (NAACP), became the rallying point for not only African-American, but Latino, Asian and Native American communities in the United States.

Although the radical, racial critique offered by the environmental racism frame was compelling, and energized the movement, it was severely limited by “the absence of prognoses or goals.”²⁴ As the limitations of this frame became apparent the more inclusive environmental justice frame was adopted, which broadened the scope of the environmental justice movement beyond race to a dizzying number of issues, including class and capitalist structural critiques. Although environmental justice deemphasized race, it became a more compelling movement and rather than a rejection of the legacy of the civil rights movement, its new “focus on justice represented a revival of the goals of the civil rights movement.”²⁵ This shift towards justice and rights is evident in the seventeen point document “Principles of Environmental Justice” produced by the October 1991 First National People of Color Environmental Leadership Summit, an event which drew more than 1,000 activists to Washington D.C. This change in environmental justice’s representation of its objectives ultimately strengthened the movement. In consequence, by the early 1990s, EJ was considered flagship issue for the NAACP and other prominent civil rights organizations.

²³ Robert D. Bullard, “Anatomy of Environmental Racism,” in *Toxic Struggles*, 26.

²⁴ Robert Benford, 41.

²⁵ *Ibid.*, 42.

Accompanying mainstream civil rights group's recognition, was the increasingly vocal and politicized support from academic circles. The 1990 formation of the Michigan Coalition, an impromptu group of activists and academics who pushed for governmental recognition of environmental justice concerns, and the *National Law Journal's* special issue published in 1992 chronicling differential and discriminatory environmental protection were a part of the chain of events leading to the movement's breakthrough into the national political discourse. Although there remained a considerable degree of doubt regarding the evidence of disproportionate impact of toxins and pollutants on poor and minority communities, especially from industry and conservatives, the backing by academics substantiated environmental justice advocate's claims of racism and discrimination. Adding to the growing calls for action on the environmental justice front were the various attempts at environmental justice legislation, including the Environmental Justice Act of 1992, sponsored by future vice President, Al Gore, the Environmental Equity Act of 1992, a revision of the previously mentioned act, and the Environmental Equal Rights Act of 1993, which focused on hazardous waste facilities.

Amongst this climate of change environmental justice "found a niche"²⁶ within the U.S. EPA in the final years of the self-proclaimed "environmental president" George H.W. Bush term;²⁷ his efforts to address environmental justice included the formation of the EPA's Environmental Equity Group, later developing into the EPA Office for Environmental Equity (later changed to Environmental Justice) in 1992. However, these actions are best characterized as public relations events.²⁸ The primary factor driving these measures was civil rights groups'

²⁶ James P. Lester, David W. Allen and Kelly M. Hill, *Environmental Justice in the United States: Myth and Realities* (Boulder, CO: Westview Press, 2001), 40.

²⁷ As mentioned in Richard Conniff, "The Political History of Cap and Trade," *Smithsonian Magazine*, August 2009, <http://www.smithsonianmag.com/science-nature/Presence-of-Mind-Blue-Sky-Thinking.html> (last accessed July 22, 2010).

²⁸ Lester, Allen and Hill, 40.

increasingly vocal outcry on environmental justice concerns. As a controversial and revealingly-worded internal EPA memo leaked to the public indicates the U.S. EPA was primarily concerned with avoiding “an emotionally charged public controversy when activist groups finally succeed in persuading the more influential mainstream groups to take ill-advised actions.”²⁹ What exactly these “ill-advised actions” would have consisted of is unclear, but as the continuing presence of environmental justice in Clinton’s 1992 campaign suggests that Bush’s actions to diffuse and quiet environmental justice concerns was unsuccessful.

Although environmental justice cannot be considered one of Clinton’s primary platform issues, civil rights groups and the Congressional Black Caucus’ strong support on his 1992 campaign made Clinton “favorably disposed towards addressing their concerns about environmental justice.”³⁰ Upon the heels of Clinton’s victory in November 1992, a group of activists submitted the Environmental Justice Transition paper, indicating the growing and continuing pressure facing the incoming president to take action on this issue.³¹ Like under the Bush administration, concern with avoiding a potential civil rights crisis, and an ensuing public relations crisis, remained a leading consideration in the continuing recognition of environmental justice issues in the public discourse. However, the appointment of two of the nation’s most prominent environmental justice activists, Rev. Benjamin Chavis and Dr. Robert Bullard, to the Natural Resources Team, an advising body on environmental policy which was a part of Clinton’s transition team, displays that environmental justice was being taken seriously by the new administration.³² In contrast to the Bush administration’s actions, under Clinton there

²⁹Ibid, , 46.

³⁰ Michael B. Gerrard, *The Law of Environmental Justice: Theories and Procedures to Address Disproportionate Risk*. Ed. Michael B. Gerrard and Sheila R. Foster (Chicago, IL: American Bar Association, 2008), 101

³¹ Ibid., 101.

³²Renee Skelton and Vernice Miller, “The Environmental Justice Movement,” National Resource Defense Council website, <http://www.nrdc.org/ej/history/hej3.asp> (last accessed July 22, 2010).

appears to have been a more genuine interest in meaningfully addressing environmental justice concerns. Clinton Administration Senior policy analyst, Stephen Warnath, affirmed in May 1993 that “evidence exists that there is a need to address civil rights problems in cleaning up the environment”³³, revealing that the new administration viewed environmental justice not only as a public relations problem, but a social reality with strong scientific evidence to back its claims. Additionally, the more inclusive environmental justice framework made the movement less radical than its predecessor environmental racism, and ultimately more palatable, and accessible, for the Democratic Party and the white majority.³⁴ And although grass-roots environmental efforts continued to call for reform, it was the institutionalization of environmental justice through mainstream civil rights groups and academics which ultimately provoked presidential action.

The path towards Executive Order 12, 898 was in the works by late Spring of 1993: as early as May 18th, 1993, a draft of the Executive Order was already circulating amongst the Department of Justice, EPA and Clinton’s Domestic Policy Advisors.³⁵ In a July 6th, 1993 Memorandum circulated to Clinton’s Domestic Policy Advisors, Katie McGinty, head of the White House’s Council of Environmental Quality (CEQ), responds to NAACP President Rev. Benjamin Chavis’ request for a EJ Summit Meeting with the President stating that, “I strongly recommend that we schedule this meeting. This is an issue of increasing importance to the civil rights community.”³⁶ In addition to recommending the summit meeting with civil rights leaders,

³³ Steve Warnath to Bruce Reed, memorandum, May 26, 1993, William J. Clinton Presidential Library, Domestic Policy Council, Bruce Reed, Subject File, Box 108, Folder 16.

³⁴ Benford, 43.

³⁵ Mike Vondenbergh to Bruce Reed, Fax, May 18th, 1993, William J. Clinton Presidential Library, Domestic Policy Council, Bruce Reed, Subject File, Box 108, Folder 16.

³⁶ Katie McGinty to Thomas McLarty, Roy Neel, George Stephanopoulos, and David Gergen, memorandum, July 6th, 1993, William J. Clinton Presidential Library, Domestic Policy Council, Bruce Reed, Subject File, Box 108, Folder 16.

McGinty supported the issuance of the Executive Order as the next step in order to avoid “appearing indifferent or opposed to the important issue.”³⁷ In the public sphere, President Clinton continued to recognize environmental justice concerns; his June 14, 1993 remarks on the President’s Council on Sustainable Development, he referred explicitly to environmental justice stating that, “when we talk about environmental justice, we mean calling a halt to the poisoning and the pollution of our poorest communities, from our rural areas to our inner cities. We don't have a person to waste, and pollution clearly wastes human lives and natural resources.”³⁸

Nearly a year in the making, Executive Order 12,898 *Federal Actions to Address Environmental Justice in Minority Population and Low-Income Populations*, issued by President Clinton on February 11, 1994, was a remarkable and momentous occasion for the environmental justice movement. It remains, up to the present day, the most wide-reaching recognition of environmental injustices in the United States and implicitly acknowledges the federal government’s role in historically discriminatory environmental regulation practices. The order states that:

To the greatest extent practicable and permitted by law [...] each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies and activities on minority population and low-income population in the United States and its territories and possessions...³⁹

³⁷ Ibid.

³⁸ William J. Clinton, speech, *Remarks on the President's Council on Sustainable Development*, June 14, 1993, The American Presidency Project, University of California, Santa Barbara, <http://www.presidency.ucsb.edu/ws/index.php?pid=46685&st=environmental+justice&st1=> (last accessed July 23, 2010).

³⁹ President William J. Clinton, “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,” Executive Order 12,898, February 11th, 1994, sec. 1.101, http://www.epa.gov/compliance/resources/policies/ej/exec_order_12898.pdf (last accessed July 8th, 2010).

The order mandates the creation of an Interagency Working Group (IWG) on Environmental Justice, headed by the administrator of the EPA (the designated lead agency on environmental justice), and requires that within 12 months, all Federal agencies develop an environmental justice strategy. According to the *Environmental Law Reporter* there are three overarching environmental justice objectives direct the Order: (1) a new focus on human health and environment in minority and low-income communities, (2) non-discrimination in federal programs and (3) increased public participation in, and access to, environmental justice matters.⁴⁰ However, there is one important caveat to the Executive Order – it prohibits judicial review, meaning that the order “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.”⁴¹ Thus, as is oft-noted by critics, the Executive Order is severely limited because “it is meant only to improve the internal management of the executive branch; it is not an enforceable statute.”⁴² Although the Executive Order was a watershed moment for environmental justice, its inability to hold federal agencies legally accountable for inadequate action of environmental justice concerns drastically impeded its impact during the remaining years of the Clinton Administration.

Accompanying the Executive Order was a presidential memorandum addressed to the heads of all Federal departments and agencies, identifying Title VI of the Civil Rights Act of 1964, and NEPA as the primary legal statutes to be used by Federal agencies in the implementation of environmental justice. In the years following the Executive Order, it would

⁴⁰ Denis Binder et al, “A Survey of Federal Agency Response to President Clinton’s Executive Order No. 12 898 on Environmental Justice, *Environmental Law Reporter* 31, no. 10 (2001), 11134.

⁴¹ Executive Order 12,898, sec. 6.609.

⁴² James P. Lester, et al., “Environmental Justice: Getting on the Public Agenda” in *Environmental Justice in the United States: Myth and Realities* (Boulder, CO: Westview Press, 2001), 41.

be the former of these statutes, Title VI, that would become the primary legal channel used by EJ advocates to challenge the EPA on environmental justice concerns.⁴³

On Earth Day, 1994, two months after the Executive order, President Clinton remarked, “For too long, this kind of pollution has been associated and concentrated in poor communities, from central cities to small towns. And for too long, Government has been part of the problem, not part of the solution.”⁴⁴ And although his Executive Order was an preliminary step towards reversing the Government’s inadequate response to environmental injustices, in the years to come, especially in his second term, Clinton would remain notably quiet on this issue. Although the reasons for this silence are not entirely clear, most likely President Clinton was distracted by the growing political opposition he faced from Congress, or perhaps considered that his work was done, leaving environmental justice concerns to the Federal agencies. Thus, in the months and years following the Executive Order, the US EPA, finding itself designated as the lead agency in charge of addressing environmental justice on the federal level would head the effort.

Immediately following the Executive Order, the US EPA responded to the newly mandated environmental justice requirements. On April 11th, 1994 the EPA convened the National Environmental Justice Advisory Council (NEJAC), an advisory body on environmental justice matters made up of 23 members from state, local and Tribal government, industry, NGOs and environmental justice activists. Though a series of public meetings held throughout 1994-95, and in its very composition, the NEJAC sought involve a variety of stakeholders in the formation of the EPA’s initial *Environmental Justice Strategy*. Published in 1995 with the input

⁴³ President William J. Clinton to Heads of All Departments and Agencies, memorandum, February 11, 1994, William J. Clinton Library, Domestic Policy Council, Carol Rasco, Subject File, Box 12, Folder 7.

⁴⁴ William J. Clinton, speech, *Remarks on the Observance of Earth Day*, April 21, 1994, The American Presidency Project, University of California, Santa Barbara, <http://www.presidency.ucsb.edu/ws/index.php?pid=50012&st=Earth+Day&st1=> (last accessed July 23, 2010).

of the NEJAC, the document was the agency's first substantial measure taken to "ensure the integration of environmental justice into the Agency's programs, policies, and activities consistent with the Executive Order."⁴⁵ The strategy outlines five primary environmental justice objectives: (1) Public Participation, Accountability, Partnerships, Outreach and Communication with Stakeholders; (2) Health and Environmental Research; (3) Data Collection, Analysis and Stakeholder Access to Public Information; (4) American Indian and Indigenous Environmental Protection; and (5) Enforcement, Compliance Assurance, and Regulatory Reviews. The final section of the document, as per the suggestion of the NEJAC, details proposed model programs for each of the ten regional EPA offices.

In terms of general themes in the document, the interest in facilitating and improving public participation in EPA decisions is one of the most significant. Increased input and involvement of affected minority and low-income populations goes only beyond the traditional model of the public meetings, seeking to incorporate stakeholders in a more meaningful capacity. For example, the strategy aims to increase minority participation through educational outreach and training, proposing alliances with Historically Black Colleges, Hispanic Serving Institutions and Tribal Colleges. Ensuring that all environmental justice information is available and accessible to all stakeholders, through the translation of texts into non-English and non-scientific language, is another important component of stakeholder involvement. Improved data collection and analysis of pollution and health effects in poor and minority communities, was another substantial component of the *Strategy*. When engaged in environmental justice struggles many communities are faced by gaps in, if not the total absence of, scientific data to substantiate claims that certain pollutants are detrimentally and disproportionately affected people of color.

⁴⁵ U.S. Environmental Protection Agency, *The Environmental Protection Agency's Environmental Justice Strategy* (April 3rd, 1995), PAGE.

Thus, the report's avowal to "work to fill data gaps including those related to pollution prevention in affected communities,"⁴⁶ recognizes that research and analysis of data are inherently political.

Perhaps the most significant section of the document for the purposes of this project however, is its strategy for enforcement, compliance and regulation of environmental justice. The proposed creation of annual environmental justice report outlining the actions taken by the EPA to address the needs of minority and low-income communities facing disproportionate health and environmental risks is one component of this, serving as evaluation tool for EPA . Plans for implementation are unsurprisingly vague, assuring to incorporate environmental justice issues into all aspects of the EPA's regulatory structure. It becomes apparent that adequately addressing environmental justice concerns was completely uncharted territory for the agency. As the *Strategy* states, "EPA will actively encourage the use of *creative* approaches to settlement of enforcement actions;"⁴⁷ realizing environmental justice objectives would require a degree of flexibility and creativity within the existing regulatory structure. Although the US EPA was considered one of the most responsive Federal agencies to EO 12,898, this statement is reminder of the very concrete fact that all reform had to occur within the limits of existing statutes and processes.

The 1995 *Strategy* proposes a more inclusive model of environmental protection, by incorporating the interests and needs of traditionally marginalized communities. In many ways, this shift parallels the ideals of the environmental justice movement; as the seventh of the "Principles of Environmental Justice" states: "Environmental Justice demands the right to participate as equal partners at every level of decision-making, including needs assessment,

⁴⁶ Ibid, 10.

⁴⁷ Emphasis added. Ibid, 14.

planning, implementation, enforcement and evaluation.”⁴⁸ The environmental justice movement sought to change the very terms of the environmental protection discourse, and this document demonstrates the shift towards more inclusive and justice oriented language. In the Clinton History Project’s version of the US EPA history during the Clinton Administration, prepared in 2000, there is a similarly significant use of the terms and language of environmental justice to frame the development of the Agency from 1993 to 2001. Environmental justice is only explicitly referred to in a brief section outlining the agency’s efforts to engage all stakeholders.⁴⁹ However, scattered throughout the document are phrases such as “protecting the places Americans live, work and play,”⁵⁰ a phrase taken directly from the environmental justice rhetoric. Although the evolution of the official language of environmental regulation signifies the acknowledgement and incorporation of environmental justice concerns on a new level, it is a shift which must be contextualized within greater structural shifts occurring in the EPA.

Until the 1970s, “public participation is best understood as a challenge to the traditional management of government policy by experts in administrative agencies.”⁵¹ The period of legislative activity from the mid 60s to early 70s, the same period in which the EPA was formed, represents a move towards a pluralistic model of public participation, which opened the decision-making process up to the public. The thriving notion of pluralism was “enshrined in environmental laws.”⁵² Despite this, the EPA’s approach to regulation from the period of its

⁴⁸ First National People of Color Environmental Leadership Summit, *Principles of Environmental Justice*, October 24-27, 1991, <http://www.ejnet.org/ej/principles.html> (last accessed July 8th, 2010)

⁴⁹ Clinton Administration History Project, introduction to *A History of the U.S. Environmental Protection Agency During the Clinton Administration, 1993-2001*, William Clinton Presidential Library, Clinton Administration History Project, Environmental Protection Agency, Box 24, Folder 24, 12-13.

⁵⁰ *Ibid*, 10.

⁵¹ Thomas C. Beierle and Jerry Cayford, *Democracy in Practice: Public Participation in Environmental Decisions* (Washington, D.C.: Resources for the Future, 2002), 2.

⁵² *Ibid*, 4.

inception until Clinton can more accurately be described as “command and control strategies,”⁵³ a description which is echoed in protests raised by environmental justice advocates throughout the 80s and early 90s. The environmental justice movement is one of the forces pushed in the early 90s for an even more participatory model –popular democracy – which “emphasizes interaction among often adversarial interest, but that interaction is viewed less as a competitive negotiation than as a way to identify the common good and subsequently act of shared communal goals.”⁵⁴

The formation of the NEJAC, the EPA’s 1995 strategy, and the strategies simultaneously released by other Federal agencies arose in the context of a “change in expectations” in which “Federal departments and agencies have introduced much more complex forms of public participation than the traditional approaches of public comment and public hearings.”⁵⁵ The EPA’s Common Sense Initiative was the “agency’s ‘flagship program’ to overcome these limitations attributed to traditional environmental regulation.”⁵⁶ The 1995 *Strategy* similarly heralded Clinton’s new age of environmental protection. Thus, although the 1995 *Strategy* is the first document which explicitly organizes a plan of action to address environmental justice concerns, it arose at a moment in which the general direction of the agency was already shifting towards a popular democratic model. Environmental justice entered the public policy stream at a moment in which the environmental protection model was already in flux.

⁵³ Cary Coglianese and Laurie K. Allen, “Building Sector-Based Consensus: A review of the US EPA’s Common Sense Initiative,” in *Industrial Transformation: Environmental Policy Innovation in the United States and Europe* (Cambridge, MA: MIT Press, 2005), 66.

⁵⁴ Beierle and Cayford, 4.

⁵⁵ Beierle and Cayford, 5.

⁵⁶ Coaglianese and Allen, 67.

The Clinton Administration History Project paints its own, albeit, more colorful version of the agency's transition in the 1990s. From the “embarrassing shadow”⁵⁷ of the agency's Regan and Bush years, the Clinton years represent a new golden age for the US EPA, “protecting public health”, “promulgating rigid national standards”, “empowering stakeholder”, and restoring public confidence and trust” all the while fostering “unparalleled and low unemployment” in America's economy.”⁵⁸ One of the major themes framing the Clinton History Project document is the agency's renewed focus on protection of public health as the central principle of the EPA's mission as an agency. Although this document can by no means be considered an critical examination of the US EPA, it is indicative of the more inclusive language official being used to describe environmental protection, which is remarkably compatible with the environmental justice discourse. Thus, the question remains: to what extent was the environmental justice plan an organic response to the Executive Order, and to what extent was did it conveniently match with the already changing public discourse surrounding environmental protection.

The 1995 strategy represents the proactive facet of the EPA's environmental justice strategy. Equally important, however, is the mechanisms available for communities to address possible past and current instances of discrimination. President Clinton's Memorandum to Executive Order 12898 highlighted Title VI as an opportunity for agencies to address environmental justice concerns through existing legal statute. The Title VI statute states that:

No 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

⁵⁷ Clinton Administration History Project, introduction to *A History of the U.S. Environmental Protection Agency During the Clinton Administration, 1993-2001*, William Clinton Presidential Library, Clinton Administration History Project, Environmental Protection Agency, Box 24, Folder 24, 1.

⁵⁸ *Ibid*, 1.

financial assistance.⁵⁹

During the Clinton years, of the legal recourses available, Title VI of the Civil Rights Act of 1964 was “the basis for most of these legal remedies [...] but has evolved to include other federal statutes, traditional environmental statutes, and potential new state laws.”⁶⁰

Legal action to remedy environmental justice violations through Title VI can be divided into three categories.⁶¹ The first is private legal actions raised by an individual or group suing to prevent the EPA from issuing a permit to a polluting facility. Usually these actions occur on a state level. Initially these actions aimed to prove disparate impact, or that minority and low-income communities will be disproportionately impacted by the facility. Although there were some successes, this method proved less fruitful in the Clinton Era than initially hoped. In addition to the powerful resistance to such cases from industry, and conservative federal judges, environmental justice advocates were dealt a serious blow in 2001 with *Alexander v. Sandoval* which ruled that any legal action taken by individuals or groups to prove Title VI violation must prove intent. In consequence, groups attempting to prevent the siting of a polluting facility had not only prove that it is discriminatory, but that the discrimination is intentional, which is infinitely more challenging, if not impossible.

The second and least utilized legal channel is a reinterpretation of existing environmental statutes, such as the Clean Air Act, or the Resource and Conservation and Recovery Act, in order to attend to environmental justice concerns, particularly through the US EPA’s Environmental Appeals Board. This approach, spearheaded by Gary Guzy of the US EPA’s General Counsel,

⁵⁹ *Civil Rights Act of 1964*, 42 U.S.C §2000d, <http://www.justice.gov/crt/cor/coord/titlevistat.php> (last accessed July 11, 2010).

⁶⁰ Holly D. Gordon and Keith I. Harley, “Environmental Justice and the Legal System,” in *Power, Justice and the Environment: A Critical Appraisal of the Environmental Justice Movement*, 167.

⁶¹ The following discussion of legal remedies to environmental injustice using Title VI draws heavily from Gordon and Harley, 154-160.

was issued in December of 2000 in the final months of Clinton's second term. With the transition into the Bush Presidency, this approach was made largely irrelevant considering the pro-industry stance characteristic of the new administration.

The third major legal recourse, which will prove the most noteworthy, is administrative complaints alleging violation of Title VI. It is by no means coincidental that this popular strategy has the lowest proof requisite, obligating the party claiming discrimination to prove only that a polluting facility would cause disparate impact. These types of complaints are filed with the US EPA's Office of Civil Rights, and like private legal actions are used to remedy alleged instances of discrimination arising from state and local agencies issuing of permits to polluting facilities. However, of the 147 complaints made from 1993 to 2004, the US EPA never formally found an instance of discrimination, and most likely it never will, but rather "will use this process from time to time to coerce federally funded entities into choosing to implement reforms."⁶² The use of Title VI during the Clinton Administration as a coercive device by the federal EPA, rather than an authentic means by which communities could have their complaints addressed is a revealing instance of the mismatch between environmental justice concerns and existing legal statutes.

Title VI applies to federally funded programs; thus "all programs and activities of a department or agency that receives EPA funds are subject to Title VI, including those programs and activities that are not EPA-funded."⁶³ Therefore, Title VI is used to adjudicate disputes on a state level, because the agencies in charge of granting permits generally receive grants from the federal EPA. A crucial factor contributing to the failure of this particular legal channel during

⁶² Gordon and Harley, 159.

⁶³U.S. Environmental Protection Agency, report, *Interim Guidance for Investigating Title VI Administrative Complaints Challenge Permits*, William J. Clinton Presidential Library, President's Advisory Board on Race Meetings, Box 70, Folder 4, 2.

the Clinton Administration was the “difficult relationship”⁶⁴ between the US EPA and state environmental protection agencies. This is in itself a topic of study, but in summary, the Federal agency is expected to issue national guidelines to be followed at the regional and state level, and to regulate the actions taken on state levels. In spite of the lack of well-defined federal guidelines, according to a 1994 American Bar Association report, more than thirty states had enacted statutes, policies or other types of actions that addressed environmental justice concerns.⁶⁵ Some states, had taken remarkable and highly progressive action on environmental justice, including Massachusetts, California and Michigan; however, other states, such as Kansas, New Mexico and Mississippi were considered “regressive.”⁶⁶

The failure of the EPA to resolve cases of alleged discrimination on the state level is intimately tied to its lackluster attempt to create firm national guidelines which define exactly what constitutes discrimination in the permitting process. Faced with the onslaught of Title VI complaints, the agency “had neither the resources nor the analytical framework to be the task of administrating and adjudicating these claims.”⁶⁷ By analyzing the 1998 document issued by the EPA which attempts to define constitutes discrimination and how to respond to Title VI allegations, *Interim Guidance for Investigating Title VI Administrative Complaints*, and the reactions from local and state government, community groups and industry, the EPA’s often frustrated process of formulating environmental justice policy becomes more transparent.

⁶⁴ Clinton Administration History Project, introduction to *A History of the U.S. Environmental Protection Agency During the Clinton Administration, 1993-2001*, William Clinton Presidential Library, Clinton Administration History Project, Environmental Protection Agency, Box 24, Folder 24, 14.

⁶⁵ *Environmental Justice for All: A Fifty-State Survey of Legislation, Policies and Initiative*, ed. Steven Bonorris, (Chicago, IL: American Bar Association, 2004).

⁶⁶ These categorizations are taken from Table 9.1 in *Environment Injustice in the United States*.

⁶⁷ *Environmental Justice: Law, Policy and Regulation*, 492.

The eleven-page *Interim Guidance* document aims “to update the Agency’s procedural and policy framework to accommodate the increasing number of Title VI complaints.”⁶⁸ Outlining an eight-step framework, *Interim Guidance* begins with acceptance of the complaint, to the determination of whether a facilities polluting potential would create a disparate impact, and to the final step, the issuance of an “informal” resolution. The documents identifies the responsibilities of the complaint (the community effected by the proposed polluting facility), the recipient (the local permitting authority in question) and the EPA’s Office of Civil Rights (OCR). Determining whether or not the complaint of disparate impact is substantiated is the responsibility of the OCR, which will “conduct a factual investigation”⁶⁹ based on a five-step framework which identifies the demographics of affected population, and assesses to what extent the potential impact could be considered as discriminatory. Perhaps the most notable characteristic of the guideline is its lack of firm definitions -- disparate impact is determined “on a case-by-case basis.”⁷⁰ As analysts Gordon and Harley affirm, “the most important factors are unapologetically portrayed [...] as highly subjective,” and furthermore, “the documents are ‘interim’ [...] meaning not binding or even reliable.”⁷¹

The documents gathered for the White House Council on Environmental Quality’s (CEQ) July 1998 Environmental Justice meeting in Los Angeles illustrate the complex conflict of interests facing the revision of *Interim Guidance*. A scathing critique issued by the California Council for Environmental and Economic Balance (CCEEB) speaks to the voice of industry facing the EPA’s formulation of environmental justice policy. A coalition of business and labor leader, the CCEEB finds that the *Interim Guidance*:

⁶⁸ *Interim Guidance*, 1.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ Gordon and Harley, 159.

as presently drafted, drastically fails to achieve what it sets out to do [...] it fails to identify – with basic clarity, fundamental fairness, and compliance with the letter and spirit of Title VI and EPA’s regulations – the legal standards by which such cases would be resolved [...] promote[ing] confusion, delay, economic loss, and litigation, and it will exacerbate division in our society rather than solve real problems.⁷²

In another response submitted to the U.S. EPA’s Office of Civil Rights, the Western States Petroleum Association expresses its alarm at the “apparently low ‘hurdle’ [required] for initiating EJ complaints.”⁷³ These strongly worded responses indicates the sort of pressure faced by the US EPA from business and industry in attempting to mediate Title VI complaints. Although Executive Order 12,898 explicitly acknowledges discriminatory patterns in the environmental regulation model, this was by no means accepted by all parties. Faced with potential loss of profits and increasingly difficult permitting requirements, the opposition on industry was entirely unsurprising.

The EPA also faced fierce criticism from local and state governments concerning *Interim Guidance*. The City of Los Angeles complained that the “implementation of the guidance, as currently written, would be difficult, cumbersome and may create unintended liabilities,”⁷⁴ while the state’s environmental council resolution alleged that “this guidance would have the effect of working against efforts to achieve environmental protection and promote sustainable economic development.”⁷⁵ On the other hand, environmental justice activists and leaders of NGOs , such as

⁷² Comments of the California Council for Environmental and Economic Balance to U.S. EPA, letter on U.S. Environmental Protection Agency’s Interim Guidance For Investigating Title VI Administrative Complaints Challenging Permits, May 1st, 1998, William J. Clinton Presidential Library, President’s Advisory Board on Race, Meetings, Box 70, Folder 3.

⁷³ Western Petroleum Association to U.S. EPA, letter on Title VI Guidance, May 5th, 1998, William J. Clinton Presidential Library, President’s Advisory Board on Race Meetings, Box 70, Folder 3.

⁷⁴ City of Los Angeles to U.S EPA Office of Civil Rights, letter, May 5, 1998,” found in William J. Clinton Presidential Library, President’s Advisory Board on Race Meetings, Box 70, Folder 3.

⁷⁵ Environmental Council of the States ,resolution, as cited in John H. Cushman, “Pollution Policy is Unfair Burden, States Tell E.P.A.,” *New York Times*, update May 10, 1998, <http://www.nytimes.com/1998/05/10/us/pollution-policy-is-unfair-burden-states-tell-epa.html> (last accessed July 11th, 2010); incidentally, and perhaps in response to the state’s negative feedback concerning Interim Guidance, in the EPA’s *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits*, published in 2000, the Federal agency suggests that that

Henry Clark, executive director of the West County Toxics Coalition complained that “it is time the government stops sitting on these [Title VI] cases. Luke W. Cole, general counsel for the Center on Race, Poverty and the Environment remarked, “the present guidance is deeply flawed in a number of respects,”⁷⁶ and more scathingly accuses the U.S. EPA’s “lack of political will,” to enforce Title VI.⁷⁷ *Interim Guidance* also received a surprising amount of, often highly unfavorable media coverage, including a *Chicago Tribune* editorial entitled “A bad mix of science and politics,”⁷⁸ and the *Detroit News*’ controversial front-page article “EPA plan risks Metro growth: A new push to classify inner-city pollution as a civil rights offense draws cries of dismay.”⁷⁹

The firestorm surrounding *Interim Guidance* eventually elicited Congressional action. In his second term, Clinton faced fierce congressional opposition, with the Republican-controlled House and Senate, and the U.S EPA fell victim to the ensuing bipartisan strife. Perhaps the Clinton History Project’s assessment of the state of affairs is not overstating the fact when it says “Simply put, the Republican leadership of the 104th Congress declared war on EPA.”⁸⁰ This showdown resulted in 30 percent budget cuts for the agency, and the shutdown of the federal government on two separate occasions due to stalemates over the US EPA’s budget. The Republican majority’s inclusion of a rider in the October 1998 congressional appropriations bills, which required the Agency to publish a revised Title VI guidance before accepting any new Title

the most productive use of Title VI would be as a front end consideration on the state level a strategy which “holds the most hope for communities.” (Cited from Veronica Eady, “Environmental Justice in State Policy Decisions,” in *Just Sustainabilites: Development in an Unequal World*, 179).

⁷⁶ As cited in “Pollution Policy is Unfair Burden”.

⁷⁷ Angela Rowen, “EPA MIA: Why won’t feds enforce environmental discrimination laws?,” *San Francisco Bay Guardian*, June 16, 1998, 12.

⁷⁸ *Chicago Tribune*, May 30, 1998, first section, 24.

⁷⁹ *The Detroit News*, April 19, 1998, Front Section.

⁸⁰ Clinton Administration History Project, introduction to *A History of the U.S. Environmental Protection Agency During the Clinton Administration, 1993-2001*, William Clinton Presidential Library, Clinton Administration History Project, Environmental Protection Agency, Box 24, Folder 24, 21.

VI complaints, explains the massive backlog of Title VI which built up in Clinton's final years in office. It is also indicative of the tenuous, conflict-ridden relationship between Congress and the EPA, in this time period, which limited the agency's ability to take action on environmental justice issues.

In 2003, the U.S. Commission on Civil Rights concluded that "the effect of the appropriations rider and the delay in issuing final Title VI guidance served to relax environmental enforcement against industry and state authorities who had allegedly violated Title VI."⁸¹ The controversy which erupted over this document goes to the heart of one of the many issues underlying US EPA's formulation of EJ policy. In light of Congress' 1998 Title VI rider, it became very apparent that as with any policy issue, the ability of the EPA to promote and enforcement environmental justice relies upon a favorable congressional climate.

Another crucial factor contributing to the uproar surrounding *Interim Guidance* was the continuing debate of the scientific evidence supporting environmental racism and injustice. Data collection and analysis, was a pivotal component of the 1995 *Strategy* not only in order to provide evidence to support or disprove particular communities claims of environmental discrimination, but also to validate the federal government's own acceptance of the environmental racism discourse, which remained heavily disputed by industry and conservative political factions. Many of the concerns raised by industry are valid and compelling criticisms of environmental justice. The WSPA's fear of the unsubstantiated Title VI claims obstructing the permitting of facilities for months or even years, touches on the often ambiguous distinction between real and perceived threats to human health. As Doris Bradshaw's struggle to prove that high cancer rates in her Memphis, Tennessee, community are the result of contamination from

⁸¹ U.S Civil Rights Commission, *Not in My Backyard: Executive Order 12 898 and Title VI as Tools for Achieving Environmental Justice* (October, 2003), 36, www.usccr.gov/pubs/envjust/main.htm.

the neighboring Department of Defense Depot demonstrates, there is a mismatch between the type of knowledge provided by Bradshaw as a community activist – anecdotal and experiential—and the type of knowledge required for EPA action – scientific.⁸² As the introduction to *Environmental Injustice in the United States* proposes: “public policies should be designed on the basis of a competent and informed understanding between race, income, politics and exposure to toxic risks rather than solely in the basis of pressure politics from activists groups.”⁸³ The EPA has a responsibility to respond to concerns of communities especially in light of its stated commitment in the 1995 *Strategy* to public participation and communication with affected communities.⁸⁴ Regardless of structural impediments to EPA action on EJ concerns, the agency was crippled from taking meaningful action in the absence of accurate and reliable scientific data substantiating claims of disproportionate impact and discrimination.

The harsh criticism facing the EPA from competing interest groups is reminiscent of Lazarus’ prognosis of the EPA nearly ten years early – besieged and immobilized by criticism. Even the 2000 *Revised Draft Guidance for Title VI Complaints* proved to as ineffective as its predecessor, *Interim Guidance*. The Clinton History Project admits in its discussion of the Interim Guidance debacle, “in a demonstration of how intractable some cutting-edge health problems could be, despite the fact that the Agency had spent hundreds of hours in public meetings, no agreement among interested parties was reached.”⁸⁵

⁸² For a more detailed analysis of this case please see Andrea Simpson, “Who Hears Their Cry?: African American Women and the Fight for Environmental Justice in Memphis, Tennessee,” in *The Environmental Justice Reader: Politics, Poetics, & Pedagogy* ed. Joni Adamson, Mei Mei Evans, and Rachel Stein (Tucson, AZ: University of Arizona Press, 2002).

⁸³ James P. Lester et al, 3.

⁸⁴ *1995 Environmental Justice Strategy*, 6.

⁸⁵ Introduction to “A History of the U.S. Environmental Protection Agency During the Clinton Administration, 1993-2001,” found in the Clinton Presidential Library, Clinton Administration History Project, Environmental Protection Agency, Box 24, Folder 24, pg. 12.

EPA EJ policy is reactionary – to Executive Order 12898, to activists, academics, local and state governments and corporate interests. Beyond the simple fact that the agency will never be able to satisfy all stakeholders, the controversy over Title VI complaints indicates that the legal channels available to address complicated and highly subjective cases prove cumbersome and unproductive. It begs the following question: is effective environmental justice policy even a possibility within the current legal constraints? As sociologist Robert Benford eloquently states, the movement “places its faith in the efficacy of using extant legislative and judicial systems to remedy problems – an ironic commitment to, and reaffirmation of, the systemic status quo.”⁸⁶

Another factor contributing to the heated debate surrounding *Interim Guidance* is the perception of environmental justice as opposed to economic development. Although the Clinton Administration History Project contend that the myth claiming “that protecting public health must come at the expense of economic growth was finally put to rest,” it is clear that critics on all sides generally doubt this assertion. Corporate and industrial groups view environmental justice as an assault on free-market economic principles, causing loss of profit and stunted development. However, activists and communities see permitting decisions through the lens of human justice, and the costs at risk of lives and well-being of human beings. Environmental justice implicates a profound and radical critique of the neo-liberal and globalized economic model which boomed under the Clinton Administration, promoting a model of

economic ‘prosperity’ [...] predicated upon the increased *privatized-maximization* of profits via the increased *socialized minimization* of the cost of production, ie the increased displacement of potential business expense onto the American

⁸⁶ Benford, 51.

public in the form of pollution, intensified natural resource exploitation and other environmental problems.⁸⁷

Although advocates are seeking to remedy situations on a local level, the root causes behind community struggles are intimately joined to national and global economic forces. Thus, understanding the unresolved crisis provoked by *Interim Guidance* in 1998, and the general trajectory of EPA EJ policy, must be placed in the context of the Clinton's greater neo-liberal economic policies. Scholars Pellow and Brulle understate the dilemma when they lament that "problematic are the participatory schemes that a neoliberal US EPA hatched during the 1990s to address EJ demands,"⁸⁸ the more grave interpretation is that a meaningful and lasting solution to the environmental justice issues is impossible under the current economic model. All attempts are simply temporary and superficial stopgap measures.

However, this project also aims to understand what has been done, and to what extent the actions realized by the EPA during the Clinton Administration were successful within the bounds of the system. There are two major challenges in realizing this analysis: (1) the historical proximity of the time period in question and (2) the lack of critical evaluations of EPA environmental justice (the EPA's own Annual EJ Reports rarely go beyond outlining current projects and restating general strategies.) Therefore, this by no mean pretends to be a definitive or exhaustive analysis, but rather aims to outline some general patterns.

The areas in which the EPA had the most perceived success during the Clinton years can be considered "non-controversial activities,"⁸⁹ such as translation of documents and grant programs. Founded in 1994 by the Office of Environmental Justice, the Environmental Justice

⁸⁷ Daniel R. Faber and Deborah McCarthy, "Neo-liberalism, Globalization and the Struggle for Ecological Democracy: Linking Sustainability and Environmental Justice," in *Just Sustainabilities: Development in an Unequal World*, ed. Julian Agyeman, Robert D. Bullard and Bob Evans (Cambridge, MA: MIT Press, 2003), 38.

⁸⁸ David Naguib Pellow and Robert J. Brulle, introduction to *Power, justice, and the Environment: Toward Critical Environmental Justice Studies*, 10.

⁸⁹ Denis Binder et al, 11141.

Small Grants Program stated purpose is “to support and empower communities that are working on local solutions of local environmental and/or public health issues.”⁹⁰ In 1995, the peak year of the program the total funding reached \$3 million distributed into 170 grants. By 2000 the funding had dwindled in \$899,000 funding only 61 grants that year, only a third of the number distributed five years earlier. Two small grants also explicitly addressed environmental justice concerns, including the five Environmental Justice Assistance Grants (\$600,000 total) and nine State and Tribal Grants for Environmental Justice (\$700,000).⁹¹ However, funding for this final grant program and to the Community-University Partnership Grants Program, were both discontinued by 2001. Larger grant programs, such as the Brownfields Pilots Cooperative Agreements Grant program, which incorporate many environmental justice issues, represent a more substantial effort -- over the same FY 96 to FY 99, 286 grants were issued amounting to \$54 million dollars.⁹²

The Environmental Justice through Pollution Prevention Grant program provided 198 grants, for a \$15 million from 1995 to 1999, according the Environmental Law Review’s report. However, the 2000 assessment of the program, issued by an outside consultant firm concluded that the program had a very low degree of success.⁹³ In turn, Superfund, the EPA’s highly controversial program to clean up hazardous waste sites received an even more scathing review of its environmental justice efforts: “U.S. EPA has consistently failed to implement that

⁹⁰ U.S. Environmental Protection Agency, Office of Environmental Justice Small Grants Program, fact sheet (March, 2010), http://www.epa.gov/compliance/environmentaljustice/grants/ej_smgrants.html (last accessed July 11th, 2010).

⁹¹ U.S. General Accounting Office, House Committee on Transportation and Infrastructure, “Appendix I: Number and Value of Project Grants, Fiscal Years 1998-99,” in *Report to the Chairman, Committee on Transportation and Infrastructure* (March 2001), 16, <http://www.gao.gov/new.items/d01359.pdf>.

⁹² U.S General Accounting Office, 16.

⁹³ Information on the *Environmental Justice through Pollution Prevention* grants program taken from Binder et al, “Survey of Federal Agency Response,” 11142.

executive order,” and furthermore, that poor and minority communities were even less likely to be placed on the Superfund listing.⁹⁴

Other non-controversial activities include the translation of documents into non-English languages, with the objective of increasing people of color’s public participation and stakeholder access to the environmental regulatory process. On the regional level, the US EPA realized other efforts, many following the model projects published in the 1995 *Strategy*, such as Baltimore’s Youth Warriors program, an apprenticeship program for minority youth to develop leadership skills and enhance urban environmental education.⁹⁵ However, the *Environmental Law Review*’s “Survey of Federal Agency Response to Executive Order No. 12898,” concludes that while these non-controversial efforts may have been valuable, the “Agency has been less likely to take stands that industry or state officials might oppose [...] spend[ing] more on brownfield redevelopment than on EJ projects, or on reform the permitting process and the establishment of more protective standards.”⁹⁶ This criticism is unsurprising considering both the structural impediments to environmental justice policy, in addition to the fact that formulating environmental justice programs was quite simply very new to the U.S. EPA.

Although “Survey of Federal Agency Response to Executive Order No. 12898” is somewhat critical, it offers a generally positive report on the U.S. EPA progress on environmental justice concerns especially in comparison to other Federal agencies. The US EPA is ranked as one of four agencies that have “consistently performed at a higher level.”⁹⁷ A 2001 evaluation is even more complimentary, characterizing the EPA’s commitment to environmental

⁹⁴ “Superfund: Evaluating the impact of Executive Order 12 898,” in *Environmental Health Perspectives* 115, no. 7 (July 2007), 1092.

⁹⁵ US EPA Office of Environmental Justice, *Environmental Justice: 1996 Annual Report Working Towards Solutions* (August, 1997), 17.

⁹⁶ Denis Binder et al, 11141.

⁹⁷ *Ibid*, 11149.

justice as “vigorous.”⁹⁸ However, both of the evaluations use the Executive Order as the standard for action; although 12,898 was undoubtedly the catalyst for environmental justice policy formulation, it should not be held as the ultimate gauge of the agency’s success.

Highlighted in both of the already mentioned evaluations is that the commitment at the highest levels of an agency is crucial to ‘carry through’ on environmental justice issues. Carol Browner, E.P.A. Administrator under Clinton, received high marks in this regard. High-level agency commitment is also essential to understand what was perhaps the least controllable factor involving the trajectory of EPA’s EJ policy: the 2000 election. The response to the transition to the Bush president is remarkable – the tone in the discussion of EJ policy undergoes an astonishing transformation, from critically hopeful to despondently pessimistic. This shift in the discourse reflects a dramatic reversal in the EPA’s commitment to environmental justice. In 2001, George W. Bush’s newly appointed US EPA Administrator Christine Todd Whitman “redefined its interpretation of environmental justice to mean environmental protection for everyone, and de-emphasized the need to focus special attention on minority and low income populations.”⁹⁹ The Bush Administration’s new direction was made clear in the EPA’s revised Environmental Justice strategy released in 2005, which eliminated race and income as special considerations, essentially nullifying the fundamental purpose of the environmental justice program as conceived by Executive Order 12,898.¹⁰⁰

The U.S. Civil Rights Commission Report is remarkably candid on the direction of environmental regulation under the Bush Administration (especially considering that it was published in October of 2003). It characterizes the administration’s EPA strategy as “pro-

⁹⁸ Lester, Allen and Hill, *Environmental Justice in the United States*, 47.

⁹⁹ *Environmental Justice: Law, Policy and Regulation*, 332.

¹⁰⁰ Liza Featherstone, “EPA says race, income shouldn’t be environmental-justice factors,” *Grist Magazine*, August 1, 2005, online, <http://www.grist.org/article/featherstone-ej/> (last accessed July 22, 2010).

industry and anti-regulation,” and suggest that the Administration-supported Clear Skies Act would lower air pollution standards.¹⁰¹ Much like the fierce congressional opposition that the EPA faced in Clinton’s second term over environmental injustice complaints using Title VI, the election of Bush illustrated that although environmental justice leaders view equal environmental protections as a basic right, it remains highly subject to the whims of the political process.

In its assessment on the U.S. EPA’s response to Executive Order 12,898, the Commission identifies two major flaws: (1) lack of adequate accountability and performance outcomes for EJ projects and (2) failure to incorporate environmental justice into the U.S. EPA’s core mission.¹⁰² The first criticism is indicative of types of resolvable problems which hindered the EPA environmental justice policy during the Clinton years: developing effective policy requires time and previous experience, neither of which the Clinton era EPA enjoyed. Although it seems unlikely that controversial programs such as Superfund could ever be administered the satisfaction of all involved stakeholders, continuing and critical consideration of environmental justice concerns could help improve regulatory system to more equally protect human health and environmental resources. Furthermore, in the ambiguous and ill-defined relationship of the U.S. EPA with state and local environmental regulatory authorities, as seen the *Interim Guidance* controversy, lies perhaps the greatest hope for the formation of effective environmental justice policy. Even without well-defined guidance from the U.S. EPA, the majority of states took some level of action during the Clinton Administration – progress on the state and local level was, and remains, the most feasible area of improvement. The areas of possible improvement of EPA environmental justice policy fall within the domain of distributive justice meaning that polluting facilities and other sources of environmental hazards which have historically impacted the health

¹⁰¹ U.S Civil Rights Commission, *Not in My Backyard: Executive Order 12 898 and Title VI as Tools for Achieving Environmental Justice* (October, 2003), 37, www.usccr.gov/pubs/envjust/main.htm.

¹⁰² *Ibid*, 7-8.

of poor and minority communities in a discriminatory manner can be more fairly allocated throughout society. Although it is doubtful that the EPA could ever achieve a perfectly equitable system, building upon the often efforts made under the Clinton Administration could yield make environmental protection less discriminatory to a certain degree.

However, the second criticism offered by the Commission of Civil Rights is the more problematic and revealing observation on the EPA's environmental justice predicament during the Clinton years. As the congressional outcry over *Interim Guidance* and the incoming Bush Administration's apathetic, if not hostile, stance towards environmental justice indicate, the reigning political climate had a powerfully restrictive effect on the ability of the federal agency's ability to meaningfully incorporate EJ concerns into its regulatory mission. Beyond political factors, there were institutional barriers which prevented the incorporation of environmental justice policy into its core mission. Incompatible and cumbersome environmental statutes produced inadequate legal channels for the adjudication of environmental justice disputes and the inherent conflict between the neo-liberal Clinton economic model and the social justice framework of the environmental justice movement, immobilized the U.S. EPA's ability to introduce preventative, rather than retroactive action.

Furthermore, a clash in theoretical framework of environmental justice with the realities of environmental regulation leaves the EPA with the impossible task of addressing the needs of all stakeholders who have totally distinct and contradictory conceptions of what the final goals of environmental regulation should be. Environmentalist David Schoenbrod's prognosis of the flaws in the U.S Commission for Civil Rights report goes to the heart of this quandary:

The commission underestimates the problem. It is that, absent intentional discrimination, environmental justice is a political question that cannot be answered on the basis of rights. Rights must be stated in terms of abstractions, and there is no abstraction to steer a middle ground between the heartfelt desire for

equality of outcome and the brass-tacks reality that environmental consequences cannot be made the same everywhere.¹⁰³

The report falls short in its analysis of the root causes behind the lackluster response by Federal Agencies to the Executive Order, and in many ways the US EPA suffered the same fate. As a component of the very structural power which environmental justice sought to overturn and reorder, the EPA was forced into an impossible situation, caught between the institutional forces which shape the agency, and the newly-awakened consciousness to the cries of environmental injustice from people of color and the poor.

Maria Palos' plea for help asked who, and how the government could protect her Wilmington, California, neighborhood from the environmental hazards threatening the health and well-being of their families. She was seeking justice for herself, her family and her community. But exactly what type of justice was she in search of? The US EPA during the Clinton years actively recognized the validity of her concerns, incorporating environmental justice into the mission of the agency on a discursive level, and strove, with limited success to achieve distributive justice through more equitable distribution of environmental hazards. But the EPA could not, and will not ever achieve source justice, or the elimination of the institutional structures which perpetuate environmental injustices against people of color and the poor in the absence of radical change, because achieving source justice would require the elimination and radical reconstruction of the agency itself.

¹⁰³ *Saving Our Environment from Washington: How Congress Grabs Power, Shirks responsibility and Shortchanges the People* (New Haven, CT: Yale UP, 2005), 151.