Now is the Time

Environmental Injustice in the U.S. and Recommendations for Eliminating Disparities

A Collaborative Report by

The Lawyers' Committee for Civil Rights Under Law

June 2010

LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

"We have also come to this hallowed spot to remind America of the fierce urgency of now. This is no time to engage in the luxury of cooling off or to take the tranquilizing drug of gradualism. Now is the time to make real the promises of democracy. Now is the time to rise from the dark and desolate valley of segregation to the sunlit path of racial justice. Now is the time to lift our nation from the quicksands of racial injustice to the solid rock of brotherhood. Now is the time to make justice a reality for all of God's children."

Martin Luther King, Jr.
"I Have a Dream - Address at March on Washington"
August 28, 1963

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Urban Environmental Program in Providence, Rhode Island.
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http://www.epa.gov/ne/eco/uep/provid/index.html

Dedication

This report is dedicated to the memory of our friend Luke W. Cole, a tireless advocate for environmental justice and a leading legal practitioner in the field who died in a tragic car accident while traveling on sabbatical in Uganda with his wife Nancy in May of 2009.

Luke brought groundbreaking cases as a staff attorney with California Rural Legal Assistance and was a major contributor to the field of environmental justice through his writing, teaching, legal advocacy and through the entity he founded and led until his death, the Center for Race, Poverty and the Environment. He was a persistent and unwavering voice on the National Environmental Justice Advisory Council and served at one time as chair of its Enforcement Subcommittee, where he led the charge to require EPA to fully enforce Title VI of the Civil Rights of 1964 and begin to adjudicate Title VI complaints submitted by environmentally overburdened communities.

Luke was an inspiring and enthusiastic colleague, friend, teacher and mentor to activists and groups across the country who was engaged in the effort to bring about environmental justice and equal treatment before the law for all communities. We miss him more than words can express.

Preface

From 1992 through 2000, many exciting efforts were underway at the federal level to identify, research and act on incidences of environmental injustice. From the issuance of Executive Order 12898 by President Clinton in 1994, to the multi-agency sponsored conference on Federal Research Needs on Environmental Justice also in 1994, to the creation of the Office of Environmental Justice by the U.S. Environmental Protection Agency, there was a sense that the federal government was working with communities to address the disproportionate burden of pollution borne by indigenous, low-income and communities of color.

These efforts seemed to cease in 2001, when the George W. Bush Administration, with its easily distinguishable and less dynamic views and priorities on the environment, civil rights and justice came into power. Approaching the end of eight full years with few meaningful opportunities for input or dialogue with federal environmental officials, in August of 2008 the Lawyers' Committee and the principal authors of this report began a discussion about the need to develop a transition report that made clear and concise recommendations as to how a new presidential administration could advance environmental justice across the breadth of the federal government.

For two days in late May 2009, the Lawyers' Committee convened a group of leading environmental justice advocates, lawyers, researchers and scholars at Gallaudet University in Washington, D.C. to discuss the state of environmental justice in the U.S. and to identify federal efforts that could be undertaken to provide equal protection for those people and places that had borne a disproportionate burden of pollution and its adverse affects. Those two days of robust dialogue were followed by months of writing, discussing and editing this report. Numerous individuals contributed to the substance of this report, which in many ways is a compilation of decades of research and reporting. It is unique in its effort to bring together the diversity of specialties, expertise and views on environmental and civil rights protection and enforcement. That the quest for environmental justice is at a critical crossroads where, with a receptive presidential administration, remarkable things can be accomplished. We call this report, quite fittingly, *Now is the Time.*

This report and its recommendations provide a roadmap for the Obama Administration to move forward the goal of ensuring equal treatment under the law for all communities and to provide focus and attention on those communities – low-income, indigenous, and people of color communities – whose lives are threatened by environmental assaults of every kind.

As the country grapples with the current oil spill disaster in the Gulf Coast, we look forward to discussions with the Obama Administration and its various agencies on protecting environmental justice communities. *Now is the Time* to achieve environmental justice and we are delighted to offer this report toward reaching that goal.

Daria Neal, Environmental Justice Senior Counsel

Veronica Eady Famira, Consultant

Vernice Miller-Travis, Consultant

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The authors of this report would like to thank the Ford Foundation for its generous financial support for the efforts that led to the publication of this report. We extend our deepest thanks to Barbara Arnwine, Executive Director of the Lawyers' Committee for Civil Rights Under Law, for supporting and housing this project over the last two years.

We express deep gratitude to the contributors, advisors and editors of this report, all who exhibited extreme patience, who were charitable with their time and intellectual investment, and who were steadfast in their dedication to completing this project: Claire Barnett of the Healthy Schools Network, Vivian Buckingham of Ceres, Mijin Cha of Urban Agenda, Abigail Dillon of Earthjustice, Michael Dorsey of Dartmouth College, Lisa Evans of Earthjustice, Emily Enderle of Earthjustice, Deeohn Ferris of Sustainable Community Development Group, Leslie Fields of Sierra Club, Timothy Fields of MDB, Inc., Sheila Foster of Fordham University School of Law, Rachel Morella-Frosch of the University of California at Berkeley, Eileen Gauna of the University of New Mexico School of Law, Patti Goldman of Earthjustice, Savonala (Savi) Horne of the Landloss Prevention Project, Al Huang of Natural Resources Defense Council, Dr. Mark Mitchell of Connecticut Coalition for Environmental Justice, Paul Mohai of the University of Michigan, Joan Mulhern of Earthjustice, Catherine O'Neill of the University of Seattle, Jim Pew of Earthjustice, Roger Rivera of the National Hispanic Environmental Council, Robin Saha of the University of Montana, Nicky Sheats of Thomas Edison State College and the New Jersey Environmental Justice Alliance, Gail Small of Native Action, Nicholas Targ of Holland & Knight LLP, Stephanie Tyree, formerly of We ACT for Environmental Justice, and Sacoby Wilson of the University of South Carolina.

We also owe thanks to Thomas Silverstein, Legal Assistant, Gini Martin, Law Fellow, and Katherine Regan, Summer Intern, for Lawyers' Committee for Civil Rights Under Law, who provided legal research, and administrative and logistical support for this project. Also a special thanks to Development Grants Officer Kimberly Hayes for committing her time and publishing expertise to the design and layout of this report.

And finally, we are enormously grateful to Quentin Pair of the U.S. Department of Justice for his faith in our work, moral support and longstanding personal commitment to environmental justice.

Purina Facility Behind Playground in Newtown Community of Gainesville, Georgia.
Photo by Lawyers Committee for Civil Rights Under Law.

About the Lawyers' Committee

The Lawyers' Committee for Civil Rights Under Law, a nonpartisan, nonprofit organization, was formed in 1963 at the request of President John F. Kennedy to involve the private bar in providing legal services to address racial discrimination. The principal mission of the Lawyers' Committee is to secure, through the rule of law, equal justice under law. The Lawyers' Committee implements its mission and objectives by marshaling the pro bono resources of the bar for litigation, public policy advocacy, and other forms of service by lawyers to the cause of civil rights.

About the Authors

Daria E. Neal is Senior Counsel for the Environmental Justice Project at the Lawyers' Committee for Civil Rights Under Law, where she represents communities subjected to discriminatory zoning resulting in the concentration of industrial plants and pollution. Additionally, Ms. Neal monitors federal and state legislation relating to the environment of low-income and communities of color and has provided advice and counsel on several federal environmental justice and civil rights bills.

In 2006, Ms. Neal coordinated the National Commission on Environmental Justice on the Gulf Coast to examine the environmental impact of Hurricanes Katrina and Rita on minority and low-income communities. Ms. Neal was the principal author of the Commission's report, "Protecting Vulnerable Coastal Communities: Meaningful Political Action and Strategies for Environmental Justice After Hurricanes Katrina and Rita." She subsequently sued the Army Corps of Engineers on behalf of these communities challenging the issuance of a regional general permit that would allow for the destruction of tens of thousands of acres of wetlands in and adjacent to historic African-American communities. Ms. Neal is also the author of "Healthy Schools: A Major Front in the Fight for Environmental Justice," where she examined the pollution burdens on the nation's school children. The article was published in *Environmental Law,* a law journal of Lewis & Clark Law School.

Ms. Neal is also an adjunct professor at Howard University Law School where she teaches a seminar on environmental justice.

Veronica Eady Famira is a policy consultant to Lawyers' Committee for Civil Rights Under Law. She is also a lawyer and writer specializing in environmental justice and human rights on global, national, and local levels. Ms. Famira is the former Director of the Environmental Justice Program and former Associate General Counsel at New York Lawyers for the Public Interest ("NYLPI"), a nonprofit civil rights law firm in New York City. Ms. Famira also served as Director of the Environmental Justice and Brownfields Programs for the Massachusetts Executive Office of Environmental Affairs, in which capacity she was principal author of the state's environmental justice policy. She also served as the Executive Director of Alternatives for Community and Environment ("ACE") in Roxbury, Massachusetts. Ms. Famira has held full-time teach-

ing positions at Stanford Law School, Tufts University in the Department of Urban and Environmental Policy and Planning, at Golden Gate Law School, and held adjunct teaching appointments at Fordham Law School, Boston College, and New College of California School of Law. She began her legal career at the U.S. Environmental Protection Agency working on litigation under the Clean Air Act, the Clean Water Act, the National Environmental Policy Act and other key environmental statutes. Ms. Famira is widely-published, most recently in the 2008 edition of *The Law of Environmental Justice,* second edition, edited by Michael B. Gerrard and Sheila R. Foster. She is a former Chair of the National Environmental Justice Advisory Council, a federal advisory committee to the U.S. Environmental Protection Agency and former Chair of its Waste and Facility Siting Subcommittee.

Vernice Miller-Travis is a policy consultant to Lawyers' Committee for Civil Rights Under Law. A seasoned urban planner focusing on the interrelationship between racial segregation, land use and environmental protection, as well as on environmental policy and civil rights advocacy, Ms. Miller-Travis is the principal in Miller-Travis & Associates, an environmental consulting firm. She also serves as Vice-Chair of the Maryland State Commission on Environmental Justice and Sustainable Communities.

Ms. Miller-Travis launched the Ford Foundation's U.S. environmental justice portfolio, while serving as a program officer in the Community and Resource Development Unit. Prior to that, Ms. Miller-Travis was the Director of the Environmental Justice Initiative of the Natural Resources Defense Council ("NRDC") for six years. While at NRDC, Ms. Miller-Travis was on the frontlines, advocating for environmental justice reform under the Clinton Administration, which ultimately led her to participation in the Oval Office signing ceremony for the Executive Order on Environmental Justice on February 11, 1994 with President Bill Clinton and other political leaders.

Playground shrouded in smog near the Gavin nuclear power plant in Cheshire, Ohio. In May 2003, residents of Cheshire were forced to move from their homes due to environmental pollution.
© 2003 Joy Phillips, Courtesy of http://photoshare.org/

Ms. Miller-Travis' many achievements in the field of environmental justice include the co-founding of West Harlem Environmental Action (currently known as We ACT for Environmental Justice) her work while on the staff of the United Church of Christ Commission for Racial Justice, where she helped to research, write and publish in 1987, the landmark report "Toxic Wastes and Race in the United States." She also served on the U.S. Environmental Protection Agency's National Environmental Justice Advisory Council from 1996 until 2001, where she chaired its Waste and Facility Siting Subcommittee. She continues to work with NEJAC, currently as Co-Chair of the Working Group on School Air Toxics Monitoring to the National Environmental Justice Advisory Council of the U.S. Environmental Protection Agency.

Ms. Miller-Travis has published extensively, most recently in a chapter she co-wrote for the 2008 book *Bringing Human Rights Home: A History of Human Rights in the United States,* edited by Cynthia Soohoo, Catherine Albisa, and Martha F. Davis.

Executive Summary

Overview

For more than 20 years a growing discourse about the field of environmental justice has emerged in the United States. This field has focused on the disproportionate impact of pollution borne by people of color and the poor and the perceived lack of equal application and enforcement of existing environmental laws, regulations and statutes in communities of color, indigenous and low-income communities across the country.

> *"The purpose of this report is to recommend specific ways that the Obama Administration can further environmental justice."*

The current circumstances necessitate immediate attention to these issues as reflected in statistics related recently by Robert Bullard and his co-authors in their report, *Toxic Waste and Race at Twenty 1987-2007.* As of 2007, more than nine million people are estimated to live in circular host neighborhoods within three kilometers of the nation's 413 commercial hazardous waste facilities.[1] More than 5.1 million people of color, including 2.5 million Hispanics or Latinos, 1.8 million African-Americans, 616,000 Asian/Pacific Islanders, and 62,000 indigenous people live in neighborhoods with one or more commercial hazardous waste facilities.[2] Neighborhoods with facilities clustered close together have higher percentages of people of color than those with non-clustered facilities (69 percent versus 51 percent).[3] Likewise, neighborhoods with clustered facilities have disproportionately higher poverty rates.[4]

The causes of the current environmental justice crisis are not limited to environmental issues. America's generations-old history of housing segregation, discrimination in land use and zoning policy, and disparate enforcement of environmental laws remains a hurdle to equal environmental protection. To successfully remedy the disparity in environmental health borne by people of color and low-income communities in a holistic and sustainable fashion, the federal government necessarily must play a leadership role. The federal government's ability to impact this issue through regulation, enforcement, monitoring, and appropriations is extremely broad, and in some respects, unique. Unfortunately, the federal government's efforts have fallen far short in this public policy arena.

The high-water mark for federal advancement of environmental justice was in 1994, when President Clinton signed Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations." Executive Order 12898 ordered each Federal agency to "make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs,

policies, and activities on minority populations and low-income populations in the United States." In addition, the Executive Order contained numerous detailed requirements, including that each federal agency develop an agency-wide environmental justice strategy that included several specific components.

Since the signing of Executive Order 12898, environmental justice has made some headway within federal and state agencies, but the letter and spirit of the Executive Order has not been fulfilled. Despite the good intentions of the Clinton Administration in laying the foundation for federal environmental justice policy, the Clinton Administration did not always follow through on its commitment to environmental justice or utilize existing laws to achieve the goals of the historic executive order. Worse yet, the Bush Administration neglected environmental justice altogether, weakening existing rules and failing to enforce environmental and civil rights laws.

Perhaps most illustrative of the federal government's shortcomings in reducing disparities in environmental protection is the lack of enforcement of Title VI of the Civil Rights Act of 1964 at the U.S. Environmental Protection Agency ("EPA"). Title VI can be a powerful tool in advancing environmental justice because it authorizes federal agencies to withdraw funds from any recipient of federal funding whose activities have a discriminatory impact on people of color. The EPA's Title VI enforcement efforts have been abysmal. According to legal scholars Clifford Rechtschaffen, Eileen Gauna, and Catherine O'Neill, by the close of 2008 "the EPA had processed a total of 211 Title VI complaints since 1993. Of those, 40 (19%) were still pending, and 171 (81%) had been closed. Of the closed cases, 127 (60%) had been rejected and 44 (21%) had been dismissed."[5] In a recent Ninth Circuit decision, *Rosemere Neighborhood Assn. v. EPA,* the court took note of EPA's sloth, finding that "the EPA failed to process a *single* complaint from 2006 or 2007 in accordance with its regulatory deadlines."[6]

Additionally, the disregard for America's most vulnerable communities was highlighted by the American tragedy of Hurricanes Katrina and Rita in 2005. The devastation was not merely the result of the tremendous storms alone, but also the result of decades of discriminatory policies and a general disinclination by the U.S. Army Corps of Engineers to construct a levee system that would be sufficiently protective of human life and property. The force of Hurricanes Katrina

New Orleans home after Hurricane Katrina.
Photo by Lawyers Committee for Civil Rights Under Law.

This report builds on the environmental justice community's collective effort to address discriminatory environmental protection.

and Rita breached 29 Superfund National Priority List sites.[7] Some of the most toxic and hazardous facilities in the nation were then and remain now in the Gulf Coast region, clustered in poor, indigenous and communities of color. The damage and waste runoff from these sites impact the most vulnerable communities and add an additional layer of complexity to cleaning-up and revitalizing these places.

The Obama Administration has the opportunity to build on the foundation laid by the Clinton Administration and leave an indelible mark by repairing the damage done in the eight years under the Bush Administration and entrench the principles of environmental justice in the executive agencies through targeted aggressive enforcement of existing environmental and civil rights laws and through active engagement of executive agencies to regularly report their efforts to address the environmental impacts of their rules and policies on people of color, low-income and indigenous communities.

The early indications from the Obama Administration are encouraging. In particular, we applaud EPA Administrator Lisa Jackson for expressly identifying environmental justice as one of her top seven priorities for EPA's future.[8] Her openness and enthusiasm for the issue is unprecedented and ideal. We are also very pleased that this Administration has been willing to engage in ongoing conversations about the recommendations set forth in this report. At the same time, these early positive statements must lead to concrete action that goes far beyond previous federal efforts.

The purpose of this report is to recommend specific ways that the Obama Administration can further environmental justice. Over the past 18 years, the Lawyers' Committee has worked with environmental justice advocates and represented people of color and low-income communities to eliminate disproportionate pollution burdens. In 2009, the Lawyers' Committee convened a group of leading environmental justice advocates, lawyers, researchers and scholars to discuss the state of environmental justice in the U.S. and to identify federal efforts that could be undertaken to provide equal protection for those people and places that had borne a disproportionate burden of pollution and its adverse effects. This report builds on the environmental justice community's collective effort to address discriminatory environmental protection.

The urgency for this Administration to act is demonstrated by the millions of Americans living near polluting facilities, being exposed to a host of contaminants threatening their health and safety. We must be proactive and vigilant in our commitment to environmental justice. Our call is not merely for enforcement of the existing laws generally, but for aggressive increased enforcement, among other things, where the greatest pollution burdens and threats to human health and safety exist. Communities are living without the most basic of needs like safe drinking water, adequate sewer and other municipal services. Moreover, they are forced to send their children to schools exposed to unsafe levels of outdoor and indoor air pollutants making them,

in turn, more susceptible to asthma and respiratory episodes. We submit this detailed analysis of the state of environmental justice in the United States and the comprehensive series of recommendations to support the advancement of this Administration's commitment to this essential public policy issue. We hope that we can work together with the Administration to achieve our mutual goals towards achieving environmental justice.

Policy Recommendations and Suggested Implementation Strategy

Adherence to and enforcement of the law is paramount to achieving the goals laid out in this report. Where a congressional intent is not clear in a statute, we seek clarity; where the law is weak in its protection, we request that it be strengthened. Protection of human health and the environment has not been equally meted out to all communities. This report offers the tools for change we believe will fulfill the promise of Executive Order 12898 on environmental justice and of this Administration to eliminate disparate burdens and secure crucial protections for the country's most vulnerable populations.

Executive Order 12898

1. Each agency covered by Executive Order 12898 should be required to report at regular intervals on its activities furthering Executive Order 12898.

2. The Department of Justice ("DOJ") should be tapped to issue guidelines for making the Executive Order on Environmental Justice fully consistent with existing civil rights laws.

3. All agencies named in Executive Order 12898 should fully and vigorously implement the executive order.

4. The Administration should encourage agencies not specifically mentioned in Executive Order 12898 but with high potential for environmental justice impacts (*e.g.* Federal Energy Regulatory Commission, Nuclear Regulatory Commission, Centers for Disease Control and Prevention) to voluntarily abide by the directives of Executive Order 12898.

National Environmental Policy Act ("NEPA") and Environmental Permitting

5. Prior to undertaking any environmental permitting or other federal action that may adversely affect human health or the environment the lead federal agency should be required to conduct an environmental justice analysis to determine whether significant disproportionate adverse effects would be caused by the action and to the maximum extent feasible avoid, minimize or mitigate the adverse environmental justice impact.

6. The White House Council on Environmental Quality should be directed to amend NEPA regulations at 40 CFR 1508.8 to expressly identify environmental justice as an issue in NEPA compliance documents.

7. The White House Council on Environmental Quality should amend NEPA regulations 40 CFR 1505.2 and 1505.3 or issue policy guidance directing Federal agencies to establish an enforceable mitigation monitoring plan for any mitigation measure in a NEPA compliance document that reduces environmental justice impacts below the significance level.

Environmental Protection Agency's Strategic Plan on Environmental Justice

8. The Environmental Protection Agency ("EPA") should emphatically and resolutely embrace a strong definition of environmental justice grounded in the central tenet that environmental justice is the prevention, reduction and elimination of the known disproportionate environmental burdens primarily on people of color, indigenous, and low-income communities.

9. EPA should clearly and urgently identify communities of color, indigenous, and low-income communities where there is a known disproportionate environmental burden or risk.

Title VI of the Civil Rights Act of 1964

10. The Administration should seek legislation amending Title VI of the Civil Rights Act of 1964, to explicitly provide for a private right of action to bring claims for violation of its regulations prohibiting federal funding of programs that have a discriminatory impact. Any Title VI amendment should entitle communities to injunctive relief upon a showing that respondent's actions constitute a substantial or significant factor in bringing about the adverse, disparate impacts.

11. DOJ should develop guidelines for Title VI compliance in the context of emergency preparedness and emergency response for recipients of federal funding.

EPA Office of Civil Rights ("OCR")

12. EPA should establish a comprehensive system of public reporting on the OCR's Title VI investigations and findings.

Environmental Enforcement

13. EPA should make full use of existing legal authority to address environmental assaults on people of color, indigenous, and low-income communities. To that end, EPA should revisit the National Environmental Justice Advisory Council ("NEJAC") Enforcement Subcommittee's 1996 memorandum with formal recommendations to EPA. The recommendations from that memorandum are set forth in Appendix A of this report.

14. EPA should implement the NEJAC's June 2003 unanimous recommendation for increased use of the Supplemental Environmental Projects ("SEPs") mechanism to address pollution prevention and environmental justice issues.

15. In order to fully embrace the scope of its authority, EPA should revisit its memorandum entitled "EPA Statutory and Regulatory Authorities Under Which Environmental Justice May Be Addressed in Permitting," from Gary S. Guzy, General Counsel to Steven A. Herman, Assistant Administrator for the Office of Enforcement and Compliance Assurance; Robert Perciasepe, Assistant Administrator for the Office of Air and Radiation; Timothy J. Fields, Assistant Administrator for the Office of Solid Waste and Emergency Response; and J. Charles Fox, Assistant Administrator for Office of Water (December 1, 2000).

16. EPA and DOJ should aggressively enforce violations of environmental laws, targeting communities with the heaviest pollution burdens, and other environmental and health impacts.

17. EPA should aggressively monitor state performance under federally delegated programs and initiate action to withdraw delegated programs from states that fail to enforce the law in sensitive and vulnerable communities.

18. EPA should require assessments of multiple, cumulative and, where possible, synergistic exposures, unique exposure pathways, and impacts to sensitive populations in issuing environmental permits and regulations under the Resource Conservation and Recovery Act, the Clean Air Act, and the Clean Water Act and other applicable federal laws. Similar risk assessment should be made in establishing site-specific clean-up standards under Superfund and Brownfields Programs.[9]

19. EPA should seek the reinstatement of the superfund tax on chemical and petrochemical manufacturers through congressional reauthorization of the Superfund tax.

20. The Justice Department should reiterate and update its commitment to the environmental justice goals it identified in its 1995 Guidance Concerning Environmental Justice.

21. The Justice Department should aggressively enforce environmental violations with greater attention to people of color and low-income communities.

22. A commitment to environmental justice must be complemented with the staff and budgetary capacity for achieving the DOJ's goals.

23. EPA has agreed to undertake a thorough environmental justice review of its Definition of Solid Waste ("DSW") rulemaking. The 2008 revisions to the DSW rule would see hazardous waste recycling facilities already concentrated near low-income and communities of color, with less regulatory control under RCRA over their operations and activities, potentially increasing adverse public health conditions near these vulnerable communities.[10] Prior to promulgating the rule, EPA declined to investigate the disparate impact of the revision to the definition of solid waste on low-income and minority communities, arbitrarily concluding that the revision would have no environmental impact.[11] EPA should not allow states to use its draft Definition of Solid Waste until a thorough environmental justice review of this rule is completed, and a comprehensive

methodology is developed to assess the potential impact of the operations of hazardous waste recycling operations on environmental justice and low-income communities.

24. The Toxic Substances Control Act ("TSCA") is the most outdated environmental statute on the books. It has not been reauthorized since it was passed in 1976. TSCA needs to be reformed in a manner that will provide EPA broad authority to protect environmental justice communities from toxic chemicals in the commercial marketplace. More than 80,000 chemicals have been produced and used in the United States and the EPA has only been required to test 200 of them against a safety standard. Of that 200, only five have been restricted. Four key principles of TSCA reform are to (a) ensure environmental justice – effective reform should contribute substantially to reducing the disproportionate burden of toxic chemical exposure placed on people of color, low-income and indigenous communities; (b) protect vulnerable groups using the best science – chemicals should meet a standard of safety for all people, including children, pregnant women, and workers. "The extra burden of toxic chemical exposure on people of color, low-income and indigenous communities must be reduced."[12] The EPA should adopt the recommendations of the National Academy of Science on how to better assess risks from chemicals; (c) immediately initiate action on the worst chemicals – persistent, bio-accumulative toxicants are uniquely hazardous. "Any such chemical to which people could be exposed should be phased out of commerce. Exposure to other toxic chemicals, such as formaldehyde, that have already been extensively studied, should be reduced to the maximum extent feasible;"[13] (d) hold industry responsible for demonstrating chemical safety--unlike pharmaceuticals, chemicals are currently presumed safe until proven harmful. "The burden of proving harm falls entirely on EPA. Instead, chemical manufacturers should be responsible for demonstrating the safety of their products."[14]

25. EPA has significant discretionary authority to take into account environmental justice concerns of risk accumulation and cumulative effects under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA").[15] When EPA finds a risk of concern to workers, it should aggregate all risks of concern to workers, children, consumers, and the environment in comparing those risks to the benefits to growers of using the pesticide.

26. FIFRA affords workers far less protection from workplace hazards than industrial workers are afforded under the Occupational Safety and Health Act. EPA should make it a priority to revise and strengthen FIFRA's worker protection standard, to protect workers from heat-induced illnesses and deaths, to require employers to provide hazard information to workers about the pesticides to which they are exposed, and to require medical monitoring of workers exposed to hazardous pesticides in the course of their work.

27. EPA should align its discretionary grant and other funding, and loan guarantee programs consistent with the Livability Principles established in the federal Partnership for Sustainable Communities of June 2009.

Toxic Air Pollution

28. EPA should issue all overdue air toxics control requirements, and correct all deficient air toxics control requirements on an expedited basis. EPA's Office of Air Quality Planning and Standards ("OAQPS") must have fully adequate resources for this task.

29. The Office of Management and Budget ("OMB") should be prevented from delaying air toxics rulemakings. EPA must be required to seek, and OMB must be required to grant, waivers of the Paperwork Reduction Act review process for rulemakings to issue overdue air toxics standards or to correct air toxics standards that are less protective than the Clean Air Act requires.

30. EPA's approach to issuing risk-based air toxics standards should be revised to reflect the true health risk faced by people in the communities most exposed to toxic air pollution and to ensure that such risks are reduced to protect public health with an ample margin of safety.

Our call is not merely for enforcement of the existing laws generally, but for aggressive increased enforcement, among other things, where the greatest pollution burdens and threats to human health and safety exist.

31. EPA should establish rules requiring actual continuous monitoring of toxic air emissions so that affected communities will be able to determine the identities and quantities of toxic pollution to which they are exposed and so that citizens, state and local governments, and the federal government can fully enforce all air toxics standards.

32. EPA should eliminate the "malfunction" exemption that currently allows sources of toxic pollution to exceed their emission standards with impunity.

33. EPA should prioritize enforcement of air toxics emission standards in communities that are most affected by toxic air pollution.

Coal Mining

34. The federal Public Lands Management Act should be revisited and revised to reflect current mining industry practices.

35. Better guidance regarding multiple-use planning of public lands is necessary where there are communities of color, indigenous or low-income communities that rely on the use of public lands. Also, the hierarchy of uses should be more balanced. Currently, uses such as mining take precedence over grazing, or water for fish or forests.

36. The "highest and best use" language in the Act is vague, and a clearer definition that will protect environmental justice interests should be developed; *i.e.,* instead of focusing on obtaining the highest graze yield, the best use should be defined as protection of natural resources.

Power Generation from Coal

37. EPA should swiftly finalize rules to force the cleanup of power plants that have saddled vulnerable communities with toxic air and water pollution for decades. Specifically, EPA should do the following: finalize Maximum Available Control Technology standards to limit emissions of hazardous air pollutants from power plants; finalize and enforce strong national standards for very fine particulate matter ($PM_{2.5}$) and ozone, enforce Best Available Retrofit Technology requirements, and promulgate binding Effluent Limitation Guidelines for discharges of heavy metals and other contaminants from power plant "scrubbing."

38. The Department of Energy, the Rural Utilities Service, and other agencies should avoid funding projects that increase dependence on dirty power generation. To this end, the Administration should limit funding for so-called "advanced" coal combustion technologies to projects that are committed to achieving 90 percent or greater reductions in emissions of carbon dioxide and also maximum achievable reductions of hazardous air pollutants, SO_x, NO_x, $PM_{2.5}$ and PM_{10}.

Cessation of Mountaintop Removal Mining

39. The Obama Administration should conduct a reexamination of a Final Environmental Impact Statement ("FEIS") started under the Clinton Administration and completed by the Bush Administration that evaluated impacts of mountaintop removal. We believe current findings do not correlate with the FEIS's recommendations.

40. The Obama Administration should issue a moratorium on all mountain top removal mining until the full environmental and public health impacts of this method are accounted for.

Overhaul of the Office of Surface Mining

41. The Office of Surface Mining should vigorously enforce existing law to stop ongoing devastation from mountaintop removal, prevent unsafe waste disposal in mines and work with EPA to clean up natural resources polluted or damaged by strip mining.

Regulation of Coal Combustion Waste

42. EPA should aggressively enforce existing Surface Mining Control and Reclamation Act ("SMCRA") and Resource Conservation and Recovery Act ("RCRA") regulations covering sludge and slurry.

43. EPA should regulate coal ash under Subtitle C of RCRA to ensure federally enforceable minimum standards for the safe disposal of ash in engineered landfills.

44. EPA should require the phase out of wet storage of coal ash in surface impoundments.

45. EPA and/or Office of Surface Mining should regulate stringently the placement of coal ash in surface mines to prevent unsafe permanent disposal of industrial waste in mines.

46. Stricter enforcement of the regulations relating to underground injection needs to occur. Many injection sites are located at old mines, which by nature have openings. There are regulations specifying a walling off procedure, but coal companies are not following them nor are they being applied or enforced by federal or state agencies.

47. The Obama Administration should promote legislation to amend the Clean Water Act to clarify that the discharge of mining tailings into a body of water is not an activity that can be permitted as wetlands fill. Rather, such a discharge requires a permit under the National Pollution Discharge Elimination System ("NPDES") program.

48. EPA should finalize Effluent Guideline Limitations under the Clean Water Act to stop ongoing contamination of rivers and streams from coal combustion wastewaters.

49. The permit renewal process should incorporate an exhaustive review focusing on public health and environmental health impacts of the permits, as well as an economic analysis, including job loss, property values, subsidence issues, and superfund site remediation.

Healthy Schools

50. EPA should engage the Department of Education regarding EPA's efforts to limit environmental contaminants near schools and the Department of Education should work alongside EPA when appropriate.

51. EPA should host 10 regional town hall meetings across the country to collect baseline information on children's health at schools and childcare centers.

52. EPA should work with community-based environmental justice groups to monitor air quality near local schools and possible migration pathways to inside schools and develop a plan to address, reduce, or eliminate toxic air contaminants. Such plans should, in addition to parents and school administrations, involve local industry and local, state, and federal governments.

53. EPA should implement a robust, high performance school siting guidance that recommends policies and best practices for state and city environmental protection agencies in how they carry out site evaluations and site cleanups, so that the siting of schools avoids environmental health hazards posed by contaminated sites and off-site sources of pollution. The guidance should also recommend that the school siting processes be fully transparent and meaningfully involve parents, teachers, staff and students. In particular, the guidance should be sensitive to and address the needs of low-income communities and communities of color that are already disproportionately exposed to environmental health hazards where they live.

54. Guidance should also be developed for the siting of cell towers, new industries, roads, transportation routes, and other potential sources of pollution near existing schools. EPA should actively engage states in strengthening their capacity to provide support to school districts in the environmental site evaluation of proposed schools sites.

55. The Department of Education should endorse the EPA Model School Siting Guidelines and require all recipients of federal assistance to comply with it.

56. Minimum mandatory standards for environmental quality and opportunity around schools should be set nationally so that no students are at a disadvantage because of the regions, states, or localities in which they live and ensure schools serving low-income communities have space for recreation and school-based gardens.

57. Where possible, outdoor air monitors should be located near schools. EPA should analyze and report regularly to communities on current ambient air toxic monitoring.

58. The Administration should endeavor to fully fund EPA healthy schools programs and the Office of Children's Health Protection and to fund EPA's related grant programs.

59. EPA should provide grants to state health and environment agencies to create school environmental quality plans and implementation timelines.

60. EPA should set federal guidelines for state and local schools agencies on indoor air quality in schools, integrated pest management, school chemical cleanouts, drinking water, school design, asbestos, PCBs in caulking, molds, comprehensive building inspections, and how pediatric environmental health specialty units ("PEHSUs") can work with state health agencies on on-site investigations.

61. EPA and the Centers for Disease Control and Prevention ("CDC") should strengthen their funding for PEHSU's and charge them with creating regional technical assistance centers that parents and communities can tap for information and intervention services on environmental problems in schools and child care centers. Each regional center should have an accessible website where city and state specific policies, rules, regulations, and best practices for school environments are posted along with the results of on-site investigations.

62. EPA and CDC should establish a research agenda for school environments that includes tracking and public reporting of school environmental problems impacting children by state.

Climate Change

63. Priority should be given to undertake additional research to reduce and eliminate climate-related illnesses and death.

64. EPA should develop a preparedness strategy for heat-related illnesses, which already disproportionately impact the elderly, children, and low-income residents.[16]

65. EPA should measure the success of adaptation strategies to ensure that they protect everyone. To that end, invest in infrastructure protection, such as enhanced levees, invest in efficient air-cooling technologies, and improve surveillance of infectious diseases related to climate change.

66. The Administration should extensively promote the use of domestically manufactured renewable energy sources and energy conservation technologies in urban areas and environmental justice communities in order to reduce emissions of greenhouse gases, to reduce emissions of co-pollutants such as fine particulate matter ($PM_{2.5}$) and to help economically revitalize urban areas, environmental justice and indigenous communities by providing badly needed jobs and other economic opportunities to residents.

67. The Administration should ramp up the use of brownfields sites for alternative energy production and generation, such as wind turbines, currently under development in EPA's RePower America initiative.

68. Adopt carbon trading systems only to the extent necessary and only when 100 percent of the carbon allowances can be auctioned annually and a significant portion of the proceeds used to support global warming initiatives in urban areas, indigenous, low-income and environmental justice communities.

69. The Administration should ensure that any carbon trading market is properly regulated to address and redress co-pollutant issues that are known to co-exist with the establishment of carbon markets.

70. The Administration should prepare climate change disaster mitigation programs specifically for residents of urban, indigenous, low-income and environmental justice communities.

71. The Administration should mandate dramatic reductions in emissions of greenhouse gases and air pollution for all federally funded projects before they are funded.

72. The Administration should establish a complaint and review process with the power to stop or significantly alter projects under consideration by the Federal Transportation Administration, the Department of Energy and EPA.

Green Jobs

73. All present and future stimulus projects should include local resident hiring at prevailing wages rates.

74. Green jobs and infrastructure projects under the American Recovery and Reinvestment Act should provide adequate training and have the potential to benefit low-wage workers and their families. This can be achieved, in part by adopting or utilizing training program models at community colleges, vocational schools and minority serving institutions, encouraging on-the-job training, and through labor union training programs.

75. New green jobs projects should partner with local Workforce Investment Boards and organizations in applying for federal funding.

76. The Department of Labor should partner with the Departments of Education, the Department of Energy, EPA and National Institute of Environmental Health Sciences

("NIEHS") to invest in the training and development of a qualified workforce to manufacture, install and operate new and advanced clean energy and energy efficiency technologies and systems of the 21st century.

77. Encourage pathways to training and employment for residents of Department of Housing and Urban Development ("HUD") subsidized housing by partnering with local Workforce Investment Boards and Public Housing Agencies.

78. Green jobs funding should be targeted towards people of color institutions and universities, tribal colleges and vocational programs and areas of high unemployment.

Transportation

79. A dramatic expansion of public transit funding is necessary to support the growing number of people living outside city work centers. Eighty percent of the funding from the Surface Transportation Authorization Act should be committed to public transit, 20 percent to highway and road maintenance rather than new road construction.

80. Under the Surface Transportation Authorization Act of 2009/10, a minimum of 50 percent of the entire Act's allocation for transit should be dedicated to *operating* purposes, with at least half of that restricted to *bus* operations.[17] Such distribution of resources will stop the massive fare increases and service cuts local jurisdictions are contemplating and allow for more bus and rail service on existing lines, fare reductions, free transfers, 24-hour/seven days a week, transit service with a block grant to cities and rural areas to reduce all transit fares by 50 percent.

81. The Department of Transportation ("DOT") should prioritize capital preservation over expansion, with at least half of all capital funds restricted to bus fleets.

82. The primary use of bus and rail capital should be for system preservation and modernization. In terms of expansion, the focus should be on bus expansion.

83. DOT should align its discretionary grant and other funding, and loan guarantee programs consistent with the Livability Principles established in the Federal Partnership for Sustainable Communities of June 2009.

84. Allocate funding from the Surface Transportation Authorization Act of 2009/10 to mitigate air quality at schools, hospitals, and residences that are significantly impacted by diesel particulate matter and very fine particulate matter from vehicles on Federal highways and rail lines.

Housing and Urban Development

85. HUD should work closely with EPA to ensure that new federally subsidized housing follows strict application of maximum residential clean-up standards at Brownfields sites that will now be considered for HUD funded or subsidized housing construction. HUD should develop its guidance for housing construction on Brownfields sites in tan-

dem with EPA and apply the strictest public health protections to achieve highest and best use principles.

86. The Administration should seek a legislative amendment of the Fair Housing Act of 1968 to include provisions that make it illegal to knowingly rent, lease, or sell housing units that pose an environmental health hazard to residents (*e.g.,* lead contaminated or mold infested), or to construct housing on or near land or structures that are known or suspected of being contaminated with serious environmental hazards.

87. EPA and HUD should vigorously pursue the removal of lead from all federally-owned and subsidized housing.

88. EPA and HUD should vigorously pursue the removal of toxic mold from all federally-owned and subsidized housing.

89. The Administration should mandate that all federally-owned or subsidized housing construction adhere to energy efficient, healthy and green home construction standards.

90. HUD should significantly increase support at the staff and grant levels for brownfields redevelopment activities.

91. Continue to fund the HUD Brownfields Economic Development Initiative ("BEDI") program at the current annul level or more.

92. Restructure and incorporate the HUD BEDI program into the Sustainable Communities Initiative, and consider renaming it the "Sustainable Brownfields Economic Development Initiative."

93. Seek continued funding and support for the HUD 108 loan program (although it should be de-linked from the HUD BEDI program), which provides unique and critical funding support for large-scale brownfields redevelopment projects and vacant property revitalization.

94. Provide policy and grant support to vacant property programs that seek to stem the resulting distressed neighborhood blight affect from home foreclosures.

95. HUD should align its discretionary grant and other funding, and loan guarantee programs consistent with the Livability Principles established in the federal Partnership for Sustainable Communities of June 2009.

Public and Environmental Health

96. The Department of Health and Human Services ("HHS"), the Agency for Toxic Substance and Disease Registry ("ATSDR") and EPA should consider cumulative impact assessments along with standard quantitative risk assessments to determine exposure, disproportionate impact or harm.

97. HHS, ATSDR, and EPA should perform an exposure audit where there is particularly suggestive evidence for toxic exposure in a community or where there is strong evidence that there is a current public health or environmental threat.

Homeland Security and Emergency Response

98. The Administration should promote the amendment of the Stafford Act to require EPA to perform soil, water and air testing in addition to mandating that services and support provided to victims of emergencies not harm the health and safety of the recipients in the short or long term.

99. The EPA and the Department of Homeland Security ("DHS") should adopt site location standards requiring a safe distance between a residential population and an industrial facility, with the development of locally administered "Fenceline Community Performance Bonds"[18] required to provide for the recovery of residents impacted by industrial accidents or natural disasters that result in industrial accidents.

100. Relevant federal agencies should work together to develop a site-specific environmental justice analysis methodology for use in federal siting issues (e.g., energy facilities, liquefied natural gas facilities, high powered transmission lines, and extractive mining) that considers cumulative risk or a full impact analysis.

101. DHS should require local industries to have an approved hazardous communication plan that immediately notifies local officials and the affected community of a release.

102. DHS should require state and local governments to develop and distribute emergency preparedness and evacuation plans for communities located near or adjacent chemical and petrochemical facilities. These plans should provide for immediate notification and safe evacuation of affected communities in the case of an industrial accident, terrorist attack or natural disaster.

103. DHS should create enhanced community assessments and communication methods to improve cultural sensitivity for environmental justice communities.

Federal Facilities

104. EPA should publish strong regulations for perchlorate contamination in drinking water sources.

105. EPA should revisit NEJAC's 2004 report, "Environmental Justice and Federal Facilities: Recommendations for Improving Stakeholder Relations Between Federal Facilities and Environmental Justice Communities" and fully consider its recommendations.

106. The Department of Defense ("DOD"), the Department of Energy ("DOE"), or other appropriate federal agencies should provide access to adequate health services for communities exposed to hazardous substances from federal facilities.

107. The Administration should seek increased funding for communities to participate in federal cleanup programs and for improvement of communication between facilities, regulators, and environmental justice communities.

108. The Administration should support an effort to modify RCRA to specifically allow for RCRA citizens' suits to be filed concerning Formerly Used Defense Sites ("FUDS").

Gulf Coast Restoration and Hurricanes Katrina, Rita, Gustav and Ivan

109. The ecological restoration required to provide the first phase of coastal protection should be prioritized by this Administration, funded adequately, and executed with precision by the Army Corps of Engineers in order to halt the repeated assaults on this region, its natural resources and its people.

Semi-Urban and Rural Areas

110. EPA should ensure that its remedies and emergency responses in one area do not create environmental burdens in communities of color, indigenous, and low-income communities, especially unincorporated communities, to ensure that decisions to accept waste like that of Perry County, Alabama do not create disproportionate impacts on people of color, indigenous, and low-income communities.

111. EPA should ensure that its directives to state and local governments are implemented fairly and thoroughly within communities of color, indigenous communities, and low-income communities so that situations like that of the Holt family in Dickson County, Tennessee are not repeated.

Industrial Animal Production

112. Strengthen regulation of emissions from concentrated animal feeding operations, such as ammonia, hydrogen sulfide, and volatile organic compounds emissions.

Lack of Sewer and Water Infrastructure

113. The Administration should ensure that rural areas are provided with adequate water and sewer services by working with local agencies and ensuring vigorous enforcement of the Safe Drinking Water Act in rural and semi-urban communities.

Land Loss

114. The Administration should review the policies of the Department of Agriculture to ensure that African American farmers and other farmers of color have equal access to federal loans, debt relief, and farm growth opportunities.

Food Security and Federal Agriculture Policy

115. EPA was required to ensure by the end of 2006 that there is a reasonable certainty that no harm will result to infants and children from aggregate exposures to pesticides. EPA reviewed and reregistered existing food-use pesticides to comply with this mandate, but it did not consider pesticide drift exposures. This oversight has left farm worker children, who are, as a general matter, disproportionately low-income and Latino, at risk of harm from pesticide exposures. EPA should immediately require no-spray buffers around schools, day care centers, homes, parks and other places where children congregate and should expeditiously undertake a full evaluation followed by changes in the registrations to minimize harmful pesticide drift exposures to children.

Indian Country

116. The American Indian Environmental Office should be housed in the Office of International Programs at EPA. The American Indian Environmental Office should also be headed by a Native American environmental professional.

117. There should be significant infrastructure investments in Indian country to enable tribal communities to fulfill their delegated authority responsibility to implement existing environmental and regulatory programs in Indian country. Most Indian Reservations still lack basic drinking water and sanitary sewage systems.

118. Federal agencies should work collaboratively when regulating natural resources in Indian country that cross inter-state boundaries, and allow tribes to be a part of the regulatory coordination process.

119. The federal Surface Transportation Board should be scrutinized for potential antitrust violations and for its process for determining necessity findings for new railroad funding and expansion through Indian country to reach new coal mining sites, while completely bypassing public rail needs of tribal communities. For example the necessity finding rendered by the Surface Transportation Board for the Tongue River Railroad expansion in Montana should be re-examined.

120. Federal funding for green job training programs should be made available to tribal colleges and vocational schools.

121. EPA and DOE should close the regulatory gaps on coal bed methane exploration in Indian country and the impact on nearby water quality. Total Maximum Daily Load or "TMDL" standards need to apply to the exploration of new energy sources in Indian country and federal water quality standards must be upheld in these instances.

122. Many tribes have waited years for EPA to approve tribal water quality standards as established by the tribes themselves via their delegated authority under the Clean Water Act. These delays must be shortened. This may be achieved by Congress expressly delegating relevant federal authority to tribes. In the meantime, EPA could promulgate federal water quality standards as a placeholder for tribal standards.

123. Prioritize Reclamation Fund monies to fund Indian water rights settlements. The Reclamation Fund is an appropriate primary funding mechanism for Indian water rights settlements in the west. The Reclamation Fund acquires money through repayments on the sale, lease or rental of public lands, and revenues from mineral leases and timber sales. These payments have been increasing in recent years largely due to increasing prices of oil and gas, and the available balance in the fund has increased as well. The Reclamation Fund should be Congress' primary funding source for Indian water rights settlements.

124. Support tribal preparation, litigation, negotiation and settlement of water rights claims. The Bureau of Indian Affairs ("BIA") regional offices distribute vital funding to tribes to conduct essential technical studies to enable them to participate fully and effectively in the litigation and negotiation processes. Over the past decade these resources have been badly cut to the point tribes are seriously crippled in these efforts. Additional financial and human resources are necessary to assist tribes in developing and pursuing Indian water rights claims. Currently 19 tribes are engaged in settlement discussions and nine more have requested monies for such purposes. The demand for funding and staffing is going to increase as water concerns continue to rise, and the BIA must be adequately equipped with staff and program monies to distribute to tribes for the preparation and subsequent negotiation of water rights claims.

125. Support the Department of Interior's Indian Water Rights Office. The Department of Interior Indian Water Rights Office should be permanently placed in the Department of Interior's structure and effectively staffed and funded to assist current and future water rights claims by the hundreds of Indian tribes. Water rights settlements must be a top priority, as water issues loom over tribal and non-tribal communities alike.[19]

Canadian Border

126. In the medium to long-term, the U.S. should work to eliminate its reliance on energy from the Canadian tar sands. Whereas in the interim period, the Administration should exempt Canada (as it has Mexico) from the North American Free Trade Agreement's proportional sharing clause.

Mexican Border

127. EPA should revisit NEJAC's 2003 report, "Unheard Voices from the Border: A Report on Environmental Justice in the U.S.-Mexico Border Region from Past to Future" ("Border Report"). NEJAC developed the report, in part, from the proceedings of the "NEJAC International Roundtable on Environmental Justice on the U.S.-Mexico Border," August 19-21, 1999, National City, California.

128. EPA should improve public participation processes by building community capacity and promoting reform of U.S., Mexican, and international institutions, including the North American Commission for Environmental Cooperation, and agencies such that community input is better taken account of in programmatic priorities.

129. EPA should broaden environmental protection programs at the border beyond water infrastructure issues.

130. EPA should strengthen and improve coordination of national and cross-border environmental enforcement efforts.

131. EPA should strengthen tribal government capacity and involvement in programs of the U.S., Mexico, and international border institutions.

132. EPA should improve the incorporation of community voices and environmental justice issues in sustainable development efforts at the border.

133. EPA should continue to address site-specific issues, including illegal hazardous waste sites on both sides of the border.

134. EPA should revisit the border communities' recommendations made at the Border Roundtable and provide a follow-up report that details EPA's activities on those recommendations.

Environmental Justice refers to those cultural norms and values, rules, regulations, behaviors, policies, and decisions to support sustainable communities where people can interact with confidence that their environment is safe, nurturing, and productive. Environmental Justice is served when people realize their highest potential without experiencing the "isms." Environmental Justice is supported by decent paying and safe jobs; quality schools and recreation; affordable housing; adequate health care; personal empowerment; and communities free of violence, drugs, and poverty. These are communities where both cultural and biological diversity are respected and highly revered, and where distributive justice prevails.

Professor Bunyan Bryant
"Environmental Justice Advocacy:
Working for Economic and Environmental Justice"
Ann Arbor, MI 2002

Part 1: Introduction

As of 2007, more than nine million people are estimated to live in circular host neighborhoods within three kilometers of the nation's 413 commercial hazardous waste facilities.

For more than 20 years, communities of color, indigenous and low-income communities have sought to draw attention to the unique environmental and public health threats undermining their health and well-being. These communities have suffered at the hands of a regulatory and public health system that often by-passed or overlooked the circumstances they have had to endure. Knowing that the U.S. has perhaps the most expansive environmental and public health regulatory system of any nation in the world makes the neglectfulness all the more bewildering.

Impacted communities and their allies have relied on a number of different strategies to bring about equal protection before the law. From grassroots advocacy, to scientific and social science research, to legal, legislative and public policy advocacy, communities have set out to bring about redress and change the course of environmentalism as we know it. Federal agencies have always been critical in the push for progressive reform at the juncture of environmental and public health policy.

The collaborative efforts contributing to advancing environmental justice crested in February of 1994, when President Clinton issued Executive Order 12898[20] "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations." The order tasked agencies to "make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States and its territories and possessions, the District of Columbia, the Commonwealth of Puerto Rico, and the Commonwealth of the Mariana Islands."

This executive order was the first of its kind in that it directed all executive branch federal agencies to develop strategies to advance environmental justice. It also required the coordination of all federal agencies efforts to address environmental justice and grassroots participation in human health research, including data collection and analysis where practical and appropriate.[21]

Much progress was achieved through the promulgation of Executive Order 12898, but all progress ceased when the Clinton Administration came to an end. From 2001 until 2008, many of the hard won advances dissipated or were actively undermined at the federal level.

When he took office as EPA Administrator during the second term of the George W. Bush Administration, Steven L. Johnson, in a November 4, 2005[22] memo-

randum, "reaffirmed" EPA's commitment to environmental justice. In a brief two-page statement he said, "Ensuring environmental justice means not only protecting human health and the environment for everyone, but also ensuring that all people are treated fairly and are given the opportunity to participate meaningfully in the development, implementation, and enforcement of environmental regulations, and policies."

He listed among his top environmental justice initiatives:

- Developing and conducting EPA's programs, policies, and activities that substantially affect human health and the environment to ensure the fair treatment of all people, including minority and/or low-income populations;
- Ensuring fair and equitable enforcement of protective environmental laws for all people, including minority and/or low-income populations;
- Ensuring greater public participation in the Agency's development and implementation of environmental regulations and policies; and
- Improving research and data collection for Agency programs relating to the health and environment of all people, including minority and/or low-income populations.

Not surprisingly, many environmental justice advocates interpreted Mr. Johnson's statement as a retreat from EPA's previous commitment under the Clinton Administration. His cryptic language seemed to redefine environmental justice as providing environmental protections for all without specifically prioritizing over-burdened low-income and indigenous populations and communities of color. His statement seemed to reaffirm EPA's overall mission of protection of human health and the environment for all Americans without offering more. In other words, Mr. Johnson's statement diluted the letter and spirit of Executive Order 12898, which singled out low-income, indigenous and communities of color for particular scrutiny in addition to providing other progressive measures intended to address disparities.

Indeed, less than one year after the former Administrator's reaffirmation memorandum, EPA's own Office of the Inspector General ("OIG") issued a deeply critical analysis of EPA's environmental justice programs, concluding "the Agency cannot determine whether its programs *cause* disproportionately high and adverse human health or environmental effects on minority and low-income populations.[23] In other words, the Inspector General's concern went beyond suspicions that EPA was failing to further environmental justice to examine whether EPA was one of the factors *contributing* to environmental racism and classism.[24] The 2006 OIG report recommended the following:

- Require the Agency's program and regional offices to identify which programs, policies, and activities need environmental justice reviews.
- Ensure that environmental justice reviews determine whether the programs, policies, and activities may have a disproportionately high and adverse environmental or health impact on minority and low-income populations.

- Require each program and regional office to develop, with the assistance of the Office of Environmental Justice, specific environmental review guidance, which includes protocols, a framework, or directions for conducting environmental justice reviews.
- Designate a responsible office to (a) compile the results of environmental justice reviews, and (b) recommend appropriate actions to review findings and make recommendations to the decision making office's senior leadership.

EPA's Office of Environmental Justice ("OEJ"), although not entirely agreeing with the OIG report, nonetheless accepted the recommendations. In 2008, more than 14 years after the historic day when President Clinton signed Executive Order 12898, EPA introduced to the public new tools under development to attempt to achieve the basic, most skeletal mandate under the executive order, to help its environmental justice programs assess its compliance.[25]

Unfortunately, the die had already been cast. The report *Toxic Wastes and Race at Twenty*[26] documented researchers' 2007 findings that environmental conditions in low-income, indigenous and communities of color were worsening. As of 2007, more than nine million people are estimated to live in circular host neighborhoods within three kilometers of the nation's 413 commercial hazardous waste facilities.[27] More than 5.1 million people of color, including 2.5 million Hispanics or Latinos, 1.8 million African-Americans, 616,000 Asian/Pacific Islanders, and 62,000 indigenous people live in neighborhoods with one or more commercial hazardous waste facilities.[28] Neighborhoods with facilities clustered close together have higher percentages of people of color than those with non-clustered facilities (69 percent versus 51 percent).[29] Likewise, neighborhoods with clustered facilities have disproportionately higher poverty rates.[30]

Environmental justice advocates hope that under the Obama Administration, EPA will not only comply with Executive Order 12898, but will herald the order, taking an aggressive lead among the agencies charged to address environmental justice and bring them in locked step, in accordance with both the letter and spirit of the executive order on environmental justice. This report outlines a host of initial steps the Obama White House should consider for EPA and all of the 17 agencies expressly included under the executive order's purview. These steps may likewise be applied to agencies not specifically identified in the Executive Order, such as the Nuclear Regulatory Commission and the Federal Energy Regulatory Commission, agencies that nonetheless may cause environmental justice impacts through their discretionary decisions.

In 2006, EPA's own Office of the Inspector General ("OIG") issued a deeply critical analysis of EPA's environmental justice programs, concluding "the Agency cannot determine whether its programs cause disproportionately high and adverse human health or environmental effects on minority and low-income populations.

Part 2: Legal Authority to Eliminate Disparities and Responsible Governmental Agencies

2.1 Executive Order 12898

The current language in Executive Order 12898 (the "EO") is unduly vague, which allows federal agencies too much discretion in the breadth of policy development with no requirement of program evaluation or mandate for achieving measurable goals. Moreover, while attention to environmental justice in the context of the National Environmental Policy Act ("NEPA") was identified in the Presidential Memorandum accompanying the EO, attention to the issue in NEPA compliance documents has been uneven and specifically identified mitigation measures have not consistently been implemented. An accountability mechanism to ensure compliance with the mandates of the EO should be adopted by affected agencies. Regular reporting should be mandated, requiring each agency within its purview to report publicly on its compliance activities under the EO, and commitments to mitigation must be enforceable. To that end, we believe the Administration should direct the White House Council on Environmental Quality to issue guidelines and regulations to ensure that environmental justice is consistently analyzed in NEPA compliance documents and commitments to mitigation are carried through.

Further, the Administration should direct the Department of Justice to issue guidelines to make the EO fully harmonious with existing environmental and civil rights laws. Specifically, the Civil Rights Division of the Department of Justice should draft a guidance to agencies on the interpretation of civil rights laws, affirming the ability of the government to consider race, color and national origin when shaping polices to address disparate burdens. An accurate analysis of the law by the Department of Justice is critical to supporting all agencies' efforts under the Executive Order to effectively address racialized environmental burdens.

The central tenet of environmental justice is the prevention, reduction and elimination of the known disproportionate environmental burdens primarily on people of color, indigenous, and low-income communities. EPA should therefore clearly define what constitutes such a community of concern.

2.2 EPA's Strategic Plan on Environmental Justice

In 2005, following the first of two OIG reports criticizing EPA's environmental justice program, EPA issued its draft Framework for Integrating Environmental Justice and an Environmental Justice Strategic Plan.[31] Unfortunately, the Strategic Plan failed to set forth measurable goals and specific strategies that would reduce or eliminate the disproportionate burden of environmental pollutants on people of color, indigenous and low-income communities and did not address the OIG's 2004 recommendations.

As most know, the environmental justice EO was intended to address serious, longstanding problems and prevent people of color, indigenous and low-income communities from being disproportionately burdened by environmental hazards. The EO was issued to direct specific federal agencies, in coordination, to address the disproportionate impact their programs and policies may have on these communities. This goal is in addition to the EPA's overall responsibility to protect all communities from environmental degradation and in addition to the overall goals and responsibilities of the other agencies specified in the EO.

The EPA's definition of environmental justice does not even capture these basic objectives, as evidenced by the following neutral statement from the EPA's 2006-2011 Strategic Plan:

- *Environmental Justice* is 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.[32]

- By way of contrast, in its earlier 1995 Environmental Justice Strategy, the EPA more emphatically identified one of its objectives at the time as the following:

- Include in its enforcement efforts identification of communities and populations, such as *low-income urban and rural populations,* which suffer from disproportionately high and adverse human health or environmental effects.[33] (Emphasis added.)

The EPA's more recent weakened approach to environmental justice, which largely reiterates EPA's overall mission and fails to take targeted and aggressive action to address significant documented disparities, guts the soul and intent of environmental justice and Executive Order 12898. Instead, the definition of environmental justice should state expressly that EPA seeks to address the disproportionate burdens of environmental hazards on people of color, indigenous and low-income communities.[34]

The central tenet of environmental justice is the prevention, reduction and elimination of the known disproportionate environmental burdens primarily on people of color, indigenous, and low-income communities. EPA should therefore clearly de-

fine what constitutes such a community of concern. Analytic methods have been developed using, e.g., zip code and census data to identify areas of concern; however, these methods have often lacked detailed local land use data that in some cases have created the potential to actually exclude communities of color, indigenous, and low-income communities that have been small enough to be overlooked by some methodologies. We caution that methods should be fine-tuned to overcome these issues. In doing so, both EPA and the public will be better able to track EPA's efforts and achieve environmental success in these small communities as well as the larger, more obvious over-burdened communities.

In Rosemere Neighborhood Association v. EPA…the Court noted that "EPA failed to process a single complaint from 2006 or 2007 in accordance with its regulatory deadlines"…we urge EPA to establish a comprehensive system of public reporting on OCR's Title VI investigations and findings.

2.3 Civil Rights: Title VI of the Civil Rights Act of 1964

The field of environmental justice lies at the nexus of the civil rights and environmental movements and implicates the attendant laws, statutes and regulations of those two frameworks. Obviously, a crucial instrument in the environmental justice toolbox is Title VI of the Civil Rights Act of 1964.[35] Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C.S. § 200d *et seq.,* provides that no person 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 funding.[36]

2.3.1 Administrative Enforcement of Title VI

Pursuant to Section 602 of the statute, most federal agencies have promulgated regulations that enforce this anti-discrimination guarantee and provide an investigation and enforcement process for reviewing complaints of racial discrimination filed with a particular agency. In 1964, a presidential task force working in conjunction with the Department of Justice ("DOJ"), which helped draft the original language of Title VI, issued model Title VI enforcement regulations mandating that recipients of federal funds not use "criteria or methods of administration which have the *effect* of subjecting individuals to discrimination."[37] (Emphasis added.) Since then, every federal Cabinet department and about 40 federal agencies adopted those model regulations as their official regulations implementing Title VI.[38] It wasn't until 20 years after the establishment of this agency that EPA first promulgated its "discriminatory effect" Title VI regulations based on the DOJ model regulations that it invited administrative complaints alleging Title VI violations against recipients of federal funding.

In early 1998, EPA issued its 11-page *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits* or "Interim Guidance." EPA endured a hailstorm of criticism from commenters representing a range of interests, who claimed that EPA had failed to establish a clear process for addressing potentially significant adverse disparate impacts. In response, EPA tabled the guidance and assembled a formal Title VI Implementation Advisory Committee under the Federal Advisory Committee Act ("FACA"). The Title VI FACA agreed on an overarching set of principles, among other things, which led EPA to issue its 147-page *Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs* ("Draft Title VI Guidance").[39] The Draft Title VI Guidance offered up a broad menu of methods for defining "disparate impact," which ultimately struggled to define comparison communities against which disparate impacts could be measured. In sum, its case-by-case recipe offered no certainty and much less comfort to environmental justice advocates and other stakeholders, allowing EPA, in theory, to reach any conclusion using any method to define disparate impact.

The most famous example illustrating the haphazard approach to Title VI that EPA adopted in the 1990's was a case known informally as "Select Steel."[40] In that case, EPA ruled that compliance with the health-based National Ambient Air Quality Standards ("NAAQS") created a rebuttable presumption that the impact was not adverse. Though EPA cautioned that there was no firm rule that compliance with environmental regulations meant compliance with Title VI, EPA's decision in *Select Steel* did leave impacted communities at a distinct disadvantage.

First, relying on health-based standards such as NAAQS overlooks the presence of toxic hot spots within the larger NAAQS air sheds. This rebuttable presumption, therefore, has the potential to undermine the environmental protection and health of countless communities of color, tribal, and low-income communities to this day. Second, communities still have no formal right to participate in the administrative process and, therefore, no forum in which to present or refute evidence offered by respondent state and local environmental agencies in order to fairly adjudicate the complaints. Moreover, there are no legally enforceable time limits for an agency to respond to complaints filed by aggrieved communities. As shown by the EPA's failure to decide Title VI complaints in a timely fashion, the ensuing backlog,[41] and summary dismissal of dozens of those complaints,[42] demonstrates that

Protest at California EPA in Oakland.
Photo Courtesy of Michael Dorsey.

administrative actions do not provide the due process and fair adjudication of complaints as do private actions. Third, even under the best-case scenario the ultimate remedy provided by the Title VI administrative process, withdrawal of federal environmental funds, remains extremely unlikely. On top of creating a political sticky wicket, withdrawal of funds would leave EPA, with its limited resources, alone to implement and enforce environmental laws on behalf of these now-unfunded state and local environmental agencies.[43]

The Federal Transit Authority ("FTA") stands in stark contrast to EPA on the issue of administrative enforcement of Title VI, and there are many lessons EPA can learn from the FTA's recent bold action on a Title VI complaint against the San Francisco Bay Area Rapid Transit District ("BART") and its proposed expansion to Oakland International Airport using economic stimulus funding under the American Recovery and Reinvestment Act ("ARRA").[44] In rejecting BART's expansion plan as non-compliant with Title VI, FTA Administrator Peter Rogoff stated plainly to BART officials:

> Given the fact that the initial Title VI complaint was well founded, I am not in a position to award the ARRA funds to BART while the agency remains out of compliance [with Title VI]. Moreover, it is clear that, if FTA were to pursue such a course, the likelihood of protracted litigation with the parties that made the complaint remains extremely high.[45]

Administrator Rogoff's extraordinary finding balances the interest in restoring the economic vitality of the Bay Area, the time sensitivity of the funding under the ARRA, and the vested interests of communities protected under Title VI from disparate impacts from recipients of federal funding. It demonstrates unequivocally that the withholding of federal funding, with its potential for political minefields, can be successfully navigated, free of the clever wording and excuses relied upon in EPA's decision in *Select Steel*.[46] Indeed, the rights of communities of color and others afforded the protections of Title VI do not need to be sacrificed. On the contrary, the FTA has proven that it can enforce Title VI and meet the broader mandates of the agency's federal mission. Nevertheless, as we lay out below, there remains an urgent need for a federal private right of action to challenge discriminatory impacts of federally funded programs under Title VI.

Sandoval Litigation

After *Sandoval,* communities of color suffering from disproportionately high levels of pollution lost a crucial legal tool to challenge and stop state agencies from placing additional polluting sources in their communities. That Title VI is without a private right of action for plaintiffs who suffer from disparate impact discrimination renders it an anomaly under the Civil Rights Act of 1964, and in anti-discrimination law more generally.

2.3.2 Judicial Enforcement of Title VI

In *Guardians Ass'n v. Civil Service Commission,*[47] the Supreme Court clearly recognized a private right of action to enforce the statute itself, which has been interpreted by courts to require a showing of intentional discrimination, but did not clearly rule that there was a similar

The Administration should direct the Department of Justice to issue guidelines to make the EO fully harmonious with existing environmental and civil rights laws.

private right to enforce the disparate impact regulations promulgated by agencies to enforce Title VI.[48] After *Guardians,* many lower courts have affirmed the plaintiffs' right to a private right of action to enforce the disparate impact regulations.[49]

The lay of the land changed dramatically in 2001. In *South Camden Citizens in Action v. New Jersey Department of Environmental Protection* ("South Camden I"),[50] the federal District Court, in a landmark decision, found that the New Jersey Department of Environmental Protection had violated EPA's Title VI regulations by failing to protect residents of color from the cumulative disparate effects of various sources of air pollution in the community even though the challenged permit met all applicable standards under the Clean Air Act.[51] After considering the clustering of industrial facilities and health status of the community, the Court remarked, "I find that [expert witness for the plaintiffs] Dr. [Michel] Gelobter's basic conclusion that in the State of New Jersey there is a 'strong, highly statistically significant, and disturbing pattern of association between the racial and ethnic composition of communities, and the number of EPA facilities with Air Permits' to be sound."[52] The Court's analysis of cumulative impacts and health effects that the new facility could have on the community was a first.

The victory was short-lived. A few days after the widely celebrated *Camden* decision, the U.S. Supreme Court, in a 5 to 4 decision, ruled in *Alexander v. Sandoval*[53] that agency regulations prohibiting disparate impact do not create a private right of action, essentially nullifying the result in the *Camden* case. The Court reasoned that the regulations could not provide greater rights than the statute's prohibition against intentional discrimination.[54] After *Sandoval,* communities of color suffering from disproportionately high levels of pollution lost a crucial legal tool to challenge and stop state agencies from placing additional polluting sources in their communities, particularly in light of the *Select Steel*[55] decision discussed above. That Title VI is without a private right of action for plaintiffs who suffer from disparate impact discrimination renders it an anomaly under the Civil Rights Act of 1964, and in anti-discrimination law more generally. Notably, both Title VII (employment) and Title VIII (housing) of the Civil Rights Act of 1964 have longstanding, well-established disparate impact causes of action available to private complainants. The same is true for newer civil rights statutes, such as the Age Discrimination in Employment Act of 1967[56] and the Americans with Disabilities Act of 1990.[57] *Sandoval* leaves plaintiffs without a cause of action for disparate impact discrimination and thus leaves Title VI plaintiffs without a remedy that is provided for in virtually every other antidiscrimination statutory scheme.

2.3.3 EPA Office of Civil Rights

Another major impediment to advancing environmental justice through enforcement of Title VI at U.S. EPA has been a minimally staffed Office of Civil Rights

Mural in Plainview, CA.
Photo Courtesy of Earthjustice.

("OCR") at EPA. EPA should make a major push to restructure and staff-up its Office of Civil Rights to issue final guidance on how to investigate Title VI complaints filed with the agency and to provide a template for state agencies to follow.

From 2001 to the present, OCR has been virtually invisible as an instrument of environmental enforcement and protection while continuing to turn away dozens of Title VI complaints for investigation or adjudication. This has been a particularly disheartening development to watch as it has reverberated at the state level leaving states without any guidance as to how to investigate and rule on Title VI complaints filed locally regarding federally funded environmental regulatory programs. Legal scholars Clifford Rechtschaffen, Eileen Gauna, and Catherine O'Neill have distilled OCR complaint data and recorded that as of the close of 2008, "the EPA had processed a total of 211 complaints since 1993. Of those, 40 (19%) were still pending, and 171 (81%) had been closed. Of the closed cases, 127 (60%) had been rejected and 44 (21%) had been dismissed."[58]

This record does not inspire much public confidence in the program. To wit, just last year the Ninth Circuit Court of Appeals criticized EPA's Title VI practices. In that case, *Rosemere Neighborhood Association v. EPA,*[59] Rosemere Neighborhood Association alleged that the City of Vancouver, Washington had discriminated against low-income and people of color neighborhoods by failing to address poor septic systems, the lack of a comprehensive sewer network, contaminated ground and surface waters, poor air quality and industrial pollutants.[60] Vancouver used EPA funding to improve affluent areas and neglected the disadvantaged low income and people of color neighborhoods.[61] The Court noted that EPA "failed to process a *single* complaint from 2006 or 2007 in accordance with its regulatory deadlines."[62]

EPA's recent appointment of Patrick Sungwook Chang as Senior Counsel for External Civil Rights to focus on the backlog of Title VI complaints is encouraging. We look forward to his recommendations for institutional changes that will help the Agency avoid future backlogs. However, we also urge EPA to establish a comprehensive system of public reporting on OCR's Title VI investigations and findings. This measure will not only build EPA's credibility with people of color, indigenous and low-income communities, but it will also empower communities with the knowledge that EPA seriously considers complaints of discrimination and acts to stem these practices.

2.3.4 Department of Justice

As mentioned above, environmental justice advocacy lies at the intersection of environmental and civil rights laws and the vigorous enforcement of those bodies of laws. As advocates, we are often tracking or involving ourselves in the work of DOJ's Environment and Natural Resources Division, which executes DOJ's statutory responsibilities for litigating environmental cases in federal court. We devote a similar amount of energy doing the same with respect to DOJ's Civil Rights Division, which has been involved in investigations and litigation to enforce Title VI where people of color communities have sought to challenge discriminatory land use and other discriminatory practices by recipients of federal funding. In 1995, the DOJ issued its Guidance Concerning Environmental Justice, identifying the following goals:

- Protect environmental quality and human health in all communities;
- Use environmental, civil rights, criminal, and civil laws to achieve fair environmental protection;
- Promote and protect community members' rights to participate meaningfully in environmental decision-making that may affect them;
- Analyze data that will assist the Department in law enforcement, mediation, and counseling efforts involving environmental justice matters; and,
- Promote full and fair enforcement of the laws, increase opportunity for access to environmental benefits, and minimize activities that result in a disproportionate distribution of environmental burdens.[63]

For purposes of the Justice Department, an "environmental justice" matter is any civil or criminal matter where the conduct or action at issue may involve a disproportionate and adverse environmental or human health effect on an identifiable low-income or minority community or federally recognized tribe.[64]

The Justice Department also recognized that it can further its environmental justice goals through its legislative review process, through filing *amicus curiae* briefs that raise environmental justice concerns, and through the protection of federally recognized tribes in coordination with the Department of the Interior.[65]

The commitment to strengthening enforcement of Title VI as articulated by Acting Assistant Attorney General Loretta King is to be commended. In King's July 10, 2009 memorandum,[66] she rightfully emphasized the need for agencies to be "particularly vigilant in ensuring strong enforcement" of Title VI in light of the fact that victims have no private action to enforce the disparate impact regulations and just rely on the administrative complaint process. King also committed DOJ to exercising its authority under Executive Order 12250[67] to ensure consistent and effective enforcement of Title VI and to providing technical assistance to agencies to support DOJ's efforts to strengthen civil rights compliance programs.

"...there remains an urgent need for a federal private right of action to challenge discriminatory impacts of federally funded programs under Title VI."

We applaud King's encouragement of agencies to submit civil rights cases that cannot be resolved administratively to the Civil Rights Division for litigation. This charge demonstrates to federal fund recipients and communities that DOJ is serious about Title VI enforcement and preventing federal monies from being used to discriminate.

2.4 Environmental Enforcement

Many existing laws and regulations provide great opportunities for achieving environmental justice. As early as 1996, the Enforcement Subcommittee of the National Environmental Justice Advisory Council ("NEJAC"), a federal advisory committee to the U.S. EPA, had produced a comprehensive memorandum that catalogued and assessed avenues within existing legal authorities through which EPA and other agencies could move to aggressively address environmental injustice and inequality. The Enforcement Subcommittee's report echoed a prevailing sentiment: Achieving environmental justice in the near term would not necessarily depend upon the promulgation of a bevy of new federal legislation or amendments to existing environmental and civil rights laws – much could be done in the near term through immediate federal action by utilizing all existing legal authorities to their fullest with particular attention paid to people of color, low-income, and indigenous communities at most risk.[68]

Deeohn Ferris, a former senior EPA enforcement attorney, was the first chair of the NEJAC Enforcement Subcommittee. In 1996, subcommittee membership included leading environmental justice attorneys and law professors. Ms. Ferris tasked Richard Lazarus, John Carroll Research Professor of Law at Georgetown University Law Center, to draft this memo with input from the other members of this Subcommittee. Once completed, reviewed and approved by the full 25-member NEJAC Executive Council[69] as a formal recommendation to the Agency, the memo was transmitted to the Assistant Administrator for the Office of Enforcement and Compliance Assurance, to the General Counsel, and to EPA Administrator Carol Browner.

Four years later, in December of 2000, at the final NEJAC meeting of the Clinton Administration, a junior member of the staff of the EPA Office of General Counsel came before the NEJAC Council and offered a 14-page response.[70] Although NEJAC members welcomed the response with great anticipation, it was clear from the four-year delay, the relative brevity of the response memo, and the fact that a junior agency official had been tasked to address the NEJAC, that the response was somewhat cursory and uninspired.

The NEJAC intended the December 2000 meeting to serve as a report card of sorts, evaluating the Clinton Administration's progress in addressing the full range of environmental justice concerns. NEJAC invited Executive Director Barbara Arnwine of the Lawyers' Committee for Civil Rights Under Law to this meeting to sum up the Clin-

ton Administration's progress made on addressing the pressing issues embedded in the environmental justice debate. In her comments, Ms. Arnwine observed that unlike previous modern civil rights debates that had taken place in the U.S. where the federal bench of lawyers were out vigorously enforcing federal law (sometimes at the risk of personal harm, danger and death), environmental justice advocates were forced to not only fight against polluting industries, but also against the federal government itself, ironically, during what had been initially perceived as an Administration open to environmental justice reform. She stated that this unusual circumstance put those advocating for environmental justice at a unique disadvantage.[71] Although the Clinton Administration made an historic commitment to environmental justice, it was slow in following through thereby forcing advocates to continue pressuring the government for further action.

In 1999, Professor Lazarus and Stephanie Tai published a law review article entitled "Integrating Environmental Justice into EPA Permitting Authority"[72] based on the Enforcement Subcommittee's 1996 memo. In their article, Lazarus and Tai examined how existing federal laws provide environmental permitting agencies with substantial authority to address environmental justice concerns in their permitting decisions.[73] Amazingly and unfortunately, most of Lazarus' observations are still relevant in 2010. We incorporate by reference the recommendations laid out in their article and the original NEJAC memo. In sum, our over-arching recommendation is for EPA to identify sensitive and vulnerable populations and ensure that these populations are receiving the full protections afforded them under federal law.

2.4.1 Toxic Air Pollution

New and existing sources of mercury, lead, chromium, dioxins, PCBs, benzene, formaldehyde, and other hazardous air pollutants continue to be located disproportionately in communities of color and poor communities. Greatly exacerbating this problem, many of these facilities are still not subject to control requirements that the Clean Air Act required EPA to put in place years ago or are subject to control requirements that are far less protective than the Clean Air Act requires.

Furthermore, because sources are not required to monitor their actual emissions, information regarding the identities and quantities of toxic pollution emitted are not available. Polluters remain seemingly ignorant of their actual emission levels, and the people most exposed to emissions, in turn, are unable to determine the identity and quantity of the toxins to which they have been exposed, nor can they determine whether the facilities in their community are in or out of compliance with toxics emission standards.

"...unlike previous modern civil rights debates that had taken place in the U.S. ...environmental justice advocates were forced to not only fight against polluting industries, but also against the federal government itself..."

Enforcement of air toxics emission standards – either by citizens, state or local governments, or the federal government – is virtually nonexistent. Because actual emissions monitoring is not required, the information necessary to enforce emission standards rarely exists. Further, because EPA's current air toxics rules for most categories of sources provide an exemption that allows polluters to exceed their standards with impunity whenever they "malfunction," even facilities that have clearly exceeded their emissions can rarely be held accountable. Not surprisingly, many sources of toxic air pollution routinely run in "malfunction" mode, effectively nullifying the public health protection that the Clean Air Act's toxics provisions were enacted to guarantee.

We urge EPA to take immediate action to begin to remedy these problems. First, EPA should issue all overdue air toxics standards and correct all deficient air toxics standards on an expedited basis. Many air toxics standards are currently years overdue, and many of the standards currently on the books are clearly less protective than the Clean Air Act requires. EPA should make correcting these deficiencies a top priority and that the program department responsible for them receives adequate resources to make all necessary corrections within the current term of the Obama Administration. More generally, the Obama Administration should ensure that Office of Management and Budget ("OMB") red tape does not impede this important work. The Paperwork Reduction Act expressly provides for waivers of time-consuming review procedures when agencies are in violation of statutory or court-ordered deadlines or because of the serious environmental threats posed by the resulting delay. EPA has rarely requested waivers, and when it did OMB did not grant such requests. Neither EPA nor OMB should allow the Paperwork Reduction Act to be an excuse for further delay of overdue reductions in toxic pollution.

Second, EPA should overhaul the residual risk program. Many of the overdue emission standards are "residual risk" standards. The Clean Air Act of 1990 required EPA to issue these risk-based standards eight years after issuing its technology-based standards, to ensure at long last that public health was protected from air toxics emissions by an ample margin of safety. Regrettably, the George W. Bush Administration deprived communities of the intended protection by devising several ways to neuter the residual risk requirements. Among other things, EPA has never collected actual emissions information from most facilities and relies instead on gross underestimates. For example, EPA typically assumes that individuals are exposed to emissions from only one source in a source category even though it is well known that individuals in heavily impacted communities are exposed to toxic emissions from many facilities in any given category. EPA also relies on assumptions about the toxicity of many pollutants that are known to be outdated and under-protective.

EPA should revise its approach to residual risk determinations by:

- Abandoning the Bush Administration approach that was apparently designed to avoid emission reduction requirements;
- Obtaining the accurate information about risk to the most vulnerable individuals in the most exposed communities; and

- Ensuring that final risk-based standards truly protect public health, including the health of the most vulnerable people, with an ample margin of safety.

Third, EPA should require emissions monitoring for air toxics. We believe that none of EPA's air toxics standards will provide the protection that Congress intended until the facilities they govern are required to gather and make public actual emissions monitoring data. Continuous emissions monitoring equipment has long been available on the market, but very few facilities are required to monitor their actual emissions. As a result, citizens in neighboring communities cannot determine either the identity or the quantity of the toxic pollutants to which they are being exposed. Neither neighboring residents nor government agencies can determine whether a given polluter is in or out of compliance with emission standards at any given time, far less hold polluters accountable for non-compliance. EPA should require actual emissions monitoring for all air toxics and should require the use of all available continuous emissions monitors to measure emissions and monitor compliance with emission standards.

Fourth, eliminating the startup, shutdown, or malfunction or "SSM" exemption is vitally necessary to protect the health and environment of people of color and low-income communities living near industrial facilities. EPA's air toxics standards for the majority of industries still include what we believe to be unlawful – the "malfunction" or SSM exemption that allows plants to escape liability for exceeding emissions whenever they "malfunction." Because virtually any violation of emission standards can be described as a malfunction, this exemption renders most air toxics emission standards effectively unenforceable. It is common knowledge that many major sources of toxic air pollution run in malfunction mode routinely and that the emissions from such operations often exceed those from normal operations. EPA should eliminate the unlawful SSM exemption immediately and restore to communities the protection that air toxics standards were intended to provide.

Elementary School in Texas.
Photo Courtesy of Earthjustice.

Finally, we urge EPA to demonstrate the will to prioritize enforcement of air toxics standards in the most heavily impacted communities. Many communities around the country – including Mossville, Louisiana, Port Arthur, Texas, and Richmond, California – are surrounded by sources of toxic air pollution. A necessary first step to protecting these communities is enforcing existing control requirements. EPA should prioritize enforcement of air toxics standards in these

communities, ensure that its enforcement division has adequate resources for the task and, as noted above, ensure that enforcement agencies and citizens are not prevented from holding polluters accountable by a lack of actual emissions information or illegal compliance loopholes.

These air toxics recommendations are critical to protecting the health and safety of environmental justice communities. People of color and low-income populations disproportionately burdened by air pollution will achieve greater protections and healthier communities with the implementation of these recommendations, which are set forth again in the Recommendations Section, below.

"...living near ash disposal sites increases the risk of damage to the liver, kidney, lungs and other organs as a result of being exposed to toxic metals like cadmium, cobalt, lead, and other pollutants at concentrations far above levels that are considered safe."

Part 3: Adverse Environmental Burdens

3.1 Coal and Mining

3.1.1 Power Generation from Coal

For communities located in coal mining country, near ash landfills and surface impoundments, and downwind of "clean coal" plants, adverse environmental impacts remain severe. Technology for "clean coal" is far from being a reality at this moment in time. Further, carbon capture and sequestration ("CCS") only removes the carbon that would be emitted from the burning of coal, side-stepping the environmental costs that comes from extraction, transport, disposal of coal combustion wastes, as well as the co-pollutants from burning coal. The risks associated with carbon sequestration are still largely unknown. Permitting agencies should seek to address these impacts and risks in permitting CCS plants. More broadly, federal agencies such as the Department of Energy and the Rural Utilities Service should restrict or cease funding for CCS projects. CCS at this point is not economically feasible, and the process to capture the carbon is energy-intensive and expensive. Some new coal-fired plants are promoting themselves as "CCS-ready," which is mere green-washing, given that CCS is not as of yet even feasible. First and foremost, criteria should be established that defines what is "CCS-ready".[74] Moreover, CCS-readiness should never be an excuse to impose lax limits for the entire suite of pollutants emitted by these plants.

Strong regulations on SO_x, NO_x, $PM_{2.5}$ and PM_{10} for coal fired power plants should be part of any climate, energy or environmental protection law. Also, statistics on air pollution emissions levels in impacted communities should be compiled. For more detailed recommendations, see the Recommendations Section.

3.1.2 Overhaul the Office of Surface Mining

The Office of Surface Mining ("OSM"), which lies within the Department of Interior, has completely failed the communities of Appalachia as well as other coalfield communities across the nation. Rather than serving as a watchdog protecting the health of people and natural resources, OSM appears to allow mining operations to permanently damage streams, forests, and generations-old communities. For those in Appalachia today, the situation is particularly explosive – literally. Not only are thousands of pounds of explosives used every day to blast apart mountains, the communities near these mines are becoming tinder boxes. Emotions run high as dust, blasting, water pollution and flooding force people out of their homes and hollows. Those who stay suffer under a constant barrage of problems, large and small, and for those brave enough to challenge what they claim are illegally granted permits in the courts, threats against home and family are now rampant.[75]

"The litany of assaults to coalfield communities is long – subsidence from long-wall mining devastates homes and destroys water sources, toxic underground mine pools seep into people's water wells and into their yards, immense sludge dams and slurry injection contaminate drinking water wells and threaten whole communities, mine disposal of coal combustion waste creates toxic pollution of groundwater and streams..."

3.1.3 OSM Should Vigorously Enforce the Law

The unsafe and untenable situation in coalfield communities across the nation would be greatly improved if the OSM vigorously enforced the existing law it has been charged to enforce for the last 30 years. Acid mine drainage continues to flow, even from mines permitted after the passage of the surface mining law, Surface Mining Control and Reclamation Act,[76] in 1977 ("SMCRA"). Bonding in many states is insufficient to take care of deserted mines. The litany of assaults to coalfield communities is long – subsidence from long-wall mining devastates homes and destroys water sources, toxic underground mine pools seep into people's water wells and into their yards, immense sludge dams and slurry injection contaminate drinking water wells and threaten whole communities, mine disposal of coal combustion waste creates toxic pollution of groundwater and streams, and perhaps the greatest atrocity of all, mountaintop removal strip mining.

3.1.4 Cessation of Mountaintop Removal Mining

Mountaintop removal mining ("MTR") has permanently buried more than 1,200 miles of streams in West Virginia and other states.[77] Furthermore, in West Virginia it has been documented that counties with MTR are the very poorest in the state and are becoming poorer as they lose natural resources that attract tourism and industry with high-paying jobs.[78]

Less than five percent of the area remaining after mountaintop removal mining is used for an economic development purpose, leaving the remaining 95 percent unutilized with no chance for regeneration.[79] This Administration should take the lead in addressing the impact of mountaintop removal mining and banning the deleterious practice now and into the future.

Every part of the human and natural environment is suffering as this most aggressive form of strip mining looms over communities and extends into lightly populated mountain hollows, forcing small communities to seek safer ground in unfamiliar cities and towns far from their roots that have nurtured generations of their families before them. As MTR decimates the very heart and soul of the mountain way of life, OSM barely responds except to adjust one regulation after another, seemingly to further aid the coal industry in destroying forest, and polluting water on which these communities depend.

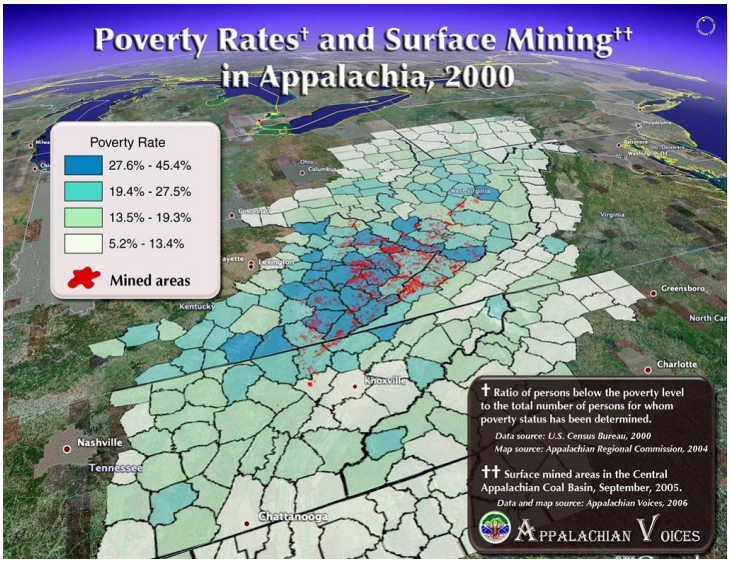
Contrary to the clear intent and purposes of SMCRA, a whole host of environmental standards, including the stream buffer zone rule, returning the landscape to its approximate original contour, saving topsoil, the proper use of topsoil substitutes, post-mining land use, cumulative hydrologic impact assessments, have all been disregarded or repealed by the OSM in order to allow this destructive mining to continue uninterrupted.

In sum, we recommend that the Office of Surface Mining:

- Enforce the law.
- Stop mountaintop removal, clean up resources polluted or damaged by strip mining.
- Stringently control the permanent disposal of industrial waste in strip mines.
- Protect the health of people who live in and near the coalfields. Though it may seem extreme, we believe this action should include aggressively overseeing state-delegated programs and perhaps even stripping delegation, where warranted and feasible, from states not acting in full accordance with the law. Recommendations for the Office of Surface Mining below in the Recommendations Section of this report.

3.1.5 Regulation of Coal Combustion Waste

Low-income communities shoulder a disproportionate share of the health risks from coal combustion waste ("CCW") stored in coal ash impoundments. Of the 181 zip codes nationally that contain coal ash impoundments, 118 (65.19 percent) have above-average percentages of low-income families.[80,81] According to a comprehensive risk assessment released by the EPA in 2007, residents near some coal ash dump sites have as much as a 1 in 50 chance of getting cancer from drinking water contaminated by arsenic, one of the most common, and most dangerous, pollutants from coal ash.[82] The EPA Risk Assessment also found that living near ash disposal sites increases the risk of damage to the liver, kidney, lungs and other organs as a result of being exposed to toxic metals like cadmium, cobalt, lead, and other pollutants at concentrations far above levels that are considered safe. The agency



can and must protect these disproportionately low-income communities by developing national, federally enforceable regulations that require all CCW be disposed of safely.

The voluminous amount of toxic waste generated by coal-fired power plants continues to pose grave threats to impoverished communities throughout the United States. Because of decades of unsafe disposal in unlined ponds and landfills, human health and the environment is threatened by the leaching of hazardous chemicals as well as the catastrophic collapse of coal ash dams. EPA should reduce the threat by regulating coal ash as "hazardous waste" under RCRA by requiring secure disposal in lined and monitored engineered landfills and by phasing out dangerous coal ash impoundments, like the one that collapsed at Tennessee Valley Authority's Kingston Fossil Plant in December 2008. In addition, EPA should finalize effluent guideline limitations ("ELGs") under the Clean Water Act to stop ongoing contamination of rivers and streams from coal combustion wastewaters. As the agency recently recognized, the ELGs for power plants, which were last revised in 1982, "need to (be) update(d)," and "have not kept pace with changes that have occurred in the electric power industry over the last three decades."[83] Specifically, EPA has to our knowledge never set limits on the discharge of pollutants including mercury, arsenic, selenium, cadmium, chromium and other heavy metals that are concededly present in waste water from coal ash landfill leachate systems, coal ash handling waters, and fluidized gas desulfurization or "FGD" systems. This failure poses a threat to drinking water supplies and to people who consume fish caught downstream from coal-fired power plants. As Administrator Jackson undertakes measures to facilitate environmental justice as one of her top seven priorities, we suggest EPA pay particular attention to issues surrounding coal and coal combustion waste and seize this opportunity to rectify the ancillary environmental and public health issues resulting from coal and coal combustion.

3.2 Healthy Schools

Healthy High Performance School facility design and operations (both healthy and green) are associated with improved attendance and achievement overall. Studies have shown asthma episodes may be reduced by up to 38 percent.[84] A healthy high performance school that is dry, clean, quiet, and has superior indoor air may reduce upper respiratory infections by over 60 percent and also save up 33 percent of the building's energy costs.[85] For children with special education needs, healthy learning environments may be an important factor in ability to learn, in relative

"According to the Center for Health, Environment and Justice, in 2001 more than 600,000 students, largely African-Americans and other children of color, in Massachusetts, New York, New Jersey, Michigan, and California were attending nearly 1,200 public schools located within a half mile of federal Superfund or state-identified contaminated sites."

health and quality of life, and the ability to contribute to society after leaving the school setting.[86]

Indeed, leading scholars, environmental advocates, and public health advocates have concluded that the environmental conditions of schools subject America's children to risks to their health and ability to learn, and despite this knowledge, and despite children spending nearly one third of their time in school, there is no government agency responsible for protecting the health of children within the school environment.[87] This is compounded by the fact that children are more vulnerable to environmental hazards than adults. Lloyd Kolbe, Ph.D., the former CDC official who founded and directed the CDC's Division of Adolescent School Health, calls school health "America's single largest unaddressed public health crisis for children."[88]

Federal agencies have been virtually silent on the epidemic of pollutants impacting schools from proximate roadways, industrial and agricultural facilities, indoor chemical spills, construction materials, use of hazardous products, poor ventilation, molds, or misapplications of cleaning products and pesticides that are known to impact the health, learning and behavior of the nation's children. School districts across the country have been allowed instead to persist in compelling children to attend schools that are dark, dirty, dank, pest- and mold-infested, polluted, and unsanitary. And sadly, we know all too well these days that many schools are even constructed on contaminated land.

Although Houston's Cesar Chavez High School is a large state-of-the-art facility, serving approximately 3,000 children,[89] three petrochemical plants are located within a quarter mile of the school.[90] In northeast Washington, D.C., River Terrace Elementary School is located just blocks from a major electrical power plant. In 1998, Barnet School in Vermont closed due to an odor problem that was traced to severe rodent infestation.[91] Approximately 800 rodents were discovered inside the school walls.[92] In July 2007, the *Washington Post* reported in its series on D.C. public schools that 64-year old Davis Elementary School suffered from peeling paint and improper ventilation.[93] According to the Center for Health, Environment and Justice, in 2001 more than 600,000 students, largely African-

Purina Facility Behind Playground in Newtown Community of Gainesville, Georgia.
Photo by Lawyers' Committee for Civil Rights Under Law.

Americans and other children of color, in Massachusetts, New York, New Jersey, Michigan, and California were attending nearly 1,200 public schools located within a half mile of federal Superfund or state-identified contaminated sites.[94] As we begin a new decade, the number of children spending time in and around contaminated schools continues to rise substantially, particularly when considering additional exposure pathways like indoor air vapor intrusion, contaminated school infrastructure, such as PCBs in window caulking,[95] and contaminated soils in playgrounds and playing fields.[96]

Two federal laws have been enacted in recent years to begin to redress the situation: the Healthy High Performance Schools Act of 2001 was enacted into the No Child Left Behind Act, which authorized the federal Department of Education to conduct a first ever national study of how facilities impact children's health and learning, and, with advice from EPA and the Department of Energy, to create federal guidelines on Healthy High Performance School design and construction for states to adapt and disseminate to local education agencies. The High Performance Green Buildings Act was incorporated into the Energy Independence and Security Act of 2007, which gave EPA new authority to create first-ever federal guidelines on school environmental health, including school siting, indoor air, integrated pest management, and building inspections, and then establish a voluntary grant program for states to accelerate healthy school environments in the states. Congress stalled over funding for these two landmark efforts, on the grounds that education was constitutionally left to the states. Interestingly, children's health and the environments were never left to the states. The National Education Association estimates the cost to bring all the nation's inventory of public schools into compliance with basic building and sanitary codes at over $322 billion,[97] caused in part, by decades of neglected infrastructure and a lack of systemic reforms that would create a child-centered research, policy, and time-lined implementation program for restoring and creating schools as healthy environments for children. In fact, a 2006 Centers for Disease Control survey of school health programs revealed that state and local education leaders had little or no accurate knowledge of relevant state policies or regulations on facilities, such as requirements to maintain indoor air quality or to reduce the use of toxic pesticides.[98]

Children's environmental health and environmental safety at school are of paramount importance to achieving environmental justice. Children cannot learn if they are not healthy. We urge EPA to give careful attention to the issue of healthy schools. The growing record of school facility deficiencies and the gaping holes in the regulation and maintenance of the nation's public schools is anachronistic in this era of technology when we have a wealth of information about exposure pathways and remedies to assist us.

Ramifications For Schools

- Although Houston's Cesar Chavez High School is a large state-of-the-art facility, serving approximately 3,000 children, three petrochemical plants are located within a quarter mile of the school.
- In northeast Washington, D.C., River Terrace Elementary School is located just blocks from a major electrical power plant.
- In 1998, Barnet School in Vermont closed due to an odor problem that was traced to severe rodent infestation. Approximately 800 rodents were discovered inside the school walls.
- In July 2007, the *Washington Post* reported in its series on D.C. public schools that 64-year old Davis Elementary School suffered from peeling paint and improper ventilation.

The Obama Administration should establish a federal interagency work group led by EPA, with the Department of Education and the Centers of Disease Control and Prevention to develop a federal strategy to accelerate healthy learning environments for all children through working with state agencies on a range of issues, including siting, design, chemical use, operations, and inspections, as well as developing a tracking and intervention program for children in harm's way at school. Please refer to the Recommendations Section, below, for detailed recommendations on achieving healthy schools for America.

3.3 Climate Change

Climate justice advocates agree that climate change has already begun to have a disproportionate impact on communities of color, low-income and indigenous communities as evidenced by the increase in climate-related illnesses and deaths and the rising costs of food and health insurance for these communities.[99] Now is an unprecedented opportunity to structure climate change solutions that promote environmental justice and reduce the existing environmental and health burdens on vulnerable communities.

Yvo de Boer, Executive Secretary of the United Nations Framework Convention on Climate Change, rightly noted in a recent press conference that the fact that the Copenhagen Climate Conference failed to produce the full agreement the world needs to address climate change "just makes the task more urgent."[100] Although the Copenhagen meetings elevated the climate change conversation to the highest levels of government and brought a global consensus on the need to find a global solution, climate justice advocates remain dismayed about the failure to address climate impacts that are already occurring to the global south and communities of color, indigenous and low-income communities across the U.S.

Boston, Massachusetts Urban Environmental Cleanup Site.
Photo: http://www.epa.gov/ne/eco/uep/

Despite Copenhagen's disappointing outcome, many countries around the world are already implementing measures to address climate change. The Obama Administration can learn from the mistakes and suc-

cesses that have befallen countries that have outpaced the U.S. climate change response.

Learning from shortcomings of the European Union Emissions Trading Scheme ("EU-ETS"), environmental justice and climate justice advocates remain skeptical that a cap and trade scheme modeled in the same vain of EU-ETS will relieve environmental justice and health issues. In fact, many believe the cap-and-trade schemes under consideration in the United States Congress will do more harm than good to vulnerable low-income, people of color and indigenous communities. Some of the issues raised by cap-and-trade rely on straightforward and *obvious* limitations proven by a free-market economy. For example:

- There may be an over-allocation of emissions credits, which allows the "cap" to permit too much pollution from the start by succumbing to political pressure from impacted industries. This increases the risk of system-wide failure.
- The notion of giving away greenhouse gas emissions permits, free-of-charge, puts consumers at risk of companies realizing windfall profits from the free permits, while raising consumer prices as if the companies had paid for the permits.
- A cap and trade system increases the potential of increased emissions of co-pollutants that have localized effects, which could create or exacerbate hot spots.

The views of environmental justice and climate justice advocates span a wide swath of proposed approaches, from a cap-and-fee system to a system of permit auctions. A carbon fee, perhaps the simplest and most transparent approach to permitting, could be phased in over time at the first point of sale following import or extraction. A fee would allow regulated industries to plan ahead and transition toward cleaner technologies.[101]

Both a fee system and an alternative permit auction system create the opportunity to direct resources toward creating and maintaining programs that invest in protection of communities hardest hit by climate change. These investments could be in a variety of forms, including tax cuts, clean energy, transportation, development projects and weatherization and energy cost subsidy programs for low-income families. Fee and auction systems also do away with financial incentives to keep old, polluting facilities open.

Under either approach, it is critical that reduction of greenhouse gases prioritize efforts on the dirtiest sources overall. Toxic emissions are usually also present at facilities targeted for greenhouse gas reductions. The host neighborhoods are often low-income and community of color neighborhoods where toxic emissions contribute to poor health, and or reservation based communities near polluting facilities.

Any climate change strategy should strive for the co-benefit of lowering toxic pollution at the same sources as those emitting greenhouse gases. This could be achieved through mapping and development of analytical tools that identify neighborhoods with the greatest opportunities to reduce greenhouse gas emissions while also

cleaning up toxic air. A failure to do so could tragically widen the gap between health benefits achieved for some through reduction of greenhouse gases and the negative health consequences for others – primarily low-income residents and residents of color who do not see a reduction in GHG's or co-pollutants.[102] Additionally, policymakers and regulators should cautiously approach the development and use of new fuels to steer clear of creating new and dangerous exposure pathways.[103] Mitigation strategies aimed at some of these potentially unintended impacts must be introduced concurrently with any greenhouse gas reduction program. We list our complete climate change recommendations in fuller detail in the Recommendations Section at the end of this report. Using and manufacturing renewable energy sources and energy conservation techniques in the inner-cities will serve at least three positive purposes:

- It will fight global warming by reducing emissions of greenhouse gases;
- It will lower fine particulate matter concentrations by reducing emissions of PM and its precursors;
- It will help to spur economic redevelopment in urban areas, indigenous and environmental justice communities by providing much-needed jobs and other economic opportunities to these community and reservation residents.[104]

In any carbon-trading system, we recommend that 100 percent of the carbon allowances should be auctioned annually and a significant portion of the proceeds used to support global warming initiatives in urban areas, indigenous, low-income and environmental justice communities.[105] Forcing polluters to pay for allowances is consistent with the principle that polluters should bear the costs of their pollution[106] and would obtain much needed funds for urban, indigenous, low-income and environmental justice communities that, as suggested above, could be used to fight global warming, to save lives by reducing concentrations of airborne particulate matter and to economically revitalize urban, indigenous, low-income and environmental justice communities by creating jobs through the use and manufacture of renewable energy and energy conservation.

3.4 Green Jobs

The appointment of former member of Congress Hilda Solis as Secretary of the Department of Labor is a significant step in connecting environmental justice with the Department of Labor. Secretary Solis demonstrated as a member of Congress her commitment to eliminating environmental burdens and to worker protections. She is an enormous asset to the development of a strong and just green economy.

Urban Agenda, a policy and advocacy organization that promotes programs that build alliances between unions, businesses and communities and convenes the New York City Apollo Alliance, defines a "green collar job" as, "A job in an environmental field that contributes directly to preserving or enhancing environmental quality and (a) good job – one that provides family-sustaining wages, safe working conditions

and chances for career advancement."[107] Green collar jobs include job opportunities with a range of skills, training and re-training to jobs in the new green economy, e.g. jobs in energy efficiency and new green technologies, and jobs that create opportunities for local employment.[108] Other non-government organizations take green collar jobs one extra step by promoting worker-owned cooperatives that allow workers to participate in building and enjoying the benefits of local wealth.[109]

"...increased support for public transit will not only lead to dramatic greenhouse gas reductions, but will improve mobility for those who rely on public transit to travel to and from work and school."

EPA and the National Institutes of Environmental Health Sciences pioneered green worker training programs in the mid-nineties with the creation of the Brownfields Worker Training and Minority Worker Training Programs. These programs funded local organizations to partner with labor and academic institutions to implement environmental training programs for at-risk youth and young adults in Showcase Communities and Brownfields Demonstration Pilots.[110] This successful model of job training initiative has wisely been recharged with funding from the American Recovery and Reinvestment Act of 2009. While the Administration has made significant strides in its support for green jobs, more actions can be taken to provide green job opportunities and environmental protection to people of color, indigenous and low-income communities, many of which suffer from the highest rates of unemployment in the nation. Additionally, funding for green jobs programs should be targeted at people of color institutions and universities as well as tribal colleges and vocational schools.

3.5 Transportation

A dramatic expansion of public transit funding is necessary to support the growing number of people living outside city work centers. We believe 80 percent of the funding should be committed to public transit, 20 percent to highway maintenance and none to new highway construction. The current formula is 80 percent for highways, 20 percent for public transportation. Continuing federal support for a private auto system will only expand greenhouse gas emissions. In stark contrast, increased support for public transit will not only lead to dramatic greenhouse gas reductions, but will improve mobility for those who rely on public transit to travel to and from work and school.

In October of 1996, the Labor/Community Strategy Center's Bus Riders Union ("BRU") filed a federal class action lawsuit against the Los Angeles Metropolitan Transit Authority ("MTA") challenging racial discrimination in the inequitable allocation of federal transportation dollars, which resulted in a landmark civil rights consent decree. The suit charged the Los Angeles MTA with violations of Title VI of the 1964 Civil Rights Act by establishing discriminatory, separate, and unequal transportation services in its large federally funded network.[111] At the time, the transit riders were 81 percent people of color overall, and virtually 100 percent people of color on the most

poorly serviced inner-city bus lines. Fifty percent of riders lived on incomes under $12,000 per year.[112] The MTA operated a transit system framework under which 75 cents of every federal transportation dollar was spent on the commuter rail system that served an overwhelmingly white suburban population, while only 25 cents was invested in the intra-city bus system, which was the transit lifeline to employment, education, public services, extended family, cultural and recreational sites for 400,000 bus riders.[113]

The BRU's case touched off a host of other transit discrimination cases across the country, largely because the transit disparities uncovered in Los Angeles are emblematic of disparities nationwide. Surveys across the country that followed the BRU suit have shown that bus riders are chiefly a population dominated by people of color. The *Orange County Register,* for example, reported that Orange County bus riders are 68 percent Latino and 78 percent of the riders take the bus four days a week, presumably relying on buses for transportation to work. In Orange County, half of the riders surveyed had incomes of $20,000 or less.[114]

In Atlanta, the racial and class disparities fall between general riders of the Metropolitan Atlanta Transit Authority ("MARTA"), local transit, and express bus passengers traveling to the white suburbs, with transit dollars being deferred to the latter. According to the Atlanta Transit Riders Union ("ATRA") in 2006, 76 percent of MARTA riders were African-American and nine percent were Latino.[115] A full 50 percent of MARTA riders in 2006 had an annual income of under $50,000, with a shocking 94 percent of MARTA riders making under $20,000 per year.[116]

ATRA says that "(Georgia Regional Transit Authority) advertises its Xpress service as: "Xpress is the Atlanta region's premier commuter transportation service, with luxury coaches … reclining seats, luggage racks, electrical outlets (some seats) and reading lamps – it's a first class way to ride!"[117] Meanwhile, ATRA describes local service on MARTA as "not in a state of good repair: headways are infrequent, service is unavailable on the weekends and at night, and limited land area is served."[118]

Similar race-based disparities in provision of transit have been recorded by the T Riders' Union, a project of the Boston-based environmental justice organization, Alternatives for Community and Environment or "ACE," fighting, among other things, disinvestment in inner city transit serving primarily people of color communities.[119]

In the case of the Bus Riders' Union of the Labor/Community Strategy Center, the legal action resulted in a ten-year consent decree encompassing dramatic improvements for low-income transit-dependent riders, including reduced monthly bus pass fare, fleet expansion, and the purchase of cleaner bus technologies. Likewise, ACE's T Riders' Union has celebrated some successes, such as the introduction of free bus transfers. Despite these successes it remains obvious that America's transit systems have a long way to go for equalizing access, particularly at a time when across the nation transit riders are fighting fare hikes and service cut-backs. The federal Department of Transportation has the authority to see that transit dollars are allocated fairly nationwide, and environmental justice advocates see significant potential to meet the broad public needs, prioritizing the needs of those who are most reliant on public transportation. Title VI of the Civil Rights Act of 1964 mandates that federal

transportation funds not be used in a manner that has a discriminatory effect. When necessary, the Department of Transportation should independently withhold funds or seek reimbursement of funds from federal funding recipients who violate Title VI.

Under the Surface Transportation Authorization Act of 2009, we believe a minimum of 50 percent of the entire Act's allocation for transit should be dedicated to *operating* purposes, with at least half of that restricted to *bus* operations.[120] Such distribution of resources will stop the massive fare increases and service cuts and allow for more bus and rail service on existing lines, fare reductions, free transfers, 24 hours/seven days a week, transit service with a block grant to cities and rural areas to reduce all transit fares by 50 percent.

Too little attention has been paid to the relationship between where housing is built and the environmental conditions of the land under or nearby this housing. Even less attention has been paid to the public health stressors that either proliferate or were already in abundance when housing targeted for low-income or people of color has been constructed.

Additionally, the Department of Transportation should prioritize capital preservation over expansion, with at least half of all capital funds restricted to bus fleets. Buses are the most cost effective way to move people in larger urban and rural areas and have historically been short-changed as rail service gets the majority of federal funds. Failure to maintain existing fleets contributes to the deterioration and bankrupting of bus systems, which often are the centerpiece of the local transportation system. We recommend that the primary use of bus and rail capital would be for system preservation and modernization. "In terms of expansion, the focus should be on bus expansion. New clean fuel buses can be put on existing streets and freeways in a year and thus bus expansion requires very little construction costs. Rail costs $150 million a mile for above ground construction and $350 million a mile for subway expansion and that is before rail cars are purchased and funds are found to operate the new rail lines. This focus on bus capital protection would focus on system preservation and create a fair division of transportation dollars between bus and rail."[121] These recommendations are re-stated in the Recommendations Section.

3.6 Housing and Urban Development

Historically the federal Department of Housing and Urban Development ("HUD") has played a significant role in the annals of environmental injustice, but perhaps not for the reasons one might think. Actions taken by HUD forerunner, the Department of Housing, Education and Welfare, allowed local governments to use federal housing dollars in ways that reinforced or created segregated housing development across the country.[122] Federal housing policy had long supported concentrating poor and communities of color in decaying urban and inner ring suburban perimeters, while investing heavily in suburban sprawl for whites *only* through federal housing programs like the G.I. bill and FHA home loans and restricting access to these same programs for people of color.[123]

Additionally, HUD has a record of supporting the creation of federally subsidized housing development on or near land that was unremediated and known to be contaminated with environmental hazards: most notably the middle class, single-family subdivision built atop what was known as the Agriculture Street Landfill in New Orleans, where debris from the devastating Hurricane Betsy of 1968 was buried,[124] as well as the low-income federally subsidized Altgeld Garden housing project on the Southside of Chicago,[125] a development built in the midst of a "toxic donut" of industrial facilities and landfills that have, over time, adversely affected the quality of life and general health status of its residents.[126]

Too little attention has been paid to the relationship between where housing is built and the environmental conditions of the land under or nearby this housing. Even less attention has been paid to the public health stressors that either proliferate or were already in abundance when housing targeted for low-income or people of color has been constructed. Too many examples exist of housing built in close proximity to known hazardous, solid, industrial and municipal waste sources near where people would live, work, worship, go to school and play.

The historical record is replete with data that demonstrates a clear linkage between diminished health outcomes, health disparities, and premature morbidity and mortality with where one lives. Researchers have recently determined that for low-income and people of color, their residential zip code can predetermine their life expectancy.[127] Some of this decreased life expectancy is due to violence and other social indicators, but much is due to the condition of the natural and built environments in which they live.

Several HUD-specific recommendations can be found in the Recommendations Section at the end of this report, but at a minimum an amendment to the Fair Housing Act of 1968 should be part of a legislative agenda to prevent the location, construction, or renovation of federally subsidized housing in, near or adjacent to land that is contaminated with polluting substances.

Some would say that instances of race-based land use and housing development are relics of the past, and that current housing and community development policy needs to look forward toward goals of sustainable community development. Sustainable development is not achievable when inequality and injustice continue to exist, or where the environmental challenges of the past remain, continuing to harm residents of polluted neighborhoods.

The Obama Administration is putting forth several major efforts to channel housing and community development into new arenas,

DISCRIMINATION

America's generations-old history of housing segregation, discrimination in land use and zoning policy, and disparate enforcement of environmental laws remains a hurdle to equal environmental protection. Our call is not merely for enforcement of the existing laws generally, but for aggressive increased enforcement, among other things, where the greatest pollution burdens and threats to human health and safety exist.

including the Choice Neighborhoods Initiative and the Sustainable Communities Initiative. One new approach the Administration is taking is the tripartite partnership among HUD, EPA and the Department of Transportation, a coordinated effort that is supported and long overdue. The measures are very encouraging, and we urge the Obama Administration to continue to improve housing for low-income communities, communities of color, and indigenous communities through policy initiatives and through pushing a strong legislative agenda.

3.7 Public and Environmental Health

Over-reliance on quantitative risk assessment impairs the ability to fully assess the environmental and/or public health harm a community may experience. Therefore, a qualitative assessment, looking at actual exposures and biomonitoring data as well as qualitative factors should become an integral part of risk assessment. A more qualitative assessment can also incorporate the psycho/social stressors that scientific literature has shown increase peoples' vulnerability to environment and health issues. This is a critical and long-standing environmental justice concern.

The Centers for Disease Control now includes a demographic analysis in some applications, but a more precise geographic focus is also necessary in these analyses. We recommend that the Department of Health and Human Services, the Agency for Toxic Substance and Disease Registry and EPA consider cumulative impact assessments along with standard chemical-specific quantitative risk assessments to determine the level of exposure, disproportionate impact or harm. Moreover, we believe that if individuals are known to have been exposed to certain pollutants or toxins, there is no need to wait until manifestation of adverse health effects occurs to take preventive action, especially if there is animal data that indicates possible adverse health impacts from exposure. An agency could perform an audit where there is particularly suggestive evidence for exposure in a community or where there is strong evidence that there is a public health or environmental threat.

Additionally, performing cumulative impacts assessment, especially by focusing on exposure levels, will require more site-specific, community-based participatory research. One source of reliable data is through hospitalization and/or emergency room records of treatment for asthma or heavy metal exposures (*e.g.,* lead and mercury). This type of geographic focus in the analysis can provide additional support for community/university partnerships to undertake further research.

3.8 Homeland Security and Emergency Response

The EPA and the Department of Homeland Security ("DHS") should adopt site location standards requiring a safe distance between a residential population and an industrial facility. Additionally, the development of locally administered "Fenceline Community Performance Bonds"[128] should be required to provide for the recovery of

residents impacted by industrial accidents or natural disasters that result in industrial accidents.

DHS should require local industries to have an approved hazardous communication plan that immediately notifies local officials and the affected community of a release. State and local governments should be mandated by DHS to develop and distribute emergency preparedness and evacuation plans for communities located near or adjacent to the nation's largest chemical and petrochemical facilities. DHS should require that state and local plans provide for the immediate notification and the safe evacuation of the affected communities in the case of an industrial accident, terrorist attack, or natural disaster.[129]

These recommendations are included in the Recommendation Section of this report.

3.8.1 Federal Facilities

Federal facilities, sites and facilities that are currently or previously owned or operated by the federal government, include active military ranges, bases and industrial plants, Department of Energy's nuclear weapons complexes, offices, laboratories, land, and infrastructure of other federal agencies, and recently transferred properties. They also include sites and facilities closed under the Department of Defense's Base Realignment and Closure Program and facilities that were closed decades ago and are being addressed under the military's Formerly Used Defense Sites Program or the Department of Energy's Formerly Used Sites Remedial Action Program. Approximately 175 of these properties are on the National Priorities List of the nation's most contaminated properties, and many others pose equally significant risks to public health, public safety, and the environment.[130]

The Department of Defense ("DOD") and Department of Energy ("DOE") currently manage the highest number of cleanup programs at such federal facilities nationwide.[131] Every year the DOD alone generates more than 750,000 tons of hazardous waste – more than the top three chemical companies combined.[132] In 2001, the EPA estimated that the total liability for the cleanup of toxic military sites would exceed $350 billion – five times the Superfund Act liability of private industry. Yet the DOD and the DOE are functionally exempt from federal and state environmental laws, resulting in hundreds of sites around the country that remain contaminated. EPA has the authority to oversee the cleanup of such contaminants and cleanup programs and should aggressively ensure that the federal agencies abide by federal laws.

In 2004, the NEJAC submitted a report to EPA entitled, "Environmental Justice and Federal Facilities: Recommendations for Improving Stakeholder Relations Between Federal Facilities and Environmental Justice Communities, October 2004." The report called for, among many things, enhanced community assessments and communication methods to improve cultural sensitivity for environmental justice communities, the provision of access to adequate health services for communities exposed to hazardous substances from federal facilities, increased funding for communities to participate in federal cleanup programs, and the improvement of communication be-

tween facilities, regulators, and environmental justice communities. The NEJAC federal facilities report should be revisited and its recommendations fully considered.

3.8.2 Perchlorate Contamination

A classic example of the failure to cleanup DOD-generated pollution is with perchlorate, a chemical used in rocket fuels, explosives, and other pyrotechnics. Environmental watchdog groups have suggested that perchlorate is leaking from hundreds of DOD facilities across the country.[133] EPA itself estimates that 16.6 million Americans are exposed to perchlorate at a level many scientists consider unsafe; independent researchers, using federal and state data, put the number at 20 million to 40 million. The EPA has reported that perchlorate is present in drinking and groundwater supplies in 35 states.[134] In the Colorado River, which provides drinking water for over 20 million people, perchlorate levels are remarkably high, likely due to the plethora of military and defense operations and contractors in the region. Centers for Disease Control studies as well as some by non-government researchers have also overwhelmingly confirmed that perchlorate is in our food supplies, cow's milk, and human breast milk.[135] "As a result virtually every American has some level of perchlorate in their body. Currently only two states, California and Massachusetts, have set a maximum allowable contaminant level for perchlorate in drinking water."[136] In October 2008, EPA decided not to regulate perchlorate.[137] Nevertheless, we find EPA Administrator Lisa Jackson's subsequent decision to review the Agency's preliminary decision not to regulate perchlorate very encouraging. Strong regulations should be the eventual outcome of the EPA's review.

3.8.3 Cleanups of Formerly Used Defense Sites

Congress created the Formerly Used Defense Sites or "FUDS" Program to address environmental contamination at over 4,000 former DOD sites that have residual contamination resulting from previous military operations. The U.S. Army Corps of Engineers ("the Corps") is the lead federal agency responsible for managing the full investigation and cleanup of these sites. During the budgeting and appropriations process Congress designates a separate line item funding source in the Corps' annual appropriations for FUDS cleanup purposes. The Corps, however, is legally precluded from using annual FUDS appropriations to relieve their own environmental liabilities at FUDS. In 2006, the approximate total cost to address residual environmental contamination at FUDS sites was $18.2 billion dollars.[138] Congress' 2007 appropriation for FUDS, on the other

Damaged caused by Hurricane Katrina in Mississippi.
Photo Courtesy of Lawyers' Committee for Civil Rights Under Law.

hand, was a paltry $253.8 million.[139] Consequently, the Corps was left with the ultimate rubix cube puzzle – how to address the vast multitude of sites, many presenting significant risks to human health and the environment, with a fraction of the funding needed. The unfortunate outcome of this lack of sufficient financial resources is that the Corps essentially must choose between a complete failure to cleanup sites or to perform cleanups that fail to protect the public health. Both choices are unacceptable from the perspective of local communities. Given the FUDS program's woeful underfunding, it is even more unfortunate that FUDS are exempt from RCRA and CERCLA citizen suits. RCRA specifically reserved the right of citizens to enforce in federal courts the cleanup of sites where disposed of solid waste posed this endangerment. Regrettably, that opportunity is not afforded to communities located near FUDS. The Administration should support an effort to modify RCRA to specifically allow for citizen suits to move forward on FUDS.

3.9 Gulf Coast Restoration and Hurricanes Katrina, Rita, Gustav and Ivan

The past five years have demonstrated the increased vulnerability of the Gulf Coast region of the United States. From Florida to Texas, we have witnessed the devastating impact of tropical hurricanes on the natural, built and human environments. Many scientists, environmentalists, and community residents sounded the alarm about the vulnerability of this region, decades ago, to no avail. However, once Hurricane Katrina came ashore in 2005 in Louisiana and Mississippi the whole country, and indeed the world began to pay closer attention.

Hurricanes Katrina and Rita tragically revealed the lack of environmental protection and enforcement for people of color and low-income communities. The breadth of the devastation and destruction and loss of human life was clearly preventable. As the Gulf region struggles to stabilize, rebuild and revitalize many have focused their attention on the critical significance of wetland restoration as essential to rebuilding the natural defenses of the Gulf Coast. Wetland restoration is a critical need, but a comprehensive restoration plan should be pursued to protect the Gulf region from suffering similar devastations from tropical storms coming ashore in the future.

A comprehensive restoration plan is emerging from the people of Louisiana and across the Gulf region that calls for a "Multiple Lines of Defense" strategic restoration strategy.[140] This strategy is based on the well-founded premise that coastal Louisiana (as well as other areas of the Gulf Coast) must be protected from future hurricane surges by both man-made features, such as effective levee systems, and by the natural coastal wetland buffers along the Louisiana Coast and other Gulf Coast areas. Experts in the region agree that, "[l]evees alone will not work. Together, a healthy coastal estuary and appropriately designed levee systems can sustain the ecology and economy of the Gulf Coast region."[141]

The Multiple Lines of Defense Strategy focuses on 11 key elements:

1. Protecting the offshore shelf
2. Restoring barrier islands
3. Reducing the salinity in the regional sounds
4. Restoration of marshes and land bridges
5. Restoration of natural ridges
6. Building and rebuilding of structurally sound and elevated highways
7. Building a flood gate system
8. Restoring and building a structurally sound levee system
9. Building structurally sound and well engineered water pumping stations
10. Creating and promulgating a building code that requires elevated housing design and construction
11. Designing a thorough evacuation plan and route that leaves no one behind.

Wetland restoration would require the following restoration-focused elements:

1. Barrier shoreline (island) restoration
2. Marsh creation
3. Shoreline stabilization
4. Reef restoration
5. Hydrologic restoration
6. River diversion
7. Ridge restoration
8. Water management areas
9. Navigable waterway stabilization

There are many other components needed to fully restore the damage to the Gulf Coast region from the impacts of the last five years of tropical hurricanes. But the ecological restoration required to provide the first phase of coastal protection should be prioritized by this Administration, funded adequately, and executed with precision by the Army Corps of Engineers in order to halt the repeated assaults on this region, its natural resources and its people.

3.10 Rural Communities

3.10.1 Soil And Groundwater Contamination

Rural, low-income, communities of color and semi-rural communities straddling unincorporated boundaries of municipalities across the United States often fall within extraterritorial jurisdictions, joint-planning agreement, and industrial zoning designations that tend to concentrate locally unwanted land uses or “LULUs” and their accompanying psycho/social stressors in these places. In addition, these areas have limited access to health-promoting infrastructure and basic amenities, such as water

and sanitary sewer infrastructure. These circumstances create economic, health, and health care access disparities between populations in rural areas in comparison to populations residing in suburban and urban areas. Moreover, residents of these communities are often disproportionately and adversely burdened by co-occurring environmental justice issues such as landfills, wastewater treatment plants, superfund sites, brownfields, Toxic Release Inventory facilities, hazardous waste sites, heavily trafficked highways, and intensive industrial animal production facilities.

For example, EPA is currently shipping coal ash from a 2008 Tennessee fly ash spill to a landfill in rural Perry County, Alabama. Two-thirds of the residents of Perry County are African-American, and the unemployment rate there is nearly 20 percent.[142] EPA Region 4 reported that, "sampling results for coal ash contaminated residential soil showed arsenic, cobalt, iron, and thallium levels above the residential Superfund soil screening values,"[143] posing significant health risks.[144] The Perry County example serves as a classic illustration of the persistence of unfair siting decisions, permitting, enforcement and emergency response within EPA toward low-income and communities of color. It should be noted that the local elected leadership of Perry County voted to accept this coal ash into their local landfill, while the majority of county residents oppose this decision. Sadly, even with measures like the Executive Order on Environmental Justice in place, these disparities continue to this day, especially in rural communities, which tend to be invisible to regulators.

Another glaring example of this problem is illustrated by the case of the Holt family of Dickson County, Tennessee. The Holt family has lived and owned land in this rural county for decades. The county's population is 90 percent white and only 10 percent African-American. The majority of the African-American residents lived on or near a street named Eno Road. Eno Road is also the location of all of Dickson County's municipal, hazardous and solid waste landfills as well as several other industrial facilities that emit pollution of various types. This pattern of residential segregation and proximity to locally unwanted land uses is an example of the historical land use practices that gave rise to the emergence of the environmental justice movement in the United States.

In the late 1980's EPA notified the State of Tennessee and Dickson County that leachate runoff from its landfills had contaminated the ground water under and near Eno Road. The state and county were instructed by EPA to inform all its residents that the groundwater had been heavily contaminated by a range of chemicals, and that no one should continue to drink or use water from private wells hence forth. The federal government was concerned that continued drinking and use of this ground water could adversely affect the health of those drawing water from contaminated wells.

Neither the Holt family nor other African-American families living along or near Eno Road were given this information. While, disturbingly, the county and state governments did manage to notify an Eno Road operation that euthanized stray dogs and cats that drinking water drawn from wells on or near the facility was not safe for the animals waiting to be euthanized.

In North Carolina where people of color and low-income families primarily depend on well water for household water supplies, families living near CAFOs are more vulnerable to exposure to resistant strains of antibiotics, E. coli, and Salmonella microbes.

Today the Holt family has lost several of its members to cancer, and nearly every Black family living on or near Eno Road had also experienced cancer and had family members who died prematurely as a result of years of exposure to and ingestion of harmful chemicals and substances. Currently the Holt family has filed legal action against the federal, state, and county governments for allowing their family and others to continue to drink and use contaminated water for over a decade without informing them of the public health risk at stake. They are charging that both their civil rights and environmental rights were intentionally denied them due to their race and due to the negligence of federal, state and local governments, and that they were denied equal protection under the law as provided by the U.S. Constitution.

3.10.2 Industrial Animal Production

Industrial animal production is a significant environmental and public health problem in rural communities, particularly for communities of color. Intensive animal production facilities raise large numbers of cows, chickens, and hogs in concentrated animal feeding operations ("CAFOs"). A large majority of them are located in North Carolina, the nation's leading meat producer,[145] on the coastal plains part of the southern "Black Belt" where slave labor built the agricultural economy and where their descendants continue to reside.[146] According to researchers, there are 19 times more CAFOs in North Carolina's poorest communities than in wealthier communities and five times more in nonwhite neighborhoods than in white neighborhoods.[147] Research has shown that residents who live in communities that host hog CAFOs are exposed to gases including ammonia, hydrogen sulfide, volatile organic compounds, particles contaminated with a variety of microorganisms, malodor (which may produce psychophysiologic impacts) and other air pollutants.[148] These exposures can lead to decreased lung function, burning of the eyes, nose, and throat, decrease in immune function, and mental health episodes.[149] Amazingly, many if not all of these air emissions are not regulated under the Clean Air Act.

According to the World Health Organization ("WHO"), in North America and Europe, an estimated 50 percent of all antibiotic production is used in food-producing animals and poultry.[150] The WHO has found that the vast majority of antibiotics are used as regular supplements for prevention of disease or augmented growth of livestock, regardless of an animal's health status.[151] Prescription non-therapeutic antibiotics can contribute to contamination of groundwater, as well as surface water, through animal waste and can be ingested through the food chain.[152] In North Carolina where people of color and low-income families primarily depend on well water for household water supplies, families living near CAFOs are more vulnerable to exposure to resistant strains of antibiotics, *E. coli,* and Salmonella microbes.[153] Some scientists and experts on the subject of CAFOs believe these pathogen pathways are the source of the deadly H1N1 swine flu pandemic.[154]

3.10.3 Lack of Sewer and Water Infrastructure

Residents of rural communities often times have to rely on a complex mixture of unregulated private wells and septic systems and inadequate public drinking water

and sanitary sewer services.[155] Many communities lack connections to public water supplies, sometimes due to past practices of racial discrimination and segregation. For example, Coal Run, Ohio, a community with a population that is 85 percent African-American, was built on top of abandoned coal mines located just outside the Zanesville, Ohio incorporated city limit. Residents relied on contaminated wells, delivered bottled water, and collecting rainwater and snow for drinking, cooking, and bathing. In 2007, Coal Run residents filed a lawsuit captioned *Kennedy v. Zanesville,*[156] *Ohio*, where plaintiffs secured nearly $11 million in settlement funds after local officials were found to have denied the residents' repeated requests for public water service for more than *five decades.*

It is not uncommon for rural and semi-rural households in communities like Coal Run to rely on a patchwork of water sources for household water, lacking the benefits of federal monitoring and routine public notification and reporting required by the federal Safe Drinking Water Act. State and local regulations of private water wells and septic waste systems, where they exist, typically require a minimal amount of testing and monitoring (usually only once at the time of construction and installation). Given the paucity of testing and monitoring performed on drinking water and sewer services in these low-income, indigenous and communities of color, knowledge of the magnitude of water quality problems and public drinking water and sewer service disparities in these communities is limited.

However, even where agricultural communities are provided with public water connections, lack of EPA enforcement jeopardizes public health. In August of 2009, environmental advocacy and policy organization the Natural Resources Defense Council ("NRDC") released a report summarizing the results of monitoring and testing of drinking water by NRDC's own scientists. NRDC found widespread contamination with the herbicide atrazine, a known endocrine disrupter that has been banned in the European Union.[157] NRDC concluded that within the water supplies tested, 75 percent of stream water and 40 percent of groundwater tested were positive for atrazine, and in four states it was detected above federal limits.[158] Two of the geographic areas tested, Louisiana and East Texas, are regions with rural communities that are largely populated by Latinos and African-American families as well as low-income families generally.

3.10.4 Land Loss

Many rural communities lose land to make way for urban and semi-urban development, new industrial corridors, highway, and road construction. Additionally, rural families that manage to hold onto their land are often burdened by neighboring locally unwanted land uses or LULUs, such as landfills and sewage treatment plants, needed to support the new development.

Likewise, African-American farmers have often found it difficult to retain possession of their land due to discrimination in receiving federal loans, debt relief, and farm growth opportunities. African-American farmers won a groundbreaking consent decree awarding them approximately $400 million in the case of *Pigford v. Glickman*,[159] a case alleging racial bias[160] by the U.S. Department of Agriculture ("USDA") in

the awarding of federal loans and access to other financial resource programs for farmers. Black farmers, who represent one percent of the farmers in America, for many years angrily referred to the USDA pejoratively as the "last plantation."[161] Likewise, many farmers feel that the settlement failed to stop unfair treatment, which they believe continues to this day.[162] Latino farmers are in the initial stages of filing a lawsuit akin to the *Pigford* case based on similar patterns and practices regarding access to federal farm support to Latino farmers and landowners.[163]

3.10.5 Food Security and Federal Agriculture Policy

In 2007 and 2008, the Land Loss Prevention Project ("LLPP"), a North Carolina nonprofit providing legal and advocacy resources to financially distressed and limited resource farmers, led a national effort to help shape the 2008 federal farm bill known as the Food, Conservation and Energy Act of 2008.[164] LLPP joined forces with other advocacy groups across the U.S. in what was called the Farm and Food Policy Diversity Initiative. Because of those combined efforts, the Farm Bill of 2008[165] provides nearly $1.5 billion for small farmers and ranchers of color and minority serving institutions to implement sustainable strategies that will keep them on their farms as productive members of rural communities. Though this seems like a large amount of money, it represents a small fraction of the federal dollars budgeted to support agricultural policy in the U.S. and food production. The bulk of federal dollars are still directed towards the operations of large intensive industrial farms and huge subsidies continue to go to certain types of growers (e.g., sugar, cotton and tobacco farmers).

The 2008 Farm Bill contains many important wins for socially disadvantaged farmers, ranchers and farmworkers. The new law includes many provisions that provide new opportunities for indigenous, African-American, Latino, Asian/Pacific Islander and other small ranchers and farmers to secure equitable access to all the programs of the Department of Agriculture. For example, the law includes a number of tools for USDA to use to improve civil rights enforcement, including:

- A moratorium on foreclosures against minority and women farmers with pending discrimination complaints;
- A requirement that county office interactions with farmers be documented;
- A mandate to generate better data on socially disadvantaged farmers;
- Establishment of a minority farmer advisory committee.

The farm policy advocacy group, Rural Coalition/Coalición Rural estimates that, "[c]urrently, over 35 million people in the United States live in households that face food insecurity and/or hunger. … The vast majority of these families are people of color, and nearly 50 percent are children."[166] The new Farm Bill will help to alleviate this problem by increasing support for nutrition and community food programs and by providing greater food safety measures for consumers and increased market access and affordability of local, healthy and fresh foods.[167]

Overall, special attention should be paid to meeting the needs of the nation's rural communities that often exist beneath the radar screen of environmental regulators. Regarding the issue of CAFOs, EPA should work closely with EPA Region 4 and 6

on this and other issues we have identified to ensure that appropriate corrective measures and protections are swiftly instituted and vigorously maintained. These two regions are highlighted because both have historically neglected their responsibilities with regard to environmental justice communities.

3.11 Indian Country

American Indian[168] tribal communities are unique due to their special legal status under federal law. Indian tribes, as sovereign governments, have the right to self-governance over their land and citizens. However, in many ways indigenous people suffer conditions similar to people of color and low-income environmental justice communities: poverty, vulnerability and lack of capacity.[169] Legal experts specialized in tribal law have cautioned that, "[m]atters in which Indian tribes are subjected to environmental impacts as a result of decisions made by federal, state or local agencies relating to activities outside reservation boundaries tend to look like EJ matters involving more typical EJ communities…. [However] there are likely to be factors that render them different in important ways. If such cases may involve decisions by federal agencies that would result in impacts on or within [sic] reservations, then, in addition to federal review processes such as those under NEPA and NHPA [National Historic Preservation Act], the legal doctrine of the federal trust responsibility to Indian tribes will be implicated.[170]

The drafters and numerous contributors of this report recognize the distinctive vision of environmental justice held by indigenous communities and do not begin to purport to speak for indigenous populations. Based on ongoing consultation with Native Action, a non-profit legal advocacy and community empowerment organization located on the Northern Cheyenne Indian reservation and several tribal stakeholders, this report will highlight significant issues indigenous communities have already raised with the Obama Administration and suggest additional affirmative steps the Administration should take to meaningfully engage tribes on environmental justice concerns.

First and foremost, the EPA, the Department of the Interior, the Department of Energy, and the Nuclear Regulatory Commission should coordinate a meeting with tribes to better understand the tribes' environmental concerns and develop a strategy for working with tribes to address these concerns as well as enable tribes to access desperately needed funds to grow tribal capacity to manage environmental regulatory programs on reservations and other tribally-held land. Additionally, we note the following concerns we have been alerted to through our consultation process with tribal activists and scholars. We restate these recommendations in our Recommendations Section at the end of this report.

- The American Indian Environmental Office should be housed in the Office of International Programs at EPA. The American Indian Environmental Office should also be headed by a Native American environmental professional.

- Federal agencies should work collaboratively when regulating natural resources in Indian country that cross inter-state boundaries, and allow tribes to be a part of the regulatory coordination process.

- The federal Surface Transportation Board should be scrutinized for potential anti-trust violations and for its process for determining necessity findings for new railroad funding and expansion through Indian country to reach new coal mining sites, while completely bypassing public rail needs of tribal communities. For example the necessity finding rendered by the Surface Transportation Board for the Tongue River Railroad expansion in Montana.

- Federal funding for green job training programs should be made available to tribal colleges and vocational schools.

- EPA and DOE should close the regulatory gaps on coal bed methane exploration in Indian country and the impact on nearby water quality. Total Maximum Daily Load or "TMDL" standards need to apply to the exploration of new energy sources in Indian country and federal water quality standards must be upheld in these instances.
- Many tribes have waited years for EPA to approve tribal water quality standards as established by the tribes themselves via their delegated authority under the Clean Water Act. These delays must be shortened. This may be achieved by Congress expressly delegating relevant federal authority to tribes. In the meantime, EPA could promulgate federal water quality standards as a placeholder for tribal standards.

It is also worth reiterating several recommendations Native Vote submitted to the Obama/Biden Transition Team regarding water rights:

- **Prioritize Reclamation Fund monies to fund Indian water rights settlements,** The Reclamation Fund is an appropriate primary funding mechanism for Indian water rights settlements in the west. The Reclamation Fund acquires money through repayments on the sale, lease or rental of public lands, and revenues from mineral leases and timber sales. These payments have been increasing in recent years largely due to increasing prices of oil and gas, and the available balance in the fund has increased as well. The Reclamation Fund should be Congress' primary funding source for Indian water rights settlements.

- **Support tribal preparation, litigation, negotiation and settlement of water rights claims.** The Bureau of Indian Affairs ("BIA") regional offices distribute vital funding to tribes to conduct essential technical studies to enable them to participate fully and effectively in the litigation and negotiation processes. Over the past decade these resources have been badly cut to the point tribes are seriously crippled in these efforts. Additional financial and human resources are necessary to assist tribes in developing and pursuing Indian water rights claims. Currently 19 tribes are engaged in settlement discussions and nine more have requested monies for such purposes. The

demand for funding and staffing is going to increase as water concerns continue to rise, and the BIA must be adequately equipped with staff and program monies to distribute to tribes for the preparation and subsequent negotiation of water rights claims.

- **Support the Department of Interior's Indian Water Rights Office.** The Department of Interior Indian Water Rights Office should be permanently placed in the Department of Interior's structure and effectively staffed and funded to assist current and future water rights claims by the hundreds of Indian tribes. Water rights settlements must be a top priority, as water issues loom over tribal and non-tribal communities alike.[171]

3.12 International Environmental Policy

The interrelationship of human rights and environmental protection is undeniable…. Without diverse and sustained living and non-living resources, human beings cannot survive. The problem can be demonstrated by the example of freshwater. Only two per cent of the water of the earth is accessible for human use. Any loss of water resources, especially pollution of underground aquifers, poses dangers for generations to come. According to the [United Nations] UN Water Council between five million and 10 million people die each year as a result of polluted drinking water, most of them women and children in poverty. Severe water shortages exist in 26 countries and by 2050, two-thirds of the world's population could face water shortages. Sixty per cent of the world's drinking water is located in just 10 countries and much of it is polluted. Freshwater shortages are already raising tensions and threaten to be a cause of future inter-state conflicts. Air pollution, contaminated soil and loss of food sources add to the problems of health and survival. Maintenance of the earth's cultural diversity, in particular the preservation of indigenous peoples and local communities, requires conserving the areas in which they live.[172]

The United Nations Stockholm Declaration of 1972 provides that "[m]an has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations." The African Charter of Human and People's Rights, the American Convention on Human Rights, and country reports of the Inter-American Commission on Human Rights have all made contributions to the evolution of the concept of a human right to a clean and healthy environment.[173]

National security experts predict that climate change will amplify already marginal living standards in the "global south" (more specifically Asia, Africa, and Middle East), causing widespread political instability and the potential for failed states.[174] Additionally, significant issues impacting U.S. border communities that overlap with Mexico and Canada need to be addressed. These communities, like urban and rural minority, indigenous and low-income communities, suffer from an inequitable burden of pollution affecting the health of U.S. citizens and residents that is exacerbated by transboundary impacts and regulatory limitations.

3.12.1 Canadian Border

One major area of concern is Canada's tar sands oil field in Alberta, which the United Nations Environment Program has placed on its list of 100 hot spots of environmental change.[175] Canada has permitted the mining of extremely heavy bitumen crude oil in these tar sands in northeastern Alberta, only 650 miles from the United States border, the location of the second largest reserve of this type of oil in the entire world.[176] Because this crude bitumen is extremely viscous, it will not flow into wells. Crude oil companies primarily use open-pit mining techniques although *in situ* mining techniques are also employed. Both techniques use large quantities of natural gas and fresh water to extract the ore there, ruining the boreal forests and peat bogs in the area. In addition, the conversion of crude oil into usable oil creates additional carbon emissions in the refining process.[177]

The water used in the extraction process comes from the Athabasca River, and eventually there will not be enough water to satisfy the needs of the extraction sites.[178] In the meantime, high levels of carcinogens in fish, water and sediment have been found downstream from tar sands areas.[179] The mining in these areas has predictably caused significant adverse impacts on the fish-eating local indigenous population, which has already experienced greater rates of cancer and other diseases they attribute to the mining practices.

Within 48 hours, enough of the tar sands are removed to fill the old Yankee Stadium. Seventy-five percent of the 1.34 million barrels produced daily in Canada is exported to the United States, and tar sands operators are aiming to expand production to more than 4.5 million barrels per day by 2020.[180] Oil companies are proposing new pipelines, refineries, and refinery expansions in the Midwest and the Gulf Coast regions to expand in order to handle more tar sands oil.[181] This increase will only exacerbate environmental pollution currently burdening those regions of the United States. Moreover, any increase in production of oil from the tar sands may cause problems under the North American Free Trade Agreement's ("NAFTA's) controversial "proportional sharing clause."[182] In the medium to long-term, the U.S. should work to eliminate its reliance on energy from the Canadian tar sands. In the interim period, the Administration should exempt Canada (as it has Mexico) from NAFTA's proportional sharing clause.

3.12.2 Mexican Border: Colonias

Colonias, unincorporated rural settlements situated along the Mexican border and the states of Arizona, California, New Mexico, and Texas,[183] are often-overlooked communities burdened by the lack of environmental protection. The population in colonias is predominately Latino, and 85 percent of those Latinos under 18 years of age are U.S. citizens.[184] In some of the Texas colonias, the unemployment rate is eight times higher than the state average.[185]

Many of these communities have no water, wastewater or sewage services. Residents often must purchase potable water by the drum to provide for their daily needs. Inadequate run-off of water coupled with inadequate septic systems, causes sewage to pool on the ground.[186] Where colonias do have sewer systems, there are few to no treatment plants in the area, so the inadequately treated or untreated wastewater is dumped into arroyos and creeks that ultimately flow into the Rio Grande River or the Gulf of Mexico.

All of these issues combined have made the colonias places of rampant disease proliferation. "Texas Department of Health data show that hepatitis A, salmonellosis, dysentery, cholera and other diseases occur at much higher rates in colonias than in Texas as a whole. Tuberculosis is also a common health threat, occurring almost twice as frequently along the border than in Texas as a whole."[187] Besides the shortage of medical services, difficulty in accessing health care is compounded by other factors, including having to travel long distances to health care facilities, fear of losing wages for time spent away from work, inconvenient health care facility hours, lack of awareness of available health care programs and no health insurance. As a result, many colonias residents' health care problems go unreported and untreated. For children, these barriers can be devastating and may result in slow growth and lower educational development rates.

3.12.3 Mexican Border: Maquiladoras

A maquiladora is a foreign-owned factory that imports raw materials free of tariff for assembly, and then re-exports the final assembled product, usually to the country of origin. They exist in vast numbers just across the U.S.-Mexico border in Mexico in order to take advantage of lower Mexican wage costs. Many maquiladoras create severe environmental and health impacts that go unaddressed due to transboundary issues. Metales y Derivados, a former battery and lead waste recycler, was one of these border factories. Though it closed operations in 1994, it continues to impact the health and environment of nearby residents.

Metales y Derivados is owned by New Frontier Trading, a profitable company operating in the U.S. When the Mexican government initiated judicial proceedings in 1995 for criminal environmental violations against New Frontier and its American owner, Jose Kahn, Mr. Kahn simply stopped traveling to Mexico where there is no extradition requirement. He safely resides in San Diego, California, beyond the reach of Mexican authority.[188]

Next to the abandoned Metales y Derivados site is Colonia Chilpancingo, a community of working poor. Residents of the colonia continued to report – even years after the abandonment of the plant – acute skin and eye irritation, gastrointestinal problems, dizziness, nausea, asthma, birth defects, and anencephaly, a congenital condition where all or part of the brain and the rear of the skull is absent.[189] On behalf of Colonia Chilpancingo, San Diego-based Environmental Health Coalition, along with Mexico-based Comité Ciudadano Pro Restauración del Canon del Padre y Servicios Comunitarios, filed a citizen submission with the North American Environmental Commission ("CEC"),[190] claiming that NAFTA parties were failing to enforce environmental laws effectively. NAFTA created the CEC under the North American Agreement for Environmental Cooperation, the so-called "environmental side agreement" to NAFTA, with the intent of curbing environmental impacts caused by liberalized trade.[191]

Ultimately, the CEC agreed with the petitioners' claims and their findings validated the community's concerns.[192] However, one of the grave shortcomings of the environmental side agreement is that the CEC is powerless to provide substantive remedies. In January of 2009 (more than ten years after the citizen's submission was filed with the CEC), EPA together with Mexico's environmental ministry celebrated the cleanup of the Metales y Derivados site, and it is now owned by the Mexican state of Baja California. Nevertheless, positive outcomes like this one should be pursued with more vigor and with the urgency that these situations warrant.

NEJAC provided formal advice to EPA regarding environmental problems on the U.S.-Mexico Border in 2003, when it transmitted to Administrator Christine Todd Whitman a comprehensive report entitled "Unheard Voices from the Border: A Report on Environmental Justice in the U.S.-Mexico Border Region from Past to Future" ("Border Report"). NEJAC developed the report, in part, from the proceedings of the "NEJAC International Roundtable on Environmental Justice on the U.S.-Mexico Border," August 19-21, 1999, National City, California. We urge EPA to revisit the Border Report and to adopt the seven key recommendations emanating from that report. For your convenience, we have incorporated those recommendations into our Recommendations Section.

4. Conclusion

Federal regulatory agencies have amassed a wealth of knowledge and experience with environmental justice law, science, and public outreach in the nearly three decades since EPA began thinking about pollution and health impacts on communities of color, low-income populations and indigenous people. Unfortunately, the last 30 years have also seen environmental issues become more acute as communities and regulators have come to understand the depths of the toxicity of many industrial and military activities. Now is the time for profound change, a sea change. This coming sea change will, finally, factor fairness and justice into environmental protection formulas so that indigenous, low-income, and people of color communities are no longer asked to bear a disproportionate environmental burden. The sea change will come decisively and in spite of setbacks of the last eight years. We believe that under the Obama Administration, the EPA and various other federal agencies have leaders who

embrace the imperative to make vigorous and sustainable changes to environmental protection as we have known it in the past. We hope the Obama Administration will accept our invitation to partner with us during this exciting transformation.

This report has been drafted after nearly a year of external dialogue with the Obama Administration as well as internally, among the participants in this report – activists, academics, scientists and social scientists, lawyers, urban planners, and most importantly, at risk communities from across the nation. This report, as a result, includes a broad range of issues that we hope will provide comprehensive guidance to the Administration. In addition to the written report, the participants and drafters are prepared to provide ongoing support towards the implementation of our recommendations.

We ask that you give thoughtful consideration to the detailed recommendations outlined in this report. To that end, supporting materials used in drafting this report may be furnished upon request. We are anxious to continue our dialogue with you to discuss the recommendations and to respond to any questions. This report is an early step in ongoing discussions we hope will continue throughout the tenure of the Obama presidency.

We believe that under the Obama Administration, the EPA and various other federal agencies have leaders who embrace the imperative to make vigorous and sustainable changes to environmental protection as we have known it in the past.

Recommendations For Eliminating Disparities

Executive Order 12898

1. Each agency covered by Executive Order 12898 should be required to report at regular intervals on its activities furthering Executive Order 12898.

2. The Department of Justice ("DOJ") should be tapped to issue guidelines for making the Executive Order on Environmental Justice fully consistent with existing civil rights laws.

3. All agencies named in Executive Order 12898 should fully and vigorously implement the executive order.

4. The Administration should encourage agencies not specifically mentioned in Executive Order 12898 but with high potential for environmental justice impacts (e.g. Federal Energy Regulatory Commission, Nuclear Regulatory Commission, Centers for Disease Control and Prevention) to voluntarily abide by the directives of Executive Order 12898.

National Environmental Policy Act ("NEPA") and Environmental Permitting

5. Prior to undertaking any environmental permitting or other federal action that may adversely affect human health or the environment the lead federal agency should be required to conduct an environmental justice analysis to determine whether significant disproportionate adverse effects would be caused by the action and to the maximum extent feasible avoid, minimize or mitigate the adverse environmental justice impact.

6. The White House Council on Environmental Quality should be directed to amend NEPA regulations at 40 CFR 1508.8 to expressly identify environmental justice as an issue in NEPA compliance documents.

7. The White House Council on Environmental Quality should amend NEPA regulations 40 CFR 1505.2 and 1505.3 or issue policy guidance directing Federal agencies to establish an enforceable mitigation monitoring plan for any mitigation measure in a NEPA compliance document that reduces environmental justice impacts below the significance level.

Environmental Protection Agency's Strategic Plan on Environmental Justice

8. The Environmental Protection Agency ("EPA") should emphatically and resolutely embrace a strong definition of environmental justice grounded in the central tenet that environmental justice is the prevention, reduction and elimination of the known dispro-

portionate environmental burdens primarily on people of color, indigenous, and low-income communities.

9. EPA should clearly and urgently identify communities of color, indigenous, and low-income communities where there is a known disproportionate environmental burden or risk.

Title VI of the Civil Rights Act of 1964

10. The Administration should seek legislation amending Title VI of the Civil Rights Act of 1964, to explicitly provide for a private right of action to bring claims for violation of its regulations prohibiting federal funding of programs that that have a discriminatory impact. Any Title VI amendment should entitle communities to injunctive relief upon a showing that respondent's actions constitute a substantial or significant factor in bringing about the adverse, disparate impacts.

11. DOJ should develop guidelines for Title VI compliance in the context of emergency preparedness and emergency response for recipients of federal funding.

EPA Office of Civil Rights ("OCR")

12. EPA should establish a comprehensive system of public reporting on the OCR's Title VI investigations and findings.

Environmental Enforcement

13. EPA should make full use of existing legal authority to address environmental assaults on people of color, indigenous, and low-income communities. To that end, EPA should revisit the National Environmental Justice Advisory Council ("NEJAC") Enforcement Subcommittee's 1996 memorandum with formal recommendations to EPA. The recommendations from that memorandum are set forth in Appendix A of this report.

14. EPA should implement the NEJAC's June 2003 unanimous recommendation for increased use of the Supplemental Environmental Projects ("SEPs") mechanism to address pollution prevention and environmental justice issues.

15. In order to fully embrace the scope of its authority, EPA should revisit its memorandum entitled "EPA Statutory and Regulatory Authorities Under Which Environmental Justice May Be Addressed in Permitting," from Gary S. Guzy, General Counsel to Steven A. Herman, Assistant Administrator for the Office of Enforcement and Compliance Assurance; Robert Perciasepe, Assistant Administrator for the Office of Air and Radiation; Timothy J. Fields, Assistant Administrator for the Office of Solid Waste and Emergency Response; and J. Charles Fox, Assistant Administrator for Office of Water (December 1, 2000).

16. EPA and DOJ should aggressively enforce violations of environmental laws, targeting communities with the heaviest pollution burdens, and other environmental and health impacts.

17. EPA should aggressively monitor state performance under federally delegated programs and initiate action to withdraw delegated programs from states that fail to enforce the law in sensitive and vulnerable communities.

18. EPA should require assessments of multiple, cumulative and, where possible, synergistic exposures, unique exposure pathways, and impacts to sensitive populations in issuing environmental permits and regulations under the Resource Conservation and Recovery Act, the Clean Air Act, and the Clean Water Act's and other applicable federal laws. Similar risk assessment should be made in establishing site-specific clean-up standards under Superfund and Brownfields Programs.[193]

19. EPA should seek the reinstatement of the superfund tax on chemical and petrochemical manufacturers through congressional reauthorization of the Superfund tax.

20. The Justice Department should reiterate and update its commitment to the environmental justice goals it identified in its 1995 Guidance Concerning Environmental Justice.

21. The Department should aggressively enforce environmental violations with greater attention to people of color and low-income communities.

22. A commitment to environmental justice must be complemented with the staff and budgetary capacity for achieving the DOJ's goals.

23. EPA has agreed to undertake a thorough environmental justice review of its Definition of Solid Waste ("DSW") rulemaking. The 2008 revisions to the DSW rule would see hazardous waste recycling facilities already concentrated near low-income and communities of color, with less regulatory control under RCRA over their operations and activities, potentially increasing adverse public health conditions near these vulnerable communities.[194] Prior to promulgating the rule, EPA declined to investigate the disparate impact of the revision to the definition of solid waste on low-income and minority communities, arbitrarily concluding that the revision would have no environmental impact.[195] EPA should not allow states to use its draft Definition of Solid Waste until a thorough environmental justice review of this rule is completed, and a comprehensive methodology is developed to assess the potential impact of the operations of hazardous waste recycling operations on environmental justice and low-income communities.

24. The Toxic Substances Control Act ("TSCA") is the most outdated environmental statute on the books. It has not been reauthorized since it was passed in 1976. TSCA needs to be reformed in a manner that will provide EPA broad authority to protect environmental justice communities from toxic chemicals in the commercial marketplace. More than 80,000 chemicals have been produced and used in the United States and the EPA has only been required to test 200 of them against a safety standard. Of that 200, only 5 have been restricted. Four key principles of TSCA reform are to (a) ensure environmental justice – effective reform should contribute substantially to reducing the disproportionate burden of toxic chemical exposure placed on people of color, low-income people and indigenous communities; (b) protect vulnerable groups using the best science – chemicals should meet a standard of safety for all people, including children, pregnant women, and workers. "The extra burden of toxic chemical exposure

on people of color, low-income and indigenous communities must be reduced."[196] The EPA should adopt the recommendations of the National Academy of Science on how to better assess risks from chemicals; (c) immediately initiate action on the worst chemicals – persistent, bioaccumulative toxicants are uniquely hazardous. "Any such chemical to which people could be exposed should be phased out of commerce. Exposure to other toxic chemicals, such as formaldehyde, that have already been extensively studied, should be reduced to the maximum extent feasible;"[197] (d) hold industry responsible for demonstrating chemical safety--unlike pharmaceuticals, chemicals are currently presumed safe until proven harmful. "The burden of proving harm falls entirely on EPA. Instead, chemical manufacturers should be responsible for demonstrating the safety of their products."[198]

25. EPA has significant discretionary authority to take into account environmental justice concerns of risk accumulation and cumulative effects under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA").[199] When EPA finds a risk of concern to workers, it should aggregate all risks of concern to workers, children, consumers, and the environment in comparing those risks to the benefits to growers of using the pesticide.

26. FIFRA affords workers far less protection from workplace hazards than industrial workers are afforded under the Occupational Safety and Health Act. EPA should make it a priority to revise and strengthen FIFRA's worker protection standard, to protect workers from heat-induced illnesses and deaths, to require employers to provide hazard information to workers about the pesticides to which they are exposed, and to require medical monitoring of workers exposed to hazardous pesticides in the course standard. Of that 200, only 5 have been restricted. Four key principles of TSCA reform are to (a) ensure environmental justice – effective reform should contribute substantially to reducing the disproportionate burden of toxic chemical exposure placed on people of color, low-income people and indigenous communities; (b) protect vulnerable groups using the best science – chemicals should meet a standard of safety for all people, including children, pregnant women, and workers. "The extra burden of toxic chemical exposure on people of color, low-income and indigenous communities must be reduced."[196] The EPA should adopt the recommendations of the National Academy of Science on how to better assess risks from chemicals; (c) immediately initiate action on the worst chemicals – persistent, bioaccumulative toxicants are uniquely hazardous. "Any such chemical to which people could be exposed should be phased out of commerce. Exposure to other toxic chemicals, such as formaldehyde, that have already been extensively studied, should be reduced to the maximum extent feasible;"[197] (d) hold industry responsible for demonstrating chemical safety--unlike pharmaceuticals, chemicals are currently presumed safe until proven harmful. "The burden of proving harm falls entirely on EPA. Instead, chemical manufacturers should be responsible for demonstrating the safety of their products."[198]

27. EPA should align its discretionary grant and other funding, and loan guarantee programs consistent with the Livability Principles established in the federal Partnership for Sustainable Communities of June 2009.

Toxic Air Pollution

28. EPA should issue all overdue air toxics control requirements, and correct all deficient air toxics control requirements on an expedited basis. EPA's Office of Air Quality Planning and Standards ("OAQPS") must have fully adequate resources for this task.

29. The Office of Management and Budget ("OMB") should be prevented from delaying air toxics rulemakings. EPA must be required to seek, and OMB must be required to grant, waivers of the Paperwork Reduction Act review process for rulemakings to issue overdue air toxics standards or to correct air toxics standards that are less protective than the Clean Air Act requires.

30. EPA's approach to issuing risk-based air toxics standards should be revised to reflect the true health risk faced by people in the communities most exposed to toxic air pollution and to ensure that such risks are reduced to protect public health with an ample margin of safety.

31. EPA should establish rules requiring actual continuous monitoring of toxic air emissions so that affected communities will be able to determine the identities and quantities of toxic pollution to which they are exposed and so that citizens, state and local governments, and the federal government can fully enforce all air toxics standards.

32. EPA should eliminate the "malfunction" exemption that currently allows sources of toxic pollution to exceed their emission standards with impunity.

33. EPA should prioritize enforcement of air toxics emission standards in communities that are most affected by toxic air pollution.

Coal Mining

34. The federal Public Lands Management Act should be revisited and revised to reflect current mining industry practices.

35. Better guidance regarding multiple-use planning of public lands is necessary where there are communities of color, indigenous or low-income communities that rely on the use of public lands. Also, the hierarchy of uses should be more balanced. Currently, uses such as mining take precedence over grazing, or water for fish or forests.

36. The " highest and best use" language in the Act is vague, and a clearer definition that will protect environmental justice interests should be developed; *i.e.,* instead of focusing on obtaining the highest graze yield, the best use should be defined as protection of natural resources.

Power Generation from Coal

37. EPA should swiftly finalize rules to force the clean up of power plants that have saddled vulnerable communities with toxic air and water pollution for decades. Specifi-

cally, EPA should do the following: finalize Maximum Available Control Technology standards to limit emissions of hazardous air pollutants from power plants; finalize and enforce strong national standards for very fine particulate matter ($PM_{2.5}$) and ozone, enforce Best Available Retrofit Technology requirements, and promulgate binding Effluent Limitation Guidelines for discharges of heavy metals and other contaminants from power plant "scrubbing."

38. The Department of Energy, the Rural Utilities Service, and other agencies should avoid funding projects that increase dependence on dirty power generation. To this end, the Administration should limit funding for so-called "advanced" coal combustion technologies to projects that are committed to achieving 90 percent or greater reductions in emissions of carbon dioxide and also maximum achievable reductions of hazardous air pollutants, SO_x, NO_x, $PM_{2.5}$ and PM_{10}.

Cessation of Mountaintop Removal Mining

39. The Obama Administration should conduct a reexamination of a Final Environmental Impact Statement ("FEIS") started under the Clinton Administration and completed by the Bush Administration that evaluated impacts of mountaintop removal. We believe current findings do not correlate with the FEIS's recommendations.

40. The Obama Administration should issue a moratorium on all mountain top removal mining until the full environmental and public health impacts of this method are accounted for.

Overhaul of the Office of Surface Mining

41. The Office of Surface Mining should vigorously enforce existing law to stop ongoing devastation from mountaintop removal, prevent unsafe waste disposal in mines and work with EPA to clean up natural resources polluted or damaged by strip mining.

Regulation of Coal Combustion Waste

42. EPA should aggressively enforce existing Surface Mining Control and Reclamation Act ("SMCRA") and Resource Conservation and Recovery Act ("RCRA") regulations covering sludge and slurry.

43. EPA should regulate coal ash under Subtitle C of RCRA to ensure federally enforceable minimum standards for the safe disposal of ash in engineered landfills.

44. EPA should require the phase out of wet storage of coal ash in surface impoundments.

45. EPA and/or Office of Surface Mining should regulate stringently the placement of coal ash in surface mines to prevent unsafe permanent disposal of industrial waste in mines.

46. Stricter enforcement of the regulations relating to underground injection needs to occur. Many injection sites are located at old mines, which by nature have openings.

There are regulations specifying a walling off procedure, but coal companies are not following them nor are they being applied or enforced by federal or state agencies.

47. The Obama Administration should promote legislation to amend the Clean Water Act to clarify that the discharge of mining tailings into a body of water is not an activity that can be permitted as wetlands fill. Rather, such a discharge requires a permit under the National Pollution Discharge Elimination System ("NPDES") program.

48. EPA should finalize Effluent Guideline Limitations under the Clean Water Act to stop ongoing contamination of rivers and streams from coal combustion wastewaters.

49. The permit renewal process should incorporate an exhaustive review focusing on public health and environmental health impacts of the permits, as well as an economic analysis, including job loss, property values, subsidence issues, and superfund site remediation.

Healthy Schools

50. EPA should engage the Department of Education regarding EPA's efforts to limit environmental contaminants near schools and the Department of Education should work alongside EPA when appropriate.

51. EPA should host 10 regional town hall meetings across the country to collect baseline information on children's health at schools and childcare centers.

52. EPA should work with community-based environmental justice groups to monitor air quality near local schools and possible migration pathways to inside schools and develop a plan to address, reduce, or eliminate toxic air contaminants. Such plans should, in addition to parents and school administrations, involve local industry and local, state, and federal governments.

53. EPA should implement a robust, high performance school siting guidance that recommends policies and best practices for state and city environmental protection agencies in how they carry out site evaluations and site cleanups, so that the siting of schools avoids environmental health hazards posed by contaminated sites and off-site sources of pollution. The guidance should also recommend that the school siting processes be fully transparent and meaningfully involve parents, teachers, staff and students. In particular, the guidance should be sensitive to and address the needs of low-income communities and communities of color that are already disproportionately exposed to environmental health hazards where they live.

54. Guidance should also be developed for the siting of cell towers, new industries, roads, transportation routes, and other potential sources of pollution near existing schools. EPA should actively engage states in strengthening their capacity to provide support to school districts in the environmental site evaluation of proposed schools sites.

55. The Department of Education should endorse the EPA Model School Siting Guidelines and require all recipients of federal assistance to comply with it.

56. Minimum mandatory standards for environmental quality and opportunity around schools should be set nationally so that no students are at a disadvantage because of the regions, states, or localities in which they live and ensure schools serving low-income communities have space for recreation and school-based gardens.

57. Where possible, outdoor air monitors should be located near schools. EPA should analyze and report regularly to communities on current ambient air toxics monitoring.

58. The Administration should endeavor to fully fund EPA healthy schools programs and the Office of Children's Health Protection and to fund EPA's related grant programs.

59. EPA should provide grants to state health and environment agencies to create school environmental quality plans and implementation timelines.

60. EPA should set federal guidelines to state and local schools agencies on indoor air quality in schools, integrated pest management, school chemical cleanouts, drinking water, school design, asbestos, PCBs in caulking, molds, comprehensive building inspections, and how pediatric environmental health specialty units ("PEHSUs") can work with state health agencies on on-site investigations.

61. EPA and the Centers for Disease Control and Prevention ("CDC") should strengthen their funding for PEHSU's and charge them with creating regional technical assistance centers that parents and communities can tap for information and intervention services on environmental problems in schools and child care centers. Each regional center should have an accessible website where city and state specific policies, rules, regulations, and best practices for school environments are posted along with the results of on-site investigations.

62. EPA and CDC should establish a research agenda for school environments that includes tracking and public reporting of school environmental problems impacting children by state.

Climate Change

63. Priority should be given to undertake additional research to reduce and eliminate climate-related illnesses and death.

64. EPA should develop a preparedness strategy for heat-related illnesses, which already disproportionately impact the elderly, children, and low-income residents.[201]

65. EPA should measure the success of adaptation strategies to ensure that they protect everyone. To that end, invest in infrastructure protection, such as enhanced levees, invest in efficient air-cooling technologies, and improve surveillance of infectious diseases related to climate change.

66. The Administration should extensively promote the use of domestically manufactured renewable energy sources and energy conservation technologies in urban areas

and environmental justice communities in order to reduce emissions of greenhouse gases, to reduce emissions of co-pollutants such as fine particulate matter ($PM_{2.5}$) and to help economically revitalize urban areas, environmental justice and indigenous communities by providing badly needed jobs and other economic opportunities to residents.[202]

67. The Administration should ramp up the use of brownfields sites for alternative energy production and generation, such as wind turbines, currently under development in EPA's RePower America initiative.

68. Adopt carbon trading systems only to the extent necessary and only when 100 percent of the carbon allowances can be auctioned annually and a significant portion of the proceeds used to support global warming initiatives in urban areas, indigenous, low-income and environmental justice communities.

69. The Administration should ensure that any carbon trading market is properly regulated to address and redress co-pollutant issues that are known to co-exist with the establishment of carbon markets.

70. The Administration should prepare climate change disaster mitigation programs specifically for residents of urban, indigenous, low-income and environmental justice communities.

71. The Administration should mandate dramatic reductions in emissions of greenhouse gases and air pollution for all federally funded projects before they are funded.

72. The Administration should establish a complaint and review process with the power to stop or significantly alter projects under consideration by the Federal Transportation Administration, the Department of Energy and EPA.

Green Jobs

73. All present and future stimulus projects should include local resident hiring at prevailing wages rates.

74. Green jobs and infrastructure projects under the American Recovery and Reinvestment Act should provide adequate training and have the potential to benefit low-wage workers and their families. This can be achieved, in part by adopting or utilizing training program models at community colleges, vocational schools and minority serving institutions, encouraging on-the-job training, and through labor union training programs.

75. New green jobs projects should partner with local Workforce Investment Boards and organizations in applying for federal funding.

76. The Department of Labor should partner with the Departments of Education, the Department of Energy, EPA and National Institute of Environmental Health Sciences ("NIEHS") to invest in the training and development of a qualified workforce to manu-

facture, install and operate new and advanced clean energy and energy efficiency technologies and systems of the 21st century.

77. Encourage pathways to training and employment for residents of Department of Housing and Urban Development ("HUD") subsidized housing by partnering with local Workforce Investment Boards and Public Housing Agencies.

78. Green jobs funding should be targeted towards people of color institutions and universities, tribal colleges and vocational programs, and areas of high unemployment.

Transportation

79. A dramatic expansion of public transit funding is necessary to support the growing number of people living outside city work centers. Eighty percent of the funding from the Surface Transportation Authorization Act should be committed to public transit, 20 percent to highway and road maintenance rather than new road construction.

80. Under the Surface Transportation Authorization Act of 2009/10, a minimum of 50 percent of the entire Act's allocation for transit should be dedicated to *operating* purposes, with at least half of that restricted to *bus* operations.[203] Such distribution of resources will stop the massive fare increases and service cuts local jurisdictions are contemplating and allow for more bus and rail service on existing lines, fare reductions, free transfers, 24-hour/seven days a week transit service with a block grant to cities and rural areas to reduce all transit fares by 50 percent.

81. The Department of Transportation ("DOT") should prioritize capital preservation over expansion, with at least half of all capital funds restricted to bus fleets.

82. The primary use of bus and rail capital should be for system preservation and modernization. In terms of expansion, the focus should be on bus expansion.

83. DOT should align its discretionary grant and other funding, and loan guarantee programs consistent with the Livability Principles established in the federal Partnership for Sustainable Communities of June 2009.

84. Allocate funding from the Surface Transportation Authorization Act of 2009/10 to mitigate air quality at schools, hospitals, and residences that are significantly impacted by diesel particulate matter and very fine particulate matter from vehicles on Federal highways and rail lines.

Housing and Urban Development

85. HUD should work closely with EPA to ensure that new federally subsidized housing follows strict application of maximum residential clean-up standards at Brownfields sites that will now be considered for HUD funded or subsidized housing construction. HUD should develop its guidance for housing construction on Brownfields sites in tandem with EPA and apply the strictest public health protections to achieve highest and best use principles.

86. The Administration should seek a legislative amendment of the Fair Housing Act of 1968 to include provisions that make it illegal to knowingly rent, lease, or sell housing units that pose an environmental health hazard to residents (*e.g.,* lead contaminated, or mold infested), or to construct housing on or near land or structures that are known or suspected of being contaminated with serious environmental hazards.

87. EPA and HUD should vigorously pursue the removal of lead from all federally-owned and subsidized housing.

88. EPA and HUD should vigorously pursue the removal of toxic mold from all federally-owned and subsidized housing.

89. The Administration should mandate that all federally-owned or subsidized housing construction adhere to energy efficient, healthy and green home construction standards.

90. HUD should significantly increase support at the staff and grant levels for brownfields redevelopment activities.

91. Continue to fund the HUD Brownfields Economic Development Initiative ("BEDI") program at the current annul level or more.

92. Restructure and incorporate the HUD BEDI program into the Sustainable Communities Initiative, and consider renaming it the "Sustainable Brownfields Economic Development Initiative."

93. Seek continued funding and support for the HUD 108 loan program (although it should be de-linked from the HUD BEDI program), which provides unique and critical funding support for large-scale brownfields redevelopment projects and vacant property revitalization.

94. Provide policy and grant support to vacant property programs that seek to stem the resulting distressed neighborhood blight affect from home foreclosures.

95. HUD should align its discretionary grant and other funding, and loan guarantee programs consistent with the Livability Principles established in the federal Partnership for Sustainable Communities of June 2009.

Public and Environmental Health

96. The Department of Health and Human Services ("HHS"), the Agency for Toxic Substance and Disease Registry ("ATSDR") and EPA should consider cumulative impact assessments along with standard quantitative risk assessments to determine exposure, disproportionate impact or harm. Performing cumulative impacts assessment, especially by focusing on exposure levels, will require more site-specific, community-based participatory research.

97. HHS, ATSDR, and EPA should perform an exposure audit where there is particularly suggestive evidence for toxic exposure in a community or where there is strong evidence that there is a current public health or environmental threat.

Homeland Security and Emergency Response

98. The Administration should promote the amendment of the Stafford Act to require EPA to perform soil, water and air testing in addition to mandating that services and support provided to victims of emergencies not harm the health and safety of the recipients in the short or long term.

99. The EPA and the Department of Homeland Security ("DHS") should adopt site location standards requiring a safe distance between a residential population and an industrial facility, with the development of locally administered "Fenceline Community Performance Bonds"[204] required to provide for the recovery of residents impacted by industrial accidents or natural disasters that result in industrial accidents.

100. Relevant federal agencies should work together to develop a site-specific environmental justice analysis methodology for use in federal siting issues (e.g., energy facilities, liquefied natural gas facilities, high powered transmission lines, and extractive mining) that considers cumulative risk or a full impact analysis.

101. DHS should require local industries to have an approved hazardous communication plan that immediately notifies local officials and the affected community of a release.

102. DHS should require state and local governments to develop and distribute emergency preparedness and evacuation plans for communities located near or adjacent chemical and petrochemical facilities. These plans should provide for immediate notification and safe evacuation of affected communities in the case of an industrial accident, terrorist attack or natural disaster.

103. DHS should create enhanced community assessments and communication methods to improve cultural sensitivity for environmental justice communities.

Federal Facilities

104. EPA should publish strong regulations for perchlorate contamination in drinking water sources.

105. EPA should revisit NEJAC's 2004 report, "Environmental Justice and Federal Facilities: Recommendations for Improving Stakeholder Relations Between Federal Facilities and Environmental Justice Communities" and fully consider its recommendations.

106. The Department of Defense ("DOD"), the Department of Energy ("DOE"), or other appropriate federal agencies should provide access to adequate health services for communities exposed to hazardous substances from federal facilities.

107. The Administration should seek increased funding for communities to participate in federal cleanup programs and for improvement of communication between facilities, regulators, and environmental justice communities.

108. The Administration should support an effort to modify RCRA to specifically allow for RCRA citizens' suits to be filed concerning Formerly Used Defense Sites ("FUDS").

Gulf Coast Restoration and Hurricanes Katrina, Rita, Gustav and Ivan

109. The ecological restoration required to provide the first phase of coastal protection should be prioritized by this Administration, funded adequately, and executed with precision by the Army Corps of Engineers in order to halt the repeated assaults on this region, its natural resources and its people.

Semi-Urban and Rural Areas

110. EPA should ensure that its remedies and emergency responses in one area do not create environmental burdens in communities of color, indigenous, and low-income communities, especially unincorporated communities, to ensure that decisions to accept waste like that of Perry County, Alabama do not create disproportionate impacts on people of color, indigenous, and low-income communities.

111. EPA should ensure that its directives to state and local governments are implemented fairly and thoroughly within communities of color, indigenous communities, and low-income communities so that situations like that of the Holt family in Dickson County, Tennessee are not repeated.

Industrial Animal Production

112. Strengthen regulation of emissions from concentrated animal feeding operations, such as ammonia, hydrogen sulfide, and volatile organic compounds emissions.

Sewer and Water Infrastructure

113. The Administration should ensure that rural areas are provided with adequate water and sewer services by working with local agencies and ensuring vigorous enforcement of the Safe Drinking Water Act in rural and semi-urban communities.

Land Loss

114. The Administration should review the policies of the Department of Agriculture to ensure that African American farmers and other farmers of color have equal access to federal loans, debt relief, and farm growth opportunities.

Food Security and Federal Agriculture Policy

115. EPA was required to ensure by the end of 2006 that there is a reasonable certainty that no harm will result to infants and children from aggregate exposures to pesticides. EPA reviewed and reregistered existing food-use pesticides to comply with this mandate, but it did not consider pesticide drift exposures. This oversight has left farm

worker children, who are, as a general matter, disproportionately low-income and Latino, at risk of harm from pesticide exposures. EPA should immediately require no-spray buffers around schools, day care centers, homes, parks and other places where children congregate and should expeditiously undertake a full evaluation followed by changes in the registrations to minimize harmful pesticide drift exposures to children.

Indian Country

116. The American Indian Environmental Office should be housed in the Office of International Programs at EPA. The American Indian Environmental Office should also be headed by a Native American environmental professional.

117. There should be significant infrastructure investments in Indian country to enable tribal communities to fulfill their delegated authority responsibility to implement existing environmental and regulatory programs in Indian country. Most Indian Reservations still lack basic drinking water and sanitary sewage systems.

118. Federal agencies should work collaboratively when regulating natural resources in Indian country that cross inter-state boundaries, and allow tribes to be a part of the regulatory coordination process.

119. The federal Surface Transportation Board should be scrutinized for potential antitrust violations and for its process for determining necessity findings for new railroad funding and expansion through Indian country to reach new coal mining sites, while completely bypassing public rail needs of tribal communities. For example the necessity finding rendered by the Surface Transportation Board for the Tongue River Railroad expansion in Montana should be re-examined.

120. Federal funding for green job training programs should be made available to tribal colleges and vocational schools.

121. EPA and DOE should close the regulatory gaps on coal bed methane exploration in Indian country and the impact on nearby water quality. Total Maximum Daily Load or "TMDL" standards need to apply to the exploration of new energy sources in Indian country and federal water quality standards must be upheld in these instances.

122. Many tribes have waited years for EPA to approve tribal water quality standards as established by the tribes themselves via their delegated authority under the Clean Water Act. These delays must be shortened. This may be achieved by Congress expressly delegating relevant federal authority to tribes. In the meantime, EPA could promulgate federal water quality standards as a placeholder for tribal standards.

123. Prioritize Reclamation Fund monies to fund Indian water rights settlements. The Reclamation Fund is an appropriate primary funding mechanism for Indian water rights settlements in the west. The Reclamation Fund acquires money through repayments on the sale, lease or rental of public lands, and revenues from mineral leases and timber sales.

123. Prioritize Reclamation Fund monies to fund Indian water rights settlements. These payments have been increasing in recent years largely due to increasing prices of oil and gas, and the available balance in the fund has increased as well. The Reclamation Fund should be Congress' primary funding source for Indian water rights settlements.

124. Support tribal preparation, litigation, negotiation and settlement of water rights claims. The Bureau of Indian Affairs ("BIA") regional offices distribute vital funding to tribes to conduct essential technical studies to enable them to participate fully and effectively in the litigation and negotiation processes. Over the past decade these resources have been badly cut to the point tribes are seriously crippled in these efforts. Additional financial and human resources are necessary to assist tribes in developing and pursuing Indian water rights claims. Currently 19 tribes are engaged in settlement discussions and nine more have requested monies for such purposes. The demand for funding and staffing is going to increase as water concerns continue to rise, and the BIA must be adequately equipped with staff and program monies to distribute to tribes for the preparation and subsequent negotiation of water rights claims.

125. Support the Department of Interior's Indian Water Rights Office. The Department of Interior Indian Water Rights Office should be permanently placed in the Department of Interior's structure and effectively staffed and funded to assist current and future water rights claims by the hundreds of Indian tribes. Water rights settlements must be a top priority, as water issues loom over tribal and non-tribal communities alike.[205]

Canadian Border

126. In the medium to long-term, the U.S. should work to eliminate its reliance on energy from the Canadian tar sands. Whereas in the interim period, the Administration should exempt Canada (as it has Mexico) from the North American Free Trade Agreement's proportional sharing clause.

Mexican Border

127. EPA should revisit NEJAC's 2003 report, "Unheard Voices from the Border: A Report on Environmental Justice in the U.S.-Mexico Border Region from Past to Future" ("Border Report"). NEJAC developed the report, in part, from the proceedings of the "NEJAC International Roundtable on Environmental Justice on the U.S.-Mexico Border," August 19-21, 1999, National City, California.

128. EPA should improve public participation processes by building community capacity and promoting reform of U.S., Mexican, and international institutions, including the North American Commission for Environmental Cooperation, and other such agencies so that community input is better taken into account in program priorities.

129. EPA should broaden environmental protection programs at the border beyond water infrastructure issues.

130. EPA should strengthen and improve coordination of national and cross-border environmental enforcement efforts.

131. EPA should strengthen tribal government capacity and involvement in programs of the U.S., Mexico, and international border institutions.

132. EPA should improve the incorporation of community voices and environmental justice issues in sustainable development efforts at the border.

133. EPA should continue to address site-specific issues, including illegal hazardous waste sites on both sides of the border.

134. EPA should revisit the border communities' recommendations made at the Border Roundtable and provide a follow-up report that details EPA's activities on those recommendations.

References

[1] Robert D. Bullard et al., United Church of Christ, Toxic Waste and Race at Twenty 1987-2007, (2007) available at http://www.ucc.org/assets/pdfs/toxic20.pdf.

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] Clifford Rechtschaffen et al., Environmental Justice: Law, Policy and Regulations, 499 (2nd ed. 2009).

[6] Rosemere Neighborhood Ass'n v. US Envtl. Protect. Agency, No. 08-35045, 2009 U.S. App. LEXIS 20668. (Emphasis added.)
(Sept. 17, 2009).

[7] Envtl. Protect. Agency, Summary of Assessments at Superfund National Priority List Sites, http://www.epa.gov/katrina/superfund.html (last visited Sept. 29, 2009).

[8] Memorandum to staff from Lisa P. Jackson, EPA Adm'r to All Employees *available* at http://blog.epa.gov/adminstrator/2010/01/12/seven-priorities-for-epas-future.

[9] See Bullard et al., supra note 1 at 8.

[10] Earthjustice, Protect Your Community From Toxic Waste: Help Undo Bush-Era Polluter Loophole, http://www.earthjustice.org/library/features/toxic-waste-speak-out.html (last visited Nov. 23, 2009).

[11] Revisions to the Definition of Solid Waste, 73 Fed. Reg. 64668, 64756-57 (Oct. 30, 2008).

[12] Press Release, Safer Chemicals, Healthy Families Coalition, Diverse Health & Environmental Coalition Calls for Sweeping Changes in U.S. Chemical Safety Law (Aug. 4, 2009).

[13] *Id.*

[14] *Id.*

[15] 7 U.S.C. §§136-136y (1994).

[16] *See generally,* N. SHEATS ET AL., AN ENVIRONMENTAL JUSTICE CLIMATE CHANGE POLICY FOR NEW JERSEY AND BEYOND (forthcoming, 2010).

[17] Surface Transportation Act of 2009, H.R. 3617, 111th Congress (2009).

[18] The "Fenceline Community Performance Bond" is a concept that ensures cost recovery resources in the event of a chemical accident in cases where exemptions from safety buffer zones between residential communities and industrial facilities. BULLARD ET AL., *supra* note 1 at 8.

[19] Incorporated from the Indian Water Rights Policy Statement for the 2008 Presidential Administration, *see* http://nativevote.org/documents/PresidentialTransition/IndianWaterRightsPolicyStatement.pdf,
accessed Dec. 10, 2009.

[20] 59 Fed. Reg. 32 (Feb. 16, 1994).

[21] *Id.*

[22] Memorandum from Steven L. Johnson, EPA Adm'r, to Assistant Adm'rs, Regional Adm'rs, Assoc. Adm'rs, Office Dirs, Office of Gen. Counsel, Chief Fin. Officer, Inspector Gen., Reaffirming the U.S. Environmental Protection Agency's Commitment to Environmental Justice (Nov. 4, 2005).

[23] ENVTL. PROT. AGENCY, OFFICE OF INSPECTOR GEN., REPORT NO. 2006-P-00034, EPA NEEDS TO CONDUCT ENVIRONMENTAL JUSTICE REVIEWS OF ITS PROGRAMS, POLICIES, AND ACTIVITIES, (Sept. 18, 2006) at 5 (Emphasis added).

[24] Executive Order 12898 requires federal agencies to, among other things, review the effects of their programs on minority and low-income communities. The 2006 report followed a 2004 Inspector General Report that found that EPA had wholly failed to satisfy the mandate of Executive Order 12898. EPA OFFICE OF THE INSPECTOR GEN. REPORT NO. 2004-P-00007, EPA NEEDS TO CONSISTENTLY IMPLEMENT THE INTENT OF THE EXECUTIVE ORDER ON ENVIRONMENTAL JUSTICE (Mar. 1, 2004).

[25] EPA's Office of Environmental Justice unveiled the Environmental Justice Smart Enforcement Tool or "EJSEAT" at a meeting of the National Environmental Jus-

tice Advisory Council in 2008. Its aim is to bring consistency to the process of identifying geographic areas with disproportionally high environmental and/or public health impacts. http://www.epa.gov/compliance/resources/policies/ej/ej-seat.html. We understand that it has been used in some test cases.

[26] ROBERT D. BULLARD ET AL., UNITED CHURCH OF CHRIST, TOXIC WASTE AND RACE AT TWENTY 1987-2007, (2007) *available at* http://www.ucc.org/assets/pdfs/toxic20.pdf.

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] EPA NEEDS TO CONSISTENTLY IMPLEMENT THE INTENT OF THE EXECUTIVE ORDER ON ENVIRONMENTAL JUSTICE, *supra* note 24.

[32] ENVTL. PROTECT. AGENCY, ENVIRONMENTAL JUSTICE STRATEGIC PLAN FRAMEWORK AND OUTLINE, 70 Fed. Reg. 43691 (July 28, 2005).

[33] ENVTL. PROTECT. AGENCY, EPA'S ENVIRONMENTAL JUSTICE STRATEGY, (Apr. 3, 1995).

[34] *See generally,* Lawyers' Committee for Civil Rights Under Law, Comments to EPA Draft Strategic Plan (2005).

[35] Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000d *et seq.,* provides that no person 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 funding. 42 U.S.C.S. § 2000d. Section 602 of Title VI authorizes federal agencies to effectuate the provisions of § 601 of Title VI by issuing rules, regulations, or orders of general applicability. 42 U.S.C.S. § 2000d-1.

[36] *Id.*

[37] 45 C.F.R. § 80.3(b)(2) (1964).

[38] Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 592, n.13 (1983) (White, J).

[39] 65 Fed. Reg. 39650 (June 27, 2000).

[40] St. Francis Prayer Ctr. v. Mich. Dep't of Envtl. Quality, EPA File No. 5R-98-R5 (Oct. 30, 1998).

[41] This topic is discussed in further detail below, in the section on EPA's Office of Civil Rights.

[42] *See* Michael Gerrard, *EPA Dismissal of Civil Rights Complaints,* N.Y.L.J., Nov. 28, 2003, at 3.

[43] For a chronological history and analytical critique of EPA's experiences with Title VI, *see* Eileen Gauna, *EPA at 30: Fairness in Environmental Protection,* 31 ENVTL. L. REP. 10528 at 10539-10550 (2001).

[44] PUB.L. NO. 115-5 (2009).

[45] Letter from FTA Adm'r Peter Rogoff to Mr. Steve Heminger, Executive Director, Metropolitan Transportation Commission, and Mrs. Dorothy Dugger, General Manager, San Francisco Bay Area Rapid Transit District, dated February 12, 2010.

[46] St. Francis Prayer Ctr., *supra* note 40.

[47] 463 U.S. 582 (1983).

[48] The Supreme Court in Alexander v. Choate suggested that *Guardians* had indeed recognized an implied private right of action to enforce agency disparate impact regulations. 469 U.S. 287, 294 (1985).

[49] *See, e.g.,* Seif v. Chester Residents Concerned for Quality Living, 132 F.3d 925 (3d Cir. 1997) (holding "that private plaintiffs may maintain an action under discriminatory effect regulations promulgated by federal administrative agencies pursuant to section 602 of Title VI of the Civil Rights Act of 1964.); see also David K. v. Lane, 839 F.2d 1265 (7th Cir. Ill. 1988)(held that plaintiffs were not entitled to preliminary injunction under Title VI but that there is a private right of action to enforce Title VI regulations under a discriminatory effect theory); Burton v. City of Belle Glade, 178 F. 3d 1175, 1202-1204 (11th Cir. Fla. 1999)(recognizing an implied private right of action to enforce Title VI regulations, the court found the record to be incomplete and remanded the case back to district court to develop the record on the Title VI claim); Flores v. Arizona, 172 F. Supp. 2d 1225, 1239-1240 (D. Ariz. 2000)(holding that under Title VI s implementing regulations proof discriminatory effect is sufficient for a private right of action; that is discriminatory intent is not required); Podberesky v. Kirwan, 764 F. Supp. 364, 378 (D. Md. 1991)(recognizing that regulations under Title VI can give rise to private right of action for disparate impact claims).

[50] 145 F. Supp. 2d 446 (D. N.J. 2001).
[51] *Id.*
[52] *Id.* at 492.
[53] 532 U.S. 275(2001).
[54] 274 F.3d 771 (3d Cir. 2001).
[55] St. Francis Prayer Ctr., *supra* note 40.
[56] Smith v. City of Jackson, 544 U.S. 228 (2005).
[57] *See* 42 U.S.C. § 12112(b) (defining "discriminate" to include "utilizing standards, criteria, or methods of administration . . .that have the effect of discrimination on the basis of disability" and "using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability").
[58] CLIFFORD RECHTSCHAFFEN ET AL., ENVIRONMENTAL JUSTICE: LAW, POLICY AND REGULATION, 499 (2nd ed. 2009).
[59] Rosemere Neighborhood Ass'n v. US ENVTL. PROTECT. AGENCY, NO. 08-35045, 2009 U.S. App. LEXIS 20668 (Sept. 17, 2009).
[60] Jennifer Koons, *Appeals Court Finds Widespread Failure by EPA to Investigate Civil Rights Complaints,* www.nytimes.com accessed Dec. 4, 2009.
[61] *Id.*
[62] Rosemere Neighborhood Ass'n., *supra* 59.
[63] DEPARTMENT OF JUSTICE GUIDANCE CONCERNING ENVIRONMENTAL JUSTICE, (Jan. 9, 1995), *available at* http://www.justice.gov/enrd/ENRDFILES/79647executiveorder.pdf.
[64] *Id.*
[65] *Id.*
[66] Memorandum from Loretta King, Acting Assistant Att'y Gen., to Fed. Agency Civil Rights Dirs. & Gen. Counsels, Strengthening Enforcement of Title VI of the Civil Rights Act of 1964. (July 10, 2009).
[67] Exec. Order No. 12250, 45 Fed. Reg. 72995 (Nov. 4, 1980).
[68] In the ensuing years, other organizations and legal scholars also explored the confines of legal authority and similarly concluded that existing legal authority existed to do more—e.g. under current permitting schemes—than was currently being done by federal and state regulatory officials. *See* ENVTL. LAW INST., OPPORTUNITIES FOR ADVANCING ENVIRONMENTAL JUSTICE: AN ANALYSIS OF U.S. EPA STATUTORY AUTHORITIES (2001); NAT'L ACAD. OF PUB. ADMIN., MODELS FOR CHANGE: EFFORTS BY FOUR STATES TO ADDRESS ENVIRONMENTAL JUSTICE (2002); NAT'L ACAD. OF PUB. ADMIN., ENVIRONMENTAL JUSTICE IN EPA PERMITTING: REDUCING POLLUTION IN HIGH-RISK COMMUNITIES IS INTEGRAL TO THE AGENCY'S MISSION (2001); Eileen Gauna, *EPA at 30: Fairness in Environmental Protection,* 31 Envtl. L. Rep. 10,528 (2001) (discussing permitting cases before the Environmental Appeals Board and Title VI guidances for permitting officials); Sheila R. Foster, *Meeting the Environmental Justice Challenge: Evolving Norms in Environmental Decisionmaking,* 30 ENVTL. L. REP. 30992 (2000) (discussing decisions of the Environmental Appeals Board interpreting legal authority to address environmental justice).
[69] NEJAC's Executive Council consisted of all of the members appointed under the Federal Advisory Committee Act, including all NEJAC subcommittee chairs; but it did not necessarily include all members of all subcommittees. Only documents adopted by a majority vote of the Executive Council became an official recommendation of the NEJAC. *See* note 26.
[70] Memorandum from Gary S. Guzy, EPA Gen. Counsel to Steven A. Herman, Assistant Adm'r for the Office of Enforcement and Compliance Assurance, Robert Perciasepe, Assistant Adm'r for the Office of Air and Radiation, Timothy J. Fields, Assistant Adm'r for the Office of Solid Waste and Emergency Response, & J. Charles Fox, Assistant Adm'r for Office of Water, EPA Statutory and Regulatory Authorities Under Which Environmental Justice May Be Addressed in Permitting. (Dec. 1, 2000).
[71] *See generally,* NEJAC REPORT ON INTEGRATION OF ENVIRONMENTAL JUSTICE IN FEDERAL PROGRAMS (summarizing NEJAC meeting Dec. 11-14, 2000); http://

www.mapcruzin.com/news/news121300a.htm (last visited Oct. 13, 2009).

[72] Richard J. Lazarus & Stephanie Tai, *Integrating Environmental Justice into EPA Permitting Authority,* 26 ECOLOGY L.Q. 617 (1999).

[73] *Id.* at 37.

[74] *See generally,* An Earthjustice Agenda for America's Clean Energy Future, http://www.earthjustice.org/library/
factsheets/clean-energy-agenda.pdf. (last visited Oct. 13, 2009).

[75] *The Surface Mining Control and Reclamation Act Of 1977: Policy Issues Thirty Years Later Before the S. Comm. on Energy & Natural Resources,* 110th Cong. (2007) (from statement of Cindy Rank West Virginia Highlands Conservancy).

[76] 30 U.S.C. § 1234, *et seq.*

[77] Press Release, Earthjustice, Mountaintop Removal Mining Program Illegal, (Mar. 26, 2007) *available at* http://www.earthjustice.org/news/press/007/mountaintop-removal-mining-permits-illegal.html.

[78] *See, e.g.* Erik Reece, *Moving Mountains: The Battle for Justice Comes to the Coal Fields of Appalachia,* ORION MAGAZINE, (Jan./Feb. 2006), http://www.orionmagazine.org/index.php/articles/article/166/; Unitarian Universalist Association of Congregations, Mountaintop Removal Coal Mining Background Information, http://www.uua.org/socialjustice/issues/environmentaljustice/mountaintopcoal/145319.shtml; Mountain Justice, Mountaintop Removal Mining Stealing Appalachia, *available at* http://mountainjusticesummer.org/facts/MJSnewsletter10.pdf.

[79] Press Release, Earthjustice, Mountaintop Removal Mining Permits Illegal, *supra* note 77.

[80] U.S. Census Bureau, Census 2000 Summary File 3 (SF 3) - Sample Data, All 5-Digit ZIP Code Tabulation Areas (860), Table P76 "Family Income in 1999" (downloaded June 23, 2009), *available at* http://factfinder.census.gov/servlet/DownloadDatasetServlet?_lang=en&_ts=263843114140. "Low-income" defined as earning less than $20,000 annually. ZIP codes containing coal ash ponds compared to a national mean percent "low-income" of 12.61%, calculated based on the "Family Income in 1999" dataset.

[81] U.S. Envtl. Prot. Agency, database of coal combustion waste surface impoundments (2009). Information collected by EPA from industry responses to Information Collection Request letters issued to the companies on March 9, 2009. Sufficient data to determine ZIP code Census Data was available for 511 of the nation's 584 known coal ash impoundments. Many impoundments are adjacent to one another surrounding generating facilities, and are listed with identical geographic coordinates in the EPA data—hence why only 181 ZIP codes contain 511 ash impoundments.

[82] U.S. Envtl. Prot. Agency, Human and Ecological Risk Assessment of Coal Combustion Wastes (released as part of a Notice of Data Availability) (Aug. 6, 2007) (draft).

[83] 74 Fed. Reg. 55,837, 55,839 (Oct. 29, 2009).

[84] GREG KATS, GREEN SCHOOL DESIGN: COST-EFFECTIVE, HEALTHY, AND BETTER FOR EDUCATION (2006), *available at* http://www.ecoliteracy.org/essays/green-school-design-cost-effective-healthy-and-better-education.

[85] *Id.*

[86] *Id.*

[87] BULLARD ET AL., *supra* note 26, *see also* HEALTHY SCHOOLS NETWORK, INC., WHO'S IN CHARGE OF PROTECTING CHILDREN'S HEALTH AT SCHOOL: A REPORT ON AMERICA'S LARGEST UNADDRESSED HEALTH CRISIS (2005); HEALTHY SCHOOLS NETWORK, INC., LESSONS LEARNED: 32,000,000 CHILDREN: A PUBLIC HEALTH CRISIS (2006).

[88] HEALTHY SCHOOLS NETWORK, INC., LESSONS LEARNED, *supra,* note 90.

[89] Dave Mann, *Separate But Toxic: The Houston Environmental Magnet School That's An Environmental Catastrophe,* TEX. OBSERVER, Mar. 23, 2007, *available at* http://www.texasobserver.org/article.php?aid=2451.

[90] *Id.*

[91] VT. PUB. INTEREST RES. GROUP, HEALTHY SCHOOLS AND HEALTHY KIDS: A PARENTS' GUIDE FOR IMPROVING SCHOOL ENVIRONMENTAL HEALTH 9 (2001), *available at* http://eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/1a/bd/e9.pdf.

[92] *Id.*

[93] Nikita Stewart, *Clouds Gather over D.C. Schools,* Wash. Post, July 31, 2007, *available at*

http://www.washingtonpost.com/wp-yn/content/article/2007/07/30/AR2007073001710.html.

[94] CTR. FOR HEALTH, ENV'T & JUSTICE, OUR POISONED SCHOOLS (2001); CTR. FOR HEALTH, ENV'T & JUSTICE, POISONED SCHOOLS, INVISIBLE THREATS, VISIBLE ACTIONS (2001).

[95] In 2008, the NY Daily News concluded an investigation and published a series of articles revealing PCB contamination in window caulking in numerous New York City public schools. *See, e.g.,* Bill Egbert, *Toxin Turns Up in School Buildings, but Officials Say There's No Danger,* NY DAILY NEWS, Apr. 7, 2008, *available at* http://www.nydailynews.com/ny_local/education/2008/04/07/2008-04-07_toxin_turns_up_in_school_buildings_but_o.html. So far, one federal case has emerged from this investigation, Gonzalez v. New York City Dep't of Education, (Case No. SDNY 09-cv-7787. Sep 9, 2009).

[96] *See e.g.,* Tina Adler, *Learning Curve: Putting Health School Principles into Practice,* ENVIRONMENTAL HEALTH PERSPECTIVES 177: A448-453 (Oct. 1, 2009).

[97] AMERICAN SOCIETY OF CIVIL ENGINEERS, REPORT CARD FOR AMERICA'S INFRASTRUCTURE (2009), *available at* http://www.infrastructurereportcard.org/.

[98] CENTERS FOR DISEASE CONTROL AND PREVENTION, SCHOOL HEALTH POLICIES AND PROGRAMS STUDY, CDC-SHPPS 2006, *available at* http://www.cdc.gov/Features/SchoolHealth/. *See also* HEALTH SCHOOLS NETWORK, SICK SCHOOLS 2009: AMERICA'S CONTINUING ENVIRONMENTAL HEALTH CRISIS FOR CHILDREN (2009).

[99] *See generally* RACHEL MORELLO-FROSCH ET AL., THE CLIMATE GAP: INEQUALITIES IN HOW CLIMATE CHANGE HURTS AMERICANS & HOW TO CLOSE THE GAP (2009), *available at* http://college.usc.edu/pere/publications/.

[100] *See* UNFCC Press Briefing on the outcome of Copenhagen and the way forward in 2010, *available at* http://unfccc.int/2860.php

[101] Further information on a cap-and-fee system is available through the Environmental Justice Forum on Climate Change, a diverse coalition of environmental justice groups representing constituencies most extremely impacted (now and in the future) by climate change and environmental decision-making. http://www.weact.org.

[102] Researchers at the University of California caution, *e.g.* that "[a] study of the Regional Clean Air Incentives Market (RECLAIM) … in Southern California, indicates that the program may have increased nitrogen oxide emissions in Wilmington, California, while region-wide emission levels declined (Lejano and Hirose 2005)." RACHEL MORELLO-FROSCH ET AL., THE CLIMATE GAP, *supra* note 100.

[103] Researchers predict that ozone-related deaths, hospitalizations, and asthma may be increased nationwide by the use of some ethanol fuels. *Id.* at 22.

[104] *Id.*

[105] *Id.*

[106] *See* ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT: THE IMPLEMENTATION OF THE POLLUTER-PAYS PRINCIPLE, *available at* http://sedac.ciesin.columbia.edu/entri/texts/oecd/OECD-4.09.html.

[107] Urban Agenda Fact Sheet: Growing Green Collar Jobs, *available at* http://www.urbanagenda.org/pdf0809/FS_GrowingGreenCollarJobs.pdf

[108] *Id.*

[109] *See, e.g.,* Green Worker Cooperatives, http://www.greenworker.coop/website_j/

[110] *See, e.g.,* NIEHS/EPA Brownfield Minority Worker Training Program, http://www.niehs.nih.gov/careers/hazmat/programs/bmwt/index.cfm

[111] Consent Decree Compliance, Bus Riders Union, *available at* http://www.thestrategycenter.org/campaign/consent-decree-compliance.

[112] *Id.*

[113] *Id.*

[114] *OCTA: About 70 Percent of Bus Riders Don't Own Car,* ORANGE COUNTY REG., Mar. 13, 2006.

[115] Memorandum from Atlanta Transit Riders' Union to the Fed. Transit Admin., Office of Civil Rights, Title VI and Executive Order on Environmental Justice Complaint (undated).

[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] Penn Loh, *T Riders' Union: A Tale of Two Campaigns in Boston,* RACE, POVERTY & THE EN-

V'T, (Winter 2005/2006).

[120] Surface Transportation Act of 2009, H.R. 3617, 111th Congress (2009).

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[122] Mindy Thompson Fullilove, Root Shock: How Tearing Up City Neighborhoods Hurts America and What We Can Do About It 24-26 (One World/Ballantine 2004).

[123] *See* Yale Rabin, *Zoning the American Dream 101, in* EXPULSIVE ZONING: THE INEQUITABLE LEGACY OF EUCLID, (Charles M. Haar & Jerold S. Kayden, eds., 1989); FULLILOVE, *supra* note 103.

[124] AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY, PUBLIC HEALTH ASSESSMENT: AGRICULTURE STREET LANDFILL, NEW ORLEANS, NEW ORLEANS PARISH, LOUISIANA, *available at* http://www.atsdr.cdc.gov/hac/PHA/agriculturestreet/asl_p1.html.

[125] AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY, HEALTH CONSULTATION: ALTGELD GARDENS, SOIL SAMPLING, CHICAGO, COOK COUNTY, ILLINOIS, *available at* http://www.atsdr.cdc.gov/HAC/PHA/altgeld/alt_p1.html.

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[127] A. Iton, et al., *Proposed Framework. The Context of Health: What are We Really Doing to Change It?* Alameda County Department of Public Health, (2008), *available at* http://www.acphd.org/AXBYC/Admin/DataReports/ood_strategic_vision_2007.pfd.; Robin Hindery, *Zip Code May Predict Health, Expert Says,* UNIVERSITY OF CALIFORNIA AT SAN FRANCISCO, Jan. 30, 2009, *available at* http://today.ucsf.edu/stories/zip-code-may-predict-health-expert-says.

[128] The "Fenceline Community Performance Bond" is a concept that ensures cost recovery resources in the event of a chemical accident in cases where exemptions from safety buffer zones between residential communities and industrial facilities. BULLARD ET AL., *supra* note 26, at 8.

[129] NAT'L COMM'N ON ENVTL. JUSTICE & LAWYERS' COMM. FOR CIVIL RIGHTS UNDER LAW, PROTECTING VULNERABLE COASTAL COMMUNITIES: MEANINGFUL POLITICAL ACTION AND STRATEGIES FOR ENVIRONMENTAL JUSTICE AFTER HURRICANES KATRINA AND RITA (2008).

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[131] NAT'L ENVTL. JUSTICE ADVISORY COUNCIL WASTE AND FACILITY SITING SUBCOMM. FED. FACILITIES WORKING GROUP, ENVIRONMENTAL JUSTICE AND FEDERAL FACILITIES: RECOMMENDATIONS FOR IMPROVING STAKEHOLDER RELATIONS BETWEEN FEDERAL FACILITIES AND ENVIRONMENTAL JUSTICE COMMUNITIES. (2) National Service Center for Environmental Publications (Oct 2004), *available at* http://www.epa.gov/compliance/resources/publications/ej/nejac/ffwg-final-report-102504.pdf.

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[134] Envtl Protect. Agency, Perchlorate Treatment Technologies Update: Federal Facilities Forum Issue Paper, (May 2005), available at http://www.epa.gov/tio/download/remed/542-r-05-015.pdf, at page 4.

[135] Agency for Toxic Substances and Disease Registry, Public Health Statement: Perchlorates, (Sept. 2008), available at http://www.atsdr.cdc.gov/toxprofiles/tp162-c1-b.pdf, pages 4-7.

[136] Frank, *supra* note 134.

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[138] Session Law Firm, Fact Sheet: Judicial Settlement at Formerly Used Defense Sites (FUDS), *available at* http://www.session.com/news/FUDSFactSheet.pdf (last visited Nov. 19, 2009).

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[141] *Id.*

[142] Tennessee Valley Authority Regulatory Submittal for Kingston Fossil Plant, Offsite Ash Disposal Option Plan (Revised) (June 30, 2009), *available at* http://www.epa.gov/Region4/kingston/Approved%20Offsite%20Ash%20Disposal%20Options%20Plan.pdf; *See also,* Press Release, Envtl.

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[149] *Id.*

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Fact Sheet, World Health Organization, Antimicrobial Resistance, Jan. 2002, *available at* http://www.who.int/mediacentre/factsheets/fs194/en/.

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[152] *Id.; see also* Amy Chapman, et al., *Airborne Multidrug-Resistant Bacteria Isolated from a Concentrated Swine Feeding Operation,* 113 ENVTL. HEALTH PERSP., 2 (Feb. 2004).

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[156] 505 F.Supp.2d 456 (S.D. Ohio 2007).

[157] MAE WU ET AL., NAT. RESOURCES DEF. COUNCIL, POISONING THE WELL: HOW THE EPA IS IGNORING ATRAZINE CONTAMINATION IN SURFACE DRINKING WATERS IN THE CENTRAL UNITED STATES (2009).

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[161] *Id.*

[162] *Black Farmers Claim Discrimination in Federal Crop Loans,* Jet, July 22, 2009.

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[166] http://www.ruralco.org/action/diversity/support.html (last visited Oct. 13, 2009).

[167] *Id.*

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[184] COMMUNITY AFFAIRS OFFICE OF THE FEDERAL RESERVE BANK OF DALLAS, TEXAS COLONIAS: A THUMBNAIL SKETCH OF THE CONDITIONS, ISSUES, CHALLENGES AND OPPORTUNITIES 3, *available at* http://www.dallasfed.org/ca/pubs/colonias.pdf.

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[188] Tseming Yang, *Of Borders, Fences, and Global Environmentalism,* 4 CHI. J. INT'L L. 237, 238 (Spring 2003).

[189] *Id.*

[190] *See* Petition Before the Commission for Environmental Cooperation, Under Articles 13, 14, and 15 of the North American Agreement for Environmental Cooperation. (Oct. 22, 1998).

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[192] COMM'N FOR ENVTL. COOPERATION, METALES Y DERIVADOS FINAL FACTUAL RECORD SEM-98-007 (2002); Yang, *supra* note 189.

[193] BULLARD ET AL., *supra* note 26 at 8.

[194] EARTHJUSTICE, PROTECT YOUR COMMUNITY FROM TOXIC WASTE: HELP UNDO BUSH-ERA POLLUTER LOOPHOLE, *available at* http://www.earthjustice.org/library/features/toxic-waste-speak-out.html (last visited Nov. 23, 2009).

[195] Revisions to the Definition of Solid Waste, 73 Fed. Reg. 64668, 64756-57 (Oct. 30, 2008).

[196] Press Release, Safer Chemicals, Healthy Families Coalition, Diverse Health & Environmental Coalition Calls for Sweeping Changes in U.S. Chemical Safety Law (Aug. 4, 2009).

[197] *Id.*

[198] *Id.*

[199] 7 U.S.C. §§136-136y (1994).

[200] Lazarus & Tai, *supra* note 72 at 19.

[201] *See generally,* N. SHEATS ET AL., AN ENVIRONMENTAL JUSTICE CLIMATE CHANGE POLICY FOR NEW JERSEY AND BEYOND (forthcoming, 2010).

[202] *Id.*

[203] Surface Transportation Act of 2009, H.R. 3617, 111th Congress (2009).

[204] The "Fenceline Community Performance Bond" is a concept that ensures cost recovery resources in the event of a chemical accident in cases where exemptions from safety buffer zones between residential communities and industrial facilities. BULLARD ET AL., *supra* note 26 at 8.

[205] Incorporated from the Indian Water Rights Policy Statement For the 2008 Presidential Administration, *available at* http://nativevote.org/documents/PresidentialTransition/IndianWaterRightsPolicyStatement.pdf, accessed Dec. 10, 2009.

[206] Richard J. Lazarus & Stephanie Tai, *Integrating Environmental Justice into EPA Permitting Authority*, 26 ECOLOGY L.Q. 617 (1999) (quoting 42 U.S.C. § 7503(a)(5)) (emphasis added).

[207] *Id.* (quoting 42 U.S.C. §7412(c)(3) and (k)).

[208] ENVTL. PROTECT. AGENCY, *Summary of the Clean Air Act, available at* http://www.epa.gov/regulations/laws/caa.html (last visited Nov. 23, 2009).

[209] Lazarus & Tai, *supra* note 207 (quoting 42 U.S.C. § 7413(e)(1) (1994)).

[210] Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (1994) (Clean Water Act).

[211] Lazarus & Tai, *supra* note 207 (quoting 33 U.S.C. §1318(a)(A) (1994)).

[212] Lazarus & Tai, *supra* note 207.

[213] Resource Conservation Recovery Act, 42 U.S.C. §§ 6901-6991 (1994).

[214] Lazarus & Tai, *supra* note 207.

[215] Lazarus & Tai, *supra* note 207.

[216] 42 U.S.C. § 6928(a)(3).

[217] Lazarus & Tai, *supra* note 207.

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