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USING NEPA IN THE FIGHT FOR ENVIRONMENTAL JUSTICE

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The movement for environmental justice has received increasing public attention since the late 1980s.¹ Environmental justice refers to the problem of an overwhelming siting of waste disposal and other environmentally undesirable facilities in primarily minority or low-income neighborhoods.² An amalgamation of the results of several studies shows the following by way of illustration: Commercial hazardous waste sites are more likely to be in minority communities;³ penalties against those who violate environmental laws are lower when the violation occurs in a minority area;⁴ and minorities may be systematically exposed to higher levels of air pollutants.⁵

The principle behind environmental justice is to make the allocation of environmental burdens more equitable.⁶ Recognizing this goal in 1991, then EPA Administrator William Reilly stated: "The consequences of

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1. In 1982, a predominantly black county in North Carolina protested the siting of a polychlorinated biphenyl ("PCB") landfill. Prompted by their involvement in this watershed event, the Commission for Racial Justice, a group formed by the United Church of Christ, undertook an investigation of the problem of the inequitable siting of hazardous waste facilities. Their subsequent report, published in 1987, has received national attention. See COMMISSION FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES (1987) [hereinafter TOXIC WASTES AND RACE REPORT]. More recently, *The National Law Journal* conducted a special investigation of environmental justice concerns. See Marianne Lavelle & Marcia Coyle, *Unequal Protection: The Racial Divide in Environmental Law*, NAT'L. L.J., Sept. 21, 1992, at S2.

2. TOXIC WASTES AND RACE REPORT, *supra* note 1, at 15-17.

3. *Id.* at 13; see also ENVIRONMENTAL EQUITY WORKGROUP, U.S. ENVTL. PROTECTION AGENCY, ENVIRONMENTAL EQUITY: REDUCING RISK FOR ALL COMMUNITIES (DRAFT), PUB. NO. 230-DR-92-002, at 15 (1992) [hereinafter REDUCING RISK].

4. Lavelle & Coyle, *supra* note 1, at S1.

5. REDUCING RISK, *supra* note 3, at 14-15.

6. See TOXIC WASTES AND RACE REPORT, *supra* note 1, at 23-27.

environmental pollution should not be borne disproportionately by any segment of the population."⁷

At present there are at least nine bills before Congress on the issue of environmental justice, including the Environmental Justice Act and a bill to elevate the EPA to Cabinet level status, which contains an environmental equity provision.⁸ Rather than creating new legislation, or waiting for a bill that may never become law, we might look to current environmental statutes to provide relief for this growing problem.⁹ This

7. REDUCING RISK, *supra* note 3, at 9 (quoting William Reilly, Administrator, U.S. Envtl. Protection Agency, Memorandum (Apr. 1, 1992)). In 1990, then Administrator Reilly responded to the concerns of a group of social scientists and civil rights leaders about environmental risk in racial minority and low-income communities by forming the EPA Environmental Equity Workgroup. The workgroup was charged with analyzing evidence that minority and low-income groups bear a disproportionate burden of environmental risks, identifying factors in current EPA programs which might cause this disparity, improving EPA's communication with these groups in the decision-making process, and reviewing EPA's own risk assessment guidelines. *Id.* at 7.

8. Steven Keeva, *A Breath of Justice*, A.B.A. J., Feb. 1994, at 88. In addition, President Clinton issued an Executive Order on February 11, 1994, adopting a new policy on environmental justice. Exec. Order No. 12,898, 59 Fed. Reg. 7629 (1994). This order does not necessarily represent a change in practice, as indicated by the following section denying standing to sue under the order:

This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any person.

Id. at § 6-609, 59 Fed. Reg. 7629.

9. Many legal authorities and commentators have suggested that environmental justice is an equal rights issue, which properly falls within the scope of Title VI of the 1964 Civil Rights Act or under the auspices of the equal protection clause. Keeva, *supra* note 8, at 91; *see also Congressional Black Caucus Seminar Says Research, Immediate Action Needed*, Wash. Insider (BNA) (Sept. 20, 1993). For example, Ted Shaw, the Associate Director of NAACP's Legal and Educational Defense Fund, has suggested that EPA should use Title VI to enforce environmental justice. Clarisse Gaylord, Director of EPA's Office of Environmental Equity, responded that the agency is working with the Department of Justice to develop an enforcement strategy using Title VI of the Civil Rights Act. *Id.* Thus far, the efforts to mount an equal protection challenge to a waste siting decision have failed. *See East Bibb Twiggs Neighborhood Ass'n v. Macon Bibb Planning & Zoning Comm'n*, 896 F.2d 1264 (11th Cir. 1989); *R.I.S.E., Inc. v. Kay*, 768 F. Supp. 1144 (E.D. Va. 1991), *aff'd without op.*, 977 F.2d 573 (4th Cir. 1992); *Bean v. Southwestern Waste Management Corp.*, 482 F. Supp. 673 (S.D. Tex. 1979), *aff'd without*

paper focuses on fitting some of the objectives of the environmental justice movement into an existing statutory framework, specifically the National Environmental Policy Act ("NEPA"),¹⁰ to offer it as a potential weapon in the fight for environmental justice.

The purpose of this Article is to show that NEPA can meet one of the primary goals of the environmental justice movement, namely making the siting of environmentally burdensome facilities more equitable. Because NEPA, through the EIS process, mandates taking into account the significant environmental effects of a proposed project, including its cumulative impact, and requires public participation as part of its process, it is a procedural device for considering environmental justice when making a siting decision. According to Professor Richard Lazarus, to combat the unfair allocation of environmental burdens, decisionmakers must infuse distributional factors into existing environmental statutes.¹¹ He goes on to state that NEPA offers applicable precedent for this infusion because it's environmental impact statements have long included discussions of the socioeconomic effects of certain proposed federal actions.¹²

This Article is divided into three Sections. First, it will argue that both the language of the statute and the legislative history indicate that NEPA was meant to address environmental effects that threaten "all aspects of the human environment," such as overburdening one group of society with environmentally undesirable facilities. Section II will focus on using the EIS process to infuse inequitable distribution concerns into environmental policymaking. As an example, it will show how a hazardous waste facility may be a major federal action triggering the preparation of an environmental impact statement ("EIS"). It briefly outlines the EIS process to show it's attention to public participation and documentation of significant environmental effects, including the

op., 782 F.2d 1038 (5th Cir. 1986).

Although these issues fall outside the scope of this article, the fact that relief under civil rights claims is also being sought at the federal level, lends support to the theory stated herein that siting decisions can be considered federal actions. Like NEPA, Title VI, while covering all federal agency activities, only applies to nonfederal actions when a sufficient federal financial nexus can be established. See Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787, 806 (Spring 1993).

10. 42 U.S.C. §§ 4321-4370d (1988 & Supp. IV 1992).

11. Lazarus, *supra* note 9, at 789.

12. *Id.*

cumulative impact of a myriad of environmental burdens. It also highlights cases which have considered socioeconomic impacts in the preparation of an EIS, providing an avenue for infusing disparities in facility siting into the decision-making process. Third, it will consider state and local laws, the progeny of NEPA, to recommend a framework for incorporating environmental justice concerns in instances when the federal statute may not be triggered. The Article will conclude by asserting that NEPA may be an existing remedy for some of the concerns raised by the environmental justice movement.

I. THE STATUTE AND ITS LEGISLATIVE HISTORY

The language of the National Environmental Policy Act of 1969 lends support to the view that the Act is an existing means for attaining environmental equity. In fact, some have declared NEPA an environmental bill of rights.¹³ Setting forth its policies and goals, the Act provides that,

The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, *particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances* and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future

13. Eva H. Hanks & John L. Hanks, *An Environmental Bill of Rights: The Citizen Suit and the National Environmental Policy Act of 1969*, 24 RUTGERS L. REV. 230 (1970).

generations of Americans.¹⁴

These words suggest that the goal of NEPA is to balance the welfare of the people against the backlash of industrialization and urbanization. Yet, balance is exactly what is lacking in the siting of environmentally burdensome facilities, the most well-known example being hazardous waste sites. According to the *Toxic Wastes and Race*¹⁵ report, conducted by the United Church of Christ's Commission on Racial Justice, environmental hazards fall disproportionately on low-income and minority communities who have borne the brunt of waste siting decisions.¹⁶ Dr. Benjamin Chavis, former head of the United Church of Christ, recently testified before the House Subcommittee on Transportation and Hazardous Materials, that three out of every five African Americans and Hispanic Americans live in communities with uncontrolled toxic waste sites.¹⁷ A study by the National Law Journal indicates, in more than half of the ten regional EPA programs, cleanup action on Superfund sites begins from twelve percent to forty-two percent later at sites in minority areas.¹⁸

The plain meaning of the statutory language of NEPA, referring to the "overall welfare and development of man"¹⁹ and "fulfill[ing] the social, economic and other requirements of present and future generations of Americans,"²⁰ provides for all socioeconomic concerns about potential environmental hazards to be considered in the decision-making process.²¹

14. NEPA § 101(a), 42 U.S.C. § 4331(a) (emphasis added).

15. See *supra* note 1.

16. TOXIC WASTES AND RACE REPORT, *supra* note 1, at 13.

17. Dr. Benjamin Chavis, Executive Director & CEO, National Ass'n for the Advancement of Colored People, Written Testimony Before the Subcomm. on Transp. & Hazardous Materials of the House Comm. on Energy & Commerce (Nov. 18, 1993) (submitted for *The Environmental Justice Act of 1993: Hearings before the Subcomm. on Transp. & Hazardous Materials of the House Comm. on Energy & Commerce on H.R. 2105*, 103d Cong., 1st Sess. (1993)) (on file with author).

18. *The Racial Divide*, *supra* note 1, at S2.

19. NEPA § 101(a), 42 U.S.C. § 4331(a).

20. *Id.*

21. This is an application of the so-called "plain meaning" doctrine, whereby a court may decide what a statute means by considering the plain or ordinary meaning of the words used. The United States Supreme Court has referred to the plain meaning doctrine countless times. For a most recent reference, see *Fogerty v. Fantasy*, 114 S. Ct. 1023, 1033 (1994) (holding that awards for attorney's fees in copyright cases should be in accord with the plain meaning of the language of the relevant statute).

One of the social and economic costs that must be considered, particularly with a hazardous waste site, is the depletion of property values and the questionable health effects connected with such facilities.

NEPA goes on to state, "[I]t is the continuing responsibility of the Federal Government to use all practicable means ... to assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings ... preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity"²² This later language, when read in conjunction with the statement of NEPA's goals, arguably provides a means for introducing environmental justice concerns into NEPA. While "an environment which supports diversity" does not necessarily mean diversity of race, neither is such an interpretation precluded.²³ When read literally, the assurance that *all* Americans have aesthetically and culturally pleasing surroundings, indicates that it is not acceptable for most environmental hazards to be concentrated in a few groups.²⁴

By encouraging the preservation of important historic and cultural aspects of our national heritage, NEPA effectively prohibits the destruction of ethnic communities. Extrapolating such reasoning from the statute is not unusual. In *Houston v. City of Cocoa*,²⁵ a redevelopment plan for Cocoa, Florida would have effectively eliminated an historically black neighborhood. The plaintiffs based their claims on a variety of legal provisions, including the National Environmental Policy Act, and upon a court ruling in their favor, the plaintiffs reached a favorable settlement with the city.²⁶

22. NEPA § 101(b), 42 U.S.C. § 4331(b).

23. The dictionary defines diversity as a point of difference, an unlikeness, or multiformity. RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (unabridged ed.) (1983). Based on this definition, "an environment which supports diversity" can be interpreted as one which respects the needs of different groups.

24. Many have argued that restrictive Supreme Court precedents have irreparably changed the way in which reviewing courts consider NEPA issues by severing the link between NEPA's goals and policy statements and the procedures designed to implement them. See, e.g., Philip M. Ferester, *Revitalizing the National Environmental Policy Act: Substantive Law Adaptations from NEPA's Progeny*, 16 HARV. ENVTL. L. REV. 207, 229 (1992) (acknowledging this trend and subsequently arguing for a revitalization of NEPA).

25. *Houston v. City of Cocoa*, No. 89-92-CIV-ORL-19, (M.D. Fla. 1989).

26. Keeva, *supra* note 8, at 91.

Reading the statute to include concerns about inequitable burdens comports with NEPA's legislative history.²⁷ Senator Jackson, who shepherded the Act to its passage, stated:

The inadequacy of present knowledge, policies, and institutions is reflected in our Nation's history, in our national attitudes, and in our contemporary life We see increasing evidence of this inadequacy all around us: haphazard urban and suburban growth; crowding, congestion, and *conditions within our central cities which result in civil unrest and detract from man's social and psychological well-being*²⁸

The legislative history continues by emphasizing the need for congressional recognition of an inalienable right to a healthful environment,²⁹ including relief from environmental quality problems, like an increasingly ugly landscape cluttered with billboards, powerlines, and junkyards.³⁰

The intent of NEPA has been subverted in situations like those in South Chicago where black families express concern that the rampant disease among them stems from the fifty abandoned factory dumps circling their public housing project and in Tacoma, Washington, where paper mills and other industrial polluters destroyed the salmon streams and lifestyle of a Native American tribe because the government never included the tribe in assessing the pollution's impact.³¹ Because minorities and low-income groups are routinely relegated to older housing areas with lower property values, they are more likely to be exposed to pollutants. One study found that almost twenty-seven percent of all black children, as opposed to seven percent of white children, have blood-lead levels exceeding the threshold

27. Commentators agree that the legislative history of NEPA suggests that Congress intended NEPA's substantive goals to be met. *See generally* Hanks, *supra* note 13 (The legislative history of NEPA indicates that it was meant to be an environmental bill of rights); Ferester, *supra* note 24 (Based on the legislative history, the Court could have interpreted the substantive goals of the Act more forcefully).

28. 115 CONG. REC. S29,067 (daily ed. Oct. 8, 1969) (emphasis added).

29. *See generally id.* at S29,067-74 (discussing the history and context of NEPA).

30. *Id.* at S29,067.

31. *See* Lavelle & Coyle, *supra* note 1, at S2.

for serious concern.³²

With great foresight, Senator Jackson linked environmental and civil rights concerns. He stated:

The crisis of the cities and the crisis of the natural and rural environments have many roots in common, although they may erroneously be viewed as extraneous to one another An effective environmental policy in the past might have prevented and would certainly have focused attention upon the wretched conditions of urban and rural slums. It would surely have stimulated a search for knowledge that could have helped to correct and prevent degraded conditions of living. It is now evident that the fabric of American society can no longer contain the growing social pressure against slum environments What is needed ... is a systematic and verifiable method for periodically assessing the state of the environment and the degree and effect of man's stress upon it, as well as the effect of the environment and the environmental change on man.³³

Both the plain meaning of the language adopted in NEPA and its legislative history strongly suggest that Congress intended problems, such as inequitable burdens, social unrest, and the generally wretched conditions in urban slums, which are primarily populated by disadvantaged groups, to fall within the protective scope of NEPA. Because these problems are important issues within the environmental justice movement, NEPA may be an appropriate vehicle for transporting environmental justice into the legal realm today.

II. THE ENVIRONMENTAL IMPACT STATEMENT

NEPA requires the preparation of an environmental impact statement whenever a major federal action will have a significant effect on

32. Donald E. Lively, *The Diminishing Relevance of Rights: Racial Disparities in the Distribution of Lead Exposure Risks*, 21 B.C. ENVTL. AFF. L. REV., 309, 317 (1994) (citing AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY, *THE NATURE AND EXTENT OF LEAD POISONING IN THE UNITED STATES: A REPORT TO CONGRESS* (1988)).

33. 115 CONG. REC. S29,070-71 (daily ed. Oct. 8, 1969).

the environment.³⁴ The statute provides, in pertinent part, "[t]he Congress authorizes and directs that, to the fullest extent possible ... all agencies of the Federal Government shall ... include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement"³⁵ In analyzing whether the mandates of NEPA apply to a particular proposal, two factors are considered: first, whether the proposal constitutes a major federal action, and second, whether the proposed action will have a significant effect on the environment.³⁶

According to the statute, an environmental impact statement must include the environmental impact of the proposed action, any adverse environmental effects, alternatives to the proposed action, consideration of the relationship between local short-term uses and the maintenance and enhancement of long-term productivity, and documentation of any irreversible commitments of resources.³⁷ The federal agency must publish a Notice of Intent in the Federal Register, announcing its intent to prepare the impact statement and describing the proposed action and possible alternatives, as well as the scope of the statement, that is, the issues that will be addressed in the EIS.³⁸ As part of the scoping process, all interested private citizens and organizations should be included.³⁹

The Council on Environmental Quality ("CEQ") regulations emphasize the importance of inviting comments on the environmental impact statement. Section 1503.1 provides, in pertinent part:

34. NEPA § 102, 42 U.S.C. § 4332. Prior to preparing an EIS, an agency prepares an environmental assessment. This public document serves three functions: (1) it provides sufficient evidence and analysis for determining whether to prepare an EIS; (2) it aids an agency's compliance with NEPA when an EIS is not required; and (3) it facilitates the preparation of an EIS when one is necessary. An environmental assessment is either followed by a finding of no significant impact ("FONSI"), which a court may overturn, or the preparation of an EIS. *See* THOMAS J. SHOENBAUM & RONALD H. ROSENBERG, ENVIRONMENTAL POLICY LAW 76 (1991) (citing Dinah Bear, *NEPA at 19: A Primer on an "Old" Law with Solutions to New Problems*, [19 News & Analysis] *Env'tl. L. Rep.* (Env'tl. L. Inst.) 10,060 (1989)).

35. NEPA § 102, 42 U.S.C. § 4332.

36. *Id.*

37. *Id.* § 102(2)(C), 42 U.S.C. § 4332(2)(C).

38. SHOENBAUM & ROSENBERG, *supra* note 34, at 77.

39. *Id.*

After preparing a draft environmental impact statement and before preparing a final environmental impact statement the agency shall: * * * (4) Request comments from the public, affirmatively soliciting comments from those persons or organizations who may be interested or affected.⁴⁰

Section 1503.4 mandates that an agency respond to outside comments in preparing the final impact statement.⁴¹

To demonstrate how NEPA may apply to an environmental justice problem, this section considers the factors that trigger the EIS process, in terms of a proposed siting of a hazardous waste facility in a minority or low-income community. This proposal has been chosen as a paradigm because, according to a report by the General Accounting Office in 1983, three out of the four offsite commercial hazardous waste landfills in the southeast United States were located in minority communities.⁴²

A. *Defining "Major Federal Action"*

Under the Solid Waste Disposal Act ("SWDA"),⁴³ Congress permits the states to develop their own hazardous waste programs, provided they follow the guidelines promulgated by the United States EPA.⁴⁴ Because most states have created their own hazardous waste programs pursuant to these guidelines, the question arises as to whether the siting of a hazardous waste landfill is a federal action.

40. 40 C.F.R. § 1503.1(a)(4) (1993).

41. *Id.* § 1503.4. Some commentators believe that, despite its emphasis on including the public and protecting the environment, the EIS procedure has been rendered ineffective because the U.S. Supreme Court has stated that NEPA does not demand substantive results. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978). However, the fact that NEPA has been the most litigated environmental statute suggests that its effectiveness persists. *See Ferester, supra* note 24, at 227.

42. U.S. GEN. ACCT. OFF., PUB. NO. RCED 83-168, *SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES* 3 (1983).

43. 42 U.S.C. §§ 6901-6992k (1988 & Supp. IV 1992). Amendments to this Act are more commonly referred to as the Resource Conservation and Recovery Act ("RCRA").

44. SWDA § 3006, 42 U.S.C. § 6926.

In making a determination as to whether a proposal is a "major federal action," courts apply different criteria. Some courts refuse to consider the action independent of its effects on the environment. For example, the United States Court of Appeals for the Eighth Circuit stated that it is impossible to speak of a "minor federal action significantly affecting the quality of the human environment."⁴⁵ If the action has a significant effect, NEPA directs the government to prepare an environmental impact statement.⁴⁶ Other courts focus on the amount of federal funds expended, the number of people affected, the length of time consumed, and the extent of government planning involved.⁴⁷ Still others hold that "[a] non-federal project is considered a 'federal action' if it cannot 'begin or continue without prior approval of a federal agency.'"⁴⁸

EPA retains four statutory roles which place it prominently in the position of a federal parent, and thus bring any siting decision within the scope of a federal action. EPA acts as the,

rulemaker that lays down the minimum standards and the program requirements; as the regulator responsible for acting in states choosing not to develop their own programs; as the overseer with the powers to say "yes", "no", and "maybe" to state requests for program authorization; and as the enforcer with the authority to initiate enforcement actions even in states with authorized programs.⁴⁹

45. See *Minnesota Public Interest Research Group v. Butz*, 498 F.2d 1314, 1321-22 (8th Cir. 1974) (en banc). But cf. *Calipatria Land Co. v. Lujan*, 793 F.Supp. 241 (S.D. Cal. 1990) (deciding that the provision of NEPA dealing with environmental impact statements requires that the action triggering the statement both "be major and significantly affect the quality of the human environment").

46. *Minnesota PIRG*, 498 F.2d at 1321; see also 40 C.F.R. § 1508.18 ("Major reinforces but does not have a meaning independent of significantly" (citations omitted)).

47. See *Como-Falcon Coalition, Inc. v. U.S. Dept. of Labor*, 465 F. Supp. 850, 857 (Minn. 1978), *aff'd*, 609 F.2d 342 (8th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980) (citing *S.W. Ngrbrhd. Assembly v. Eckard*, 445 F.Supp. 1195, 1199 (D.C.C. 1978), *modified*, 609 F.2d 342 (8th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980)).

48. *Maryland Conservation Council, Inc. v. Gilchrist*, 808 F.2d 1039, 1042 (4th Cir. 1986) (holding that a locally planned highway is a major federal action because it requires the approval of a federal agency).

49. 4 WILLIAM H. RODGERS, ENVIRONMENTAL LAW: HAZARDOUS WASTES & SUBSTANCES § 7.22, at 253 (1992).

Having the power to enforce interpretations and conditions not included in a state-issued permit, EPA retains a de facto veto over the state's permitting process.⁵⁰ Therefore, even though a permit for a hazardous waste disposal site may be state-issued and a non-federal project, it may be a federal action for the purposes of NEPA because EPA retains significant approval and enforcement powers.

Second, federal grant money, which often comes with conditions, represents "the major portion of a state's hazardous waste program budget, and many states could not operate a successful program without it."⁵¹ According to one commentator, federal grants to state governments make up forty percent of the state budgets for hazardous waste programs.⁵² Many courts, in determining that a project constitutes a "major federal action" within the scope of NEPA, consider the federal funds expended in the project. For example, the Fourth Circuit, in holding that a locally planned highway fell within the scope of a "major federal action," considered that the county received \$245,000 in federal funds towards the project.⁵³ Likewise, a Minnesota district court found that the establishment of a Job Corps center was a major federal action given the federal funds expended.⁵⁴ The fact that there are significant federal funds involved in a state's hazardous waste program buttresses the position that the siting of a hazardous waste facility is a major federal action warranting the completion of an environmental impact statement.

Finally, projects that courts have interpreted as major federal actions have run the gamut from agency licensing and permit procedures⁵⁵

50. *Id.* at 264.

51. David Schnapf, *State Hazardous Waste Programs Under the Federal Resource Conservation and Recovery Act*, 12 ENVTL. L. 679, 703 (1982).

52. Lazarus, *supra* note 9, at 806. (citing U.S. ENVTL. PROTECTION AGENCY, A PRELIMINARY ANALYSIS OF THE PUBLIC COSTS OF ENVIRONMENTAL PROTECTION: 1981-2000, at 9 (1988)).

53. Maryland Conservation Council, Inc. v. Gilchrist, 808 F.2d 1039, 1042 (4th Cir. 1986); *see also* Winnebago Tribe of Nebraska v. Ray, 621 F.2d 269 (8th Cir.), *cert. denied*, 449 U.S. 836 (1980) (pointing to the presence of direct federal funding as an important consideration in determining whether NEPA applies to the construction of a proposed power line).

54. Como-Falcon Coalition, Inc. v. U.S. Dept. of Labor, 465 F. Supp. 850, 857 (Minn. 1978), *aff'd*, 609 F.2d 342 (8th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980); *see Como-Falcon Coalition*, 609 F.2d at 343.

55. "Federal courts [have] extended [the] ambiguous term [major federal action] to agency licensing and permit procedures" DANIEL R. MANDELKER, ENVIRONMENT AND EQUITY 110 (1981).

to the construction of an incinerator.⁵⁶ According to one commentator, an overview of the cases implicating NEPA indicates "that the level of federal action to which § 102(2) applies has been pushed quite low."⁵⁷ For example, the United States District Court for the District of Columbia held that a nonprofit organization of property owners and business-persons could enjoin the progress of an urban renewal project for failing to comply with NEPA, even though a local governing body ultimately had veto power over the project.⁵⁸ One explanation for the liberal reading given to the term "major federal action" comes in the form of an admonition to federal agencies: "the requirement of compliance 'to the fullest extent possible' has been interpreted by the courts to mean that the federal government should anticipate environmental impacts at every available opportunity, even when its own part in launching or authorizing the action is slight."⁵⁹

EPA's approval and enforcement powers with respect to state hazardous waste programs and the federal funds given to support those programs, in combination with the low threshold which some courts have established for the "major federal action" criterion, support the proposition that the siting of a hazardous waste disposal facility may be a major federal action within the purview of NEPA. The EPA Environmental Equity Workgroup, when assessing how to incorporate environmental justice concerns into its programs and policies,⁶⁰ stated that EPA should review and selectively revise its permit, grant, monitoring, and enforcement procedures to address high concentrations of risk in racial minority and low-income communities.⁶¹ The Workgroup further recommended that EPA emphasize its concerns about environmental equity to state and local

56. *See* *Montgomery Cty. v. Richardson*, 2 *Envtl. L. Rep.* (Envtl. L. Inst.) 20,140 (D.D.C. Jan. 31, 1972).

57. FREDERICK R. ANDERSON, *NEPA IN THE COURTS: A LEGAL ANALYSIS OF THE NATIONAL ENVIRONMENTAL POLICY ACT* 76 (1973).

58. *See* *Businessmen Affected Severely by the Yearly Action Plans, Inc. v. D.C. City Council*, 339 F. Supp. 793 (D.D.C. 1972).

59. ANDERSON, *supra* note 57, at 64.

60. *See supra* note 2 and accompanying text (discussing the formation and objectives of the EPA Environmental Equity Workgroup).

61. REDUCING RISK, *supra* note 3, at 5. The Commission for Racial Justice likewise recommends that EPA should monitor the siting of new hazardous waste facilities to insure that adequate consideration is given to the racial and socioeconomic characteristics of potential host communities. TOXIC WASTES AND RACE REPORT, *supra* note 1, at 24.

governments.⁶² Forcing a state to consider these concerns through the NEPA process when siting a hazardous waste facility could be a substantial step in achieving these objectives.

B. *Making the "Significance" Determination*

One of the threshold questions a court must ask in determining the necessity of an environmental impact statement is whether the environmental effect claimed to be significant is covered by NEPA.⁶³ In the case of an environmental justice claim, the effect would be a socioeconomic one. To apply NEPA to such a claim, socioeconomic effects must fall within the scope of recognized interests in making the significance determination.

The CEQ defines "effects" broadly to include ecological, aesthetic, historic, cultural, *economic*, *social*, or health.⁶⁴ It goes on to define "human environment" to include "the natural and physical environment and the relationship of people with that environment. This means that economic and social effects are not intended by themselves to require preparation of an environmental impact statement."⁶⁵ Because a hazardous waste facility has other environmental effects, such as possible groundwater leakage, the potentially adverse effects include, but are not limited to, socioeconomic concerns. The Eighth Circuit has held that preservation of the character of a neighborhood is a legitimate element of the "human environment" when combined with other physical effects on the natural environment.⁶⁶

The Second Circuit, in particular, has recognized that NEPA's review encompasses socioeconomic concerns, such as the quality of urban life. In *Trinity Episcopal School Corporation v. Romney*,⁶⁷ the court held that several factors must be considered in an environmental impact statement, including: the impact of the environment on current residents

62. REDUCING RISK, *supra* note 3, at 5.

63. See DANIEL R. MANDELKER, NEPA LAW AND LITIGATION § 8.35 at 90 (1984).

64. 40 C.F.R. § 1508.8(b).

65. *Id.* § 1508.14.

66. *Como-Falcon Coalition, Inc. v. U.S. Dept. of Labor*, 609 F.2d 342, 345 (8th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980); see also *Como-Falcon Coalition*, 465 F. Supp. 850, 857 (Minn. 1978), *aff'd*, 609 F.2d 342 (8th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980).

67. 523 F.2d 88 (2nd Cir. 1975).

and their activities, decay and blight imposed on the surrounding community, traffic, and neighborhood stability.⁶⁸ According to one study, the existence of operating hazardous waste facilities and uncontrolled sites poses a serious threat to both public health and overall community development.⁶⁹ This stunting of community development often leads to physical decay, and consequently, a lack of stability in the neighborhood. The Second Circuit again held that these are factors that NEPA is meant to address, stating that significant effects include economic and physical deterioration in the community, which contribute to an "atmosphere of urban decay and blight, making environmental repair of the surrounding area difficult if not infeasible."⁷⁰

Another approach courts have adopted in making the significance determination is to analyze whether the project will change the existing use of the affected area as well as its absolute quantitative adverse environmental effect on the area, including its cumulative harm.⁷¹ CEQ defines cumulative impact as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (federal or non-federal) or person undertakes such other actions."⁷² Expounding on this definition, the Second Circuit, stated:

Although the existing environment of the area which is the site of a major federal action constitutes one criterion to be considered, it must be recognized that even a slight increase in adverse conditions that form an existing environmental milieu may sometimes threaten harm that is significant. *One more factory polluting air and water in an area zoned for industrial use may represent the straw that breaks the back of the environmental camel.*⁷³

Commonly, minority and low-income communities are burdened with numerous environmental hazards, with the proposed siting of a hazardous

68. *Id.* at 93.

69. TOXIC WASTES AND RACE REPORT, *supra* note 1, at 23.

70. *City of Rochester v. United States Postal Service*, 541 F.2d 967, 973 (2d Cir. 1976).

71. *See, e.g., Hanly v. Kleindienst* ("Hanly II"), 471 F.2d 823 (2d Cir. 1972), *cert. denied sub nom., Hanly v. U.S. Attorney General*, 412 U.S. 908 (1973).

72. 40 C.F.R. § 1508.7.

73. *Hanly II*, 471 F.2d at 831 (emphasis added).

waste facility adding to the list of surrounding potential industrial polluters. Thus, the cumulative impact of the industrial polluters is overly burdensome, with the proposed hazardous waste siting providing the proverbial straw that breaks the camel's back.

According to one commentator, minorities and low-income groups have often "inherited hazards by moving into older sectors of cities, where decrepit factories and other facilities were built long before anyone worried about pollution."⁷⁴ Burdened by drugs, poverty, crime, bad medical care and joblessness, these groups are powerless to prevent their communities from becoming a repository for the nation's debris.⁷⁵ For these reasons, a proposed hazardous waste site will significantly affect the quality of the human environment. As Judge Craven stated, in a strongly worded dissent in *Rucker v. Willis*:⁷⁶

It is, of course, true that the issuance of a permit by the Corps to construct a boat dock on an inland waterway for a private homeowner is not a major federal action requiring the preparation of an impact statement. But what about the 500th such permit, or the 10,000th one? At some point "zoning" and environmental impact merge. Ecology is largely a matter of land use.⁷⁷

Finally, the significance language may also be triggered when projects are "highly controversial." CEQ defines "significantly" to include the degree to which the effects on the quality of the human environment are likely to be highly controversial.⁷⁸ One commentator has suggested that this requirement views public opposition as an environmental "effect" that makes an impact statement necessary.⁷⁹ Under this theory, a

74. John Elson, *Dumping on the Poor*, TIME, Aug. 13, 1990, at 46, 47.

75. *Id.* at 46.

76. 484 F.2d 158 (4th Cir. 1973).

77. *Id.* at 162 (Craven, J., dissenting) (majority held that an EIS was not required for the construction of a commercial fishing pier).

78. 40 C.F.R. § 1508.27(b)(4).

79. MANDELKER, NEPA LAW, *supra* note 63, at 92. *But cf.* Hanly v. Kleindienst ("Hanly II"), 471 F.2d 823, 830 (2nd Cir. 1972) ("Controversial" refers to a dispute about the size, nature or effect of the federal action, rather than to the existence of opposition to a particular use, the effect of which is clear), *cert. denied sub nom.* Hanly v. U.S. Attorney General, 412 U.S. 908 (1973).

minority or low-income group's refusal to allow a hazardous waste site in their area may be sufficient to trigger NEPA.

III. STATE VERSIONS OF NEPA

Should a proposed action, such as the siting of a landfill, not fall within the scope of a "major federal action," NEPA-like remedies may be available at the state level. As of 1992, twenty-eight states had enacted legislation patterned on NEPA, establishing state environmental policies and requiring an analysis of the environmental effects of proposed projects through the EIS process.⁸⁰

Similar to NEPA, state legislation may consider socioeconomic impacts or the cumulative effects of a proposed action, thus making the state legislation applicable to environmental justice concerns. Socioeconomic impacts are likely to fall within the purview of significant environmental effects,⁸¹ because the scope of the states' EIS process is broader.⁸² The EIS process at the state level also may be used to fight the incremental environmental degradation that occurs in minority and low-income communities, by taking into account the cumulative impact of isolated and discrete decisions. For example, a New York appellate court held that an EIS for a proposed solid waste management facility must consider the cumulative impact of the facility, including its effects upon traffic, zoning, and community character.⁸³

80. Ferester, *supra* note 24, at 209.

81. As a general rule, case law from NEPA applies to the state versions or "little NEPAs" as well. For example, a New York court, basing its decision on those of the Second Circuit, held that the socioeconomic impacts of the location of a state governmental facility must be considered in the EIS under SEQRA. *County of Franklin v. Connelie*, 408 N.Y.S.2d 174, 181 (N.Y. Sup. Ct. 1978), *rev'd on other grounds*, 415 N.Y.S.2d 110 (N.Y. App. Div. 1979). The EIS process enjoys a status similar to a uniform state law. Nicholas A. Robinson, *SEQRA's Siblings: Precedents from Little NEPA's in the Sister States*, 46 ALB. L. REV. 1155, 1157 (1982).

82. If there is a possibility that a project will have significant effects on the environment, state courts will require the preparation of an EIS. Where there is doubt about the significance of the effects, that doubt is resolved in favor of complying with the EIS process. Jeffrey T. Renz, *The Coming of Age of State Environmental Policy Acts*, 5 PUB. LAND L. REV. 31, 37 (1984).

83. *Golten Marine Co, Inc. v. New York Dept. of Env'tl. Conservation*, 598 N.Y.S.2d 59, 60 (N.Y. App. Div. 1993).

In some respects, the state legislation differs from NEPA. While the state environmental policy acts duplicate the broad environmental goals of NEPA, they impose more substantive requirements.⁸⁴ In addition, some state NEPA legislation applies to private as well as public agency development.⁸⁵ A brief overview of the statutes of California, Washington, and New York shows that they offer a broader application, provide an inalienable right to a clean environment, and specifically recognize the character of a neighborhood as environmental effect, respectively. These differences may add to the statutes' effectiveness in rectifying environmental inequities.

The California Environmental Quality Act ("CEQA")⁸⁶ requires preparation of an Environmental Impact Report ("EIR") for proposed state and local projects that may have a significant impact on the environment.⁸⁷ In an early and well-known decision, *Friends of Mammoth v. Board of Supervisors*,⁸⁸ the California Supreme Court relied on CEQA's legislative history to apply CEQA to all private development activities requiring a government permit or approval.⁸⁹ CEQA compliance is mandated for actions such as power plant authorizations, annexation of land by a municipality, permits for subdivisions, and local zoning decisions.⁹⁰ Because CEQA has a broad application, it is likely that most actions will fall within its scope, requiring the preparation of an EIS.

84. The Washington Supreme Court has specifically rejected arguments that SEPA is a purely procedural requirement. *Polygon Corporation v. City of Seattle*, 578 P.2d 1309, 1312 (Wash. 1978); *see also ASARCO, Inc. v. Air Quality Coalition*, 601 P.2d 501 (Wash. 1979) (reaffirming SEPA's substantive nature). Under California case law, if a County plans to go forward with a project, it must set forth why it has approved the project in light of each identified adverse environmental impacts. *Twain Harte Homeowners v. County of Tuolumne*, 188 Cal. Rptr. 233, 239-40 (1982). California statute then requires mitigation to the extent feasible. CAL. PUB. RES. CODE § 21081. For a more in depth analysis of states requiring both substantive and procedural compliance, see Renz, *supra*, note 82, at 49-52.

85. MANDELKER, ENV'T & EQUITY, *supra* note 55, at 108.

86. CAL. PUB. RES. CODE §§ 21,000-21,177 (West 1986 & Supp. 1994) (enacted in 1970).

87. *Id.* § 21,100.

88. 502 P.2d 1049 (Cal. 1972).

89. *Id.* at 1054-56.

90. Robinson, *supra* note 81, at 1169.

Washington's State Environmental Policy Act ("SEPA"),⁹¹ enacted in 1971, goes even further, providing that "each person has a fundamental and inalienable right to a healthful environment."⁹² According to one commentator, the Washington Supreme Court has held that SEPA imposes substantive duties,⁹³ thereby giving the EIS process considerably more force.

The State Environmental Quality Review Act of New York ("SEQRA")⁹⁴ extends beyond NEPA, CEQA, and even SEPA because it arguably imposes a duty on agencies to choose an environmentally favorable alternative.⁹⁵ Declaring its overall aim as "encourag[ing] [a] productive and enjoyable harmony between man and his environment,"⁹⁶ SEQRA requires both procedural and substantive compliance.⁹⁷ By its language, SEQRA establishes a lower threshold for triggering an impact statement than NEPA. First, SEQRA applies to any state government action; it does not have to be "major."⁹⁸ Second, SEQRA includes environmental effects, such as changing the character of the community or neighborhood, within its statutory language.⁹⁹ This statutory language supports the application of the EIS process to environmental justice concerns.

Some jurisdictions have responded specifically to the concerns of the environmental justice movement by incorporating socioeconomic impacts and the fair distribution of facility siting into their impact statement requirements. For example, in the aftermath of *Bean v. Southwestern Waste Management*,¹⁰⁰ involving an unsuccessful attempt to use the equal protection clause to challenge the siting of a landfill in a predominantly minority community, the state of Texas began to require landfill applicants to include socioeconomic information concerning the

91. WASH. REV. CODE ANN. §§ 43.21C.010-.21C.910 (West 1983 & Supp. 1994).

92. *Id.* § 43.21C.020(3).

93. MANDELKER, NEPA LAW, *supra* note 63, § 12:05.

94. N.Y. ENVTL. CONSERV. LAW §§ 8-0101 to 8-0117 (Consol. 1982 & Supp. 1993).

95. *See id.* § 8-0109(1).

96. *Id.* § 8-0101.

97. Neil Orloff, *SEQRA: New York's Reformation of NEPA*, 46 ALB. L. REV. 1128, 1132 (1982).

98. N.Y. ENVTL. CONSERV. LAW § 8-0109(2).

99. *Id.* § 8-0105(6).

100. 482 F. Supp. 673 (S.D. Tex. 1979), *aff'd without op.*, 782 F.2d 1038 (5th Cir. 1986).

proposed site in order to obtain a permit.¹⁰¹ New York City has developed an even more elaborate response to the problem of inequity in siting.

To achieve greater fairness in the siting of city facilities, the New York City Charter employs criteria "designed to further the fair distribution among communities of the burdens and benefits associated with city facilities, ... with due regard for the social and economic impacts of such facilities upon the areas surrounding the sites."¹⁰² These criteria, known as the "fair share criteria," add the equitable distribution of city facilities to other traditional factors in assessing siting proposals.¹⁰³ Among the general criteria an agency must consider when examining a siting proposal are the extent to which a neighborhood may be adversely affected by a concentration of facilities and whether the site is inconsistent with neighborhood or borough plans.¹⁰⁴ With regard to waste management decisions, the siting agency must also consider the number and proximity of existing city and non-city facilities, having similar environmental effects, located within a half-mile radius of the proposed site.¹⁰⁵ These criteria embody the cumulative impact assessment espoused by NEPA.

While private facilities do not have to meet the "fair share" requirements, the city's decisions do take into account the location of these facilities when it is assessing a siting proposal.¹⁰⁶ Moreover, when the City Planning Commission recommends a site for a private, state, or federal facility, it considers fair share criteria.¹⁰⁷

State NEPAs may offer protection for minority or low-income groups in those instances where a proposed action fails to trigger NEPA. A state remedy may be preferable, even in those cases where the proposal is likely to trigger NEPA, because many state courts recognize a broader range of actions and effects covered by these "little NEPAs."

101. Lazarus, *supra* note 9, at 848.

102. Naikang Tsao, *Ameliorating Environmental Racism: A Citizen's Guide to Combatting the Discriminatory Siting of Toxic Waste Dumps*, 67 N.Y.U.L. REV. 366, 375 (1992) (citing New York City Charter § 203(a)).

103. *Id.* at 376.

104. *Id.* (citing NEW YORK CITY PLANNING COMM'N, CRITERIA FOR THE LOCATION OF CITY FACILITIES art. 4 (1990)).

105. *Id.* at 377 (citing NEW YORK CITY PLANNING COMM'N, CRITERIA FOR THE LOCATION OF CITY FACILITIES art. 6.42 (1990)).

106. *Id.* at 378 n.68.

107. *Id.*

IV. CONCLUSION

NEPA may proffer at least an interim remedy for the environmental justice movement because it mandates a process more likely to consider the concerns of minority and low-income groups, overburdened by potential industrial polluters.¹⁰⁸ In accordance with NEPA, an agency is not only required to predict the environmental effects of a proposed action, it is also compelled to involve concerned parties in the decision-making process.¹⁰⁹ The EIS process is an accepted vehicle for bringing pressure on an agency in a way which is likely to produce results.¹¹⁰ For example, Chemical Waste Management, Inc. announced September 7, 1993, its intent to abandon a plan to build a large toxic waste incinerator near the Hispanic community of Kettleman City, California.¹¹¹ This retreat by Chemical Waste Management, one of the few successes in the fledgling environmental justice movement, came about after the court ordered the company to conduct a new EIS, taking into account the Hispanic community.¹¹²

Moreover, NEPA is advantageous in that it focuses on attacking proposed hazardous waste facilities rather than on stopping operating ones. The benefits of that approach are best supplied by EPA itself, which has stated: "It is much more difficult for public opposition to shut down an

108. NEPA also has the benefit of being available today. Other alternatives, such as bringing new legal theories for expanding civil rights, are not likely to be met with sympathy in most courts in this country. Luke W. Cole, *Remedies for Environmental Racism: A View from the Field*, 90 MICH. L. REV. 1991, 1997 (1991).

109. Orloff, *supra* note 97, at 1129.

110. Many commentators have recognized the importance of a community bringing pressure upon an agency to effectuate change. See e.g. Cole, *supra* note 108, at 1991. In a similar vein, EPA's Environmental Equity Workgroup recommended that EPA "expand and improve the level and form with which it communicates with minority and low-income communities and should increase efforts to include them in environmental policy-making." REDUCING RISK, *supra* note 3, at 5.

111. Marcia Coyle & Marianne Lavelle, *Environmental Victory*, NAT'L L.J., Sept. 20, 1993, at 13.

112. See *El Pueblo Para el Aire y Agua Limpio v. County of Kings*, 22 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,537 (Cal. Super. Ct. Dec. 30, 1991). As part of the new EIS prepared in accordance with CEQA, the company was required to translate the report and all other material in the case into Spanish. The judge declined to rule on the civil rights charges at that time.

operating facility than to prevent a facility siting."¹¹³ According to EPA, a state regulatory agency is apt to vigorously defend its regulatory process and thus, the site.¹¹⁴ Therefore, public opposition is more likely to be successful during the siting phase than when the facility is operating.¹¹⁵ As one commentator has observed with regard to hazardous waste facilities, "few proposals survive the volatile public review that often accompanies announcement of the recommended siting of a hazardous waste facility."¹¹⁶

While it may be unrealistic at this point to hope that NEPA can actually prevent the siting of a hazardous waste facility in every low-income or minority neighborhood, it is conceivable that the EIS process, state or federal, may include concerns about inequitable siting in the decision-making process.

113. U.S. ENVTL. PROTECTION AGENCY, PUB. NO. SW-809, SITING OF HAZARDOUS WASTE MANAGEMENT FACILITIES AND PUBLIC OPPOSITION 25 (1979).

114. *Id.*

115. *Id.*

116. Lazarus, *supra* note 9, at 798.