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Environmental Justice and Title VI

Civil Rights Act of 1964

The Civil Rights Act of 1964 arose from a growing perception that the federal government should be authorized to address discrimination on the basis of race. Title VI of the Civil Rights Act (42 USC §2000) states:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Title VI was enacted pursuant to the Fourteenth Amendment and the Commerce Clause of the U.S. Constitution and codified into statutory formula the equal protection and nondiscrimination guarantees of the Federal Constitution. Title VI directed each federal agency that is authorized to extend federal financial assistance—including grants, loans or contracts other than a contract of insurance or guaranty—to issue Title VI implementing regulations of general applicability that are consistent with the objectives of the statute authorizing the agency to provide financial assistance. Since the passage of Title VI of the Civil Rights Act over 30 years ago, federal agencies have adopted such implementing regulations. The regulations, however, do not directly address environmental permitting or environmental justice issues.

The U.S. Department of Justice's Coordination and Review Section of the Civil Rights Division has the overall federal responsibility for coordinating Title VI implementation by the federal agencies. Primary enforcement responsibility for Title VI remains with the federal agencies, virtually all of which provide federal financial assistance.

Exec Order on Environmental Justice

In February 1994, President Clinton signed Executive Order 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*. (See *LLW Notes*, April 1994, p. 12.) The memo that accompanied the executive order emphasized the use of existing laws, including Title VI, to advance environmental justice:

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

Title VI Complaints re State Agencies Increasing

The filing of administrative complaints under Title VI of the Civil Rights Act of 1964 (Title VI) against state regulatory agencies to raise environmental justice claims is a relatively recent tactic used by community, environmental and/or opposition groups to challenge state permitting actions. The first environmental justice administrative complaint to be filed under Title VI was submitted to EPA in September 1993, challenging a permit issued by the Louisiana Department of Environmental Quality (DEQ) under the Resource Conservation and Recovery Act (RCRA). Since that time, approximately 41 such complaints have been filed with EPA against state agencies, one has been filed with NRC, and an unknown number of Title VI environmental justice complaints have been filed with other federal agencies that provide federal financial assistance to states. —*LAS*

> In accordance with Title VI of the Civil Rights Act of 1964, each Federal agency shall ensure that all programs or activities receiving Federal financial assistance that affect human health or the environment do not directly, or through contractual or other arrangements, use criteria, methods, or practices that discriminate on the basis of race, color, or national origin.

Under the Executive Order, EPA is the lead agency for coordinating environmental justice implementation. In addition, each federal agency must develop a strategy for implementing environmental justice. These strategies are not codified in federal regulations as the federal agency implementing regulations for Title VI; rather, the environmental justice strategies function as internal management tools for the federal agencies.

The Department of Justice (DOJ) and EPA have formed a Title VI Task Force, which is charged with developing guidance for addressing environmental justice under Title VI. At this time, it is not known what the the schedule for issuance of the guidance will be, or whether the guidance will be codified in federal regulations to amend the existing Title VI implementing regulations to explicitly address environmental justice issues.

Applicability to States

Federal Agency Policy

Since its enactment, Title VI has been applied by the federal government and the courts to entities receiving federal financial assistance, including state and local governments. Title VI applies only to recipients of federal financial assistance; federal agencies are not considered to be recipients of federal financial assistance. Executive orders have historically been considered internal management tools of the Executive Branch and not applicable to state governments.

The DOJ's and EPA's position regarding the 1994 Executive Order is that the environmental justice provisions of the Executive Order do not apply to states or other recipients of federal financial assistance. However, environmental justice advocates have submitted Title VI administrative claims asserting that Executive Order provisions should be applied to recipients of federal financial assistance. Those administrative complaints are still pending.

White House Intent Not Clear

As noted, the federal agencies to date have not applied the Executive Order on Environmental Justice to recipients of federal financial assistance. The intent of the Clinton Administration regarding the applicability of environmental justice provisions of the Executive Order to states and localities through the use of existing law, including Title VI, is unclear.

A prepared statement—*Earth Day Address: Environmental Justice*—issued by the White House in April 1993 (prior to the signing of the executive order on environmental justice in February 1994) declares

> The President asked the Environmental Protection Agency and the Department of Justice to begin an inter-agency review of federal, state and local regulations and enforcement that affect communities of color and low-income communities with the goal of formulating an aggressive investigation of the inequalities in exposure to environmental hazards. As part of this evaluation, the Department of Justice and the Environmental Protection Agency—in coordination with the Department of Housing and Urban Development and the Department of Labor—will identify examples of communities in which the distributional inequalities of environmental decision making have adversely affected minority and low-income populations. This process will be the basis for legislative and enforcement reforms if necessary.

States' Analysis of Federal Intent

A May 1995 Issue Brief prepared by the National Governors' Association observes:

> Recently ... citizens have begun to pursue environmental justice concerns by charging states with violating Title VI of the Civil Rights Act of 1964. This provision prohibits states from using any federal funds, such as those associated with state implementation of federal hazardous waste regulations, in programs that result in discriminatory effects, regardless of their intent. Just what constitutes a discriminatory effect from state administration of federal environmental programs, whether it is the uneven geographic distribution of hazardous waste facilities, a disproportionate enforcement, or an unacceptable difference in the ambient concentration of

pollutants, will depend on the courts and legal interpretations by EPA and the U.S. Department of Justice. For example, EPA's Office of Civil Rights is currently considering Title VI complaints filed by citizen groups against California, Louisiana, Michigan, Mississippi, and Texas. The outcome of these complaints, and the associated guidance and interpretations developed at the federal level, could lead to fundamental changes in state environmental programs.

Novel Application of Title VI to Environmental Programs

Title VI has been applied in a variety of contexts, including housing, education, public works and employment. Application of Title VI to environmental programs, however, is new. Application of Title VI to facilities through a state's permitting process—rather than to a state-owned facilities—is a novel approach that has yet to be legally substantiated.

Enforcing Environmental Justice under Title VI

Philosophical Differences—Environmental Justice and Title VI

As noted, Title VI was adopted in 1964 to prohibit discrimination based on race, color and national origin under programs or activities that receive federal financial assistance, and has historically been applied to broad-based social and educational federally-funded programs. The environmental justice movement emerged in the late seventies, when environmental justice advocates asserted that people of color and the poor are exposed to greater environmental hazards than are whites and the wealthy.

Activists have pursued a number of different avenues to raise environmental justice claims—including filing lawsuits under the Equal Protection Clause of the U.S. Constitution and filing lawsuits under federal and state statutes to allege disparate enforcement of environmental laws. However, previous legal strategies for advancing environmental justice claims have in general failed to meet established legal criteria for success. The current use of Title VI to file administrative claims and/or lawsuits is the most recent strategy being used to raise environmental justice claims.

Although environmental justice legal strategies have met with little success to date, the environmental justice movement has achieved some political success, as illustrated by the Executive Order on environmental justice.

Title VI and the environmental justice movement have two distinct philosophical differences:

Scope of Protected Status

- Title VI prohibits discrimination based upon three defined characteristics: race, class and national origin. The poor are not a "protected group" under Title VI. Absent a demonstration of impact on a protected group, a Title VI claim against a state agency does not have standing under Title VI.

  The Executive Order on Environmental Justice, however, directs federal agencies to consider low-income—in addition to minority populations—as a distinct class when evaluating the impacts of federal programs. The broader environmental justice movement typically encompasses any group perceived to be disadvantaged—whether due to race, income, gender, age and/or health.

Causation

- Title VI requires a finding of causation between the actions of a recipient of federal financial assistance and a discriminatory impact upon a protected group. The environmental justice concept, however, does not demand that causation be demonstrated. Simply proving a discriminatory effect necessitates the correction and/or mitigation of that effect—even when the specific actions of the recipient of federal financial assistance did not create the discriminatory effect.

Ambiguities in Existing Title VI Guidance

As noted, federal agencies were required to develop implementing regulations under Title VI to prohibit discrimination in federal programs following the passage of Title VI in 1964. However, these implementing regulations do not address issues specific to environmental justice claims raised under Title VI or the executive order. Unresolved issues include

- definitions and legal interpretations of key environmental justice terms and concepts, such as the conditions that may be considered under "human health and environmental effects";
- how to measure specific environmental justice concepts, such as affected population and the spatial distribution of facilities;
- the capacities of environmental laws as currently conceived to address racial and socioeconomic concepts in addition to environmental parameters;
- how environmental justice considerations should be weighed in conjunction with legal and statutory requirements which outline the parameters that state agencies may consider in permitting decisions; and
- how to address the interrelationships—and potential conflicts—between environmental justice goals, environmental laws, local zoning authorities, community economic development efforts, and the role of a free-market economy in distributing societal costs and benefits.

Clarification of Existing Title VI Guidance

Title VI Task Force

The Title VI Task Force established by DOJ and EPA presumably will address these issues as it develops federal agency guidance. The guidance may be issued as internal EPA guidance for deciding Title VI cases—and thus would not be applicable to other federal agencies. It is unknown at this time whether the Title VI guidance will be subject to public review and comment.

National Environmental Justice Advisory Council

EPA has also established a federal advisory committee—the National Environmental Justice Advisory Council (NEJAC)—to provide EPA with recommendations for implementing environmental justice. (See related story.) Since its inception in 1994, NEJAC has developed a model public participation plan for interested parties. According to NEJAC members, additional NEJAC guidance and recommendations may be forthcoming. Absent the issuance of guidance and recommendations by federal agencies, court rulings will determine the role of environmental justice in state environmental programs.

Existing Title VI Implementing Guidelines

Until further guidance is available, federal agencies are required to follow existing guidance for implementing Title VI, including investigating Title VI complaints. To date, federal agencies typically have not complied with the schedules contained in the federal agencies' regulations when evaluating Title VI environmental justice complaints due to the lack of guidance on specific environmental justice issues. Federal agencies usually have complied, however, with the requirement to develop environmental justice strategies under the Executive Order.

An examination of existing federal regulations, guidance and interpretations for Title VI complaints provides insights into potential applications of Title VI to state environmental programs, including low-level radioactive waste management programs.

"Federal Financial Assistance"

Title VI prohibits discrimination in programs and activities that receive federal financial assistance. An undated background document prepared by DOJ's Civil Rights Division describes methods of identifying which state and local entities are recipients of federal financial assistance and thus subject to Title VI requirements:

> The easiest method for identifying a recipient is to determine whether an entity directly receives a Federal grant, loan, or contract other than a contract for insurance or guaranty. However, to determine the reach of Title VI solely on the basis of a cash flow analysis is to improperly restrict its intended scope. Title VI assistance can flow from aid that enhances a recipient's ability to improve or expand the allocation of its resources in addition to aid that increases those resources. Therefore "Federal financial assistance" may be in the form of not only cash but also goods, services, or equipment.

The Civil Rights Restoration Act of 1987 reversed a 1984 Supreme Court decision and reinstated a broad application of Title VI by defining "program" and "program or activity" as "all of the operations of [the institution receiving federal financial assistance] any part of which is extended Federal financial assistance." The legislative history states that these definitions "make clear that discrimination is prohibited throughout entire agencies or institutions if any part receives Federal financial assistance."

NRC's Agreement State Program—Federal Financial Assistance?

Under the Atomic Energy Act, NRC may enter into agreements with states (Agreement States) to discontinue—not delegate—its authority over the regulation of certain activities and radioactive materials in those states. NRC has maintained that Title VI covers financial assistance to the Agreement States, including the provision of training and associated travel. NRC's regulations, which are contained in 10 CFR Part 4, list the types of federal financial assistance to which Title VI applies. These regulations do not specifically address whether the transfer of NRC's legal authority to Agreement States constitutes federal financial assistance for the purposes of Title VI.

The regulations define assistance to include:

- conferences on regulatory programs (without full-cost recovery);
- orientation and instruction (without full-cost recovery);
- courses in fundamentals of radiation (without full-cost recovery);
- participation in meetings and conferences to assist scientific, professional or educational institutions (without full-cost recovery); and
- research support.

In Fiscal Year 1997, NRC substantially reduced training and associated travel that is provided to Agreement States without full-cost recovery. NRC and individual Agreement States are best able to determine whether the Agreement States receive assistance from NRC that qualifies as federal financial assistance for the purposes of Title VI.

Administrative Complaints vs.Lawsuits

Pros and Cons

Title VI claims may be brought either through a federal administrative process or in federal court. The courts do not require that plaintiffs exhaust their administrative remedies before filing a Title VI lawsuit. A common first step for a person contemplating an environmental justice claim is to evaluate the relative chances of success for a Title VI administrative claim compared to a Title VI lawsuit. A person making an administrative complaint has no formal means of participation in the administrative complaint process. However, under the administrative claim process, the federal agency to which the claim is submitted conducts the investigation of the claim—thus relieving the person making the complaint of the responsibility to do so.

In addition, courts often defer to the administrative fact-finding process of federal agencies. Thus, a positive finding on an administrative claim may provide support for a future Title VI lawsuit. Under presidential administrations that encourage the filing of Title VI administrative claims pertaining to environmental justice, there is a greater chance of a federal agency finding in favor of Title VI administrative complaints. The current administration's recent emphasis on environmental justice may have contributed to the increased filing of Title VI administrative complaints.

Available Remedies

Under the administrative complaint process, the only remedy for a finding of discrimination—if informal resolution fails—is termination of federal financial assistance. However, a complaint may be referred to the Department of Justice for litigation. In Title VI lawsuits, declaratory and injunctive relief are available as remedies—for instance, a project could be relocated and/or canceled, and a state environmental program could be restructured to address discriminatory effects. Damages, however, are generally precluded unless intentional discrimination is demonstrated.

The focus of this article is the administrative complaint process, since environmental justice advocates have been using the administrative process more frequently than litigation to promote their claims.

Effect and Disparate Impact

Following the passage of the 1964 Civil Rights Act, each federal agency adopted similarly worded—but not identically worded—implementing regulations for Title VI to prohibit recipients of federal financial assistance from directly or indirectly utilizing criteria or methods of administration that have the effect of subjecting individuals to discrimination. While Title VI only prohibits intentional discrimination, federal agencies may prohibit unintentional discrimination by adopting a "disparate impact standard" in their Title VI implementing regulations. Virtually all of the federal agencies have adopted a disparate impact standard.

Thus, while administrative claims and/or lawsuits that are filed under Title VI must demonstrate *intentional discrimination*, claims and/or lawsuits filed under a federal agency's implementing regulations for Title VI must demonstrate only that the actions in question have a *disparate impact* upon protected groups, regardless of intent.

Three-Step Process

Courts have held that Title VI and federal agencies' implementing regulations do not prohibit disparate impact per se. Only those actions that have an unjustified disparate impact—and for which there is no less discriminatory alternative—are prohibited. Thus, a Title VI investigation may evolve into a three-step process of evaluation.

First, to demonstrate a disparate impact, a complaint must

- prove disparity in the action; and
- prove a tangible impact.

Second, if the complaint meets these two standards, a recipient may defend against such allegations by articulating the substantial, legitimate and program-related criteria and actions that caused the disparate impact. In facility siting, such a defense would likely include a demonstration that the siting criteria have a sound technical basis and do not arbitrarily place facilities in locations that are disproportionately populated by minorities.

Third, the complaint must provide a feasible and less-discriminatory alternative to the action being challenged. A recipient may defend the action being challenged by demonstrating a substantial legitimate justification for the action.

Termination, Suspension or Refusal to Grant Federal Financial Assistance

Federal agency actions under Title VI implementing regulations are subject to judicial reviews. A federal agency cannot terminate, suspend, or refuse to grant federal financial assistance until

- the agency has informed the recipient of the failure to comply and has determined that compliance cannot be achieved by voluntary means;
- there has been an express finding on the record of failure to comply—after opportunity for a hearing;
- the termination or suspension has been approved by the responsible agency official; and
- the expiration of thirty days after the agency has filed with the U.S. Congressional committees of jurisdiction over the relevant program a full written report of the grounds for suspension or termination of federal financial assistance.

For further information pertaining to environmental justice, please see the following issues of the LLW Notes: May/June 1997, p. 31; April 1997, p. 33; Feb. 1997, pp. 1, 4-9, 23, 28; LLW Notes Supplement: Background on Environmental Justice, Feb. 1997; Aug./Sept. 1996, pp. 24-27; Aug./Sept. 1995, p. 30; Nov./Dec. 1994, pp. 30-31; Oct. 1994, p. 11; July 1994, p. 26; and April 1994, p. 12.

A Title VI violation is a disproportionate adverse impact by race, color or national origin—not income, gender, age or health—caused by a recipient of federal financial assistance for which there is no substantial, legitimate (program-related) justification and no feasible, less discriminatory alternative. This standard is the basis for evaluations of both administrative and legal complaints.

DOJ Guidance Defines Environmental Justice

Following the issuance of the Executive Order on environmental justice, each federal agency developed an environmental justice strategy. As noted, the strategies are distinct from federal agency implementing regulations for Title VI, which are codified as federal regulations. The following is excerpted from Department of Justice Guidance Concerning Environmental Justice.

For purposes of the Justice Department, an "environmental justice" matter is any civil or criminal matter where the conduct action at issue may involve a disproportionate and adverse environmental or human health effect on an identifiable low-income or minority community or federally-recognized tribe.

The ultimate determination whether a particular situation raises an environmental justice issue will depend on an evaluation of the totality of the circumstances. However, there are a number of factors that should be considered in determining whether any individual situation does raise such an issue:

a. Whether individuals, certain neighborhoods, or federally recognized tribes suffer disproportionately adverse health or environmental effects from pollution or other environmental hazards;

b. Whether individuals, certain neighborhoods, or federally recognized tribes suffer disproportionate risks or exposure to environmental hazards, or suffer disproportionately from the effects of past underenforcement of state or federal health or environmental laws;

c. Whether individuals, certain neighborhoods, or federally recognized tribes have been denied an equal opportunity for meaningful involvement, as provided by law, in governmental decisionmaking relating to the distribution of environmental benefits or burdens. Such decisionmaking might involve permit processing and compliance activities.

While it is important to avoid overly narrow conceptions of possible environmental justice situations, the mere presence of environmental hazards in a particular community does not in and of itself mean that an environmental justice problem is addressable in litigation. Additional factors must be considered, such as the accumulation of a number of environmental hazards in an affected area because of the lack of public participation by the community, lack of adequate protection under the laws designed to protect health and the environment, or unusual vulnerability of the community to such hazards. Thus, each environmental justice matter must be assessed on a case-by-case basis.

NEJAC Meets, Adopts Far-Reaching Resolution re Siting

The National Environmental Justice Advisory Council (NEJAC) met May 12–16 on the Potawatomi Indian Reservation in northern Wisconsin. NEJAC was established by EPA in 1994 under the Federal Advisory Committee Act (FACA) to advise, consult with, and make recommendations to the EPA Administrator on matters relating to environmental justice. (See *LLW Notes*, July 1994, p. 26.) Upon receipt of a NEJAC resolution, EPA is required to consider the substance of the resolution, determine the appropriate agency response to the resolution, and convey the agency response to the NEJAC.

On May 19–20, the National Governors' Association (NGA) convened a workshop of Governors' advisors and state officials to discuss environmental justice and facility siting. During the meeting, the states expressed support for the concept of environmental justice, but expressed concerns pertaining to the composition of NEJAC and the process by which NEJAC adopts resolutions regarding individual facilities. (See related story.)

NEJAC Adopts Far-Reaching Resolution

Background: Consideration of Resolution re Ward Valley

In December 1996, NEJAC considered adopting a resolution stating that the siting of the planned low-level radioactive waste disposal facility in Ward Valley is an environmental justice issue. (See *LLW Notes*, Feb. 1997, pp. 1, 23-25.) The resolution was brought before the full NEJAC by the Subcommittee on Indigenous Peoples, which recommended the resolution for adoption. NEJAC did not adopt the resolution at the meeting, but requested that the subcommittee provide further information and raise the resolution again at the next NEJAC meeting.

After several inaccurate press articles appeared in California papers, staff of the California Department of Health Services (DHS) contacted EPA's Office of Environmental Justice staff to inquire about the status of the NEJAC resolution pertaining to the planned low-level radioactive waste disposal facility in Ward Valley, California. Prior to California DHS' contacting EPA, neither the State of California nor the Southwestern Compact had been approached by NEJAC, the NEJAC Subcommittee on Indigenous Peoples, EPA's Office of Environmental Justice, or EPA Region IX staff for information on the siting process for the Ward Valley disposal facility—despite the fact that the resolution had initially been suggested in November 1995, and thus had been pending for over a year.

Resolution Addresses All Types of Facilities

California DHS staff requested the opportunity to discuss with NEJAC members the siting process for the Ward Valley facility prior to NEJAC consideration of a resolution pertaining to Ward Valley. Peter Baldridge and Carl Lischeske of California DHS attended both the Indigenous Peoples Subcommittee meeting and the NEJAC meeting to provide information. After the Indigenous Peoples Subcommittee agreed to recommend a Ward Valley resolution to the full NEJAC for approval, the DHS representatives requested that the resolution include a general basis for evaluating environmental justice claims related to Indian Tribes in order to clarify how NEJAC would propose to ensure environmental justice in specific cases. Thus, the final resolution is not limited to the Ward Valley facility, but addresses the range of facilities—including waste facilities, military sites and mines—that NEJAC asserts should be subject to EPA's environmental justice oversight. The resolution recommends that EPA oversight be invoked whenever an environmental justice claim is raised by a member of an indigenous community, regardless of whether the facility in question is on tribal land.

For further information on NEJAC contact EPA's Office of Environmental Justice at (202)564-2515.

See also NEJAC's World Wide Web page at http://www.prcemi.com:80/nejac/.

INDIGENOUS PEOPLES RESOLUTION NO. 23

National Environmental Justice Advisory Council

May 16, 1997

Whereas, the National Environmental Justice Advisory Council (NEJAC), Subcommittee for Indigenous Peoples, has heard from several Indigenous communities regarding environmental impacts on areas that are of cultural and spiritual significance to these communities, and

Whereas, the NEJAC is concerned that Indigenous communities' claims regarding the cultural significance of areas are often overlooked by non-Indigenous decisionmakers because of a lack of respect for or understanding of Indigenous Peoples' cultural connection to those areas, and

Whereas, for example, the Ft. Mohave Indian Tribe (the Tribe) has come before the Subcommittee on behalf of the alliance of the five Lower Colorado River Tribes (which include the Quechan, Fort Mojave, Cocopah, Chemehuevi, and Colorado River Indian Tribes) to present its concerns regarding the siting of a low-level nuclear waste facility in areas of cultural significance to the Tribes, and

Whereas, in addition to the location of the facility in an area of cultural significance to the Tribes, the Tribes are also concerned by the site-selection process for the waste facility, and the ability of the state of California to construct a facility that will not jeopardize the health and the environment of the surrounding community, and

Whereas, the State of California has come before the Subcommittee to provide an overview of its site selection process and its dealings with affected tribes, and

Whereas, areas of cultural or spiritual significance to Indigenous communities, whether on or off reservation, often go to the heart of what defines an Indigenous community as culturally and politically distinct, and

Whereas, federal environmental law recognizes impacts to areas of cultural significance as impacts on the human environment which require consideration and mitigation, and

Whereas, because of the essential role these areas play in the life ways of Indigenous communities, mitigation is often not an option, and the only acceptable alternative is complete avoidance of any impacts, and

Whereas, because many Indigenous communities are forced to live on small remnants of what were once large aboriginal territories, and because these areas are now generally "remote" by today's standards, these areas are now frequently targeted for siting of hazardous waste facilities (including nuclear waste facilities and test sites), and the indigenous communities that live in these areas may be disproportionately impacted by such facilities, and

Whereas, large-scale activities (e.g., mining or waste facilities) frequently disturb or even obliterate aspects of the physical environment that are essential to the cultural or spiritual integrity of Indigenous communities, and

Whereas, the NEJAC is concerned that disproportionately high and adverse impacts on Indigenous communities are occurring as a result of insufficient consideration being given to cultural and spiritual impacts on these communities, and

Whereas, the Subcommittee recognizes that areas of cultural significance to Indigenous communities are often located in areas that are not within the boundaries of Indian reservations, and are therefore not under the direct control of Indigenous communities, and

Whereas, Indigenous communities rarely have either the political clout or financial resources to ensure that these issues are adequately addressed, and therefore rely significantly upon their federal trustees to assist communities in identifying and preventing these impacts, and

Whereas, as a result of discussions with the state of California over issues at Ward Valley, the Subcommittee has expressed its concern to the NEJAC that states have not been provided with sufficient guidance on how to address environmental justice issues of concern to Indigenous peoples, especially in the area of impacts on cultural resources, and

Whereas, the Subcommittee is also concerned that the Lower Colorado River Tribal Alliance has not had sufficient opportunity to communicate its concerns directly to high-level federal representatives,

THEREFORE, be it resolved by the NEJAC that EPA should adopt procedures that ensure that Indigenous communities are involved in all phases of decision making when activities impact or potentially impact areas of cultural significance to such communities.

Be it further resolved that when initiating procedures to select a site for locating waste facilities, impacts to areas of cultural significance should be identified at the outset, so these impacts can, to the maximum extent possible, be avoided altogether when making initial decisions about where to consider locating such facilities.

Be it further resolved that when a state is making a waste siting decision that impacts or potentially impacts areas of cultural significance to Indigenous communities, EPA should document that environmental justice issues are appropriately addressed, and, if necessary, conduct a study of its own to address such issues.

Be it further resolved that EPA should presume that Indigenous communities' claims regarding the cultural significance of areas are legitimate and act to support such claims and prevent impacts to these areas.

Be it further resolved that EPA should request a high level meeting among the Administrator, other appropriate executive branch leaders, and the five Colorado River Tribes to discuss the Tribes' concerns regarding the siting of a low-level nuclear facility in Ward Valley.

Be it further resolved that the EPA should conduct an environmental justice analysis of the siting of the Ward Valley nuclear waste site, including but not limited to a review of the process of consultation with the Lower Colorado River Tribes, the consideration of alternative locations for the facility, the impacts of current storage practices of low-level radioactive waste on environmental justice impacted communities, and the consideration of impacts to areas of cultural significance to the Tribes.

Be it further resolved that EPA should develop environmental justice guidance for states to follow when state actions or decisions raise environmental justice issues of concern to Indigenous communities.

States Meet, Support Environmental Justice Concept

Express Concerns About Federal Approach, Composition of NEJAC

On May 19–20, the National Governors' Association (NGA) convened a workshop of Governors' advisors and state officials to discuss environmental justice and facility siting. The discussion included representatives from fourteen states, two representatives from state organizations, staff members from the DOJ and EPA, two NGA staff members and one Afton staff member attending as an observer. State participants developed the following key points—each of which is equally significant—regarding environmental justice, Title VI, and the federal government's approach to the issue. *For information, contact Debbie Spiliotopoulos of NGA at (202)624-7895.*

"• States support the concept of environmental justice and want to work with senior-level EPA staff in developing the Agency's environmental justice policy. A number of states already have programs that ensure full community involvement in the siting and permitting process.

- States are concerned that EPA is developing a policy behind closed doors that will have significant effects upon state programs and local land use authorities. States stressed the need for full public involvement in the development of any kind of guidance or policy regarding environmental justice and recommend that EPA address the issue of environmental justice in a public process that would incorporate the following:

  1. EPA should hold workshops with affected stakeholders to develop guidance or policy on environmental justice.

  2. The Office of Management and Budget and other federal agencies need an opportunity to review EPA's environmental justice policy to address its many implications for economic development, employment, land use, and other issues outside of EPA's jurisdiction.

- States believe EPA is interpreting Title VI of the Civil Rights Act incorrectly in its emerging policy and has gone well beyond the scope of Executive Order 12898 in defining human health effects to include emotional distress. Any policy interpretation should have a basis in statute and regulations.

- States will be reluctant/unwilling to carry out EPA's apparently emerging interpretation of Title VI authority to override state hazardous waste laws as the basis of permit decisions, unless criteria are first clearly and reasonably defined.

- EPA must itself comply with any environmental justice policy it seeks to impose on states.

- States note that a key weakness with current permitting criteria is the lack of data and analytical methods for measuring cumulative risks that can result from multiple exposures. States request that EPA focus research on providing these data.

- EPA policies or regulations on environmental justice must respect state and local land use plans. The polic[ies] should not conflict with brownfield or economic development initiatives. Local communities must have the authority to make local decisions.

- EPA must carefully consider the implementation impacts on state programs of any proposed policy or guidance and ensure any policy, including the environmental justice policy, does not burden states with an unfunded mandate.

- States believe that the National Environmental Justice Advisory Council (NEJAC) requires a greater state representation than presently exists and a more balanced representation of stakeholder communities.

- The NEJAC should consider issues only when all sides have the opportunity to present their positions. States recommend that the NEJAC ensure the attendance of a representative cross section of residents of affected communities to present their positions."