July 18, 1996

To: Enforcement Subcommittee of the National Environmental Justice Advisory Committee
Deeohn Ferris, Chair

From: Richard Lazarus, Member, Enforcement Subcommittee

Re: Draft Memorandum on Integrating Environmental Justice into EPA Permitting Authority

A recurrent issue in the discussions of both the National Environmental Justice Advisory Council (NEJAC) and its Subcommittee on Enforcement has been the extent to which EPA possesses the authority to condition on environmental justice grounds permits that the Agency (and States with federally-approved programs) issues to regulated entities pursuant to the various federal environmental protection laws administered by EPA. A related question is the extent to which the permitting authority (state or federal) may *deny* a permit altogether solely on environmental justice grounds.

Attached is a draft memorandum that seeks to address the extent to which EPA possesses permitting authority that it is not yet effectively exercising on behalf of environmental justice concerns. And I mean "draft." My goal in preparing this draft was to jumpstart the process by getting something down on paper that we can all use to begin to focus further discussions and debate. I do not doubt that there are significant matters missing from the memorandum and that there may be some inaccuracies still within this draft. My hope is that by getting something in writing and having it reviewed by others in NEJAC, the Subcommittee, EPA, and the field of environmental law, we will ultimately be able to convert this preliminary draft into a final, likely very different, working document that will help EPA and the environmental justice communities that we are trying to assist.

The current draft, which is attached to this memorandum, is a revision of the initial May 7, 1996 draft. When we circulated the May 7th draft at the NEJAC Enforcement Subcommittee meeting at the end of May, we asked for comments by July 8th. The revised draft reflects those comments and the contents of a draft memorandum prepared by EPA that I received since that meeting. EPA's draft memorandum includes a chart listing possible statutory sources of the Agency's EJ authority. The Agency's production of this memorandum and chart is itself a significant positive step. EPA's memorandum and accompany chart are appended to my revised memorandum.

# MEMORANDUM ON INTEGRATING ENVIRONMENTAL JUSTICE INTO EPA PERMIlTING AUTHORITY

**Prepared by the**
**Subcommittee on Enforcement of the**
**National Environmental Justice Advisory Council**
**Deeohn Ferris, Chair**

A recurrent issue in the discussions of both the National Environmental Justice Advisory Council (NEJAC) and its Subcommittee on Enforcement has been the extent to which EPA possesses the authority to condition on environmental justice grounds permits that the Agency (and States with federally-approved programs) issues to regulated entities pursuant to the various federal environmental protection laws administered by EPA. A related question is the extent to which the permitting authority (state or federal) may *deny* a permit altogether solely on environmental justice grounds.

The purpose of this memorandum is to question the apparent assumption of many that no such permit conditioning or denial authority exists relating to environmental justice concerns. The memorandum is concerned exclusively with the issue whether EPA possesses *authority* that it has not yet chosen to exercise. The memorandum does not comprehensively address the distinct question whether EPA is *required* under existing statutory provisions to impose such conditions or deny such permits. Plainly, EPA's statutory authority is broader than its statutory obligations. The Agency possesses wide ranging authority. The question posed is to what extent may EPA, in its discretion, exercise such authority in the permitting process to promote environmental justice concerns. But, of course, if one concludes that such discretionary authority does exist, there will inevitably be circumstances in which the failure to exercise such discretion would amount to abuse of discretion and therefore be unlawful.

The memorandum is divided into four parts. First, the memorandum describes, in general terms, both what kinds of factors might be implicated in the permitting context by "environmental justice" and the types of conditions that might be imposed in response to those concerns. Second, the memorandum describes and discusses the four EPA Environmental Appeals Boards decisions that have addressed the relevancy to EPA's permitting authority of environmental justice concerns. Third, the memorandum surveys various federal environmental laws for statutory and regulatory language that might provide a legal basis for EPA conditioning permits, or denying them altogether, on environmental justice grounds. Included in this discussion is a brief analysis of certain provisions within each of the laws that readily lend themselves to injecting environmental justice concerns into the environmental protection standards themselves. Presumably, EPA is currently already doing so as part of its overall effort to comply with the President's executive order. Finally, there is a brief conclusion.

## I. The Meaning of "Environmental Justice" in the EPA Permitting Context

In the context of an EPA permitting decision, environmental justice's core expression is likely that EPA should take into account the racial and/or socioeconomic makeup of the community most likely to be affected adversely by the environmental risks to be created by the activity seeking a permit. Notwithstanding the common misapprehension of many, taking into account the makeup of the community does not mean that EPA must automatically deny a permit solely because the affected area is a community of color or a low-income community. The Agency's inquiry into the character of the community -- *i.e.*, whether it is a community of color or a low-income community -- is instead necessary to allow the Agency to make an informed permitting decision regarding the actual environmental and health effects of a permit applicant's proposed activity.

For example, because EPA knows that certain communities are more likely to be exposed to cumulative environmental and health risks from varied sources than are other communities, EPA can take that relevant fact into account in deciding whether, or to what extent, to permit additional risks from the newly-proposed activity. The bottom line for EPA's permitting decision remains environmental and health risks. Knowledge of the character of the community is necessary for the permitting agency to apprehend fully what those risks actually are -- to consider those risks in aggregation. Risks that may seem acceptable in isolation may be more properly seen as being unacceptably high when the broader social context, including associated health and environmental risks, are accounted for in a total aggregation. Hence, one question is whether EPA's statutory authority allows the permitting authority to consider the true cumulative impact of the activity seeking a permit -- in aggregation with other sources of risks -- or instead confines the Agency to considering solely the risks of the permitted activity.

A distinct inquiry concerns the Agency's authority to take into account equity or disproportionality concerns. The disproportionality issue is plainly related to the unacceptably high aggregation (or cumulative impact) issue. Aggregation is the fundamental cause of disproportionality. And, in many circumstances, aggregation and disproportionality occur simultaneously -- for instance, when accounting for aggregation makes it possible for the Agency to realize that one community is exposed to unacceptably high levels of risk and another community is not.

But, for many, equity is a legitimate consideration, regardless of whether aggregation of risk violates EPA's established environmental or human health norms for what constitutes acceptable risk. They would like to see EPA deny or condition a permit based on the fact that the affected community would otherwise be subject to a disproportionate share of environmental risk. Proof of disproportionality would be sufficient. There would be no additional need to establish that the level of risk being imposed was otherwise unacceptably high from either a strictly health or environmental perspective. In short, disproportionality would, by itself, be presumptively unreasonable or perhaps even *per se* unreasonable, absent mitigating permit conditions.

A third aspect of environmental justice of possible relevance to a permitting decision relates to community enforcement and compliance assurance. Congress deliberately included citizen suit enforcement provisions in federal environmental protection laws because of its awareness that government enforcement resources would necessarily be insufficient (and unreliable) to establish the credible enforcement threat needed to promote compliance. One of the central teachings of environmental justice, however, is that environmental justice communities have historically lacked the resources needed to monitor polluting facilities in their neighborhoods for possible violations and, when found, negotiate their correction, persuade federal or state enforcement officials to take action, or, if necessary, to bring a citizen suit enforcement action against the facility in violation. Promoting community enforcement capacity is, accordingly, a central goal of the Enforcement Subcommittee. To that end, permit conditions might be designed to redress this resource deficiency by providing communities with greater oversight and enforcement capacity. Conditions could range from making monitoring reports more readily available to the community to the more ambitious possibility of providing community access for inspection or even the funding of a community oversight operation.

These three examples of environmental justice considerations relevant to permitting -- accounting for risk aggregation, redressing risk disproportionality, and promoting community enforcement capacity -- are merely illustrative. No doubt there are many other ways in which environmental justice considerations could be factored into Agency permitting decisions. For the purpose of this memorandum, however, the list need not be exhaustive. What this memorandum seeks to address is the threshold issue whether environmental justice can in any manner be relevant to EPA's exercise of its permitting authority under the various environmental laws. These three examples offer a basis for addressing that threshold issue. If the answer is in the affirmative -- permitting agencies may deny or condition permits on such grounds -- consideration of the full reach of environmental justice in the permitting context may then be ripe.

## II. USEPA Environmental Appeals Board Decisions Regarding the Relationship of Environmental Justice to EPA Permitting Authority

Neither the EPA Administrator nor her General Counsel has formally addressed the question addressed by this memorandum. Each has emphasized their commitment to fulfilling the mandates of Executive Order 12898 as well as their overall support for reforming Agency practices as necessary to promote environmental justice concerns. But neither has issued any formal analysis of the extent to which EPA might affirmatively use its permitting authority to address environmental justice. In response to an earlier draft of this memorandum, however, EPA provided the NEJAC enforcement subcommittee with a chart listing of statutory provisions (and corresponding regulations) that might provide the Agency with as of yet unexercised authority to address environmental justice concerns, including within the permitting process. A memorandum accompanying that chart warns that "the inclusion of a statutory or regulatory provision in the

charts is not intended to suggest that any conclusion has been reached as to the practicality or effectiveness of using such authorities for environmental justice purposes." A copy of that memorandum and attached chart is appended to this memorandum.

Unfortunately, the issue has instead arisen before the Agency and been formally addressed by it only on a case by case basis and in a defensive posture. A Regional EPA Office or a State environmental agency with permitting authority pursuant to a federal environmental law has initially refused to account for environmental justice factors in exercising its permitting authority. Disappointed environmental justice advocates have challenged those negative determinations before EPA's Environmental Appeals Board. And, in all four cases, the Environmental Appeals Board has rejected the appeals and affirmed the permitting authority's negative rulings.

The disadvantages of the Agency's considering the issue only in this posture are considerable. First, case by case adjudication does not readily lend itself to the kind of broad, systemic Agency reforms required for the promotion of environmental justice. In a more adversarial setting, the natural impulse for most Agency decisionmakers is to deny the existence of a legal obligation -- in this context, the obligation to consider environmental justice in a permitting decision. There is also a substantial risk that in making that argument, agency personnel will take the further step of denying *authority.* Although "authority" and "legal obligation" are legally distinct concepts, one can always buttress one's denial of the latter by extending it to a denial of the former. And, conversely, any admission of "authority" makes it harder to deny that such authority may, in some circumstances, become a "legal obligation" based, for example on a party's claim of abuse of discretion. There is reason to expect, therefore, that the tendency of case by case adjudication will be to make systemic reform promoting environmental justice more difficult. Overcoming this tendency will require top-down directives that the Agency wants to exercise its discretionary authority to promote environmental justice, extending beyond what the Agency is legally obligated to do.

A closer look at each of the four Environmental Appeals Board decisions underscores these limits of case by case adjudication. It also hints at how the Agency might, through the exercise of permitting authority, exploit currently untapped avenues for furthering the environmental justice goals of Executive Order 12898.

**A. *In the Matter of Genesee Power Station Limited Partnership,* PSD Appeal Nos. 9-1 through 93-7 (September 8, 1993) *(Genesee 1),* order on motion for clarification (October 22, 1993) *(Genesee II)***

In this matter, a local environmental justice community organization (the Society of Afro-American People) challenged a state agency's decision to grant a Prevention of Significant Deterioration (PSD) Permit under the Clean Air Act. The citizen group contended, *inter alia*, that the decision to locate the facility in a predominantly Afro-American community reflected environmental racism.

In its initial ruling, the Appeals Board concluded that the state agency lacked authority under the provisions of the federal Clean Air Act the agency was administering to consider community opposition and, therefore, its failure to do so, was entirely appropriately and, therefore, could not be deemed evidence of racially discriminatory intent. The state agency's inquiry is properly confined under the federal statute, the Appeals Board stated, to the question whether the facility would meet federal air quality requirements. A matter such as community opposition, the Board reasoned, would normally be a matter for consideration by a local zoning board.

The Appeals Board further found that even if the state agency had authority under some state law to consider community opposition -- and the Appeals Board had authority to review the state's compliance with that state law -- the state agency's actions in this cases were not discriminatory. The Board rejected the community group's claim of disparate impact, which was based on the state agency's having denied a permit to an incinerator opposed by white residents. The Board found that there were "legitimate, nondiscriminatory reasons" for denying the permit in that other case, but not in the instant case *(e.g.,* local zoning approval had been denied, the incinerator's proximity to a wetland would violate the federal Wild and Scenic Rivers Act, and the facility would not comply with state law). And, while noting that the citizen plaintiffs had not proven the state agency's intent to discriminate, as required to make out an Equal Protection claim, the Board also specifically declined to reach that constitutional issue.

EPA's Office of General Counsel (OGC) responded to the Appeals Board ruling by filing a Motion for Clarification, in which OGC requested that the Board revise its reasoning, but not the results. Specifically, OGC challenged the Board's rationale that a state agency (acting as a PSD permitting authority under federal delegation) lacks authority to consider community opposition to the proposed facility location so long as the air quality impacts of the facility meet federal requirements. Although the Board responded in a hostile fashion to the OGC's motion -- "The Board does not view its function as that of making its legal views consistent with those of program and Regional offices * * * * for the Board was created in part to ensure that the controversies pending before it are decided fairly and impartially -- the Board ultimately agreed to excise the portions of the initial opinion considered objectionable by OGC. The excised portions included the Board's statements that the permitting authority lacked authority under

federal clean air legislation to consider community opposition. The Board reasoned that excision was appropriate because these were issues of national importance that deserved greater attention.

The two *Genesee Power* administrative rulings illustrate the pitfalls of having environmental justice addressed, in the first instance, in case by case adjudication. Both the state agency and EPA -- in the form of the Appeals Board -- followed their natural impulse to deny the legitimacy of a new claim, here, one promoting environmental justice concerns. Rather than look for ways to read statutory authorities expansively, they instead read them narrowly, presumably in order to insulate agency decisionmaking from secondguessing by outsiders.

Juxtaposing the two decisions, however, also illustrates the potential for positive reforms should EPA take the initiative outside the adjudicatory process to read its authorities more expansively. Because the Office of General Counsel in this case took the initiative, the Appeals Board's modified its reasoning so as not to preclude the Agency from embracing a more proactive approach to environmental justice in the future. The challenge the Agency faces, however, is now to fill the gap currently existing in the law regarding the relevancy of environmental justice concerns in permitting decisions before those gaps are filled in a manner unsympathetic to environmental justice by agency employees and state environmental agencies interpreting relevant authorities in adjudicatory settings. For, once the government has "dug in" to a legal position, it will be far harder to effectuate needed reforms.

Finally, there is one more lesson to take away from the *Genesee Power* case -- the significance of community enforcement capacity. The Board concluded that there were "legitimate nondiscriminatory reasons" for why the state had denied the permit to be located in the white community but granted the permit for the facility to be located in the African American community. Perhaps so. But perhaps not, if similar violations of state law might have been developed had the African American community had the legal resources and political power necessary to do so. But, absent such a level playing field, even what appears to be entirely "legitimate nondiscriminatory reasons" may in fact be the product of yet a different kind of inequity.

### B. *In re Chemical Waste Management of Indiana, Inc*., RCRA Appeals Nos. 95-2 & 95-2 (June 29, 199S)

In this matter, local citizens challenged on environmental justice grounds EPA Region V's decision to grant a permit to a landfill pursuant to Section 3005 of the Resource Conservation and Recovery Act. 42 U.S.C. 6925. The Region held an informational meeting with concerned citizens and industry representatives to discuss, among other items, environmental justice issues. And, the Region also prepared a demographic study (based on a one-mile radius around the facility).

The citizens' challenge included several arguments based explicitly on environmental justice. The citizens claimed that the Region had acted in a clearly erroneous fashion and had abused its discretion in seeking to implement Executive Order 12898 in the absence of the Agency's having promulgated a national environmental justice strategy. And, they contended that the demographic study was clearly erroneous, because of its restricted one-mile radius scope and because the Region had ignored certain evidence regarding the racial and socio-economic composition of the affected area and the impacts of the permitted facility.

The Appeals Board rejected both contentions. The Board concluded, at the outset, that Executive Order 12898 "does not purport to, and does not have the effect of changing the substantive requirements for the issuance of a permit under RCRA and its implementing regulations." The Board further concluded that "if a permit applicant meets the requirements of RCRA and its implementing regulations, the Agency must issue the permit, regardless of the racial or socio-economic composition of the surrounding community and regardless of the economic effect of the facility on the surrounding community."

The Appeals Board then sought to temper what otherwise appeared to be a blanket rejection of any statutory authority to consider environmental justice concerns in the permitting context. First, the Board held that "when a Region has a basis to believe that operation of the facility may have a disproportionate impact on a minority or low-income segment of the affected community, the Region should, as a matter of policy, exercise its discretion to assure early and ongoing opportunities for public involvement in the permitting process. The Board, therefore, supported enhancing avenues for public participation when environmental justice concerns are raised.

The more significant part of the opinion, however, is when the Board went beyond procedural requirements to consider the possible substantive significance to environmental justice of the omnibus clause under Section 3005(c)(3), which provides:

> Each permit issued under this section shall contain such terms and conditions as the Administrator (or the State) determines necessary to protect human health and the environment.

42 U.S.C. 6925(c)(3). The Board agreed that this clause requires that the Agency condition, and if necessary deny altogether, a permit "if the operation of a facility would have an adverse impact on the health or environment of the surrounding community * * * as necessary to prevent such impacts." The Board concluded that EPA was permitted under RCRA to take "a more refined look at its health and environmental impacts assessment" in response to environmental justice claims. And, the Board specifically acknowledged that an assessment that looked only at a "broad cross-section of the community * * * might mask the effects of the facility on a disparately affected minority or low-income segment of the community." Accordingly, the Board held, "when a commenter submits at least a superficially plausible claim that operation of the facility will have a disproportionate impact on a minority or low-income segment of the affected

community, the Region should, as a matter of policy, exercise its discretion under Section 3005(c)(3) to include within its health and environmental impacts assessment an analysis focusing particularly on the minority or low-income community whose health or environment is alleged to be threatened by the facility."

Finally, the Board stressed that the omnibus clause of Section 3005(c)(3) could not be used as a statutory basis for injecting into the analysis factors other than "ensuring the protection of the health or environment or low-income populations. "The Region would not have discretion to redress impacts unrelated or only tenuously related to human health and the environment, such as disproportionate impacts on the economic well-being of a minority or low-income community."

Notwithstanding the stark terms of the Board's threshold suggestion that "the racial or socio-economic composition of the surrounding community" are irrelevant to a the permitting authority under RCRA, the Board's opinion leaves substantial room for EPA to exercise its authority to promote environmental justice in exercising its permitting authority under RCRA. It allows for the Agency to engage in the kind of risk aggregation analysis upon which environmental justice claims are frequently bottomed. This includes both a closer examination of the cumulative impacts of various risk producing facilities affecting community as well as the possibility that certain subpopulations may be especially susceptible to being harmed by environmental pollutants. The Board also suggested a potentially low threshold trigger for the preparation of such analysis: "a superficially plausible claim * * * [of] disproportionate impact on a minority or low-income segment of the affected community."

Perhaps even more significantly, the Board seems to have ruled that permit conditions or denials need not depend on the showing of a violation of some pre-established environmental standard. The Board opinion provides that EPA has authority to condition a permit whenever "the operation of a facility would have an adverse impact on the health or environment of the surrounding community * * * as necessary to prevent such impacts." The Board does not make clear what it means by "an adverse impact" and how it intends to square this aspect of its opinion with its initial admonishment that "if a permit applicant meets the requirements of RCRA and its implementing regulations, the Agency *must* issue the permit." Presumably, though, they are reconciled by the Administrator being given discretion in Section 3005(c)(3)'s omnibus provision to determine what constitutes an adverse impact warranting a condition (or possibly a permit denial). The Board, therefore, does not deny the Administrator authority in RCRA permitting to take account of the socio-economic or racial composition of a community *so long as she does so only in the first instance* as a reason to take a closer look at the human health and environmental effects of the facility seeking a permit. The final permit condition or denial must rest on those human health and environmental effects and not simply on the socioeconomic or racial composition of the community.

### C. *In re Puerto Rico Electric Power Authority*, PSD Appeal No. 95-2 (Dec. 11, 1995)

In this matter, a citizen group in Puerto Rico sought review of Region II's issuance of a Prevention of Significant Deterioration (PSD) permit to the Puerto Rico Electric Power Authority (PREPA). The group claimed, among other things, that PREPA and Puerto Rico should have prepared an epidemiological study of the area surrounding the proposed facility and that their failure to do so violated Executive Order 12898 and the federal Constitution. The Board rejected the claim, relying on Region II's explanation that it had fully responded to environmental justice issues raised during the comment period, including the preparation of demographic analysis of the affected area. The Region had concluded that the facility "would cause no disproportionate adverse health impacts to lower-income populations. Finally, the Board likewise rejected the citizen group's contentions that the Region had relied on flawed meteorological data and had failed adequately to consider PREPA "history of violations" in the past.

The precedential significance of this decision is fairly limited because the citizen group's petition for review appears to have been too cursory (two-pages) to be persuasive. The matter is nonetheless significant because it underscores both the limited resources available to most community-based environmental justice organizations and the importance of EPA's taking a more proactive view of its affirmative ability to promote environmental justice in the permitting context. It is no great surprise that where, as in this case, the EPA Regional Office declines to actively pursue the environmental justice concerns of an affected community, the Appeals Board will almost always affirm that ruling. Unless the local community group has managed to obtain substantial legal expertise and resources, they are unlikely to be able to articulate their concerns in a manner likely to prompt the Appeals Board to second guess the Region. As stressed by the Appeals Board in this matter, the Board will not grant a petition for review "unless to decision is based on either a clearly erroneous finding of fact or conclusion of law, or involves an important matter of policy or exercise of discretion that warrants review."

Effective promotion of environmental justice will instead turn mostly on a Region's willingness to respond to a local community group's concerns by exercising its discretion to take the initiative to become closely engaged with those in the community. Where, as in this matter, the issue becomes what the Agency is required to do, those promoting environmental justice will most often lose. And, as here, one cannot really know wherein lie the merits of the group's claim. Because, without EPA's active and affirmative support, citizen groups were unlikely to be able to make the case necessary to overturn EPA, once the Agency had initially decided to grant PREPA the PSD permit.

### D. *In re Envotech, L.P., UIC* Appeals Nos. 95-2 through 95-37 (February 15, 1996)

In this matter, local residents and nearby municipalities challenged EPA Region V's decision to grant two Underground Injection Control (UIC) permits under the Safe Drinking Water Act. The permits authorize the permittee, Envotech, to drill, construct, test, and operate two hazardous waste injection wells in Washtenaw County, Michigan. The local opposition raised many contentions, including the permittee's poor history of environmental compliance, the unsafe and unproven nature of underground injection, the absence of necessary state and local governmental approvals, flawed geological assessments, errors in characterizations of the hazardous wastes to be received by the facility, and failure to provide required waste minimization certification. The residents also raised distinct environmental justice claims.

The Appeals Board rejected all the claims except for the claim that a waste minimization certification is required. The Board specifically denied the contention of a community organizations opposed to the facility, Michigan Citizens Against Toxic Substances, that local opposition provides a basis for UIC permit denial. The Board reasoned that "local opposition alone is simply not a factor that the Region may consider in its permit decision" and that "[m]ore fundamental issues, such as siting of the wells, are a matter of state or local jurisdiction rather than a legitimate inquiry for EPA."

The Board also rejected opposition to the permit that was based on the past compliance (or lack thereof) with environmental requirements of companies affiliated with the permittee. The Board concluded that such a concern "simply does not present a link to a condition of the UIC permits at issue here sufficient to invoke the Board's authority to review the permit decision." The Board similarly found no basis for relief in any of the environmental justice claims, which focussed on the fact that the area surrounding the facility was already host to numerous burdensome land uses.

The Appeals Board, however, used the matter as another opportunity to state its views on the significance of environmental justice in the permitting context. Citing to its earlier ruling in *Chemical Waste Management of Indiana (CWM)*, previously discussed, the Board stated that, as with RCRA permitting under Section 3005, "if a UIC permit applicant meets the requirements of the SDWA and UIC regulations, the "'Agency *must* issue the permit, regardless of the racial or socio-economic composition of the surrounding community and regardless of the economic effect of the facility on the surrounding community.'" (citing *CWM*, at 9). But, as in *CWM*, the Board went on to identify "two areas in the UIC permitting scheme in which the Region has the necessary discretion to implement the mandates of the Executive Order."

The "two areas" described by the Board as existing within the Safe Drinking Water Act UIC program are virtually the same as those described by the Board in *CWM* as existing within RCRA. The first is the right to public participation, allowing the Region to "exercise its discretion to assure early and ongoing opportunities for public involvement in the permitting

process." The second area of discretionary authority the Board derived from "regulatory 'omnibus authority' contained in 40 C.F.R. 144.52(a)(9)," which authorizes "permit conditions 'necessary to prevent migration of fluids into underground source of drinking water." The Board reasoned that "there is nothing in the omnibus authority that prevents a Region from performing a disparate impacts analysis when there is an allegation that the drinking water of minority or low-income communities may be particularly threatened by a proposed underground injection well. Finally, the Board concluded that the Region should exercise its discretionary authority to undertake such an analysis "when a commenter submits at least a superficially plausible claim that a proposed underground injection well will disproportionately impact the drinking water of a minority or low-income segment of the community in which the well is located. "

Applying this framework to the Region's actions in this case, the Appeals Board concluded that the Region took adequate steps to implement the Executive Order 12898. The Board took note of the two days of informal hearings convened by the Region to allow surrounding communities to voice their concerns and the demographic analysis performed of the area surrounding the site. The Board upheld the Region's decision to base that analysis on a two-mile area, rejecting community opponent arguments that the subject area was too small

The Appeals Board's ruling is positive for environmental justice advocates to the extent that it demonstrates the Board's willingness to find that the Agency can base discretionary authority to promote environmental justice in its regulations and, therefore, presumably need not rely on statutory language in the first instance. In *CWM*, the omnibus authority was contained in statutory language. Second, the omnibus language upon which the Board relied on in *Envotech* was less obviously expansive than that construed in *CWM (Section* 3005(c)(3) of RCRA). The Board's willingness to find such broad based authority in the regulatory language "necessary to prevent migration of fluids" increases the possibility that similar omnibus authority can be found in other environmental statutes and regulations. As footnoted by the Board, the Board has already indicated that "necessary" could "arguably extend to imposition of more-stringent financial responsibility requirements than are generally prescribed for UIC permittees." If so, "necessary" might likewise extend to more stringent monitoring and reporting requirements, or even enhancement of community enforcement capacity, for those facilities located where there is reason to believe that absent such a condition, there will not be the kind of oversight necessary for compliance assurance.

The more sobering assessment of the Board's opinion in *Envotech* is its reiteration that EPA's exercise of expansive permit authority to promote environmental justice will most likely occur only if the Agency takes the initiative. As in *Envotech* (and *CWM*), neither the Appeals Board or a reviewing court is very likely to order EPA to take such action (either by denying or conditioning a permit). The Board's decision not to do so here is entirely consistent with its repeated characterization of EPA's authority as "discretionary" and the narrow scope of the Board's review of a Region's permitting determination. Hence, the challenge EPA now faces is to persuade the Regions and delegated state permitting authorities to seize and exploit the discretionary authority that the Board has now made clear they possess to fulfill Executive Order 12898's mandates.

## III. Survey of Federal Environmental Statutory Provisions Authorizing Permit Conditions or Denials Based On Environmental Justice Considerations

The history of environmental law is replete with examples of instances in which broadly worded statutory language or regulations have been successfully enlisted in support of arguments that EPA has authority beyond that initially contemplated by the regulated entities, environmentalists, affected communities, or even the Agency itself. The Refuse Act's restrictions on water pollution, NEPA's strict procedural requirements, the Clean Air Act's PSD program, and, more recently, Section 401 of the Clean Water Act, are all very much products of such innovative and expansive interpretations of existing statutory language.

This issue now before the Agency is whether existing statutory and regulatory language can similarly be resurrected on behalf of environmental justice. Not withstanding there generally rigid outlook, the Appeals Board opinions discussed above set forth two possibilities: the omnibus clause contained in Section 3005(c)(3) of RCRA, discussed in *CWM of Indiana*, and the omnibus clause contained in the Safe Drinking Water Act regulation, 40 C.F.R. 144.52(a)(9), discussed in the *Envotech*. In addition, the draft EPA memorandum and chart prepared by the Agency, and provided to this Subcommittee in response to an initial draft of the memorandum, lists several other statutory provisions that authorize the Agency to address more fully environmental justice concerns. A copy of that memorandum and chart is appended to this memorandum.

What this portion of the memorandum seeks to accomplish is to examine the statutory language of each of the several environmental protection laws, one statute at a time, in an effort to identify clauses in addition to RCRA Section 3005(c)(3) and the SDWA regulation 40 C.F.R. 144.52(a)(9), that might similarly support expansive understandings of EPA's authority to promote environmental justice through permit conditions and denials. This review does not purport to by exhaustive of all possibilities. The hope is instead hat this memorandum may serve as a catalyst to prompt others, especially those far more familiar with the statutory and regulatory intricacies of the various programs, to find other examples as well.

### A. Clean Air Act

Within the Clean Air Act, there are plainly many opportunities to infuse environmental justice concerns more into the Act's substantive standards that the Agency has historically don. For instance, determination of National Ambient Air Quality Standards (NAAQS) under Section 109 are supposed to be based on subpopulations that are especially sensitive to the adverse effects of pollutants. 42 U.S.C. 7409; see Lead Industries Assoc. v. EPA 647 F.2d 1130 (D.C. Cir. 1980). Looking more to the subpopulations having the characteristics of those residing in low-income communities and communities of color, which often have the most sensitive subpopulations, would make those air pollution control standards more responsive to the teachings of environmental justice. Air quality criteria, upon which the NAAQS are based are

supposed to include information on "those variable factors * * * which of themselves or in combination with other factors may alter the effects on public health or welfare." 42 U.S.C. 7408. These "variable factors" should likely include many of the kinds of characteristics of environmental justice communities that render the harmful effects of pollutants on those already environmentally stressful communities even more harmful. Pursuant to CAA Section 109(d), EPA is required to revise air quality criteria and the standards themselves at a minimum of every five years as needed to ensure their adequacy in light of new information and changing circumstances. For instance, the Environmental Defense Fund has recently challenged EPA's refusal to issue a five-minute S02 NAAQS, which EDF contends is necessary especially to address the health concerns of environmental justice communities subject to short term exposure to high levels of S02.

The Clean Air Act's nonattainment provisions also offer several opportunities. An explicit objective of the Subchapter D's Nonattainment Program is "to assure that any decision to permit increased air pollution in any area to which this section applies is made only after careful evaluation of *all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decisionmaking process. "* 42 U.S.C. 7470. Prior to any redesignation of any nonattainment area, there must be notice and a public hearing in the areas proposed to be redesignated. And, prior to that hearing, "a satisfactory description and analysis of the health, environmental, economic, *social,* and energy effects of the proposed redesignation shall be prepared." *Id* Environmental justice concerns naturally fall within the legitimate scope of such analysis. Sanctions for failure to meet nonattainment requirements would likewise seem to offer a basis for redressing environmental justice concerns. Such sanctions extend to "such additional measures as the Administrator may reasonably prescribe," which seems sufficiently open-ended to extend to environmental justice concerns in appropriate circumstances. 42 U.S.C. 7509(d)(2).

Another example of a Clean Air Act provision potentially allowing for greater importation of environmental justice's concern with risk aggregation is the waiver provision for innovative technological systems of continuous emission reduction applicable to Section 111's new source performance standards. A condition for determining whether an applicant for a waiver from certain requirements otherwise applicable to a person proposing to own or operate a new source is "demonstrat[ion] to the satisfaction of the Administrator that the propose system *will not cause or contribute to unreasonable risk to public health.*" 42 U.S.C 7411j(1)(A)(iii) . The statutory emphasis on public health and inclusion of "contribute to" would seem to permit the Administrator to take into account the cumulative public health impact of the facility on the affected community.

The Act's nonattainment provisions offer further potential environmental justice authorities. Section 173 describes the requirements for a nonattainment permit. One explicit permit requirement is that "an analysis of alternative sites, sizes, production processes, and environmental control techniques for such proposed source demonstrates that benefits of the proposed source significantly outweigh the environmental and social costs imposed as a result of

its location, construction, or modification." CAA 173(a)(5). The reference both to "social costs" of to "location" is a strong basis for EPA's assertion of statutory authority to take environmental justice concerns into account in evaluating the "location" of a facility seeking a nonattainment permit.

Another Clean Air Act provision that expressly authorizes consideration of facility "location" can be found in Section 112(r)(7)'s program for the prevention of accidental releases of hazardous air pollutants. Section 112(r)(7) provides:

> "In order to prevent accidental releases of regulated substances, the Administrator is authorized to promulgate release prevention, detection, and correction requirements which may include monitoring, record-keeping, reporting, training, vapor recovery, secondary containment, and other design, equipment, work practice, and operational requirements. Regulations promulgated under this paragraph may make distinctions between various types, classes, and kinds of facilities, devices and systems taking into consideration factors including, but not limited to, the size, location, process, process controls, quantity of substances handled, potency of substances, and response capabilities present at any stationary source."

This authority is not directly tied to the issuance of a permit, but presumably EPA could somehow incorporate into its permits the regulations authorized by this provision.

Section 112 also includes two other subsections of potential relevance -- Section 112(c)(3) and Section 112(k). Both provide the Agency with authority to consider the aggregate effects of multiple sources of hazardous air pollutants, especially in urban areas. Section 112(c)(3) provides that the "Administrator shall list * * * each category or subcategory of areas sources which the Administrator finds presents a threat of adverse effects to human health or the environment (by such sources individually or in the aggregate) warranting regulation under this section." The Administrator must list "sufficient categories or subcategories of area sources to ensure that area sources representing 90 percent of the area source emissions of the 30 hazardous air pollutants that present the greatest threat to public health in the largest number of urban areas are subject to regulation under this section * * *." Section 112(k) further calls for EPA's creation by five years after November 15, 1990, of "a comprehensive strategy to control emissions of hazardous air pollutants from area sources in urban areas." Included in the strategy is identification of no fewer than 30 hazardous air pollutants that present the greatest threat in urban areas, the source categories or subcategories that emit such pollutants and "a schedule of specific actions to substantially reduce the public health risks posed by the release of hazardous air pollutants from area sources that will be implemented by the Administrator under the authority of this and other laws * * * or by the States. The strategy shall achieve a reduction in the incidence of cancer attributable to exposure to hazardous air pollutants of not less than 75 per centum * * *.

Yet another Clean Air Act provision that expressly authorizes the Agency to promulgate regulations concerned with the siting or location of polluting facilities is Section 129(a)(3),

which is concerned with the siting of solid waste incinerators. Section 129(a)(3) provides that standards promulgated under CAA Sections 111 and 129 applicable to solid waste incineration units shall "incorporate for new units siting requirements that minimize, on a site specific basis. to the maximum extent practicable potential risks to public health or the environment." Such "siting requirements" could possibly extend to environmental justice matters.

EPA's enforcement authority under the Clean Air Act likewise allows the Agency to take account of environmental justice in allocating its enforcement resources. EPA's decision to maintain a civil or criminal enforcement action is generally a matter of administrative agency discretion to exercise as the Administrator deems "appropriate." There is reason to believe that historically federal and state enforcement of environmental protection laws has not occurred at a level commensurate with the environmental risks presented in environmental justice communities. Under the statute, EPA has the discretion to reallocate its enforcement resources in a manner that more actively promotes those communities for government oversight and enforcement.

Even more specifically, the Clean Air Act's penalty assessment criteria would seem to allow the Administrator to take account of the special need for a credible enforcement threat in those communities that have not generally benefited from enforcement in the past. Section 113 provides that "in determining the amount of any penalty to be assessed," the Administrator shall take into consideration several specific factors and "such other factors as justice may require." 42 U.S.C. 7413. The Administrator could deem environmental justice concern with the absence of government enforcement in the past and the lack of community resources to oversee a facility's compliance as cause of enhanced penalties for violations in certain communities.

For the purposes of this memorandum, the Clean Air Act provisions of greatest interests are those that may allow the permitting authority greater discretion to take into account environmental justice concerns in the permitting process, including use of the permitting process to build community enforcement capacity. Section 504 would seem to confer on EPA just such authority. Subsection (a) provides that "[e]ach permit issued under this subchapter shall include * * * such other conditions as are necessary to assure compliance with applicable requirements of this chapter." A major component for achieving compliance assurance under the Clean Air Act is the citizen suit component of that statute. For, absent a credible enforcement threat, there will be no compliance assurance. Subsection (a), therefore, would seem to authorize EPA to impose as a condition on those receiving Clean Air Act permits that they take certain steps in order to enhance the affected community's ability to ensure the permitted facility's compliance with applicable environmental protection laws. Steps could range from simply providing more ready access to the information necessary to oversee the permitted facility's operation and compliance to even perhaps working to enhance the resources of a citizen group charged with overseeing environmental enforcement and compliance assurance. To that same effect, subsection (b) authorizes the Administrator to prescribe "procedures and methods for determining compliance" and subsection (c) requires that each permit "set forth inspection, entry, monitoring, compliance certification, and reporting requirements to assurance compliance." EPA could make the

enhancement of community enforcement capacity an explicit objective of the requirements that the Agency establishes pursuant to these subsections.

Finally, Section 128 of the Act, 42 U.S.C. 7428, provides the Administrator with authority to ensure that state permitting boards and pollution control enforcement authorities are more likely to take environmental justice concerns into account. Section 128 mandates that state implementation plans require that "any board or body which approves permits or enforcement orders under this chapter shall have at least a majority of members who represent the public interest * * *." The "public interest" standard could allow the Administrator to require that persons with concerns about environmental justice and/or representative of those communities be included on state boards or bodies with permitting or enforcement authority.

### B. Clean Water Act

As with the Clean Air Act, there are multiple opportunities within the Clean Water Act for EPA to modify the environmental standards themselves to respond better to environmental justice concerns. Section 302, for instance, confers authority on the Administrator to promulgate restrictions supplemental to the Act's technology-based controls if, absent such additional restrictions, the discharges "would interfere with the attainment or maintenance of that water quality in a specific portion of the navigable waters which shall assure protection of public health, public water supplies * * *." Although the Agency has historically been wary of invoking Section 302, the provision does provide EPA with some statutory authority beyond technology-based controls to address environmental justice concerns related to public health, public water supplies, and other water quality objectives. The Administrator also possesses similarly-worded statutory authority in developing individual control strategies for toxic pollutants under Section 304(1)(1)(A)(ii).

The water quality standard provisions of the CWA offer another opportunity for EPA's exercise of authority to consider and address environmental justice concerns. These water quality standards are enforced through the Act's permitting provisions. For instance, EPA could ensure that state compliance with the Agency's nondegradation policy's protection of "existing uses" included subsistence uses, which can be of especial importance to certain environmental justice communities. In its oversight of state development of total maximum daily load allocations, where supplemental restrictions are required to meet state water quality standards, EPA could ensure that the resulting allocations do not unfairly burden low income communities and communities of color.

The Clean Water Act also confers authority on the Administrator to promote environmental justice in imposing monitoring and reporting requirements on owners and operators of point sources. In order to assist the Administrator in developing pollution control effluent limitation or standard or in determining whether there has been a violation of a limitation or standard, Section 308 authorizes the Administrator to require point sources to maintain records, make reports, use monitoring equipment, sample effluent, and "provide such other

information as he may reasonably require." 33 U.S.C. 1318(a). It further provides that the Administrator "or his authorized representative" shall have right to reasonable access and inspection." Here, too, the Administrator could invoke these authorities creatively to promote community enforcement capacity. Monitoring reports and general compliance information could be directed to community groups in the first instance, obviating the need to travel to inconvenient locations. In appropriate circumstances, a local community organization might also become an "authorized representative" of the Administrator, which would allow the organization a right of entry and inspection.

In addition to providing EPA with discretionary authority to target its resources in enforcing the Clean Water Act in a manner more responsive to the needs of environmental justice communities, the Clean Water Act also permits administrative and civil penalties to take into account environmental justice concerns, perhaps as a reason for increasing the fine (in order to ensure compliance in an area long subject to noncompliance). Section 309(d) provides that civil penalties may be calculated based on several factors including "such other matters as justice may require" and subsection (g), regarding administrative penalties, includes identical language. 33 U.S.C. 1319(d), (g). The use of "justice" in this context confers on EPA considerable discretionary authority beyond that provided in those instances where the exclusive statutory touchstone is "health and the environment." Environmental justice's distinct concern with disproportionality and equity easily falls within the "justice" rubric.

Section 402 of the Act, however, is likely the most significant potential source of permit conditioning authority. Section 402 provides that the Administrator may issue a permit for the discharge of any pollutant

> upon condition that such discharge will meet either (A) all applicable requirements under sections 301, 302, 306, 307, 308, and 403 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, *such conditions as the Administrator determines are necessary to carry out the provisions of this chapter."*

42 U.S.C. 1342(a)(1). Clause (B) would seem to confer on the Administrator wide ranging authority to impose permit conditions promoting environmental justice. There are two limitations: (1) the authority exists only prior to taking of certain implementing actions; and (2) the conditions must carry out the provisions of this Act. But, both could be met. The Administrator has most certainly not taken all implementing actions under several provisions, including, for instance, Section 302 discussed above. And, because the purpose of the condition would be to protect public health, public water supplies, promote compliance assurance, and the like, it should not be difficult to fashion permit conditions that both promote environmental justice, including community enforcement capacity, risk aggregation, and that "carry out the provisions of this chapter."

### C. Resource Conservation and Recovery Act

The Resources Conservation and Recovery Act (RCRA) includes many provisions the broad wording of which leaves EPA with substantial authority to take environmental justice concerns into account in the Agency's implementation of this law. The touchstone for the Agency's promulgation under RCRA of regulations applicable to generators, transporters, and owners and operators of hazardous waste treatment, storage, and disposal facilities is the same: "as may be necessary to protect human health and the environment." 42 U.S.C. 3002(a), 3003(a), 3004(a). Because, as discussed in Part I above, one of the major lessons of environmental justice is that EPA's past failure to account for the effects of aggregation of risks and cumulative impacts has caused EPA's existing standards not to protective of human health and the environment" in certain communities, EPA's authority under RCRA to correct this problem cannot be gainsaid. The relevant statutory language specifically directs the Agency to do what it can only do by considering the actual human health and environmental effects of managing hazardous waste on disparately affected low-income communities or communities of color.

Section 3004 of RCRA, which applies to owners and operators of hazardous waste treatment, storage, and disposal facilities, further elaborates on the kinds of standards that EPA may promulgate. Several have significant implications for environmental justice. For instance, Section 3004(a) provides that EPA standards shall include requirements respecting:

> (2) satisfactory reporting, monitoring, and inspection * * *;
>
> (4) the location, design, and construction of such hazardous waste treatment, disposal, or storage facilities;
>
> (5) contingency plans for effective action to minimize unanticipated damage * * *;
>
> (6) the maintenance of operation of such facilities and requiring such additional qualifications as to ownership, * * * training for personnel as may be necessary or desirable * * *.

EPA could fashion "reporting, monitoring, and inspection" requirements in a manner more responsive to the needs of environmental justice communities, which tend to have fewer resources to engage in effective oversight of a regulated facility's compliance with environmental performance standards. EPA is authorized to impose requirements relating to the "location" of facilities, which would seem to permit the Agency at the very least to account for risk aggregation in the siting of such facilities. The reference to "contingency plans" would seem to allow EPA to require contingency plans that reflect the needs of environmental justice communities that, because of their own limited resources, may require the owner and operator to invest more of its own resources into the community to develop and implement such plans. Finally, EPA could consider the socio-economic, racial, and ethnic makeup of a community in

promulgating requirements regarding "qualifications of ownership" and "training for personnel. " A major problem in the past has been the lack of adequate training in bridging the gap between the community and a regulated facility located within that community. Special training may be needed for personnel operating facilities within communities, including, quite possibly, the hiring of more individuals who are themselves residents of the affected community.

In addition, Section 3004(o)(7) may provide EPA with authority to promulgate regulations regarding the location of hazardous waste treatment, storage, and disposal (TSD) facilities that reflect environmental justice concerns. Those requirements would, in turn, be enforced through RCRA Section 3005's permitting program. Section 3004(o)(7) provides that the TSD regulations shall included "specific criteria for the acceptable location of new and existing treatment. storage or disposal facilities as necessary to protect human health and the environment." EPA could construe "acceptable" as embracing the kinds of concerns reflected in the President's Environmental Justice Executive Order. Those opposing such a construction of the statute would likely refer to the next sentence of the statute, which concerns "areas of vulnerable hydrogeology," and argue that EPA's determination of "acceptable locations" is confined to technical issues of a particular location's geology. Because, however, the issue would not be what EPA is required to do, but the full extent to which the statute confers discretionary authority to EPA, a broader construction of "acceptable location" might well prevail. There is no suggestion, EPA could maintain, that Congress intended the explicit reference to "hydrogeology" to be exclusive of the kinds of factors EPA could consider relevant in deciding whether a specific particular locations is "acceptable."

EPA also possesses under RCRA the authority to target its enforcement resources in a manner more responsive to the needs of environmental justice communities. RCRA is different from the Clean Air Act and Clean Water Act because it does not similarly include an express provision that the penalty may be based on "justice," but the Administrator is instructed to account for the "seriousness of the violation" in calculating the appropriate penalty in a compliance order. In many circumstances, environmental justice concerns could relate to the "seriousness" of a particular violation.

EPA's inspection authority is likewise susceptible to being implemented in a manner more responsive to environmental justice. EPA has inspection authority, but so too does a "duly designated * * * representative" of the Agency. 42 U.S.C. 6927(a). Records, reports, or other information obtained by EPA pursuant to its inspection authority is also supposed to be made publicly available. 42 U.S.C. 6927(b). EPA could strive to ensure that such information is meaningfully available to those who reside in communities who might otherwise not have ready access to documents that are "available" only in name. EPA is also authorized to "distinguish between classes and categories of facilities commensurate with the risks posed by each class or category" in ensuring thorough and adequate inspection of regulated facilities. 42 U.S.C. 3007(e)(1). Arguably, one class or category of facilities warranting special attention are those located in environmental justice communities.

With regard to permit conditions, EPA has considerable authority to take environmental justice concerns into account in its permitting decisions by considering the possibility that a particular community is being subject to disparate environmental risks. As described by the Environmental Appeals Board in *CWM of Indiana,* Section 3005(c)(3) provides that "[e]ach permit issued under this section shall contain such terms and conditions as the Administrator (or the State) determines necessary to protect human health and the environment." 42 U.S.C. 6925(c)(3). As in Sections 3002, 3003, and 3004, already discussed, this language in the permitting provision permits the Agency to "tak[e] a more refined look at its health and environmental impacts assessment in light of allegations that operation of the facility would have a disproportionately adverse effect on the health or environmental of low-income or minority populations. " Such a closer examination could justify permit conditions (or presumably denials) based on adverse effects on a disparately affected community that would otherwise be "mask[ed]" if the regulator undertook only an "analysis of a broad cross-section of the community. "

Permit conditions could, however, be more far ranging. Protection of human health and the environmental turns on compliance assurance and permit conditions might, accordingly, extend to those needed to promote community enforcement capacity. As previously discussed, such enforcement capacity is essential to the statute’s accomplishments of its objectives, especially in low-income communities and communities of color that, lacking that capacity in the past, have been the repeated victims of environmental noncompliance.

Finally, one other RCRA provision worthy of special mention is Section 4002, which governs the federal guidelines for state solid waste management plans. Among the considerations relevant to the promulgation of those guidelines are "the political, economic * * * problems affecting comprehensive solid waste management." 42 U.S.C. 6942(c)(9). There are many disagreements regarding the meaning and portent of claims of environmental injustice. There can be little dispute, however, that environmental justice presents a major "political * * * problem[] affecting solid waste management."

### D. Safe Drinking Water Act

The Safe Drinking Water Act includes much of the same kinds of opportunities already mentioned in the context of the Clean Air Act, Clean Water Act, and the Resource Conservation and Recovery Act. The Administrator retains the usual significant discretion to target enforcement based on environmental justice factors and civil penalties are assessed based on several factors including "such other matters as justice may require." 42 U.S.C. 300h-2.

In some respects, though, the Safe Drinking Water Act may be especially susceptible to infusion of environmental justice concerns because of the statute's broad wording. For instance, the Act directs the Administrator, in promulgating national primary drinking water regulations to consider several specific factors, but then also "other factors relevant to protection of health. " 42 U.S.C. 300g-1(b)(7)(C)(i). The kinds of risk aggregation and cumulative impacts disparately affecting environmental justice communities would seem to be such a relevant factor. In addition, in establishing the list of containment level goals, the Administrator forms an advisory working group that must include members from several specified offices (e.g., Office of Drinking Water, Pesticides, Toxic Substances) "and any others the Administrator deems appropriate." 42 U.S.C. 300g-l(b)(3)(B). In light of Executive Order 12898, the Office of Environmental Justice could now easily be considered another "appropriate" office for this advisory working group.

Likewise, although the Act permits a State with primary enforcement to grant variances in certain circumstances, the statute further provides that any such variance "shall be conditioned on such monitoring and other requirements as the Administrator may prescribe." Here, too, the Administrator could strive to fashion conditions that reflect the kinds of risks of noncompliance faced especially by many environmental justice communities.

Finally, although this memorandum does not purport to undertake an exhaustive review (let alone any meaningful review) of Agency regulations in search of those providing the Agency with open-ended authority relevant to environmental justice, the Appeals Board has already identified one such regulation implementing the Safe Drinking Water Act. In *Envotech,* the Board ruled that EPA possesses substantial discretionary authority deriving from "regulatory 'omnibus authority' contained in 40 C.F.R. 144.52(a)(9). As described by the Board, that regulation "authorizes permit conditions 'necessary to prevent migration of fluids into underground source of drinking water.'" The Board reasoned that "there is nothing in the omnibus authority that prevents a Region from performing a disparate impacts analysis when there is an allegation that the drinking water of minority or low-income communities may be particularly threatened by a proposed underground injection well."

### E. Toxic Substances Control Act

The Toxic Substances Control Act (TSCA) is one of the few environmental laws to include an explicit environmental justice program, albeit of a quite limited scope. The provisions dealing with technical and grant assistance to the States for radon programs expressly target "homes of low-income persons" for such assistance. 15 U.S.C. 2665(a)(6), 2666(i)(2). Although the assistance provisions of the other laws do not include such a mandate, they do not preclude such a preference and, based on the Executive Order, EPA plainly has the authority to provide it.

Like the other environmental laws, TSCA's substantive standards are responsive to environmental justice. Environmental justice is implicated in testing and data gathering under TSCA. TSCA also looks to "cumulative" and "synergistic effects" in determining the regulatory border between reasonable and "unreasonable risk to health or the environment" (15 U.S.C. 2603(a), (b)(2)(A)), which are precisely those effects that environmental justice teaches have been too often overlooked in considering risks imposed on low-income cornmunities and communities of color.

Finally, TSCA is significant because Congress instructed the Administrator to "carry out" the law by considering the "environmental, economic and *social impact* of any action the Administrator takes * $ *." 15 U.S.C.2601(c). Hence, wholly apart from the Executive Order, the EPA possesses wide ranging authority in implementing TSCA to consider environmental justice concerns in fashioning and enforcing the Act's requirements.

### F. Federal Insecticide, Fungicide, and Rodenticide Act

The Federal Insecticide, Fungicide, and Rodenticide Act confers substantial authority on the Administrator to address environmental justice concerns. EPA's principal responsibility in administering FIFRA is in its registration of pesticides to guard against "unreasonable adverse effects on the environment." 7 U.S.C. 136a. Environmental justice is concerned with FIFRA's administration for many reasons, but one major reason is because of the substantial threat to the health of farmworkers posed by unreasonably dangerous use of pesticides. FIFRA provides EPA with significant authority to eliminate these unreasonable risks, including use and disposal restrictions, labeling requirements, registration denials, and conditional registrations. EPA's authority is broadly worded, thereby leaving the Agency with significant discretionary authority to take into account wide ranging concerns in implementing FIFRA. Environmental justice concerns with risk accumulation, cumulative effects, worker notice, all fall easily within the core of the Agency's regulatory authority under FIFRA. See 7 U.S.C. 136a.

## CONCLUSION

This memorandum is intended merely as an opening salvo in an effort to prompt EPA to strive more systematically to use its considerable permitting authority to promote environmental justice. As stressed at the outset, this memorandum does not purport to set forth for discussion all of the many authorities that EPA possesses. Its purpose is far more modest: to survey some of the provisions of the major laws for examples of open-ended statutory language capable of infusing environmental justice concerns more into the lawmaking and permitting process. There are undoubtedly significant provisions missing from this presentation. The memorandum, moreover, barely begins to explore the potential presented by similarly open-ended authorities created by EPA *regulations* rather than by congressional statutes. And, conversely, there may well be statutory provisions that have been included that, upon further reflection, would prove capable of carrying the weight that this memorandum may too optimistically assign to them (at least without changes in existing Agency regulations).

But whatever the risks of under- and overinclusiveness inherent in this memorandum, what remains clear is that EPA has considerable authority to promote environmental justice through permit conditions and denials (and registration conditions and denials) that the Agency has yet to enlist effectively. One area plainly ripe for exploitation is EPA's substantial authority to account better for the aggregation and accumulation of risks in environmental justice communities in the Agency's permitting decisions. EPA has far more authority than it has historically acknowledged to restrict and deny the operation of environmentally risky facilities based on the factor that the community to be exposed is already disparately subject to such risks from other sources. EPA also possesses considerable authority to use its permitting authority to condition permits in a manner that requires the regulated entity itself to help the exposed community to build the community enforcement capacity necessary for the community to oversee and ensure the facility's compliance with applicable environmental laws. Nor is there anything untoward or improper about requiring the regulated facility to do so. Indeed, quite the opposite is true. Such community enforcement is an indispensable element of the statutory scheme enacted by Congress and a necessary element of any executive branch program intended to fulfill the President's environmental justice mandate in Executive Order 12898.