

Reactions to EPA's Interim Guidance: The Growing Battle for Control over Environmental Justice Decisionmaking

JUNE M. LYLE*

*In a total work, the failures have
their not unimportant place.*
— May Sarton

INTRODUCTION

In February of 1998, in response to a growing national call for environmental policies that protect all minority communities from disproportionate levels of pollution, the Environmental Protection Agency ("EPA" or "Agency") released its interim environmental justice guidance ("*Interim Guidance*").¹ The *Interim Guidance* establishes policies to ensure that federally funded state environmental permit programs do not violate Title VI's antidiscrimination requirement.² Almost immediately, the *Interim Guidance* incurred tremendous negative response from a surprising range of interests, including state environmental agencies, mayors of minority urban communities, and the grassroots environmental justice movement.

Such vituperative reaction from these various levels led the EPA to acknowledge that it had blundered by not sufficiently considering the interests of affected groups, or "stakeholders," in developing the *Interim Guidance*.³ To date, however, there is no indication that the EPA has attempted to analyze the origins and larger implications of this widespread disapproval. This Note attempts to develop such an analysis, specifically to suggest some lessons that the EPA should take away from its unfortunate experience in issuing the *Interim Guidance*. Part I provides a brief background of the environmental justice movement, including its origins and relevant recent developments. Part II discusses the EPA's historically conflicted relationship with the environmental justice movement as a backdrop for understanding the current policy conflicts. Part III offers an overview of the key provisions of the *Interim Guidance* issued in February 1998. Part IV analyzes the response to the *Interim Guidance* from stakeholders at the state, municipal, and grassroots levels and explores the reasons behind the negative reactions. Finally, the Conclusion suggests lessons that the EPA must learn from these reactions in order to better frame successful environmental justice policies in the future.

* J.D. Candidate, 2000, Indiana University School of Law—Bloomington; M.A., English, 1994, University of Illinois. I would like to thank Professor John Applegate for his thoughtful comments on this Note. I would also like to thank Bill Simmons for his steadfast support in law school and other endeavors.

1. U.S. Environmental Protection Agency, *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits* (visited Jan. 19, 2000) <<http://es.epa.gov/oeca/oej/titlevi.html>> [hereinafter *Interim Guidance*].

2. See 42 U.S.C. §§ 2000d to 2000d-7 (1994).

3. See *EPA Official Says Consultation Before Guidance Release Insufficient*, 22 Chem. Reg. Rep. (BNA) 779 (July 24, 1998).

I. BRIEF OVERVIEW OF THE
ENVIRONMENTAL JUSTICE MOVEMENT

A. Origins

The core principle of the environmental justice movement is that “[t]he nation’s environmental laws, regulations, and policies have not been applied fairly across all segments of the population,” with low-income and minority communities bearing a disproportionate pollution burden.⁴ Sociologist Robert Bullard, a leading expert on environmental justice issues, has identified five basic elements of the environmental justice framework: a right of all individuals to be protected from pollution, a preference for prevention strategies, a shift to polluters and dischargers of the burdens of proof, a definition of discrimination that includes disparate impacts and statistical evidence, and an emphasis on targeted action to redress unequal risk burdens.⁵ Environmental justice issues are also referred to by the terms “environmental racism” and “environmental injustice,” which reflect slightly different perspectives on essentially the same issues.⁶

Early signs of the environmental justice movement were evident in the 1960s, when individual minority and low-income communities fought the siting of landfills and dumps in their neighborhoods.⁷ However, most commentators point to opposition to the siting of a hazardous waste landfill in predominantly black Warren County, North Carolina in 1982, as the origin of the environmental justice movement as it exists today.⁸ The Warren County protest involved national civil rights organizations such as the National Association for the Advancement of Colored People (“NAACP”) and the United Church of Christ, as well as community members.⁹

The Warren County controversy sparked initial attempts to determine whether minority communities bear disproportionate pollution burdens. First, the General Accounting Office conducted a limited investigation that concentrated on the siting of hazardous waste landfills in the South, finding that three of the four largest landfills were located in predominantly black, low-income communities.¹⁰ The United Church of Christ followed with a nationwide study of hazardous waste sites in 1987, which concluded that race was the most significant factor in locating commercial

4. Robert D. Bullard, *Introduction to UNEQUAL PROTECTION: ENVIRONMENTAL JUSTICE AND COMMUNITIES OF COLOR* at xv, xv (Robert D. Bullard ed., 1994).

5. See Robert D. Bullard, *Environmental Justice for All*, in *UNEQUAL PROTECTION: ENVIRONMENTAL JUSTICE AND COMMUNITIES OF COLOR*, *supra* note 4, at 3, 10.

6. For a more detailed discussion of the implications of the varying terminology employed by environmental justice commentators, see Gerald Torres, *Environmental Justice: The Legal Meaning of a Social Movement*, 15 J.L. & COM. 597, 603-05 (1996).

7. See Bullard, *supra* note 5, at 3-5.

8. See, e.g., *id.* at 5.

9. See Evan J. Ringquist, *Environmental Justice: Normative Concerns and Empirical Evidence*, in *ENVIRONMENTAL POLICY IN THE 1990S: REFORM OR REACTION?* 231, 234-35 (Norman J. Vig & Michael E. Kraft eds., 3d ed. 1997).

10. See Gerald Torres, *Environmental Burdens and Democratic Justice*, 21 *FORDHAM URB. L.J.* 431, 434-45 (1994).

hazardous waste facilities.¹¹ In 1992, the *National Law Journal* published the results of a special investigation, which found that EPA enforcement of environmental laws showed race bias.¹² In reporting that the EPA responded more quickly to violations and sought stiffer penalties in nonminority areas than in minority areas, the study served to bolster the arguments made by grassroots environmental justice organizations and to bring the issue to the attention of policymakers and the legal community.¹³

An influential 1993 law review article on environmental justice concludes that current evidence tends to support the notion that poor communities are disproportionately affected by environmental burdens and suggests the "strong possibility" that minority communities also are disproportionately affected.¹⁴ However, while environmental justice studies have done much to draw attention to environmental justice concerns, they have been quite limited in number as well as in scope.¹⁵ The existing body of environmental justice research has tended to focus on the siting of hazardous waste facilities, and critics have challenged the findings of each of the studies mentioned above on various grounds.¹⁶ Indeed, numerous articles in recent years have critiqued claims of environmental injustice,¹⁷ contesting the limited empirical research available¹⁸ or suggesting that disproportionate environmental burdens are the result of legitimate market choices made by low-income people.¹⁹

B. Developments

Recent developments have served to make environmental justice one of the fastest growing environmental issues of the 1990s, culminating in the EPA's decision to issue its *Interim Guidance* in 1998. The academic treatment of environmental

11. *See id.* at 435.

12. *See* Marianne Lavelle & Marcia Coyle, *Unequal Protection: The Racial Divide in Environmental Law*, NAT'L L.J., Sept. 21, 1992, at S1.

13. *See id.* In the past year, several sources have reported that the EPA has conducted studies that refute some of the conclusions of the *National Law Journal* study. *See EPA Studies on Superfund Site Populations Fuel Industry Opposition to Title VI Guidance*, 29 Env't Rep. (BNA) 317 (June 5, 1998). The EPA has been criticized heavily for not disseminating the results of its research. *See* David Mastio, *EPA Keeps Key Documents Secret: They Contradict New Agency Policy on Environmental Justice*, DET. NEWS, July 17, 1998, at A1.

14. Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787, 796 (1993).

15. *See id.*

16. *See* CHRISTOPHER H. FOREMAN, JR., *THE PROMISE AND PERIL OF ENVIRONMENTAL JUSTICE* 18-27 (1998).

17. For a discussion and analysis of the major criticisms of environmental justice, see Torres, *supra* note 6, at 607-12.

18. *See* Roliff Purrington & Michael Wynne, *Environmental Racism: Is a Nascent Social Science Concept a Sound Basis for Legal Relief?*, HOUS. LAW. Mar.-Apr. 1998, at 34.

19. *See e.g.*, Vicki Been, *Analyzing Evidence of Environmental Justice*, 11 J. LAND USE & ENVTL. L. 1 (1995); Lynn E. Blais, *Environmental Racism Reconsidered*, 75 N.C. L. REV. 75 (1996); Robert R. Kuehn, *The Environmental Justice Implications of Quantitative Risk Assessment*, 1996 U. ILL. L. REV. 103.

inequities got its start in the field of sociology, particularly through the research of Robert Bullard, whose 1990 study *Dumping in Dixie: Race, Class, and Environmental Quality*²⁰ has been extremely influential in this field. The subject began to receive attention in the legal literature in the early 1990s, beginning with influential articles by Rachel Godsil and Richard Lazarus.²¹ The legal literature on the subject has grown exponentially in the past five years, with various legal commentators evaluating the evidence of environmental inequities and offering a number of legal approaches for addressing the problems of environmental injustice.²²

In a development that had its impact largely within the beltway, the environmental justice movement more formally defined its political agenda at the First National People of Color Environmental Leadership Summit in Washington, D.C.²³ During the 1991 conference, the 600 conferees voiced their commitment to a fight against environmental racism, and articulated seventeen "Principles of Environmental Justice."²⁴ Among the principles were demands for "public policy [to] be based on mutual respect and justice for all people" and for "the right to participate as equal partners at every level of [environmental] decision-making."²⁵ Among the conferees was Rev. Benjamin Chavis, Jr., who had been instrumental in the United Church of Christ's hazardous waste siting study,²⁶ and who would shortly be named to the Clinton-Gore Administration's transition team regarding environmental issues.²⁷ On the executive front, in 1994 President Clinton issued Executive Order 12,898, which requires each federal agency to "make achieving environmental justice part of its mission"²⁸ and to conduct all activities affecting human health or the environment in a manner that does not discriminate by race, color, or national origin in accordance with Title VI.²⁹ Clinton and Gore implemented the policy upon the recommendation of their transition team—in an attempt to increase the body of knowledge about environmental justice issues and to require federal agencies to incorporate environmental justice considerations into the decisionmaking process.³⁰ The EPA's reluctance to comply with this Executive Order and the problems that arose when the

20. ROBERT D. BULLARD, *DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY* (1990).

21. See Lazarus, *supra* note 14; Rachel D. Godsil, Note, *Remedying Environmental Racism*, 90 MICH. L. REV. 394 (1991).

22. See *The Law of Environmental Justice: A Research Pathfinder*, 25 *Envtl. L. Rep.* (Envtl. L. Inst.) 10543 (Oct. 1995). The article noted in 1995 that although the legal field had not yet adequately addressed environmental justice, "legal scholars and practitioners are increasingly interested in this issue." *Id.* at 10552.

23. See Karl Grossman, *The People of Color Environmental Summit*, in *UNEQUAL PROTECTION: ENVIRONMENTAL JUSTICE AND COMMUNITIES OF COLOR*, *supra* note 4, at 272.

24. *Id.* at 274.

25. *Id.*

26. See *id.* at 275-76.

27. See Deoohn Ferris, *A Call for Justice and Equal Environmental Protection*, in *UNEQUAL PROTECTION: ENVIRONMENTAL JUSTICE AND COMMUNITIES OF COLOR*, *supra* note 4, at 298, 299.

28. Exec. Order No. 12,898, 3 C.F.R. 859 (1994), *reprinted in* 42 U.S.C. § 4321 (1994).

29. See *id.*

30. See Torres, *supra* note 6, at 615-16.

agency finally attempted compliance by issuing its *Interim Guidance* are best understood in light of the EPA's historic attitude toward the environmental justice movement, discussed in Part II below.

The environmental justice case law has grown in recent years as well, with most federal cases being brought under either the Equal Protection Clause of the Fourteenth Amendment or Title VI.³¹ In a series of cases, federal courts have denied equal protection challenges to the siting of solid waste facilities and landfills in predominantly minority areas.³² This approach has consistently failed because the minority plaintiffs have been unable to prove intentional discrimination in the siting decision, as required by the Supreme Court's equal protection jurisprudence.³³ Some legal scholars and activists have seen promise in using Title VI to bring environmental justice claims.³⁴ Under Title VI, plaintiffs need not prove discriminatory intent if regulations pursuant to Title VI validly prohibit actions that result in disparate impact.³⁵ Despite the legal community's enthusiasm for Title VI as a theory for environmental justice claims, the case law remains limited.³⁶

The Supreme Court had agreed to hear one such case during its 1998-1999 Term, which challenged a permit to site a hazardous waste incinerator in the mostly black city of Chester, Pennsylvania.³⁷ The Third Circuit had held that a private right of action exists to enforce EPA's discriminatory effect regulations under Title VI.³⁸ Despite much anticipation on the part of environmental justice groups and industry, the Supreme Court dismissed the case and vacated the Third Circuit's decision after the permit for the incinerator was revoked.³⁹

Those with an interest in environmental justice issues have turned their attention to a predominantly black community in Louisiana's "cancer alley," where community members brought a Title VI challenge against a permit granted to Shintech, a

31. See Michele L. Knorr, Comment, *Environmental Injustice: Inequities Between Empirical Data and Federal, State, Legislative and Judicial Responses*, 6 U. BALT. J. ENVTL. L. 71, 90-98 (1997).

32. See *R.I.S.E., Inc. v. Kay*, 768 F. Supp. 1144 (E.D. Va. 1991), *aff'd* 977 F.2d 573 (4th Cir. 1992) (unpublished disposition); *East Bibb Twigg's Neighborhood Ass'n v. Macon-Bibb Co. Planning & Zoning Comm'n*, 706 F. Supp. 880 (M.D. Ga. 1989), *aff'd*, 896 F.2d 1264 (11th Cir. 1989); see also *Bean v. Southwestern Waste Management Corp.*, 482 F. Supp. 673 (S.D. Tex. 1979) (a § 1983 challenge).

33. See *Washington v. Davis*, 426 U.S. 229 (1976).

34. See Donna Gareis-Smith, Comment, *Environmental Racism: The Failure of Equal Protection To Provide Judicial Remedy and the Potential of Title VI of the 1964 Civil Rights Act*, 13 TEMP. ENVTL. L. & TECH. J. 57, 76-78 (1994).

35. See *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1406 (11th Cir. 1993).

36. See Steven A. Light & Kathryn R.L. Rand, *Is Title VI a Magic Bullet? Environmental Racism in the Context of Political-Economic Processes and Imperatives*, 2 MICH. J. RACE & L. 1, 27 (1996).

37. See *Supreme Court Agrees To Review Civil Rights Decision by Third Circuit*, 29 Env't Rep. (BNA) 372 (June 12, 1998).

38. See *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925 (3d Cir. 1997).

39. See *Supreme Court Dismisses Challenge, Vacates Third Circuit Civil Rights Decision*, 29 Env't Rep. (BNA) 849 (Aug. 21, 1998).

Japanese chemical manufacturer.⁴⁰ The case, which has generated considerable attention and controversy, is expected to serve as the test case for Title VI environmental justice claims.⁴¹ In September of 1998, Shintech announced its decision to move the plant to a predominantly white community nearby, citing the inconvenience of undergoing the EPA's investigation as the reason for its decision.⁴² However, the EPA has not decided whether it will continue its investigation of Louisiana's permitting processes statewide, and within the state's industrial corridor.⁴³

In what may be the first instance of a regulatory agency's refusal to grant a license because of environmental justice concerns arising under Executive Order 12,898, a Nuclear Regulatory Commission ("NRC") licensing panel in 1997 denied an energy company's request to build a uranium-enrichment plant between two predominantly black communities in northern Louisiana.⁴⁴ The NRC affirmed the panel's ruling the following year, and said that more investigation would be required before the proposed Claiborne Enrichment Center could be licensed.⁴⁵ The energy company withdrew its license application following the NRC's decision.⁴⁶ Environmental justice advocates described the Claiborne Enrichment Center decision as an important victory that would show other federal agencies how to take environmental justice concerns into account.⁴⁷ At that time, the EPA's troubled attempts to comply with Executive Order 12,898 had just begun.

40. See *First Citizen Petition Under Title VI Granted To Block Construction of Industrial Facility*, 28 Env't Rep. (BNA) 835 (Sept. 12, 1997).

41. See *Black Caucus, EPA To Meet on Shintech; Dispute May Be Test Case on Title VI Suits*, 22 Chem. Reg. Rep. (BNA) 780 (July 24, 1998). It should also be noted that several unsuccessful attempts have been made to pass environmental justice legislation. For a discussion of those bills, see Knorr, *supra* note 31, at 85-89.

42. See Mike Dunne, *Shintech Withdraws Plan: WBR Location Selected for Smaller Facility*, BATON ROUGE ADVOC., Sept. 18, 1998, at 1A.

43. See Vicki Ferstel, *Shintech Change Won't End Environmental Justice Test Case*, BATON ROUGE ADVOC., Sept. 18, 1998, at 11A.

44. See *In the Matter of Louisiana Energy Services, L.P.*, 45 N.R.C. 367 (1997); *Energy Company Denied License by NRC for Louisiana Uranium-Enrichment Plant*, 28 Env't Rep. (BNA) 48 (May 9, 1997).

45. See *Louisiana Energy Services, L.P.*, 47 N.R.C. 77 (1998); *Licensing of Uranium Enrichment Plant Needs More Study, Commission Decides*, 28 Env't Rep. (BNA) 2645 (Apr. 10, 1998).

46. See *Louisiana Energy Services, L.P.*, 47 N.R.C. at 113.

47. See *Energy Consortium Withdraws Application for Uranium-Enrichment Plant License*, 29 Env't Rep. (BNA) 23 (May 1, 1998).

II. EPA'S RESPONSE TO THE ENVIRONMENTAL JUSTICE MOVEMENT

From the time of its creation, EPA has indicated its unwillingness to incorporate issues of racial discrimination into its environmental protection agenda, and has been criticized by civil rights and environmental justice groups for this position.⁴⁸ EPA Administrator William Ruckelshaus told the U.S. Commission on Civil Rights in 1971 that strict enforcement of Title VI antidiscrimination law was not part of the Agency's environmental mandate.⁴⁹ Four years later, the Commission on Civil Rights criticized the EPA for its failure to enforce Title VI, particularly its failure to demand that municipal recipients of federal funds provide adequate sewer services in minority communities.⁵⁰ The Commission found that if the EPA did not take affirmative action to ensure adequate sewer services, it would be "responsible for perpetuating that discrimination."⁵¹ Former New Mexico Governor Toney Anaya made a similar criticism of the EPA's antidiscrimination efforts at the First National People of Color Leadership Summit, stating that the EPA could only begin to redress disproportionate minority environmental burdens by making fundamental changes in its attitude.⁵²

Despite these criticisms, the EPA continued to view issues of discrimination as outside its statutory purview into the early 1990s. In response to growing demands for environmental justice, the EPA established an Environmental Equity Workgroup ("Workgroup") in 1990, assigning it the task of reviewing evidence of disproportionate environmental burdens and recommending EPA action.⁵³ But in a 1992 article, then-Administrator William K. Reilly still emphasized the technical nature of the EPA's role in environmental decisionmaking⁵⁴ and described the preliminary findings of the Environmental Equity Workgroup as inconclusive.⁵⁵ In his article, Reilly argued that environmental protection benefits everyone and said the recent charges of environmental discrimination against the EPA served to "infuriate" him.⁵⁶

The Workgroup published its final report to the Administrator in June 1992, titled *Environmental Equity: Reducing Risk for All Communities*.⁵⁷ The report, which had been eagerly awaited by environmental justice advocates, concluded that "there is a general lack of data on environmental health effects by race and income," with the

48. See Lazarus, *supra* note 14, at 836-37.

49. See *id.* at 837.

50. See Torres, *supra* note 10, at 431-32.

51. Lazarus, *supra* note 14, at 838 (quoting 6 U.S. COMMISSION ON CIVIL RIGHTS, THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT—1974, at 595 (1975)).

52. See *Former Governor Calls for Rethinking at EPA To Combat Effects of "Environmental Racism"*, 22 Env't Rep. (BNA) 1655 (Nov. 1, 1991).

53. See ENVIRONMENTAL EQUITY WORKGROUP, U.S. ENVTL. PROTECTION AGENCY, ENVIRONMENTAL EQUITY: REDUCING RISK FOR ALL COMMUNITIES (1992).

54. See William K. Reilly, *Environmental Equity: EPA's Position*, EPA J., Mar.-Apr. 1992, at 18, 20.

55. See *id.* at 19.

56. *Id.* at 18.

57. ENVIRONMENTAL EQUITY WORKGROUP, *supra* note 53.

notable exception of lead poisoning.⁵⁸ In addition, the report recommended actions the EPA should take to address “environmental equity” issues, including development of more information on the issue, incorporation of considerations of environmental equity, and improvements in the Agency’s communication with minority and low-income communities.⁵⁹

Grassroots leaders found the report to be “a public relations ploy to diffuse the issue,”⁶⁰ and EPA’s attitude toward environmental justice issues in general to be wholly inadequate. Charles Lee of the United Church of Christ criticized the Agency’s continued use of the bureaucratic phrase “environmental equity” rather than “environmental justice” as an indication of EPA’s unwillingness to take grassroots concerns seriously.⁶¹ Richard Moore, then with the grassroots Southwest Network for Environmental and Economic Justice (“SNEEJ”), echoed his disappointment with the report: “There is no acknowledgment of the problem; there is no analysis of what is causing the problem and an inadequate analysis of how to address the problem.”⁶² Minority community leaders also argued that the Workgroup had failed to solicit their perspectives in preparing the report.⁶³

This grassroots frustration with the EPA had been fueled by the leak of a confidential EPA memo in early 1992, in which EPA Assistant Administrator Lewis Crampton urged the Agency to win recognition for environmental equity efforts “before the minority fairness issue reaches the ‘flashpoint’” and before grassroots leaders succeeded in garnering the support of mainstream groups such as civil rights organizations, churches, and unions.⁶⁴ Some environmental justice advocates saw the memo as the EPA’s attempt to co-opt the movement and drive a wedge between environmental justice groups and mainstream civil rights and environmental organizations, rather than substantively address environmental justice concerns.⁶⁵

By 1993, with Clinton in office and Benjamin Chavis of the United Church of Christ having served on the administration’s transition team, the EPA appeared ready to begin addressing environmental justice issues in a meaningful way. As a result of the *National Law Journal* study, the U.S. Commission on Civil Rights announced in April of 1993 that it had begun an investigation into whether the EPA discriminates against minorities in siting and enforcement decisions and that the EPA had responded with concern about environmental equity in meetings with the Commission.⁶⁶ In March of 1993, EPA Administrator Carol Browner made her first speech about environmental justice to a forum of civil rights and environmental

58. *Id.* at 3.

59. *See id.* at 4.

60. Robert D. Bullard, *Environmentalism with Justice*, in *CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS 195, 196-97* (Robert D. Bullard ed., 1993).

61. *See* Marianne Lavelle, *Residents Want “Justice,” the EPA Offers “Equity”*, *NAT’L L.J.*, Sept. 21, 1992, at 512.

62. *Id.*

63. *See id.*

64. *Id.*

65. *See* Bullard, *supra* note 60, at 195.

66. *See* Marianne Lavelle, *EPA Enforcement To Be Probed by Rights Commission*, *NAT’L L.J.*, Apr. 5, 1993, at 3, 34.

activists sponsored by the Lawyers' Committee on Civil Rights Under Law.⁶⁷ Browner indicated an important shift in the Agency's public stance regarding environmental justice issues when she stated: "It is clear to me that lower income and minority communities are disproportionately affected by environmental risks, and we have got to be mindful about that in every decision we make at the Environmental Protection Agency."⁶⁸ Despite this stated commitment to environmental justice, the EPA's first major environmental justice regulatory initiative, the *Interim Guidance*,⁶⁹ would not go into effect until almost five years later.⁷⁰

III. EPA'S TITLE VI INTERIM GUIDANCE

EPA's new interim procedure for investigating complaints that pollution control permits violate federal civil rights law⁷¹ was made public on February 10, 1998, five days after it had gone into effect.⁷² The new procedure applies only to permitting decisions made by state and local agencies that receive funding from the EPA.⁷³ The introduction to the *Interim Guidance* explains that the document "is intended to update the Agency's procedural and policy framework" to meet an increasing number of challenges to permitting decisions.⁷⁴ The *Interim Guidance* is specifically designed to bring the EPA into compliance with Executive Order 12,898 by establishing procedures to ensure that permits issued by EPA-funded agencies do not result in discriminatory effects based on race, color, or national origin.⁷⁵ The *Interim Guidance* applies to permit modifications and renewals, as well as new permits.⁷⁶

The *Interim Guidance* establishes an eight-step framework for processing a Title VI permitting complaint. The basic framework is as follows:

1. "Acceptance of the Complaint"—Upon receipt of a complaint, the EPA's Office of Civil Rights ("OCR") determines whether it states a valid claim.⁷⁷ A valid complaint is generally filed within 180 days of the alleged discriminatory act.⁷⁸

67. *See id.*

68. *Id.*

69. *Interim Guidance*, *supra* note 1.

70. *See Policy Set for Handling of Complaints on Local, State Environmental Permits*, 28 *Env't Rep.* (BNA) 2125 (Feb. 13, 1998).

71. *See Interim Guidance*, *supra* note 1.

72. *See Policy Set for Handling of Complaints on Local, State Environmental Permits*, *supra* note 70.

73. *See Interim Guidance*, *supra* note 1. The procedure applies as well to state or local programs that are not EPA-funded, so long as the state or local agency is itself an EPA funding recipient. *See id.*

74. *Id.* at 2. Past EPA Title VI challenges had primarily involved allegations of discrimination in employment or access to water and sewer systems. *See id.*

75. *See id.* at 2.

76. *See id.* at 7.

77. *Id.* at 4.

78. *See id.* This often will be the issuance of the final permit. *See id.* However, OCR may waive the time limit for good cause. *See id.* at 6-7.

2. "Investigation/Disparate Impact Assessment"—If a claim is accepted, OCR conducts a factual investigation. If OCR makes an initial finding of disparate impact, it will notify the recipient.⁷⁹
3. "Rebuttal/Mitigation"—Upon notice of initial finding of disparate impact, the recipient will have the opportunity to rebut the finding, propose a mitigation plan, or justify the disparate impact. If the EPA accepts the rebuttal or mitigation plan, no further action on the complaint is required.⁸⁰
4. "Justification"—The recipient may attempt to show that it has a "substantial, legitimate interest that justifies the decision to proceed with the permit notwithstanding the disparate impact."⁸¹ OCR must also consider whether an alternative exists that would satisfy the stated interest but eliminate or reduce the disparate impact.⁸²
5. "Preliminary Finding of Noncompliance"—If the recipient fails to rebut, mitigate, or justify, the OCR will notify the recipient of a preliminary finding of noncompliance.⁸³
6. "Formal Determination of Noncompliance"—If the recipient is unable to demonstrate that the preliminary finding is incorrect or that it can achieve compliance, OCR will issue a formal written determination of noncompliance within fifty days of the preliminary finding of noncompliance.⁸⁴
7. "Voluntary Compliance"—The recipient is given ten days after the formal determination of noncompliance to come into voluntary compliance. If the recipient does not meet this deadline, OCR will initiate procedures to terminate EPA funding.⁸⁵
8. "Informal Resolution"—OCR will pursue informal resolutions wherever practicable at any time during this process.⁸⁶

The *Interim Guidance* included a request for comments and noted EPA's belief that "robust stakeholder input" is necessary for addressing Title VI issues.⁸⁷ The *Interim*

79. *Id.* at 4. The *Interim Guidance* also provides a five-step framework for determining whether a disparate impact exists. *See id.* at 7-10. Since the issuance of the *Interim Guidance*, the EPA's Science Advisory Board has made recommendations as to the appropriate models to be used to evaluate disparate impact. *See SAB Recommends Steps for EPA in Analyses of Disproportionate Impacts*, 29 *Env't Rcp.* (BNA) 1310 (Oct. 30, 1998).

80. *Interim Guidance*, *supra* note 1.

81. *Id.*

82. *See id.* To be a justifiable disparate impact, there must be an "articulable value to the recipient in the permitted activity." *Id.* In evaluating justification, the OCR may consider broader governmental interests, the seriousness of the disparate impact, whether the permit is a renewal with demonstrated benefits, and whether any of the articulated benefits will benefit the community at issue in the Title VI complaint. *See id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

Guidance did not indicate, however, that any stakeholder input had gone into the development of the policy. After the *Interim Guidance* was released, the EPA created an advisory committee to recommend changes.⁸⁸

IV. FALLOUT

The hostile response to EPA's *Interim Guidance* has come from stakeholder groups with very different concerns and agendas, but each has shared the conviction that the EPA's action was an unwelcome attempt to take away that stakeholder's control over environmental decisionmaking. The criticisms have come primarily from three camps: state-level stakeholders, municipal-level stakeholders, and grassroots-level stakeholders. This section examines the historical and political background behind each of these groups' current struggle with the EPA over its environmental justice policies.

A. State-Level Stakeholders: Environmental Council of States, Western Governors' Association, National Governors' Association, State Attorneys General

After the issuance of the *Interim Guidance* in February of 1998, a number of state-level organizations and officials quickly voiced their dissatisfaction with the new policy. Those going public with their opposition included the Environmental Council of States, the Western Governors' Association, the National Governors' Association, and fourteen state Attorneys General. Their complaints all voiced the concern that the new policy would take decisionmaking power away from state agencies and introduce significant regulatory uncertainty into state permitting decisions.

1. Trend Toward Greater Local Control in Environmental Policy

As this Note explains,⁸⁹ the EPA's *Interim Guidance* establishes procedures whereby the EPA may review any permitting decision that has prompted a Title VI complaint, even if the state has issued a final permitting decision. This potential federal "veto-power" over state environmental permitting decisions seemed to fly in the face of EPA's increasing devolution of control to the states in the 1980s and 1990s.⁹⁰ Beginning with the Reagan era, presidential administrations have increasingly shifted environmental decisionmaking power to the state programs

88. See *Browner Defends Release of Interim Policy on Processing of Civil Rights Complaints*, 22 Chem. Reg. Rep. (BNA) 387 (May 22, 1998).

89. See discussion *supra* Part III.

90. See James P. Lester, *A New Federalism? Environmental Policy in the States*, in ENVIRONMENTAL POLICY IN THE 1990S: TOWARD A NEW AGENDA 59, 59 (Norman J. Vig & Michael E. Kraft eds., 1990); Barry G. Rabe, *Power to the States: The Promise and Pitfalls of Decentralization*, in ENVIRONMENTAL POLICY IN THE 1990S: REFORM OR REACTION?, *supra* note 9, at 31, 32-34. For a more detailed history of environmental federalism, see Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141 (1995).

established by many of the important environmental acts of the 1970s, on the assumption that states have the institutional capacity to handle such programs.⁹¹ Some state environmental agencies have succeeded in their expanded role as environmental caretakers and have been dubbed the "new heroes" of environmental federalism for their innovative regulatory strategies.⁹² However, empirical studies of state administration of pollution control programs have demonstrated that, in fact, individual states vary widely in their ability and commitment to pursue environmental protection.⁹³ Other commentators suggest that the problem is not only one of uneven state performance, but that EPA and other environmental actors have failed to adequately distinguish between those environmental problems that states can best address and those environmental problems that the federal government can best address.⁹⁴

Despite states' mixed record in administering environmental programs, the call for increased decentralization and "flexibility" has only increased in recent years. The 1994 Republican ascendancy in the U.S. House of Representatives brought with it powerful demands for Congress to turn management of numerous federal programs over to the states.⁹⁵ In the environmental context, states argue that they are in the best position to make decisions about environmental issues that affect unique local interests.⁹⁶ Not surprisingly, industry enthusiastically supports these demands for state

91. See Lester, *supra* note 90, at 59-61.

92. Rabe, *supra* note 90, at 32-34. Rabe notes that states have been the breeding ground for innovation in areas including pollution prevention, regulatory integration, economic incentives, emissions trading, and disclosure mandates. See *id.* at 34-39. Despite this devolution of agency power, relations between the EPA and state environmental administrators have remained strained. See Charles E. Davis & James P. Lester, *Federalism and Environmental Policy*, in ENVIRONMENTAL POLITICS AND POLICY: THEORIES AND EVIDENCE 57, 60-61 (James P. Lester ed., 1989).

93. See Lester, *supra* note 90, at 72-76; Rabe, *supra* note 90, at 40-41. Lester groups the states into four categories: Progressives, which have both the commitment and institutional capability to administer environmental programs (these include California, Florida, Illinois, Maryland, Massachusetts, Michigan, New Jersey, New York, Ohio, Oregon, Pennsylvania, Virginia, Washington, and Wisconsin); Strugglers, which have the commitment but lack institutional resources (these include Connecticut, Delaware, Hawaii, Indiana, Iowa, Kentucky, Maine, Minnesota, Montana, South Dakota, and Vermont); Delayers, which have the institutional capacity but lack commitment to environmental protection (these include Alabama, Alaska, Arkansas, Georgia, Louisiana, Missouri, Oklahoma, South Carolina, Tennessee, Texas, and West Virginia); and Regressives, which lack both the commitment and institutional capacity for environmental protection (these include Arizona, Colorado, Idaho, Kansas, Mississippi, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Rhode Island, Utah, and Wyoming). See Lester, *supra* note 90, at 72-75. Thus, according to Lester's research, only 14 of the 50 states have both an adequate commitment to and capacity for administering environmental protection programs.

94. See William W. Buzbee, *Brownfields, Environmental Federalism, and Institutional Determinism*, 21 WM. & MARY ENVTL. L. & POL'Y REV. 1, 1 (1997); Rabe, *supra* note 90, at 49.

95. See Dan Balz, *Governors Press Congress for Power To Manage Programs at State Level*, WASH. POST, Dec. 11, 1994, at A6.

96. See WALTER A. ROSENBAUM, ENVIRONMENTAL POLITICS AND POLICY 143-44 (3d ed.

discretion in administering environmental programs.⁹⁷ Furthering this insistence upon increased local control is a pervasive rhetoric that the federal government is “besieging” states and individuals with onerous environmental regulation, particularly in the western states.⁹⁸ Given the current political backdrop, it is anything but surprising that the EPA’s assertion of its power to review state permitting decisions met with hostile reaction from state-level interests.

2. Numerous State Interests Oppose Interim Guidance

The first state-level interest to express its dissatisfaction with the new *Interim Guidance* was the Environmental Council of States (“ECOS”), which is comprised of the top environmental officials of forty-nine states, as well as two U.S. territories and the District of Columbia.⁹⁹ At its annual meeting, ECOS members passed a resolution urging the EPA to withdraw its *Interim Guidance*, saying that it “would clearly disrupt the management of environmental permit programs” and suggesting a number of principles that the EPA should incorporate into future environmental justice initiatives.¹⁰⁰ The resolution noted that, despite ECOS members’ repeated message to the EPA that states needed to be involved in the development of major environmental policies to be carried out by the states, “[s]tates have not had a significant role in the development of U.S. EPA’s interim guidance.”¹⁰¹ The resolution states ECOS’s commitment to “environmental equity,” but appears to adopt the EPA’s pre-1994 formulation of that issue, noting in a manner reminiscent of former Administrator Reilly¹⁰² that the *Interim Guidance* “extend[s] well beyond traditional authority of U.S. EPA and State environmental programs.”¹⁰³

ECOS’ principles for acceptable Title VI guidance include the following demands:

The EPA must assist states in complying with Title VI and avoid policies with the “effect of shifting permit decision-making from States to the federal government”;¹⁰⁴

1995).

97. *See id.*

98. For an interesting example of this rhetoric, typical of the wise use, multi-use, and property rights movements, see WILLIAM PERRY PENDLEY, *WAR ON THE WEST: GOVERNMENT TYRANNY ON AMERICA’S GREAT FRONTIER* (1995).

99. *See State Agency Chiefs Ask EPA To Withdraw New Guidance on Civil Rights Complaints*, 28 Env’t Rep. (BNA) 2531 (Apr. 3, 1998).

100. *Resolution Number 98-2, Environmental Protection Agency’s Interim Guidance for Investigating Environmental Permit Challenges* (visited Dec. 1, 1999) <<http://www.sso.org/ecos/resolutions/98-2.htm>>.

101. *Id.*

102. *See supra* text accompanying note 53.

103. *Resolution Number 98-2, supra* note 100.

104. *Id.*

Any Title VI guidance must allow states to implement "alternative environmental equity programs" so long as they comply with Title VI;¹⁰⁵

Any Title VI guidance must provide definite time frames, definitions, and methodologies;¹⁰⁶ and

Any Title VI guidance must address conflicts with existing laws.¹⁰⁷

Echoing many of the concerns found in the ECOS resolution, fourteen state attorneys general soon followed suit in asking the EPA to withdraw the *Interim Guidance*.¹⁰⁸ In a letter to EPA Administrator Carol Browner, the attorneys emphasized that the *Interim Guidance* did not adequately account for the realities of state permitting processes.¹⁰⁹ Of particular concern to the letter's signatories was the *Interim Guidance*'s applicability to final permits: "Rather than placing itself in the role of the 'Monday morning quarterback' who second-guesses state decisions," the letter said the agency would be better served by building Title VI compliance requirements into state permitting procedures.¹¹⁰ The attorneys general also indicated concerns about the *Interim Guidance*'s lack of specificity, particularly its failure to provide criteria for a finding of disparate impact and its potential conflict with other zoning and environmental laws.¹¹¹

The National Governors' Association also voiced the opinion that the EPA's *Interim Guidance* goes beyond the scope of Executive Order 12,898.¹¹² One governor, John Engler of Michigan, has been particularly hostile to the EPA's *Interim Guidance*. Engler blamed the *Interim Guidance* for Select Steel's announced decision to forego plans to build in Flint because it was the subject of a Title VI investigation.¹¹³ Calling the new *Interim Guidance* "reckless" and "ill-defined," Engler said the EPA is a "jobkiller" imposing its will over the Flint community and

105. *Id.*

106. *See id.*

107. *See id.* The resolution cites local zoning laws, brownfield programs, and urban economic development programs as examples of laws with the potential to conflict with Title VI guidance. *See id.* A representative of one state environmental organization presented these concerns before a congressional subcommittee a few months later. *See EPA's Title VI Interim Guidance and Alternative State Approaches: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Commerce*, 105th Cong. 37-41 (1998) (testimony of Michael J. Hogan, Counselor to the Comm'r, State of N.J.; Dep't of Env'tl. Protection).

108. *See EPA Civil Rights Policy Lacks Recognition of State Permit Processes, Attorneys Say*, 29 Env't Rep. (BNA) 183 (May 15, 1998).

109. *See id.* New York Attorney General Dennis Vacco was the lead author of the letter. *See id.*

110. *Id.*

111. *See id.*

112. *See Vicki Ferstel, Executive Order Draws Attention to New Concern*, BATON ROUGE ADVOC., June 23, 1998, at 1A.

113. *See Michigan Governor Blames EPA Policy for Company Decision To Scrap Factory Plan*, 29 Env't Rep. (BNA) 995 (Sept. 18, 1998).

punishing industry.¹¹⁴ The EPA dismissed the complaint within weeks of Engler's comments.¹¹⁵

In June of 1998, the Western Governors' Association ("WGA") joined the chorus of disapproval by requesting withdrawal of the *Interim Guidance*.¹¹⁶ A resolution passed at the organization's annual meeting stated that the *Interim Guidance* "was adopted essentially without input from states," and should be replaced with a policy developed in cooperation with representatives from state environmental agencies.¹¹⁷ The concerns and demands of the WGA's resolution largely mirror earlier opposition documents: a need for recognition of "alternative state approaches" to Title VI compliance,¹¹⁸ a need for more precise standards and methodologies, and a need for EPA to support states in incorporating environmental justice concerns into the permitting process.¹¹⁹

3. Rectifying EPA's Missteps with State-Level Stakeholders

It is probably unrealistic to imagine that any EPA guidance asserting the agency's authority to review state-level permitting decisions would be warmly received by state interests. However, EPA's failure to work with states in drafting the *Interim Guidance* and failure to recognize states' legitimate need for regulatory certainty¹²⁰ has resulted in an unnecessarily high level of backlash from state-level interests. The EPA's obligation to strictly enforce the antidiscrimination mandate of Title VI need not offend states that are truly committed to incorporating environmental justice into their permitting procedures. The EPA should improve its relationships with state-level interests in three ways. First, it must gather input from state-level interests and incorporate state-level concerns where appropriate.¹²¹ Second, it needs to establish clear default standards and deadlines to build into state permitting processes to further regulatory certainty. Third, while the EPA cannot assume that states are willing and

114. *Id.*

115. See *EPA Dismisses Michigan Complaint; State Officials Still Wary of New Policy*, 22 Chem. Reg. Rep. (BNA) 1256 (Nov. 6, 1998).

116. See *Western Governors' Association Joins Calls for EPA To Withdraw Civil Rights Guidance*, 29 Env't Rep. (BNA) 570 (July 10, 1998).

117. *Western Governors' Association, Environmental Protection Agency Interim Guidance for Addressing Environmental Justice Challenges to Permits* (visited Dec. 1, 1999) <<http://www.westgov.org/wga/policy/98009.htm>>.

118. New Jersey and Texas are states that have implemented their own environmental justice programs which incorporate equity issues early in the permitting process. See David Sive & Lemuel M. Srolovic, *Environmental Justice Issues Develop: Facility Permits and Civil Rights*, N.Y. L.J., Oct. 26, 1998, at S1.

119. See *Western Governors' Association*, *supra* note 117.

120. For a discussion of the importance of regulatory certainty, see William W. Buzbee, *Remembering Repose: Voluntary Cleanup Approvals, Incentives, and the Costs of Interminable Liability*, 80 MINN. L. REV. 35, 96 (1995).

121. Recommendations for increased stakeholder participation in EPA decisionmaking can be found in ENTERPRISE FOR THE ENV'T, CENTER FOR STRATEGIC AND INT'L STUDIES, THE ENVIRONMENTAL PROTECTION SYSTEM IN TRANSITION: TOWARD A MORE DESIRABLE FUTURE 41-43 (1998).

able to meet their Title VI obligations,¹²² it can work with interested state agencies to develop alternative Title VI compliance policies, establishing minimum conditions that must be met before states can implement alternative policies.¹²³

*B. Municipal-Level Stakeholders: U.S. Conference of Mayors,
Chamber of Commerce, Black Chamber of Commerce*

State-level interests were not alone in opposing the EPA's *Interim Guidance* as an attempt to wrest control of permitting decisions away from nonfederal units of government. Perhaps the most vocal opponent of the new *Interim Guidance* has been the U.S. Conference of Mayors,¹²⁴ which shares many of the state-level interests' concerns about the *Interim Guidance*'s lack of regulatory certainty and EPA's failure to incorporate stakeholder input. The Conference of Mayors and the Black Chamber of Commerce have emphasized an additional concern: that the *Interim Guidance* will frustrate attempts to draw industrial development into predominantly minority urban communities.¹²⁵ Given that the NAACP and the Congressional Black Caucus have been strong advocates of environmental justice initiatives,¹²⁶ it is an indicator of the complex nature of the politics surrounding this issue that some of the EPA *Interim Guidance*'s strongest opponents have been mayors who represent predominantly minority communities. A closer look at the political landscape of poor urban communities helps to explain this irony.

122. For a discussion of states' varying levels of commitment and ability to administer environmental regulations, see *supra* text accompanying notes 92-93.

123. This approach to resolving conflicts of environmental federalism is suggested in Percival, *supra* note 90, at 1177-78.

124. Detroit Mayor Dennis Archer's opposition to the guidance received coverage in the mainstream media. See, e.g., Lynette Clemetson, *A Green Bottom Line: Black Leaders Struggle To Balance Jobs, Pollution*, NEWSWEEK, Nov. 2, 1998, at 53.

125. See *Pollution in Minority and Inner-City Neighborhoods: Hearings Before the House Subcomm. on Oversight and Investigations of the House Comm. on Commerce*, 105th Cong. (1998), available in 1998 WL 12763210 [hereinafter *Hearings*] (testimony of Harry C. Alford, President, National Black Chamber of Commerce, Inc.); *Environmental Justice: U.S. Conference of Mayors Calls on EPA To Suspend Guidance on Civil Rights*, 29 Env't Rep. (BNA) 469 (June 26, 1998);

126. See *EPA Bungling Leaves "Environmental Justice" Elusive*, USA TODAY, July 20, 1998, at 14A; *NAACP Head Demands Environmental Action*, NAT'L L.J., May 10, 1993, at 5, 23. The Congressional Black Caucus has criticized the mitigation and justification provisions of the *Interim Guidance*, however. See *Black Caucus, EPA To Meet on Shintech; Dispute May Be Test Case on Title VI Suits*, 22 Chem. Reg. Rep. (BNA) 780 (July 24, 1998).

1. *Environmental Movement's Perceived
Disregard of Minority Urban Issues*

The municipal-level stakeholder reaction to the EPA's *Interim Guidance* must be considered in light of minority communities' historical suspicion of the agenda of mainstream environmental agencies and organizations. While minority urban communities do care about environmental issues, they tend to care more about pollution problems that directly affect them and less about "preservation of wildlife and wilderness."¹²⁷ To the extent that environmental agencies and organizations have focused or have been perceived to focus their energies on conservation issues, minority urban communities have seen the environmental movement as irrelevant to their lives. As a result of these perceptions and of institutional racism, minorities have historically not been involved in environmental decisionmaking.¹²⁸

As the environmental movement gained momentum in the early 1970s, this strained relationship became the subject of a national conference attended by representatives of mainstream environmental organizations, civil rights organizations, and municipal governments.¹²⁹ Conferees noted the perceived disconnect between the concerns of environmentalists and the concerns of the urban poor and pointed out that the urban poor often see the environmental movement as a "deliberate attempt by a bigoted and selfish white middle-class society to perpetuate its own values and protect its own life style at the expense of the poor and the underprivileged."¹³⁰ One commentator noted that this disconnect allows corporations to portray environmentalists as "not giving a damn" about jobs and human welfare.¹³¹

This historical disconnect is furthered by the economic realities of many predominantly minority urban areas. Many minority communities have fewer resources to fight the siting of polluting industries and "are more likely than others to tolerate pollution-generating commercial development in the hope that economic benefits will inure to the community in the form of jobs, increased taxes, and civic improvements."¹³² Observers frequently characterize this trade off between jobs and freedom from pollution as environmental blackmail.¹³³ When faced with the

127. Regina Austin & Michael Schill, *Black, Brown, Red, and Poisoned*, in UNEQUAL PROTECTION: ENVIRONMENTAL JUSTICE AND COMMUNITIES OF COLOR, *supra* note 4, at 57-58.

128. See Lazarus, *supra* note 14, at 811-12.

129. See James Noel Smith, *Preface* to ENVIRONMENTAL QUALITY AND SOCIAL JUSTICE IN URBAN AMERICA at ix, x (James Noel Smith ed., 1974).

130. James Noel Smith, *The Coming of Age of Environmentalism in American Society*, in ENVIRONMENTAL QUALITY AND SOCIAL JUSTICE IN URBAN AMERICA, *supra* note 129, at 1, 2. In reality, America's mainstream environmental organizations vary widely in their level of commitment to environmental justice and environmental issues affecting urban populations. The Sierra Club was an early proponent of environmental justice issues, whereas other organizations are more exclusively focused upon conserving wildlife and wilderness areas. See Jeffrey St. Clair & Bernardo Issel, *A Field Guide to the Environmental Movement*, IN THESE TIMES, July 28, 1997, at 17.

131. Smith, *supra* note 130, at 4.

132. Austin & Schill, *supra* note 127, at 55.

133. See Robert D. Bullard, *Anatomy of Environmental Racism and the Environmental Justice Movement*, in CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE

alternative of allowing devastating economic conditions to continue, many African-American civil rights and political leaders have opted for bringing more industry into their communities despite the potential trade off of increased pollution.¹³⁴ And, given the environmental mainstream's historical agenda, poor urban communities may be skeptical of environmentalists' attempts to improve the situation.¹³⁵

2. Mayors Oppose Interim Guidance

When set against this historical and political backdrop, it is perhaps not surprising that the mayor leading the charge against the EPA's *Interim Guidance* was Detroit's Dennis Archer, who has worked to bring industrial investment to his economically ailing, predominantly black city.¹³⁶ The U.S. Conference of Mayors in June of 1998 unanimously adopted Archer's resolution urging the EPA to suspend the *Interim Guidance*.¹³⁷ The Conference of Mayors expressed concerns that the *Interim Guidance* "will stifle inner-city development and strip minorities of job opportunities," take away decisionmaking power from local governments, and create regulatory uncertainty for industries.¹³⁸

In the same vein, the Chamber of Commerce and Black Chamber of Commerce, as representatives of their local chapter organizations, have opposed the *Interim Guidance* on the grounds that "[m]inority and low-income communities in this country are sorely in need of the jobs, tax revenues, and other benefits that industrial facilities bring with them."¹³⁹ The President of the U.S. Chamber of Commerce accused the EPA of trying to become a "national zoning board" by overturning state and local development decisions.¹⁴⁰

Despite Administrator Browner's insistence that the EPA is committed to achieving both urban economic development and environmental protection for all citizens, the EPA has not determined how it will address minority support of an industrial project in resolving Title VI permitting complaints.¹⁴¹ In July of 1998, Archer made clear in a meeting with Administrator Browner his belief that urban mayors are in a better position than the EPA to make decisions about community redevelopment and about protecting minority citizens.¹⁴² In response to the mayors' criticisms, Browner

GRASSROOTS, *supra* note 60, at 15, 23.

134. *See id.* at 22-23; Lazarus, *supra* note 14, at 808.

135. *See Dialogue: Attitudes Toward Environmentalism, in ENVIRONMENTAL QUALITY AND SOCIAL JUSTICE IN URBAN AMERICA, supra* note 129, at 37, 42.

136. *See* Clemetson, *supra* note 124, at 53.

137. *See* David Mastio, *Archer Tackles the EPA: U.S. Mayors Back His Call To Suspend Race-Based Policy*, DET. NEWS, June 23, 1998, at A1.

138. *Id.*; *see also* *Environmental Justice: U.S. Conference of Mayors Calls on EPA To Suspend Guidance on Civil Rights*, 29 Env't Rep. (BNA) 469 (June 26, 1998).

139. *Hearings, supra* note 125 (testimony of Harry C. Alford, President, National Black Chamber of Commerce, Inc.).

140. *Chamber Seeks Minority Business Support in Dispute with Agency over Title VI Policy*, 29 Env't Rep. (BNA) 614 (July 17, 1998).

141. *See* Ferstel, *supra* note 112, at 1A.

142. *See Mayors Rap EPA at Meeting with Browner for Failure To Consult on Interim*

acknowledged that perhaps the EPA should have solicited municipal-level input before issuing the *Interim Guidance*.¹⁴³ At that meeting, Browner also offered the EPA's first statement of the goals of the *Interim Guidance*: "First, to provide citizens with input into decisionmaking and swift resolution of their concerns. Second, to give businesses a climate of certainty that fosters development. And third, not to second-guess responsible local and state decisionmaking."¹⁴⁴

3. Rectifying EPA's Missteps with Municipal-Level Interests

In 1993, sociologist Robert Bullard predicted the quandary the EPA finds itself in today. He wrote that unless environmental initiatives address the profound economic concerns of poor communities of color, "people of color and poor white workers are likely to end up siding with corporate managers in key conflicts concerning the environment."¹⁴⁵ Certainly that is the situation that has developed in response to the EPA's *Interim Guidance*, as mayors of poor, minority cities find themselves more closely allied with industry interests like the Chamber of Commerce than with the NAACP.

To correct its missteps, the EPA must first work to include these municipal leaders in its development of environmental justice initiatives, working to counter the historical perception that environmental agencies do not care about the problems of minority urban communities. Second, the EPA must move beyond mere rhetoric in proving the point that economic development and environmental protection can occur at the same time.¹⁴⁶ Municipal-level interests have shown that they are doubtful that both goals can be achieved at once,¹⁴⁷ and do not want to cede control to the EPA to determine which alternative is preferable. If the EPA wants to have credibility with municipal interests, it must provide urban leaders with concrete, real-world examples of the simultaneous achievement of the two goals, and involve municipal interests in

Guidance, 29 Env't Rep. (BNA) 658 (July 24, 1998).

143. See *id.*

144. Carol M. Browner, *Remarks Prepared for Delivery, Environmental Justice Roundtable, Detroit MI, July 17, 1998* (visited Dec. 1, 1999) <<http://www.epa.gov/swerosps/ej/html-doc/ejremark.htm>>.

145. Bullard, *supra* note 133, at 23.

146. The head of the Michigan Environmental Council argued in the *Detroit News* that "[i]f Detroit hopes to follow in the footsteps of other American cities that have already enjoyed an urban renaissance, it will have to clean itself up, not allow itself to be used as an environmental dumping ground." Lana Pollack, *Environmental Justice Fights Race Bias*, DET. NEWS, July 2, 1998, at A13. Pollack also suggested that "economic Armageddon" arguments were reminiscent of the rhetoric used to fight the civil rights movement. *Id.*

147. It is interesting to note that most Americans believe we can have growth and a clean world. See EVERETT CARL LADD & KARLYN H. BOWMAN, *ATTITUDES TOWARD THE ENVIRONMENT: TWENTY-FIVE YEARS AFTER EARTH DAY 9* (1995). The National Resources Defense Council has challenged the argument that it is necessary to choose between environmental justice or pursuing economic development. See *Permits Cited in Civil Rights Complaints Have Remained Valid, EPA Official Says*, 152 Daily Env't Rep. (BNA) A-9 (Aug. 7, 1998).

the development of plans to increase economic development while ensuring environmental protection.¹⁴⁸

*C. Community-Level Stakeholders:
Grassroots Environmental Justice Organizations*

The EPA's *Interim Guidance* offers community-based environmental justice organizations an important tool for challenging the siting of polluting facilities in minority neighborhoods. Financially strapped community organizations are likely to view filing an administrative complaint with the EPA as a welcome alternative to lawsuits. However, the EPA's repeated assertions to state and municipal level stakeholders that it has yet to overturn a permitting decision under the *Interim Guidance* is likely to bring little reassurance to community groups that the new policy will aggressively protect their civil rights.¹⁴⁹ In addition, the EPA's failure to involve grassroots leaders in developing the *Interim Guidance*¹⁵⁰ is likely to alienate communities that already see the EPA as not protective of their interests. The EPA must gain a better understanding of the principles and priorities of grassroots environmental organizations if it wants to involve these groups in future environmental justice initiatives.

1. Grassroots Strategies

Grassroots environmental justice organizations believe that good environmental decisionmaking requires participation from members of affected communities.¹⁵¹ In line with this philosophy, organizations such as the Southwest Organizing Project ("SWOP") and SNEEJ have emphasized hands-on tactics, such as meetings, demonstrations, and petitions.¹⁵² While legal action may constitute part of an organization's arsenal of tactics, there is a "certain skepticism about the efficacy of litigation in advancing the goals of minority grass-roots environmentalism," perhaps because community members feel an alienation from and distrust of the judicial system.¹⁵³ In fact, public interest attorney Luke Cole has argued that litigation serves as one of the least useful strategies for grassroots organizations.¹⁵⁴

148. See Roger H. Bezdek, *The Net Impact of Environmental Protection on Jobs and the Economy*, in ENVIRONMENTAL JUSTICE: ISSUES, POLICIES, AND SOLUTIONS 86 (Bunyan Bryant ed., 1995).

149. See *Permits Cited in Civil Rights Complaints Have Remained Valid*, EPA Official Says, *supra* note 147.

150. See *EPA Official Says Consultation Before Guidance Release Insufficient*, 22 Chem. Reg. Rep. (BNA) 779 (July 24, 1998).

151. See Daniel Faber, *Introduction to THE STRUGGLE FOR ECOLOGICAL DEMOCRACY: ENVIRONMENTAL JUSTICE MOVEMENTS IN THE UNITED STATES 1* (Daniel Faber ed., 1998).

152. See Austin & Schill, *supra* note 127, at 63-64.

153. *Id.*

154. See Luke W. Cole, *Environmental Justice Litigation: Another Stone in David's Sling*, 21 FORD. URB. L.J. 523, 524 (1994). Others have agreed that Title VI litigation is not the solution in the environmental racism context. See Light & Rand, *supra* note 36, at 38.

Grassroots environmental justice organizations tend to have little faith that the government will intervene to solve their problems.¹⁵⁵ Richard Moore, Coordinator of SNEEJ, describes his region's EPA office as "located in a bank building, with guards, that many of our community folk don't have access to. This is symbolic of the general character of the EPA and the U.S. government."¹⁵⁶ The release of the EPA memo urging co-optation of the grassroots environmental justice movement¹⁵⁷ served to reinforce this grassroots perception that the EPA sets itself apart from American communities and lacks a commitment to identifying and remedying environmental injustice within them.

2. Remedying EPA's Missteps with Community-Level Interests

While the severe backlash from state and municipal level interests has convinced the EPA that it erred in failing to involve those stakeholders in the development of the *Interim Guidance*,¹⁵⁸ its failure to involve grassroots organizations may pose more serious consequences for the legitimacy of EPA's *Interim Guidance* and future environmental justice initiatives. The environmental justice movement, as noted above,¹⁵⁹ is the product of community organizations that have developed their own approaches to fighting disproportionate pollution burdens in their neighborhoods. As a result, only by involving affected minority groups in the decisionmaking process can the EPA alter its agency culture to understand and address environmental injustice.¹⁶⁰ In particular, "members of affected minority groups themselves are the most appropriate ones to identify and prioritize the economic, social, health, educational, and environmental issues for their communities."¹⁶¹ Of course, EPA cannot abdicate its important role in environmental justice decisionmaking; it must maintain that role in order to meet its statutory obligations under Title VI.¹⁶² But the EPA must do better than simply creating Title VI procedures that environmental justice groups may or may not use to further their objectives.

155. See Austin & Schill, *supra* note 127, at 62.

156. Paul Almeida, *The Network for Environmental and Economic Justice in the Southwest: An Interview with Richard Moore*, in *THE STRUGGLE FOR ECOLOGICAL DEMOCRACY: ENVIRONMENTAL JUSTICE MOVEMENTS IN THE UNITED STATES*, *supra* note 151, at 182.

157. See *supra* text accompanying notes 62-63.

158. See *EPA Official Says Consultation Before Guidance Release Insufficient*, *supra* note 150, at A-9.

159. See *supra* text accompanying notes 148-51.

160. See Torres, *supra* note 10, at 453.

161. *Id.*

162. For a discussion of the ways in which environmental professionals should be involved in the environmental justice movement, see Conner Bailey et al., *Environmental Justice and the Professional*, in *ENVIRONMENTAL JUSTICE: ISSUES, POLICIES, AND SOLUTIONS*, *supra* note 148, at 35. The authors suggest that agencies attempting to further environmental justice should hire community relations coordinators to improve the sharing of information between the agency and the community. See *id.* at 40.

CONCLUSION: LESSONS TO BE LEARNED
FROM THE *INTERIM GUIDANCE*

Perhaps the most obvious lesson that the EPA will learn from the profound dissatisfaction with its 1998 *Interim Guidance* centers around the importance of involving the multiple levels of environmental stakeholders in the environmental justice decisionmaking process—state, municipal, and grassroots. This idea of “stakeholder participation” is now quite popular and widely touted in many regulatory arenas, especially in the environmental context. A new report argues that well-designed stakeholder involvement is crucial to environmental decisionmaking,¹⁶³ while a recent study of the EPA found that the agency must improve stakeholder participation.¹⁶⁴ EPA’s experience with response to its *Interim Guidance* suggests that this lesson applies in the environmental justice context as well. Stakeholder involvement will likely create an atmosphere of increased good faith, and may help the EPA avoid some basic public relations missteps.

But the recent spate of controversy over the EPA’s guidelines offers a more complex lesson for the agency. Environmental justice efforts necessarily raise a complicated set of political conflicts. Increased stakeholder participation will not likely resolve the fundamental philosophical differences that form the real root of much of the dissatisfaction over the *Interim Guidance*—differences that arise from the fundamental question of which group or groups should have decisionmaking power when it comes to environmental justice issues.

If the EPA is to succeed in furthering environmental justice goals, it cannot continue to do so while turning a blind eye to the complex political histories and agendas that stakeholders at the state, municipal, and community levels bring to environmental justice policy making. Environmental justice regulators also need to realize that they cannot please each of these groups of stakeholders and develop a meaningful environmental justice program.

As the EPA refines the environmental justice guidelines embodied in the *Interim Guidance*¹⁶⁵ and undertakes other environmental justice initiatives, it must address some fundamental issues. First, it must explicitly define the objectives of its environmental justice policy. As part of this analysis, the EPA needs to determine whether it has the institutional commitment and wherewithal to enforce federal civil rights laws in the face of sometimes determined local and commercial opposition. Second, the EPA needs to more clearly define state and federal roles in environmental justice decisionmaking by identifying the concrete ways in which state permitting processes can help prevent disproportional environmental impacts, but reserving

163. See TERRY F. YOSIE & TIMOTHY D. HERBST, USING STAKEHOLDER PROCESSES IN ENVIRONMENTAL DECISIONMAKING: AN EVALUATION OF LESSONS LEARNED, KEY ISSUES, AND FUTURE CHALLENGES (1998).

164. See ENVERPRISE FOR THE ENV’T, *supra* note 121, at 49.

165. The EPA had planned to issue draft revised guidelines in the fall of 1999. See *EPA To Issue Draft Revision this Fall of Guidance for Civil Rights Act Title VI*, 169 Daily Env’t Rep. (BNA) A-1 (Sept. 1, 1999). However, the EPA had not yet issued revised guidelines at the time this Issue went to press, and the EPA does not expect to issue revised guidelines for several months. Telephone Interview with Mavis Sanders, U.S. Env’tl. Protection Agency, Office of Civil Rights (Jan. 24, 2000).

other decisionmaking and enforcement activities exclusively to the federal government. Finally, the EPA should develop long-term strategies to debunk the seeming conflict between environmental protection and community development that is at the core of this environmental justice stakeholders' debate. The longer that stakeholders perceive a necessary trade off between environmental quality and jobs in their community, the less success EPA will have guaranteeing rich and poor communities alike the benefits of a safe environment. Until the agency specifically addresses these key issues, the winds of opposition from various stakeholders will continue to buffet EPA's environmental justice policies, and will prevent EPA from making meaningful progress in enforcing the guarantees of Title VI in the environmental context.