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An Essay on Environmental Justice: The Past, the Present, and Back to the Future

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THE PAST

In the late 1980s, right on the heels of a long and arduous struggle among states, industry, and environmentalists for the heart and soul of the Environmental Protection Agency (EPA), environmental justice entered the regulatory scene at the national level. At that time, the EPA was a battle-weary agency, recovering from internal scandals,[1] at odds with the White House, the Office of Management and Budget, congressional subcommittees, and the states.[2] The agency was also reeling from approximately 800 court or congressionally imposed deadlines and was plagued by lawsuits from all stakeholders for the rules it managed to promulgate.[3] The last thing this demoralized agency needed was the grassroots, politically explosive charge of environmental racism.[4]

Residents from the grassroots probably knew little of this regulatory state of siege. What they undoubtedly knew about, through experience, was the frustration of years of living at the epicenters of our nation's worst environmental risks. Parents living near refineries positioned bags of clothing by their doors, ready for the not infrequent refinery accidents and midnight evacuations, while their children knew well the "shelter in place" drills that prompted them to go inside and shut all the windows and doors.[5] Residents living near commercial hazardous waste facilities, chemical plants, metal plating shops, and other facilities storing or using highly-toxic chemicals, looked at those facilities with worry and suspicion as the cases of childhood leukemia and rare cancers multiplied within their communities. People in poor rural areas saw their once bucolic environments irrevocably changed as large concentrated animal feeding operations sprang up, emitting unbearable smells and contaminating water supplies. These affected areas were predominantly people-of-color neighborhoods, and the residents began to wonder why this was so. These are some of the conditions that caused local organizing efforts to coalesce into a national effort later called the environmental justice movement.[6]

Certain landmark events caused the issue of environmental racism to percolate into the public dialogue. The first was the release in 1987 of a national study that found a positive correlation between racial minorities

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and proximity to commercial hazardous waste facilities and uncontrolled waste sites.[7] The 1991 First National People of Color Environmental Leadership Summit in Washington, D.C., also raised the profile of these issues and resulted in the adoption of the Principles of Environmental Justice by many environmental justice organizations.[8] The principles called for more democratic forms of decision making and the elimination or reduction (rather than redistribution) of environmental risk on local to global scales.[9]

Suddenly confronted by the charge of racism in environmental protection, the EPA administrator convened a workgroup to undertake a review of the then existing evidence of disparities. In 1991, at the conclusion of the two-year review, the workgroup submitted a report that acknowledged that racial and ethnic minorities were disproportionately subjected to exposures to air pollutants, hazardous waste facilities, contaminated fish, and agricultural pesticides.[10] The evidence also revealed demonstrated disparate adverse health effects from lead poisoning.[11] Also in that year, the *National Law Journal* published an article reporting on an eight-month investigation that found racial disparity in the enforcement of federal environmental laws.[12] Some of the most alarming findings were that penalties under federal hazardous waste laws were as much as 500 percent higher in predominantly white areas than non-white areas (a discrepancy of 46 percent existed under all federal environmental laws).[13] In the area of cleanup of contaminated properties, the study concluded that it generally took longer to place non-white areas on the national priorities list for cleanup (20 percent longer); cleanup in non-white areas took longer (began from 12 percent to 42 percent later) and was less protective (EPA chose to "cap" the contamination seven percent more frequently, while at the white sites, it chose to remove or treat the contamination 22 percent more often).[14]

Although these and other studies lent support to the allegations coming from the grassroots, as one might imagine, the charge of environmental racism was contested. At this earlier time, those skeptical of the charge responded in two ways. First, critics argued that the methodologies of these early studies were flawed.[15] While this criticism was a fair one, many of the more recent studies, using more sophisticated techniques, tended to confirm the findings of the earlier studies.[16] Even if the studies adequately described current conditions, some still questioned whether the existing racially disparate pattern of location near risk-producing land practices was the product of racial discrimination in the siting process or was instead the result of more neutral, post-siting market forces.[17] For a while, the debate shifted to a question of which came first, the polluting facility or the people of color community, *i.e.*, the "discriminatory siting" theory and the "market dynamics" theory. Although early studies indicated that race was generally a statistically more significant variable than income,[18] some proponents of the market dynamics theory insisted

that noxious and risky practices are located where land is less expensive. Once the facility is sited, "minority move-in" occurs as the price of housing declines and the quality of the neighborhood is perceived to decrease.

This debate is itself telling and hints at something more than just academic quibbling. Some were of the view that the question was important because resources put into reforming a supposedly discriminatory siting process would be wasted if market dynamics would cause the racially disparate pattern to re-emerge. Others argued that the market dynamics theory seemed to suggest that, if the racially disparate pattern was the result of market forces, there was no overt racial discrimination involved and, therefore, resulting conditions were somehow more acceptable. Although this latter point need not follow logically, the assumption of market neutrality appeared implicit in the context of this debate because proponents of the market theory did not generally advocate for aggressive interference with the market. And as pointed out by Luke Cole and Sheila Foster, the reality of race discrimination in the housing market affects individual preferences and mobility, and, as such, the "free" nature of market choices (to move into or stay in environmentally burdened communities) must be called into question.[19] Thus, the market dynamics theory is, if anything, a compelling reason to seriously address market dynamics, rather than a means by which to weaken the position of environmental justice advocates in the course of siting controversies. Moreover, a case can be made that even if the existing disparity is caused in large part by post-siting market dynamics, a corrective siting process is still a viable and appropriate way to help offset market-inspired socially undesirable results.

Although the "chicken and egg" debate[20] continued within academic and regulatory circles, it was during this time that the movement itself was broadening to encompass class as well as race disparities, with many in the movement arguing that neither people of color or the poor should systematically receive the lion's share of our risk, simply by virtue of their relative lack of resources and social capital. Although the early challenges were cast in terms of "environmental racism," the movement soon broadened to address class disparities, and "environmental justice" or "environmental injustice" became the terms more often used. Although this signaled a philosophical shift, as a practical matter, the overburdened communities tended to be both poor and people of color and organizing in these communities continued to be the primary focus of the movement.

Meanwhile, as the studies continued, they seemed to raise more questions than they answered. One national study found a statistical disparity in siting hazardous waste facilities in Hispanic communities, but no similar evidence in African-American communities.[21] Curiously, however, the study also found little evidence of post-siting demographic changes (sometimes called minority move-in).[22] How then, did the *existing*

disparity arise with respect to the African-American communities?[23] This study also found that very poor areas tended to repel, rather than attract, hazardous waste facilities, a finding that called into question the claim that the availability of cheap land, not the racial profile of the surrounding community, was more of a motivating factor in siting decisions. Several other studies have also found that very poor communities do not host a disproportionate share of facilities releasing toxic chemicals.[24]

Another, more recent study in the Los Angeles area found that, statistically, communities that were experiencing an "ethnic shift" are the communities of choice for siting risk-producing land practices. The researchers offered a tentative theory of causation based upon this finding. They posited that, because the social ties in communities are weakened when a community is undergoing a population transition from one ethnic group to another, such communities are less likely to organize and mount a successful challenge to a facility siting. To what degree do those who make the site location decision actually seek out such vulnerable communities can, of course, only be inferred from this circumstantial statistical evidence. For obvious reasons, direct evidence of racial targeting is nowhere to be found, although there is some direct evidence of class targeting.[25] In any event, the inquiry into the dynamics of the siting process, and its relationship to race and class, still continues.

The inquiry into causes is an important one, even though in retrospect the "which came first" debate was too simplistic and perhaps too flavored with political agendas. A positive result was that the issue prompted serious study that in turn yielded important information. But one also has to question whether excessive attention to causation issues tends to hijack the discourse in critical arenas of potential reform, and whether there will ever be sufficient evidence to answer this question one way or another. Are we pursuing chimeras that pull valuable time and resources from exigent problems? People of color and the poor are, after all, indisputably disparately exposed to dangerous environmental risks and are suffering serious illnesses in otherwise unexplained, disturbingly large numbers.

As one might imagine, environmental justice activists did not stand idly by awaiting the results of the research and ultimate outcome of this debate. In a variety of participatory fora, they forcefully demanded a place at the table.[26]

The injection of this new movement into an already cacophonous stakeholder process upset the status quo and proceeded to change the landscape of environmental regulation. For a while, industry, conventional environmentalists, agriculture, sister federal agencies, states, and local agencies were distressed and defensive as the newcomers demonstrated, made politically explosive charges, and demanded to have a place in the process. These traditional stakeholders were subsequently even more

flummoxed as the newcomers declined their invitation to negotiate tradeoffs in the technocratic jargon of environmental law, science, and engineering. More often, activists refused to quibble about acceptable emission or effluent limitations, monitoring protocols, and risk factors; as indicated earlier, they challenged the siting decision itself on ethical rather than technical grounds.[27]

The direct action methods and the initial siting challenges were only the entry point, however. Unfortunately, the impression of these early challenges set the environmental justice movement in an inaccurate but enduring image. Just as one cannot capture the essence of the mainstream environmental movement solely with the image of young college students chaining themselves to old growth trees, one cannot fairly capture the essence of the environmental justice movement with the image of community residents demonstrating against the siting of a hazardous waste facility. It is that, to be sure, but it is much more.

A descriptive account of the adaptation of activists to the national regulatory apparatus, and vice versa, has yet to be comprehensively written from the perspective of grassroots activists. Yet it is clear that these dedicated individuals, with meager resources, have tenaciously maintained strategies that have been remarkably effective.[28] Entering stakeholder processes as tokens, they quickly became a force to be taken seriously. In the ensuing years, activists have moved far beyond siting controversies, examining environmental injustices in a wide range of functional contexts—agency decision making, public participation, regulatory policy, program design, criteria development and other forms of standard setting, facility permitting, and the cleanup of contaminated sites.[29] They spearheaded the effort that culminated in the signing of an important executive order on environmental justice by former President Clinton.[30] Due in large part to their advocacy, which often included taking agency personnel on "toxic tours" through impacted areas, agencies began to take a more comprehensive look at cumulative risk.[31] Their activism quickly moved beyond the EPA to state environmental agencies and other federal agencies, such as the Department of Transportation, Department of the Interior, the military, etc.[32] They began to litigate not only under the environmental laws but pursued common law claims, constitutional claims, and civil rights claims.[33] One of the most creative and high profile legal strategies they used was claims under Title VI of the Civil Rights Act.[34] These claims, pursued both in court and administratively, caused an uproar by the regulated community when the EPA issued its guidance to investigate Title VI claims against state regulatory agencies accused of discriminatory permitting practices.[35] They also used procedural statutes, such as disclosure laws and planning laws, most effectively. They participated in federal advisory groups,[36] educational projects,[37] and interagency collaborative projects.[38] They formed international coalitions to

address cross-boundary and global problems.[39] To expand the scope of efforts thus, while retaining a steadfast loyalty to grassroots organizing and local campaigns, has been no easy feat. But as irresistible as this story is, it awaits chronicling in a more comprehensive way.

THE PRESENT

Perhaps the most important contribution the environmental justice movement has made to environmental regulation has been to bring to the surface the potential conflict between efficiency and equity and the complicated interplay between the two principles. This question is an important one because the philosophical forces underlying efficiency and equity cannot help but affect environmental policy in profound ways and the ascendancy of one means, sacrificing, to some degree, the other.

On the efficiency side, the challenge to environmental regulation has come mainly from industrial interests and the political right. In a more extreme form of this view, economic efficiency should be the controlling principal of environmental regulation, not merely an analytical tool used to choose among plausible, but protective, regulatory options. In other words, when used in its normative sense, resources (including environmental necessities) should be allocated to those willing to pay the most for them. The "willingness to pay" criterion is the foundation upon which efficiency is measured. The problem with this, as noted by several environmental scholars,[40] is that willingness to pay is largely dependent upon ability to pay, and thus resources are not shifted to those who value them most in the absolute sense, but those who "value" them most in the economic sense, *i.e.*, who not only want but can afford them.[41] Allocating designer jeans, or even land, in this manner is not objectionable once one accepts the desirability of a market economy, but it does not necessarily follow that environmental necessities that affect public health can or should be distributed this way. Everyone, regardless of their wealth, should be able to breath clean air and drink uncontaminated water.

No one that I am aware of seriously contends that efficiency should be used in this extreme form, well, almost no one.[42] However, the line between efficiency as a prevailing norm and efficiency as an analytic tool is not a clear one, and the bleeding of one into the other confounds the pursuit of environmental justice. A good example of this problem can be found in the interstices of the debate about "command and control" regulation and the newly termed "environmental innovation."[43] Command and control regulation is a derisive term used to describe the generally prescriptive nature of environmental pollution control requirements that were formed under the current set of environmental statutes and the matrix of regulations they spawned. The quintessential command and control requirements, for example, are the two pariahs of regulatory control: the

specification standard[44] and the technology-based standard.[45] A specification standard, for example, might mandate the use of a certain type of pollution control equipment, or the use of particular industrial processes or materials.[46] A technology-based approach requires control regardless of the location or particular circumstances of any given facility.[47] As the argument goes, the-one-size-fits-all approach and the micro-management of industrial processes by bureaucrats has resulted in firms paying an enormous amount of money to control pollution that should not even be controlled (for example, when the media can adequately absorb it), or that can be controlled in a much less expensive manner overall (for example, when some industrial sectors or individual firms can develop a much less expensive means of control than that mandated by the statutes and regulations).[48]

At first blush, there is no apparent conflict between the goals of environmental justice and the goal of fixing regulation to be more efficient. After all, by definition environmental justice communities are not typically located in areas where the environmental media (air, land, water) can adequately absorb the pollution. And in the toxic hot spot areas where pollution is a serious problem, there should be no objection to allowing firms to control pollution by less expensive means. Unfortunately, efficiency in this sense ceases to be benign once one considers the regulatory strategies currently promoted to achieve more efficient regulation. The case of markets in pollution is a good example.

Market strategies fall into three broad categories termed "emissions offset programs," "cap and trade," and a more recent program termed "open market trading."[49] These market regimes might operate at a facility level or within a larger geographic region. An offset program or a cap and trade program is, in essence, the placement of a metaphoric bubble over an area that defines the overall pollution limit. With a cap and trade program, the facility operator has the flexibility to operate its industrial processes as long as it purchases approved emission credits, thus ensuring that the cap is not exceeded. With trading programs, firms can therefore reduce, change, or eliminate expensive controls on individual pieces of polluting equipment (units) as long as they achieve the same result, in essence "trading" the right to pollute among units[50] or even entire facilities over a large geographic region.[51] Open market trading programs do not have an expressly defined cap, instead firms are allowed to use emission reduction credits from past reductions in lieu of installing expensive equipment that might otherwise be required.[52]

The problem with these more innovative trading strategies is that, on a facility level, it is difficult for the affected community to review and analyze the permit because they are much more complicated than the traditional technology-based permit requirements.[53] Unless there are adequate monitoring requirements, it is difficult for the community or an

enforcement agency to assess ongoing compliance and sue to enforce if necessary. The problem becomes much more acute once inter-facility, inter-pollutant, or point-nonpoint trading is allowed, particularly for highly toxic pollutants. If firms within a geographic region can trade pollution rights among each other, that leaves open a significant risk of formation of hot spots within environmental justice communities. One of the most high-profile examples is in California, where refineries were allowed to buy up "reduction credits" from the scrapping of old cars within the greater Los Angeles air basin and use those credits in lieu of installing vapor recovery equipment at their marine terminals.[54] As a result, the air quality worsened in the predominantly Latino communities near the three refineries that purchased most of the credits (and the workers in the refineries continued to face high risk exposures), even though the air quality of the large basin as a whole might have improved by retiring some older, heavily polluting cars.[55]

Theoretically, it might be possible to design a trading program that avoids hot spots and enforcement problems,[56] and permit review might be enhanced with adequate provisions for technical assistance to impacted communities. For example, I have discussed elsewhere how a variable offset rate might be used to encourage pollution reductions (*i.e.*, the generation of credits) in impacted areas for their use outside of impacted communities, thus fine-tuning incentives to pull pollution away from, rather than towards, environmental justice communities.[57] Another feature of a protective market program would be to simply prohibit trades that result in greater emissions in overburdened communities.[58] However, this utopian market regime (utopian from an environmental justice perspective) is not likely to emerge any time soon for a variety of economic, technical, legal, and political reasons. First and perhaps most important is that the older, bigger, and most polluting facilities are already located near the poor and people-of-color communities, and many of these facilities are not in compliance with current pollution control requirements.[59] Any reductions in emissions from these older facilities are likely to come from enforcement of existing legal requirements, not surplus reductions, and therefore will be unavailable to sell as offsets.[60] Secondly, for economic reasons, the upgrading of these older facilities is tied to a decision to increase production capacity,[61] which in turn will lead to the potential output of greater (not lesser) emissions, which in turn will require the facility operators to buy (rather than sell) pollution credits.[62]

Another reason to be pessimistic about the likelihood of an environmental justice-friendly market is that the primary proponents of market regimes, for philosophical reasons, are strong advocates of a market that is as unfettered as possible. Another reason is that some firms perpetually balk at requirements to install continuous emissions monitoring equipment, and the EPA capitulates to this resistence.[63] This equipment is

necessary to adequately monitor ongoing trades. And last but not least, the utopian market will likely never arrive because of the lure of point source to non-point source trades, *i.e.*, using nonpoint reductions (scrapping old cars, reducing vehicle miles, fleets with lower emissions) to forgive point source increases (facilities).[64] Nonpoint trades, by their very nature, cannot be adequately measured and verified. Inter-pollutant trades have additional problems because the types of pollutants being traded might have different health impacts.[65] The same problems of distribution, measurement, and verification also plague open market regimes and do so without at least the minimal protection of a theoretical cap or limit. In short, the recent experience with market programs illustrates how reforms premised upon notions of efficiency are promoted rigorously, with little attention given to equity concerns such as the distributional consequences.

Despite the promotion of market strategies as efficient, from a broader perspective it still remains unresolved whether there is a true conflict between efficiency and equity. This is because, as a political reality, market regimes are rigorously promoted because they promise to be more cost effective and allow more operational flexibility to the regulated community, not because they are more efficient to society as a whole. However, it could very well be that market programs are really *inefficient* once one considers that toxic hot spots—and the environmental, health, and economic problems that result from them—are costly. These latter costs are diffuse and typically borne by society as a whole rather than the private business sector and, therefore, enter into the regulatory calculus to a much lesser extent, making a more comprehensive efficiency analysis of this important regulatory strategy illusive.[66] Although market programs are an inevitable fact of regulatory life, the continuing battle on this front has to include a sustained effort to get regulators to curb their zeal for market strategies and to seriously consider the societal and economic costs of markets that lack adequate protections for vulnerable communities.

That efficiency is, to a large degree, equated with industry cost effectiveness leads to the very heart of the environmental justice dilemma, and brings with it a sober prediction. For the last decade, environmental justice activists have been addressing the effects of the skewed way in which our environmental laws have been enforced. This has been a difficult battle because the significant potential for adverse environmental justice consequences lies embedded deep within the technicalities of regulatory requirements. One of the lessons that activists have learned in the last decade is that—however appropriate is the ethical force of their positions—to be effective, they must also engage and participate in the process at its most technical level. They have done so, effectively analyzing complicated permits,[67] the design of regulatory programs,[68] and criteria (standards) development.[69] But they have even more serious challenges awaiting them, and once again much of what awaits them comes from the

philosophical appeal of efficiency and the regulatory appeal of market programs.

BACK TO THE FUTURE

The Bush administration is expanding the move toward market programs that began in the Clinton administration. For example, new source review (a major air permitting program) is being redesigned to routinely allow facility-wide caps in lieu of traditional control.[70] The new implementation of the "TMDL program"[71] under the Clean Water Act (a regulatory planning program designed to address water bodies that do not currently meet water quality standards) also has a strong trading regime (a favored goal of industry).[72] Environmental justice activists must continue to question the design of these strategies, at the state and national programmatic level. Otherwise, the multiple hot spots that will follow at the local level, and the necessary responses to them, will continue to strain the limited resources of the local environmental justice organizations.

But pollution markets are not the only place that the rhetorical appeal of efficiency is making headway. New methodologies for measuring the costs and benefits of regulation are underway, and these methodologies will seriously impact the result of a cost-benefit analysis, which in turn will affect the agency's decision to go forward with—or refrain from going forward with—regulations that have the potential to improve conditions in environmental justice communities.

Recently, the EPA's cost-benefit methodology has been under attack and in some instances the challengers were successful in invalidating protective regulations. The premier example is the EPA's ill-fated proposed ban on asbestos, which—despite over ten years of hard work by the EPA—the Fifth Circuit invalidated.[73] The Court, among other things, essentially held that if the EPA was going to project costs of a regulation into the future, and discount those costs to present value, it should similarly discount the future benefits of a regulation to a present value as well.[74] Discounting is a procedure used by economists to evaluate, in present dollar values, investments that produce future incomes. At a three percent discount rate, for example, the present value of $100 earned a year from now is $97 today.

The problem, however, is that the benefits of environmental regulations are often measured in lives saved. The first part of this problem is the obvious ethical dilemma, that of translating a human life into a dollar amount. Such valuation is necessary in some contexts, such as wrongful death suits where the only available remedy is monetary compensation. But in the context of regulatory cost-benefit analysis, the enterprise of "monetizing" human life and other noneconomic values is much more problematic. Law professor Liza Heinzerling and environmental economist

Frank Ackerman have pointed out several serious flaws inherent in this process and in particular criticize the practice of discounting the benefits of statistically saved lives.[75] They note that,

> [w]hile discounting makes sense in comparing alternative *financial* investments, it cannot reasonably be used to make a choice between preventing noneconomic harms to present generations and preventing similar harms to future generations. Nor can discounting reasonably be used even to make a choice between harms to the current generations; the choice between preventing an automobile fatality and a cancer death should not turn on prevailing rates of return on financial investments.[76]

As they point out, discounting would downgrade the importance of environmental regulation generally and would particularly trivialize long-term environmental risks.[77] The ultimate result is to distort environmental protection, favoring those regulations that aim to save lives lost in the near future (such as those lost by accidents) and disfavoring regulations potentially saving lives otherwise lost by illnesses stemming from chronic exposures and following long latency periods, *i.e.*, the types of illnesses that thrive in environmental justice communities. Making future lives saved count less on a regulatory scale, without further inquiry into the distributional implications of that determination (*i.e.*, who those statistical lives are likely to belong to), is perhaps the most modern form of elevating notions of efficiency over equity considerations.

Another battle that is currently brewing in the hyper-technical world of the cost-benefit analysis is in response to efforts coming from the Office of Management and Budget. OIRA director John Graham[78] is promoting the idea of QALYs, or quality-adjusted life years.[79] The thrust of this new twist on the cost-benefit analysis is to measure statistical years rather than lives—and to do so qualitatively rather than quantitatively—depending upon the circumstances of the statistically exposed person.[80] As a result, a year in the life of an 85-year-old arthritic asthmatic is worth less, on a regulatory scale, than the life of an athletic, healthy 20-year old due to the differences in health and remaining life span. If this idea gains traction in regulatory circles, the implications of this new methodology could mean that regulations that primarily protect vulnerable populations will be less likely to be cost-justified than regulations that protect healthier populations, despite the fact that both regulations would save the same amount of statistical lives (absent the use of QALYs). For example, short-term peaks (or spikes) of air emissions of sulfur dioxide primarily affect asthmatics rather than healthy populations, so a regulation aimed at reducing SO_2 spikes would be less likely to be cost justified than other forms of regulation. There is a statistically greater incidence of asthma and other

respiratory illnesses among children of color.[81] Similarly. the QALY methodology could affect the cost-benefit calculus of regulations designed to ultimately reduce blood lead levels. African-American children as a group have comparatively high incidences of elevated blood lead levels.[82] Given the low visibility of these technical issues, the ability of environmentalists (and environmental justice activists) to garner public support is questionable. It is these arcane, highly technical issues, which originate in sites where environmental justice activism has not yet gained access (here the initiative is coming from the Office of Management and Budget), that may pose the biggest challenges for the environmental justice advocates in years to come. And, reminiscent of the early years of the environmental justice movement, it will return activists to their former excluded positions.

Another serious challenge, ironically, has been brought on by the events of September 11. The Bush administration's recently proposed and enacted homeland security legislation might bode badly for environmental justice communities.[83] Legislation of this nature is part of a larger trend towards the kind of secrecy measures that will prove harmful for environmental justice communities. For example, in the wake of September 11, the EPA, other governmental agencies, and private firms removed information from their websites about the risks of accidental chemical releases from toxic facilities, despite the speculative efficacy of such measures from a national security standpoint. The fact that these initiatives have moved to the national legislative arena makes the challenge an even more difficult one because activists lack the resources often needed to exercise influence at the legislative level.[84]

It is presently unclear to what extent legislation of this nature, when fully implemented, might affect the obligations of an agency to release information under the Freedom of Information Act, or even the obligation of facilities currently required to report information about their releases, such as information ultimately reported in the Toxic Release Inventory (TRI data).[85] Although homeland security legislation purports to cover information about private activity that is "voluntarily" disclosed to the government, environmental and civil liberty organizations are concerned that private firms will attempt to use the broad language of the legislation to keep a wide range of information secret (even information that might be required by law if voluntarily disclosed in certain situations), declaring that it falls within the scope of the act and is therefore confidential. This is particularly likely given the expansive interpretation of existing exemptions under the Freedom of Information Act adopted by the Department of Justice under Attorney General Ashcroft.[86] Moreover, the legislation contains penalties that will further discourage government employees from disclosing data and whistleblowers from coming forward with critical information about health risks.[87] Documentation of this nature, much of

which has been obtained under FOIA request, has played a critical role in successful environmental justice campaigns, resulting in protective measures being put into place.[88] Mapping tools available to these communities through the Internet also rely heavily upon publicly available information, including TRI data.[89] Even if the availability of most TRI data is deemed to be outside the scope of the homeland security legislation (because it is not "voluntarily" disclosed to the government), other information about the risks posed by private facilities, such as risk management plans, will likely be included within the scope and will therefore be unavailable. In our zeal to keep information from terrorists, we will also keep it away from communities that need it the most. If the secrecy provisions of homeland security legislation are construed too broadly, protective measures in environmental justice communities may be the first, unintended casualties.

Another legislative measure that has recently surfaced that will likely affect the availability of publicly available information is the Data Quality Act, a short but powerful provision recently attached as a rider to an appropriations bill.[90] This Act imposes a higher burden on the EPA to establish the reliability of the data it releases, despite the fact that the quality of such data is largely outside the control of the agency when it is industry-generated data. The higher burden upon the EPA, and the processes for challenging the reliability of data, will mean even longer delays in reporting the data than occurs currently.[91] It might also mean that much information will not be posted, and, just as in the case of homeland security, communities will have less information available to them.[92] An equally sobering aspect of this new challenge is that, just as in the case of cost-benefit methodologies and secrecy initiatives, environmental justice activists will be largely excluded from the fora where these issues are being discussed and resolved.

CONCLUSION

Environmental justice advocates began their trek as true outsiders, unwanted guests begrudgingly given a place in the technocratic, expert-driven world of environmental regulation. They were remarkably successful, even before the Internet became widely available, because they were resourceful in obtaining information. However, since activists now depend more heavily upon the participatory, stakeholder model of regulatory processes to promote their views, their relative lack of access to information will again place them at a serious disadvantage. Publicly available information is of greater importance to environmental justice communities because they lack money and, therefore, the access to costly technical experts that regulated entities and the government routinely enjoy. In this crucial respect, and also because the new arenas of debate are

less accessible, there is a great risk that environmental justice will take a giant step backwards, in effect similar to the initial days when they were virtually excluded from regulatory processes.

This essay describes a few of the challenges predicted for the environmental justice movement in the years to come. But it is equally important to remember that these challenges are occurring within a regulatory context that is different than the one that existed upon the movement's entry. It is often argued that we are in a "second-generation" era of environmental problems, where the regulatory low-hanging fruit has been picked, *i.e.*, the easy environmental problems have been solved but the difficult and intractable ones remain.[93] We also have fewer societal resources to address those problems now that public attention and significant resources are increasingly shifted to other concerns, including terrorist activity. Another condition that must be kept in mind is that there is increasing pressure to devolve environmental regulatory authority from the national to the local level. Although devolution may appear to have certain advantages, it also has its troubling side. It is by no means clear whether greater local control will be amenable to community-based environmental decision making, or whether—because of the concentrated influence of powerful interest groups at the state and local level, coupled with significant disparities in the states' abilities to effectively address environmental problems—devolution will work against localized grassroots campaigns.

Two things are clear, however. Local organizing is the key to the vitality of the movement. Yet, paradoxically, there are significant advantages to addressing environmental justice at the national level and at the regulatory front end, in the initial design of programs, rather than reactively at the tail end of a long chain of regulatory processes, as is typified by permit challenges and siting controversies. Activists understand this and will continue to organize locally while promoting more democratic processes and adequate protections at the programmatic level (state or federal). They will continue to be tenacious and resourceful. Such is cause for optimism, but to what extent the zeal for market programs and other forms of innovation, the questionable changes to cost-benefit methodology and data dissemination, shifted national priorities and devolution will thwart these efforts remains to be seen. The challenges are indeed daunting. But then, for environmental justice activists, they always have been.

ENDNOTES

1. MARC C. LANDY, MARC J. ROBERTS, & STEPHEN R. THOMAS, THE ENVIRONMENTAL PROTECTION AGENCY, ASKING THE WRONG QUESTIONS FROM NIXON TO CLINTON, 49 (1994).

2. For an account of this regulatory condition, see Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, 54 LAW AND CONTEMP. PROB. 311 (1991).

3. *Id.*

4. Dr. Benjamin Chavis is believed to have first coined the phrase "environmental racism" during the release of his landmark study documenting exposures to hazardous waste sites. Dr. Chavis, former Executive Director of the United Church of Christ Commission for Racial Justice, defines racism as

> racial prejudice plus power. Racism is the intentional or unintentional use of power to isolate, separate and exploit others. This use of power is based on a belief in superior racial origin, identity or supposed racial characteristics. Racism confers certain privileges on and defends the dominant group, which in turn sustains and perpetuates racism. Both consciously and unconsciously, racism is enforced and maintained by the legal, cultural, religious, educational, economic, political, environmental and military institutions of societies. Racism is more than just a personal attitude; it is the institutionalized form of that attitude.

Benjamin F. Chavis, *Preface to* COMMISSION FOR RACIAL JUSTICE UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES, ix-x (1987) [hereinafter TOXIC WASTES AND RACE].

5. *See* Ed Timms, *Racial Patterns: Economics and Segregation Left Minorities Closer to Toxic Sites*, DALLAS MORNING NEWS, Oct. 3, 2000, at A1 (describing how accidental releases from refineries force residents in nearby public housing to evacuate or adopt "shelter in place" strategies).

6. *See generally* JIM SCHWAB, DEEPER SHADES OF GREEN (1994) (profiling eight communities' environmental justice campaigns).

7. TOXIC WASTES AND RACE, *supra* note 4. This was the first high-profile national study, but it was not the first study. *See* RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS: A TIME FOR DISCOURSE, at 166 (Bunyan Bryant & Paul Mohai eds., 1992) (table summarizing studies indicating exposure to air pollution disproportionate by race and income) [hereinafter RACE AND THE INCIDENCE]; U.S. GENERAL ACCOUNTING OFFICE, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES (1983) (giving the location of offsite hazardous waste facilities in EPA Region IV).

8. UNITED CHURCH OF CHRIST COMMISSION FOR RACIAL JUSTICE, PROCEEDINGS OF THE FIRST NATIONAL PEOPLE OF COLOR ENVIRONMENTAL LEADERSHIP SUMMIT (Charles Lee ed., 1991).

9. *Id.*

10. *See* U.S. EPA, 2 SUPPORTING DOCUMENT TO 1992 WORKGROUP REPORT TO THE ADMINISTRATOR 17-14 (1992) (discussing income and racially disparate exposure to environmental hazards from contaminated soil, air pollution, water pollution) [hereinafter SUPPORTING DOCUMENT]; *see also* U.S. EPA, 1 WORKGROUP REPORT TO THE ADMINISTRATION (1992).

11. U.S.E.P.A., 1 WORKGROUP REPORT TO THE ADMINISTRATION (1992).

12. *See* Marcia Coyle, Marianne Lavelle & Claudia Maclachan, *Unequal Protection: The Racial Divide in Environmental Law*, NAT'L L.J., Sept. 21, 1992, at S1-S12.

13. *Id.* at S-2.

14. *Id.*

15. For a discussion of the debates about methodology, see, *e.g.*, Vicki Been & Francis Gupta, *Coming to the Nuisance or Going to the Barrios? A Longitudinal Analysis of Environmental Justice Claims*, 24 ECOLOGY L.Q. 1 (1997); Robert Bullard, *Environmental Justice: It's More Than Waste Facility Siting*, 77 SOC. SCI. Q. 493 (1997); James T. Hamilton, *Testing for Environmental Racism: Prejudice, Profits, Political Power?*, 14 J. POL. ANALYSIS & MANAG. 107 (1995); Paul Mohai, *The Demographics of Dumping Revisited: Examining the Impact of Alternate Methodologies in Environmental Justice Research*, 14 VA. ENVTL. L.J. 615, 650-51 (1995); Vicki Been, *Analyzing Evidence of Environmental Justice*, 11 J. LAND USE & ENVTL. L. 1, 16 (1995); Christopher Boerner & Thomas Lambert, *Environmental Injustice*, 118 THE PUBLIC INTEREST Winter 1995, at 61. For a discussion of methodology in the NAT'L L. J. investigation, see, Mark Atlas, *Rush to Judgment: An Empirical Analysis of Environmental Equity in U.S. Environmental Protection Agency Enforcement Actions*, 35 L. & SOC. REV. 633 (2001).

16. In 1999, the Institute of Medicine's Committee on Environmental Justice reviewed the available scientific literature and concluded

> that there are identifiable communities of concern that experience a certain type of double jeopardy in the sense that they (1) experience higher levels of exposure to environmental stressors in terms of both frequency and magnitude and (2) are less able to deal with these hazards as a result of limited knowledge of exposures and disenfranchisement from the political process. Moreover, factors directly related to their socioeconomic status, such as poor nutrition and stress, can make people in these communities more susceptible to the adverse health effects of these environmental hazards and less able to manage them by obtaining adequate health care....

COMMITTEE ON ENVTL. JUST., INST. OF MEDICINE, TOWARD ENVIRONMENTAL JUSTICE RESEARCH, EDUCATION, AND HEALTH POLICY NEEDS 6 (1999); *see also* CLIFF RECHTSCHAFFEN & EILEEN GAUNA, ENVIRONMENTAL JUSTICE: LAW, POLICY & ENVIRONMENTAL REGULATION, 71-76 (2002) (discussing more recent studies, including studies that address facilities other than hazardous waste facilities); *see also* John A. Hird & Michael Reese, *The Distribution of Environmental Quality: An Empirical Analysis*, 79 SOC. SCI. Q. 693 (1998); Evan J. Ringquist, *Equity and Distribution of Environmental Risks: The Case of TRI Facilities*, 78 SOC. SCI. Q. 811 (1997); Rachel Morelo-Frosch, Manual Pastor, & James Saad, *Environmental Justice and Southern California's Riskscape: The Distribution of Air Toxics Exposures and Health Risks Among Diverse Communities*, 36 URB. AFF. REV. 511 (2001). For an example of a study with contrary findings, see Douglas L. Anderton et al., *Environmental Equity: The Demographics of Dumping*, 31 DEMOGRAPHY, May 1994, at 229.

17. Been & Gupta, *supra* note 15.

18. *See* RACE AND THE INCIDENCE, *supra* note 7, at 166.

19. LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT, 61 (2001).

20. The term, in this context, was probably first used derisively by Robert Bullard. *See* Robert D. Bullard, *A New "Chicken-or-Egg" Debate: Which Came First—The Neighborhood, or the Toxic Dump?*, 19 THE WORKBOOK, Summer 1994, at 60.

21. This was a longitudinal study of commercial hazardous waste facilities; the researchers concluded that there was statistical evidence that these facilities were disproportionately sited near Hispanic communities, but at the same time they found no statistical evidence of disproportionate siting near African-American communities. Been & Gupta, *supra* note 15, at 32. This might lead one to conclude that the disparity near African-American communities was the result of post-siting market dynamics. However, the same study found that, in general, there were no significant demographic changes in the vicinity after these facilities were sited. *Id.*

22. *Id.*

23. The answer could lie in the facilities that were sited before 1970. Reliable demographic information on these facilities at the time of the siting was not available to the researchers. *Id.* Robert Bullard criticizes Been and other researchers for excluding older facilities from the studies due to the lack of census tract data because this has the effect of excluding some of the largest regional hazardous waste landfills. Bullard, *supra* note 15. James Hamilton notes that, of the treatment, storage, and disposal facilities (TSDFs) for hazardous waste with a Resource Conservation and Recovery Act permit in 1987, 60 percent of on-site treatment facilities (those that handle their own waste) and limited commercial facilities (those that primarily handle their own waste but may accept waste from other facilities), and one-third of commercial TSDFs (primarily handle other facilities' wastes for a fee) were sited before 1970. Hamilton, *supra* note 15.

24. Evan J. Ringquist, *Equity and the Distribution of Environmental Risk: The Case of TRI Facilities*, 78 SOC. SCI. Q. 811 (1997); James Sadd, et al., *"Every Breath You Take....": The Demographics of Toxic Air Releases in Southern California*, 13 ECON. DEVELOP. Q. 107 (1999); Susan A. Perlin, et al., *Distribution of Industrial Air Emissions by Income and Race in the United States: An Approach Using the Toxic Release Inventory*, 29 ENVTL. SCI. TECHN. 69 (1995).

25. There are more candid discussions promoting class targeting. A 1984 report prepared for the California Waste Management Board by J. Stephen Powell of Cerrell Associates observed that all socioeconomic groupings tend to resent the nearby siting of major facilities, but the middle and upper-socioeconomic strata possesses better resources to effectuate their opposition. Accordingly, the report advised that middle and higher-socioeconomic-strata neighborhoods should not fall at least within the one-mile and five-mile radii of the proposed site. J. STEPHEN POWELL, CERRELL ASSOCIATES, POLITICAL DIFFICULTIES FACING WASTE TO ENERGY CONVERSION PLANT SITING, REPORT TO THE CALIFORNIA WASTE MANAGEMENT BOARD 42-43 (1984). The report noted, "Ideally,...officials and companies should look for 'lower socioeconomic neighborhoods.'" Dick Russell, *Environmental Racism*, 11 AMICUS J. 22, 26 (quoting the Cerrell report). The same sentiments have been expressed in the international arena. In a memorandum from World Bank Vice President and Chief Economist Lawrence Summers to his colleagues, Summers wrote, "Shouldn't the World Bank be encouraging more migration of the dirty industries to the LDCs (less developed countries)?" *World Bank Dumps on Third World Again*, RACE, POVERTY & THE ENV'T, Fall 1991–Winter 1992, at 12 (quoting the memorandum). Summers further proposed that the Bank encourage the dumping of toxic waste in Africa. *Id.* (quoting the memorandum). Summers also noted, "I think the economic logic behind dumping a load of toxic waste in the lowest wage country is impeccable and we should face up to that." *Id.* (quoting the memorandum). When the memorandum was publicized, Summers claimed his remarks were intended as a "sardonic counter-point, an effort to sharpen the analysis." *Id.* (quoting the memorandum).

26. *A Place at the Table, A Sierra Roundtable on Race, Justice and the Environment*, SIERRA MAG., May–June 1993, at 51.

27. However, the few legal challenges that were cast in ethical terms—generally under the equal protection clause of the U.S. Constitution rather than the environmental statutes—were unsuccessful. *See generally*, Chapter XIII of RECHTSCHAFFEN & GAUNA, *supra* note 16 (chapter on constitutional claims).

28. Richard J. Lazarus, *Symposium: Innovations in Environmental Policy: "Environmental Racism! That's What It Is,"* 2000 U. ILL. L. REV. 255 (describing effectiveness of environmental justice advocates).

29. *See generally* RECHTSCHAFFEN & GAUNA, *supra* note 16; COLE & FOSTER, *supra* note 19.

30. *See* Environmental Protection Agency, Environmental Justice Strategy: Executive Order 12898, EPA/200-R-95-00 (1995).

31. *See, e.g.*, U.S. Envtl. Protection Agency, Cumulative Exposure Project, *available at* http:www.epa.gov/cumulativeexposure/index.htm (last updated Apr. 4, 1999).

32. For examples of federal efforts beyond the EPA, see the web page of the Environmental Justice Resource Center at Clark Atlanta University, *available at* http://www.ejrc.cau.edu/ (last visited Nov. 11, 2002).

33. DEEOHN FERRIS, GLOBAL ENVIRONMENTAL RESOURCES, INC., REPORT TO THE FORD FOUNDATION COMMUNITY AND RESOURCE DEVELOPMENT PROGRAM ON PROMOTING COMMUNITY BUILDING THROUGH FUNDING APPROACHES AND COLLABORATIVE ENVIRONMENTAL JUSTICE LEGAL STRATEGIES (2002), *available at* http://www.law.gwu.edu/csrg/ej.doc.

34. *See generally* RECHTSCHAFFEN & GAUNA, *supra* note 16, at 351 (Chapter on Enforcement of the Civil Rights Act); *see also* Bradford C. Mank, *Using § 1983 to Enforce Title VI's Section 602 Regulations*, 49 U. KAN. L. REV. 321 (2001); Bradford C. Mank, *The Draft Title VI Recipient and Revised Investigation Guidances: Too Much Discretion for EPA and a More Difficult Standard for Complainants?*, 30 ENVTL. L. REP. 11,144 (2000).

35. NATIONAL ADVISORY COUNCIL FOR ENVIRONMENTAL POLICY AND TECHNOLOGY, REPORT OF THE TITLE IV IMPLEMENTATION ADVISORY COMMITTEE: NEXT STEPS FOR EPA, STATE, AND LOCAL ENVIRONMENTAL JUSTICE PROGRAMS (1999).

36. The most prominent of these is the National Environmental Justice Advisory Council (NEJAC). For more information regarding the NEJAC, see their web page, *available at* http://www.epa.gov/compliance/environmentaljustice/nejac/ (last visited Nov. 11, 2002).

37. *See, for example*, Report, Forum on Building Collaborative Models to Achieve Environmental Justice, 19 (May 17 & 18, 2001, Chevy Chase, Md.), available at http://www.icma.org.

38. *Id.* (describing collaborative efforts among federal and subfederal agencies, tribes, the private sector, and impacted communities).

39. The efforts of Just Transition, a project with a central mission to transition from ecologically harmful activities at the U.S.–Mexico boarder. For more information on Just Transition, see their web page, *available at* http://www.jtalliance.org/ (last visited Nov. 11, 2002).

40. Stephen Johnson explains,

> Classical economic theory institutionalizes and exacerbates existing social disparities that are based on unequal distributions of income. As Judge Richard Posner suggested, in a free market economy, in which voluntary exchange is permitted, "resources are shifted to those uses in which the *value* to consumers, as measured by their *willingness to pay*, is highest. When resources are being used where their value is highest, we may say that they are being employed *efficiently*." Although Judge Posner defined "value" in terms of "willingness to pay," on closer reflection it is clear that Judge Posner and other economists incorporated "ability to pay" into the concept of "willingness to pay." Thus, under traditional economic theory, a pollutant trading program, tax program, or similar market-based reform that shifts pollution to low-income communities is operating efficiently and, therefore, desirably because resources, such as clean air and clean water, are shifted to the uses in which the value to consumers, as measured by their willingness (and ability) to pay, is highest. Because wealthy communities are "willing to pay" more for clean air and water than low-income communities, the market operates efficiently when it funnels those resources to those communities rather than to low-income communities. In a free market, low-income communities will never have sufficient financial resources to buy clean air, clean water, and similar environmental and public health resources from wealthy communities or polluters....

Stephen M. Johnson, *Economics vs. Equity: Do Market-Based Environmental Reforms Exacerbate Environmental Injustice?*, 56 WASH. & LEE L. REV. 111, 118-19 (1999) (citing Richard A. Posner, ECONOMIC ANALYSIS OF LAW § 1.1 (4th ed. 1992)); *see also* Sheila Foster, *Justice from the Ground*

Up: Distributive Inequities, Grassroots Resistance, the Transformative Politics of the Environmental Justice Movement, 86 CAL. L. REV. 775 (1998).

41. *See* Johnson, *supra* note 40.

42. Rena Steinzor has noted that "some conservatives have even gone so far as to characterize a clean environment as a 'luxury good' that should be affordable only by the affluent." Rena I. Steinzor, *Toward Better Bubbles and Future Lives*, 32 ENVTL. L. REPT. 11421, 11422 (2002) (citing P.J. O'ROURKE, ALL THE TROUBLE IN THE WORLD 201 (1994); *Making the Poor Pay for Pollution*, WASH. TIMES, Sept. 20, 1993, at A22; Michael Kinsley, *Twilight Zones*, NEW REPUBLIC, May 25, 1992, at 6).

43. *See generally* EPA Office of Policy, Economics & Innovation Home Page, *available at* http://www.epa.gov/opei (last updated Nov. 6, 2002). The Clinton administration used the term "reinvention," but it was promptly dropped under the Bush administration.

44. *See generally* ROBERT V. PERCIVAL, ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY (3d ed., 2000) (describing standards and comparing regulatory strategies).

45. *Id.* at 642-43 (discussing effluent limitations and technology standards under the Clean Water Act).

46. *Id.*

47. PERCIVAL ET AL., *supra* note 44 (discussing the debate over technology-based standards).

48. For a discussion of command and control, its critics and defenders, *see generally* Dennis D. Hirsch, *Second Generation Policy and the New Economy*, 29 CAP. U. L. REV. 1 (2001).

49. U.S. ENVTL. PROTECTION AGENCY OFFICE OF THE INSPECTOR GENERAL EVALUATION REPORT: AIR, OPEN MARKET TRADING PROGRAM FOR AIR EMISSIONS NEEDS STRENGTHENING 2 (Sept. 30, 2002), *available at* http://www.epa.gov/oigearth/ereading_room/omt.pdf [hereinafter INSPECTOR GENERAL EVALUATION REPORT].

50. Trades among emission units within a facility might be used by major sources to avoid certain technology requirements or to avoid permit review under the Clean Air Act. The primary permit program's most onerous requirements come from a pre-construction permit program termed "new source review or NSR," which sets the emission requirements for units within a major facility. For discussion of the mechanics of the nonattainment NSR program, see Eileen Gauna, *Major Sources of Criteria Pollutants in Nonattainment Areas: Balancing the Goals of Clean Air, Environmental Justice, and Industrial Development*, 3 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 379 (1996); for a discussion of the mechanics of the PSD program, see Craig N. Oren, *Prevention of Significant Deterioration: Control Compelling versus Site-Shifting*, 74 IOWA L. REV. 1 (1988).

51. The acid rain program under the Clean Air Act is the premier example of a regional program.

52. *See* INSPECTOR GENERAL EVALUATION REPORT, *supra* note 49.

53. Eileen Gauna, *EPA at Thirty: Fairness in Environmental Protection*, 31 ENVTL. L. REP. 10,528, (2001) (discussing recent guidance for the design of flexible air permits).

54. Richard Toshiyuki Drury et al., *Pollution Trading and Environmental Injustice: Los Angeles' Failed Experiment in Air Quality Policy*, 9 DUKE ENVTL. L. & POL'Y F., 231 (1999).

55. *Id.*

56. In this program, there were significant technical and enforcement problems. *Id. See also* Clifford Rechtschaffen, *Competing Visions: EPA and the States Battle for the Future of Environmental Enforcement*, 30 ENVTL. L. REP. 10803 (Oct. 2000).

57. A variable offset rate would essentially make pollution reduction in impacted communities "count" more within the trading regime. *See* Gauna, *supra* note 53, at 10564.

58. *Id.*

59. Many of the older utility plants were grandfathered into law and since have taken advantage of certain exemptions (typically the "routine maintenance and repair" exemption) to keep from having to install more stringent pollution control equipment. There was a

significant initiative by the Justice Department to bring power plants into compliance. For two different perspectives on the use of the routine maintenance and repair exception to new source review, the Department of Justice and state NSR enforcement initiative and the ensuing review of the NSR program by the Bush Administration, compare U.S. ENVTL. PROTECTION AGENCY, NSR 90-DAY REVIEW BACKGROUND PAPER, A-2001-19 (June 22, 2001) [hereinafter USEPA BACKGROUND PAPER] with CLEAN AIR TASK FORCE, POWER TO KILL: DEATH AND DISEASE FROM POWER PLANTS CHARGED WITH VIOLATING THE CLEAN AIR ACT (June 2001), *available at* http://cta.policy.net/relatives/18300.pdf.

60. Under current law, offsets must be surplus, *i.e.*, not otherwise legally required. *See* Gauna, *supra* note 53, at 387-89 (discussing offset requirements).

61. USEPA BACKGROUND PAPER, *supra* note 59, at 3-4.

62. *Id.* at 12 (discussing trends in electric capacity and utilization).

63. Steinzor questions the practice, in the name of flexibility, of granting of exemptions from precise monitoring requirements that bear no relationship to producing superior performance. Rena I. Steinzor, *Reinventing Environmental Regulation: The Dangerous Journey From Command to Self-Control*, 22 HARV. ENVTL. L. REV. 103, 194 (1998).

64. *See* Gauna, *EPA at Thirty*, *supra* note 53, at 10554-57 (May 2001) (discussing the EPA's proposal to allow refineries to use anticipated reductions from cleaner gasoline to offset increases in emissions at refineries).

65. Environmental News Service, EPA Approves Interpollutant Trading for Louisiana (Oct. 30, 2001), *available at* http://ens-news.com/ens/archives/2002/oct2002archive.asp (noting criticism of the plan because it allows oil and chemical companies to emit more carcinogenic and other hazardous chemicals in return for reducing less dangerous nitrogen oxide emissions).

66. To date, there is no regulatory benefit-cost analysis on market programs that factor in the costs of hot spots and nonenforcement.

67. Robert R. Kuehn, *Denying Access to Legal Representation: The Attack on the Tulane Environmental Law Clinic*, 4 J. LAW & POL'Y 33 (2001) (describing challenge to a Clean Air Act Title V permit application by Shintech).

68. *See* Drury, et al. *supra* note 54 (describing challenge to car scrapping rule by Communities for a Better Environment).

69. In a recent meeting of the National Environmental Justice Advisory Council, activists testified about the inadequacy of the current water quality standards. *See* Transcript of NEJAC meeting, Dec. 6, 2001, *available at* http://www.epa.gov/Compliance/resources/publications/ej/nejacmtg/transcript_seattle_120601.pdf.

70. These caps are called PALS, which stands for plantwide applicability limits. The Bush administration has announced its plan to formalize a proposed rule allowing these caps as a matter of course; until now they have been allowed only in special projects. For the Bush Administration's proposed revisions, see the EPA's New Source Review web page, *at* http://www.epa.gov/air/nsr-review/ (Nov. 22, 2002). For the EPA's recommendations, including a recommendation concerning the use of PALs, see RECOMMENDED IMPROVEMENTS TO THE NEW SOURCE REVIEW PROGRAM (June 2002), *available at* http://www.epa.gov/air/nsr-review/recommendations.html.

71. The acronym stands for "total maximum daily loads."

72. Testimony before the Subcommittee on Water Resources and the Environment of the U.S. House of Representatives regarding Water Quality Trading: An Innovative Approach to Achieving Water Quality Goals on a Watershed Basis, submitted by Rena Steinzor, University of Maryland School of Law, on behalf of the Center for Progressive Regulation, Washington, D.C., June 13, 2002, *available at* http://www.house.gov/transportation/water/06-13-02/steinzor.html (last visited Nov. 11, 2002) [hereinafter Steinzor Testimony].

73. Corrosion Proof Fittings v. Environmental Protection Agency, 947 F.2d 1201 (5th Cir. 1991).

74. *Id.*

75. Although the full flavor of this issue, in all its technical glory, cannot be adequately described here, Lisa Heinzerling and Frank Ackerman have critiqued this troubling practice in a cogent and accessible way. *See* Lisa Heinzerling & Frank Ackerman, Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection, Georgetown Environmental Law and Policy Institute, Georgetown University Law Center (2002); *see also* Lisa Heinzerling, *The Perils of Precision*, ENVTL. F. Sept./Oct. 1998, at 38; Lisa Heinzerling, *The Rights of Statistical People*, 24 HARV. ENVTL. L. REV. 189 (2000).

76. Heinzerling & Ackerman, *supra* note 75, at 1-2 (Executive Summary).

77. *Id.* at 2.

78. OIRA stands for Office of Information and Regulatory Affairs.

79. *See* Comments submitted by the Center for Progressive Regulation on the Draft 2002 Report to Congress on the Costs and Benefits of Federal Regulations, May 28, 2002, at 11-12, *available at* http://www.ombwatch.org/regs/2002/cprcomments; Resources for the Future (RFF) Press Release by Alan Krupnik, senior fellow and director of RFF's Quality of the Environment division, Mar. 20, 2002, *available at* http://www.rff.org/news/newsarticles/keyeconomisturges.htm. As stated by Krupnik, "Using the techniques advanced by OMB assumes that those with compromised health or approaching the end of their lives places less value on the remainder of their lives." *See also* 29 INSIDE EPA 13 (Mar. 29, 2002).

80. Steinzor, *supra* note 42.

81. It has been noted that asthma is on the rise in low-income communities of color. Craig N. Oren, *Run Over by American Trucking Part I: Can EPA Revive Its Air Quality Standards?*, 29 ENVTL L. REP. 10653; 10661 (1999)

> [A]sthma is apparently becoming more common—even though air pollutant concentrations have been dropping—and appears to be concentrated among the poor and non-white. According to the Center for Disease Control in Atlanta, the incidence of acute asthma attacks among children has doubled in the past decade, even though highly effective medications have been developed. Asthma is the most common cause of hospitalization among children—five million hospitalizations each year—and deaths among children with asthma rose by 78 percent from 1980 to 1993. The disease in concentrated in heavily populated urban areas. A recent study in New York City shows that hospitalization rates for asthma are far higher in poorer, minority areas than in affluent areas....

Id. at 10661.

82. SUPPORTING DOCUMENT, *supra* note 10, at 10.

83. *See* OMB (Office of Management and Budget) Watch web page, available at http://www.ombwatch.org/ (last visited Nov. 11, 2002).

84. For example, influence is likely to be comparatively weak due to the inability of environmental justice organizations to hire lobbyists to promote their positions. Nor can environmental justice activists enjoy the types of access to elected governmental officials that is sometimes facilitated by large campaign contributions.

85. As this article went to press, legislation of this nature passed the House and Senate. It remains unclear, given the broad language of the Act, how far reaching its provisions will be when implemented.

86. *See* Stephen Gidiere & Jason Forrester, *Balancing Homeland Security and Freedom of Information*, 16 NAT. RESOURCES & ENVT. 139, 144 (2002).

87. Dan Morgan, *Disclosure Curbs in Homeland Bill Decried*, WASH. POST, Nov. 16, 2002, at A13.

88. *See* Bradley C. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?*, 89 GEO. L.J. 257, 340 (2001); for an analysis of another disclosure initiative, see Clifford Rechtschaffen, *The Warning Game: Evaluating Warnings Under California's Proposition 65*, 23 ECOLOGY L.Q. 303 (1996).

89. For an example, see Environmental Defense's user-friendly format, *available at* www.Scorecard.org (last visited Nov. 11, 2002); *see also* EPA's Envtl. Justice Mapper, *available at* http://es.epa.gov/oeca/main/ej/ejmapper (last updated Oct. 1, 2002).

90. Treasury and General Government Appropriations Act for Fiscal Year 2002, Pub. L. No.106 Section 515(a) (2001).

91. For example, the EPA released the 2000 TRI data on May 23, 2001. *See generally* http://www.epa.gov/tri/tridata/tri00/data/index.htm.

92. *See generally* U.S. Envtl. Protection Agency, Guidelines for Ensuring and Maximizing Quality, Objectivity, Utility and Integrity of Information Disseminated by the Environmental Protection Agency, *available at* http://www.epa.gov/oei/qualityguidelines/EPA-OEI-IQG-FINAL-10.2.pdf (last visited Nov. 27, 2002).

93. The factual premise of this observation is questionable. Environmental justice activists routinely point to very low hanging fruit that is virtually rotting on the vine, *i.e.*, pollution control or prevention that can be easily accomplished technically but for the influence of powerful interest groups. *See* Eileen Gauna, *Farmworkers as an Environmental Justice Issue: Similarities and Differences*, 25 ENVIRONS 67, 74-75 (2002) (describing prevention of pesticide poisoning). But this may be a case where perception is more important than reality, especially if regulators, believing the regulatory low hanging fruit has been picked, turn their attention elsewhere.