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ENVIRONMENTAL JUSTICE RENEWAL ACT

SEPTEMBER 24 (legislative day, SEPTEMBER 17), 2008.—Ordered to be printed

Mrs. BOXER, from the Committee on Environment and Public Works, submitted the following

R E P O R T

[To accompany S. 2549]

together with

MINORITY VIEWS

[Including an estimate from the Congressional Budget Office]

The Committee on Environment and Public Works, to which was referred the bill (S. 2549) to require the Administrator of the Environmental Protection Agency to establish an Interagency Working Group on Environmental Justice to provide guidance to Federal agencies on the development of criteria for identifying disproportionately high and adverse human health or environmental effects on minority populations and low-income populations, and for other purposes, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE AND SUMMARY OF THE LEGISLATION

The purpose of this bill is to ensure that every Federal Agency take environmental justice into account when carrying out activities and programs; establish an Interagency Working Group on environmental justice; expand and create new grant programs to help communities and States address environmental justice; and increase training and accountability regarding environmental justice at the Environmental Protection Agency (EPA).

BACKGROUND AND NEED FOR THE LEGISLATION

Background

Environmental pollution has a disproportionate impact on minority and low-income populations.

In 1982, residents in Warren County, North Carolina, a rural, predominantly low-income, African-American area, protested the dumping of soil contaminated with polychlorinated biphenyls (PCBs) in their community—a “solution” that would eventually result in PCB contamination of drinking water. Over 500 residents were arrested when they tried to stop the trucks carrying the soil from dumping them in the town landfill. Although they were unsuccessful, this incidence galvanized civil rights leaders into action on issues of what they termed “environmental racism.” The term “environmental justice” (EJ) is now widely used to describe this concern and movement, which focuses on addressing the disproportionate impact of pollution on low-income and minority communities.

By 1990, in response to the concerns of environmental justice advocates, the George H.W. Bush Administration established the Environmental Equity Work Group, which eventually determined that “racial minority and low-income populations experience higher than average exposures to selected air pollutants, hazardous waste facilities, contaminated fish and agricultural pesticides in the workplace.” In 1992, the George H.W. Bush Administration established the Office of Environmental Equity, now known as the Office of Environmental Justice, at the EPA.

In 1994, President Clinton signed Executive Order 12898, which mandated federal agencies to incorporate environmental justice into their work and programs. As part of that Executive Order, EPA convened an Interagency Working Group on Environmental Justice, and by 1995, the Agency had produced an environmental justice strategy. The Clinton Administration also formed the National Environmental Justice Advisory Council (NEJAC) which met multiple times during the Clinton Administration.

Since the activities of the first Bush and Clinton Administrations, however, in 2001 and 2005, EPA Administrators released memos attempting to redefine environmental justice as something to address environmental pollution among all Americans, rather than recognizing the importance of environmental justice in addressing the disproportionate impact of pollution upon low-income and minority communities.

- Although the NEJAC met 16 times over 7 years during the Clinton Administration, it has met only 5 times in 8 years during the Bush Administration.

- A 2004 report from the Office of the Inspector General at the EPA noted that the “EPA has not fully implemented Executive Order 12898 nor consistently integrated environmental justice into its day-to-day operations.”

- In 2005, the Government Accountability Office released a report concluding that the agency has failed to consistently consider environmental justice in making rules that protect families from environmental degradation and pollution.

- In 2006, the Office of the Inspector General released another report on the EPA’s environmental justice record, concluding that

EPA senior management had not “sufficiently directed program and regional offices to conduct environmental justice reviews.”

The Environmental Justice Renewal Act was introduced to address some of the concerns raised over the Administration’s handling of environmental justice.

Need for legislation

S. 2549 was introduced by Senator Reid for Senator Clinton on January 23, 2008. The bill’s cosponsors are Senator Cardin, Boxer, Lautenberg, and Schumer. This bill is designed to address numerous aspects of environmental justice issues in our country. The Committee notes that studies over a number of years have shown that toxic waste dumps are located in minority and low-income communities more often than can be explained by chance alone.¹ Studies have also shown that minority populations are more likely to breathe dangerous levels of toxic pollution than other groups.² It is also important to remember that people in low income and minority communities may face cumulative threats from several sources of toxins, including from the air and water pollution, contaminated lead dust, and other dangerous sources of toxins.

Dr. Bob Bullard, a pioneer in the environmental justice movement who testified before the Environment and Public Works Committee, summed up the threats by stating:

Poor children . . . are poisoned in their homes. And when they go to school, they get another dose. And when they go outside and play, they get another dose. It’s a slow-motion disaster: the most vulnerable population in our society is children, and the most vulnerable children are children of color. If we protect the most vulnerable in our society—these children—we protect everybody.

Communities of color and low income people should not shoulder an unfair burden of the pollution produced in our country. By helping to protect these heavily-exposed populations, we can improve their lives, the lives of their children, and communities across our nation that is burdened by a legacy of pollution.

The Environmental Justice Renewal Act can help to address many of the problems that face low income and communities of color as they attempt to solve environmental justice problems. This Act would hold federal agencies accountable for developing and implementing plans to address environmental justice problems that may exist as a result of their rules or policies, or that may exist within issues that the agencies are actively involved in. The ombudsman can serve as an important neutral agent—who is extremely important given the long history of documented environmental justice problems in this country, and the Agency’s Inspector

¹G.A.O., “Siting of Hazardous Waste Landfills and Their Correlation With Racial and Economic Status of Surrounding Communities.” (1983); United Church of Christ Commission for Racial Justice, *Toxic Wastes and Race in the United States: A National Report on Racial and Socioeconomic Characteristics of Communities With Hazardous Waste Sites* (1987); Benjamin Goldman & Laura Fitton, *Toxic Wastes and Race Revisited: An Update of the 1987 Report on the Racial and Socioeconomic Characteristics of Communities With Hazardous Waste Sites* (1994).

²Paul Mohai & Bunyan Bryant, *Environmental Racism: Reviewing the Evidence*, in *Race and the Incidence Of Environmental Hazards: A Time For Discourse* (Bunyan Bryant & Paul Mohai Eds., 1992); U.S. EPA, *Environmental Equity: Reducing Risk For All Communities*, Vol. 2: Supporting Document 7–15 (1992).

General criticizing EPA's actions. Issues of Environmental Justice are complicated and include many social and demographic factors. It is important that the Ombudsmen adequately address these issues with appropriate data driven actions that reflect the appropriate accountability to federal agencies.

The grant and training programs will help federal, state, and local representatives to be aware of potential environmental justice problems and actively find ways to address such problems where they occur. This type of training is routine in other settings, such as with occupational hazards, waste, graft, and corruption. Government employees should be similarly trained to address environmental justice problems that can have serious consequences for communities of people burdened by exposure to dangerous, toxic chemicals.

The Act would also address the National Environmental Justice Advisory Committee (NEJAC). The NEJAC, along with Act's emphasis on citizen's meetings and an information clearing house are meant to provide tools that can help investigate problems, coordinate between different groups and individuals to address problems, and to preserve and build on a growing body of knowledge on how to best and most efficiently address environmental justice problems.

The Act's reporting requirement will help to provide critical oversight and assessment information on the success or need for adjustments on certain efforts. Oversight and assessment are vitally important on this issue to ensure that the federal government not only uses its funds wisely, but to ensure that this problem is addressed quickly and thoroughly.

SUMMARY OF MAJOR PROVISIONS OF THE BILL

SECTION-BY-SECTION ANALYSIS

Section 1. Short title

Section 1 establishes the short title of the Act as "The Environmental Justice Renewal Act."

Section 2: Definitions

Section 2 defines terms used in the bill.

Environmental justice is defined as the fair treatment and meaningful involvement of all individuals regardless of race, color, or national origin, educational level, or income with respect to the development, implementation, and enforcement of environmental laws (including regulations) to ensure that—

(A) minority and low-income populations have access to public information relating to human health and environmental planning, regulations, and enforcement; and

(B) no minority or low-income population shall be exposed to a disproportionate burden of the negative human health and environmental impacts of pollution or other environmental standards.

Environmental justice community is defined as a community with significant representation of racial or ethnic minorities or low-income populations that experiences, or is at risk of experiencing, a significant or disproportionate burden of environmental stressors, risks, adverse human health effects, or environmental effects.

Fair Treatment is defined as: the conduct of policies and practices to ensure that no group of individuals (including racial, ethnic, or socioeconomic groups) experiences a disproportionate burden of high and adverse human health or environmental effects resulting from any program, activity, or policy of a Federal agency.

Section 3: Interagency Working Group on Environmental Justice

This section would codify the Interagency Working Group on Environmental Justice, requiring it to outline measurable duties and tasks to advance environmental justice throughout the government, including both evaluation of current policies and programs and development of additional plans to address environmental justice. The Working Group will be responsible for holding public meetings on environmental justice, developing interagency model projects on environmental justice, and providing guidance on identification, coordination, and consistency among environmental justice projects. Each Federal agency participating in the Working Group will be responsible for developing an environmental justice strategy for its agency, and then bringing them together at the Working Group level to develop a coordinated Interagency Strategy for the entire federal government. Such Interagency Strategy will be finalized no later than 2 years following the date of enactment of this Act.

Section 4: Responsibilities of Federal agencies

This section requires each Federal agency participating in the Working Group to develop an agency-wide environmental justice strategy to identify and address adverse health impacts on minority and low-income populations, ensure meaningful public participation, and integrate environmental justice into activities. Such agency-wide strategy will be finalized no later than one year following the date of enactment of this Act. After finalization, each agency shall submit to the Working Group an annual report on progress of implementing such strategy.

Section 5: Ombudsmen

This section shall require the creation of an Environmental Justice Ombudsman position at the EPA's main office, and allow for the appointment of regional Ombudsman. The duties of such Ombudsman shall be to receive, review and process complaints and allegations with respect to the environmental justice activities and programs of the EPA.

Section 6: Employee training

This section requires the Administrator to offer environmental justice training to each employee of the EPA. Any individual hired by the EPA one year after the date of enactment of this act shall be required to undergo environmental justice training. All individuals who have been appointed to the position of environmental justice coordinator, environmental justice ombudsman, or any other position involving environmental justice activities shall be required to complete such training. Failure to do so will result in a transfer from EJ-related activities.

Section 7: Grant programs

This section sets up several grant programs.

Part (a) codifies the Small Grant Program, through which non-profit, community-based organizations can develop collaborative partnerships, educate and provide outreach to the community, and identify environmental or public health concerns. These grants are authorized at \$5 million annually for FY 2009 through 2013.

Part (b) codifies the Collaborative Grant Program, through which non-profit community based organizations address local environmental justice that fall under the jurisdiction of at least two relevant environmental statutes, using an EPA-developed collaborative problem solving framework. These grants are authorized at \$5 million annually for FY 2009 through 2013.

Part (c) establishes the Interagency Grant Program, through which partnerships of government agencies, community based organizations, educational institutions, and local businesses receive grants to address cross-cutting environmental justice issues. These grants are authorized at \$5 million annually for FY 2009 through 2013.

Part (d) establishes the State Grant Program, through which states, tribes, and territories would each receive funding to establish and improve environmental justice activities. Such funding could not be used to supplant currently existing state funds directed toward environmental justice programs. These grants would be authorized at \$2.5 million annually for FY 2009 through 2013.

Part (e) would be used to establish Community-Based Participatory Research Grant, through which multiyear grants will be given to partnerships of universities and community-based organizations to research and improve health outcomes for residents of environmental justice communities. These grants would be authorized at \$2.5 million annually for FY 2009 through 2013.

Section 8: Environmental Justice Basic Training Program

This section is modeled after the Superfund training program, and is designed to ensure that those in impacted communities have the tools to begin remediation of the environmental hazards in their communities, and have the skills needed to detect, assess, and evaluate hazardous substances and their impact on human health. \$3 million will be authorized for this program annually for FY 2009 through 2013.

Section 9: National Environmental Justice Advisory Council

This section would codify the National Environmental Justice Advisory Council (NEJAC), based upon the language of the current NEJAC charter, and provide new requirements to ensure that the NEJAC meets no less than biannually.

Section 10: Environmental Justice Clearinghouse

This section requires the establishment, not later than one year of the date of enactment, of an Internet-based clearinghouse of environmental justice information, including a directory of individuals who possess technical expertise in environmental justice. The Administrator shall consult with academic and community-based organizations in developing such clearinghouse, and the NEJAC shall review the contents of such clearinghouse on an annual basis.

Section 11: Public meetings

This section requires the EPA to hold public meetings on environmental justice issues in each of its ten regional offices on a biennial basis to get public input on the future direction of environmental justice activities. The EPA shall be required to have at least one staff member at the level of Assistant Administrator in attendance.

Section 12: Supplemental environmental projects for environmental justice communities

This section ensures that all SEPs developed as part of settlements relating to violations in environmental justice communities are developed with the meaningful participation of and result in a quantifiable improvement to the health and well-being of individuals in environmental justice communities.

Section 13: Evaluation by Government Accountability Office

This section requires a biennial GAO report evaluating the effectiveness of the activities in this Act.

LEGISLATIVE HISTORY AND VOTES

VOTES

The Committee on Environment and Public Works held a business meeting on July 31, 2008. Senator Inhofe offered an amendment to strike the provisions of the bill relating to the ombudsman, which was rejected by vote of 11 to 8. Senators Alexander, Isakson, Barrasso, Bond, Vitter, Craig, Warner, Inhofe voted for the amendment. Senators Klobuchar, Baucus, Lautenberg, Lieberman, Cardin, Sanders, Carper, Clinton, Voinovich, Whitehouse, and Boxer voted against the amendment.

Senator Inhofe also offered an amendment to express a Sense of the Senate on energy, which was rejected by a vote of 10–9. Senators Alexander, Isakson, Barrasso, Bond, Vitter, Voinovich, Craig, Warner, and Inhofe voted yes. Senators Klobuchar, Baucus, Lautenberg, Lieberman, Cardin, Sanders, Carper, Clinton, Whitehouse, and Boxer voted no.

The Committee favorably reported the bill out of committee on an 11–8 vote, with Senators Boxer, Cardin, Klobuchar, Lautenberg, Whitehouse, Sanders, Voinovich, Baucus, Carper, Clinton and Lieberman voting for the bill, and Senators Alexander, Barrasso, Inhofe, Bond, Craig, Isakson, and Warner voting against the bill.

REGULATORY IMPACT STATEMENT

In compliance with section 11(b) of rule XXVI of the Standing Rules of the Senate, the committee notes that the Congressional Budget Office has found that “S. 2549 contains no . . . private-sector mandates as defined in” the Unfunded Mandates Reform Act (UMRA). In other words, its economic impact on private entities would be below the UMRA threshold.

MANDATES ASSESSMENT

In compliance with the Unfunded Mandates Reform Act of 1995 (Public Law 104–4), the Committee notes that the Congressional

Budget Office has said that “S. 2549 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.” The CBO further found that “The bill would benefit state, local, and tribal governments by establishing several grant programs to address environmental justice issues within communities and by establishing a research grant program for institutions of higher education to conduct studies on those issues.”

CONGRESSIONAL BUDGET OFFICE ESTIMATE

SEPTEMBER 2, 2008.

Hon. BARBARA BOXER,
Chairman, Committee on Environment and Public Works, U.S. Senate, Washington, DC.

DEAR MADAM CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 2549, the Environmental Justice Renewal Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Susanne S. Mehlman.

Sincerely,

PETER R. ORSZAG.

Enclosure.

S. 2549—Environmental Justice Renewal Act

Summary: S. 2549 would require the Environmental Protection Agency (EPA) to establish an Interagency Working Group to advise federal agencies about how to best minimize any disproportionately high and adverse effects of pollution on minority and low-income populations (referred to in the bill as environmental justice issues). Enacting this legislation also would require EPA to establish an ombudsman to address issues concerning such effects, a training program concerning environmental justice issues for EPA employees, an advisory council, and an Internet-based clearinghouse for information on environmental justice. Finally, the bill would authorize specified appropriations for EPA to provide grants to states, nonprofit organizations, federal agencies, and other entities working on those problems.

CBO estimates that implementing S. 2549 would cost \$106 million over the 2009–2013 period, assuming appropriation of the necessary amounts. Enacting S. 2549 would not affect direct spending or receipts.

S. 2549 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

Estimated cost to the Federal Government: The estimated budgetary impact of S. 2549 is shown in the following table. The costs of this legislation fall within budget function 300 (natural resources and environment).

	By fiscal year, in millions of dollars—					
	2009	2010	2011	2012	2013	2009–2013
CHANGES IN SPENDING SUBJECT TO APPROPRIATION						
Grant Programs:						
Authorization Level	26	26	26	26	26	130

	By fiscal year, in millions of dollars—					
	2009	2010	2011	2012	2013	2009–2013
Estimated Outlays	10	20	23	25	26	104
EPA Support for Environmental Justice Activities:						
Estimated Authorization Level	*	*	*	*	*	2
Estimated Outlays	*	*	*	*	*	2
Total Changes:						
Authorization Level	26	26	26	26	26	132
Estimated Outlays	10	20	23	25	26	106

Note: * = less than \$500,000.
Numbers may not sum to totals because of rounding.

Basis of estimate: For this estimate, CBO assumes that S. 2549 will be enacted near the start of fiscal year 2009 and that the necessary amounts will be appropriated each year. Estimated outlays are based on historical spending patterns for similar programs. Implementing this legislation would establish several grant programs to address environmental justice issues within communities and to support research on such issues. CBO estimates that those grant programs would cost \$104 million over the 2009–2013 period, assuming appropriation of the authorized amounts.

According to EPA, many of the activities required under this legislation are already underway. CBO estimates, based on information from EPA, that implementing this legislation would increase that agency's administrative costs by less than \$500,000 annually over the 2009–2013 period.

Intergovernmental and private-sector impact: S. 2549 contains no intergovernmental or private-sector mandates as defined in UMRA. The bill would benefit state, local, and tribal governments by establishing several grant programs to address environmental justice issues within communities and by establishing a research grant program for institutions of higher education to conduct studies on those issues.

Estimate prepared by: Federal costs: Susanne S. Mehlman; Impact on state, local, and tribal governments: Burke Doherty; Impact on the private sector: Amy Petz.

Estimate approved by: Theresa Gullo, Deputy Assistant Director for Budget Analysis.

MINORITY VIEWS

BACKGROUND

S. 2549 would create a complex new bureaucratic process within all Federal Agencies that will be costly and unnecessary. The main component of this bill is the creation of an Interagency Working Group where by all Federal Agencies will have to develop an Environmental Justice Strategy Guidance Document. In effect, before any new highway, water resource or infrastructure project, industrial facility or power plant is built, it will first be required to go through a new complex social, demographic and economic Environmental Justice Review. Federal Agencies are not equipped to make these kinds of complex environmental justice determinations. S. 2549's new requirement creates unprecedented policy mandates which are outside the core competencies and missions of the respective agencies; as a result of these misplaced new agency functions, complex environmental justice determinations will be left up to the courts to determine outcomes.

This new Environmental Justice review process will require all Federal Agencies to determine if any new federal actions are "fairly" affecting minority or low income communities. This bill fails to clearly define the meaning of the term "fair" which will undoubtedly lead to inconsistent application and will continue to ignore the cumulative factors and net socio-economic benefits to consider in environmental justice determinations.

The bill sets forth a long list of criteria that each agency-wide strategy plan must contain, with no consideration of the potential economic benefits new development brings to minority and low income communities. This one sided approach will enable federal agencies and environmental activists to prevent permits for new industrial facilities and refineries, new infrastructure and new jobs without the much needed cumulative analysis of all the economic factors.

S. 2549 authorizes \$130 million in new grant programs, without an appropriate demonstration of needs. Current EPA Office of Environmental Justice grant authorizations are not fully subscribed; in light of this the minority believes \$130 is excessive.

The ambiguous use of the term Environmental Justice within this legislation and the unspecified legal standing of the actions of the Interagency Working Group will lead to a proliferation of lawsuits on environmental justice grounds, disrupt plans to revitalize economically depressed areas, and deny communities the right to decide what is in its own best interest. "Community leaders should be concerned about the health and safety of those who reside near environmental hazards. Current federal civil rights law rightly forbids policy-makers and other recipients of federal funds from considering the ethnic or racial composition of a neighborhood when

making sitting, permitting or environmental enforcement decisions. Environmental justice activists, however, seek to create a federal civil rights claim every time an environmental or public health problem impacts minorities.”¹

Concerns about the erroneous assumptions and duplication of existing bureaucracy within S. 2549 prompted this September 22, 2008 letter to Chairman Boxer and Ranking Member Inhofe of the Environment and Public Works Committee, from Peter Kirsanow, a Commissioner on the United States Commission on Civil Rights:

Aside from the unnecessary duplication of existing programs and increased bureaucracy created by this legislation, S. 642 and S. 2549 are particularly troubling because they use civil rights antidiscrimination law and policies as a vehicle for resolving complex environmental and public health issues. This legislation makes the same mistake of many environmental activists in assuming that disparate impact on a local population is evidence of intentional discrimination by government agencies. Results of studies on this issue inevitably depend upon numerous variables, including the size of the study, the definition of “minority community,” the aggregation or disaggregation of urban and rural communities, and control for income levels. The evidence of any correlation between environmental hazards and race is mixed at best, and there are a series of studies that show, for example, no disproportionate racial impact in environmental facility siting decisions.

This legislation is based on entirely erroneous assumptions that also fail to recognize that many minority communities have developed around existing environmental sites because of lower housing costs, increased employment opportunities, or both. Yet, the background of these legislative proposals leave the reader with the impression that environmental “hazards” have been thrust upon minority communities specifically because they are minority communities—that is a false presumption that lacks merit.

. . . The real concern in adopting S. 2549 and S. 642 is the elimination of limitations on judicial review. Under Title VI, individuals are protected from intentional discrimination. In the landmark case *Alexander v. Sandoval*,² the U.S. Supreme Court held that Title VI provides no private right of action for claims of disparate impact. In S. 2549, section 4(a) directs the federal agencies involved to conduct every program and evaluate every decision in the context of disparate impact on an individual. This effectively overturns *Sandoval* and will increase lawsuits, thwart the revitalization of economically depressed areas and deny communities the right to decide what is in their own best interests.

¹United States Commission on Civil Rights study: *Not in My Backyard*, Executive Order 12,898 and Title VI as Tools for Achieving Environmental Justice, October 2003, Dissenting Views.

²532 U.S. 275 (2001).

Concerns about the consequences of adopting S. 2549 are not only shared by the legal and civil rights community, but also shared by many groups. Below is an excerpt from a letter sent to Members of Congress on September 19, 2008 from the United States Chamber of Commerce:

The U.S. Chamber of Commerce, the world's largest business federation representing more than three million businesses and organizations of every size, sector, and region, strongly opposes S. 642, the "Environmental Justice Act of 2007", and S. 2549, the "Environmental Justice Renewal Act" which may be offered as amendments to must-pass legislation during the remaining days of the 110th Congress.

. . . In the years since President Clinton signed Executive Order 12898, titled "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," misguided environmental justice activism has delayed or permanently derailed countless projects and facilities that would have brought significant economic development to minority and low-income neighborhoods. The environmental justice movement has been used to drive businesses from those areas most in need of economic stimulus and, in the process, operated as a disincentive for businesses to locate in these needy areas. The grim reality is that environmental justice, intended to sensitize policy-makers to equitable environmental considerations, has been used to harass businesses, prevent job creation, and stifle economic development in the minority and low-income areas.

. . . While S. 2549 does not codify the Executive Order, it would create a new NEPA-like process for ensuring agencies include environmental justice considerations in every policy, activity, and program. This review would be accomplished by the creation of a new Interagency Working Group tasked with developing a comprehensive "guidance document" containing myriad criteria for federal agencies to follow. The Interagency Working Group would have inordinate power over all federal projects and activities as it will be the final arbiter of whether environmental justice considerations have been properly considered by an agency.³ Moreover, its decisions are not subject to review or challenge, making its authority on these matters absolute. The need for an Interagency Working Group is especially unclear considering the United States already has an extensive body of environmental and civil rights laws to protect human health, human rights, and the environment for all citizens.

The bill also creates, among other things, an Environmental Justice Ombudsman within EPA to process complaints and allegations relating to environmental justice

³ Senator Clinton's bill gives the Interagency Working Group the power to "assess and review" every federal policy and program and take whatever steps are necessary to "minimize and eliminate" what it considers to be potentially adverse impacts.

violations. The Ombudsman will have the power to hire an unlimited number of full-time employees at both EPA headquarters and every regional office in the country, further bloating our already swollen bureaucracy. Worse, the Ombudsman is also redundant as there is already an Office of Environmental Justice within EPA created under President Clinton in 1993 that is responsible for coordinating environmental justice efforts among all of EPA's program offices.

Both S. 642 and S. 2549 advance the failed policies of the environmental justice movement. Rather than injecting the benefits of economic development into our national environmental policy discourse, these bills offer activists the opportunity to prevent businesses and communities from bringing jobs and economic stimulus into the poorest . . .

These complex and far-reaching bills deserve to be carefully deliberated by Congress, not rushed through the legislative process. Therefore, the U.S. Chamber urges you to oppose any attempt to offer these bills as amendments to important legislation.

CREATION OF ENVIRONMENTAL JUSTICE COMMUNITIES

S. 2549 would require the Interagency Working group to publish a guidance document to be used by federal agencies in identifying areas as "environmental justice communities". Once a community has been defined in this way, there is possibility that existing industry within this area will be unjustly targeted by environmental activists. The Minority is concerned that industrial complexes and refineries over the years have built their facilities near ports and highways for production requirements and logistical reasons. Often times these areas are associated with lower property values so that these facilities can create a "land buffer" from the surrounding development. Advocates of environmental justice aim to hold these facilities accountable for the resulting poor conditions and health effects of the neighboring low income communities. Unfortunately, in many cases, the industrial siting pre-dates the people in the community or has had no effect at all.

In Committee, as we marked up this legislation, I offered an amendment to add factors of consideration to be used when defining the location of an "environmental justice community". This legislative change would have protected socially responsible industry that after many years of operation now finds itself vulnerable to environmental justice complaints. My amendment would have required the Interagency Working Group to take into account the industrial facilities' historical existence in the community and the resulting housing migration patterns associated with the low property values. S. 2549 would seek to penalize industrial facilities that cannot logistically function at any other location, and who pre-date the surrounding community's poor economic condition.

THERE IS INSUFFICIENT EVIDENCE OF DISPARATE IMPACT AS NEGATIVE

Studies on the demographic impact of industrial and environmental decisions are mixed. They are based upon many variables

such as study size, minority community definitions and varying income levels. Advocates of this legislation assume findings which indicate racially disproportionate impacts are correct without creating a consistent decision-making process. This will lead to a single claim of the presence of disproportionate impacts as proof-positive of discriminatory intent. In addition, Environmental Justice claims will fail to incorporate cost-benefit analysis and risk assessment; sometimes the location of environmental hazards can be very beneficial to the local communities. For example, increased employment opportunities, increased social services made possible by a larger tax base, and lower housing costs and real estate prices are quite possible due to the selection of a community for a project.⁴

ENVIRONMENTAL AND PUBLIC HEALTH PROGRAMS IN MINORITY COMMUNITIES ARE GENERALLY NOT THE RESULT OF RACIST DECISION-MAKING

Health problems in minority communities are often the result of a “multitude of factors, including poverty, substance abuse, family instability, poor nutrition, and low participation rates in preventative care programs.” The focus on environmental justice detracts from the real public policy solution: improving the health and safety of all communities, while consistently enforcing existing environmental laws.

ANTIDISCRIMINATION LAW IS AN IMPROPER LEGAL APPLICATION FOR ADDRESSING ENVIRONMENTAL JUSTICE ISSUES: OVERTURNING ALEXANDER V. SANDOVAL (2001) IS THE WRONG APPROACH

Title VI of the Civil Rights Act appropriately forbids intentional discrimination but S. 2549 would go one step further and utilize federal antidiscrimination law as a method of solving complex environmental problems. When evaluating environmental justice claims using disparate impact analysis, motive is irrelevant—policies are considered “discriminatory” simply because they have a disproportionate adverse impact on a protected group.⁵ Although the disparate impact model may provide a useful mode of analysis in some areas of the law, the Supreme Court has cautioned that disparate impact should not be applied reflexively to all areas of antidiscrimination law.”⁶ Environmental justice activists do not explain this model as meaningful in the public health and environmental context, which needlessly forces disadvantaged communities into a zero-sum game: deciding between health and economic well-being.

ENVIRONMENTAL JUSTICE ACTIONS OF THE ENVIRONMENTAL PROTECTION AGENCY

In the Fiscal Year 2008 House Appropriations Committee Report 110–187, EPA was directed to address and implement where need-

⁴United States Commission on Civil Rights study: Not in My Backyard, Executive Order 12,898 and Title VI as Tools for Achieving Environmental Justice, October 2003, Dissenting Views

⁵United States Commission on Civil Rights study: Not in My Backyard, Executive Order 12,898 and Title VI as Tools for Achieving Environmental Justice, October 2003, Dissenting Views

⁶See *Washington v. Davis*, 426 U.S. 229, 246 48 (1976); see also Jennifer C. Bracer, Killing the Messenger: The Misuse of Disparate Impact Theory to Challenge High-stakes Educational Tests, 55 VAND. L. REV. 1111, 1142 (2002)

ed the recommendations of the 2004 and 2006 EPA Inspector General and 2005 GAO reports. In this July 18, 2008 report EPA states in part:

. . . As a result of strategic efforts and lessons learned since the program began in 1992, the Agency has made steady progress towards developing coherency and cohesion in its environmental justice visions, goals, expectations, performance measurement, and comprehensive integration into Agency strategic planning. In recent years, efforts to incorporate environmental justice considerations into EPA's core functions have accelerated partly in response to recommendations in the Inspector General's (IG) evaluation reports in 2004 and 2006, and the General Accounting Office (GAO) report in 2005.

EPA has made tremendous strides to understand and to integrate environmental justice into EPA's daily work. Efforts extend across the Agency's core functions, as reflected in EPA's Strategic Plan, National Program Manager's (NPM) Guidance, Environmental Justice Action Plans, program evaluation activities, and rulemaking activities, as well as to training, collaborative problem-solving efforts and disaster preparation and response activities.

EPA is learning how to measure the EJ Program's progress in a way that is accurate, meaningful, and cognizant of the unique and complex issues of environmental justice. EPA recognizes that it takes time to build a community's capacity and to identify the shared responsibilities of many levels of government. By continuously improving the EJ Program, the Agency can achieve the tangible results that make a positive impact in the health of communities disproportionately burdened by environmental hazards. . . .

Since 1992, the EPA has made a consistent, long-term, agency-wide commitment to integrate environmental justice, promote environmental justice to external stakeholders, and provide financial assistance to address local environmental and/or public health issues.

The EPA has identified eight priorities in this area:

1. Reduction in number of asthma attacks;
2. Reduce exposure to air toxics;
3. Safe fish/shellfish;
4. Clean and safe drinking water;
5. Revitalization of brownfields and contaminated sites;
6. Reducing elevated blood lead levels;
7. Ensuring compliance;
8. Collaborative problem-solving to address environmental justice

issues.

Environmental justice is evidenced in each of the EPA's strategic goals. For example, in Goal 1: Clean Air and Global Climate Change, EPA set a target to reduce exposure to indoor asthma triggers with a special emphasis on children and other disproportionately impacted populations.

In Goal 2: Clean and Safe Water, EPA commits to providing small community drinking water systems serving low-income populations training and assistance in using cost-effective treatment technologies, properly disposing of waste, and complying with standards for high-priority contaminants.

In Goal 3: Land Preservation and Restoration, EPA encourages broader use of improved sample collection techniques, analytical tools, and indicators to better address environmental justice concerns and identify areas that may suffer disproportionate impacts.

In Goal 4: Healthy Communities and Ecosystems, EPA has developed transparent, measurable, and accountable environmental justice targets, such as reducing blood lead levels in low-income children 1–5 years old, and achieving significant environmental and public health improvement in communities through collaborative problem-solving strategies. The goals for the community collaborative problem-solving grants are measured in terms of the actions taken within areas disproportionately and adversely burdened by environmental risks and harms, and the improvements in environmental and public health resulting from grants funded by EPA.

In Goal 5: Compliance and Environmental Stewardship, EPA emphasizes achieving results in all areas including those with potential environmental justice concerns through compliance assistance, compliance incentives, and monitoring and enforcement.

These efforts have been enhanced by the creation of the Environmental Justice Executive Steering Committee, which directed each national program manager and Regional Office to develop and maintain EJ Action Plans. In addition, an EJ review process was established to improve the effectiveness of the EJ programs. A training program was also created in order ensure EPA staff take environmental justice concerns into consideration when executing their tasks.

CONCLUSION

This bill would create a complex new process within all Federal Agencies that will have far reaching negative legal ramifications. The Minority would strongly oppose moving forward with this bill, without the opportunity on the Senate floor to offer amendments that address the problems with this legislation. We strongly oppose attempts to move forward with this legislation, as it makes complex changes to existing environmental laws, absent the rigor of the full parliamentary process.

CHANGES IN EXISTING LAW

Section 12 of rule XXVI of the Standing Rules of the Senate requires the committee to publish changes in existing law made by the bill as reported. Passage of this bill will make no changes to existing law.