

# **United States of America**

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### **Environmental Justice**

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### **Endorsements:**

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## **EXECUTIVE SUMMARY**

This report addresses the United States of America's (U.S.) implementation of its human rights obligations in the area of environmental justice. In the U.S., communities of color and low-income communities are disproportionately burdened by environmentally harmful human activities and their adverse health consequences. While this phenomenon is caused by multiple governmental actions and inactions, this report focuses on three main issue areas:

- 1) The failure of U.S. law to redress discriminatory actions that adversely impact communities of color in the absence of proof of discriminatory motives;
- 2) The failure of U.S. law and policy to adequately protect the inherent right to life of racial minorities through a precautionary approach to environmental decision-making; and
- 3) The failure of U.S. law and policy to protect communities of color and low-income communities from cumulative impacts created by the concentration of environmentally harmful uses in discrete communities.

In support of its analysis and recommendations, the report draws upon credible environmental research, government studies and analyses, and specific case studies.

The main submitting organizations for this report are the Center on Race, Poverty, and the Environment (CRPE) and New York Lawyers for the Public Interest (NYLPI). Founded in 1989, CRPE is an environmental justice litigation organization dedicated to helping grassroots groups across the United States attack head on the disproportionate burden of pollution borne by poor people and people of color. Founded in 1976, NYLPI is a nonprofit, civil rights law firm that strives for social justice through impact litigation, community organizing and advocacy.

### **I. CURRENT NORMATIVE AND INSTITUTIONAL FRAMEWORK FOR THE PROMOTION AND PROTECTION OF HUMAN RIGHTS**

1. The Universal Declaration of Human Rights, adopted by the United Nations General Assembly in 1948, states that “everyone has the right to life, liberty, and the security of person.”<sup>1</sup> It further acknowledges that all “are entitled without any discrimination to equal protection of the law” and “to an effective remedy by the competent national tribunals for acts violating [their] fundamental rights.”<sup>2</sup>
2. The International Convention on the Elimination of All Forms of Racial Discrimination (CERD), ratified by the U.S. in 1994, requires state parties to “amend, rescind, or nullify any laws and regulations which have the *effect* of creating or perpetuating racial discrimination wherever it exists.”<sup>3</sup> CERD protects the right to public health including “the underlying determinants of health, such as ...healthy occupational and environmental conditions.”<sup>4</sup>
3. The International Convention on Civil and Political Rights (ICCPR), ratified by the U.S. Senate in 1992, states that “every human being has the inherent right to life,”<sup>5</sup> a right that includes freedom from exposure to environmental dangers.<sup>6</sup>

4. The U.S. Constitution's 14<sup>th</sup> Amendment mandates that no "state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."<sup>7</sup> This mandate has been extended by the U.S. Supreme Court to apply to federal actions as well.<sup>8</sup> An important basis for addressing racial discrimination in the United States, this equal protection clause has been interpreted by the U.S. Supreme Court to only prohibit actions motivated by *intentional* racial discrimination.<sup>9</sup> In a departure from CERD's mandates, the Court provides no redress for actions that are discriminatory in effect where there is no evidence of a racially discriminatory motive.

5. Similarly, Title VI of the Civil Rights Act of 1964 prohibits, "on the ground of race, color, or national origin, [that any person] be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."<sup>10</sup> Section 601 of Title VI provides for a private right of action to enforce its anti-discrimination mandate and Section 602 of Title VI authorizes federal agencies to issue implementing regulations.<sup>11</sup> Most federal agencies' Title VI regulations, including those of the U.S. Environmental Protection Agency (EPA),<sup>12</sup> bar recipients of federal funds from taking actions that have disparate impacts on the basis of race, color or national origin. Prior to 2001, private citizens could enforce regulations promulgated under Section 602 in U.S. courts. In 2001, the U.S. Supreme Court ruled in *Alexander v. Sandoval* that private parties could not bring suit to enforce disparate impact regulations issued under Section 602 of Title VI.<sup>13</sup> As a result, private enforcement of Title VI can only occur pursuant to Section 601, which the Supreme Court had previously held to require proof of discriminatory intent.<sup>14</sup>

6. The National Environmental Policy Act (NEPA) requires federal agencies to consider the environmental impacts of their proposed actions.<sup>15</sup> For any proposed action that may significantly impact upon the environment, including those "significantly affecting the quality of the human environment,"<sup>16</sup> NEPA requires preparation of an environmental impact statement (EIS) that assesses potential significant impacts, including cumulative impacts and identifies measures or alternatives to avoid or mitigate such impacts.<sup>17</sup> Federal regulations define cumulative impacts as "the impact on the environment which results from the incremental impact of [a proposed] action when added to other past, present, and reasonably foreseeable future actions."<sup>18</sup>

## II. PROMOTION AND PROTECTION OF HUMAN RIGHTS

7. It is well-established that U.S. communities of color and low-income communities are disproportionately burdened by environmentally harmful human activities and their individual and cumulative adverse health consequences such as:

- The siting of toxic waste disposal facilities;<sup>19</sup>
- The concentration of pollution emitting facilities;<sup>20</sup>
- The distribution of environmental harms caused by the extraction of natural resources, particularly coal and uranium (an issue of particular concern for Native American communities);<sup>21</sup>
- The contamination of wildlife used as a food source by Native American and low-income and minority populations that engage in subsistence hunting and fishing.<sup>22</sup>

- The siting of low-income housing<sup>23</sup> and public schools<sup>24</sup> in close proximity to sources of pollution; and
- The racial segregation of U.S. housing markets, which concentrates populations of color in neighborhoods with substandard housing conditions, limited access to healthy food, and high levels of environmental pollution, leading to disproportionately negative health outcomes such as asthma and diabetes.<sup>25</sup>

These disproportionate burdens on communities of color and low-income communities raise three broad and related human rights concerns: the lack of adequate legal remedies for racially disparate environmental injuries; the failure of U.S. law to protect of racial minorities through a precautionary approach to environmental decision-making; and the failure of U.S. law to address the cumulative effects of concentrating environmentally harmful uses in communities of color and low-income communities. These broad concerns remain, despite recent developments at EPA suggesting a deeper commitment to address disproportionate environmental burdens on communities of color and low-income communities.

#### **A. Failure to Provide Adequate Legal Remedies for Racially Disparate Environmental Injuries.**

8. In 2008, the Committee on the Elimination of Racial Discrimination reviewed U.S. compliance with CERD and recommended that it “review the definition of racial discrimination used in the federal and state legislation and in court practice, so as to ensure – in light of the definition of racial discrimination provided for in article 1, paragraph 1, of the Convention – that it prohibits racial discrimination in all its forms, including practices and legislation that may not be discriminatory in purpose, but in effect.”<sup>26</sup> To date, the U.S. has failed to amend its anti-discrimination legislation accordingly, thus continuing to deny effective remedies to victims of actions with a discriminatory effect.

9. The aforementioned *Sandoval* ruling has undermined the ability of communities of color to seek legal redress from discriminatory siting and environmental permitting practices. For example, prior to the ruling, residents of the predominately minority Waterfront South neighborhood in Camden, New Jersey, filed suit against New Jersey’s environmental agency under EPA’s Title VI regulations to invalidate a permit for the operation of a cement crushing facility in their neighborhood, which already contained “two Superfund sites, several contaminated and abandoned industrial sites, and many currently operating facilities, including chemical companies, waste facilities, food processing companies, automotive shops, and a petroleum coke transfer station.”<sup>27</sup> On April 19, 2001, a federal district court judge suspended the cement plant’s permit, finding that New Jersey’s permitting had disparately impacted racial minorities in violation of the EPA’s Title VI regulations.<sup>28</sup> The Supreme Court issued its *Sandoval* decision five days later. In response the district court judge allowed the plaintiffs to amend their complaint and found that the amended complaint still stated a valid claim.<sup>29</sup> Upon appeal, however, the U.S. Court of Appeals for the Third Circuit held that EPA’s Title VI regulations could not be privately enforced.<sup>30</sup> The cement plant’s permit was restored.

10. After *Sandoval*, the only redress at the federal level for victims of actions having a disparate impact on the basis of race, color or national origin is to file an administrative

complaint with the appropriate federal agency under the agency's Title VI regulations. This course of action has proven ineffective in environmental matters. A number of studies and a recent court ruling document EPA's consistent failure to process and investigate Title VI complaints in a timely and thorough fashion.

11. In 2003, the U.S. Commission on Civil Rights issued a study of the effectiveness of EPA's Title VI Complaint Program.<sup>31</sup> The study found that, of the 124 complaints filed with EPA by January 1, 2002, only 13 cases (10.5%) were processed by the agency in compliance with its 20 day processing rule; and all 13 cases were rejected for investigation by the agency for failure to meet the agency's regulatory requirements ("rejected").<sup>32</sup> By June 30, 2003 EPA had received a total of 136 Title VI complaints, and of that total, 75 were rejected, 26 were dismissed for other reasons, and the remaining 35 complaints were accepted by the agency for further action.<sup>33</sup> Of the 35 complaints accepted for further action, only 2 were informally resolved by EPA and another 2 were referred to another agency. The other 31 complaints remained in some stage of EPA review at the time of the study.<sup>34</sup>

12. Six years later, an independent report examined more recent data on EPA's Title VI complaint process.<sup>35</sup> This report found that between 1993 and 2008 the EPA processed a total of 211 Title VI complaints and of those, 40 (19%) were still pending and 171 (81%) had been closed. Of the closed cases, 127 had been rejected for investigation and 44 had been dismissed. Not a single complaint resulted in the EPA ordering remedial measures. Also, in 2009, the Ninth Circuit Court of Appeals reinstated a lawsuit filed by a non-profit community organization against EPA for failing to timely process a series of Title VI complaints.<sup>36</sup> Through discovery in the matter, it was learned that in 2006 and 2007 EPA failed to process a single Title VI complaint within the timeframes set forth in EPA's Title VI regulations.<sup>37</sup> The court found that the EPA engaged in "a consistent pattern of delay" in response to Title VI administrative complaints.<sup>38</sup>

13. The U.S.'s deliberate failure to meet its international human rights obligations is further underscored by the failure of EPA and other federal agencies to implement a 1994 executive order on environmental justice, Executive Order 12898. The Order directs every federal agency to "make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the U.S. and its territories."<sup>39</sup> Over the past six years, EPA's Office of the Inspector General (OIG) issued two evaluation reports faulting EPA for failing to determine whether the agency's programs caused any disproportionate adverse environmental impacts on minority and low-income populations and for failing even to develop criteria for assessing such impacts,<sup>40</sup> an omission which continues to this day.

**B. U.S. failure to adequately protect the inherent right to life of racial minorities through a precautionary approach to environmental decision-making.**

14. CERD requires signatory states to "review... and amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists."<sup>41</sup> The precautionary principle provides a framework for such a review and is essential to

eliminating disparate environmental impacts on communities of color and low-income communities in the U.S.

15. Human activities that use and release toxic pollution, extract natural resources, and that change the natural environment have significant adverse consequences for the environment and public health, particularly for communities of color and low-income communities. The precautionary principle contains four important components for reducing the disparate pollution burden experienced by these communities: a) “where an activity raises threats of harm to the environment or human health, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically;” b) the entity proposing an activity bears the burden of showing safety - i.e. affected communities do not bear the burden of proving harm; c) less harmful alternatives are identified and possibly adopted; and (d) the decision-making process requires full participation of those affected by a proposed activity.<sup>42</sup>

16. The precautionary principle is well established in international environmental law. In 1982, the World Charter on Nature first recognized the precautionary principle in relation to the natural environment and human activities.<sup>43</sup> Since then it has been included in several treaties including the Rio Declaration on Environment and Development,<sup>44</sup> the Climate Change Convention,<sup>45</sup> and the Convention on Biodiversity.<sup>46</sup> The European Commission has also adopted a Communication on the Precautionary Principle which outlines how Europe will apply the precautionary principle throughout its regulations.<sup>47</sup> In addition, Europe uses the precautionary principle in its Registration, Evaluation, Authorization, and Restriction of Chemical substances regulation (REACH).<sup>48</sup>

17. In stark contrast is the U.S.’s ineffective chemical policy - the Toxic Substances Control Act (TSCA). Low-income communities and communities of color in the U.S. suffer adverse health impacts from heightened chemical exposure, as substantiated by a recent study that focused on synthetic chemicals, such as dioxin, pesticides, disinfectants, and PCBs.<sup>49</sup> Among other things, the study found that:

non-Hispanic Blacks are much more likely to be exposed to dioxins and polychlorinated biphenyls (PCBs) and are more likely to be exposed at higher levels; Mexican-Americans are much more likely to be exposed to pesticides, herbicides, and pest repellants and are more likely to be exposed at higher levels than non-Hispanic Whites, and are much more likely to be exposed to polycyclic aromatic hydrocarbons (PAHs) and phytoestrogens and are more likely to be exposed to phthalates at higher levels; non-Hispanic Blacks and Mexican-Americans are much more likely to have higher levels of less common chemicals; and non-Hispanic Blacks are exposed to the greatest number of chemicals.<sup>50</sup>

18. This disproportionate exposure has led to increased “rates of illness linked to chemical exposure include those of obesity, diabetes, thyroid disease, childhood cancers, breast cancer, prostate cancer, heart disease, asthma, neurodevelopmental problems, and learning disabilities in children that persist throughout life.”<sup>51</sup> In order to comply with its

international obligations, and consistent with our recommendations below, the USA must reform its chemical policy in light of the precautionary principle.

**C. The failure of U.S. law and policy to protect communities of color and low-income communities from cumulative impacts created by the concentration of environmentally harmful uses in discrete communities**

19. As described above, communities of color and low-income communities are disproportionately burdened by and exposed to a multitude of environmentally harmful land uses and practices and disproportionately suffer the adverse health outcomes they cause. This is true despite a federal law, NEPA, that ostensibly requires agencies to ensure that significant adverse environmental impacts, including impacts to the human environment, are avoided and/or mitigated before a proposed action or land use can proceed. One of the major reasons that the NEPA mandate remains unfulfilled is the U.S.'s failure to adopt regulations and guidelines that ensure that the cumulative impacts of a proposed action and of other past, present, and reasonably foreseeable actions are adequately assessed and dealt with.

20. The ineffectiveness of the U.S.'s approach to addressing cumulative impacts is due in large part to its failure to develop a clear methodology for doing so. As pointed out by the U.S. Commission on Civil Rights, "Federal agencies...have not adopted formal cumulative impact standards to assess the risk to human health from exposures to multiple chemicals from multiple sources, even though Executive Order 12898 requires consideration of multiple and cumulative exposures."<sup>52</sup> Moreover, as noted above, the requirement to address cumulative impacts has existed since the passage of NEPA. As a result of this omission, there is significant variation in the nature and quality of cumulative impact assessment from agency to agency and from project to project.

21. Another significant problem is that agencies generally ignore potential cumulative impacts where methodological and data limitations make their assessment difficult. For example, NEPA's implementing regulations require that an agency, when confronted with the challenge of incomplete information from which to assess cumulative impacts, consider the "overall cost" of obtaining complete information.<sup>53</sup> Guidelines developed by the Council on Environmental Quality (CEQ), which was created within the executive branch by NEPA to coordinate and provide guidance on environmental impact assessments, specify that the costs to be considered include "financial costs and other costs such as costs in terms of time (delay), program and personnel commitments."<sup>54</sup> Thus, it is within the discretion of a permitting agency to prioritize expediency over the health of a community.

22. Where information is incomplete, NEPA's regulations instruct that the limitations be expressly stated in an environmental impact assessment, and that an agency assess cumulative impacts to the extent possible given the "credible scientific evidence" that is available.<sup>55</sup> Such a standard, ostensibly based in sound research principles, effectively creates the presumption that there are no human health risks where such risks cannot be properly assessed due to limitations in data and/or limitations in our understanding of the cumulative and synergistic effects of given impacts. An approach designed to protect the rights to life and health would instead presume that caution is paramount in communities where multiple environmental harms exist: "there is no

presumption that multiple exposures, in any amount, constitute an adverse health impact. This ‘piling-on’ of exposures should be given great weight when assessing the health risk associated with placing yet another facility in a neighborhood.”<sup>56</sup>

23. Perhaps most significantly, as pointed out by the Council on Environmental Quality, even where a cumulative impact analysis determines that a proposed action will lead to adverse human health consequences, the proposed action may still go forward:

Under NEPA, the identification of a disproportionately high and adverse human health or environmental effect on a low-income population, minority population, or Indian tribe does not preclude a proposed agency action from going forward, nor does it necessarily compel a conclusion that a proposed action is environmentally unsatisfactory. Rather, the identification of such an effect should heighten agency attention to alternatives (including alternative sites), mitigation strategies, monitoring needs, and preferences expressed by the affected community or population.<sup>57</sup>

Such a policy is in clear conflict with the U.S.’s international human rights obligations. The procedural requirement that a proposed action’s impact on environmental health be *considered* is a far cry from the requirement that a community’s environmental health be protected.

**D. Recent developments at EPA suggest a renewed commitment to addressing disproportionate environmental burdens on communities of color and low-income communities.**

24. While this report is largely critical of the U.S. government’s actions and inactions with respect to environmental justice, recent developments at EPA suggest that the agency plans to address disproportionate environmental burdens on communities of color and low-income communities more aggressively than it has in the past. Those new developments include:

- Environmental justice was named as one of seven agency priorities by the new EPA administrator Lisa Jackson, who declared in a January 12, 2010 memorandum to all EPA employees that EPA “must include environmental justice principles in all of our [agency’s] decisions.”<sup>58</sup>
- On January 22, 2010, EPA strengthened the health-based National Ambient Air Quality Standard (NAAQS) for nitrogen dioxide (NO<sub>2</sub>), by creating a new 1-hour NO<sub>2</sub> standard at the level of 100 parts per billion (ppb) and ordering additional monitoring stations for NO<sub>2</sub> in urban areas near major roads as well as in other locations where maximum concentrations are expected. The new standard was developed to protect public health of sensitive populations – people with asthma, children and the elderly.<sup>59</sup>
- On June 16, 2009, EPA signed an agreement with the U.S. Department of Housing and Urban Development (HUD) and the U. S. Department of Transportation (DOT) creating an interagency Partnership for Sustainable Communities to help improve access to affordable housing, more transportation options, and lower transportation costs while protecting the environment in communities nationwide.<sup>60</sup>

- On April 10, 2010, EPA issued a detailed guidance governing the agency's review of Appalachian surface coal mining operations that directs EPA regional administrators in EPA Regions 4, 5 and 6 to identify and address the potential adverse human health and environmental effects of proposed mining related activities on low-income and minority populations in permitting decisions under the Clean Water Act.<sup>61</sup>

### III. RECOMMENDATIONS

25. The following are recommendations based on the human rights concerns described herein:

- a) The EPA should enforce its Title VI regulations by providing an effective administrative remedy for addressing actions within its jurisdiction that are racially discriminatory in effect. Doing so requires EPA to address the substantial existing backlog of administrative complaints, respond to new complaints within the time frame required by its regulations, thoroughly investigate credible claims of discrimination, and enforce remedial measures that address the impacts of such discrimination.
- b) The U.S. government should amend Title VI of the Civil Rights Act of 1964 to clarify that its prohibition on racial discrimination in federally funded programs applies to actions that are discriminatory in effect regardless of their intent; and to provide a private right of action to enforce existing federal regulations forbidding recipients of federal funds from taking actions that are discriminatory in effect regardless of their intent.
- c) The U.S. government should enact legislation proposed in 2008<sup>62</sup> to codify Executive Order 12898 and to provide for judicial review of agency actions with respect to implementation of said Executive Order and a private right of action to enforce compliance with the Order.
- d) The U.S. government should reform the Toxic Substance Control Act (TSCA) of 1976 in light of the precautionary principle. TSCA,<sup>63</sup> which authorizes EPA to regulate the use of chemicals, needs to be reformed in a manner that will: a) reduce the disproportionate burden of toxic chemical exposure placed on people of color, low-income people and indigenous communities; (b) protect vulnerable groups using the best science – chemicals should meet a standard of safety for all people, including children, pregnant women, and workers; (c) take action to phase out uniquely hazardous and persistent, bio-accumulative toxicants and identify safer alternatives; and (d) hold industry responsible for demonstrating chemical safety.<sup>64</sup> Currently, chemicals are presumed safe until proven harmful; chemical manufacturers should be responsible for demonstrating the safety of their products.<sup>65</sup>
- e) The U.S. should adopt and encourage localities to adopt precautionary land use regulations that require a distance between residential populations and hazardous industrial facilities sufficient to prevent chemical exposure. The European Commission

controls the siting of new facilities “to maintain appropriate distances between establishments ...and residential areas, areas of public use and areas of particular natural sensitivity or interest”<sup>66</sup> and obliges the owner or operator of existing uses “to take all measures necessary to prevent major accidents and to limit their consequences for man and the environment.” The United States should adopt similar regulations.<sup>67</sup>

- f) The U.S. should amend the National Environmental Policy Act to state that:
  - i) Any proposed action that will create disproportionately high and adverse environmental impacts for communities of color and low-income communities cannot go forward unless measures are adopted to eliminate such impacts.
  - ii) Actions proposed in communities that already host a disproportionate share of environmentally burdensome facilities are presumed to create significant adverse environmental impacts that must be avoided or mitigated to the greatest extent possible.
- g) The U.S. should prioritize and fund research efforts designed to determine the cumulative and synergistic effects of environmental toxins found in overburdened communities of color and low-income communities.
- h) The U.S. should provide clear, uniform guidance to federal, state, and local agencies for effectively assessing cumulative impacts and disproportionate environmental impacts on communities of color and low-income communities in the context of an environmental review.

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<sup>1</sup> Universal Declaration on Human Rights Art. 3 (UDHR).

<sup>2</sup> UDHR Art. 7, 8.

<sup>3</sup> International Convention on the Elimination of All Forms of Racial Discrimination, art. 2(1)(c) *entered into force* Jan. 4, 1969 [emphasis added].

<sup>4</sup> Paul Hunt, *Report of the Special Rapporteur*, UN Doc. E/CN.4/2003/58, ¶ 23 (2003).

<sup>5</sup> International Covenant on Civil and Political Rights, Art. 6(1)

<sup>6</sup> *See EHP v. Canada*, Human Rights Committee, Communication No. 67/1980, U.N. Doc. CCPR/C/17/D/67/1980 (Oct. 27, 1982)

<sup>7</sup> U.S. Const. Amend. XIV, Sec. 1.

<sup>8</sup> *Bolling v. Sharpe*, 347 U.S. 497 (1954).

<sup>9</sup> *Washington v. Davis*, 426 U.S. 229 (1976).

<sup>10</sup> 42 U.S.C. §2000d.

<sup>11</sup> *Id.*, 40 USC 2000d-1

<sup>12</sup> *See*, 40 C.F.R. Part 7

<sup>13</sup> *Alexander v. Sandoval*, 532 U.S. 275 (2001).

<sup>14</sup> *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

<sup>15</sup> 42 U.S.C. §4321 *et seq.*

<sup>16</sup> 42 U.S.C. §4332 (2007).

<sup>17</sup> 40 CFR 1508.25.

<sup>18</sup> 40 C.F.R. § 1508.7

<sup>19</sup> People of color make up 56% of the population in neighborhoods that host the nation’s 413 commercial hazardous waste facilities and 69% of the population in neighborhoods where such facilities are clustered (as opposed to 30% of the population of non-host neighborhoods), and race continues to be an independent predictor of the location of

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such facilities. Bullard, Mohai, Saha and Wright, *Toxic Wastes and Race at Twenty 1987-2007, A Report Prepared for the United Church of Christ Justice & Witness Ministries*, <http://www.ucc.org/assets/pdfs/toxic20.pdf>

<sup>20</sup> Residents of the predominantly African-American community in Mossville, Louisiana, filed a petition with the Inter-American Commission on Human Rights of the Organization of American States alleging that the United States government and its political subdivisions authorized fourteen industrial facilities to manufacture, process, store, and discharge toxic and hazardous substances in close geographic proximity to their community, in violation of international human rights law. The Commission recently accepted jurisdiction to hear the complaint. Both the complaint and the Commission's admissibility ruling are available at: [www.ehumanrights.org](http://www.ehumanrights.org).

<sup>21</sup> Both the UN Committee on the Elimination of Racial Discrimination and the UN independent expert on the question of human rights and extreme poverty expressed human rights concerns from the impact of natural resource extraction on low-income and minority communities, particularly Native American communities in the United States. See, Committee On The Elimination of Racial Discrimination, CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 9 OF THE CONVENTION, CONCLUDING OBSERVATIONS OF THE COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION, UNITED STATES, OF AMERICA, at ¶29 (February, 2008) CERD/C/USA/CO/6; Economic and Social Council, REPORT SUBMITTED BY THE INDEPENDENT EXPERT ON THE QUESTION OF HUMAN RIGHTS AND EXTREME POVERTY, ARJUN SENGUPTA, MISSION TO THE UNITED STATES, at ¶73 (27 March 2006) E/CN.4/2006/43/Add.1.

<sup>22</sup> See, International Indian Treaty Council, MERCURY: THE TOXIC LEGACY OF THE CALIFORNIA GOLD RUSH, (Undated) available at <http://www.treatycouncil.org/PDFs/UpdatedMercuryflyer614.pdf>.

<sup>23</sup> The UN Special Rapporteur, on her mission to the United States, visited at least one subsidized housing development located next to polluted areas, Altgeld Gardens outside of Chicago, and expressed concern about its proximity to landfills, numerous industrial manufacturing plants and waste dumps. UN Human Rights Council, REPORT OF THE SPECIAL RAPPORTEUR ON ADEQUATE HOUSING AS A COMPONENT OF THE RIGHT TO AN ADEQUATE STANDARD OF LIVING, AND ON THE RIGHT TO NON-DISCRIMINATION IN THIS CONTEXT, RAQUEL ROLNIK, ADDENDUM, MISSION TO THE UNITED STATES OF AMERICA, at ¶43 (12 Feb. 2010) A/HRC/13/20/Add.4.

<sup>24</sup> A growing number of urban school districts are choosing to site schools on former industrial sites contaminated with unsafe levels of toxic substances. Only five (5) states prohibit or severely restrict siting schools on or near hazardous or toxic waste sites. Another nine (9) states have policies that prohibit outright the siting of schools on or near sources of pollution or other hazards that pose a risk to children's safety. See, Center for Health, Environment and Justice, BUILDING SAFE SCHOOLS: INVISIBLE THREATS, VISABLE ACTIONS, at 11-17 (Dec. 2005) available at [http://www.childproofing.org/documents/building\\_safe\\_schools.pdf](http://www.childproofing.org/documents/building_safe_schools.pdf).

<sup>25</sup> See, UN Human Rights Council, REPORT OF THE SPECIAL RAPPORTEUR ON ADEQUATE HOUSING AS A COMPONENT OF THE RIGHT TO AN ADEQUATE STANDARD OF LIVING, AND ON THE RIGHT TO NON-DISCRIMINATION IN THIS CONTEXT, RAQUEL ROLNIK, ADDENDUM, MISSION TO THE UNITED STATES OF AMERICA, at ¶¶37, 65 (12 Feb. 2010) A/HRC/13/20/Add.4.; Economic and Social Council, REPORT SUBMITTED BY THE INDEPENDENT EXPERT ON THE QUESTION OF HUMAN RIGHTS AND EXTREME POVERTY, ARJUN SENGUPTA, MISSION TO THE UNITED STATES, at ¶32 (27 March 2006) E/CN.4/2006/43/Add.1.

<sup>26</sup> Committee On The Elimination of Racial Discrimination, CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 9 OF THE CONVENTION, CONCLUDING OBSERVATIONS OF THE COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION, UNITED STATES, OF AMERICA, at ¶10 (February, 2008) CERD/C/USA/CO/6.

<sup>27</sup> *S. Camden Citizens in Action v. N.J. Dep't of Env'tl. Prot.*, 274 F.3d 771, 775 (3d. Cir. 2001).

<sup>28</sup> See, *S. Camden Citizens in Action v. N.J. Dep't of Env'tl. Prot.*, 145 F. Supp. 2d 446 (D.N.J. 2001).

<sup>29</sup> *Id.* at 505.

<sup>30</sup> See, *S. Camden Citizens in Action v. N.J. Dep't of Env'tl. Prot.*, 274 F.3d 771 (3d. Cir. 2001).

<sup>31</sup> U.S. Commission on Civil Rights, NOT IN MY BACKYARD: EXECUTIVE ORDER 12898 AND TITLE VI AS TOOLS FOR ACHIEVING ENVIRONMENTAL JUSTICE, (Oct. 2003), available at [www.usccr.gov/pubs/envjust/ej0104.pdf](http://www.usccr.gov/pubs/envjust/ej0104.pdf).

<sup>32</sup> *Id.*, at 57.

<sup>33</sup> *Id.*, at 58.

<sup>34</sup> *Id.*

<sup>35</sup> CLIFFORD RECHTSCHAFFEN ET AL., ENVIRONMENTAL JUSTICE: LAW, POLICY AND REGULATION, 499 (2nd ed. 2009).

<sup>36</sup> *Rosemere Neighborhood Ass'n v. US Env'tl. Protect. Agency*, 581 F. 3d 1169 (9<sup>th</sup> Cir. 2009).

<sup>37</sup> *Id.*, at 1175.

<sup>38</sup> *Id.*

<sup>39</sup> Executive Order No. 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, 59 Fed. Reg. 7629 at ¶1-101 (Feb. 11, 1994) (hereafter, Executive Order 12898).

<sup>40</sup> EPA Office of Inspector General, EPA NEEDS TO CONDUCT ENVIRONMENTAL JUSTICE REVIEWS OF ITS PROGRAMS, POLICIES, AND ACTIVITIES, Report No. 2006-P-00034, September 18, 2006, available at <http://www.epa.gov/oig/reports/2006/20060918-2006-P-00034.pdf>; EPA Office of Inspector General EPA NEEDS TO CONSISTENTLY IMPLEMENT THE INTENT OF THE EXECUTIVE ORDER ON ENVIRONMENTAL JUSTICE, Report No. 2004-P-00007, March 1, 2004, available at <http://www.epa.gov/oig/reports/2004/20040301-2004-P-00007.pdf>

<sup>41</sup> CERD, Article 2, ¶1(C).

<sup>42</sup> Wingspread Statement on the Precautionary Principle available at <http://www.gdrc.org/u-gov/precaution-3.html>.

<sup>43</sup> UN Resolution 37/7, 22 I.L.M. 455 (1983), II.11.

<sup>44</sup> Rio Declaration on Environment and Development, June 14, 1992, U.N. Doc. A/CONF.151/5/Rev.1 (1992), reprinted in 31 I.L.M. 874 (1992), Principle 15.

<sup>45</sup> 1992 Climate Change Convention, Art. 3(3), reprinted in 31 ILM 849.

<sup>46</sup> Convention on Biodiversity (June 5, 1992) reprinted in 31 I.L.M. 818, Preamble and Article 14.

<sup>47</sup> Communication from the Commission on the Precautionary Principle (Com 2/2/2000) 16, 22, available at [ec.europa.eu/dgs/health\\_consumer/library/pub/pub07\\_en.pdf](http://ec.europa.eu/dgs/health_consumer/library/pub/pub07_en.pdf) (visited on April 5, 2010).

<sup>48</sup> EC 1907/2006 available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:396:0001:0849:EN:PDF>. “This Regulation is based on the principle that it is for manufacturers, importers and downstream users to ensure that they manufacture, place on the market or use such substances that do not adversely affect human health or the environment. Its provisions are underpinned by the precautionary principle.” Id. Article I, The regulation also encourages the development of alternatives. Id. Article 55.

<sup>49</sup> Environmental Justice and Health Union, *Environmental Exposure and Racial Disparities* (2003) available at <http://www.ejhu.org/disparities.html>. This 2003 study provides a racial analysis of the Center for Disease Control and Prevention’s Second Report on Human Exposure to Environmental Chemicals available at <http://www.cdc.gov/exposurereport/>.

<sup>50</sup> *Id.*

<sup>51</sup> Letter of Principles for Toxic Regulatory Reform to the Obama Transition government available at <http://namanet.org/files/documents/Letter%20of%20Principles%20for%20Toxic%20Chemical%20Regulatory%20Reform%20to%20the%20Obama%20Transition%20government.pdf>; See also testimony before the House of Representatives by Cecil Corbin-Mark, Deputy Director of We Act for Environmental Justice, Committee On Energy AND Commerce Subcommittee on Commerce and Trade and Consumer Protection at a Hearing to Revisit the Toxic Substances Control Act of 1979 February , available at [http://energycommerce.house.gov/Press\\_111/20090226/testimony\\_corbinmark.pdf](http://energycommerce.house.gov/Press_111/20090226/testimony_corbinmark.pdf); Testimony of Maureen H. Swanson Healthy Children Project Coordinator Learning Disabilities Association of America Before The U.S. House of Representatives Committee on Energy and Commerce Subcommittee on Commerce, Trade, and Consumer Protection At a Hearing On Revisiting the Toxic Substances Control Act of 1976 (February 26, 2009).

<sup>52</sup> U.S. Commission on Civil Right, *infra note* \_\_\_ p.21.

<sup>53</sup> 40 C.F.R. 1502.22a.

<sup>54</sup> Council on Environmental Quality, *Guidance on the consideration of past actions in cumulative impact analysis* (6/24/05).

<sup>55</sup> 40 C.F.R. 1502.22b(4).

<sup>56</sup> U.S. Commission on Civil Rights, *infra note* 31 at p.22.

<sup>57</sup> Council on Environmental Quality, *Environmental Justice Guidance Under the National Environmental Policy Act*, p 10 (1997).

<sup>58</sup> Memorandum available at <http://blog.epa.gov/administrator/2010/01/12/seven-priorities-for-epas-future/>

<sup>59</sup> *Primary National Ambient Air Quality Standards for Nitrogen Dioxide; Final Rule*, 75 Fed. Reg. 6473 (Feb. 9, 2010).

<sup>60</sup> Partnership agreement available at <http://www.epa.gov/smartgrowth/pdf/dot-hud-epa-partnership-agreement.pdf>

<sup>61</sup> Detailed Guidance document available at [http://www.epa.gov/owow/wetlands/guidance/pdf/appalachian\\_mntop\\_mining\\_detailed.pdf](http://www.epa.gov/owow/wetlands/guidance/pdf/appalachian_mntop_mining_detailed.pdf). The Guidance document states that EPA is “working with other federal agency partners to develop and implement an interagency environmental justice strategy to more fully evaluate environmental justice considerations in review of Appalachian surface coal mining operations. *Id.*, at note 2.

<sup>62</sup> See, *Environmental Justice Act of 2008*, S.642 (110<sup>th</sup> Cong. 2d Sess.) available at <http://www.govtrack.us/congress/billtext.xpd?bill=s110-642>

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<sup>63</sup> 15 U.S.C. §§ 2601 *et seq.*

<sup>64</sup> Press Release, Safer Chemicals, Healthy Families Coalition, Diverse Health & Environmental Coalition Calls for Sweeping Changes in U.S. Chemical Safety Law (Aug. 4, 2009).

<sup>65</sup> *Id.*

<sup>66</sup> Serveso Directive II 96/82/EC, Article 12

<sup>67</sup> Recently, two California communities adopted buffer zones to successfully reduce or eliminate pollution. In June 2009, the California Energy Commission (CEC) denied a power plant permit that was incompatible with the City of Chula Vista's General Plan which required a 1000 foot buffer zone between power plant development and residences. Press Release, *Victory! Power Plant Expansion Denied CEC recommendation supports community demands* (1/23/2009). In addition, the Kern and Tulare County Agricultural Commissioners imposed quarter-mile buffer zones to prevent pesticide drift around schools. Press Release, *Tulare County Residents Win Greater Protection from Dangerous Pesticides* (February 21, 2008).