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Jason Pinney

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THE FEDERAL ENERGY REGULATORY COMMISSION AND ENVIRONMENTAL JUSTICE: DO THE NATIONAL ENVIRONMENTAL POLICY ACT AND THE CLEAN AIR ACT OFFER A BETTER WAY?

JASON PINNEY*

Abstract: The Federal Energy Regulatory Commission (FERC) has failed to incorporate environmental justice principles into its decisionmaking process. Accordingly, in light of FERC's questionable environmental record and seeming immunity from traditional environmental justice challenges, the potential for abuse arises when FERC decides on matters impacting poor and minority communities. Why hasn't FERC established a comprehensive strategy to prevent environmental injustice? There is no ready answer to this question. But one thing is clear: FERC should not be permitted to act with impunity when deciding on issues affecting poor and minority communities. To ensure this result, agencies and activists should consider provisions of the National Environmental Policy Act and the Clean Air Act as a means of promoting FERC's compliance with environmental justice principles.

INTRODUCTION

In Mount Vernon, New York, neighborhood activists, local politicians, and one influential senator have banded together in opposition to the Millennium Project—a gas pipeline slated to run directly through the heart of the city.\(^1\) The demand is for environmental jus-

* Executive Editor, Boston College Environmental Affairs Law Review, 2002-03.

1 See infra Part II.B. Following the completion of this Note, Millennium Pipeline Co. and the City of Mount Vernon entered into a settlement rerouting the proposed pipeline through a commercial district, instead of a residential district. See Millennium Pipeline Co., 100 F.E.R.C. ¶ 61,277 (2002) (order issuing certificate), 2002 FERC LEXIS 1903, at *9. The terms of the settlement are confidential. Telephone Interview with Michael Zarin, Zarin & Steinmetz (Jan. 22, 2003). Interestingly, although failing to discuss environmental justice issues, FERC approved the variation in part because it moved the location of the pipeline "away from sensitive resources such as residential neighborhoods, apartment buildings, a school, health center, hospital, churches, and fire stations." Millennium Pipeline, 100 F.E.R.C. ¶ 61,277, 2002 FERC LEXIS 1903, at *24. FERC, however, still has not promulgated an environmental justice policy or agreed to incorporate such principles into their decisionmaking process.
At the heart of this controversy is whether the Federal Energy Regulatory Commission (FERC or Commission), an independent regulatory agency with the responsibility of licensing the project, is obligated to take environmental justice concerns into account when making decisions affecting poor and minority communities.

This Note suggests that the answer is yes. Part I begins with an overview of the environmental justice movement, from its origins twenty years ago to the present day. In Part II, the discussion shifts to the creation of FERC, its status as an independent agency, and its questionable environmental record. Part III examines how traditional environmental justice arguments might fare against FERC's actions. Finally, Part IV questions the Commission's reluctance to take environmental justice into account, examines the advantages that environmental statutes may provide, and concludes by suggesting that specific provisions of the National Environmental Policy Act (NEPA) and the Clean Air Act (CAA) may present the best options for ensuring that environmental justice becomes a factor in FERC's decision-making process.

I. HISTORY OF ENVIRONMENTAL JUSTICE

The concept of environmental justice is not a judicial construct. It did not originate on the floors of the House of Representatives or

2 The U.S. Environmental Protection Agency 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, including a racial, ethnic, or socioeconomic group, should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal programs and policies.


3 See discussion infra Part III.C.2.

4 The first environmental justice arguments were made by residents of Houston, Texas in Bean v. Southwestern Waste Management Corp., 482 F. Supp. 673, 674–77 (S.D. Tex. 1979). Plaintiffs charged that the defendants had discriminated against them in the operation of a solid waste management facility in a predominantly minority community. Id. The judge, however, dismissed their novel claim for failing to prove intentional discrimination. Id. at 681; see discussion infra Part IV.C.2.
the Senate. Nor did the media invent it. Rather, environmental justice began with the public. Once citizens began to examine the relationships between race, class, political power, and exposure to environmental hazards, they began to see a pattern emerge: poor people of color were bearing the brunt of the burden. In response, grassroots activists from Maine to Alaska began to organize and demonstrate against disproportionate environmental impacts on minority communities. These efforts culminated into a movement that has, over time, given a voice to those who have traditionally been underrepresented in the environmental arena.

A. Origins of the Movement

The environmental justice movement began with a collection of concerned citizens united in the general belief that the burdens of environmental pollution should not fall disproportionately on poor and minority communities. Exactly where and when the movement first formed is the subject of mild debate. Commentators commonly


6 The phrase "environmental racism," often used synonymously with environmental justice, is widely attributed to Dr. Benjamin Chavis, former executive director of the United Church of Christ Commission for Racial Justice. See Michele L. Knorr, Environmental Injustice: Inequities Between Empirical Data and Federal, State Legislative and Judicial Responses, 6 U. BAL. J. ENVT'L. L. 71, 72 n.9, 73 (1997); James H. Colopy, Note, The Road Less Traveled: Pursuing Environmental Justice Through Title VI of the Civil Rights Act, 13 STAN. ENVTL. L.J. 125, 129 n.7 (1994).

7 See Robert D. Bullard, Dumping in Dixie 118 (2d ed. 1994) (stating that the environmental justice issues were brought to the forefront by academics and activists); Dorceta E. Taylor, Environmentalism and the Politics of Inclusion, in Confronting Environmental Racism: Voices from the Grassroots 53, 53-55 (Robert D. Bullard ed., 1993) (discussing the influx of minority participation in environmental groups).

8 See Taylor, supra note 7, at 54.


10 See Taylor, supra note 7, at 53-54.


12 Compare Robert D. Bullard, Environmental Justice for All, in Unequal Protection: Environmental Justice and Communities of Color, supra note 11, at 3–5 (linking a 1967 student revolt at Texas Southern University with environmental justice), with Daniel Faber, The Struggle for Ecological Democracy and Environmental Justice, in The Struggle for
refer to one key event, however, when discussing the rise of the environmental justice movement: the Warren County protests.\(^{13}\)

In 1982, the Governor of North Carolina selected Warren County to be the dumping grounds for more than 6000 truckloads of soil contaminated with polychlorinated biphenyls (PCBs).\(^{14}\) PCBs are extremely toxic industrial by-products, which have been linked with liver, blood, nerve, and reproductive disorders.\(^{15}\) The Warren County site was officially chosen because it presented a secure landfill,\(^{16}\) but later studies revealed that the site was not suitable because of its proximity to the water table.\(^{17}\)

Suspicions arose that North Carolina had not secured the safest place to store the waste, but rather, had chosen the path of least political resistance.\(^{18}\) At the time of the decision, Warren was the poorest county in the state, and the population was over 65% black.\(^{19}\) Before long, these suspicions developed into feelings of victimization, and, in response, residents began to form a movement in opposition to the landfill.\(^{20}\) This movement attracted the attention of national civil rights and environmental leaders who joined with the residents in an effort to block the selection of the site.\(^{21}\)

Massive protests ensued, resulting in over 500 arrests.\(^{22}\) Although the demonstrations did not stop the state from siting the landfill in Warren County, protestors were successful in forcing national media and activist groups to focus on the problem of what came to be known

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\(^{14}\) Ken Geiser & Gerry Waneck, *PCBs and Warren County*, in *Unequal Protection: Environmental Justice and Communities of Color*, supra note 11, at 43.

\(^{15}\) See id. at 44, 46.

\(^{16}\) *Id.* at 43-44.

\(^{17}\) See id. at 51.

\(^{18}\) See id. at 50 (citing one protestor who proclaimed: "The trend is very clear. They would rather experiment with poor black people, [and] poor white people, than to experiment with the middle and upper classes .... The regulations are such that [they] allow landfills to be placed in environmentally unsafe, but politically powerless areas.").

\(^{19}\) *Id.* at 50.

\(^{20}\) See Geiser & Waneck, *supra* note 14, at 48-49.

\(^{21}\) See id. at 50, 52.

\(^{22}\) See Bullard, *supra* note 12, at 5.
as "environmental justice." In this sense, the Warren County protests brought these issues to the forefront, and can be remembered as the spark that ignited the movement.

B. Evolution of the Movement

Congressman Walter E. Fauntroy, Chairman of the Congressional Black Caucus in Washington, D.C., participated in the Warren County protests. In fact, he was among the 500 arrested. Following this experience, Congressman Fauntroy requested that the General Accounting Office (GAO) conduct a study to determine whether a relationship existed between the location of hazardous waste landfills and the demographics of the communities that surround them. The GAO obliged, releasing a report the following year concluding that three out of four off-site landfills examined in eight southeastern states, were located in predominantly minority communities. Furthermore, the study found that the percentage of people living below the poverty line in these areas ranged between 42 and 26%. Although it did not conclusively establish a link between race, income, and hazardous waste, the report stimulated debate and spurred further academic inquiry into the topic.

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23 See id. at 5–6.
25 See Bullard, supra note 12, at 6.
27 On its Web site, the General Accounting Office claims: "The General Accounting Office (GAO) is the investigative arm of Congress. GAO exists to support Congress in meeting its Constitutional responsibilities and to help improve the performance and ensure the accountability of the federal government for the American people." See U.S. GEN. ACCOUNTING OFFICE, at http://www.gao.gov (last visited Nov. 4, 2002).
30 An off-site landfill is a landfill not connected to an industrial facility. See id.
31 Id.
32 Id.
34 See Lazarus, supra note 26, at 802–03.
The United Church of Christ (UCC), another Warren County participant, undertook the next major inquiry into the relationships between race, income, and environmental hazards. Unlike previous efforts, the UCC’s examination was national in scope. It released a report in 1987, revealing that race was the single most significant factor associated with the location of licensed and abandoned hazardous waste facilities—over other variables such as income, home ownership rates, and property values. The study identified a national pattern of race-based siting of toxic waste facilities, and suggested that affected communities may have been intentionally targeted because of their minority status.

Almost a decade after the Warren County protests, and following additional academic inquiries into the incidence of race and environmental pollution, the environmental justice movement united. The First National People of Color Environmental Leadership Summit (Summit), held in Washington, D.C., during the Fall of 1991, brought together minority leaders from every state to discuss the issue of environmental justice. The Summit resulted in a seventeen-point statement entitled Principles of Environmental Justice, wherein minority leaders pledged to build a national environmental justice movement to address the ecological threats facing minority and disadvantaged communities. The Summit is remembered as a watershed moment in the history of the environmental justice movement. Providing structure, organization, and solidarity, the Summit helped turn disjointed grassroots efforts into a collective assembly of activists, all sharing common objectives.

35 See id. at 801 (identifying the UCC study as one of the most widely acknowledged in connecting race with environmental risk).
36 See Bullard, supra note 12, at 17.
38 See id. at 13.
41 Id.
42 See id. at 272–75.
44 See id. at 113–16.
As interest in the environmental justice movement increased, additional evidence of discrimination emerged.\textsuperscript{45} In 1992, the National Law Journal (NLJ) released a landmark study uncovering glaring inequities in the way the government enforces environmental laws.\textsuperscript{46} The NLJ study examined the Environmental Protection Agency’s (EPA) performance record at 1117 Superfund toxic waste sites\textsuperscript{47} and concluded:

[Penalties against pollution law violators in minority areas are lower than those imposed for violations in largely white areas. In an analysis of every residential toxic waste site in the 12-year-old Superfund program, the NLJ also discovered the government takes longer to address hazards in minority communities, and it accepts solutions less stringent than those recommended by the scientific community.\textsuperscript{48}]

In addition to a broad scope, the study also had a unique approach.\textsuperscript{49} Instead of focusing on the minority population’s proximity to environmental hazards, the NLJ study focused on the government’s enforcement of environmental laws in minority communities, finding that laws were not enforced equally in minority communities as compared to predominantly white communities.\textsuperscript{50} As a result, the environmental justice movement expanded its focus from inequitable distribution of environmental burdens to include concerns about the unequal enforcement of environmental laws.\textsuperscript{51}

C. The Modern Environmental Justice Movement

The modern environmental justice movement was ushered in by a group of scholars and environmental activists who gathered at the University of Michigan School of Natural Resources to share ideas and

\textsuperscript{45} See Robert D. Bullard, Decision Making, in Faces of Environmental Racism 5 (Laura Westra & Peter S. Wenz eds., 1995).

\textsuperscript{46} See id.

\textsuperscript{47} Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9611 (2000) (creating a fund, known as the “Superfund,” for use by EPA to clean up hazardous waste sites listed on the National Priorities List).


\textsuperscript{49} See Bullard, supra note 45, at 6.

\textsuperscript{50} Lavell & Coyle, supra note 48, at S1 (“This racial imbalance [in the enforcement of environmental laws] . . . often occurs whether the community is wealthy or poor.”).

\textsuperscript{51} See Bullard, supra note 45, at 6.
to search for solutions to the problem of environmental injustice.\textsuperscript{52} Known as the Michigan Coalition, this group of twelve activist-scholars used both the GAO and the NL\textsuperscript{1} studies (among others)\textsuperscript{53} to pressure EPA and other governmental agencies to explore the environmental problems facing poor and minority communities.\textsuperscript{54}

The Michigan Coalition was successful.\textsuperscript{55} In response to its efforts, EPA formed a working group to study whether EPA was insensitive to socio-economic concerns affecting both minority and low-income neighborhoods.\textsuperscript{56} Based on the results of a later study finding in the affirmative,\textsuperscript{57} EPA formed the Office of Environmental Equity (later titled the Office of Environmental Justice) in order to develop and implement environmental justice initiatives.\textsuperscript{58}

Legislators also began to take note. In the period between 1992 and 1994, several environmental justice bills were introduced in the House of Representatives.\textsuperscript{59} All failed to be enacted, but they succeeded in drawing attention to environmental justice issues and placing the topic squarely on the national political agenda.\textsuperscript{60}

Prodding from academics and activists, actions taken on the part of EPA, and studies completed by social scientists culminated in President Clinton issuing Executive Order No. 12,898\textsuperscript{61} on February 11, 1994.\textsuperscript{62} Entitled \textit{Federal Actions to Address Environmental Justice in}

\begin{itemize}
  \item \textsuperscript{52} See Bunyan Bryant & Paul Mohai, \textit{Introduction to Race and the Incident of Environmental Hazards}, supra note 39, at 3.
  \item \textsuperscript{53} \textit{E.g.}, Mohai & Bryant, supra note 39, at 163–76 (providing a detailed discussion of additional studies).
  \item \textsuperscript{54} See Bryant & Mohai, supra note 52, at 4.
  \item \textsuperscript{55} See id. at 5 (noting that EPA's first public recognition of environmental justice issues was in reference to the coalition's meeting at the University of Michigan).
  \item \textsuperscript{56} See Clarice E. Gaylord & Elizabeth Bell, \textit{Environmental Justice: A National Priority, in Faces of Environmental Racism}, supra note 45, at 31–32.
  \item \textsuperscript{57} See generally U.S. Envtl. Prot. Agency, Pub. No. EPA-230-R-92-008A, \textit{Environmental Equity: Reducing Risk for All Communities} (1992) (uncovering "clear differences between racial groups in terms of disease and death rates" and concluding that "great opportunities exist for EPA and other government agencies to improve communication about environmental problems with members of low-income and racial minority groups").
  \item \textsuperscript{58} See Gaylord & Bell, supra note 56, at 32.
  \item \textsuperscript{60} See Knorr, supra note 6, at 85–90.
\end{itemize}
Minority Populations and Low-Income Populations, the Order held that "each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States." It went on to declare:

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

This Order provided the environmental justice movement with the structure and support it needed to begin solving the ecological problems facing low-income and minority communities, instead of just identifying them. Commentators praised the Order for giving the issue the treatment that it deserved. More specifically, as mandated by the Order, many federal agencies developed and implemented environmental justice principles into their decisionmaking processes.

In the years following Executive Order No. 12,898, EPA took on a more expansive role in championing environmental justice issues. The Order itself called upon EPA to create a working group to provide guidance to other federal agencies on environmental justice is-

63 Id. § 1–101, 59 Fed. Reg. at 7629.
65 See Newton, supra note 24, at 22–23.
66 See, e.g., Cole & Foster, supra note 61, at 10; Newton, supra note 24, at 23 (calling the order "arguably the most important step to occur in the environmental justice movement in its short history"); Bradford C. Mank, Executive Order 12,898, in The Law of Environmental Justice 103 (Michael B. Gerrard ed., 1999).
67 Mank, supra note 66, at 114–31. The included agencies and departments in the order are Agriculture, Commerce, Defense, Energy, Health and Human Services, Housing and Urban Development, Interior, Justice, Labor, National Aeronautics and Space Administration, Nuclear Regulatory Commission, and Transportation. Id. at 114.
sues. But EPA went beyond the requirements of the Executive Order by creating the National Environmental Justice Advisory Council (NEJAC), the Office of Environmental Justice, the Environmental Justice Steering Committee, and, the Office of Civil Rights. The efforts of EPA and these sub-agencies were instrumental in weaving the movement's ideology into federal agency procedure.

Environmental justice made further strides under the Clinton Administration. The movement's goals tended to coincide with those of the Administration. For instance, President Clinton assigned two of

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70 See generally NAT'L ENVT'L JUSTICE ADVISORY COUNCIL, U.S. ENVT'L PROT. AGENCY, at http://www.epa.gov/compliance/environmentaljustice/nejac/index.html (last visited Nov. 7, 2002). "The National Environmental Justice Advisory Council (NEJAC) is a federal advisory committee that was established ... to provide independent advice, consultation, and recommendations to the Administrator of the ... [EPA] on matters related to environmental justice." Id.

71 See generally OFFICE OF ENVT'L JUSTICE, U.S. ENVT'L PROT. AGENCY, at http://www.epa.gov/compliance/resources/faqs/ej/index.html#faq1 (last visited Nov. 12, 2002) [hereinafter OFFICE OF ENVIRONMENTAL JUSTICE WEB SITE]. "The Office oversees the integration of environmental justice into EPA's policies, programs, and activities throughout the Agency." Id.

72 Id. The EPA Office of Environmental Justice's Web site describes the Committee as follows:

The Environmental Justice Executive Steering Committee is made up of senior managers representing each of the Headquarters offices and representatives from the regions. It provides leadership and direction on strategic planning, cross-media policy development, and ensures that coordination is implemented at all levels to ensure that environmental justice is incorporated into Agency operations.

Id.

73 See generally OFFICE OF CIVIL RIGHTS, U.S. ENVT'L PROT. AGENCY, at http://www.epa.gov/ocrpage1/aboutocr.htm (last visited Nov. 7, 2002). "The Office of Civil Rights (OCR) ... serves as the principal adviser to the Administrator with respect to EPA's nationwide internal and external equal opportunity and civil rights programs and policies. OCR also investigates and resolves complaints of unlawful discrimination either by EPA or its financial assistance recipients." Id.

74 Cf. COLE & FOSTER, supra note 61, at 163 (discussing how the National Environmental Justice Advisory Committee "raised the stature of the Environmental Justice Movement to new heights"); Mank, supra note 66, at 107–09 (describing the efforts undertaken by the sub-agencies to alleviate environmental injustice).
the movement’s leaders, Robert Bullard and Benjamin Chavis, to his transition team. In addition, Vice President Al Gore, a strong supporter of the environment and environmental justice, sponsored the Environmental Justice Act of 1992 while he was still in the Senate. Finally, EPA Administrator Carol Browner, a Clinton appointee, quickly made environmental justice a top priority within EPA.

D. Environmental Justice Today

It is too early to tell how environmental justice will fare under the George W. Bush Administration. However, there are some indications that it will remain a priority. In fact, the new EPA Administrator Christine Todd Whitman reaffirmed the agency’s commitment to environmental justice stating, “Integration of environmental justice into the programs, policies, and activities [of EPA] ... is an Agency priority.”

It has been suggested that the future success of the environmental justice movement depends on its ability to expand and connect with other movements, thereby bolstering resources, power, and support in the political arena. Indeed, there are some indications that the environmental justice movement is headed in this direction already, as exemplified by the Environmental Justice and Climate

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75 Robert Bullard is a leading environmental justice activist and scholar. See Newton, supra note 24, at 69; Lazarus, supra note 26, at 803 n.61.

76 Benjamin Chavis was the head of the United Church of Christ and another prominent leader in the movement. See Cole & Foster, supra note 61, at 20 n.5; Newton, supra note 24, at 71–72.

77 Cole & Foster, supra note 61, at 32.


79 See Office of Environmental Justice Web Site, supra note 71. The government Web site notes:

Because of the Agency’s strong belief that all Americans regardless of race, color, national origin, or economic circumstance are important to the future of our nation and should be able to live in a clean, healthy environment, EPA Administrator Browner made environmental justice one of EPA’s highest priorities and established environmental justice as one of the seven guiding principles in the Agency’s strategic plan in 1993.

Id.


Change Coalition, which is comprised of environmental justice leaders and climate change activists.\(^{83}\) Academics think that such unions will increase the support for environmental justice concerns, broaden the political debate over such issues, and will eventually result in a progressive coalition of diverse leaders striving toward the same goal.\(^{84}\) Additionally, environmental justice may be able to seep into new areas of the political arena where no one would have thought it belonged.

### E. Growth of a Movement

Two authors have suggested a particularly apt metaphor for capturing the history of the environmental justice movement: a river, fed over time by many tributaries.\(^{85}\) "No one tributary made the river the force that it is today; indeed, it is difficult to point to the headwaters, since so many tributaries have nourished the movement."\(^{86}\) In this sense, the movement is the product of a diverse combination of efforts and strategies. Because of this diversity, the movement is never the same for very long.\(^{87}\) It grows as new streams add to the flow, it shifts in response to bumps in the topography, and it deepens as new strategies for advancement emerge.\(^{88}\)

### II. The Creation of the Federal Energy Resource Commission

Shortly before the rise of the environmental justice movement, Congress established the Federal Energy Resource Commission (FERC).\(^{89}\) The following section covers the creation of FERC, its independence, and its record on environmental matters.

#### A. History of FERC

FERC was created within the Department of Energy (DOE)\(^{90}\) in response to a congressional finding that the "United States faces an


\(^{84}\) See Cole & Foster, supra note 61, at 165.

\(^{85}\) See id. at 20.

\(^{86}\) Id.

\(^{87}\) See id.

\(^{88}\) See id.


\(^{90}\) Id.
increasing shortage of nonrenewable energy sources,"\(^91\) and the belief that "this energy shortage and . . . increasing dependence on foreign energy supplies presents a serious threat to the national security of the United States and the health, safety and welfare of its citizens."\(^92\) Legislators hoped that FERC and DOE would be able to effectively manage the energy concerns of the government, develop a coordinated energy policy, and implement that policy effectively with an eye towards the future.\(^93\)

FERC is the successor to the Federal Power Commission (FPC), an agency established under the Federal Water Power Act of 1920.\(^94\) FPC was charged with general authority over the development and control of waterpower.\(^95\) It was created, in part, out of fear that the United States' involvement in World War I had depleted coal and oil reserves to dangerously low levels, and that waterpower provided an effective alternate energy source.\(^96\) Jurisdictional authority for FPC derived from Congress's power to regulate commerce over the nation's navigable waters.\(^97\)

In 1977, Congress transferred the powers of FPC to FERC.\(^98\) Over the next twenty-five years, Congress allocated additional responsibilities to FERC through subsequent legislation, including the Natural Gas Act,\(^99\) the Natural Gas Policy Act,\(^100\) the Public Utility Regulatory Policies Act of 1978,\(^101\) and the Office of Federal Procurement Policy

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\(^91\) Id. § 7111(1).

\(^92\) Id. § 7111(2).

\(^93\) Id. § 7112(2)–(5).


\(^95\) See 16 U.S.C. § 797(a)–(g).


\(^97\) 16 U.S.C. § 797(e).

\(^98\) Department of Energy Organization Act, 42 U.S.C. § 7172(a)(1). Essentially, FERC took over for FPC, and began overseeing waterpower along with the sale of electricity and gas. See id. § 7172(a)(1)(A)–(F).


As a result, FERC maintains broad regulatory authority over the "development of waterpower and resources ... electric utility companies engaged in interstate commerce, and ... the transportation and sale of natural gas" across state lines.\textsuperscript{103}

\textbf{B. FERC as an Independent Agency}

While DOE was designated as an executive agency under the control of the President,\textsuperscript{104} FERC was created as an independent regulatory commission.\textsuperscript{105} The difference between the two is essentially one of political control:

The President's power over the heads of independent agencies, whom he can remove only "for cause," is . . . considered to be substantially weaker than is his power over the heads of "executive branch" agencies, who can be removed for any reason or no reason at all. From this, the inference is drawn that the regulatory commissions are "independent" of presidential power.\textsuperscript{106}

The justification offered "for making agencies independent is that since they exercise adjudicatory powers requiring impartial expertise, political interference is undesirable."\textsuperscript{107} FERC's independence stems from its ability to regulate sensitive topics, namely power trading.\textsuperscript{108} Some courts have questioned the constitutionality of such

\begin{itemize}
  \item \textsuperscript{103} 64 AM. JUR. 2D Public Utilities § 207 (2001); see also FERC, \textit{About FERC}, at http://www.ferc.fed.us/About/about.htm (last visited Nov. 7, 2002) [hereinafter \textit{About FERC}]. FERC's primary responsibilities include: (1) regulating "the transmission and sale of natural gas for resale in interstate commerce"; (2) regulating "the transmission of oil by pipeline in interstate commerce"; (3) regulating "the transmission and wholesale sales of electricity in interstate commerce"; (4) licensing and inspecting "private, municipal and state hydroelectric projects"; (5) oversight of "environmental matters related to natural gas, oil, electricity and hydroelectric projects"; (6) administering "accounting and financial reporting regulations on the conduct of jurisdictional companies"; and (7) approving "site choices as well as abandonment of interstate pipeline facilities," \textit{About FERC supra}.
  \item \textsuperscript{104} Department of Energy Organization Act, 42 U.S.C. § 7131 (2000).
  \item \textsuperscript{105} Id. § 7171 (a).
  \item \textsuperscript{108} See generally H.R. CONG. REP. NO. 95–539 (1978), \textit{reprinted in} 1977 U.S.C.C.A.N. 925 (discussing the creation of FERC as an independent regulatory agency to prevent abuse in
agencies, finding that they become, in effect, a "headless fourth branch" of government under a constitution that calls for only three. The concern is that as these agencies are not accountable to the executive branch, they are renegade in nature, and present the possibility of bureaucratic abuse. In short, independent agencies lack political accountability. Judges, however, have historically rejected these arguments, settling the constitutionality of independent agencies.

FERC, then, stands as an agency "independent of executive authority... and is thus free to exercise its judgment without the leave or hindrance of any other official." Such independence leaves the Commission isolated and impacts its consideration of environmental justice principles.

C. FERC and the Environment

Throughout its tenure, FERC has repeatedly come under fire for failing to adequately respond to environmental concerns, especially those relating to the preservation of natural resources, in particular, fish habitats and spawning grounds. Traditionally, these criticisms have stemmed from FERC's role in the development and operation of the power trading industry. Power trading involves the sale of wholesale electric power. FERC, WHAT FERC DOES, at http://www.ferc.fed.us/home/whatfercdoes.asp. FERC approves the pricing for such transactions. Id.

See Synar v. United States, 626 F. Supp. 1374, 1398 (D.D.C. 1986), aff'd on other grounds sub nom. Bowsher v. Synar, 478 U.S. 714 (1986). The court also commented, "It is not as obvious today as it seemed in the 1930's that there can be such things as genuinely 'independent' regulatory agencies..." Id.


Id. at 625-26 (discussing the creation of the Federal Trade Commission, another independent agency).

Id. at 625-26 (discussing the creation of the Federal Trade Commission, another independent agency).

See, e.g., Blumm & Nadol, supra note 96, at 88 ("Unfortunately, FERC historically has resisted not only [the Electric Consumer Protection Act's] requirements, but also other statutory measures protective of environmental interests."); F. Lorraine Bodi, FERC's Mid-Columbia Proceeding: Ten Years and Still Counting, 16 ENVTL. L. 555, 580 (1986) ("The mid-Columbia proceeding is a prime example of FERC's inability to deal promptly and effectively with requests to modify existing project licenses and protect fishery resources."); Lydia T. Grimm, Fishery Protection and FERC Hydropower Relicensing Under EPCA: Maintaining a Deadly Status Quo, 20 ENVTL. L. 929, 930 (1990) ("FERC sees itself as an energy agency making decisions that affect power needs and economics rather than an environmental agency making decisions that affect natural resources.").
hydropower, but recent charges have focused on FERC's role in the continued burning of fossil fuels to accommodate our nation's energy requirements. These critiques are important for understanding how FERC operates in the environmental arena, and specifically, how FERC has responded to environmental justice concerns.

1. FERC and Hydropower

Through the provisions of the FPA, FERC is vested with the responsibility of overseeing the life cycle of all dams under its jurisdiction, from preliminary licensing to abandonment. This authority places the Commission in a unique position. On one hand, FERC was created, in part, to help solve energy problems by decreasing the nation's dependence on foreign energy. The promotion of hydropower is particularly suited to this goal because dams provide inexpensive, easily-stored power. On the other hand, the continued operation of hydroelectric dams, which often threatens fish, wildlife, and water quality, can lead to disastrous consequences for the environment. These competing interests often boil down to a choice between economics and the environment, pitting industry against activist. In the context of hydropower, critics contend that on too many occasions FERC has sided with industry at the expense of the

117 See id. § 7111(2).
120 See Stephenson, supra note 118, at 477. But see Zygmunt J.B. Plater et al., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 36 (2d ed. 1998) (stating that the perceived choice between "progress" and environmental quality is, to most modern environmental analysts, simply a classic false tradeoff: "In the long term both goals are inseparable; in the short term they can and must be reconcilable.").
environment, creating an underlying tension between activists and the Commission.\textsuperscript{121}

Much of the early concern over FERC's hydropower regulation stemmed from the "sweeping authority" granted to FERC's predecessor, the FPC, under the FPA.\textsuperscript{122} Although slowly eroding over the years, FERC still maintains "a broad and paramount federal regulatory role" over hydropower,\textsuperscript{123} leaving opponents of FERC decisions with few options for challenging the Commission's reasoning. As a result, FERC decisions are, to a degree, insulated from environmental challenges.\textsuperscript{124}

2. Statutory Inroads

The situation is beginning to change. In the years following FERC's creation, a deluge of lawsuits have been filed against the Commission, generally charging that FERC failed to adequately take the public interest into account in its decisions.\textsuperscript{125} Subsequently, in 1986, Congress amended the Federal Power Act by enacting the Electric Consumers Protection Act of 1986 (ECPA).\textsuperscript{126} This legislation required FERC to give "equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of fish and wildlife, the protection of recreational opportunities, and the preservation of other aspects of environmental quality."\textsuperscript{127} The aim of Congress was to ensure that FERC's licensing decisions would now incorporate both developmental and non-developmental values, thus balancing both energy and environmental concerns.\textsuperscript{128} In 1992, Congress built on this foundation by passing the Energy Policy

\textsuperscript{121} See, e.g., Bryant supra note 118, at 96 (declaring that FERC "earned a reputation as a friend of the hydroelectricity industry and a nemesis of environmentalists"); Stephenson, supra note 118 at 487–88 (recognizing that FERC has been charged with placing too much emphasis on hydropower interests).

\textsuperscript{122} See Scenic Hudson Pres. Conference v. Fed. Power Comm'n, 354 F.2d 608, 613 (2d Cir. 1965) ("Congress gave the Federal Power Commission sweeping authority and a specific planning responsibility.").

\textsuperscript{123} California v. FERC, 495 U.S. 490, 499 (1990).

\textsuperscript{124} See Stephenson, supra note 118, at 484–85.

\textsuperscript{125} See Michael C. Blumm, A Trilogy of Tribes v. FERC: Reforming the Federal Role in Hydropower Licensing, 10 Harv. Envtl. L. Rev. 1, 2–6 (1986). The author notes that thirty-four lawsuits were filed by 1984 in response to FERC's hydroelectric decisions. Id. at 3.


\textsuperscript{128} See Grimm, supra note 114, at 943.
Act (EPACT). Although intended primarily to develop competition among electric utilities, EPACT also included measures protecting fish. Together, ECPA and EPACT have had the effect of limiting FERC's ability to override competing interests and to unilaterally impose its own licensing conditions.

3. Judicial Inroads

Similarly, courts have also made inroads against FERC's broad regulatory authority. In *PUD No. 1 v. Washington Department of Ecology*, the U.S. Supreme Court refused to limit the State of Washington's authority to impose its own water quality standards, rejecting the theory that such standards interfered with FERC's authority to license hydroelectric projects. Thus, state authorities could "condition [hydropower] certification upon any limitations necessary to ensure compliance with state water quality standards or any other 'appropriate requirement of State law.'" More recently, the Ninth Circuit extended this reasoning by allowing federal fishery agencies to require that FERC licensing decisions integrate recommendations regarding the protection of fish. These two decisions demonstrate that the courts also support the consideration of non-developmental values in the FERC decisionmaking process.

The upshot of these developments is that FERC no longer has the final word on how its decisions affect the environment. The decrease of the Commission's autonomy favors a more representative and inclusive scheme of environmental decisionmaking. It remains to be seen whether this trend will impact FERC's environmental justice views.

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133 See id.
134 Id. at 713-14.
135 See Am. Rivers v. FERC, 201 F.3d 1186, 1206-11 (9th Cir. 2000).
136 See Blumm & Nadol, *supra* note 96, at 117.
III. ENVIRONMENTAL JUSTICE AS APPLIED TO FERC'S DECISIONMAKING: THE TRADITIONAL METHODS

The Department of Energy (DOE), FERC's parent agency, has pledged to be a world leader in environmental justice. In 1995, DOE released its Environmental Justice Strategy proclaiming:

[L]eadership in science and technology, coupled with the incorporation of environmental justice options into our management infrastructure, will establish us as a world leader in environmental technology development and application. This will enhance the Department's role as a key contributor in the Nation's effort to develop and apply sustainable, clean, and economically competitive energy technologies in order to improve the quality of life for all and facilitate environmental justice for our communities, both nationwide and globally.

DOE explicitly views environmental justice as an instrumental part of its quest to become a "world leader" in environmental technology development.

In glaring contrast, FERC does not have an environmental justice strategy. As a result, challengers must resort to outside authorities when attacking a FERC decision on environmental justice grounds.

Petitioners have traditionally relied upon three authorities in framing legal challenges to perceived environmental injustices:


140 See id. The Department of Energy anticipated that it could achieve its goals by: (1) Heightening its "sensitivity to identifying and addressing disproportionately high and adverse human health and environmental effects of . . . [its] programs, policies, and activities on minority communities and low-income communities"; (2) "[p]rotecting human health and restoring the quality of the environment and level of safety" for its workers' communities; (3) "[e]nsuring full compliance with existing environmental, health, and safety laws, regulations, and statutes"; 4) "[e]nhancing procedures to detect and mitigate potential disproportionately high and adverse human health or environmental effects of . . . [its] planned programs, policies, and activities and to promote non-discrimination among various population segments"; and (5) "[f]ocusing on a 'Partnership in Participation Approach' with . . . [its] stakeholders including the general public, affected communities, Federal, Tribal, State, and local governments in the early stages of planning and implementing environmental justice procedures." Id.

141 See id.

142 See generally ABOUT FERC, supra note 103.

143 See id.
(1) Executive Order No. 12,898; (2) Title VI of the Civil Rights Act; and (3) the Equal Protection Clause of the U.S. Constitution. The following discussion examines this tripartite strategy, and concludes that it offers little chance of success against FERC.

A. Executive Order No. 12,898

Executive Order No. 12,898 requires "each federal agency" to incorporate environmental justice into its decisionmaking process. Since its inception in 1994, the Order has had a profound effect. Many federal agencies have responded by implementing environmental justice strategies into their respective administrative judgments. For reasons explored below, however, FERC is not among them.

1. Scope of the Order

On its face, Executive Order No. 12,898 applies to "each federal agency." However, a closer examination reveals that the Order is limited in scope. Section 6–604 states that "for purposes of this order, Federal agency means any agency on the working group, and such other agencies as may be designated by the President, that conducts any Federal program or activity that substantially affects human health or the environment." The working group is made up of

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146 See Mank, supra note 66, at 132.

147 See id. These strategies include enhanced public participation, research gathering, protection of natural resources, and enforcement measures related to environmental justice. Id.


149 Id. § 6–604, 59 Fed. Reg. at 7629.

150 Discussed supra notes 69–76 and accompanying text.
seventeen agencies, including FERC’s parent agency, the DOE.\textsuperscript{151} FERC, however, is not included on the list.\textsuperscript{152}

Section 6–604 goes on to state that "[i]ndependent agencies are requested to comply with the provisions of this order."\textsuperscript{153} As previously discussed, FERC was created as an independent agency.\textsuperscript{154} Although some courts have questioned the distinction between independent and executive agencies in the modern era,\textsuperscript{155} the language of the Order is clear; Executive No. Order 12,898 does not explicitly bind FERC.\textsuperscript{156}

2. Judicial Review

There are other weaknesses in the seemingly strong language of the Executive Order. The Order is qualified in large part by section 6–609, which reads:

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

\textsuperscript{151} Exec. Order No. 12,898, § 1–102(a), 59 Fed. Reg. at 7629. Other agencies include the Department of Defense, Department of Health and Human Services, Department of Housing and Urban Development, Department of Labor, Department of Agriculture, Department of Transportation, Department of Justice, Department of Interior, Department of Commerce, Environmental Protection Agency, Office of Management and Budget, Office of Science and Technology Policy, Office of the Deputy Assistant to the President for Environmental Policy, Office of the Assistant to the President for Domestic Policy, National Economic Council, and Council of Economic Advisors. Id.

\textsuperscript{152} See id.

\textsuperscript{153} Id. § 6–604, 59 Fed. Reg. at 7632.

\textsuperscript{154} Department of Energy Organization Act, 42 U.S.C. § 7171 (a) (2000); infra Part III.B.

\textsuperscript{155} See Consumer Energy Council of Am. v. FERC, 673 F.2d 425, 472 (D.C. Cir. 1982) (noting in regard to independent and executive agencies that “[t]here has been a general breakdown in any distinction between the functions of the two types of agencies”), aff’d mem. sub nom. Process Gas Consumers Group v. Consumer Energy Council of Am., 463 U.S. 1216 (1983).

\textsuperscript{156} See, e.g., City of Tacoma, Washington, 86 F.E.R.C. ¶ 61,311 (1999) (recognizing that FERC is an independent agency and, as such, Executive Order 12,898 does not apply), 1999 WL 177637, at *2.
of the United States, its agencies, its officers, or any other person with this order.\textsuperscript{157}

Thus, by foreclosing any rights against federal agencies for non-compliance, and by precluding the possibility of judicial review, section 6–609 reduces the Order’s bold pronouncements into a “paper tiger” of sorts.\textsuperscript{158} FERC has cited this final clause as a reason for dismissing environmental justice claims brought against it in administrative proceedings.\textsuperscript{159}

B. \textit{Title VI of the 1964 Civil Rights Act}

Title VI of the 1964 Civil Rights Act prohibits discrimination in the administration of programs receiving federal financial assistance.\textsuperscript{160} Many commentators have praised Title VI as a valuable legal tool for presenting environmental justice challenges.\textsuperscript{161} Title VI provides two vehicles that minority groups\textsuperscript{162} may employ to seek relief from environmental injustice: section 601 and section 602.\textsuperscript{163} However, due to the procedural difficulties involved in bringing a Title VI claim, advocates of environmental justice will likely be unsuccessful in using it to challenge a FERC decision.\textsuperscript{164}

\begin{itemize}
\item \textsuperscript{157} Exec. Order No. 12,898, § 6–609, 59 Fed. Reg. at 7632–33.
\item \textsuperscript{158} See Sandweiss, \textit{supra} note 13, at 44 (noting that “[t]he order does not compel any particular substantive result, it only mandates consideration of environmental justice criteria”); cf. \textit{Plater et al., supra} note 120, at 615 (comparing the National Environmental Policy Act of 1969 (NEPA) to a “paper tiger”). The authors comment that NEPA “contains a great deal of poetic language and precious little that is mandatory.” \textit{Id}.
\item \textsuperscript{159} See, e.g., \textit{City of Tacoma}, 86 F.E.R.C. ¶ 61,311 (1999) (finding that the Order “is intended to improve the internal management of the Executive Branch, [and] does not create any legally enforceable rights”), 1999 WL 177637, at *2. Still, for the agencies that have adopted the Order’s principles, it has become a valuable tool for fighting environmental injustice. See Mank, \textit{supra} note 66, at 133 (noting that administrative law judges for EPA, NRC, and the Department of the Interior have upheld the order in administrative proceedings).
\item \textsuperscript{162} Unlike Executive Order No. 12,898, Title VI does not apply to low-income communities. \textit{See} Civil Rights Act of 1964, § 601, 42 U.S.C. § 2001d.
\item \textsuperscript{163} \textit{See id.} §§ 601, 602, 42 U.S.C. §§ 2000d, 2000d-1.
\item \textsuperscript{164} \textit{See infra} Part III.B.2.
\end{itemize}
1. Generally

Section 601 declares that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." This means that recipients of federal funding may not discriminate on the basis of race, color, or national origin. To prevail under section 601, the courts have long required that petitioners demonstrate proof of discriminatory intent. This requirement poses a formidable burden for environmental justice plaintiffs and, as a result, many turned to section 602 for relief.

In short, section 602 instructs agencies that distribute federal funds to abide by section 601's anti-discrimination requirements. Unlike section 601, however, section 602 has been interpreted as requiring only a showing of disparate impact, not discriminatory intent. Under this interpretation, private plaintiffs did not have the difficult job of proving that an agency was motivated by discrimination in arriving at a decision; rather, plaintiffs proceeded by showing that the agency's decision disproportionately affected minority populations.

As a result of this interpretation, early cases brought under section 602 showed great promise for environmental justice proponents. Recently, however, the Supreme Court, in Alexander v. Sandoval, retreated from this position, declaring that private parties do not

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168 See Hurwitz & Sullivan, supra note 167, at 24-25; Latham Worsham, supra note 166, at 646.
169 See Latham Worsham, supra note 166, at 645. Section 602 reads: “Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity ... is authorized and directed to effectuate the provisions of section 2000d of this title.” Civil Rights Act of 1964, § 602, 42 U.S.C. § 2000d-1.
170 See Lazarus, supra note 26, at 834.
171 See id.
have standing to sue under section 602. Because there is now no private enforcement right under section 602, private plaintiffs must turn back to section 601 for relief, requiring proof of discriminatory intent. Thus, "[i]f plaintiffs cannot prove intentional discrimination, they cannot sue under Title VI or its regulations, even if they can prove that the challenged action has a discriminatory impact for which no justification can be shown." As a result, Title VI's ability to alleviate environmental injustice may be muted.

2. As Applied to FERC

Even if a party could provide evidence of discriminatory intent in a FERC regulatory decision, it appears that Title VI does not apply directly to federal agencies. As noted, Title VI applies to "any program or activity receiving Federal financial assistance." The terms "program" or "activity" are defined as: (1) "a department, agency, special purpose district, or other instrumentality of a State or of a local government;" (2) "a college, university, or other postsecondary institution, or a public system of higher education;" or (3) "an entire corporation, partnership, or other private organization, or an entire sole proprietorship." Thus, Title VI covers "only those situations where federal funding is given to a non-federal entity which, in turn, provides financial assistance to the ultimate beneficiary." Therefore, Title VI does not apply to discrimination by federal agencies them-

173 See 532 U.S. 275, 293 (2001); Lisa S. Core, Note, Alexander v. Sandoval: Why a Supreme Court Case About Driver's Licenses Matters to Environmental Justice Advocates, 30 B.C. Envtl. Aff. L. Rev. 191, 193–213, 224–28 (2002). In a five-to-four decision the majority declared, "Neither as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under § 602. We therefore hold that no such right of action exists." 532 U.S. at 293.

174 Id.

175 Adele P. Kimmel et al., The Sandoval Decision and Its Implications for Future Civil Rights Enforcement, 76 Fla. B.J. 24, 24 (Jan. 2002).

176 Cf. Core, supra note 173, at 236–42 (arguing that Sandoval also "signaled the impossibility of using 42 U.S.C. § 1983 as an enforcement mechanism" for disparate impact regulations enacted pursuant to section 602 of Title VI). But see Kimmel et al., supra note 175, at 27 (noting that the Sandoval decision "leaves open the question of whether Title VI's disparate impact regulations may be enforced against public recipients of federal funds under 42 U.S.C. § 1983").


178 Id. § 2000d-4a(1) (A).

179 Id. § 2000d-4a(2) (A).

180 Id. § 2000d-4a(3) (A).

selves. Accordingly, FERC appears to be immune from Title VI claims.

C. Equal Protection Clause

The Equal Protection Clause has become one of the most disfavored theories for environmental justice advocates to employ in challenging discriminatory actions. In fact, some critics have opined that equal protection claims should only be included in an environmental justice complaint for political value. Perhaps this is because not a single environmental justice proponent has ever prevailed on equal protection grounds in federal court. This is not for a lack of trying.

1. Generally

The Fifth Amendment of the Constitution declares that "[n]o person shall be . . . deprived of life, liberty, or property without the due process of law." In addition, the Fourteenth Amendment decrees that a state may not "deny to any person within its jurisdiction the equal protection of the laws." Together, these two clauses have

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The plaintiffs claim that it would be "inconceivable" that Title VI should not apply to discrimination by federal agencies. However, the language of the statute and the cases addressing the issue support just that conclusion. The Court does not have the authority to redraft an unambiguous statute and ignore established case authority. Therefore, the Court will also dismiss the plaintiffs' Title VI claims.

183 However, environmental justice advocates could bring suit against a state or local agency that received federal funding from FERC and subsequently discriminated in its decisionmaking process. See Heckler, 717 F.2d at 38.

184 See, e.g., Cole, supra note 144, at 540-41 (suggesting that the equal protection doctrine is the worst option for plaintiffs looking to challenge environmental discrimination); Donna Gareis-Smith, Environmental Racism: The Failure of Equal Protection to Provide a Judicial Remedy and the Potential of Title VI of the 1964 Civil Rights Act, 13 TEMP. ENVTL. L. & TECH. J. 57, 58 (1994) (finding that the requirements of the Equal Protection Clause have presented the most significant hurdle for plaintiffs); Lazarus, supra note 26, at 829-35 (stating that the equal protection doctrine has not been hospitable to environmental justice arguments).

185 See Cole, supra note 144, at 541.

186 See COLE & FOSTER, supra note 61, at 126.

187 See discussion infra Part III.C.

188 U.S. CONST. amend. V.

189 U.S. CONST. amend. XIV, § 1.
been interpreted to mean that neither the federal nor the state governments may deny citizens equal protection under the law. Whether bringing action against the federal or the state government for race-based discrimination, the applicable judicial standards are essentially the same.

Two landmark decisions have defined the rough contours of the equal protection doctrine as applied to environmental discrimination. In Washington v. Davis, the Supreme Court held that in order to find an equal protection violation, minority plaintiffs must establish more than discriminatory impact on their communities as a result of the law. The Court requires proof of invidious discrimination—discriminatory intent. The following year, the Court reaffirmed the need to prove intentional discrimination in race-based equal protection cases in Village of Arlington Heights v. Metropolitan Housing Development Corp. Generally, such proof may be based on circumstantial or direct evidence of an intent to discriminate. Cases citing disproportionate impacts among minorities will only surpass this heightened standard when such impacts are “unexplainable on grounds other than race.” These instances are rare. The combined effect of the Washington and Arlington Heights rulings is that equal protection plaintiffs must prove discriminatory intent—the elusive smoking gun—or be denied a remedy under the doctrine. This is a formidable challenge because only overt acts of discrimination will suffice.

2. Equal Protection and Environmental Justice

Three major environmental justice cases have been tried since the decisions in Washington and Arlington Heights, and all three plaintiffs lost because they failed to overcome the high “discriminatory in-

191 See id.
193 Id. at 240 (holding that “the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose”).
194 429 U.S. 252, 265 (1977) (“Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.”).
195 See id. at 266.
196 Id.
197 Id. For an example of the type of evidence needed to overcome this hurdle, see Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886), where the Supreme Court found that the only possible conclusion for the disparate impact shown by the plaintiff was hostility to the plaintiff’s race.
198 See Fisher, supra note 161, at 306.
tent” hurdle established by the Court. 199 The first, Bean v. Southwestern Waste Management Corp., concerned the siting of a solid waste landfill on the outskirts of Houston, Texas. 200 There, plaintiffs offered statistical evidence that the majority of such landfills were sited in areas with predominantly minority populations. 201 The court rejected this argument, however, concluding that the landfills were placed in these areas because that is “where Houston’s industry is, not because that is where Houston’s minority population is,” and because the data could be interpreted differently to reveal almost no disparity in siting choices. 202 Therefore, the court held that the plaintiffs’ showing did not satisfy the Washington and Arlington Heights standards. 203

The next decision, East Bibb Twiggs v. Macon Planning & Zoning Commission, dealt with a similar situation in which plaintiffs brought equal protection claims seeking to enjoin the development of a landfill in a largely minority community. 204 However, the only other landfill in the area was in a predominantly white neighborhood. 205 This fact worked against plaintiffs’ disparate impact argument, and ultimately the court held that the standards imposed by Washington and Arlington Heights were not satisfied. 206

In R.I.S.E., Inc. v. Kay, the court once again decided in favor of the defendants on an environmental justice equal protection claim brought to prevent a private landfill from being sited in a minority area. 207 Plaintiffs proffered evidence that the residents in the area surrounding the planned facility were 64% black, and that past facilities had been sited in areas with populations ranging from 95 to 100% black. 208 However, the court rejected these arguments, finding 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.” 209

201 See id. at 678–79.
202 Id. at 679.
203 See id. at 677.
205 Id. at 884.
206 Id.
208 Id. at 1148.
209 Id. at 1150.
3. As Applied to FERC

The cases above exemplify the difficulty in proceeding under the Equal Protection Clause. Because plaintiffs must demonstrate that the government intentionally discriminated against them on the basis of race, they will not be able to prevail unless there is overt discrimination.\(^{210}\) Mere evidence of discriminatory impact will not suffice.\(^{211}\)

This poses a problem for potential victims of environmental injustice who seek redress from a federal agency such as FERC. For example, suppose that FERC is deciding on whether to approve the location of a proposed oil pipeline, and has concluded that a route traveling through rural, predominantly minority neighborhoods presents the best option. In order to prevail using the Equal Protection Clause, residents would have to provide evidence that FERC's commissioners intentionally supported the proposition because the residents of those communities were minorities.\(^{212}\) Unless the only possible explanation was that the decision was based upon race, it wouldn't matter that the path of the pipeline wove around white neighborhoods and passed straight through minority neighborhoods so long as an intent to discriminate could not be shown.

As several authors have pointed out, the burden of showing intentional discrimination is nearly impossible to overcome, particularly in the siting context where FERC's motivations could easily be masked.\(^{213}\) Thus, the Equal Protection Clause seems to afford little protection for those would-be challengers of a FERC decision that results in a disparate impact on low-income and minority communi-

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\(^{210}\) \textit{Cf.} K.G. Jan Pillai, \textit{Neutrality of the Equal Protection Clause}, 27 Hastings Const. L.Q. 89, 97–98 (1999) (stating that "the Supreme Court has made the task of proving intentional discrimination—in the absence of some so-called 'smoking gun' evidence—extremely difficult.").

\(^{211}\) See Weinberg, \textit{supra} note 190, at 6–7.


\(^{213}\) See, \textit{e.g.}, Sheila Foster, \textit{Race(ial) Matters: The Quest for Environmental Justice}, 20 Ecology L.Q. 721, 729 (1993) ("Often no visible smoking gun exists behind the decision to place a toxic facility in a neighborhood composed primarily of racial minorities."); Peter L. Reich, \textit{Greening the Ghetto: A Theory of Environmental Race Discrimination}, 41 U. Kan. L. Rev. 271, 306–12 (1992) (finding that injuries such as disparate waste siting are not usually accompanied by evidence of motive); Gerald Torres, \textit{Environmental Burdens and Democratic Justice}, 21 Fordham Urb. L.J. 431, 442 n.73 (1994) (concluding that "in this day and age, few would be so obtuse as to admit, on the record, that he or she made a particular decision based upon purely racial considerations. There are few 'smoking guns' when it comes to racial discrimination.").
ties.214 For all intents and purposes, unless the Commission evinces discrimination in its decisionmaking process, the Equal Protection Clause offers little hope for environmental justice proponents.

IV. FERC AND ENVIRONMENTAL JUSTICE: DO ENVIRONMENTAL STATUTES PROVIDE A BETTER WAY?

The inescapable conclusion to be drawn from the foregoing discussion is that FERC is somewhat insulated from environmental justice challenges, raising the potential for abuse when the Commission decides on important matters impacting low-income and minority communities. The remainder of this Note will question why FERC is not obligated to consider environmental justice, and then explore how environmental statutes may offer petitioners the best opportunity to advance environmental justice arguments against the Commission.

A. FERC and Environmental Justice

FERC has only dealt directly with environmental justice on a handful of occasions.215 Interestingly, upon initial consideration of the issue, FERC seemed willing to abide by the Executive Order on environmental justice. In ruling on a 1997 pipeline proposal, the Commission determined that it “complied . . . with the directives of Executive Order No. 12,898, and considered whether [the pipeline] would have a disproportionately high and adverse effect on low[-]income or minority populations.”216 Subsequent decisions, however, were not as accommodating; finding that Executive Order No. 12,898 “does not apply to independent agencies, such as the Commission.”217 This discrepancy suggests that FERC made an active decision not to take environmental justice into account.

Occasionally, however, after determining that it is not bound to consider environmental justice principles, FERC will still take the time to respond to environmental justice concerns.218 The problem is that

214 Id.
215 An advanced search of FERC’s online database of administrative decisions revealed only a limited treatment of the issue. See ABOUT FERC, supra note 103 (last searched Mar. 14, 2002).
such concerns are often summarily dismissed with little discussion of how a FERC decision might disproportionately impact low-income and minority populations.\(^\text{219}\) Often no reference is made to census figures for the affected areas, or whether these communities are already subject to significant environmental burdens.\(^\text{220}\) The implication is that FERC is reluctant to explore the issue in any degree of detail. Several factors, however, suggest that FERC should pay closer attention to these claims.

1. Independence as a Shield

As noted above, FERC commonly cites its independent status as a reason for not considering Executive Order No. 12,898 in its decisionmaking process.\(^\text{221}\) But FERC was granted independence because of its involvement in power trading, not because of its role in hydro-power licensing and pipeline construction—two areas where environmental justice considerations come into play.\(^\text{222}\) Therefore, FERC should not be allowed to hide behind its independence when addressing the effects of its actions on minority and low-income communities.

Furthermore, the line between independent and federal agencies has faded over time. As one court commented, it is questionable whether "the decisions of such agencies so clearly involve scientific judgment rather than political choice that it is even theoretically desirable to insulate them from the democratic process."\(^\text{223}\) Moreover, legal scholars, the Justice Department, and the Supreme Court alike have echoed these concerns.\(^\text{224}\) Such questioning casts further doubt on FERC's practice of relying on its independence as a basis for disregarding environmental justice.\(^\text{225}\)

\(^{219}\) See id. (including only four paragraphs of discussion on environmental justice out of 199 total pages).


\(^{221}\) See supra Part II.B.

\(^{222}\) Department of Energy Organization Act, 42 U.S.C. § 7171(a) (2000); see discussion supra note 115.


\(^{225}\) See id.
2. Comparison with Other Agencies

There are sixteen independent agencies, such as FERC, currently operating within the federal government. How have these other agencies responded in the wake of the environmental justice movement and Executive Order No. 12,898? Few of them would have cause for considering environmental justice principles, as their regulatory agendas revolve around finance or labor issues. But at least one agency, the Nuclear Regulatory Commission (NRC), has considered the issue. The difference between FERC's and NRC's responses to environmental justice concerns is striking.

NRC has taken a completely different tack on environmental justice. Just one month after President Clinton issued the Executive Order on environmental justice, NRC declared its intention to enforce the Order internally. Later, NRC voluntarily joined the Interagency Working Group created by the Order, and drafted its own comprehensive environmental justice strategy. In light of these efforts, three judges for the Atomic Safety and Licensing Board held that NRC was in fact obligated to enforce the Executive Order, notwithstanding its independence from the Executive Branch.

Despite the fact that compliance with the Order was voluntary, NRC wholeheartedly adopted environmental justice principles into its decisionmaking processes. Presumably, NRC recognized the impact that its decisions might have on poor and minority communities, and took immediate action to protect against potential unfairness. While NRC's support of Executive Order No. 12,898 suggests that there are no tangible impediments to FERC embracing environmental justice, FERC decided against it, choosing instead to preserve

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226 See 44 U.S.C. § 3502(5) (2001) (repealed 2002). Independent agencies include the Board of Governors of the Federal Reserve System, the Commodity Futures Trading Commission, the Consumer Product Safety Commission, the Federal Communications Commission, the Federal Deposit Insurance Corporation, the Federal Housing Finance Board, the Federal Maritime Commission, the Federal Trade Commission, the Interstate Commerce Commission, the Mine Enforcement Safety and Health Review Commission, the National Labor Relations Board, the Nuclear Regulatory Commission, the Occupational Safety and Health Review Commission, the Postal Rate Commission, and the Securities and Exchange Commission. Id.


228 Id.

229 Id. at 385.

230 Id.

231 Id. at 381–87.

232 See id.

its autonomy. More importantly, NRC’s contrasting position calls into question FERC’s motive in refusing to adopt a policy based on social equality and fairness.

Another contrast can be seen in comparing FERC’s stance on environmental justice to its parent agency, the Department of Energy (DOE). As previously noted, DOE has pledged to incorporate environmental justice into its decisionmaking process in an effort to become a world leader in environmental technology development and application.234 Shouldn’t DOE, as an agency with such a firm commitment to environmental justice, begin its enforcement efforts by first ensuring that all agencies under its wing are, at a minimum, actively monitoring their decisions for environmental justice issues? Shouldn’t FERC seek to further reasonable policy goals of its parent agency? The fact that FERC does not even have an environmental justice policy, while its parent agency has pledged to be a leader in the area, calls into question the reasons for FERC’s unwillingness to examine the effect of its decisions on poor and minority communities.

3. The Effect of FERC’s Failure: Mount Vernon

The people of Mount Vernon, New York have been severely affected by FERC’s refusal to actively consider environmental justice in its decisionmaking process.235 There, residents and community leaders, including Senator Hillary Clinton, have banded together to protest against a FERC siting decision on environmental justice grounds.236 The challenge concerns a 424-mile pipeline slated to run from Canada to Mount Vernon.237 Millennium Pipeline Company, a partnership composed of four energy conglomerates, proposed the project in December of 1997 to supply energy to the expanding New York City market.238 Amidst strong opposition,239 FERC approved the project in December of 2001.240

234 See supra Part III.
236 Id.
238 Id.
239 See Under Pressure, supra note 235, at 11.
240 See generally Millennium Pipeline, 97 F.E.R.C. ¶ 61,292, 2001 WL 1631910.
Mount Vernon is a community composed of over 70% minority residents. In the areas closest to construction, however, this number jumps to more than 85%. Opponents of the pipeline have charged that Mount Vernon’s more affluent neighbors received better treatment when dealing with FERC, that the pipeline need not go through Mount Vernon at all, and that the proposed site runs too close to local schools, churches, hospitals, and playgrounds. Additionally, the project has raised health concerns, including the risk of explosion and the threat that construction will unearth dioxin, a carcinogenic chemical used legally in the area during the 1960s and 1970s.

Currently, the City of Mount Vernon is protesting FERC’s decision. In addition to other factors, the City points out that although only 3.1 miles of the 424-mile pipeline require street construction, 61% of this construction goes through Mount Vernon. As Michael Zarin, counsel for the City, questioned, would this be acceptable in a wealthy neighboring community like Scarsdale?

In light of the face-off in Mount Vernon, the question necessarily moves from whether FERC should be taking environmental justice into account to the larger question of whether it must. The remainder of this Note examines how environmental statutes may be employed by people, in Mount Vernon and elsewhere, to compel FERC to consider environmental justice in its decisionmaking process.

B. Environmental Justice Under Statutory Authority

Partly in response to the difficulties encountered when challenging an agency’s decision under Executive Order No. 12,898, Title VI of the Civil Rights Act, and the Equal Protection Clause, several com-

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241 See id. at *46.
242 See Under Pressure, supra note 235, at 11.
243 Id. Initially, even Senator Clinton’s request for an additional public hearing on the project was denied by FERC. Id.
245 See Under Pressure, supra note 235, at 11.
246 See Millennium Meets New Struggle, supra note 244, at P1.
249 Id.
250 Telephone Interview with Michael Zarin, Zarin & Steinmetz (Mar. 14, 2002).
mentators began emphasizing the importance of general environmental statutes in pursuing environmental justice claims. These statutes can be a powerful tool for advocates and agencies alike in challenging disparate environmental impacts on those often least equipped—politically or financially—to respond to environmental threats.

1. The Traditionalist Approach

Perhaps the most basic reason for seeking redress under a statutory scheme can be seen in the "traditionalist" approach. The traditionalist seeks to remedy environmental injustices through conventional environmental law. This approach begins with the premise that environmental statutes were created to protect all people. Therefore, environmental justice advocates can avoid the complexities inherent in framing their argument around civil rights law, and instead look to basic environmental law. In short, environmental justice without the justice: using an environmental statute to correct environmental justice problems without reference to race or class.


252 See Cole, supra note 144, at 527 ("Environmental law challenges in the context of environmental justice struggles have a proven track record of success.").

253 See Targ, Environmental Justice Issues, supra note 251, at 531-32 (discussing the ability of EPA to address environmental justice concerns under statutory authority).

254 See Cole, supra note 144, at 528. The author, a prolific environmental justice commentator, concludes that traditional environmental law is perhaps the most valuable tool for proponents of environmental justice. See id. at 526-28. "Th[e] nuts-and-bolts knowledge of arcane statutes is the least sexy part of environmental justice law, to be sure, but perhaps the most important." Id. at 528.

255 Id. at 526-28.

256 See Torres, supra note 213, at 437.
Under this traditionalist approach, activists also enjoy the benefit of familiarity. Judges, agencies, and other decisionmakers generally have a fair understanding of environmental statutes, and may have less difficulty basing their decision on a statutory discrepancy rather than an amorphous concept of equal protection.257

2. Public Participation

Another reason for increasing reliance on environmental statutes is that many of these statutes provide opportunities for the public to participate in agency decisionmaking.258 This is accomplished through public participation provisions mandating that agencies communicate with those affected by their decisions.259 These provisions allow environmental justice advocates to provide feedback to an agency before it issues its final decision on a matter, enabling their concerns to be addressed at the front-end of agency decisionmaking.260

Although public participation requirements are procedural in nature, they do have the potential to produce a substantive effect.261 Recently, environmental justice advocates in Louisiana were successful in petitioning EPA, under the Clean Air Act, to deny a permit for a large chemical facility.262 In addition, if an agency fails to abide by the participation requirements in reaching a decision, courts may invalidate the decision.263 Because of these and other benefits, some environmental justice scholars have suggested that activists take a closer look at participation requirements when defending against environmental injustice.264

257 See discussion supra Parts III.B, .C.
258 See Sheila Foster, Public Participation, in THE LAW OF ENVIRONMENTAL JUSTICE, supra note 66, at 185.
259 See id.
260 See id. at 185–86.
261 See id. at 185–89.
3. Bridging the Gap Between Environmental Law and Environmental Justice

It is doubtful, however, that basic environmental statutes alone could correct the disparity that exists between race, class, and the incidence of environmental hazards. Environmental laws themselves are sterile and fail to account for institutional and overt racism in agency decisionmaking. Specifically, something is needed to bridge the gap between environmental law and environmental justice.

For now, that bridge is found in the specific powers conferred to federal agencies via environmental statutes. In 1994, President Clinton issued a separate memorandum in conjunction with Executive Order No. 12,898, calling for increased reliance on environmental statutes in an effort to promote environmental justice. The memorandum stated:

The purpose of this separate memorandum is to underscore certain provision[s] of existing law that can help ensure that all communities and persons across this Nation live in a safe and healthful environment. Environmental . . . statutes provide many opportunities to address environmental hazards in minority communities and low-income communities. Application of these existing statutory provisions is an important part of this Administration’s efforts to prevent those minority communities and low-income communities from being subject to disproportionately high and adverse environmental effects.

Further, the memorandum identified specific provisions within the National Environmental Policy Act (NEPA) and the Clean Air Act (CAA) that would enable a more detailed environmental justice review to take place. As a result, administrators and activists alike were

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265 See Lazarus, supra note 26, at 856–57.
266 See Torres, supra note 213, at 450. Torres states that “few statutes—state or federal—require agency officials to consider the racial or distributional effects of an environmental decision or action. Therefore . . . a claim that relies upon a traditional environmental statute often does not necessarily affect the . . . process through which environmental benefits and burdens are distributed.” Id.
267 President’s Memorandum on Environmental Justice, 30 WEEKLY COMP. PRES. DOC. 279 (Feb. 11, 1994).
268 Id.
269 See id.
given a statutory roadmap to follow in pursuit of environmental justice. The following discussion will analyze the specific statutory provisions that administrators and activists may advance in order to compel FERC to implement environmental justice into its decision-making process.

C. Do NEPA and CAA Provide Environmental Justice Claimants With a Remedy?

For those battling FERC in Mount Vernon and elsewhere, the statutory provisions of NEPA and CAA highlighted in President Clinton’s memorandum on environmental justice may contain means for compelling the Commission to incorporate environmental justice into its decisionmaking process. Several of NEPA’s provisions support environmental justice principles, and may be used to pressure FERC to consider the effects of its decisions on minority and low-income communities.\(^{270}\) Additionally, the CAA may be employed to inject environmental justice issues directly into FERC’s evaluation process.\(^{271}\)

1. The National Environmental Policy Act (NEPA)

In 1970, NEPA was enacted “[t]o declare a national policy which will encourage productive and enjoyable harmony between man and his environment.”\(^{272}\) Over the years, this broad and wistful language has been used to induce agencies to “stop-and-think” before launching projects that may harm the environment,\(^{273}\) and to compel agencies to disclose information to the public before embarking on a specific course of action.\(^{274}\) The vehicle used to accomplish these twin aims is the Environmental Impact Statement (EIS).\(^{275}\) An EIS must be completed for every major federal action significantly affecting the quality of the human environment.\(^{276}\) The EIS requires an agency to consider, among other things, “the environmental impact of the proposed action,”\(^{277}\) and “alternatives to the proposed action.”\(^{278}\) Once completed, NEPA’s administrating agency, the Council on Environ-

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\(^{270}\) See infra Part IV.C.2.

\(^{271}\) See infra Part IV.C.4.


\(^{273}\) See PLATER ET AL., supra note 120, at 611.

\(^{274}\) Id.

\(^{275}\) Id.

\(^{276}\) See 42 U.S.C. § 4332(2)(C).

\(^{277}\) Id. § 4332(2)(C)(i).

\(^{278}\) Id. § 4332(2)(C)(iii).
mental Quality (CEQ), requires that an EIS be available to the public and any other federal agency with particular expertise regarding the proposal.279

Despite its vibrant prose, the statute creates no substantive duties for agencies to follow.280 Instead, NEPA is merely a procedural mechanism for agencies to follow when considering proposals that would have significant environmental effects.281 Agencies are only required to take a "hard look" at the environmental consequences that follow from their approval of major projects.282 Although there is no citizen suit provision found within NEPA, courts have upheld lawsuits for violations of the Act's procedural obligations.283

There is some question as to whether NEPA's requirements apply to independent agencies such as FERC. Under the guidelines established by CEQ, NEPA applies to "all Federal agencies."284 CEQ defines federal agencies as "all agencies of the Federal Government,"285 but the language does not explicitly refer to independent agencies.286 The Supreme Court has not specifically addressed this question,287 but lower courts have held that CEQ regulations do apply to independent agencies.288 More importantly, because FERC has promised to comply with both NEPA and CEQ's regulations, the issue may be settled.289

280 See PLATER ET AL., supra note 120, app. at 57.
282 See id. at 97.
283 See PLATER ET AL., supra note 120, app. at 57.
284 40 C.F.R. § 1500.3 (2002).
286 Cf. The National Historic Preservation Act, 16 U.S.C. § 470f (2002) (demonstrating that independent agencies have been expressly included in some other provisions). The provision reads:

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall . . . take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register.

Id. (emphasis added).
288 See, e.g., Sierra Club v. United States Nuclear Regulatory Comm'n, 862 F.2d 222, 229 (9th Cir. 1989); Steamboaters v. FERC, 759 F.2d 1382, 1393 n.4 (9th Cir. 1985).
2. Environmental Justice Analysis Under NEPA

In regards to NEPA, President Clinton’s memorandum declares:

Each Federal agency shall analyze the environmental effects, including human health, economic and social effects, of Federal actions, including effects on minority communities and low-income communities, when such analysis is required by [NEPA]. Mitigation measures outlined or analyzed in an environmental assessment, environmental impact statement, or record of decision, whenever feasible, should address significant and adverse environmental effects of proposed Federal actions on minority communities and low-income communities.

Each Federal agency shall provide opportunities for community input in the NEPA process, including identifying potential effects and mitigation measures in consultation with affected communities and improving the accessibility of meetings, crucial documents, and notices. 290

Thus, the memorandum advocates utilizing NEPA in furtherance of two main objectives: (1) analyzing the effect of environmental decisions on minority and low-income communities and (2) increasing the opportunities for these communities to participate in the decisionmaking process. 291

In light of these goals, CEQ issued its own guidance “to further assist Federal agencies with their NEPA procedures so that environmental justice concerns are effectively identified and addressed.” 292 Although noting that there is no “standard formula for how environmental justice issues should be identified and addressed,” 293 the guidance points to several principles that may assist agencies in evaluating environmental justice claims. 294

290 President’s Memorandum on Environmental Justice, 30 Weekly Comp. Pres. Doc. 279 (Feb. 11, 1994).
291 See id.
293 See id. at 8.
294 See id. at 9. The principles are: (1) area composition; (2) public health data; (3) cultural and economic factors; (4) public participation; (5) community representation; and (6) tribal representation. Id.
Specifically, an agency submitting an EIS must consider the “aesthetic, historic, cultural, economic, social, or health”\textsuperscript{295} effects of its action, “whether direct, indirect, or cumulative.”\textsuperscript{296} As the CEQ report notes, environmental justice concerns fall squarely within the ambit of this language.\textsuperscript{297} Furthermore, the “cumulative” effects language has been interpreted to mean that the preparing agency must consider the “additional effects contributed by actions unrelated to the proposed action . . . .”\textsuperscript{298} Thus, agencies must be aware of environmental harms accumulating on already overburdened communities.

Because FERC has pledged to comply with NEPA and CEQ’s regulations implementing the statute, activists and others may argue that any failure by the Commission to consider a proposal’s impact on minority and low-income communities constitutes a violation of NEPA’s requirement that agencies examine the cultural, economic, and social effects of major federal projects. Courts have found similar violations in the past, and have issued preliminary injunctions for failure to conform to NEPA’s guidelines.\textsuperscript{299} In addition, administrative tribunals have found NEPA violations for failure to consider socio-economic concerns.\textsuperscript{300} Thus, environmental justice activists able to establish that FERC did not consider the effect of an agency decision on a minority or low-income community may be able to argue that this failure has resulted in a violation of NEPA, and thereby secure an injunction until such impacts are adequately addressed.

3. The Clean Air Act

The CAA, which was enacted in 1963\textsuperscript{301} and incorporated a technology-forcing strategy after it was extensively amended in 1970,\textsuperscript{302}

\textsuperscript{295} 40 C.F.R. § 1508.8 (2002); see also id. § 1508.14.
\textsuperscript{296} Id. § 1508.8.
\textsuperscript{297} See CEQ GUIDANCE, supra note 292, at 8.
\textsuperscript{301} Clean Air Act, 42 U.S.C. §§ 7401–7671q (2000).
1977,\textsuperscript{303} and 1990,\textsuperscript{304} was established to combat the dangers posed by air pollution from urbanization, industrialization, and motor vehicles.\textsuperscript{305} Its purpose was, in part, “to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population.”\textsuperscript{306} The CAA established National Ambient Air Quality Standards for both mobile and stationary sources of pollution as the primary vehicle for achieving this goal.\textsuperscript{307} Through these standards the government sought to reduce the harm inflicted by air pollution, and to encourage technological advances capable of reducing or eliminating emissions altogether.\textsuperscript{308}

4. Environmental Justice Analysis Under CAA

CAA was also singled out in President Clinton’s memorandum on environmental justice.\textsuperscript{309} The President proclaimed:

The Environmental Protection Agency, when reviewing environmental effects of proposed action of other Federal agencies under section 309 of the Clean Air Act, 42 U.S.C. section 7609, shall ensure that the involved agency has fully analyzed environmental effects on minority communities and low-income communities, including human health, social, and economic effects.\textsuperscript{310}

Thus, EPA is entrusted, by statute, with the responsibility of reviewing the environmental effects of other agency proposals. This power of review stands as an additional means to inject environmental justice into FERC decisions.

Specifically, section 309 of CAA requires EPA to review and comment, in writing, on the environmental impacts of “newly authorized

\textsuperscript{305} See 42 U.S.C. § 7401(a)(2).
\textsuperscript{306} Id. § 7401(b)(1).
\textsuperscript{307} See PLaTER ET AL., supra note 120, at 441–49.
\textsuperscript{308} Id.
\textsuperscript{309} See President’s Memorandum on Environmental Justice, 30 WEEKLY COMP. PRES. Doc. 279 (Feb. 11, 1994).
\textsuperscript{310} Id.
Federal projects for construction and any major Federal agency action" to which 42 U.S.C. § 4332(2)(C) applies. Section 4332(2)(C) is the provision of NEPA that mandates an EIS be created for all major federal projects. Consequently, this language requires EPA "to comment in writing upon the environmental impacts associated with certain proposed actions of other federal agencies, including actions subject to NEPA's EIS requirement." Although somewhat counter intuitive, this means EPA—under the authority of an air pollution statute—has a say in major projects not necessarily involving air pollution.

In addition, section 309 of CAA provides that if the EPA Administrator finds any proposal to be "unsatisfactory from the standpoint of public health or welfare or environmental quality, he shall publish his determination and the matter shall be referred to the [CEQ]." This referral power, however, should only be invoked after EPA has attempted to resolve its concerns with the offending agency.

Therefore, EPA has the ability, through CAA, to inject its pro-environmental justice perspective into projects pursued by other federal agencies. This ability involves two components: (1) the power to review; and (2) the power to refer to CEQ. Together, these powers provide a great opportunity to advance environmental justice issues. EPA has promulgated its own guidance for consideration of environmental justice issues under section 309 of CAA:

EPA is responsible for developing informed comments and recommendations that notify the public and action agency of potential oversights in the identification and evaluation of potential impacts. EPA determines whether the action agency analyzed data on the potential impacts of the proposed action on the environment and human health and

314 42 U.S.C. § 7609(b).
317 See id.
318 See generally EPA GUIDANCE, supra note 313. Like the NEPA guidance, this guidance does not create any judicially enforceable right. Id. at 1 (disclaimer).
whether a reasonable effort was made to inform and involve the public in the EIS development process.\(^\text{319}\)

More specifically, the guidance states, “All EISs filed with EPA should be reviewed for adequate environmental justice content.”\(^\text{320}\) Therefore, EPA is obligated to inject environmental justice principles into every major federal action requiring an EIS under NEPA.

EPA developed a ratings system to assist in this endeavor.\(^\text{321}\) Under this system, EPA employs an eight-step process that outlines how to identify potential negative environmental impacts on minority and low-income populations.\(^\text{322}\) It also establishes procedures for public involvement where there are disproportionately high and adverse impacts on the affected community.\(^\text{323}\) This system is employed when minority and low-income communities are present in an area affected by a proposal and disproportionate impacts may result.\(^\text{324}\) Similarly, when considering the adequacy of a proposal, EPA should consider whether a sufficient amount of information was supplied in the EIS, and whether the statement adequately addresses any resulting impacts.\(^\text{325}\)

The result of this system is that EPA has the power to review every FERC decision requiring an EIS for proper observance of environmental justice principles. Should EPA find FERC’s environmental justice review to be substandard, it could then publish its own findings and attempt to correct any deficiencies through direct negotiations with the Commission.\(^\text{326}\) Should these efforts fail, EPA has the power to refer the matter to CEQ for final determination.\(^\text{327}\)

Once a decision has been referred to CEQ, the waters get considerably murkier. The question becomes whether CEQ can overturn FERC approval of a project for failure to adequately address environmental justice concerns? FERC would say, “No.” In an order entitled Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities, FERC declined to “participate” in an EPA section 309 referral on the grounds that there was not a

\(^{319}\) Id. § 2.1, at 10.
\(^{320}\) Id. § 2.3, at 11.
\(^{321}\) See id. § 2.4.1-.4.3, at 16.
\(^{322}\) See id. § 3, at 16–22.
\(^{323}\) Id.
\(^{324}\) See id. § 2.4.1, at 16.
\(^{325}\) See EPA GUIDANCE, supra note 313, § 2.4.2, at 16.
\(^{326}\) See id. § 2.4.1-.4.2., at 16.
\(^{327}\) See id.
significant factual basis to justify the action, and that, as an independent agency, the Commission is not bound by CEQ determinations. FERC did agree, however, to address EPA concerns independently of any obligations to do so.

FERC argued that it was required “by law” to make its decisions independent of executive authority, and that it was obligated to ensure the overall independence of its decisionmaking process. Its opinion went on to declare that the CEQ process was “wholly unsuitable” for resolving disputes with an independent agency, and that it “cannot” be bound by such a process. Interestingly, the opinion failed to explain FERC’s reasoning.

More importantly, the opinion failed to address the fact that FERC had explicitly agreed to abide by CEQ’s regulations, including CEQ’s section 309 referral power, “except where those regulations are inconsistent with the statutory requirements of the Commission.” Because CEQ’s referral power is itself a statutory requirement, this qualification would seem not to pose a problem. Thus, it does not appear that FERC can reasonably remove itself from the section 309 referral process.

After receiving a referral, CEQ is authorized to do a number of things. For instance, CEQ can require additional meetings to be held or force agencies to engage in extended negotiations. CEQ may also submit the matter to the President for “action.” These powers appear to afford CEQ the leverage necessary to require enhanced environmental justice review of a FERC decision. In light of FERC’s refusal to participate in the referral process, it may fall upon the courts to enforce CEQ statutory authority. Although there has been almost

329 Id.
330 Id.
331 Id.
334 See 18 C.F.R. § 380.1.
336 See 40 C.F.R. § 1504.3(f)(3), (5).
337 See id. § 1504.3(f)(7).
no judicial review on this issue,338 what case law there is suggests that CEQ's authority under section 309 is considerable.339

In *Sylvester v. United States Army Corps of Engineers*, the court considered a project that EPA had referred to CEQ pursuant to section 309.340 The court found that section 309 referrals place CEQ in the position of "arbiter in disputes between federal agencies on environmental issues."341 Furthermore, the court stated that "[t]his is not done as an idle exercise. It is to provide guidance to all who may be concerned, including courts."342 Although CEQ had actually granted its approval of the project in *Sylvester*, it did so only after the defendant had complied with several modifications suggested by CEQ.343 Further, the court held that CEQ's approval of the defendant's actions was entitled to judicial deference.344

Although not directly on point, *Sylvester* supports the assertion that CEQ's approval under section 309 is significant,345 and provides judicial deference to CEQ's decisions.346 The court's decision suggests that if CEQ had failed to approve of the project, the defendants might not have fared as well.347

Similarly, in *National Wildlife Federation v. Goldschmidt*, EPA rejected the Federal Highway Administration's approval of a highway project based on a NEPA violation and referred the matter to CEQ under section 309.348 Like EPA, CEQ found the project unacceptable on the same grounds,349 and work on the project was halted.350 As in *Sylvester*, this sequence of events supports the contention that CEQ has substantial authority under section 309.

In summary, it appears that EPA does have power under section 309 to reject federal projects and refer the matter to CEQ for further inquiry. If problems are not corrected, CEQ's determination may

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338 This relative lack of case law may be due to the fact that many problems are worked out in the negotiation process between CEQ, EPA, and the offending agency.
339 See generally, e.g., *Sylvester v. United States Army Corps of Eng'rs*, 884 F.2d 394 (9th Cir. 1989); *Nat'l Wildlife Fed'n v. Goldschmidt*, 677 F.2d 259 (2d Cir. 1982).
340 884 F.2d 394, 398.
341 *Id.* at 399.
342 *Id.*
343 *Id.* at 398.
344 *Id.* at 399.
345 *Id.*
346 884 F.2d at 399.
347 *Id.* at 398–99.
348 See 677 F.2d 259, 261–62 (2d Cir. 1982).
349 *Id.* at 262.
350 See *id.*
well be entitled to judicial deference. As a result, if EPA rejects a FERC proposal for failure to adequately consider environmental justice, it may refer the case to CEQ, which may also reject FERC’s decision and withhold approval. A court may uphold this determination.

Because both EPA and CEQ have professed to be staunch supporters of environmental justice, the threat of a section 309 referral may provide environmental justice advocates with the leverage necessary to overturn or significantly improve a FERC decision affecting poor and minority communities.

**CONCLUSION**

Since its creation twenty-five years ago, FERC has been hesitant to incorporate environmental justice principles into its decisionmaking process. When challenged, it has clung to its independent agency status as a means of warding off those who seek to invoke the mandate of Executive Order No. 12,898. Because it is unlikely that the Commission can be held accountable under Title VI of the Civil Rights Act or the Equal Protection Clause of the Constitution, an agency like FERC has been effectively insulated from environmental justice challenges.

But why has FERC not taken it upon itself to establish a comprehensive strategy to address these issues? Is it not concerned that its decisions may disproportionately impact poor and minority neighborhoods? If it is concerned, should it not seek to align itself with agencies like NRC and DOE, strong supporters of environmental justice that bear close relation to FERC? What is FERC’s motive in sidestepping the issue?

There are no ready answers to these questions. But one thing is clear: FERC should not be permitted to act with impunity when deciding matters affecting poor and minority communities. To ensure that FERC incorporates environmental justice concerns into its decisionmaking process, agencies and activists should consider using the provisions in NEPA and CAA as a means of redress for environmental injustices attendant to any FERC decision.

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351 *See supra* Parts I.C (EPA), IV.C.2 (CEQ).