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# Environmental Justice: Deciphering the Maze of a Private Right of Action

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## INTRODUCTION

The concept of environmental justice involves a grassroots movement that fights for the equal treatment of citizens with respect to protections under environmental, health, energy, and land use regulations.[1] In general, the movement questions environmental decisions of private industry and governments that have potentially serious equity implications, particularly on minority and low-income communities.[2] Litigation in this segment of environmental law focuses primarily on the possible discriminatory practices in the permitting and siting processes of environmentally harmful facilities, and, more importantly, the alleged disparate impacts these processes impose on minorities.[3] Although the movement itself and the environmental justice concept are not new issues,[4] there is no firmly rooted definition of "environmental justice." All other things being equal, the initial problem of defining "environmental justice" is a reflection of the public tension and viewpoints among various stakeholders affected by environmental equality concerns within this environmental milieu.

Even today, there is no universally accepted definition of environmental justice.[5] An environmental justice plaintiff ("E.J. Plaintiff") typically claims that a government agency

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1. Amanda K. Franzen, Comment, *The Time is Now for Environmental Justice: Congress Must Take Action by Codifying Executive Order 12898*, 17 PENN ST. ENVTL. L. REV. 379, 382 (2009).

2. CHRISTOPHER H. FOREMAN JR., THE PROMISE AND PERIL OF ENVIRONMENTAL JUSTICE 1 (Bookings Inst. Press 1998).

3. Luke W. Cole, *Environmental Justice Litigation: Another Stone in David's Sling*, 21 FORDHAM URB. L. J. 523, 524 (1994) (stating that siting disputes have been the primary context for environmental justice litigation thus far); *see also* Julia B. Latham Worsham, *Disparate Impact Suits Under Title VI, Section 602: Can a Legal Tool Build Environmental Justice?*, 27 B.C. ENVTL. AFF. L. REV. 631, 632 (2000) (observing the ongoing debate regarding private suits brought under Title VI of the Civil Rights Act of 1964 against local agencies issuing permits to industrial facilities that cause a disparate impact on minority populations).

4. In fact, it has been over twenty-five years since environmental racism was first recognized nationally in 1982 after a protest arising in Warren County, North Carolina. Franzen, *supra* note 1, at 381–84. See THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS (Michael B. Gerrard & Sheila R. Foster eds., ABA Publ'g 2d ed. 2008) (1999), for a comprehensive treatise on environmental justice jurisprudence.

5. Michael B. Gerrard, *Preface to the First Edition* of THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS, *supra* note 3, at xxxiii, xxxiii.

discriminated on the basis of race in the agency's decision-making process for granting permits to hazardous waste landfill operators, nuclear power plants, or other potentially harmful facilities in an area where a large number of minority populations reside.[6] Thus, a proponent of environmental justice would subscribe to the notion that particular communities, mostly those composed of people of color and the poor, "have been forced to bear *disproportionately* the external costs of industrial process," and that these costs should be "born proportionately by all who reap the benefits of these processes."[7] In contrast, the conservative lexicon would define environmental justice as excessive regulatory encroachment on private property rights.[8]

Importantly, the U.S. Environmental Protection Agency's ("EPA") definition, which is heavily criticized by environmental justice proponents, attempts to strike a societal balance by providing a facially neutral alternative.[9] In late 2006, the EPA issued its 2006-2011 Strategic Plan, which purported to implement environmental justice aspects throughout the agency and prescribed a broad definition of environmental justice.[10] The EPA defines "Environmental Justice" as:

> [T]he 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. Fair treatment means that *no group of people* should bear a disproportionate share of the negative environmental consequences resulting from

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6. Philip Weinberg, *Equal Protection*, *in* THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS, *supra* note 3, at 3, 6.

7. KENNETH A. MANASTER, ENVIRONMENTAL PROTECTION AND JUSTICE: READINGS AND COMMENTARY OF ENVIRONMENTAL LAW AND PRACTICE 192 (Anderson Publ'g Co. 1995) (emphasis added).

8. FOREMAN, *supra* note 2, at 30.

9. On June 22, 2005, the EPA issued a notice in the Federal Register stating that it would begin to take public comments on a draft "Environmental Strategic Plan." Bradford C. Mank, *Title VI*, *in* THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS, *supra* note 3, at 23, 29. Following the public comment period, however, the EPA decided not to issue a separate strategic plan and concluded that it would instead integrate the issue into the Agency's planning and budgeting process. Environmental Justice, Environmental Justice in EPA's Strategic Planning Process, http://www.epa.gov/compliance/resources/publications/data/planning/strategicplan/ej/index.html (last visited Jan. 29, 2010).

10. Environmental Justice, Background Information, http://www.epa.gov/compliance/basics/ejbackground.html (last visited Jan. 29, 2010).

> industrial, governmental and commercial operations or policies. Meaningful involvement means that: (1) people have an opportunity to participate in decisions about activities that may affect their environment and/or health; (2) the publics contribution can influence the regulatory agency's decision; (3) their concerns will be considered in the decision making process; and (4) the decision makers seek out and facilitate the involvement of those potentially affected.[11]

While recognizing that minority and low-income populations may be frequently exposed to adverse human effects,[12] the agency's neutral, racially non-bias approach is at odds with other definitions espoused by environmental justice advocates, a Clinton-era executive order issued in 1994, and proposed legislation currently on the congressional table.[13]

Although finding a universally acceptable definition for "environmental justice" is no easy task, such a search exemplifies a separate and distinct story underpinning this entire body of law. To date, individuals claiming environmental inequities have exhausted most, if not all, remedial measures to cure alleged environmental injustices. Claimants have attempted to secure relief through various legal theories, including claims based on the equal protection doctrine, Title VI of The Civil Rights Act of 1964, private enforcement of Executive Order 12,898, and environmental laws that focus on procedure or public participation.[14]

The purpose of this Note is to analyze the environmental justice problem through a two-tier framework in an effort to cogently reach the conclusion that the sole avenue of relief must derive from amendments to Title VI of the Civil Rights Act of 1964. The first tier ("TIER 1") entails increasing awareness of the problem at the federal level. At the other end of the spectrum, the second tier ("TIER 2") involves establishing a private right of action to enforce the

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11. *Id.* (emphasis added).

12. U.S. ENVTL. PROT. AGENCY, 2006-2011 EPA'S STRATEGIC PLAN: CHARTING OUR COURSE 61 (Sept. 30, 2006), *available at* http://www.epa.gov/ocfo/plan/2006/entire_report.pdf.

13. *See* Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994); Manu Raju *EPA's Draft Equity Plan Drops Race as a Factor in Future Decisions*, INSIDE THE EPA, July 1, 2005, *available at* 2005 WLNR 10287377; *see also* discussion *supra* Part II.

14. *See* Luke W. Cole, *Environmental Justice Litigation: Another Stone in David's Sling*, 21 FORDHAM URB. L. J. 523, 526 (1994); James H. Colopy, *The Road Less Traveled: Environmental Justice Through Title VI of the Civil Rights Act of 1964*, 13 STAN. ENVTL. L. J. 125, 169–71 (1994).

disparate impact standard of discrimination against governmental agencies that receive federal funds from the EPA. Regarding the TIER 1 problem, the Note examines the proposed Environmental Justice Act of 2008,[15] which is directed at the development of a better federal cognizance with respect to the environmental justice problem by strengthening inter-executive branch collaboration and review of agency decision-making. While the Note applauds legislative efforts to solve the TIER 1 problem, the Note posits that improving the structural process within the federal government is only the first solution to a two-part problem. Ultimately, this Note will argue that the TIER 2 problem—securing immediate and appropriate declaratory or equitable relief under the disparate impact standard of discrimination for environmental justice violations—is solved only by amendments to Title VI of the Civil Rights Act of 1964 via the Environmental Justice Enforcement Act of 2008.[16]

Part I of this Note focuses on the failure of equal-protection-based environmental justice claims as a form of relief for the E.J. Plaintiff. Next, Part II explains the pitfalls of President William J. Clinton's executive mandate to employ environmental justice policies throughout federal agencies and the EPA's curtailment of the mandate since its issuance. Building upon the historical backdrop of this pseudo-political and policy-driven initiative, the Note then discusses proposed legislation that codifies the President's mandate, articulates arguments that suggest that such proposed legislation will not effectively cure environmental justice concerns, and prompts the passage of a more comprehensive legislative scheme that will alleviate the failures in securing environmental justice. Part III discusses Title VI of the Civil Rights Act of 1964 in the environmental justice context. Specifically, this Part highlights the current administrative process within the EPA for handling Title VI complaints, the process' relative policies and

15. Environmental Justice Act of 2008, S. 642, 110th Cong. (as reported by S. Comm. on Envt. & Pub. Works, July 31, 2008).

16. Environmental Justice Enforcement Act of 2008, S. 2918, § 3 110th Cong. (2008).

guidelines, and an analysis of the flaws within the system. Finally, the Note concludes in Parts IV and V that the sole avenue in solving the TIER 2 problem is through amending Title VI of the Civil Rights Act of 1964 via the Environmental Justice Enforcement Act of 2008.

## I. THE FAILED LEGAL TACTIC OF THE EQUAL PROTECTION DOCTRINE

### *A. Equal Protection Jurisprudence: A Brief Background*

The Equal Protection Doctrine[17] is triggered, and the guarantee of its protection is violated, in two basic ways: (1) when a government's rules or programs classifies so as to distinguish between individuals who should be regarded as similarly situated;[18] and (2) when a government's rules or programs fail to classify individuals who should be regarded as differently situated.[19] Denials of equal protection of the first type are often coined as *de jure discriminations*; deprivations of the second type are commonly referred to as *de facto discriminations*.[20] The contours of the doctrine's second scenario behoove the realm

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17. Procedurally speaking, an E.J. Plaintiff may challenge alleged discriminatory practices of state, municipal, or local governments under the Equal Protection Clause of the Fourteenth Amendment or against the federal government under the Due Process Clause of the Fifth Amendment. *See* U.S. CONST. amend. XIV, § 1 ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."); U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."); *see also* Bolling v. Sharpe, 347 U.S. 497, 498–99 (1954) (finding that the Fifth Amendment's Due Process Clause and the Fourteenth Amendment's Equal Protection Clause are not mutually exclusive, and that discrimination by the federal government may be so unjustifiable as to be violative of due process). Moreover, the most common procedural vehicle used for asserting equal protection claims is a suit brought under 42 U.S.C. § 1983, which provides a federal statutory remedy for alleged state and local violations of federal laws or constitutional rights. Weinberg, *supra* note 6, at 18. Section 1983 reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State . . . subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privilege, or immunities secured by the Constitution and laws, shall be liable to the party in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983.

18. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1438 (2d ed. 1988). This type of equal protection violation usually involves express classifications of individuals that result in facial discrimination. *See id.* ("[I]ndividuals might be classified as eligible or ineligible for attendance at a particular public school based on their race (an alleged denial of treatment as equals)); *see also* Plyler v. Doe, 457 U.S. 202, 216 (1982) (applying this fundamental principle of equal protection jurisprudence to a Texas law that withheld from local school districts any state funds for educating, and authorized local school district to deny enrollment to, illegal alien children).

19. *Id.*

20. *Id.* at 1439.

environmental justice litigation, *i.e.*, the doctrine's protection extends to those persons unequally affected by environmental decision-making that fails to take special notice that these persons are differently situated and in need of special protection. *De facto discriminations*, such as those in the arena of environmental justice, are particularly resistant to a successful constitutional attack because the concept of "depriving persons of the right to be treated as equals . . . [is] usually . . . viewed as only a formal requirement."[21] Equal Protection Law, as applied to notions of "environmental justice for all," not only exhibits this arbitrary legalism, but also explains why claims based on the doctrine have failed in the environmental justice context. Otherwise stated, the amorphous ideal of "justice," combined with the even more shapeless concept of what constitutes "environmental equality," typifies the futile nature of the equal protection doctrine as a tool to unveil private racial animus in the implementation of facially neutral statutes, ordinances, and agency decisions. As one commentator stated, "[t]his phenomenon [(the inability of federal courts to find racial animus from *de facto discriminations*)] reflects the long term failure of civil rights law to address a historic form of racial discrimination perpetuated through facially neutral policies."[22]

Apart from the judiciary grappling to find congruence amongst the law and private societal discrimination, the true hurdle to an E.J. plaintiff's use of the Equal Protection Doctrine is proving invidious discrimination. Racial discrimination is the primary complaint of an E.J. plaintiff, which therefore causes the doctrine to take on a deeper significance in environmental

21. *See id.*; *see also id.* n.21 ("The relatively more immune position of *de facto* discriminations is traceable, at bottom, to a reluctance—diminishing over the long run but still very much a reality—to recognize and especially to enforce affirmative governmental duties to redress disadvantages or injuries not thought to be actively engineered by government itself.").

22. Carlton Waterhouse, *Abandon all hope ye that enter? Equal Protection, Title VI, and the Divine Comedy of Environmental Justice*, 20 FORDHAM ENVTL. L. REV. 51, 103–04 (2009) (analogizing *de facto* segregation in housing and education to environmental racism).

justice litigation.[23] The doctrine prohibits governmental action that is either facially discriminatory,[24] facially neutral yet administered or applied in a discriminatory manner,[25] or governmental action that has a discriminatory purpose.[26] In cases involving distinctions not drawn according to race, challenged governmental action is subject to rational basis review, *i.e.*, whether the action is *rationally related* to a *legitimate* governmental purpose.[27] However, the Supreme Court has long held that acts that discriminate on the basis of race, national origin, or other suspect class are subject to strict scrutiny review, *i.e.*, whether the government can prove that its action is *narrowly tailored* to a *compelling* governmental interest.[28]

The distinction between the standards of judicial review gains greater importance in the context of environmental justice because the focus "has shifted to laws, neutral on their face, that are claimed to have been unequally applied."[29] Prior to the Supreme Court's landmark decisions in *Washington v. Davis*,[30] and *Arlington Heights v. Metropolitan Housing Development Corp.*,[31] plaintiffs could prevail on an equal protection theory by proving that a governmental practice had a statistically discriminatory impact.[32] In *Davis*, the Court held that a claim of racial discrimination must ultimately be traced to a racially discriminatory purpose, and that while

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23. Weinberg, *supra* note 6, at 6–7.

24. Indeed, every law, to have effect, does classify people in some manner. However, classification here is not used in its broad sense; rather, it means laws that explicitly break up the population into various subgroups that resulting in unequal treatment. It has been said that "laws that discriminate outright against minorities on the basis of race are unlikely to resurface." *Id.* at 6. This is because discriminatory intent is inferred from the classification itself. *Id.* at 7.

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

26. *See* Village of Arlington Heights v. Metro. Hous. Dev. Co., 429 U.S. 252 (1977).

27. Loving v. Virginia, 388 U.S. 1, 9 (1967).

28. Plyler v. Doe, 457 U.S. 202, 217 (1982). Additionally, a court may take a middle-ground approach using intermediate scrutiny. *Id.* ("[C]ertain forms of legislative classification, while not facially invidious, nonetheless give rise to recurring constitutional difficulties; in these limited circumstances we have sought the assurance that the classification reflects a reasoned judgment consistent with the ideal of equal protection by inquiring whether it may fairly be viewed as furthering a substantial interest of the State.").

29. Weinberg, *supra* note 6, at 6.

30. 426 U.S. 229 (1976).

31. 429 U.S. 252 (1977).

32. Naikang Tsao, Note, *Ameliorating Environmental Racism: A Citizens' Guide to Combating the Discriminatory Siting of Toxic Waster Dumps*, 67 N.Y.U. L. REV. 366, 406 (1992) (citing *Hawkins v. Town of Shaw*, 437 F.2d 1286 (5th Cir. 1971)).

disproportionate impact is not irrelevant, it is not the sole touchstone of invidious racial discrimination and does not trigger equal protection guaranteed by the Constitution on its own.[33] The Court's decision in *Arlington Heights* reaffirmed *Davis*, holding that the requisite showing of intent to discriminate only requires that invidious discrimination was a motivating factor, and that such intent may be proven by circumstantial and direct evidence.[34] Thus, as a general rule, neutral governmental actions, *e.g.*, land use, zoning, or permitting decisions, are subject to the lower rational basis review. The difficulty, though, is the exacting burden on the E.J. plaintiff to affirmatively show racial animus behind these same types of decisions so that the higher burden of strict scrutiny applies. Consequently, environmental justice suits based on an equal protection theory almost consistently fail because of the E.J. plaintiff's inability to prove discriminatory intent.[35]

### *B. Hammering a Square Peg in a Round Hole: The Equal Protection Doctrine and Environmental Justice Litigation*

In the wake of *Davis* and *Arlington Heights*, claimants alleging environmental discrimination have not been completely hampered in proving that the basis for siting and permitting facilities involved discriminatory intent; however, the obstacles are extremely hard to overcome.[36] For example, in one of the earliest environmental justice cases grounded in equal protection jurisprudence, the court in *Bean v. Southwestern Waste Management*[37] rejected the

33. *Washington*, 426 U.S. at 242.

34. *Arlington Heights*, 429 U.S. at 266–68 (1977). Evidence of intent to discriminate includes: (1) whether the official action bears more heavily on one race or another; (2) a clear pattern of discrimination, unexplainable on grounds other than race, that emerges from the official action; (3) the historical background of the decision; (4) the specific sequences of events leading up to the challenged decision; (5) departures from the normal procedural sequence; (6) substantive departures; and (7) legislative or administrative history. *Id.*

35. Weinberg, *supra* note 6, at 10.

36. *Id.* at 13.

37. 482 F. Supp. 673 (S.D. Tex. 1979). To review other cases where a plaintiff's equal protection claim failed, see Rozar v. Mullis, 85 F.3d 556 (11th Cir. 1996); East-Bibb Twiggs Neighborhood Ass'n v. Macon Bibb Planning & Zoning Comm'n, 896 F.2d 1264 (11th Cir. 1989); Cox v. City of Dallas, 2004 WL 2108253 (N.D.

plaintiff's contention that racial discrimination motivated the Texas Department of Health's decision to grant the defendant, Southwestern Waste Management, a permit to operate a solid waste facility.[38] In *Bean*, the plaintiffs offered statistical data to advance two alternative theories of liability based on racial discrimination in an attempt to obtain a preliminary injunction against the granting of the permit.[39]

The plaintiff's first theory rested on the assertion that the approval of the waste facility permit was part of a pattern or practice of discrimination.[40] In examining the plaintiff's data, the court found that the data failed to establish a pattern or practice of discrimination by the permitting agency and, further, that there was no supplemental *Arlington Heights* evidence that supported such a claim.[41] The plaintiff's second theory proposed that the approval of the permit, in the context of the historical placement of solid waste sites and events surrounding the application, constituted discrimination.[42] Again, the court found that the set of data proffered by the plaintiffs failed to meet the standard for proving the discriminatory application of facially neutral permitting laws and regulations.[43] In the end, the court held that the plaintiffs did not establish a substantial likelihood of success on merits that the granting of the permit involved purposeful racial discrimination, finding that there was no statistical disparity and that a large number of sites were located near high Anglo populations.[44] Interestingly, the court subtly

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Tex. 2004), *aff'd*, 430 F.3d 734 (5th Cir. 2005); Boyd v. Browner, 897 F. Supp. 590 (D.D.C. 1995), *aff'd*, 107 F.3d 922 (D.C. Cir. 1996); R.I.S.E., Inc. v. Kay, 768 F. Supp. 1144 (E.D. Va. 1991).

38. *Bean*, 482 F. Supp. at 680.

39. *Id.* at 679.

40. *Id.* at 677. The data indicated that 58.8% of the sites granted permits were located in census tracts with 25% or less minority population and 82.4% were located in census tracts with 50% or less minority population at the time of their opening. *Id.*

41. *Id.*

42. *Id.*

43. *See id.* (citing *Yick Wo. v. Hopkins*, 118 U.S. 356 (1886).

44. *Id.* at 679–80. The court noted, however, that all of the other prerequisites granting the preliminary injunction were present because: (1) there was a substantial threat that irreparable injury would occur because the opening of the facility would affect land values, aesthetics, health and safety, and the operation of a school located nearby that contained a predominantly black student body; (2) that the threatened injury to the

examined other factors from *Arlington Heights*, but ultimately found that the plaintiffs only established that the permit decision was both unfortunate and insensitive.[45]

Only a handful of cases have refused to reject equal protection claims, but these cases are rare and do not involve specific allegations of discriminatory practices in the granting of permits to, or the siting of, potentially harmful facilities in minority communities. Instead, the plaintiffs contend, similar to the plaintiffs in *Miller v. City of Dallas*,[46] that invidious discrimination motivated municipality practices in providing services to its residents.[47] In *Miller*, the plaintiffs claimed that the city engaged in past, and continued to engage in, purposeful racial and ethnic discrimination in providing municipal services to the residents of Cadillac Heights, a predominantly African-American area in Dallas, Texas.[48] The court denied the city's motion for summary judgment because the plaintiff's presented sufficient *Arlington Heights* evidence rebutting the city's contention that there was no evidence to establish that the municipality committed the alleged discrimination pursuant to a municipal policy, custom, or usage.[49] However, the court did not try the case on its merits because the parties settled after the denial of summary judgment.[50] The *Miller* decision is important in the context of environmental justice because the court vigorously examined the plaintiffs' claims under an *Arlington Heights* analysis

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plaintiff's outweighed the threatened harm to the defendants in not granting the injunction if success on the merits were shown; and (3) the public interest would not be disserved if success on the merits were shown. *Id.* at 677.

45. *Id.* at 679 (observing that the supplementary non-statistical data raised questions as to approval of the permit, *i.e.*, the past denial of a permit for a proposed site in an almost identical location and the seemingly non-recognition of land use considerations regarding the placement of the facility near a predominantly black school with no conditioning and a nearby residential neighborhood).

46. No. Civ.A. 3:98-CV-2955-D, 2002 WL 230834, at *1 (N.D. Tex. 2002) (mem.).

47. *Id.*

48. *Id.* (contending that Cadillac Heights contained a 98.5% minority population, 46% of whom live in poverty and asserting that the city discriminated against these residents with respect to flood protection, zoning, protection from industrial nuisances, landfill practices, streets and drainage, and federal funding for housing and community development).

49. *Id.* at *2.

50. Weinberg, *supra* note 6, at 13.

and found that a reasonable trier of fact could find intentional race-based discrimination in the city's municipal services.[51]

Markedly, proof of severely disparate impact in municipal services has sufficed to show a denial of equal protection in a small number of other cases.[52] Still, these very few instances of success should not deter from the fact that the Equal Protection Doctrine is an insufficient tool to fix the TIER 2 problem of environmental justice. In one of the best examples illustrating the ineffectiveness of the doctrine, the court in *R.I.S.E. v. Kay*[53] made it explicit that "the Equal Protection Clause does not impose an affirmative duty to equalize the impact of official decisions on different racial groups. Rather, it merely prohibits government officials from intentionally discriminating on the basis of race."[54] While this statement is not unfounded, it surmises the key struggle between equal protection jurisprudence and environmental justice litigation: absent unequivocal racial animus, shown by either express classifications or historic *de jure discriminations*, there is an "implicit contemporary presumption that . . . governments act without discriminatory purpose."[55] This presumption, therefore, creates an insurmountable

51. 2002 WL 230834, at *8 (N.D. Tex. 2002).

52. *See* Hawkins v. Town of Shaw, 437 F.2d 1286 (5th Cir. 1971); Ammons v. Dade City, 594 F. Supp. 1274 (M.D. Fla. 1984), *aff'd*, 783 F.2d 982 (11th Cir. 1986).

53. 768 F. Supp. 1144 (E.D. Va. 1991). In *R.I.S.E.*, the King and Queen County ("County") sought to enter a joint venture landfill with a private corporation. *Id.* At this time, three of the County's existing landfill facilities were located in predominately (95%-100%) black populations. *Id.* at 1148. A fourth facility, located in a predominantly white area, was closed as a result of the landfill's affect on property values and the health, safety, and welfare of the County's citizens. *Id.* at 1148–49. The proposed facility was to be located in an area that consisted of 64% black residents and 36% white residents. In its conclusions of law, the court found that "the placement of landfills in King and Queen County from 1969 to the present has had a disproportionate impact on black residents." *Id.* at 1149. Despite this finding, the Court continued on with its analysis, finding that "official action will not be held unconstitutional solely because it results in a racially disproportionate impact." *Id.* Applying the factors from *Arlington Heights*, the court first found that "the impact of an official action-in this case, the historical placement of landfills in predominantly black communities-provides an 'important starting point' for the determination of whether official action was motivate by discriminatory intent." *Id.* (citing *Arlington Heights*, 429 U.S. 252, 266 (1977). Notwithstanding this statement, the court found that the remaining *Arlington Heights* factors weighed in favor of a conclusion that the permitting decision was not racially motivated, and, "at worst . . . [the decision appeared to be] more concerned about the economic and legal plight of the County as a whole than the sentiments of the residents who opposed the placement of the landfill in their neighborhood." *Id.* at 1150.

54. *Id.* at 1150.

55. Waterhouse, *supra* note 22, at 69.

burden for the E.J. Plaintiff; not only does the E.J. Plaintiff have to provide "smoking gun" evidence of discriminatory intent, but she must also relegate *de jure* discriminatory action to that of a governmental entity. In a poignant, yet eloquent synopsis of the doctrine in the field of environmental justice, one commentator noted that "[e]nvironmental justice and other litigants seeking to surmount the mount of joy may find themselves trapped in a legal hell occupied by the spirits of past litigants who hoped for racial justice."[56]

## II. ATTEMPTS AT RECTIFYING ENVIRONMENTAL RACISM: FROM EXECUTIVE ORDERS TO ENVIRONMENTAL JUSTICE LEGISLATION

### *A. Executive Order 12,898: Grassroots Optimism Towards Codification*

In 1994, lobbying from civil rights groups dedicated to the grassroots environmental justice movement spurred politicians to address the importance of environmental justice issues.[57] On February 11, 1994, President William J. Clinton recognized these inequities by issuing Executive Order 12,898 ("Order"),[58] which provided much for activists to cheer about because a president had coordinated a response to the now widely recognized problem of environmental justice.[59] The Order requires each federal agency, "[to] the greatest extent practicable and permitted by law, . . . 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 population and low-income populations."[60] Additionally, the Order calls for the creation of an Interagency Working Group on Environmental Justice ("Working Group") headed by EPA's Administrator,[61] requires

56. *Id.*
57. Mank, *supra* note 9, at 101.
58. Exec. Order No. 12,898, 59 Fed. Reg. 7629, 7629 (Feb. 11, 1994).
59. FOREMAN, *supra* note 8, at 32.
60. Exec. Order No. 12,898, 59 Fed. Reg. at 7629.
61. *Id.* The Working Group is comprised of the heads of 15 top-level executive agencies. *Id.* Under § 1-102(b)(2) of the Order, the Working Group is to provide guidance to federal agencies on criteria for identifying

agencies to develop environmental justice strategies, and conduct research, data collection, and analysis.[62]

The primary setback of the Order is contained in Section 6-909, which explicitly denies private enforcement or judicial review of the Order:

> Judicial Review. This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any person. This order shall not be construed to create any right to judicial review involving the compliance or noncompliance of the United States, its agencies, its officers, or any other person with this order.[63]

As a result of this Section, the Order is not binding on any executive department or independent regulatory agency, such as the EPA.[64] Instead, the Order is intended only to improve the internal management of the executive branch and its regulatory agencies.[65] This Section leaves the E.J. plaintiff inept to enforce the Order against the EPA so as to conquer the fear that the executive branch and its regulatory agencies will not follow the order or implement its goals into their respective programs or policies.[66]

As will be discussed below, Section 6-909 has proved to impose further limitations on a private citizen's use of the Order. The courts, administrative law judges, and agencies have uniformly interpreted Section 6-909 to preclude independent judicial review.[67] Thus, even judicial and administrative recognition of the Order's significance has been found wanting.

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disproportionate environmental effects on minority and low income populations, and to ensure that an agency's environmental justice strategy is interpreted and enforced in a consistent manner throughout the agencies programs, activities, and policies. *Id*.

62. *Id.* at 7630–31.

63. *Id.* at 7632–33.

64. *See id.*

65. *Id.*

66. *See* Franzen, *supra* note 1, at 388 (stating that the Order can only be enforced by leaders of the executive branch and that if these leaders are not concerned with environmental justice, then there are no consequences for non-compliance with the order for failure to abide by its terms).

67. Mank, *Executive Order 12,898*, *in* THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS, *supra* note 3, at 132.

Notably, were the EPA to begin rejecting or modifying permits because of environmental justice considerations, opposing stakeholders such as industry and state permitting officials may challenge such decisions because the Order is neither statutorily authorized by Congress nor binding under the Administrative Procedure Act because the EPA has not issued new regulations that incorporate the Order.[68] Since nearly two decades have passed without substantive changes in EPA regulatory policy regarding environmental justice, it seems that statutory authorization is the only way that the Order can have binding effect.[69]

### *B. The Environmental Justice Act of 2008: On the Precipice of Solving the Two-Tiered Problem of Environmental Justice*

Dating back to the 105th session of Congress, proposed legislation aimed at furthering the Order's goals have taken on various forms, but it was not until the 110th session of Congress that legislators proposed a bill that directly mirrored the Order by explicitly codifying it into law. On September 24, 2008, Senator Richard J. Durbin presented on the Senate floor the Environmental Justice Act of 2008 ("Act").[70] Specifically, the purpose of the Act is to "codify Executive Order 12898 . . . to require the Administrator of the Environmental Protection Agency to fully implement the recommendations of the Inspector General of the Agency and the Comptroller of the United States."[71] Moreover, the text following the proposed enabling clause states that "[t]he President of the United States is authorized and directed to execute, administer, and enforce as a matter of Federal Law the provisions of Executive Order 12,898."[72] Thus, the Act provides the requisite congressional authorization for the Order to become law.

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68. *Id.*
69. *See* Chrysler Corp. v. Brown, 441 U.S. 281, 304 (1979) (holding that an executive order must be authorized by statute to have binding effect).
70. Environmental Justice Act of 2008, S. 642, 110th Cong. (as reported by S. Comm. on Env't. & Pub. Works, July 31, 2008), S. Rep. No. 110-485 (2008), 2007 CONG US S 642.
71. *Id.*
72. *Id.* § 2.

The flexing muscle of the legislation is simple: the codification of the Order's principle directive that requires agencies to "address" and "identify" disproportionate human health effects on minority and low-income populations.[73] This language, in conjunction with other language

73. *See, e.g.* Exec. Order No. 12,898, 59 Fed. Reg. at 7629; S. 642, § 2. While the constitutional validity of the agency model is beyond the scope of this Article, it is important to note the constitutional problem that could arise if the proposed legislation were passed. One commentator has suggested that such a mandate, without specifying how federal agencies should go about addressing and identifying these populations, may violate non-delegation principles. Carlton Waterhouse, *Abandon all hope ye that enter? Equal Protection, Title VI, and the Divine Comedy of Environmental Justice*, 20 FORDHAM ENVTL. L. REV. 51, 109 (2009). Although the successfulness of a nondelegation challenge is somewhat tenuous, an examination of the jurisprudential policy enunciated in this area of Constitutional Law provides a beneficial starting point for highlighting why the Act may ultimately fail to provide the environmental justice plaintiff with appropriate relief. The support for such an argument is based in the conflict between the structural constitution and the authority to exert legislative and adjudicative powers granted to an agency by Congress. *Compare* U.S. Const. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives") *with* U.S. Const. art. I, § 8 ("The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof"). As recently as 2001, the Supreme Court reaffirmed the non-delegation doctrine. *See* Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457 (2001). When Congress confers decision-making authority upon an agency, Congress must "lay down by legislative act an intelligible principle to which the person or body authorized is directed to conform." J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928). Thus, a statutory grant of power to promulgate rules or issue orders through adjudication must be cabined by a guiding principle to ensure that the doctrine's justifications are advanced. Justice Rehnquist delineated the justifications behind the non-delegation in his concurrence to *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607 (1980). Justice Rehnquist opined that the nondelegation doctrine served three important functions. First, "it ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will." *Id* at 685. Second, "to the extent Congress finds it necessary to delegate authority, it provides the recipient of that authority with an "intelligible principle" to guide the exercise of the delegated discretion." *Id.* at 685–86. Finally, and derivative of the second, "the doctrine ensures that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards." *Id.* at 686. Notwithstanding the possibility that prudential concerns may sound the alarm for better statutory guidance by which the EPA can follow when applying and interpreting the Act's legislative text, the proposed legislation still passes muster when examined through the nondelegation principles discussed above. Indeed, the language of the Act implicates broad regulatory powers of federal agencies. *See, e.g.* Exec. Order No. 12,898, 59 Fed. Reg. at 7629; S. 642, § 2. This expansive power presumably encompasses actions by the EPA, such as strengthening existing programs or promulgating new rules, to comply with the Order. Moreover, this extensive authority is granted without a plethora of minute guidelines to follow when "addressing" or "identifying" adverse environmental effects of its programs on minority or low-income populations. However, even in sweeping regulatory schemes, courts do not demand that statues provide a determinate criterion. *See Whitman*, 531 U.S. at 458–59. Furthermore, Section 1-102 of the Order calls for the creation of an Interagency Working Group on Environmental Justice, which will provide guidance to federal agencies on criteria for identifying disproportionate environmental effects on minority and low-income populations. Exec. Order No. 12,898, 59 Fed. Reg. at 7629. Even supposing that the Act unconstitutionally delegates Article I powers to the EPA, a non-delegation challenge will likely fail because the Supreme Court does not confine itself to the strictures of a rigid nondelegation doctrine interpretation. For the two instances in which the United States Supreme Court has found an invalid delegation of power to the executive branch, see *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) and *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). Still, Congress should heed the policy justifications espoused by Justice Rehnquist before it passes the Act due to the unique difficulties within the environmental justice field, *i.e.*, reconciling not only the interest in industrial progressivity

within the statute that requires the EPA to carry out past recommendations by the Inspector General of the EPA and the United States Government Accountability Office, will serve as a catalyst for elevating environmental justice concerns and improving the environmental justice framework with the EPA and other executive agencies.

No one will gainsay the fact that the environmental justice problem requires a two-tier solution: First, the federal government, and specifically the EPA, needs to improve its own policies concerning environmental justice. While the Act's directive is straightforward, it is also acutely vague. Inevitably, this will create problems for the E.J. Plaintiff as the EPA interprets the Act's mandate through the promulgation of its rules and regulations to "identify" and "address" environmental justice problems; however, the Act fulfills the TIER 1 objective by converting what once were federal agency directives under the Order into enforceable statutory responsibilities.[74] Second, direct and tangible relief must be statutorily afforded to the E.J. Plaintiff. This by and large is the ultimate pitfall of the proposed legislation, as the remedial consequences of the Act are minimal at best. While the Act may seem to birth a new era of environmental justice relief, the vitality of the Act is diminished by the fact that it still does not provide the E.J. Plaintiff the appropriate and immediate relief needed to solve the TIER 2 problem, *i.e.*, a declaratory or equitable remedy for the discriminatory siting and permitting of facilities that adversely affect the environmental quality of life of populations located near these facilities.

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with the protection of the environment—which traditionally resonates from environmental legislation—but also the interest in extinguishing discrimination through the furtherance of civil rights law. As the Part II of this Note illustrates, comprehensive legislation that corrects the ambiguities in the Order, provides better direction to agencies regarding their responsibilities, and confers a personal and direct remedy to the environmental justice will have to be passed.

74. Waterhouse, *supra* note 22, at 109.

1. TIER 1: Reaping the Benefits of the Act at an Administrative Pace

Much of the criticism regarding the EPA's failed implementation of the Order has been aimed at the Bush Administration's curtailment of funds and programs to the EPA's Office of Environmental Justice, as well as the Office of Civil Rights' poor record of investigating Title VI complaints.[75] Similarly, reports issued by the Inspector General of the EPA ("I.G.") and the United States Government Accountability Office ("G.A.O.") also proffered criticism against the EPA.[76] For example, the I.G.'s report stated in its opening summary that the "EPA has not fully implemented Executive Order 12898 nor consistently integrated environmental justice into its day-to-day operations," and that the EPA had not "identified minority and low-income, nor identified populations addressed in the Executive Order, and has neither defined nor developed criteria for determining disproportionately impacted."[77] In response to the I.G.'s draft report and recommendations, the EPA concluded that:

> The Agency disagrees with the major assertions made by the OIG in the draft evaluation report because we strongly believe that those assertions were based on a mistaken interpretation of the language of the Executive Order. In light of the above, the Agency asks the OIG to reconsider its basic premise and interpretation of the language of the Executive Order since every recommendation flows from that mistaken interpretation.[78]

The EPA went on at great lengths to support its assertion that the I.G. rested its recommendations on a "mistaken interpretation" of the Order. The I.G.'s first recommendation was that the EPA

75. *See* Franzen, *supra* note 1, at 390 (asserting that the Bush Administration cut the budget of the Office of Environmental Justice by more than 25% and downplayed the disparate environmental effects on minority and low-income populations) (citations omitted); *see also* Waterhouse, *supra* note 22, at 110 (2009) ("Due to its small staff and limited budget, the thorough investigation of complaints often proceeds at a glacial pace.").

76. Daniel J. Carroll & Steven J. Weber, Off. Of Inspector Gen., Rep. No. 2004-P-00007, Evaluations Report: EPA Needs to Consistently Implement the Intent of the Executive Order on Environmental Justice (2004) [hereinafter I.G. Rep. 2004], http://www.epa.gov/oig/reports/2004/20040301-2004-P-00007.pdf; Off. Of Inspector Gen., Rep. No. 2006-P-00034, EPA Needs to Conduct Environmental Justice Reviews of Its Programs, Policies, and Activities (2006); U.S. Gov. Accountability Office, GAO 05-289, Environmental Justice: EPA Should Devote More Attention to Environmental Justice when Developing Clean Air Rules (2005).

77. I.G. Rep. 2004 at i.

78. *Id.* at 58.

issue a memorandum reaffirming the Order, and to remind EPA officers of the Agency's priority, namely, that minority and low-income populations that are disproportionally impacted are the beneficiaries of the Order.[79] The I.G. found support for this recommendation in Section 1-101 of the Order, which requires the Agency to identify and address specific communities and to define disproportionately impacted.'"[80]

In rebuttal, the EPA suggested that the I.G. had strained the language of the Order to require the Agency to develop a national standard for defining and/or determining a minority and low-income community.[81] Rejecting this mistaken interpretation, the EPA further contended that the Order merely requires the "[a]gency to conduct internal reviews of its programs, policies, and activities instead of seeking to establish a "brightline" for identifying an "environmental justice community."[82] Additionally, the EPA asserted that the Order "does not require the Agency to

79. *Id.* at 40 ("OIG Proposed Recommendation 2-1").

80. *Id.* at 9.

81. *Id.* at 40 ("Agency Response"). Continuing on with its contention, the EPA engaged in grammatical semantics:

> By emphasizing those 7 words (identifying....addressing....disproportionately....minority populations....low-income populations"), the OIG concludes that the Executive Order requires the Agency to develop a national standard or threshold for defining and/or determining a minority or low-income community. According to the Director of the Office of Environmental Justice, who represented the American Bar Association throughout the development and discussions with the White House Counsel's Office and the Council on Environmental Quality pertaining to Executive Order 12898, this is a strained interpretation of the language, which appears to rest on the word "disproportionately," which was not the intent of the drafters. Following ordinary rules of grammar, the word "disproportionately" modifies the language that immediately follows it. Moreover, grammatically, the phrase "identify and address" does not modify "minority populations and low-income populations" based upon normal sentence structure. Rather, the language of the Executive Order instructs the Agency to identify and address the "disproportionately high and adverse human health or environmental effects of it programs, policies, and activities." This language requires EPA to *review* all of its programs, policies, and activities in order to identify and address the "disproportionately high and adverse human health or environmental effects....on minority populations and low- income populations."

*Id.* (emphasis added).

82. *Id.*

define 'disproportionately impacted'" because the phrase is not in the Order.[83] Further quelling this criticism, the EPA contended that it had consistently integrated environmental justice concepts in its decision-making process.[84]

Although the debate is couched in laudable interpretations and grammatical technicalities, its outcome has the far-reaching effect of determining not only the parameters of the Order's requirements, but also the Act's solution to the TIER 1 problem. The bulk of the proposed legislation connotes a firm direction towards improving the environmental justice framework throughout the EPA. The Act specifically directs the Administrator of the EPA, as promptly as practicable, to carry out certain recommendations of the I.G. and the GAO.[85] Among these recommendations include: (1) the Agency's identification of programs and activities that need an environmental justice review;[86] (2) the Agency's consideration of environmental justice concepts when engaging in rulemaking;[87] and (3) that the Agency establish specific time frames for the development of definitions, goals, and measurements regarding environmental justice and that it establish a definition for a minority and low-income community.[88] Significantly, the Act explicitly rejects the EPA's interpretation of the Order by requiring the EPA to "provide the regions and program offices a standard and consistent definition for a minority and low-income community."[89]

All of these provisions, however, would be without force if the EPA continued to institute its current definition of "environmental justice"[90] because of the de-emphasis on ensuring that

83. *Id.*
84. *Id.* at 42.
85. *See* Environmental Justice Act of 2008, S. 642, § 3 110th Cong. (as reported by S. Comm. on Env't. & Pub. Works, July 31, 2008), S. Rep. No. 110-485 (2008), 2007 CONG US S 642.
86. *See id.* § 3(a)(1)–(4).
87. *See id.* § 3(b)(1)–(4).
88. *See id.* § 3(c)(1)–(4).
89. *See id.* § 3(c)(2).
90. *See supra* note 11 and accompanying text.

minority and low-income populations are specifically protected.[91] To give the Act its intended force, the Act provides the following statutory definition of "environmental justice" that emphasizes the protection of minority and low-income populations:

> "The term 'environmental justice' means the fear treatment and meaningful involvement of all people regardless of race, color, national origin, educational level, or income with respect to the development, implementation, and enforcement of environmental laws and regulations in order to ensure that . . . no minority or low-income population is forced to shoulder a disproportionate burden of the negative human health and environmental impacts of pollution or other environmental hazard.[92]

Although a rudimentary proposition, there is a persuasive argument that the mandatory shift towards implementing this new definition will greatly improve the environmental justice framework within the EPA. For the first time, the EPA will be required to ensure that no minority or low-income population is forced to shoulder a disproportionate burden of adverse environmental impacts whenever the Agency implements the statute's provisions. Consequently, the "mistaken interpretation," once thought to strain the language of the Order, will prove victorious in the grammatical debate.

Still, as the EPA moves forward with regulatory development in area of environmental justice, there remains the fear that a "business as usual" approach will continue throughout the EPA and that the Act offers communities little hope for meaningful change.[93] To begin, the Act imposes no new substantive requirements on the EPA.[94] Accordingly, the antecedent discretion given to the EPA will remain readily present notwithstanding the Order's codification. In other words, the EPA will only be required to give more weight to its existing responsibilities and may

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91. In the I.G.'s Report, however, the EPA contended that "it is clear that the Agency has not reinterpreted the Executive Order. Rather, the Agency seeks to ensure that all communities and persons across this Nation secure environmental justice and live in safe and healthful environments. This does not suggest that the Agency is "de-emphasizing minority and low-income populations" as proffered by the OIG. I.G. Report 2004 at 42.

92. *See* S. 642, § 2(b)(1)(A)–(B).

93. Waterhouse, *supra*, note 22, at 110.

94. *Id.*

strengthen or restrain, at its own discretion, its policies, programs, and activities to comply with the Order and the I.G.'s recommendations.[95] As noted previously, the EPA disagreed with many of the criticisms of the I.G. and contended that it has fulfilled the goals of the Order. Thus, the argument goes, simply directing the EPA to follow the recommendations of the I.G. and the G.A.O. will do nothing more than permit the EPA to interpret them as they see fit, which will cause further bureaucratic stagnation.

Most importantly, while the watchdog mechanisms for the statute's enforcement are certainly necessary to solve the TIER 1 problem, they will not adequately combat alleged discriminatory practices encompassed within the TIER 2 problem, *i.e.*, affording a private individual the right to sue a federally funded recipient or the government and its agencies based on the disparate impact standard. First, the Act simply requires EPA's Administrator to submit an initial report to Congress regarding the EPA's strategy for implementing the I.G. and G.A.O. recommendations within six months after enactment, with semi-annual reports thereafter.[96] This can hardly be said to secure expeditious relief for the E.J. Plaintiff. And second, other proposed legislation,[97] while providing a commendable oversight scheme, will more than likely receive the same opposition as the Act.[98]

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95. *Id.*

96. *See* S. 642, § 4.

97. *See* Environmental Justice Renewal Act, S. 2549, 110th Cong. (as reported by S. Comm. on Env't. & Pub. Works, July 31, 2008), S. Rep. No. 110-485 (2008), 2007 CONG US S 2549. The Environmental Justice Renewal Act (E.J.R.A.) greatly expands the responsibilities of the Working Group created by the Order. First, the E.J.R.A. requires the Working Group to publish a Uniform Consideration Guidance Document that outlines what considerations are taken into account when defining environmental justice communities. S. 2549, § 3(f). Second, the E.J.R.A. mandates that each federal agency ensure that their programs, policies, and activities do not subject any individuals to disparate impact because of race, color, national origin, or income level. *Id.* § 4(a). Third, the E.J.R.A. establishes various grant programs to incentivize non-profit, community-based organizations and States to, *inter alia*, carry out projects to address environmental justice concerns. *Id.* § 7. Finally, the E.J.R.A. requires the Administrator of the EPA to establish and Environmental Justice Basic Training Program. *Id.* § 8. It is important to note, however, the E.J.R.A.'s establishment of an Environmental Justice Ombudsman seems to be the only true watchdog mechanism for the Act's enforcement. The only duties of the Ombudsman is to "receive, review, and process complaints and allegations with respect to environmental justice programs and activities of the

2. TIER 2: The Act's Inadequate Private Remedy

The absence of a sufficient private statutory remedy is not readily apparent from the language of the Act. To this point, the supposed vitality of the Act lies within Section 2(c), which explicitly revokes Section 6-609 of the Order.[99] Accordingly, the Act creates: (1) a right to enforce the Order at law or equity against the United States and its agencies;[100] and (2) a right to ensure compliance with the Order through judicial review.[101] Therefore, a private cause of action can be brought if policies or rules adopted by the EPA adversely and disproportionately affect minority and low-income populations.[102] At first glance, Section 2(c) is seen as a long overdue tool for the E.J. Plaintiff that can serve as a mechanism for truly lifting disparate environmental burdens off of minority and low-income populations. In the end, however, the Act's private right of action is inadequate in part because of the EPA's history of finding that the Agency complied with the Order, and in part because of inaccurate interpretations of the private action's actual remedial effect. Ultimately, though, the Act's private right of action targets the wrong defendant, *i.e.*, although the federal government should be held accountable for violating the Order, the true perpetrator of environmental racism is more than likely state or local governmental entities that receive funds from the federal government.

The EPA's Environmental Appeals Board ("EAB") has an extensive history of reviewing whether the EPA's actions complied with the Order, but has never found that the agency violated

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Environmental Protection Agency." *Id.* § 5. The Ombudsman is report directly to only the Administrator of the EPA, and is not required to report to the Office of Environmental Justice. *Id.*

98. *See* Letter from Bruce Josten, Executive Vice President, Government Affairs at the U.S. Chamber of Commerce to the Members of the United States Congress (Sept. 12, 2008), *available at* http://www.uschamber.com/issues/letters/2008/080912_opposing_s642_s2549.htm (stating that "[t]he current bills would exacerbate, rather than alleviate, the fundamental problems inherent in environmental justice" and that the Environmental Justice Renewal Act would essentially cause the "further bloating of our already swollen bureaucracy").

99. *See* S. 642, § 2(c).

100. *See id.*

101. *See id.*

102. *See id.*

the Order in any case.[103] Presently, the EAB may review the EPA's efforts to implement the Order in the course of assessing the validity of a permit decision at issue.[104] Due to Section 6-609 of the Order, however, the EAB typically affords discretion to the EPA and frames the issue as a matter of internal agency policymaking.[105] By the Act's inclusion of a private right of action, the Act confronts the EAB's position that the Order is not enforceable at law. Nevertheless, one wonders whether such a shift in EAB review of EPA actions will cause the EAB to vacillate about whether the EPA complied with the underlying goals of the Order, especially when juxtaposed to the many instances in which the EAB found the EPA in compliance with the Order. Moreover, environmental justice claims will more than likely confront similar deference issues when an E.J. Plaintiff proceeds by filing a cause of action in federal courts due to the extreme deference courts give to agency decision-making.[106]

There is a credulous misconception that the Act's private remedy allows an individual to sue governmental entities for discrimination under a disparate impact standard.[107] Yet, this interpretation is incorrect, as the Act only permits a cause of action to the extent of the private

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103. Mank, *supra* note 67, at 133.

104. *See* 40 C.F.R. § 124.19(a) ("any person who filed comments on that draft permit or participated in the public hearing may petition the Environmental Appeals Board to review any condition of the permit decision"); *see also* Mank, *supra*, note 47, at 132.

105. *See* Mank, *supra* note 67, at 133 (citing *In re Chemical Waste Management of Indiana*, 6 E.A.D. 66 (EAB 1995), 1995 WL 395962). For a recent string of EAB cases dismissing arguments based on non-compliance with the Order, see *In re: Upper Blackstone Water Pollution Abatement District*, 2010 WL 236454 (E.P.A.) (finding that petitioner failed to allege facts showing a disproportionately high impact on environmental justice populations); *In re: Beeland Group, LLC, BEELAND Disposal Well # 1 UIC Permit No. MI-009-1I-0001*, 2008 WL 4517160 (E.P.A.) (finding that the EPA conducted a sufficient "Environmental Justice Screening Evaluation" because the evaluation's data showed that the "the percent of minority and percent of people below the poverty level [at the siting location were] at or below the state-level percentages and comparable to county-level percentages"). For cases in which the EAB has remanded a permit for further environmental justice analysis, see *In re Knauf Fiber Class, GmbH*, 9 E.A.D. 121 (EAB 1999), 1999 WL 64235; In re AES Puerto Rico, L.P., 8 E.A.D. 324 (EAB 1999), 1999 WL 345288.

106. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

107. *See* Letter from Bruce Josten, Executive Vice President, Government Affairs at the U.S. Chamber of Commerce to the Members of the United States Congress (Sept. 12, 2008), http://www.uschamber.com/issues/letters/2008/080912_opposing_s642_s2549.htm (stating that the Environmental Justice Act of 2008 would effectively overturn the United States Supreme Court's decision in *Alexander v. Sandoval*, which held that a private right of action to enforce an agency's disparate impact regulations does not exist under Title VI of the Civil Rights Act of 1964).

enforcement of the Order once codified; it in no way alters a plaintiff's remedies under Title VI of the Civil Rights Act of 1964.[108] Moreover, the plain language of the Order indicates that only *federal* governmental entities are subject to the Order's mandates.[109] Nothing in the Order or the Act prescribes enforcement of the Order against *state*, *municipal*, or *county* governmental entities.[110] Despite the mistaken reading of the Act, this viewpoint unknowingly raises an interesting point: Why doesn't the Act provide for a private right of action to bring a claim of discrimination against a federally funded permitting entity based on a disparate impact standard?

Throughout the history of environmental justice litigation, most notably in claims raising equal protection violations[111] and petitions filed with OCR alleging violations of the Civil Rights Act of 1964, plaintiffs have sought to utilize the disparate-impact standard.[112] And while the Act indeed connotes Congress's affirmation that federal agencies have a legal obligation to deter and prevent adverse human health effects on minority and low-income populations—which will certainty help to resolve the TIER 1 problem—the Act fails to recognize the pressing concern for providing a private right of action based upon a disparate-impact standard. In order to alleviate this legislative neglect, Congress must amend Title VI of the Civil Rights Act of 1964, for this may well be the only means by which to solve the TIER 2 problem of environmental justice.

## III. THE CIVIL RIGHTS ACT OF 1964: THE PROMISE AND FAILURE OF TITLE VI CLAIMS

### *A. A Legal Backdrop of Title VI, the EPA, and Environmental Justice*

As a governmental agency that provides federal funding to intermediary nonfederal entities,[113] the EPA is bound by the terms of Title VI, which prohibits federal agencies and

108. *See* S. 642, § 2(c).
109. Exec. Order No. 12,898, 59 Fed. Reg. 7629, 7629 (Feb. 11, 1994).
110. *See id.; see also* S. 642.
111. *See* discussion *supra* Part I.
112. *See* discussion *infra* Part III(A).
113. Mank, *supra* note 9, at 25. A typical intermediary nonfederal entity is a state agency that receives grants or other funding that in turn provides finding to a wide range of beneficiaries, including individuals, local or

departments from providing funding to programs that discriminate on the basis of race.[114] Furthermore, Section 602 commands agencies governed under Title VI to promulgate regulations and provide an administrative complaint process for determining whether one of its recipients engaged in discriminatory practices.[115] Unfortunately, the E.J. Plaintiff who brings a claim under Title VI of the Civil Rights Act of 1964 faces hurdles similar to those present in an equal protection suit.[116] These obstacles are best illustrated when the two pertinent Title VI provisions, Section 601 and Section 602, are aligned to judicial precedent.

The Supreme Court has held that: (1) proof of intentional discrimination is required to enforce a private right of action under Section 601;[117] and (2) that no private action exists to enforce Section 602 agency regulations.[118] Thus, similar to the exacting burden involved in an equal protection suit, Section 601 of Title VI has been ineffective in preventing environmental inequities because the E.J. Plaintiff must still prove that a governmental body or industry

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state governments, non-profit organizations, or private industry. *Id.* Title VI clearly applies to about 1,500 recipients, including almost all state or regional siting or permitting agencies, all of whom receive a piece of the several billion dollars allocated to the EPA for funding these agencies. *Id.*

114. *See* Civil Rights Act of 1964 § 601, 42 U.S.C. § 2000d (1988). Section 601 of Title VI states that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the befits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." *Id.* However, the EPA cannot be held liable under Title VI. Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs & Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits [hereinafter Investigation Guidance], 65 Fed. Reg. 39650, *39690 (June 27, 2000) ("[Title VI] was meant to cover only those situations where federal funding is given to a non-federal entity which, in turn, provides financial assistances to the ultimate beneficiary." (quoting *Soberal-Perez v. Heckler*, 717 F.2d 36, 38 (2d Cir. 1983))).

115. Civil Rights Act of 1964, § 602, 42 U.S.C. § 2000d-1 (1988). That Section provides:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.

*Id.*

116. *See supra* Part I (discussing the difficulty of proving intentional discrimination through the use of statistical data showing disparate impact).

117. Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582 (1983).

118. Alexander v. Sandoval, 532 U.S. 275 (2001).

consciously discriminated on the basis of race.[119] At one time, Section 602 at one time promised to be a formidable legal tool for an environmental justice advocate.[120] Prior to the Supreme Court's decision in *Alexander v. Sandoval*,[121] discussed in greater detail in Part III(B) and IV of this Note, most courts of appeals held that a private right of action existed under an agency's Section 602 regulations prohibiting disparate impact.[122] Under its regulations, the EPA adheres to a disparate impact standard that prohibits recipients from using methods that would subject individuals to discriminatory effects,[123] or siting a facility in a location that would subject individuals to discrimination.[124] This standard is noticeably more beneficial because it does not require proof that an intermediary nonfederal agency engaged in intentional discriminatory practices.[125] However, on the advent of the Supreme Court's reasoning in *Sandoval* that no such private right of action exists to enforce an executive agency's Section 602 regulations, Title VI has since proved to be a daunting opponent to the E.J. Plaintiff, and not the once promised deathly arrow in the E.J. Plaintiff's quiver.

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119. Mank, *supra* note 9, at 23.

120. Worsham, *supra* note 3, at 645 ("Section 602 holds more promise for environmental justice advocates than Section 601 . . . .").

121. *Alexander*, 532 U.S. 275.

122. *See, e.g.* S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 145 F. Supp.2d 505 (D.N.J. 2001), *rev'd*, 274 F.3d 771 (3rd Cir. 2001); Mank, *supra* note 9, at 35.

123. 40 C.F.R. § 7.35(b) (2003). The EPA's disparate impact standard provides:

> A recipient shall not use criteria or methods of administering its program or activity which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program or activity with respect to individuals of a particular race, color, national origin, or sex.

*Id.*

124. 40 C.F.R. § 7.35(c) (2003). This provision states that:

> A recipient shall not choose a site or location of a facility that has the purpose or effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination under any program or activity to which this Part applies on the grounds of race, color, or national origin or sex; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of this subpart."

*Id.*

125. Worsham, *supra* note 3, at 645 (stating that a plaintiff challenging a siting decision under Section 602 is relieved of the formidable task of proving that the permit in question was issued with the intent to discriminate; a showing of discriminatory effect or disparate impact on the basis of race suffices).

### *B. The EPA's Title VI Administrative Complaint Process*

In addition to the legal jargon prohibiting an E.J. Plaintiff from utilizing the EPA's disparate impact standard, adequate and immediate relief under Title VI continues to escape the grasp of the E.J. Plaintiff despite efforts by the EPA to effectuate the provisions of Title VI. Pursuant to Section 602 of Title VI, the EPA first promulgated its regulations in 1973, which prohibited a recipient from engaging in actions that have discriminatory effects.[126] Later, in 1984, the EPA revised and amended these regulations, but reiterated its historic policy of forbidding recipients from creating disparate impacts.[127] Even though the EPA's Title VI framework includes an external administrative complaint process that presumably applies the EPA's disparate impact standard, E.J. Plaintiffs have been hampered in forwarding the environmental justice movement due to mediocre administrative efficiency and legal uncertainty. The following Section of Part III of this Note provides a brief synopsis of the EPA's Title VI external complaint scheme. Next, the Note discusses the precedential environmental justice case of *Rosemere Neighborhood Ass'n v. EPA*, and more specifically, what tangible effect, if any, will result from its disposition.

#### 1. EPA's Office of Civil Rights and the Draft Guidances

Currently, a claimant's only recourse for redressing disparate racial impacts from federally funded environmental agencies rests with the EPA's Office of Civil Rights ("OCR").[128] The EPA created the OCR in 1994 and charged it with the task of dealing exclusively with investigating Title VI complaints and implementing the EPA's regulations promulgated under Section 602.[129] In executing the EPA's Title VI responsibilities, the OCR adheres to two

126. Mank, *supra* note 9, at 26.
127. *Id.*
128. Waterhouse, *supra* note 22, at 110.
129. Mank, *supra* note 9, at 27.

distinct, yet related inter-agency draft Guidance documents: the Draft Final Recipient Guidance ("Recipient Guidance") and the Draft Revised Investigation Guidance ("Investigation Guidance").[130] However, the EPA sought to avoid subsequent legal challenges by using public notice-and-comment procedures in drafting the Guidances[131] and to limit judicial review by not issuing the Guidances as binding rules.[132] Thus, the remaining form of relief employing a disparate impact standard is processed behind closed administrative doors and without any judicial oversight.[133]

The primary purpose of the Recipient Guidance is to assist recipients of federal funding in minimizing the likelihood that a claim of disparate impact discrimination will be filed against the recipient.[134] To further this principal goal, the Recipient Guidance focuses on different approaches that intermediary permitting agencies can use to ensure and enhance the public involvement portion of their permitting programs so that a recipient may avoid allegations of

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130. Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs & Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits [hereinafter Investigation Guidance], 65 Fed. Reg. 39650 (June 27, 2000). The EPA issued its final draft of the Recipient Guidance in 2005, which is essentially the same as the original draft. *See* Draft Final Title VI Public Involvement Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs [hereinafter Recipient Guidance], 70 Fed. Reg. 10625 (Mar. 4, 2005).

131. Mank, *supra* note 9, at 43. One commentator has argued that the EPA needs to issue a finalized Guidance so that the EPA task force can know what complaints should be accepted and which should be dismissed. *See* Jenna Settino, Editorial, *Is It The End For EPA's Title VI Guidance?*, Nov. 30, 2001, *available at* http://www.vjel.org/editorials/ED10020.html ("After *Sandoval* the administrative complaint process may be the fastest and cheapest means by which communities can stop the issuance of a permit. . . . The EPA is [sic] most appropriate avenue for giving a voice to people who do not have one, and only a finalized Title VI Guidance would help strengthen that voice.").

132. *See* Investigation Guidance, *supra* note 130, at *39699 ("The statements in this document are intended solely as guidance. This document is not intended, nor can it be relied upon, to create any rights or obligations enforceable by any party in litigation. EPA may decide to follow the guidance provided in this document, or to act at variance with the guidance, based on its analysis of the specific facts presented."); Recipient Guidance, *supra* note 130, at *10627 ("This document does not change or act as a substitute for any legal requirements. Rather, the sources of authority and requirements for Title VI programs are the relevant statutory and regulatory provisions."); Bradford C. Mank, *The Draft Title VI Recipient and Revised Investigation Guidances: Too much Discretion for EPA and a More Difficult Standard for Complainants?*, 30 ENVTL. L. REP. 11144, (2000) (stating that courts are not bound by the Guidances because they lack the binding effect of a properly promulgated rule; however, the Guidances might influence judicial reasoning).

133. *See* Jenna Settino, Editorial, *Is It The End For EPA's Title VI Guidance?*, Nov. 30, 2001, *available at* http://www.vjel.org/editorials/ED10020.html (stating that the EPA considers itself the only "game in town" because of its Title VI administrative complaint process) (citation omitted).

134. *See* Recipient Guidance, *supra* note 131, at *10627.

public involvement violations of Title VI or violations of EPA's Title VI implementing regulations.[135] At the same time, the Recipient Guidance connotes a firm commitment to enforcing civil rights laws as a complement to environmental laws, while simultaneously acknowledging the importance of fostering sustainable economic development.[136] The EPA recognizes that recipients are not required to implement these approaches; however, recipients are still required to comply with the non-discrimination requirements of Title VI and EPA's implementing regulations.[137] Accordingly, a recipient of federal funds from the EPA is strongly encouraged to institute a program that promotes the principles of environmental justice in order to secure solace from the chance of potential violations.[138] The Recipient Guidance can be broken up into four primary parts: (1) Approaches to Meaningful Public Involvement;[139] (2) Suggested Approaches for Reducing Common Title VI Complaints;[140] (3) Evaluating Approaches for Meaningful Public Involvement;[141] and (4) Due Weight.[142] Some states and municipalities are beginning to follow the Recipient Guidance's suggestions via legislation.[143]

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135. *See id.* at 10628–33. The Recipient Guidance notes that meaningful public involvement is an integral part of the permit decision process and that informing, consulting, and working with communities during the permitting process to address their concerns can foster trust and solid relationships between permitting agencies and communities, thereby ensuring that concerns and the reduction of complaints may be dealt with in a timely manner). *Id.* at 10628.

136. *Id.* at 10628. The following are some of the EPA's guiding principles for Title VI for the Recipient Guidance: (1) that all persons regardless of race, color, or national origin are entitled to a safe and healthful environment; (2) the prevention of Title VI violations and complaints via strong civil rights enforcement; and (3) the awareness that civil rights laws and environmental laws are complementary and can both be achieved in a manner consistent with sustainable economic development. *Id.*

137. *Id.* at 10628–29.

138. *Id.* at 10629.

139. *Id.* at 10629–32.

140. *Id.* at 10632–33.

141. *Id.* at 10633–34.

142. *Id.* at 10634. This section explains that OCR give "due weight," when investigation a Title VI complaint, to the measures taken by the recipient to comply with Title VI and the EPA's implementing regulations. *Id.* While the "OCR cannot completely defer to a recipient's own assessment of whether Title VI or EPA's Title VI implementing regulations have been violated, . . . [the] EPA . . . can . . . recognize the results of information submitted [by the recipient] and give it appropriate due weight." *Id.*

143. *See* CONN. GEN. STAT. ANN. § 22a-20a (2009) (defining terms such as "environmental justice community," "affecting facility," "meaningful public involvement" and "community environmental benefit agreement," and requiring applicants seeking permits to locate or expand an affecting facility in environmental

The Investigation Guidance, on the other hand, is designed to provide a framework for the OCR to process Title VI complaints filed under the EPA's implementing regulations that allege that a recipient's issuance of a permit creates discriminatory effects.[144] The investigative structure, which comports with the EPA's Title VI implementing regulations, begins with the initial filing of a complaint that alleges that a recipient is engaging in discriminatory practices.[145] Upon receipt of the complaint, the OCR will then decide whether to accept the allegation for investigation or reject it with 20 calendar days.[146] If the OCR formally accepts the complaint, it will first attempt to resolve the matter informally.[147] If informal resolution fails, the OCR will conduct a factual investigation to determine whether the permit at issue creates an adverse disparate impact.[148] At this point, a "180-day" clock begins to run, wherein the OCR must investigate the complaint and report its preliminary findings to the recipient within 180 calendar days from the start of the complaint investigation.[149]

Additionally, the Investigation Guidance provides a lengthy adverse disparate impact analysis, but it also maintains that the investigation of alleged violations are based upon the "totality of the circumstances that each case presents" and that no "single technique for analyzing

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justice communities to file a meaningful public participation plan that contains measures to facilitate meaningful public participation in the regulatory process, including such things as an informal public meeting whereby the applicant makes a reasonable and good faith effort to provide clear, accurate and complete information about the proposed facility and the potential environmental and health impacts of such facility); *see also* Cincinnati, Oh., Ordinance 210 (June 24, 2009), http://www.cincinnati-oh.gov/cmgr/downloads/cmgr_pdf37622.pdf. The Ordinance is a "first-in-the-nation Ordinance [that] generally requires new or expanding industrial facilities to get an Environmental Justice (EJ) Permit prior to beginning operation. To get an EJ Permit, the facility must demonstrate that they will not cause health problems for the surrounding communities, using methodologies spelled out in the Ordinance." Office of the City Manager, *Cincinnati Environmental Justice*, CITY OF CINCINNATI, http://www.cincinnati-oh.gov/cmgr/pages/-17684-/.

144. Investigation Guidance, *supra* note 131, at *39670.

145. *See id.* at *39672 (laying out the jurisdictional criteria required for the OCR to investigate a complaint).

146. *Id.*; *see also* 40 C.F.R. 7.120 (d)(1)(i).

147. Investigation Guidance, *supra* note 131, at *39670; *see also* 40 C.F.R. 7.120(d)(2).

148. *Id.*

149. *Id.*; *see also* 40 C.F.R. 7.115(c)(1).

and evaluating adverse disparate impact allegations" is applicable to all situations.[150] And while the Investigation Guidance provides a definition of "adverse impact,"[151] it does not provide a definition for "disparate adverse impact."[152] At any rate, the OCR expects that this analytical framework will be omitted, altered, or supplemented to address the particular characteristics of each complaint.[153] The remaining parts of the Investigation Guidance deal with the procedures for informal resolution, a formal finding of noncompliance, the urging of voluntary compliance, and the hearing and appeals process available to a funded recipient in the case of a finding of noncompliance.[154]

2. Agency Inaction: The Reality of *Rosemere Neighborhood Ass'n v. EPA*[155]

Before delving into an examination of the *Rosemere* case, it is necessary to provide a short overview of the Administrative Procedure Act ("APA").[156] The APA allows litigants to sue a federal agency for refusing to take requested government action, but only when "no other adequate remedy" is available and when the agency's decision is not already committed to agency discretion.[157] Further, the Supreme Court has held that an agency's decision to take no enforcement action "should be presumed immune from judicial review," as "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion."[158] Title VI enforcement is succinctly within the EPA's discretion through its isolated enforcement measures. In regards to the "no

150. Investigation Guidance, *supra* note 131, at *39676.
151. *Id.* at *39864 (defining adverse impact to mean "[a] negative impact that is determined by EPA to be significant, based on comparisons with benchmarks of significance. These benchmarks may be based on law, policy, or science").
152. *See id.*
153. *Id.* at *39676.
154. *Id.* at *39670–74.
155. 581 F.3d 1169 (9th Cir. 2009).
156. 5 U.S.C 500 *et seq.* (West 2010).
157. 5 U.S.C.A. § 701–06 (West 2010); *see also* Heckler v. Chaney, 470 U.S. 821, 828 (1985).
158. *See Heckler*, 470 U.S. at 831–32.

other adequate remedy" prong, commentators at one time suggested that a plaintiff had an adequate cause of action under Section 601, and arguably Section 602 of Title VI.[159] In fact, the Investigation Guidance itself recites such a position.[160] Therefore, the EPA's "non-action" of choosing not to proceed against a recipient is presumptively immune from judicial review. However, in light of the Supreme Court's decision in *Sandoval*[161] to dispense with an implied private right of action under Section 602, as well as the extreme difficulty of securing relief under Section 601's requirement of proof of intentional discrimination, courts may be more apt to review the EPA's enforcement of its own Title VI regulations in light of *Rosemere*.[162]

The EPA, and specifically the OCR, has been consistently criticized for failing to meet its own deadlines for investigating and processing Title VI complaints. While agency inaction or

159. *See* Colopy, *supra* note 14, at 169–71; *see also* Washington Legal Foundation v. Alexander, 984 F.2d 483, 486 (D.C. Cir. 1993) (stating that plaintiffs do not have a cause of action under the APA since they have an implied right of action against the recipient); Women's Equity Action League v. Cavazos, 906 F.2d 742, 751 (D.C. Cir. 1990) (asserting that an APA suit would be more disruptive to agency enforcement than a private suit against the recipient of federal aid).

160. "[T]hose who believe they have been discriminated against in violation of Title VI or EPA's implementing regulations may challenge a recipient's alleged discriminatory act in court without exhausting their Title VI administrative remedies with EPA." Investigation Guidance, *supra* note 131, at * 39671 & n.77 (citing *Powell v. Ridge*, 189 F.3d 387, 397–400 (3d Cir. 1999); *see also* Powell v. Ridge, 189 F.3d 387, 397–400 (finding that, per the factors set forth in *Cort v. Ash*, 422 U.S. 66 (1975), an individual as a private right of action to enforce agency regulations promulgated under Section 602 of the Civil Rights Act of 1964).

161. Before *Sandoval*, at least one case, *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*, 145 F. Supp. 2d 446 (D.N.J. 2001), relied on *Powell* and permitted private citizens to enforce the EPA's Section 602 disparate impact regulations against the New Jersey Department of Environmental Protection. *See id.* In a supplemental opinion following *Sandoval*, the court reversed its decision regarding the private right of action theory. South Camden Citizens in Action v. New Jersey Department of Environmental Protection, 145 F. Supp. 2d 505 (D.N.J. 2001). Interestingly, though, the court still allowed the plaintiff's to utilize the EPA's Section 602 regulations under 42 U.S.C. § 1983. *See id.* After an adverse finding against the state agency, however, the state agency appealed and the Third Circuit Court of Appeals reversed. *See* South Camden Citizens in Action v. New Jersey Department of Environmental Protection, 274 F.3d 771 (3d Cir. 2001).

162. *See* Rosemere Neighborhood Ass'n v. EPA, 581 F.3d 1169 (9th Cir. 2009). It should also be noted that, with respect to the "no other adequate remedy prong," "there are no appeal rights for the complainant built into EPA's Title VI regulatory process." Investigation Guidance, *supra* note 131, at * 39672. There are, however, appeal rights for the recipient. The Investigation Guidance explains that if a finding of noncompliance is warranted and imposed upon the recipient, the recipient may request an appeal hearing before an EPA administrative law judge ("ALJ"). *Id.* at *39671. Subsequent to the ALJ's determination, the recipient is permitted to file exceptions to the decision within 30 days the EPA's Administrator. *Id.* The Administrator then has discretion about whether to review the ALJ's determination. *Id.* If the Administrator decides to review the appeal, she may deny, annul, suspend, or terminate EPA assistance. *Id.* Such decision begins final within 30 days after the Administrator submits a report to Congress. *Id.*

delay is presumptively unreviewable, this presumption is qualified if the and agency refuses to enforce its properly adopted rules.[163] Recently, in *Rosemere Neighborhood Association v. E.P.A.*, the Court of Appeals for the Ninth Circuit found that EPA's Office of Civil Rights engaged in a "consistent pattern of delay" in the processing of environmental justice complaints.[164] In *Rosemere*, the plaintiff filed a complaint with the OCR alleging that the City of Vancouver, Washington failed to properly utilize funds to address lingering environmental problems in the City's minority and low-income communities.[165] Some eighteen months after the OCR accepted the complaint, however, the OCR still had not issued preliminary findings or recommendations.[166] The plaintiff then filed suit in federal court under the APA seeking declaratory and injunctive relief compelling the EPA to complete its investigation and to comply with its regulatory deadlines.[167] After holding for the plaintiff, the *Rosemere* Court noted that the plaintiff's experience before the EPA "appears, sadly and unfortunately, typical of those who appeal to OCR to remedy civil rights violations."[168]

As indicated in *Rosemere*, the APA may be a valuable legal tool to initiate a challenge against the EPA for the its failure to enforce its Title VI implementing regulations and, therefore, give rise to a claim that the EPA abdicated its Title VI responsibilities. In response to the *Rosemere* decision, environmentalists praised the ruling, stating that "no matter what jurisdiction

163. *See* Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 675 (1985) (asserting that the bar of unreviewability is lifted upon an agency's refusal to enforce properly adopted agency rules).

164. *Rosemere*, 581 F.3d 1169, at 1175.

165. *Id.* at 1171.

166. *Id.* at 1172.

167. *Id.* at 1171. EPA regulations state that the OCR will notify the recipient by certified mail of preliminary findings within 180 days from the start of the complaint investigation. 40 C.F.R. § 7.115(c)(1).

168. *Rosemere*, 581 F.3d at 1175 (stating that discovery has indicated that the EPA failed to process a single complaint from 2006 or 2007 in accordance with its regulatory deadlines).

your in . . . [i]t is at least persuasive precedent."[169] However, a better reasoned conclusion of the effect of *Rosemere* is that the decision only dealt with the procedural aspect of the enforcement of Title VI, and not the substance or merits of the Title VI complaint itself.[170] Prospectively, though, the decision embraces the APA as a tool that the E.J. Plaintiff should harness in future environmental justice litigation. Otherwise stated, the E.J. Plaintiff should take advantage of the APA's judicial review provisions upon an OCR finding that a recipient did not violate the EPA's Section 602 disparate impact regulations. Because the OCR would essentially be taking a "no enforcement action," the E.J. Plaintiff should argue the following points to show that there is simply no other adequate remedy to enforce EPA disparate-impact regulations: (1) there is no private right of action to enforce Section 602 regulations; (2) there are no appeal rights for a complainant within the EPA's external Title VI complaint system; (3) the OCR has seemingly renounced its duty to enforce Title VI provisions and Section 602 regulations; and (4) that the APA provides the only recourse for judicial review.[171] Although these arguments will still not allow for private enforcement of the EPA's disparate impact regulations, they are certain to incite improvement in administering environmental claims. If nothing else, a decision rendered by a federal court on the issue would undeniably have the same force as the *Rosemere* decision.

In the end, the *Rosemere* decision demonstrates the EPA's failings to enforce Title VI and the flaws present within its current system of informal investigation and quasi-adjudication. Nonetheless, the environmental justice advocate should not be so naïve so as to believe that the impact of the decision will be anything more than unsubstantial in the grand scheme. If anything, the *Rosemere* decision is more apt to spur improvement in the TIER 1 problem of

169. Dawn Reeves, *Jackson Orders Agency Reforms to Speed Civil Rights Claims Reviews*, 30 INSIDE THE EPA No. 38, Sept. 25, 2009, *available at* 2009 WLNR 18813232.

170. *Id.*

171. For a similar argument posited before the *Sandoval* decision, see James H. Colopy, *supra* note 14, at 169–71.

environmental justice, *i.e.*, improving the internal management of the executive branch.[172] Thus, the lingering question of how to secure immediate relief for the environmental justice plaintiff remains.

### *C. First, Administrative Delay; Second, an Inadequate System; Third, Timid Enforcement: Waiting for a "Slam Dunk" Case*

The *Rosemere* decision supports the views of various commentators and environmental justice proponents that the EPA should reevaluate its Title VI program because its small staff and limited budget stymies thorough investigations of complaints and causes delays in the administrative complaint process.[173] The more concrete problem underpinning the inadequacy of the EPA's Title VI external complaint system, however, are the significant drawbacks to filing an administrative complaint with the OCR and proceeding through its non-adversary process. First, the complainant is left largely outside of the OCR's investigatory process.[174] Furthermore, a good faith investigatory effort on the part of the OCR may be undermined by the fact that the

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172. *See id.* After *Rosemere*, EPA Administrator Lisa Jackson ordered agency staff to reform and speed up its process for resolving Civil Rights Act discrimination claims. *Id.* Additionally, Lisa Jackson hired Patrick Chang, deputy chief of the Department of Justice's civil rights office, as senior counsel to help overhaul the OCR. Jonathan Strong, *Legal Uncertainty May Stymie Jackson Bid For Rights Office Overhaul*, 30 INSIDE THE EPA No. 46, Nov. 30, 2009, *available at* 2009 WLNR 23329235. Still, the true effect of the *Rosemere* decision remains unknown:

> "[O]n Title VI petitions, 'I'm not really sure they'll really do all that much because they are really in a bind. [These petitions] go against the recipients of federal funding, which are the states. I don't even see the Jackson EPA' coming down hard on the states. 'I suspect the historic, awkward relationship will continue to limp along without EPA deciding to start wrapping a lot of knuckles.'"

Reeves, *supra* note 171 (quoting an industry insider).

173. Waterhouse, *supra* note 52, at 110; Mank, *supra* note 118 (stating that EPA's regulations were written before the question of environmental inequities became a serious public concern).

174. The Investigation Guidance notes that complainants may play an important role in the administrative process, but that role is determined by the nature and circumstances of the claims. Investigation Guidance, *supra* note 131, at *39671. However, the role of the complainant is somewhat limited. Specifically, the Investigation Guidance merely notes the complainant's important role is to provide the OCR with all relevant information and to meaningfully participating in the informal resolution process. *Id.* at *39671–72. Still, the EPA makes it explicit that it does not represent the complainants, but rather the interests of the Federal Government and that the OCR's investigation does not involve an adversarial process between the complainant and the recipient. *Id.* at *39671.

Guidances, which purportedly direct the OCR's investigation, are not legally binding.[175] Second, the EPA cannot provide any damages to the plaintiff.[176] Instead, the primary remedy for a finding of noncompliance is the termination of the recipient's funding, but the EPA typically resorts to the informal resolution process through voluntary compliance measures before imposing such a penalty.[177] Moreover, any investigation of a Title VI complaint chiefly concerns the actions of nonfederal recipients rather than permitees.[178] Finally, a complainant has very little or no opportunity to challenge the OCR's determination to not enforce the provisions of Title VI against a funded recipient through judicial review under either Title VI or the Administrative Procedure Act.[179]

Akin to the administrative drawbacks of the external complaint process is the legal uncertainty about the use of EPA's Section 602 disparate impact regulations in a federal court action between the EPA and the funded recipient. As discussed previously, some environmentalists are beginning to suggest that the EPA close the OCR altogether due to the large backlog of pending investigations, with some dating back to 1994 and 1995.[180] Despite

175. *See supra* note 132 and accompanying text.

176. *See* 40 C.F.R. § 7.310 (stating that the EPA may terminate or refuse to grant and award or to continue assistance or by other means authorized by law to get compliance, including a referral of the matter to the Department of Justice).

177. *See id.*; *see also* Investigation Guidance, *supra* note 131, at *39670 ("[T]he OCR is committed to pursuing informal resolution of Title VI complaints whenever possible because informal resolution will often lead to the most expeditious and effective outcome for all parties"); *see also id.* at *39673–75 (explaining the OCR's informal resolution process).

178. Recipient guidance, *supra* note 131, at *10625 ("The filing or acceptance for investigation of a Title VI complaint does not suspend an issued permit. Title VI complaints concern the programs and activities being implemented by Federal financial assistance recipients, and any EPA investigation of such a complaint primarily concerns the actions of recipients rather than permittees.").

179. *See* Investigation Guidance, *supra* note 131, at *39671 (asserting that because the EPA's Title VI administrative process is not an adversary one, there are no appeal rights for the complainant in the EPA's Title VI regulatory process); *see also* discussion *supra* Part III(B)(2).

180. Dawn Reeves, *Environmentalists Suggest EPA Close Civil Rights Office Due to Petition Backlog*, 31 INSIDE THE EPA No. 41, Oct. 15, 2010, *available at* 2010 WLNR 20536675. As of October 2009, the OCR had 37 open investigations, one third of which dated back to 2003. Jonathan Strong, *EPA Civil Rights 'Best Practice' Guidance Plan Fails to Quell Criticism*, 30 INSIDE THE EPA No. 42, October 23, 2009, *available at* 2009 WLNR 20928642. Since 1993, the OCR rejected 129 of 210 complaints, with 10 complaints between 1993 and 2009 being informally resolved. *Id.*

continuing to accept discrimination complaints, the OCR has never found that a challenged action involved a discriminatory purpose.[181] It is speculated that this is due in part to the tremendous legal bar set by the Supreme Court in *Alexander v. Sandoval* requiring Title VI plaintiffs to show intentional discrimination.[182] Because the OCR has yet to receive a "slam dunk" case on which to test a credible theory, the OCR has avoided pursuing such a claim in federal court for fear that it would be unsuccessful.[183] In *Sandoval*, the Court noted that it had never ruled on whether regulations promulgated under Section 602 "may validly proscribe activities that have a disparate impact on racial groups, even though such activities are permissible under § 601."[184] In other words, the Court has never ruled on whether disparate impact qualifies as violation of Title VI.[185] Maybe it is a "lack of political will"[186] on the part of the OCR, but the reticence of the OCR to bring a federal action to enforce its Section 602 regulations against a funded recipient begs the question of when, if ever, an environmental justice claim will triumph on a disparate impact claim of discrimination.

## IV. THEREIN LIES A SIMPLE SOLUTION TO A COMPLEX PROBLEM

As the preceding portions of this Note elucidate, finding or proposing a sufficient remedy for challenging alleged discriminatory practices in the siting or permitting of hazardous waste facilities that cause a disparate impact is particularly troublesome. Yet, accomplishing such an objective is quite achievable if Congress enacts legislation that rejects the Supreme Court's

181. Reeves, *supra* note 174.

182. *Id.*

183. *Id.* The difficulty, some sources say, is that the "OCR has long faced difficulty in finding an adequate tests case that would help establish precedent from proving such impact," and that "EPA's attempts to prepare legal defenses for making a disparate impact discrimination 'never passed the laugh test.'" Strong, *supra* note 172 (quoting an anonymous source).

184. Alexander v. Sandoval, 532 U.S. 275, 281 (2001).

185. Strong, *supra* note 172.

186. *Id.* (quoting a civil rights activist who asserted that this is the underlying problem behind the OCR's hesitance to bring such a claim, and not a concern about justifying a disparate impact challenge in a potential future court case).

conclusion in *Alexander v. Sandoval*,[187] which held that there is no private right of action to enforce agency regulations under Section 602 of Title VI.[188] An obvious limitation of the Environmental Justice Act of 2008 is that it neither recognizes nor acknowledges the Supreme Court's decision in *Sandoval*, a matter easily resolved through legislation granting private citizens the right to use the EPA's discriminatory effects standard in private suits against federally funded recipients.[189] Interestingly enough, such legislation has been on the table since 2006, but has yet to be enacted.[190]

The Environmental Justice Enforcement Act ("E.J.E.A.") amends the Civil Rights Act of 1964 in two significant ways, which would effectively overturn the reasoning of the *Sandoval* decision. First, Section 601 would permit a finding of discrimination under Title VI based on disparate impact.[191] The insertion of a disparate impact standard is significant because it expresses congressional will to reject prior *Sandoval's* conclusion that Section 601 only forbids intentional discrimination.[192] Similarly, it is beyond dispute that private individuals may sue to enforce § 601's ban on intentional discrimination.[193] In an analogous fashion, Title VI, if amended by the E.J.E.A., would allow an aggrieved E.J. Plaintiff to directly enforce Section 601's ban on not only intentional discrimination, but also governmental discrimination based on disparate impact.[194] Moreover, the E.J.E.A. amendment would be in accord with both Supreme Court precedent upholding the legality of the disparate impact standard in the Title VII context and also amendments to the Civil Rights Act of 1964 enacted in 1991. The original Civil Rights

187. *Alexander*, 532 U.S. 275 (2001).
188. *See id.*; *see also* discussion *supra* Part III(A).
189. Waterhouse, *supra* note 52, at 110.
190. *See* Environmental Justice Enforcement Act of 2008, S. 2918, 110th Cong. (2008).
191. *See id.* at § 3 (amending Section 601 by adding subsection (b)(1)(A) permitting a discrimination claim based on disparate impact).
192 *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).
193. *Alexander*, 532 U.S. at 280.
194. *See* Environmental Justice Enforcement Act of 2008, S. 2918, § 3 110th Cong. (2008).

Act of 1964 did not include an express prohibition on policies or practices that produced a disparate impact;[195] however, the United States Supreme Court, in *Griggs v. Duke*,[196] interpreted the Act as prohibiting an employer's facially neutral practices that are discriminatory in operation.[197] Twenty years after *Griggs*, Congress statutorily codified Title VII's ban on discrimination to prohibit disparate impact discrimination by passing the Civil Rights Act of 1991.[198] Likewise, in addition to reflecting VII's ban on disparate impact discrimination, the E.J.E.A. would include the necessary burdens of proof on either party for such a claim.[199]

Second, not only would the E.J.E.A Act allow an environmental justice plaintiff to bring a disparate impact claim pursuant to a private right of action under Section 601, but it would also allow such an action under agency regulations promulgated pursuant to Section 602.[200] The United States Supreme Court in *Sandavol* reasoned that because Section 601 prohibited only intentional discrimination,[201] Section 602's language providing that "each federal department and agency . . . is authorized and directed to effectuate the provisions of § 601[,]"[202] limited agencies to effectuating rights already created by Section 601.[203] Thus, the Court found that only those agency regulations applying Section 601's ban on intentional discrimination were covered by the cause of action to enforce that section because "such regulations, if valid and reasonable, authoritatively construe the statute itself."[204] By parallel reasoning, the E.J.E.A. would necessarily comply with the Court's reasoning in *Sandavol* because the legislative recognition of

195. Ricci v. DeStefano, 129 S.Ct. 2658, 2672 (2009).
196. Griggs v. Duke Power Co., 401 U.S. 424 (1971).
197. *See id.* at 431 (1971).
198. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2010).
199. *See* 42 U.S.C. § 2000e-2(k)(1)(A)–(C) (2010); hypothetical *infra* p. 43.
200. *See* Environmental Justice Enforcement Act of 2008, S. 2918, § 4 110th Cong. (2008) (amending Section 602 by addition subsection (b), which states that "Any person aggrieved by the failure of a covered entity to comply with this title, including any regulation promulgated pursuant to this title, may bring a civil action in any Federal or State court of competent jurisdiction to enforce such person's rights").
201. *Id.*; *see also* Civil Rights Act of 1964 § 601, 42 U.S.C. § 2000d (1988).
202. *See* Civil Rights Act of 1964, § 602, 42 U.S.C. § 2000d-1.
203. Alexander v. Sandoval, 532 U.S. 275, 280 (2001).
204. *Id.* at 284.

disparate impact discrimination as amended in Section 601 would cover agency disparate impact regulations promulgated under Section 602. In this regard, the Court in *Sandoval* found that Section 602 neither focuses on the beneficiaries of Title VI protection or the funded recipients being regulated, but on agencies that do the regulating.[205] Accordingly, the Court found that "there is far less reason to infer a private remedy in favor of individual persons."[206] Once again, the E.J.E.A. Act would counter the Court's restraint on implying a private right of action by statutorily revealing congressional intent to create a private right of action so that an individual could enforce an agency's disparate impact regulations via the statutory language itself.

While the holding in *Sandoval* is inapposite to the language of the E.J.E.A., the Court did find that regulations promulgated under Section 602 of Title VI may validly proscribe activities that have a disparate impact, despite the fact that such activities are permissible under Section 601.[207] Furthermore, previous attempts to invalidate disparate impact regulations created under Title VI have been rejected by Congress.[208] In effect, The E.J.E.A. would not only reinforce Congress' acknowledgment of the legality of disparate impact regulations, but would also serve as a prime test case for the Supreme Court to determine the legal validity of the disparate impact standard under Title VI.

## V. CONCLUSION

Amendments to an already exceedingly complex and expansive civil rights statutory regime may seem like a tall order for Congress to fill. After exploring the various facets of the environmental justice framework to find a sufficient private remedy—the failed legal tactics under the equal protection doctrine, the ineptitude of Executive Order 12,898, the absence a

205. *Id.* at 289.
206. *Id.*
207. *Id.* at 281.
208. *See* Environmental Justice Enforcement Act of 2008, S. 2918, § 2(4) 110th Cong. (2008).

disparate impact enforcement mechanism in the Environmental Justice Act of 2008, and the flaws apparent within the EPA's Title VI complaint process—it becomes quite clear that amending Title VI of the Civil Rights Act of 1964 is the proper solution for the TIER 2 problem of environmental justice. As a corrective measure, the Environmental Justice Act of 2008 helps to resolve the TIER 1 problem by highlighting the past neglect of certain federal departments and agencies and articulating means in which to better their respective programs and policies. Still, an adequate private enforcement remedy is absent for the proposed statute. Moreover, the equal protection doctrine, while directly coinciding with the concept of securing personal relief for discrimination, has failed to be a useful tool to the E.J. Plaintiff. The history of litigation in this area of law has proven difficult because of the cumbersome requirement that a plaintiff prove that a governmental actor engaged in intentional discrimination.

At present, the only available means for a plaintiff to equip herself with the disparate impact standard is through the Office of Civil Rights within the EPA. Failure to instate a private right of action to enforce the EPA's disparate impact regulations leaves vindication rights to equality solely to these agencies, which may fail to take necessary and appropriate action because of administrative overburden.[209] Furthermore, the E.J.E.A. will resolve the legal uncertainty regarding the EPA's administration of its Title VI responsibilities. The OCR has long avoided pursuing civil rights complaints alleging discrimination based on disparate impact because they are difficult to prove and rife with legal uncertainty.[210] Additionally, the EPA fears that a losing challnege in court would set a damaging legal precedent that could establish a strict test for what qualifies as a disparate impact under civil rights law, thereby making it harder to

209. Environmental Justice Enforcement Act of 2008, S. 2918, § 2(12) 110th Cong. (2008).
210. Strong, *supra* note 172.

bring such claims in the future.[211] Even as recent as 2009, Justice Scalia reiterated that the Supreme Court has yet to decide the constitutionality of a disparate impact claim.[212] If the E.J.E.A. were passed, it would assure the EPA that it could ferociously proceed to process disparate impact claims, which would help to hold the agency accountable. Notwithstanding this tangential benefit, the E.J.E.A. provides a concrete solution to the TIER 2 problem, namely, declaratory and equitable relief via the disparate impact standard to the E.J. plaintiff. A hypothetical is illustrative:

> Acme Corp. seeks to locate an industrial facility that produces many hazardous wastes in an environmental justice community in State X. A representative of Acme Corp. goes to the Permitting Agency of State X ("X"), which receives federal funds to conduct its operations from the EPA. X grants the permit to Acme Corp to locate its facility in the environmental justice community. Residents of the environmental justice community bring a cause of action under the E.J.E.A. to enforce the EPA's disparate impact regulations. According to the E.J.E.A., the residents of the environmental justice community ("the aggrieved party") must demonstrate that X ("the covered entity") has a policy or practice that causes disparate impact on the basis of race, color, or national origin.[213] If this is proved, the burden of proof shifts to X to demonstrate that the challenged policy or practice is related to and necessary to achieve the nondiscriminatory goals of the program or activity alleged to have been operated in a discriminatory manner.[214] However, if X demonstrates that a specific policy or practice, such as the issuance of the permit to Acme Corp., does not cause a disparate impact, then X is not required to demonstrate that such policy or practice is necessary to achieve the goals of its program or activity.[215] If X were to prove that the issuance of the permit to Acme Corp. was necessary to achieve the nondiscriminatory goals of X's program, the residents of the environmental justice community may still attempt to demonstrate that a less discriminatory alternative policy or practice exists, and that the covered entity refuses to adopt such alternative.[216]

Under the facts of the hypothetical, if the court found that X discriminated on the basis of race because the entity's practices cause a disparate impact on the residents of the environmental

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211. *Id.*
212. *See* Ricci v. DeStefano, 129 S.Ct. 2658, 2682–83 (2009) (Scalia, J., concurring).
213 Environmental Justice Enforcement Act of 2008, S. 2918, § 3(b)(1)(A)(i) 110th Cong. (2008).
214. *Id.*
215. *Id.* at §3(b)(1)(B)(ii).
216. *Id.* at §3(b)(1)(A)(i).

justice community, the court would thereupon order that the permit to Acme Corp. be revoked and that the particular harmful facility be relocated.[217] In sum, this is precisely what is needed to solve the TIER 2 problem of environmental justice.

217. The rights and remedies with respect to Acme Corp.—substantive rights to intervene in the cause of action between the E.J.C. and X, reimbursement by X to Acme Corp. for funds expended as a result from Acme Corp.'s reliance on X's permit, lost profits or contractual rights, or any other type of third party claim that may arise out of the disparate impact lawsuit between the E.J.C. and X—is beyond the scope of this Article.