STUDENT ARTICLE

AT THE BUS DEPOT: CAN ADMINISTRATIVE COMPLAINTS HELP STALLED ENVIRONMENTAL JUSTICE PLAINTIFFS?

JEREMY LINDEN

TABLE OF CONTENTS

INTRODUCTION

On September 7, 2003, the New York City Metropolitan Transit Authority[1] (MTA) re-opened a bus depot on 100th Street and Lexington Avenue to house 116 of its low-sulfur diesel buses.[2] Community members were furious, not just because of the added noise and traffic but because they claimed the MTA disregarded evidence that bus emissions may cause cancer, increase chances of heart attack, and lead to asthma attacks, especially in children.[3] Moreover, the problem was that this was not a singular event. Northern Manhattan, above 96th Street, was already home to five active MTA diesel bus depots.[4] The area is primarily made up of Harlem, East Harlem, Washington Heights, and Inwood, predominantly residential neighborhoods with high proportions of black and Latino residents.[5] The bus depots do not present the sole

[1] The MTA is the largest transportation network in North America. It is centered in New York City but covers 5,000 square miles and serves a population of 14.6 million people. The MTA's subways, buses, and commuter trains carry 2.4 billion people per year, an equivalent of about a third of all the mass transit use in the United States. Metropolitan Transit Authority, The MTA Network: Public Transportation for the New York Region, http://www.mta.info/mta/network.htm (last visited Oct. 14, 2007).

[2] *See* Seth Kugel, *A Bus Depot Will Reopen, And Residents Worry*, N.Y. TIMES, Aug. 24, 2003, § 14, at 5; *see also* Sheila Foster, Professor of Prop. Law, Fordham Univ. Sch. of Law, Testimony to the Council of the City of New York, Committee on Transportation (Oct. 18, 2006), *available at* http://www.weact.org/transportation/downloads/citycouncil_testimony_2006-10-18.pdf.

[3] *See* Kugel, *supra* note 2.

[4] *See* Press Release, W. Harlem Envtl. Action, Inc., Title VI Discrimination Complaint Against the MTA (Nov. 15, 2000), http://weact.org/pressadvisories/2000_Nov_15.html.

[5] *See* DEPARTMENT OF CITY PLANNING, CITY OF N.Y., MANHATTAN COMMUNITY DISTRICT 9, at 1, 4, *available at* http://www.nyc.gov/html/dcp/pdf/lucds/mn9profile.pdf, DEPARTMENT OF CITY PLANNING, CITY OF N.Y., MANHATTAN COMMUNITY DISTRICT 10, at 1, 4, *available at* http://www.nyc.gov/html/dcp/pdf/lucds/mn10profile.pdf (on Harlem); MANHATTAN COMMUNITY DISTRICT 11, 1, 4 at http://www.nyc.gov/html/dcp/pdf/lucds/mn11profile.pdf (on East Harlem); DEPARTMENT OF CITY PLANNING, CITY OF N.Y., MANHATTAN COMMUNITY DISTRICT 12, at 1, 4,

source of environmental concern. The area is also home to two sewage treatment plants, three Department of Sanitation truck facilities, and one MTA outdoor train yard.[6] Aggravating environmental justice concerns, the 100th Street depot was re-opened after the MTA shut down another depot in an industrial, non-residential area of Southern Manhattan on West 16th Street in Chelsea.[7]

Diesel bus depots are dangerous because they lead to increased emissions of diesel exhaust, which has been found to cause cancer and to exacerbate respiratory illnesses, such as bronchitis and asthma,[8] as well as well as contributing to increased traffic and noise pollution. The re-opened depot posed an immediate threat to low-income and minority communities. For the zip code in which the 100th Street depot is located, the 2000 Census found that 34.5% of the residents were African American, 57.6% of the residents were Hispanic or Latino, and 35.9% of the residents were below the poverty line.[9] A series of studies conducted in the late 1990s found that East Harlem had an asthma hospitalization rate of 30 patients per 1000 residents, compared with a national average of 3.7 per 1000.[10] Also, asthma is the leading cause of child hospitalizations in Harlem.[11]

---

available at http://www.nyc.gov/html/dcp/pdf/lucds/mn12profile.pdf (on Washington Heights and Inwood).

[6] *See* W. Harlem Envtl. Action, Inc., Some of the Polluting Facilities in Northern Manhattan, http://weact.org/gis/facilitylist.html (last visited Oct. 14, 2007). The area is also bounded and crossed by three major, heavily-congested highways, 9A Westside Highway, FDR Drive, and I-95, leading up to the George Washington Bridge. *See* Mapquest, Map of New York, NY, http://www.mapquest.com/maps/map.adp?zipcode=10030 (last visited Oct. 14, 2007) (for Harlem and East Harlem); Mapquest, Map of New York, NY, http://www.mapquest.com/maps/map.adp?zipcode=10033 (last visited Oct. 14, 2007) (for Washington Heights and Inwood).

[7] *See* Kugel, *supra* note 2.

[8] Natural Resources Defense Council, Exhausted by Diesel: How America's Dependence on Diesel Engines Threatens our Health, http://www.nrdc.org/air/transportation/ebd/chap2.asp (last visited Oct. 14, 2007).

[9] *See* U.S. Census Bureau, American FactFinder, http://factfinder.census.gov (enter zip code "10029" into "city/town, county, or zip" field) (last visited Oct. 14, 2007) (showing the demographic for United States postal code 10029.).

[10] *See* W. Harlem Envtl. Action, Inc., *supra* note 4; *see also* N.Y. CITY CHILDHOOD ASTHMA INITIATIVE, N.Y. CITY DEP'T OF HEALTH & MENTAL HYGIENE, ASTHMA FACTS 16 fig.16 (2003).

[11] *See* Complaint at 15, W. Harlem Envtl. Action, Inc. v. Metro. Transp. Auth., No. 2001.0053 & 2001.0062 (Federal Transit Administration Nov. 14,

Community residents, in order to protect their health, sought to stop the MTA plan to reopen the 100th Street depot. Because the MTA received approximately $5 billion from the federal government from 2000 to 2004, used in part to buy more diesel buses, the MTA action was subject to United States Department of Transportation (DOT) regulations that require examination of environmental justice issues.[12] A community group called West Harlem Environmental Action, Inc. (WE ACT)[13] filed a Complaint (Complaint) with the DOT.[14]

WE ACT is a non-profit organization that works with the local community to achieve environmental justice for communities of color, especially residents of West, Central, and East Harlem and Washington Heights.[15] WE ACT, founded in 1988, works to increase community power to combat environmental racism and advance environmental health with its predominantly African-American and Latino neighbors.[16]

One of WE ACT's first actions was to file a lawsuit against the MTA in 1988 to try to halt the building of the Manhattanville bus depot, the MTA's sixth diesel bus depot in Northern Manhattan.[17] During discussions, the MTA told West Harlem

2000) (on file with New York University Environmental Law Journal).

[12] *See* W. Harlem Envtl. Action, Inc., *supra* note 4; *see also* Exec. Order No. 12,898, 59 Fed. Reg. 7629, 7629–30 (Feb. 11, 1994).

[13] WE ACT is located on 125th Street in West Harlem and "is a non-profit, community-based, environmental justice organization dedicated to building community power to fight environmental racism and improve environmental health, protection and policy in communities of color." WE ACT focuses its work on the communities of West, Central, and East Harlem, Washington Heights, and Inwood. W. Harlem Envtl. Action, Inc., http://weact.org/index.html (last visited Oct. 14, 2007).

[14] Complaint, *supra* note 11.

[15] *See* W. Harlem Envtl. Action, Inc., *supra* note 13.

[16] *See id.*; W. Harlem Envtl. Action, Inc., Biographical Sketch – Peggy Shepard, http://weact.org/staff/peggy_shepard/index.html.

[17] *See* Complaint, *supra* note 11, at 6; *see also* Peggy M. Shepard, *Issues of Community Empowerment*, 21 FORDHAM URB. L.J. 739, 748 (1994). The MTA also planned to build a senior citizens' housing project over the depot. *See id.* WE ACT asked the court to require the MTA to prepare an environmental impact statement. *See id.* The MTA argued that an environmental impact statement was not necessary because the facility was a replacement in kind since the site was formerly a trolley barn. *See* Complaint, *supra* note 11, at 6. The court ruled in favor of the MTA being exempt from needing an environmental impact statement. *See* Shepard, *supra*. The court added, however, that if the MTA also planned a residential development, the project would no longer be exempt from the environmental impact statement requirement. *See id.* at 748–49. As a result

residents that once the Manhattanville depot opened, the MTA would be closing the Amsterdam depot that was located four blocks away.[18] Twelve years later, when WE ACT, spurred by the MTA's plan to reopen the 100th Street depot, filed a Complaint with the United States DOT on November 14, 2000, the Amsterdam depot had still not been shut down, even though it was adjacent to a junior high school and a New York City Parks Department swimming pool.[19] Unfortunately, WE ACT's administrative Complaint and the DOT's subsequent investigation did nothing to halt the MTA's plan to demolish and reconstruct the 100th Street depot.[20]

Environmental inequality continues while the environmental justice movement (EJM) is, for the most part, locked out of the courtroom by adverse precedent. I will argue that, although these daunting litigation hurdles have weakened the environmental justice movement, grassroots organizing and other legal actions still provide powerful tools for minority and low-income communities fighting to protect themselves from the environmental harms with which they are burdened. Administrative complaints are an alternative avenue to the enforcement of legal claims that may help remedy environmental justice harms.

Compared to successful litigation, administrative complaints are weaker because they can still be quite costly to prepare; they are not an adversarial process and can limit the opportunity for environmental justice groups to have their say; much is left to agency discretion so that groups have fewer structural protections and can be ejected from the process more easily; and less powerful remedies are available. On the other hand, when faced with little hope in the courtroom, administrative complaints may have significant value in being able to slow down undesirable projects; forcing funding recipients to acknowledge the community's presence; setting up the potential for negotiation; requiring the funding recipient to pursue, or at least consider, better compliance going forward; achieving symbolic gains for fledgling community

the depot was constructed, but the seniors' housing was not. *See id.* at 749.

[18] *See* Complaint, *supra* note 11, at 6.

[19] *See id.*

[20] *See* Press Release, W. Harlem Envtl. Action, Inc., Road Rage at 100th Street? Residents Take on MTA at September 7th Rally (Sept. 8, 2003), http://weact.org/pressadvisories/2003_Sept_8.html.

groups trying to empower marginalized residents; and complementing community organizing by providing the important tool of a legal enforcement mechanism. To illustrate this argument I examine WE ACT's dispute with the MTA.

Part I of this Note provides a background history of the EJM in the United States and examines certain problems environmental justice plaintiffs face when they try to bring litigation. Part II will look at another tool of the EJM, administrative complaints, using WE ACT's fight against the MTA over the re-opening of the 100th Street bus depot as a case study. Part III will then evaluate the effectiveness of administrative complaints in enabling the EJM to meet its goals.

I. THE ENVIRONMENTAL JUSTICE MOVEMENT AND THE LAW

The principle of the EJM is that minority and low-income communities face a disproportionate number of environmental threats compared to white and higher-income communities.[21] The goal of the movement is to lessen the environmental risks these communities face. The EJM, at one time, was able to use courtroom litigation to protect and enforce the rights of community residents. Today, however, adverse case law appears to forestall any judicial remedies the EJM might seek.[22] This section of the paper examines the beginnings of the EJM and the litigation hurdles the movement now faces.

A. *Beginnings of the EJM*

The EJM began in opposition to "environmental racism" and merged the formerly distinct social concerns of racial discrimination and environmental destruction.[23] The heart of the problem is distribution inequity, where low-income and minority communities are burdened with a disproportionate share of the environmental and health harms caused by locally undesirable land uses (LULUs), while wealthier, predominantly non-minority, communities receive a disproportionate share of the benefits of

[21] *See, e.g.*, Brian Crossman, Note, *Resurrecting Environmental Justice: Enforcement of EPA's Disparate-Impact Regulations Through Clean Air Act Citizen Suits*, 32 B.C. ENVTL. AFF. L. REV. 599, 599–600 (2005).

[22] *See id.* at 601.

[23] *See id.*

these land uses.[24] Much of the inspiration behind the EJM comes from the Civil Rights Movement of the 1960s.[25] The EJM, similar to the Civil Rights Movement, employs a grassroots approach, focusing on empowering the community and helping it organize against negative environmental impacts, combined with a strategy of legal action, primarily in the form of litigation.[26]

1. *Fighting Market and Political Process Failures*

The EJM is necessary because it fights problems that cannot be solved through the market or the political process.[27] Market dynamics cannot fully account for the disparate impacts affecting minority communities.[28] Professor Vicki Been and Francis Gupta

[24] *See* Browne C. Lewis, *What You Don't Know Can Hurt You: The Importance of Information in the Battle Against Environmental Class and Racial Discrimination*, 29 WM. & MARY ENVTL. L. & POL'Y REV. 327, 330 (2005).

[25] *See* James H. Colopy, Note, *The Road Less Traveled: Pursuing Environmental Justice Through Title VI of the Civil Rights Act of 1964*, 13 STAN. ENVTL. L.J. 125, 140 (1994).

[26] *See id.* at 141–42.

[27] *See* Joshua Glasgow, *Not in Anybody's Backyard? The Non-Distributive Problem with Environmental Justice*, 13 BUFF. ENVTL. L.J. 69, 97 (2005):

> [G]overnment intervention is justified to correct market failures, and uncompensated pollution is the classic market failure. Understanding environmental justice through a public choice lens extends that intervention rationale to the regulatory process. When the poor are systematically unable to impose costs on LULU developers because of collective action and information problems, a market failure is occurring. The fact that the 'market' in this case is the political process does not alter the analysis.

[28] Market dynamics would explain disparate impacts as simple economics rather than environmental injustice. The "coming to the nuisance" theory says that there was not a disparate impact to start with but that when the LULU came, it caused the housing prices in the area to drop, so minority and low-income residents moved in. *See* Rachel D. Godsil, *Environmental Justice and the Integration Ideal*, 49 N.Y.L. SCH. L. REV. 1109, 1122 (2004–05). This theory assumes that the white residents originally living there can move out more easily than minority residents, due to economic and housing discrimination, leaving the original minority residents and new minority buyers to take advantage of the depressed pricing. *See id.* This is combined with the "pollution magnet" theory, which says that once a neighborhood has several LULUs and is populated by minority and low-income residents, it begins to attract more LULUs because the land is devalued and the residents are politically powerless. *See id.* at 1123–24. When LULUs are sited where the land has the least value and the residents are the least likely to fight about the siting, then the market is being efficient, not racist. *See id.* at 1124. Market dynamics can dismiss the seeming unfairness of the situation because the residents of the polluted neighborhoods have the value of being able to afford to live in these hazardous areas, whereas they might face homelessness in environmentally cleaner communities. *See id.*

conducted a nationwide study looking at the relationships among the siting of commercial hazardous waste facilities, population demographics, and market dynamics.[29] They determined that market dynamics did not explain the disproportionate siting of hazardous waste facilities in predominantly minority compared to predominantly white communities. While a higher percentage of African Americans predicted that a facility would be present in an area, they did not find evidence of white residents leaving, but rather the disproportionate siting in these communities seemed to have occurred prior to 1970 and remained constant.[30] Been and Gupta further found that the percentage of Hispanic or Latino residents at the beginning of a decade was a predictor of whether a hazardous waste facility would be sited near the community later in the decade, indicating the presence of active disproportionate siting.[31]

Housing discrimination is part of the market failure that leads to discriminatory siting and disparate negative impacts. Thirty years after the passage of the Fair Housing Act, sociologist Nancy Denton found that many parts of the country, particularly northern cities, remained quite segregated between blacks and whites.[32] John Yinger estimated that discrimination cost black and Hispanic homeseekers an average of $3,680 when they tried to buy a new house.[33] Segregation and discrimination lead to wealth inequality because blacks are less likely to buy homes, and the homes they do own are of lower value based on their less desirable locations.[34] This limits home appreciation rates, which are a major way middle

---

[29] Vicki Been with Francis Gupta, *Coming to the Nuisance or Going to the Barrios? A Longitudinal Analysis of Environmental Justice Claims*, 24 ECOLOGY L.Q. 1, 9 (1997).

[30] *See id.* at 4, 32.

[31] *See id.* at 33–34.

[32] *See* NANCY A. DENTON, HALF EMPTY OR HALF FULL: SEGREGATION AND SEGREGATED NEIGHBORHOODS 30 YEARS AFTER THE FAIR HOUSING ACT (1999), *reprinted in* ROBERT C. ELLICKSON & VICKI L. BEEN, LAND USE CONTROLS: CASES AND MATERIALS, at 694 (3d ed. 2005). Based on a 100 point index where zero represented no segregation and 100 represented complete segregation, Denton found, "[i]n the Northern metropolitan areas, Black-White segregation averaged 85.5 in 1970, 80.1 in 1980, and 77.8 in 1990," a decrease of only 8 points. *Id.*

[33] John Yinger, *Cash in Your Face: The Cost of Racial and Ethnic Discrimination in Housing*, 42 J. URB. ECON. 339, 340 (1997).

[34] *See* Nancy A. Denton, *The Role of Residential Segregation in Promoting and Maintaining Inequality in Wealth and Property*, 34 IND. L. REV. 1199, 1205–1207 (2001).

and lower classes typically accumulate wealth.[35] Minority residents cannot leave communities that bear the burden of undesirable land uses as easily as they could absent market failure. The EJM combats these problems by providing an alternative to exit for residents facing the impending siting of a LULU.

The EJM can also help to overcome political process failures. Political process failure occurs when the political process consistently allows a small group to be exploited by a more sizeable contingent of beneficiaries.[36] This is precisely what happens to many minority and low-income communities disproportionately burdened by LULUs. The political process is even less likely to work when voters and decision makers are separated by appointed committees,[37] such as the MTA Board, that have no direct accountability to voters.[38] However, communities that face disparate impacts can turn to the EJM, which relies on a two-pronged approach to neutralize market and political process failures.

2. *A Two-Pronged Attack*

Similar to the Civil Rights Movement, the EJM developed a two-pronged strategy consisting of grassroots community organization and empowerment in tandem with legal actions, primarily litigation, to secure the rights of minority communities.[39]

The EJM first received attention in 1982 when a series of

---

[35] *Id.* at 1206.

[36] *See The Supreme Court, 2004 Term*, 119 HARV. L. REV. 169, 305 (2005). John Hart Ely said on this topic:

> Malfunction [of the political process] occurs when the *process* is undeserving of trust, when (1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system.

JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 103 (1980).

[37] *See, e.g.*, Amy Widman, *Replacing Politics with Democracy: A Proposal for Community Planning in New York City and Beyond*, 11 J.L. & POL'Y 135, 143 (2002) (saying that unless vulnerable communities can play roles in zoning decisions, political process failures may result).

[38] *See* Shepard, *supra* note 17, at 748.

[39] *See* Colopy, *supra* note 25, at 142.

community protests against the siting of a polychlorinated biphenyl (PCB) landfill in predominantly African-American Warren County, North Carolina made national headlines.[40] In response, Congress called on the United States Government Accountability Office (GAO)[41] to conduct the first major Environmental Justice study in 1983.[42] The results of the study were staggering. In a large region of the southeastern United States, three out of every four hazardous waste sites were found in predominantly African American communities.[43] The head of the United Church of Christ's (UCC's)[44] Commission for Racial Justice led the 1982 Warren County protests, and in 1987, the UCC released a national study that concluded that throughout the country, race, not socioeconomic status, was the predominant factor in whether one would find a hazardous waste facility in a residential neighborhood.[45] A third major study was published in the National Law Journal (NLJ) in 1992.[46] The NLJ study found that Environmental Protection Agency (EPA) programs and enforcement penalties significantly favored predominantly white communities over predominantly minority communities.[47]

While grassroots protests and national studies were being conducted, some minority communities also had success in the courtroom. In 1988, a group of predominantly Latino, Spanish-speaking residents of Kettleman City, California organized a

[40] *See* Carolyn Graham & Jennifer B. Grills, Comment, *Environmental Justice: A Survey of Federal and State Responses*, 8 VILL. ENVTL. L.J. 237, 239 (1997).

[41] The General Accounting Office changed its name to the Government Accountability Office (both names use the acronym GAO). The GAO studies how the federal government uses the taxes it collects and advises Congress and the executive agencies on how they can become more effective and efficient. U.S. Gov't Accountability Office, What is GAO?, http://www.gao.gov/about/what.html (last visited Oct. 14, 2007).

[42] *See* Graham & Grills, *supra* note 40, at 239–40.

[43] *Id.* at 240.

[44] The UCC, a diverse Christian church founded in 1957, is made up of several Christian traditions. The UCC dedicates part of its ministries to racial justice and community building. United Church of Christ, Short Course in the History of the United Church of Christ, http://www.ucc.org/about-us/short-course/the-united-church-of-christ.html (last visited Oct. 14, 2007).

[45] *See* Scott Michael Edson, Note, *Title VI or Bust? A Practical Evaluation of Title VI of the 1964 Civil Rights Act as an Environmental Justice Remedy*, 16 FORDHAM ENVTL. L. REV. 141, 146–47 (2004); Lewis, *supra* note 24, at 331–32.

[46] *See* Lewis, *supra* note 24, at 332–33.

[47] *See id.*

community group to oppose the siting of a hazardous waste incinerator in the community, which already had a toxic waste dump.[48] The group won a delay in court and, ultimately, a number of marches and protests forced the waste company to withdraw its proposal.[49]

The EJM today continues in much the same fashion. WE ACT is a grassroots organization that focuses on empowering the community to fight environmental injustices. There are a number of similar organizations in other neighborhoods of New York City, as there are throughout the country.[50] Environmental injustice remains, and community groups continue to rely on EJM community organizing and awareness tactics. However, the second prong of the EJM strategy, legal action, has been increasingly weakened by several Supreme Court decisions.[51] In most environmental justice cases litigation is no longer a promising recourse. Other tools, like administrative complaints, have become more valuable.[52]

B. *The Litigation Landscape*

Over the course of the EJM, environmental justice plaintiffs have had varying degrees of success. Unfortunately, the current statutory limitations and adverse judicial holdings have stymied environmental justice litigation. This has forced EJM proponents to try other methods in pursuit of environmental equality.[53]

1. *Constitutional Claims*

Early EJM litigation strategists attempted to follow their civil rights predecessors by bringing claims under the Equal Protection

---

[48] *See* Colopy, *supra* note 25, at 131.

[49] Colopy, *supra* note 25, at 143.

[50] The list of New York City Environmental Justice groups includes: Southern Queens Park Association, United Puerto Rican Organization of Sunset Park, South Bronx Clean Air Coalition, Lower Washington Heights Neighborhood Associates, Magnolia Tree Earth Center, and El Puente. *See* New York City Environmental Justice Alliance, http://www.cobbmedia.com/garden/ (last visited Oct. 14, 2007).

[51] Uma Outka, Comment, *Environmental Injustice and the Problem of the Law*, 57 ME. L. REV. 209, 210 (2005).

[52] *See* Kyle W. La Londe, *Who Wants to Be an Environmental Justice Advocate?: Options for Bringing an Environmental Justice Complaint in the Wake of* Alexander v. Sandoval, 31 B.C. ENVTL. AFF. L. REV. 27, 36 (2004).

[53] *See id.* at 34.

Clause of the Fourteenth Amendment.[54] An environmental justice plaintiff can rely on the Equal Protection Clause to challenge the siting of a LULU in her predominantly minority community based on racial discrimination on the part of the government site-chooser.[55] However, this claim will virtually always fail under the Court's holding in *Village of Arlington Heights v. Metropolitan Housing Development Corp.* that plaintiffs must carry the burden of proving that a discriminatory purpose was the *motivating* factor of a defendant's decision; a "discriminatory 'ultimate effect' is without independent constitutional significance."[56]

R.I.S.E., Inc. v. Kay, in which a bi-racial community group challenged the decision of a county board in Virginia to site a landfill in its neighborhood, provides an example.[57] Three pre-existing landfills in the county were in communities in which over 90% of the residents were African American.[58] The one landfill located in a community that was predominately white had been shut down temporarily due to environmental mishaps. The Board of Zoning Appeals later voted not to re-open the site because it would significantly lower property values in the surrounding area.[59] The court in *R.I.S.E. v. Kay* found that the siting of landfills in the county had a disproportionate impact on black residents but despite this finding, the court ruled in favor of defendants.[60] The court reasoned that the plaintiffs had failed to meet the intentional discrimination requirement of the Equal Protection Clause.[61]

Intentional discrimination is difficult to prove. Plaintiffs will

---

[54] Colopy, *supra* note 25, at 145. *See also* U.S. CONST. amend. XIV, § 1.

[55] Colopy, *supra* note 25, at 145.

[56] Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270–71 (1977). A plaintiff can ask a court to infer intent from a disproportionate distribution of environmental harms, but the plaintiff still has the burden to show that the defendant's choices were made because of their negative impact on the protected class. *See* Sandra L. Geiger, *An Alternative Legal Tool for Pursuing Environmental Justice: The Takings Clause*, 31 COLUM. J.L. & SOC. PROBS. 201, 210 (1998).

[57] *See* R.I.S.E., Inc. v. Kay, 768 F. Supp. 1144 (E.D. Va. 1991).

[58] *Id.* at 1148–49.

[59] *Id.* at 1149.

[60] *Id.* at 1149–50. (The court said that this was a good "starting point" for determination of whether there was discriminatory intent.)

[61] *Id.* at 1150. (The court wrote: "the Equal Protection Clause does not impose an affirmative duty to equalize the impact of official decisions on different racial groups. Rather, it merely prohibits government officials from intentionally discriminating on the basis of race.")

often struggle to uncover hard evidence to back such a claim. This severely limits environmental justice plaintiffs' abilities to bring constitutional claims, denying them a claim that could potentially carry far-ranging results.[62]

2. *Early Use of Title VI of the Civil Rights Act of 1964*

For a period, EJM plaintiffs relied on Title VI of the Civil Rights Act of 1964 with success.[63] Title VI "prohibits the federal government from financially supporting any program operated in a racially discriminatory manner."[64] EJM litigation focused on two key sections of Title VI, sections 601 and 602.[65] Section 601, generally cited as Title VI, says that "[n]o person 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."[66] Section 602 authorizes federal agencies that "provide federal funding to promulgate regulations that implement the requirements of § 601."[67]

A series of Supreme Court decisions parsed out the intent requirements for Title VI.[68] *Alexander v. Choate* finally provided

---

[62] *See* Crossman, *supra* note 21, at 602–03.

[63] *See, e.g.*, *id.* at 603–04. The Civil Rights Act of 1964 is made up of Titles I–XI. The Act prohibits discrimination in public accommodations, employment, and programs receiving federal funding. *See* A. Leon Higginbotham, Jr. & Barbara Kopytoff, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, *in* F. MICHAEL HIGGINBOTHAM, RACE LAW: CASES, COMMENTARY, AND QUESTIONS 473, 475 (2nd ed. 2005).

[64] Colopy, *supra* note 25, at 152.

[65] *See generally* 42 U.S.C. §§ 2000d, 2000d-1 (2000); Outka, *supra* note 51, at 223.

[66] 42 U.S.C. § 2000d (2000).

[67] Outka, *supra* note 51, at 223. Section 602 states in part:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section [601] with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.

42 U.S.C. § 2000d-1 (2000).

[68] In *Regents of the University of California v. Bakke*, the Court looked to legislative intent and found, "Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment." Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 287 (1978).

a unanimous announcement of two Title VI principles.[69] The first was that, by itself, Title VI prohibited only intentional discrimination.[70] The second was that "actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI."[71] Federal agencies are allowed to promulgate regulations that prohibit fund recipients from creating disparate impacts, with or without a discriminatory intent.[72] With federal courts willing to imply a right of action to the statute, § 602 held a great amount of promise for the EJM.[73]

a. *Implied Right of Action*

The difficulty of satisfying the intent requirement is not the only hurdle for Title VI plaintiffs; Title VI also does not contain an explicit private right of action.[74] Finding an implied right of action is especially important for § 602 suits. In *Alexander v. Choate*, the court indicated approval for disparate impact regulations to remedy violations of Title VI under § 602.[75] However, an individual harmed will only have standing to bring a suit if he or she possesses a right of action, explicit or implied.

3. *Title VI's Dethroning*

Early on, federal courts looked favorably upon environmental

This seemed to indicate that Title VI only applied to intentional discrimination. Crossman, *supra* note 21, at 608. The Court went back to *Bakke* in *Guardians Ass'n v. Civil Service Commission*, where black and Hispanic New York Police Officers brought a suit against the city alleging that there were disproportionate layoffs of minority officers because they had less seniority due to the fact that officers were hired in order of their testing scores and the testing discriminated against blacks and Hispanics. Guardians Ass'n. v. Civil Serv. Comm'n, 463 U.S. 582, 585, 589–92 (1983). The Court came out with only a plurality opinion against the plaintiffs, due to lack of discriminatory intent, but agreed that disparate impacts without explicit discriminatory intent could be included under Title VI in some instances. *See id.*; *see also* Crossman, *supra* note 23, at 609.

[69] *See* Crossman, *supra* note 21, at 610. This was based on the Court's interpretation of *Guardians Ass'n v. Civil Service Commission*. *Id.*

[70] *See* Alexander v. Choate, 469 U.S. 287, 293 (1985).

[71] *Id.*

[72] *See* Outka, *supra* note 51, at 224.

[73] *See id.* at 224–25.

[74] Section 601 does not have an explicit private right of action. 42 U.S.C. § 2000d (2000). Section 602 also does not have an explicit private right of action. 42 U.S.C. § 2000d-1 (2000).

[75] *See* Alexander v. Choate, 469 U.S. 287, 293 (1985).

justice plaintiffs' arguments for an implied right of action in § 602 of Title VI. In *Chester Residents Concerned for Quality Living v. Seif* [76] and *South Camden I*,[77] environmental justice groups won important victories based on appellate and district courts finding implied private rights of action. The EJM victory in *South Camden I* lasted for only five days; on April 24, 2001, the United States Supreme Court handed down its ruling in *Alexander v. Sandoval*, holding that § 602 did not contain a private right of

[76] Chester Residents Concerned for Quality Living v. Seif, 132 F.3d 925, 927 (3d Cir. 1997). A community group in Chester, Pennsylvania brought an action against the Pennsylvania Department of Environmental Protection (PADEP) for issuing a permit for a soil remediation facility in their community on the grounds that it violated EPA regulations on disparate impact. *See id.* at 927. The city of Chester was 65% African American while the rest of the county was over 90% white. *Id.* at n.1. The PADEP had already granted permits for five waste facilities in Chester while it had only granted two permits for waste facilities sited in the remainder of the county. *Id.* The Third Circuit Court of Appeals ruled in favor of the plaintiffs, finding that the EPA regulations were within the scope of Title VI and that an implied private right of action would be in furtherance of the purpose of Title VI. *Id.* at 936. The United States Supreme Court granted certiorari but never got the case because the state of Pennsylvania withdrew the permits. *See* Crossman, *supra* note 21, at 612; *see also* Seif v. Chester Residents Concerned for Quality Living, 524 U.S. 974 (1998).

[77] A community group sued the New Jersey Department of Environmental Protection (NJDEP). S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 145 F. Supp. 2d 446, 450 (D.N.J. 2001). The group alleged that the NJDEP's granting of a permit to a major cement grinding facility to be located in the Waterfront South neighborhood of Camden, New Jersey violated the EPA disparate impact regulations. *Id.* NJDEP had approved a permit for cement grinding facility to be located in the Waterfront South neighborhood of Camden, New Jersey, a community of over 90% minority residents of whom over half were below the poverty line with an overall median income of $15,082, compared with the rest of Camden County, which was 75.1% white, non-Hispanic and had a median income of $40,027. *Id.* at 459. Waterfront South was already home to three county industrial sites, two Superfund sites, four sites being investigated for releasing hazardous substances, and fifteen additional sites that NJDEP had recognized as contaminated. *Id.* The cement grinding facility would release inhalable particulate matter into the air and would be responsible for 77,000 trucks traveling annually to transport materials to and from the site. *Id.* at 460. Also, the self-reported asthma rate in Waterfront South was 33%, which was more than double the asthma rates for other parts of Camden. *Id.* at 461. Judge Stephen Orlofsky held that the NJDEP violated EPA Title VI regulations in granting the permit and issued a preliminary injunction that vacated the cement grinding facility's permit, reasoning that 1) NJDEP had an obligation under Title VI to consider the disparate impact before issuing a permit; and 2) "plaintiffs . . . established a prima facie case of disparate impact discrimination based on race and national origin in violation of the EPA's regulations promulgated pursuant to § 602." *Id.* at 505, 451–52.

action.[78]

a. Alexander v. Sandoval

Though not an environmental justice case, *Sandoval* nonetheless affects the fate of environmental justice Title VI suits.[79] The only question in front of the Court in *Sandoval* was whether there was a private cause of action available to enforce disparate-impact regulations under § 602.[80] Justice Scalia's opinion held that there was no right of action for private parties. Writing for a 5–4 majority, he started with three premises: first, a private cause of action was available for individuals to sue to enforce § 601 for both injunctive relief and damages; second, § 601 prohibits only intentional discrimination; and third, for the purposes of the case, the court would assume that regulations written under § 602 could prohibit conduct that had a racially disparate impact even if § 601 would allow the conduct.[81] Scalia then reasoned,

> It is clear now that the disparate-impact regulations do not simply apply § 601—since they indeed forbid conduct that § 601 permits—and therefore clear that the private right of action to enforce § 601 does not include a private right to enforce these regulations.[82]

Scalia found that § 602 did not have § 601's "rights-creating language" to show a legislative intent to give § 602 a private cause of action.[83] The Court also found that § 602 did not provide any

[78] Alexander v. Sandoval, 532 U.S. 275, 293 (2001); *see also* S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 145 F. Supp. 2d 446 (D.N.J. 2001).

[79] In *Sandoval*, plaintiff Martha Sandoval represented a class challenging the Alabama Department of Public Safety's policy that the state driver's license test be offered only in English. *See id.* at 279. Sandoval wanted to enforce the Department of Justice (DOJ) Title VI regulations, alleging that the Alabama policy had the effect of discriminating based on national origin. *See id.* The district court agreed and enjoined the policy; the Eleventh Circuit Court of Appeals affirmed. *Id.*

[80] *Id.* at 278.

[81] *See id.* at 279–81.

[82] *Id.* at 285.

[83] *See id.* at 288–89. Scalia also determined that § 602 did not address prospective private plaintiffs, which would help show an intent to give a private right of action, and did not even address the people who might be harming plaintiffs, but rather the doubly removed administrative agency promulgating regulations. *See id.* at 289.

congressional intent to create a private remedy.[84] So the Court concluded, "Neither as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under § 602. We therefore hold that no such right of action exists."[85]

b. *Stevens' Dissent and § 1983*

In the dissent, Justice Stevens raised several reasons that a private right of action should be available, including that almost every Court of Appeals had found a § 602 Title VI case to have an implied right of action.[86] In his dissent, Stevens predicted that future plaintiffs would invoke 42 U.S.C. § 1983 in order to enforce Title VI regulations against state actors.[87] Under § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .[88]

It was not clear, however, that *Sandoval* also affected § 1983's connection to racially disparate impact regulations.[89] To uphold a § 1983 claim, plaintiffs need to convince a court that a violation of a federal right had occurred, not simply the violation of a federal law.[90]

c. South Camden II *and* III

Sandoval had, in effect, overruled *South Camden I*, so Judge Orlofsky asked both sides to brief the impact of *Sandoval* on the case and on the enforcement of disparate-impact regulations through § 1983.[91] In *South Camden II*, the district court decided a § 1983 claim had not been precluded and looked to see if Title VI regulations made under § 602 created a federal right that would

---

[84] *See id.*
[85] *Id.* at 293.
[86] *See id.* at 295 n.1 (Stevens, J., dissenting).
[87] *Id.* at 300.
[88] 42 U.S.C. § 1983 (2000).
[89] *See* Crossman, *supra* note 21, at 616.
[90] *See* Blessing v. Freestone, 520 U.S. 329, 340 (1997).
[91] Crossman, *supra* note 21, at 617–18.

enable a § 1983 claim.[92] This was another victory for the *South Camden* plaintiffs, but again, it did not last long. On appeal, *South Camden II* was reversed by *South Camden III*.[93] The *South Camden III* court reasoned that since *Sandoval* made it clear that Title VI prohibits intentional discrimination only, it cannot be applied to provide a right against disparate impacts.[94]

4. *§ 1983 and Other Suits*

Section 1983 has not delivered on the promise that Justice Stevens envisioned. The Supreme Court denied certiorari to rule on *South Camden III*,[95] and the Court has not yet heard a case relying on § 1983 to challenge a disparate impact § 602 regulation.[96] However, *Gonzaga University v. Doe*[97] held that in order to enforce § 1983 the Court must "determine whether Congress *intended to create a federal right*."[98] All of the circuits that have considered § 1983 claims applying Title VI after *Sandoval* and *Gonzaga* have reached the same result as the Third Circuit in *South Camden III*.[99] The Ninth Circuit's analysis reasoned: "We believe the Supreme Court's *Sandoval* and *Gonzaga* decisions, taken together, compel the conclusion we reach today: that agency regulations cannot independently create

---

[92] *See* S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 145 F. Supp. 2d 505, 518–19 (D.N.J. 2001). The district court used the factors in *Blessing v. Freestone* to determine that the EPA Title VI regulations did in fact create a federal right because the regulations were intended to benefit the class of which plaintiffs were a part, the language of the regulations was not ambiguous, and the regulations could be cast as mandatory obligations on the recipients of federal funds. *See id.* at 535–42; *see also* Blessing v. Freestone, 520 U.S. 329, 340–41 (1996).

[93] S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 274 F.3d 771, 774 (3d Cir. 2001).

[94] *Id*.

[95] S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 274 F. 3d 771 (3d Cir. 2001), *cert. denied*, 536 U.S. 939 (2002).

[96] *See also* Outka, *supra* note 51, at 230–31.

[97] Gonzaga Univ. v. Doe, 536 U.S. 273, 287 (2002) (holding that since the Family Educational Rights and Privacy Act of 1974 (20 U.S.C. § 1232g) did not create a privately enforceable right, it could not be enforced under 42 U.S.C. § 1983).

[98] *Id.* at 283.

[99] *See, e.g.*, Save Our Valley v. Sound Transit, 335 F.3d 932, 936, 939 (9th Cir. 2003) (the Third, Fourth, Ninth, and Eleventh Circuits reach the same result as *South Camden III*); Johnson v. City of Detroit, 446 F.3d 614, 629 (6th Cir. 2006) (the Sixth Circuit overturns an earlier case to follow the other Circuits).

rights enforceable through § 1983."[100]

Without proof of intentional discrimination, environmental justice plaintiffs cannot successfully bring suit based on the Fourteenth Amendment, Title VI, or § 1983 application of § 602 regulations. The denial of such powerful litigation tools has significantly weakened the EJM. Although EJM organizations have not given up hope that a previously un-mined statutory hook will get them back into court,[101] at this point, the EJM is essentially locked out of the courtroom and must rely on other tools to help it reach its goals.

II. THE ADMINISTRATIVE COMPLAINT AS A TOOL: WE ACT AND THE MTA

Because of the difficulties outlined above, EJM plaintiffs have been forced to turn to other avenues to enforce their rights. One potential tool is the administrative complaint. Part A will briefly describe the relationship between administrative regulations and environmental justice. Part B examines WE ACT's administrative complaint against the MTA specifically.

[100] Save Our Valley, 335 F.3d at 939. The court justified this holding saying: "Our conclusion should surprise no one, as it results directly from the broader, venerated constitutional law principle that Congress, rather than the executive, is the lawmaker in our democracy." *Id.*

[101] Swati Prakash of WE ACT says *Sandoval* forces environmental justice plaintiffs to "be creative." Telephone Interview with Swati R. Prakash, Environmental Health Director, West Harlem Environmental Action, Inc., in New York, N.Y. (Mar. 15, 2006). Prakash thinks that fair housing and land use suits could be the next to work for the EJM. *Id.* Others have suggested using the Takings Clause or giving Equal Protection arguments another try. *See* Brian Faerstein, Comment, *Resurrecting Equal Protection Challenges to Environmental Inequity: A Deliberately Indifferent Optimistic Approach*, 7 U. PA. J. CONST. L. 561, 563 (2004) (arguing that a if a plaintiff can prove a government agency's "deliberate indifference" in not investigating environmental justice issues as thoroughly as EPA regulations mandate, then a court will consider that the equivalent of intentional discrimination, which would then allow an Equal Protection claim to be brought); Geiger, *supra* note 56, at 204 (proposing that community residents could file takings clause actions for the damage caused by the siting of a LULU and seeking a remedy of "just compensation" and then using the money to help them relocate to a safer area).

A. *The Administrative Landscape*

1. *Executive Order 12,898*

On February 11, 1994, President Bill Clinton signed Executive Order 12,898 (Order), titled: "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations."[102] In strong wording, the Order stated:

> To the greatest extent practicable and permitted by law . . . each Federal agency shall 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 United States.[103]

The Order mandates that every executive agency must create an environmental justice strategy, encourages public participation, and calls for more environmental justice research.[104]

On the same day that the Order was announced, President Clinton also sent a memorandum (Memo) to all of the federal departments and agency heads.[105] The President outlined some actions that all federal agencies should take in order to comply with the Order.[106] The Memo directs all agencies to ensure projects receiving federal funding do not use methods or practices that discriminate based on race, color, or national origin in accordance with Title VI.[107] Additionally, the Memo requires that Environmental Impact Statements and Environmental Assessments should include information on the potential negative effects of proposed projects on minority and low-income communities.[108] The Memo instructs federal agencies to ensure that these communities have the opportunity for input in the National

---

[102] Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994).

[103] *Id.* at 7629.

[104] *Id.* at 7630.

[105] *See id.*; Memorandum from William Clinton, President of the United States, Memorandum for the Heads of All Departments and Agencies, Subject: Executive Order on Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations 1 (Feb. 11, 1994), *available at* http://www.epa.gov/compliance/resources/policies/ej/clinton_memo_12898.pdf [hereinafter Memo.].

[106] Memo, *supra* note 105.

[107] *Id.*

[108] *Id.*

Environmental Policy Act[109] (NEPA) process, "including identifying potential effects and mitigation measures in consultation with affected communities and improving the accessibility of meetings, crucial documents, and notices."[110] Though they unquestionably gave new focus on environmental justice principles and had some amount of influence on administrative policy, neither the Order nor the Memo is binding on federal agencies.[111]

2. *Agency Responses to Executive Order 12,898*

Despite its limited legal force, the Order did spark executive agencies to craft regulations addressing environmental justice issues,[112] but the agencies have often done a poor job

[109] The purpose of NEPA is: "to declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man." 42 U.S.C. § 4321 (2000).

[110] Memo, *supra* note 105, at 1–2.

[111] *See* Memo, *supra* note 105, at 2. "[T]his order . . . 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." Exec. Order No. 12,898, 59 Fed. Reg. 7629, 7632–33 (Feb. 11, 1994). The Order also explicitly does not "create any right to judicial review involving the compliance or noncompliance of the United States, its agencies, its officers, or any other person." *Id.*

[112] See, e.g., U.S. Dep't of Transp., Order to Address Environmental Justice in Minority and Low-Income Populations, 62 Fed. Reg. 18,377 (Apr. 15, 1997) (affirming the DOT's commitment to Title VI and to Executive Order 12,898, saying in part:

> It is the policy of DOT to promote the principles of environmental justice (as embodied in the Executive Order) through the incorporation of those principles in all DOT programs, policies, and activities. This will be done by fully considering environmental justice principles throughout planning and decision-making processes in the development of programs, policies, and activities, using the principles of the National Environmental Policy Act of 1969 (NEPA), Title VI of the Civil Rights Act of 1964 (Title VI), the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, (URA), the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) and other DOT statutes, regulations and guidance that address or affect infrastructure planning and decisionmaking; social, economic, or environmental matters; public health; and public involvement.

Id. at 18,379.); U.S. Dep't of Transp., Fed. Highway Admin. FHWA Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, FHWA Ord. 6640.23 (Dec. 2, 1998), available at http://www.fhwa.dot.gov/legsregs/directives/orders/

implementing them.[113] The EPA set up a system to investigate environmental justice complaints, but it has not led to the results that environmental justice advocates had sought. By 2002, the EPA had received 130 environmental justice complaints.[114] Of this 130, the EPA did just four investigations, and each of the four investigations ruled against the complainant.[115] Even if the EPA had ruled in favor of a minority complainant against a state, the only remedy its regulations offer is the termination of funds to the state. Moreover, this remedy is only available if the House of Representatives and the Senate do not object.[116]

It appears that the EPA has recently distanced itself from Executive Order 12,898. A GAO report issued in July of 2005 found that in drafting clean air regulations, the EPA "generally devoted little attention to environmental justice."[117] Moreover the EPA adopted a new definition of environmental justice, which does not highlight race as the primary factor, thus providing less focus on protecting minority communities.[118] These policy decisions do not directly affect agency regulations and complaint

6640_23.htm (last visited Oct. 14, 2007) [hereinafter FHWA Ord. 6640.23] (establishing procedures and policies for the Federal Highway Administration)

[113] *See, e.g.*, Jerome Balter, *It Is Time for a Change*, 1 RUTGERS J.L. & URB. POL'Y 20, 21 (2003).

[114] *See id.* The way the process works is that only once a state has issued a permit, a community may file a complaint with the EPA. *See id.*

[115] *Id.*

[116] *Id.*

[117] U.S. GOV'T ACCOUNTABILITY OFFICE, ENVIRONMENTAL JUSTICE: EPA SHOULD DEVOTE MORE ATTENTION TO ENVIRONMENTAL JUSTICE WHEN DEVELOPING CLEAN AIR RULES 3 (2005), *available at* http://www.gao.gov/new.items/d05289.pdf. The EPA responded that the "GAO's approach is too narrow and does not ask the right questions," and that the GAO report "'completely neglects the most important issues—do the rules advance or hinder environmental justice?' and 'do they help provide cleaner air to people who need it?'" *GAO Finds EPA Failed to Properly Consider Effects of Clean Air Rules on Poor and Minorities*, FOSTER ELECTRIC REP., Aug. 17, 2005, at 15.

[118] The EPA's definition says: "Environmental Justice is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies." The EPA goes on to say, "EPA has this goal for all communities and persons across this Nation. It will be achieved when everyone enjoys the same degree of protection from environmental and health hazards and equal access to the decision-making process to have a healthy environment in which to live, learn, and work." United States Environmental Protection Agency, Environmental Justice, http://www.epa.gov/environmentaljustice/ (last visited Oct. 14, 2007).

procedures based on § 602, but they may indicate that the agency will be less likely to exercise its discretion in the investigation process.

Despite the EPA's poor record on environmental justice matters, in general, federal agencies have embraced environmental justice concerns after Executive Order 12,898. Many agencies have formal complaint procedures that allow private individuals and organizations to bring complaints against fund recipients, including complaints based on disparate impacts.[119] DOT regulations, for example, expand Title VI protections to include that:

> A recipient . . . may not . . . utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color or national origin.[120]

The EPA example demonstrates that the effectiveness of these complaints depends in part on how the agency handles the complaint.[121]These complaints may lead to an investigation by the agency.[122] Where the process is available, EJM organizations can use administrative complaints to further their goals, but it may be wise to first evaluate how the given agency may be likely to respond before going forward.

B. *WE ACT's Fight Against the MTA*

The history of the EJM is characterized by local communities taking action.[123] This section will examine one example of an EJM action, WE ACT's response to the MTA's siting of bus depots in Northern Manhattan. WE ACT decided to bring an

---

[119] *See, e.g.*, 40 C.F.R. § 7.120 (2006) (EPA regulations for complaint investigations)*;* FHWA ORD. 6640.23, *supra* note 112 (explaining FWHA regulations for complaint investigations).

[120] Dep't of Transp. Effectuation of the Title VI of the Civil Rights Act of 1964, 49 C.F.R. § 21.5(b)(2) (2006).

[121] *See* Balter, *supra* note 113, at 21–22.

[122] *See e.g.* 40 C.F.R. § 7.120 (EPA regulations for complaint investigations); FHWA ORD. 6640.23, *supra* note 112 (explaining FWHA regulations for complaint investigations).

[123] *See* Shelia Foster, *Justice from the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement*, 86 CAL. L. REV. 775, 776 (1998).

administrative complaint to the MTA's primary federal-funder, the DOT. In examining this case I hope to shed light on the potential of administrative complaint as an alternative to litigation.

1. *Background for the WE ACT Complaint*

WE ACT's Complaint, the MTA's Response, and the FTA's Findings are more useful when the context of the Complaint is understood. Particularly relevant are the background of Northern Manhattan, the MTA's operations there, and the effects of the bus depots on the area.

a. *Brief History of Northern Manhattan*

The history of Northern Manhattan helps to shed light on the past interactions between the MTA and the area and on the current milieu in which residents live. Today Northern Manhattan is racially, socio-economically, and culturally distinct from the southern part of Manhattan. Harlem and East Harlem, also known as Spanish Harlem, are recognizable throughout America as archetypal minority communities. Washington Heights and Inwood, the other two communities in Northern Manhattan, are similarly heavily populated by minority residents. Each of the neighborhoods is unique, but together, this 7.4 square miles of land is home to over 500,000 residents, most of whom are African-American or Latino.[124]

Dutch Governor Peter Stuyvesant founded the village of New Haarlem (Harlem) in 1658.[125] Much of Harlem remained farmland in 1870, but when elevated rail service was extended to Harlem in 1880 a period of extensive real estate speculation began.[126] Over-speculation led to a decline in housing prices and rents. First Italian, then Eastern European and Jewish immigrants began to populate the neighborhood.[127]

In 1904, Philip Payton,[128] a black businessman, started a real

[124] *See* Complaint, *supra* note 11, at 6.

[125] *See* GEORGE J. LANKEVICH & HOWARD B. FURER, A BRIEF HISTORY OF NEW YORK CITY 21–22 (1984).

[126] *See* East-Harlem.com, East Harlem's History, http://www.east-harlem.com/cb11_197A_history.htm (last visited Oct. 14, 2007).

[127] *See id.*

[128] Black Businessman Philip Payton founded the Afro-American Realty Company in 1904. Payton used the deflated housing market to acquire many leases from white-owned buildings. He then rented apartments to African

estate company and began renting apartments in Harlem to middle-class black families.[129] By the 1920s, Harlem was the cultural center of black America.[130] In the 1930s, East Harlem began to see a steady influx of Puerto Rican immigrants.[131] By the 1940s, most non-minority residents had moved out of the area, "redlining"[132] was rampant, and landlords failed to perform any maintenance on the buildings, though sometimes continuing to raise rents.[133] This resulted in the condemnation of a large portion of the housing and its replacement by the New York City Housing Authority with high-rise public housing projects.[134] In the past few decades, many middle-class black and Puerto Rican families have moved out, succeeded by Latino immigrants from the Dominican Republic and Mexico and black immigrants from the Caribbean and West Africa, as well as Turkish and Chinese immigrants.[135]

Washington Heights and Inwood, the two Manhattan communities north of Harlem, have also traditionally been home to many minorities.[136] Today the majority of the population is Latino, most residents being immigrants from the Dominican Republic.[137] The area is becoming more gentrified, however, as immigrants are pushed out by higher income professionals looking for more affordable housing options in the city.[138]

The bus depots located in Northern Manhattan are in minority communities. According to the 2000 census, 57% of the residents

---

Americans at ten percent profit over his lease costs. Many African Americans then began moving to Harlem. Home to Harlem, Harlem History, http://www.hometoharlem.com/harlem/hthcult.nsf/harlem/harlemhistory (last visited Oct. 14, 2007).

[129] *Id.*

[130] *See id.*

[131] *See* East-Harlem.com, *supra* note 126.

[132] "Redlining" is a form of economic dis-investment. *Id.* It is defined as "[c]redit discrimination (usu. unlawful discrimination) by an institution that refuses to provide loans or insurance on properties in areas that are deemed to be poor financial risks or to the people who live in those areas." BLACK'S LAW DICTIONARY 1305 (8th ed. 2004).

[133] *See* East-Harlem.com, *supra* note 126.

[134] *Id.*

[135] *See id.*

[136] Washington Heights & Inwood Online, About WaHI, http://www.washington-heights.us/about/ (last visited Oct. 14, 2006)

[137] *See* DEPARTMENT OF CITY PLANNING, CITY OF N.Y., MANHATTAN COMMUNITY DISTRICT 12, at 15 (2005), *available at* http://www.nyc.gov/html/dcp/pdf/lucds/mn12profile.pdf.

[138] Washington Heights & Inwood Online, *supra* note 136.

of New York City's five boroughs are minorities.[139] Manhattan's population is 54% minority residents, and 20% of Manhattan's population is below the poverty line.[140] This chart shows the demographics of residents living within a half mile radius of the six Northern Manhattan bus depots:[141]

Bus Depot	**Total Population**	**% Minority**	**% Below Poverty**
Amsterdam	26,539	85.5%	35.3%
Knightsbridge	7.770	60.0%	17.9%
Manhattanville	20,481	85.2%	35.0%
Mother Clara Hale	20,773	99.4%	32.6%
100th Street	22,593	65.5%	33.7%
126th Street	21,397	96.8%	42.7%

All but the Kingsbridge depot are located in densely populated areas with high percentages of minority and low-income residents.

The demographics for the zip code in which the 100th Street depot is located, are as follows: there are 75,390 residents; 34.5% are African American; 57.6% are Hispanic or Latino; 59.0% of the population speaks a language other than English at home; the median household income is $22,232; and 35.9% of residents are below the poverty line.[142]

On the other hand, the downtown Hudson depot, located on a pier jutting into the Hudson River and further separated from any buildings by a major highway, is in a highly industrial area, with very few residential units.[143] When the 100th Street bus depot re-

[139] *See* DEPARTMENT OF CITY PLANNING, CITY OF N.Y., DEMOGRAPHIC CHARACTERISTICS – NEW YORK CITY 1 (2005), *available at* http://home2.nyc.gov/html/dcp/pdf/census/demonyc.pdf.

[140] *See id.* at 10; Letter of Finding from Michael A. Winter, Dir., Office of Civil Rights, Fed. Transit Admin., to Peggy M. Shepard, Executive Dir., W. Harlem Envtl. Action, Inc. 5, 8 (rec'd Nov. 5, 2004) [hereinafter Letter of Finding] (on file with New York University Environmental Law Journal) .

[141] *See* Letter of Finding, *supra* note 140, at 6, 9; Letter of Finding, *supra* note 140, at Enclosure 1, "Demographic Profiles of Communities within 1/2 mile of MTA Depots;" *Id.* at Enclosure 1, "Poverty Profiles of Communities within 1/2 Mile of MTA Depots."

[142] U.S. Census Bureau, *supra* note 9.

[143] *See id.* The pier is in Cenus Tract 317.02, which has zero housing units

opened, the Hudson depot permanently shut down.[144] In effect, the decision not only increased the environmental burden on neighborhood surrounding the 100th Street but shifted this burden from a neighborhood where fewer people were exposed to the harm.

b. *The MTA in Northern Manhattan*

The MTA has both positive and negative impacts on Northern Manhattan. MTA buses and subways provide the minority and low-income residents of Northern Manhattan with an indispensable transit system, providing access to the rest of the city. Without this transit system, minority and low-income Northern Manhattan residents would find it nearly impossible to commute to work locations outside of their immediate neighborhoods.[145] At the same time, minority and low-income Northern Manhattan residents are not the only groups benefiting from the transit system. The millions of New Yorkers who live in the five boroughs receive similar benefits, as do the millions employed in New York City who commute in from the tri-state area and the millions of tourists and traveling business people who visit the city from around the globe.[146] The vast majority of the others who benefit from the MTA network, however, do not suffer the harmful effects of the bus depots.

These bus depots were not initially built by the MTA. Four of the Northern Manhattan bus depots had originally been built in the 1880s–1890s as trolley barns, and the other two had been built by private bus companies to house buses in the first half of the twentieth century.[147] In 1953, New York City Transit Authority

and most closely borders Census Tract 99, which has 401 housing units. Census Tract 166, where the 100th Street Depot is located, has 2,889 housing units (based on data for Census tract 99, the census tract that encompasses the address: 11 Eleventh Avenue, New York, N.Y., 10011).

[144] *See* Complaint, *supra* note 11, at 7.

[145] It would be nearly impossible because without the vast transit system the city would face disabling traffic congestion. Also there is a very limited amount of public and private parking options, with the rental of private parking spaces in lots and garages being prohibitively expensive.

[146] The MTA estimates that it reaches a population of 14.6 million people in the 5000 square mile area surrounding the city. Metropolitan Transit Authority, *supra* note 1. Eighty percent of the rush-hour commuters that travel to New York City's central business district use the transit network. *Id.*

[147] Respondents' Submission in Opposition to the Complaint at 7–8, W. Harlem Action v. Metro. Transp. Auth. No. 2001.0053 & 2001.0062 (Fed.

(NYCT), a subsidiary of the MTA, was established to operate many of the private bus routes; it is now responsible for managing and operating the subways and buses in the five boroughs of New York City.[148]

At the time the WE ACT Complaint was filed, eight of the MTA's eighteen New York City bus depots were located in Manhattan.[149] After the downtown Hudson depot's permanent closure, there were six active diesel bus depots in the 7.4 square miles of Northern Manhattan, and only one bus depot operated in the 10.5 square miles of Southern Manhattan.[150] As further illustration, at the time the Complaint was filed, there was only one bus depot operating in the 28 square miles of the Bronx, four depots in the 82 square miles of Queens, four depots in the 54 square miles of Brooklyn, and two depots in the 48 square miles of Staten Island.[151]

In addition to having a disproportionate number of bus depots sited in Northern Manhattan, the Northern Manhattan depots are overcrowded. Bus ridership increased markedly in the late 1990s with the advent of the MetroCard, which replaced fare tokens and allowed free transfer between subways and buses.[152] This caused NYCT to purchase a significant number of new diesel buses.[153] In 1998, the Walnut bus depot in the South Bronx was abruptly

Transit Admin. Mar. 5, 2000) (on file with New York University Environmental Law Journal).

[148] *Id.* at 4, 6. The MTA also controls other subsidiaries, including: the MTA Long Island Railroad, the MTA Long Island Bus, the Metro-North Railroad, and the MTA Bridges and Tunnels. Metropolitan Transit Authority, About NYC Transit, http://www.mta.info/nyct/facts/ffintro.htm (last visited Oct. 14, 2007). From 2000 to 2004, the MTA was allocated $4.984 billion in federal assistance from the United States DOT. Complaint, *supra* note 11, at 6. Today, NYCT's 4,518 buses carry 2.4 million passengers daily and 741 million annually Metropolitan Transit Authority, About NYC Transit, http://mta.info/nyct/facts/ffbus.htm (last visited Oct. 14, 2007).

[149] Respondents' Submission in Opposition to the Complaint, *supra* note 147, at 7. The two Manhattan bus depots below 96th Street were the Hudson depot on 11th Avenue and 14th Street in Chelsea and the Michael J. Quill depot on 11th Avenue and 41st Street. The six bus depots in Northern Manhattan were: the Kingsbridge depot in Washington Heights, the Amsterdam and Manhattanville depots in West Harlem, the Mother Clara Hale depot in Central Harlem, the 126th Street depot in East Harlem, and the 100th Street depot in East Harlem that had been demolished and was in the process of being rebuilt. *See id.* at 7–8.

[150] *See* Complaint, *supra* note 11, at 7.

[151] *Id.*

[152] *Id.* at 8.

[153] *Id.*

closed, two years ahead of schedule, so that the land on which it was built could be sold to the New York Post for use as a color printing plant.[154] Subsequently, 202 of the Walnut depot's 220 buses were sent to be housed in the Northern Manhattan depots, meaning that the already overcrowded Northern Manhattan depots were forced to absorb an entire depot's worth of buses.[155]

The significant overcrowding means that buses are often parked on the public streets and sidewalks near the depots, sometimes blocking traffic, even emergency vehicles.[156] The MTA also houses buses outdoors in areas adjacent to bus depots to hold extra buses.[157] These outdoor parking lots are problematic to residents in much the same way the depots are: by creating an eyesore; by using the land in a way that excludes it from being able to create jobs or recreational space, thus impeding economic and community development; and by exacerbating potential health risks already associated with the nearby diesel bus depots, especially when drivers allow their buses to idle.[158]

(1) *Re-Opening the 100th Street Depot*

The 100th Street bus depot takes up a full city block bounded by East 100th Street and East 99th Street on the north and south and Lexington Avenue and Park Avenue on the east and west. This area is highly residential.[159] There are tenement buildings separated from the depot by no more than the width of a one way street.[160]

When the 100th Street depot re-opened, the Hudson depot in

---

[154] *Id.*

[155] *Id.* In winter 2005, Northern Manhattan's bus depots housed 973 of NYCT's 4,818 total buses. *See* Letter from Michael A. Winter, Director, Office of Civil Rights, Fed. Transit Admin., to Peggy M. Shepard, Executive Director, W. Harlem Envtl. Action, at attachment 3 [hereinafter Final Letter] (on file with New York University Environmental Law Journal) .

[156] Complaint, *supra* note 11, at 4, 8.

[157] *See id.* at 8.

[158] *Id.* at 4, 9.

[159] See U.S. Census Bureau, New York County, New York by Block Group, http://factfinder.census.gov/servlet/TMSelectedDatasetPageServlet?_lang=en (search "100th Street and Lexington, New York, NY 10029" in address and "New York County" in geography) (last visited Oct. 14, 2007).

[160] *See generally* Gwen Goodwin, East Harlem Bus Stop!, http://gwengoodwin.netfirms.com/ehbusstop/ (last visited Oct. 14, 2007) (displaying photographs of the depot being rebuilt and the intrusion into the community caused by the depot).

Chelsea permanently shut down.[161] The Hudson depot was located in a non-residential area.[162] The MTA needed to move out of the Hudson depot because the term of its lease on the property, which is now controlled by the Hudson River Park Trust, was nearing expiration.[163] The reconstruction of the 100th Street depot cost approximately $100 million.[164] The remodeling expanded the depot's capacity by 50%.[165] Residents living near the 100th Street depot were angered because the MTA was spending $100 million dollars to re-open a depot near them while closing a depot that did not affect any residential communities downtown.[166]

(2) *Diesel Buses*

Many scientists believe that diesel exhaust is dangerous to human health. One problem with diesel is that the wax in the fuel begins to cloud the fuel as outside temperatures reach the "cloud point," around forty degrees Fahrenheit.[167] When the temperature

---

[161] Kugel, *supra* note 2.

[162] In fact, the depot was located on Pier 57 on the Hudson River, isolated from any residential space. *See* Albert Amateau, *Park Advocates Consider Pier 57's Future Uses*, THE VILLAGER, January 29, 2003, *available at* http://www.wirednewyork.com/forum/showthread.php?t=2954 (last visited Oct. 14, 2007).

[163] *See id.*; *see also* Kugel, *supra* note 2. This depot closure may not have been the MTA's decision, but it is nonetheless an environmental justice issue because the Hudson River Park Act, agreed to by the city and the state, calls for closure of all municipal uses of the piers on the lower Westside of the Manhattan, including the Hudson depot. *Id*. This is in order to create a five-mile long park in the more expensive, less minority-populated West Village and Chelsea areas of Manhattan, knowing that the buses and other municipal uses, including a busy sanitation facility, would most likely be relocated. Amateau, *supra* note 162.

[164] Respondents' Submission in Opposition to the Complaint, *supra* note 147, at 20.

[165] *See* Leon Tulton, *Buses and Foes: Community Says 'No' to Reopening Depot*, VILLAGE VOICE (N.Y.), Apr. 12–18, 2000. The depot has four floors providing approximately 300,000 square feet. *Id.* Originally, plans called for 133 articulated buses to be housed in the depot; according to the MTA, 190 buses were actually housed there. *See* Complaint, *supra* note 11 at 16; Final Letter, *supra* note 155, at enclosure 1.

[166] *See, e.g.*, Goodwin, *supra* note 160; Leon Tulton, Bus Depot Reopens, EAST HARLEM NEWS, Sept. 25, 2003, *available at* http://www.east-harlem.com/mt/archives/000053.html.

[167] *See* Power Stroke Diesel, Know Your Winter Diesel Fuel, http://www.powerstrokedieselstuff.com/product_articles.aspx?cid=3 (last visited Oct. 14, 2007); CHEVRON PRODUCTS COMPANY, DIESEL FUELS TECHNICAL REVIEW 6–7 (1998), *available at* http://www.chevron.com/products/

drops fifteen degrees below the cloud point, the wax begins to solidify and can clog the fuel line.[168] The common way bus drivers avoid this problem is to keep the buses idling; drivers also keep the engines running so as to keep the climate control inside the bus at comfortable temperatures for themselves and passengers.[169] Idling at the depots and outdoor parking lots increases the emissions the communities surrounding the depots must endure. Moreover, the depot design requires frequent accelerations and decelerations.[170] This design contributes to emissions because when a diesel engine accelerates the emission of exhaust increases.[171]

Diesel emissions have been associated with creating serious health concerns.[172] Diesel particulate matter (DPM) is composed of fine and ultrafine particles, both of which have large surface areas that make them excellent at absorbing organics, and because of their small size, these particles can penetrate deep into the lungs.[173] California's Environmental Protection Agency found over forty substances in diesel exhaust that the California Air Resources Board considers toxic air contaminants that may pose a threat to human health.[174] Specifically, the California Air Resources Board identifies DPM as a toxic air contaminant linked to lung cancer.[175] The United States EPA concluded that diesel exhaust is "likely to be carcinogenic in humans by inhalation,"

prodserv/fuels/bulletin/diesel/Diesel%20Fuel%20Rev.pdf.

[168] *See* CHEVRON PRODUCTS COMPANY, *supra* note 167, at 6–7.

[169] *See* Petitioner's Counterresponse to Respondent's Opposition to the Complaint at 20–21, (Federal Transit Administration Nov. 14, 2000) W. Harlem Envtl. Action, Inc. v. Metro. Transp. Auth., No. 2001.0053 & 2001.0062 (Federal Transit Administration June 28, 2002) (on file with New York University Environmental Law Journal).

[170] *See* Complaint, *supra* note 11, at 13.

[171] *See id.*

[172] *See* YEWLIN CHEE ET AL., ENVIRONMENTAL DEFENSE, CLEANER AIR FOR AMERICA: THE CASE FOR A NATIONAL PROGRAM TO CUT POLLUTION FROM TODAY'S DIESEL ENGINES, 8–11 (2005), *available at* http://www.environmentaldefense.org/documents/4488_cleanerairamerica.pdf.

[173] U.S. ENVTL. PROT. AGENCY, NAT'L CTR. FOR ENVTL. ASSESSMENT, HEALTH ASSESSMENT DOCUMENT FOR DIESEL ENGINE EXHAUST 24 (2002), *available at* http://oaspub.epa.gov/eims/eimscomm.getfile?p_download_id=36319.

[174] OFFICE OF ENVTL. HEALTH HAZARD ASSESSMENT & AMERICAN LUNG ASS'N OF CAL., FUELS AND YOUR HEALTH 1 (2005), *available at* http://www.oehha.ca.gov/public_info/facts/pdf/fuels4-02.pdf.

[175] *Id.*

including inhalation via environmental exposure.[176]

Beyond the long term cancer risks, diesel exhaust also presents short term risks. Scientific evidence demonstrates a close relationship between exposure to diesel exhaust and asthma exacerbation, the induction of asthma attacks in asthmatics, and the association seems especially strong with children exposed to diesel exhaust.[177] Asthma exacerbation in Northern Manhattan is especially worrisome because asthma hospitalization rates in parts of Harlem were among the highest in the nation.[178] A 2003 study found that 25.2% of school-aged children screened in Central Harlem were asthmatic.[179] East Harlem had the highest rate of hospitalizations for childhood asthma in all of New York City.[180]

---

[176] U.S. ENVTL. PROT. AGENCY, supra note 173, at 603.

[177] *See* Petitioner's Counterresponse, *supra* note 169, at 21–23. *See generally, e.g.*, Bert Brunekreef et al., *Air Pollution from Truck Traffic and Lung Function in Children Living Near Motorways*, 8 EPIDEMIOLOGY 298, 298–303 (1997) (scientists examined the lung function of children in the Netherlands living near busy roadways and found that reduced lung function was more associated with truck traffic density than automobile traffic density and was most strongly associated with the children living the closest to the roadways); David Diaz-Sanchez et al., *Diesel Exhaust Particles Induce Local IgE Production In Vivo and Alter the Pattern of IgE Messenger RNA Isoforms*, 94 J. CLINICAL INVESTIGATION 1417, 1421–24 (1994) (research on the effect of DPM on local immune responses that shows that reaction to DPM produces some types of immune cells and implies that environmental exposure to DPM could cause an increase in the expression of respiratory allergic disease; in other words, DPM can cause asthmatics to react more severely to substances to which they are already allergic); Heinrich Duhme et al., *The Association between Self-Reported Symptoms of Asthma and Allergic Rhinitis and Self-Reported Traffic Density on Street of Residence in Adolescents*, 7 EPIDEMIOLOGY 578, 578–82 (1996) (3,703 German adolescents ages 12 to 15 answered surveys showing a positive relationship between self-reported wheezing and allergic rhinitis and the self-reported frequency of truck traffic at the adolescents' residences, supporting the hypothesis that traffic exposure is linked to asthma and allergic rhinitis symptoms); Michael S. Friedman et al., *Impact of Changes in Transportation and Commuting Behaviors During the 1996 Summer Olympic Games in Atlanta on Air Quality and Childhood Asthma*, 285 JAMA 897, 897–905 (2001) (researchers compared asthma hospitalizations for children ages 1 to 16 years old during the 17 days of the Olympics when Atlanta traffic was extremely limited with the four weeks before and after the Olympics and found a 41.6% reduction in hospitalizations in the Georgia Medicaid database for metropolitan Atlanta; this data supports the idea that reduction in air pollution with the reduction of motor vehicle traffic would help lower the rates of serious asthma attacks).

[178] *See* Richard Pérez-Peña, *Study Finds Asthma in 25% of Children in Central Harlem*, N.Y. TIMES, Apr. 19, 2003, §A, at 1.

[179] *See id.*

[180] *See* Nicholas Freudenberg, *Case History of the Center for Urban Epidemiologic Studies in New York City*, JOURNAL OF URBAN HEALTH 508, 510

Admittedly, the MTA has recently, in the past few years, taken it upon itself to lessen some of the health and environmental risks by improving the bus fleet.[181] NYCT now uses ultra-low sulfur diesel fuel, which reduces the emission of hydrocarbons and DPM.[182] It also replaced approximately 700 older, two-stroke diesel engines with cleaner, four-stroke diesel engines and is in the process of installing particulate filters on more than 3000 buses.[183] The MTA says that these upgrades may reduce emissions of DPM by up to 95%.[184] NYCT is also buying hybrid electric and compressed natural gas (CNG)[185] buses for use in New York City.[186] However, even if these actions lowered the environmental burdens of the MTA fleet, none of these actions remedies the disproportionate environmental impact of the MTA's siting decisions.

(3) *Conversion to CNG*

Despite these improvements to the bus fleet, NYCT changed its mind about converting the Manhattanville depot into a CNG bus depot.[187] NYCT also rejected the Governor's and State legislature's mandate to design the 100th Street depot with CNG

(2001). Asthma is a national issue for the environmental justice movement because "African Americans are three times more likely to be hospitalized for asthma, five times more likely to seek treatment for asthma at an emergency room, and three times more likely to die from asthma as their white counterparts." NAT'L BLACK ENVTL. JUSTICE NETWORK, ASTHMA FACTS IN BLACK AND WHITE AND GREEN 2 (2005), *available at* http://www.nbejn.org/resources.html.

[181] Letter of Finding, *supra* note 140, at 14.

[182] Respondents' Submission in Opposition to the Complaint, *supra* note 147, at 24.

[183] Letter of Finding, *supra* note 140, at 14.

[184] Respondents' Submission in Opposition to the Complaint, *supra* note 147, at 26.

[185] CNG buses store natural gas in high-pressure fuel cylinders and use the natural gas as their sole fuel source. Chemically, CNG is inherently cleaner than gasoline and diesel. Use of CNG rather than gasoline reduces carbon monoxide emissions by 90 to 97% and carbon dioxide emissions by 25%. CNG engines produce little to no particulate matter. As of 2002 there were over 85,000 CNG vehicles on the road in the United States, including one out of every five transit buses. U.S. ENVTL. PROT. AGENCY, CLEAN ALTERNATIVE FUELS: COMPRESSED NATURAL GAS 1 (2002), http://eerc.ra.utk.edu/etcfc/docs/EPAFactSheet-cng.pdf.

[186] Letter of Finding, *supra* note 140, at 14.

[187] *See* Respondents' Submission in Opposition to the Complaint, *supra* note 147, at 24; Letter of Finding, *supra* note 140, at Enclosure III-1.

buses in mind.[188] The 2000–2004 MTA capital plan required all new bus depots to be compatible with CNG buses, and the 100th Street depot was in the process of being demolished and rebuilt when the capital plan was passed.[189] The MTA justified its refusal to make the depot compatible with alternative fuel on the grounds that the reconstruction had already been planned before the new mandate was passed.[190]

The MTA never undertook the conversion of the Manhattanville depot because it claimed that the benefits were not worth the costs.[191] Conversion to a CNG facility was not worthwhile, according to NYCT, because it would cost approximately $72 million to convert the depot, and at the same time, the new and re-fitted diesel buses were almost as clean as new CNG buses.[192] Saving the money that would be spent on conversion would allow NYCT to incrementally replace the existing diesel buses at Manhattanville with hybrid-electric buses that are the cleanest of the three.[193] The CNG buses, however, did still have environmental advantages over the new diesel buses. CNG is a clean burning fuel. Diesel, however, requires a series of filters that clean the emissions. If those filters do not function properly, the diesel will be much dirtier. Unlike diesel, human and mechanical failure is not an issue for cleanliness of CNG.[194]

(4) *Other Harms*

There are also other adverse effects of housing so many buses in Northern Manhattan besides the health risks from diesel exhaust. When an old depot is demolished and then rebuilt, the neighborhood must suffer through extended periods of noise, dust,

---

[188] *See* Complaint, *supra* note 11, at 7–8.

[189] *See id.* at 9. The MTA initially introduced and voted on its capital plan for 2000 through 2004 without notice to the public or opportunity for the public to comment on the plan. *Id.* at 8. WE ACT and other environmental groups then formed a coalition to educate state legislators about the MTA capital plan, and their efforts culminated in a legislative hearing where public comment was invited. *Id.* The state legislature then inserted a requirement into the MTA capital plan for 2000–2004 that all new bus depots be compatible with alternative fuel buses, meaning CNG buses. *Id.* at 9.

[190] *Id.* at 7–8.

[191] Telephone Interview with Swati R. Prakash, *supra* note 101.

[192] Letter of Finding, *supra* note 140, at Enclosure III-7.

[193] *See id.*

[194] Telephone Interview with Swati R. Prakash, *supra* note 101.

construction traffic, and vibrations.[195] There is also increased traffic congestion due to buses entering and exiting and from buses parked around the overcrowded depots.[196] Other negatives are the smell from the diesel fumes and the unattractive nature of the depots that take up valuable economic, residential, and community space.

2. *The Administrative Complaint*

a. *The WE ACT Complaint*

Seeking to hold the MTA and NYCT accountable for the disparate impacts caused by their decisions, WE ACT and several individual residents of Northern Manhattan (petitioners) brought a Complaint against the MTA and NYCT (respondents) to the Federal Transit Administration (FTA) of the United States DOT on November 14, 2000.[197] This was an administrative complaint brought to the FTA, not a state or a federal lawsuit.[198] The Complaint relied on Title VI and the DOT regulations that implement Title VI.[199]

---

[195] *See* Petitioner's Counterresponse, *supra* note 169, at 23.

[196] *See id.*

[197] Complaint, *supra* note 11, at 1; *see* Foster, *supra* note 2.

[198] *See* Complaint, *supra* note 13, at 1. A lawsuit was also brought by Gwen Goodwin, a woman who lived across the street from the 100th Street depot and started a group to stop the reconstruction called East Harlem Bus Stop. She was helped by the Puerto Rican Defense Fund, who aligned her with the New York City firm Davis Polk & Wardwell on a pro bono basis. The suit had problems finding a basis for a claim, looking mainly for procedural deficiencies. Telephone Interview with Swati R. Prakash, *supra* note 101. Ultimately, Davis Polk dropped Goodwin and her case, saying that they would only continue if Goodwin removed herself as president of East Harlem Bus Stop, which she refused to do. *See* Kugel, *supra* note 2.

[199] Complaint, *supra* note 11, at 1. 49 C.F.R. § 21 includes the provision:

> A recipient may not make a selection of a site or location of a facility if the purpose of that selection, or its effect when made, is to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program or activity to which this rule applies, on the grounds of race, color, or national origin; or if the purpose is to, or its effect when made will, substantially impair the accomplishment of the objectives of this part.

Dept of Transp. Effectuation of the Title VI of the Civil Rights Act of 1964, 49 C.F.R. § 21.5(d) (2006). Part 21 also provides the availability of an administrative complaint: "Any person who believes himself or any specific class of persons to be subjected to discrimination prohibited by this part may by himself or by a representative file with the Secretary a written complaint." Dep't

The Complaint alleged that the MTA's process of placement, expansion, and operation of diesel bus depots and outdoor bus parking lots had the effect of discriminating on the basis of race against the residents of Northern Manhattan and exposed the residents to disproportionately high health risks associated with diesel exhaust.[200] The petitioners requested that the DOT "immediately investigate the racial discrimination by MTA and NYCT, and aggressively seek to stop it."[201]

In its Opposition to the Complaint (Opposition),[202] the MTA contended that the Complaint failed to state valid claims under Title VI and the DOT regulations because it did not show that the operation of bus depots in Northern Manhattan was the result of discriminatory intent or had a disparate impact on the area's minority population.[203] WE ACT and the other petitioners then filed a Counterresponse.[204]

The FTA's response to the 2000 Complaint was slow.[205] After dragging its feet, the FTA Office of Civil Rights finally began a Title VI Compliance Review (Compliance Review) of

---

of Transp. Effectuation of the Title VI of the Civil Rights Act of 1964, 49 C.F.R. § 21.11(b) (2006). The complaint may trigger an investigation:

> The Secretary will make a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with this part. The investigation will include, where appropriate, a review of the pertinent practices and policies of the recipient, the circumstances under which the possible noncompliance with this part occurred, and other factors relevant to a determination as to whether the recipient has failed to comply with this part.

Dept. of Transp. Effecutation of the Title VI of the Civil Rights Act of 1964, 49 C.F.R. § 21.22(c) (2006).

[200] Complaint, *supra* note 11, at 6–9.

[201] *Id.* at 1.

[202] Respondents' Submission in Opposition to the Complaint, *supra* note 147.

[203] *Id.* at 2.

[204] *See* Petitioner's Counterresponse, *supra* note 169, at 1.

[205] The FTA did not start investigating the WE ACT complaint when it was filed in November of 2000. Telephone Interview with Swati R. Prakash, *supra* note 101. Prakash, of WE ACT, characterizes the FTA as not seeming very interested in investigating the WE ACT complaint when it was filed. *Id.* She says WE ACT felt that the FTA kept trying to pass the responsibility onto others. *Id.* In the Summer of 2002, the case was handed over to a mediator from the United States Department of Justice Community Relations Service. Letter of Finding, *supra* note 140, at 2. The mediator, however, retired a month later, so the complaint went back in limbo. Telephone Interview with Swati R. Prakash, *supra* note 101. The United States DOT then tried to send the case to the Regional DOT office but that did not lead to action either. *Id.*

NYCT in August of 2003.[206] The FTA did not inform WE ACT that it was beginning an investigation and did not contact WE ACT over its course.[207] The MTA cooperated with the FTA throughout the investigation.[208] The FTA Office of Civil Rights finally filed a Letter of Finding in November, 2004[209] and submitted a final letter on February 28, 2005,[210] over four years after the initial Complaint was filed.

b. *Legal Issues and FTA Analysis*

The FTA identified four issues central to the Complaint and analyzed them without any formal assignment of burdens: the distribution of bus depots in relation to minority and low-income communities, the impact of depots on these communities, public involvement in MTA decision-making, and mitigation and alternatives to the MTA's current practices.[211] These four issues do, nonetheless, resemble the elements of a Title VII case.[212]

This subsection will briefly discuss the timeliness of the Complaint and then will examine the FTA's four highlighted topics.

---

[206] Letter of Finding, *supra* note 140, at 2.

[207] Telephone Interview with Swati R. Prakash, *supra* note 101. The DOT regulations state: "The investigation will include, where appropriate, a review of the pertinent practices and policies of the recipient, the circumstances under which the possible noncompliance with this part occurred, and other factors relevant to a determination as to whether the recipient has failed to comply with this part." Dep't of Transp. Effectuation of the Title VI of the Civil Rights Act of 1964, 49 C.F.R. § 21.11(c) (2006). The regulations do not require the FTA investigator to communicate with the complainant during the investigation. *See id.*

[208] Telephone Interview with Swati R. Prakash, *supra* note 101.

[209] Letter of Finding, *supra* note 140, at 1.

[210] *See* Final Letter, *supra* note 155 at 1.

[211] Letter of Finding, *supra* note 140, at 3.

[212] Pre-*Sandoval* Title VI disparate impact suits directed parties to follow the same framework as they would in a Title VII suit. *See, e.g.*, Powell v. Ridge, 189 F.3d 387, 393–94 (3d Cir. 1999); Ga. State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1417 (11th Cir. 1985). The analysis involves burdening the complainant with providing a prima facie case of intentional discrimination or disparate impact, then the defendant with providing a substantial legitimate justification, and then going back to the complainant to prove there is an effective alternative. *See* Respondents' Submission in Opposition to the Complaint, *supra* note 147, at 30. The first three topics would all be part of a prima facie case, and then, assuming the FTA found that the MTA gave sufficient justification for its practices in its analysis of the topics and in its mitigation, the FTA would look at alternatives proposed by complainants. *See id.*

(1) *Timeliness*

Under DOT regulations "[a] complaint must be filed not later than 180 days after the date of the alleged discrimination . . . ."[213] The WE ACT Complaint relied on the date of the opening of an outdoor bus parking lot on West 215th Street as the beginning of the 180 day period.[214] WE ACT argued that the negative impacts on the residents began when the lot received its first bus, on June 14th, 2000.[215] The MTA argued that the Complaint was untimely because nearly all of the activities involving the bus depots and parking lots described in the Complaint occurred years, decades, or even a century prior.[216] It accused WE ACT of trying to sidestep the 180 day limitation by using the 215th Street lot as the triggering event.[217]

WE ACT countered that the Complaint is not about the original siting of the depots, much of which happened fifty or more years ago when the demographics may have been different.[218] Rather, the decisions at issue were those "over the past decade to maintain, re-open, re-construct and expand these facilities (including the addition and expansion of parking lots) during a time when the population surrounding the depots was solidly and predominantly people of color."[219] WE ACT claimed the opening of the lot was "part of a pattern and practice of ongoing racial discrimination by the MTA and NY Transit."[220] When the discrimination occurred over a series of decisions in a period of time, WE ACT claimed there was no specific discriminatory decision from which the 180 days needed to be counted.[221]

---

[213] Dep't of Transp. Effectuation of the Title VI of the Civil Rights Act of 1964, 49 C.F.R. § 21.11(b) (2006).

[214] *See* Complaint, *supra* note 11, at 9.

[215] *See id.* The complaint was filed November 14, 2000, less than 180 days after June 14th. *Id.* at 1.

[216] *See* Respondents' Submission in Opposition to the Complaint, *supra* note 147, at 26.

[217] *Id.* at 27. Even so, the MTA does not think even this triggering event fits because the community board knew about the plan to operate the lot on May 17, 2000, 182 days before the complaint was filed. *Id.*

[218] Petitioner's Counterresponse, *supra* note 169, at 4.

[219] *Id.*

[220] Complaint, *supra* note 11, at 9.

[221] Petitioner's Counterresponse, *supra* note 169, at 5. As far as the MTA's claim that the complaint was not filed until 182 days after the MTA informed the community of its parking lot plans on 215th Street, WE ACT said that the 180 days begins to run at the time of the "discrimination," not necessarily at the time

Observe that it is not clear that the FTA would have found WE ACT's timeliness arguments persuasive. Being within 180 days did not affect the FTA's investigation of the MTA's compliance with Title VI policies because the FTA based its investigation on its discretionary Compliance Review and not on the WE ACT complaint. Furthermore, the FTA made no comment on timeliness in its letters. Agency discretion arguably helped WE ACT in this situation, but reliance on agency discretion is quite risky because it does not mandate adherence to any particular set of burdens or procedures, thus depriving WE ACT and other complainants of due process-type protections.

(2) *Geographic Distribution of Bus Depots*

The Complaint focused on the bus depots sited in Manhattan. WE ACT alleged that six out of eight were located in Northern Manhattan in zip codes that were populated primarily with minority and low-income residents.[222] When the MTA chose to construct, re-construct, or operate these facilities, this decision had to be based on discriminatory intent or had to have a disproportionate impact on these residents.[223]

The MTA argued that there was no discriminatory intent because the depots had been built over fifty years prior, when the area's demographics were much different, and, moreover, by the companies that came before NYCT.[224] The MTA also disagreed with the petitioner's use of demographic information, challenging the presence of any disparate impact.[225] Instead of using zip codes, which did not yield sufficient accuracy, the MTA used census tract information to argue that only five of the eight Manhattan depots were in predominantly non-white neighborhoods.[226] More importantly, the MTA contended that, since NYCT runs a city-wide bus system, WE ACT was incorrect in not analyzing the demographics of every neighborhood near an NYCT bus depot in

of awareness of the discrimination. *Id.* at 5–6.

[222] Complaint, *supra* note 11, at 15–17.

[223] *Id.* at 1, 17.

[224] *See* Respondents' Submission in Opposition to the Complaint, *supra* note 147, at 2.

[225] *See id.* at 14–15.

[226] *See id.* Based on 1990 census tracts, within a quarter mile of the depots, the Kingsbridge depot is in an area which is 53.7% white, non-Hispanic. *Id.* at 15.

all the five boroughs, not just Manhattan.[227] According to the MTA's analysis, eight of the twenty NYCT depots were located in predominantly white, non-Hispanic neighborhoods, and this 40% compared closely with New York City's overall 43% white, non-Hispanic population figure.[228]

The MTA further justified the choices it made by explaining the four planning components that go into bus depot decision-making: Strategic Context, Functional Context, Financial Context, and Community/Environmental Context.[229] Strategic Context was based on NYCT's twenty-year capital needs assessment that projects the future needs of NYCT's physical infrastructure and assets.[230] Functional Context involved assessing "functional planning parameters" affecting a depot's location such as bus route and fleet assignments, traffic circulation patterns, and maintenance area size and locations.[231] Functional Context aimed to minimize "deadheading," where a "bus travels between the depot and the service without passengers aboard."[232] The Financial Context focused on business necessity, including the capital investment of planning, building, rehabilitating, maintaining, and operating a depot.[233] Importantly, this context would have included the cost to buy or lease land in Manhattan.[234] Applying this context, the MTA claimed that most land in Manhattan was unsuitable because it was too expensive, not zoned properly, too far from bus routes, too small to fit a depot, or too congested with traffic to allow buses to get in and out.[235]

In the Community/Environmental Context, NYCT policies required asking for public comment, addressing community concerns to the extent feasible, and mitigating environmental impacts associated with its projects.[236] The MTA claimed many bus depot reconstruction projects, including the 100th Street depot project, did not require a formal Environmental Impact Statement

[227] Respondents' Submission in Opposition to the Complaint, *supra* note 147, at 15–16.
[228] *Id.* at 16.
[229] *Id.* at 17.
[230] *Id.*
[231] *Id.* at 18–19.
[232] *Id.* at 19.
[233] *Id.* at 20.
[234] *See id.*
[235] *Id.*
[236] *Id.* at 22.

under NEPA because they qualified for a Categorical Exclusion.[237] Categorical Exclusions allow projects that do not have significant effects on the "human environment" to be built without the requirement of an Environmental Impact Statement or an Environmental Assessment.[238] The MTA also argued that the New York State Environmental Quality Review Act[239] (SEQRA) did not apply because the construction was occurring on property already used for transit purposes and would not be materially changing the general character of such transit use.[240] The MTA also met with members of the community about the 100th Street depot expansion in this context, but despite the problems community members had, NYCT determined that the 100th Street depot site was still the best location.[241] Even though the decision was exempt, the MTA had commissioned an Environmental Assessment;[242] the Assessment concluded that the rebuilding of the 100th Street depot would result in fewer emissions compared to the original 100th Street depot.[243]

---

[237] *Id.* at 22.

[238] Council on Envtl. Quality, Terminology and Index, 40 C.F.R. § 1508.4 (2006). FTA regulations allow that, with Administration approval, a rehabilitation or reconstruction of an existing bus building can be classified as a Categorical Exclusion if only a small amount of additional land is used and if there will not be a substantial increase in users. 23 C.F.R. § 771.117(d)(9) (2006). Categorical Exclusions will be questioned, however, if there are unusual circumstances, including: significant environmental impacts, controversies on environmental grounds, or inconsistencies with any federal, state, or local administrative determination, requirement, or law. In these cases, environmental studies must be done to see if a Categorical Exclusion is appropriate. § 771.117(b).

[239] N.Y. COMP. CODES R. & REGS. tit. 1, § 362.1 (2006).

[240] Respondents' Submission in Opposition to the Complaint, *supra* note 147, at 22; *see* N.Y. PUB. AUTH. L. § 1266-c(11) (2007).

[241] Respondents' Submission in Opposition to the Complaint, *supra* note 147, at 22–23.

[242] *Id.* at 23. An Environmental Assessment is less intensive than an Environmental Impact Statement. An Environmental Assessment is used if it not clear whether an Environmental Impact Statement is necessary. The objectives of an Environmental Assessment are to: "determine which aspects of the proposed action have potential for social, economic, or environmental impact; identify alternatives and measures which might mitigate adverse environmental impacts; and identify other environmental review and consultation requirements." 23 C.F.R. § 771.119 (2006). An Environmental Impact Statement is a much more formal procedure that requires public notice and comment, with a circulated draft for comments and a final Environmental Impact Statement. §§ 771.123, 771.125.

[243] Respondents' Submission in Opposition to the Complaint, *supra* note 147,

WE ACT argued that only Manhattan should be used in the disparity analysis because, even though the MTA and NYCT made decisions for all five boroughs, the decision-making criteria used was different for each particular borough.[244] Many of the factors the MTA listed in its Opposition were unique to Manhattan's political, economic, and social contexts.[245] WE ACT did a new set of statistical analysis using 2000 census information and quarter mile radius census tracts and found that while minority residents made up 45.4% of the overall population of Manhattan, they made up 57.7% of the population residing within a quarter mile of a Manhattan bus depot.[246] They also did a citywide analysis, finding that minorities made up 55.3% of the total city population but made up 59.2% of the population within a quarter mile of a NYCT bus depot.[247]

WE ACT argued that the MTA's four planning components did not justify respondents' decisions because the depots sited in Northern Manhattan represented many exceptions to the rules.[248] First, proximity to bus routes was not consistent with many of the Northern Manhattan bus depots, which housed many buses that did not offer any stops in the depot area.[249] Second, there was much

at 23. There would be less emissions because fewer buses would be stored there, since they would be the longer articulated ones, and, with more internal space and an additional entrance and service lane, there would be fewer idling buses waiting to go in and out. *Id.* The 1998 Environmental Assessment also found that the concentrations of Clean Air Act regulated air pollutants (O_3, CO, SO_2, NO_2 PM-10, and lead) would all be below National Ambient Air Quality Standards. *Id.* at 24.

[244] *See* Petitioner's Counterresponse, *supra* note 169, at 7.

[245] *See id.* WE ACT explained, "Elements such as the cost of land and real estate, appropriate zoning, proximity to bus routes/heavy users, projections of future development in parts of Manhattan are inevitably unique to each borough and service market." *Id.*

[246] *Id.* at 13–14. They found an even greater disparity in the numbers for Hispanic residents where 37.2% of the population that lives within a quarter mile of a Manhattan bus depot is Hispanic as opposed to Hispanics being 26.3% of the population everywhere else in Manhattan. *Id.* at 15.

[247] *Id.*

[248] *See id.* at 25, 30.

[249] *See id.* at 30–31. Only 4 of the 22 bus routes housed in the Kingsbridge depot have a stop in the local area; 5 of the 8 Mother Clara Hale depot routes stop in the area but two are north/south that also stop near the Hudson depot; at the 126th Street depot, 3 out 6 do not stop in the local area; in the Amsterdam depot 4 of the 9 routes do not service Manhattan at all; meanwhile, at the Hudson depot, 7 of the 10 routes had service in the local area with Hudson being at the end of the route, and for the other 3 this was still the closest depot. *See id.*

more appropriately zoned land in the southern half of Manhattan than respondents admitted and that no zoning rationale could explain reconstructing the 100th Street depot, which was in the middle of a heavily populated residential area.[250] WE ACT argued that while it might be expensive to construct a depot downtown, some costs might be defrayed by renting out retail space as was done at the Port Authority Bus Station at 42nd Street.[251]

In its Letter of Finding, the FTA decided that the appropriate region to analyze was neither solely Manhattan nor solely the five boroughs but the entire MTA service area, including the full NYCT system and MTA Long Island Bus.[252] The FTA chose this because the DOT guidelines required them to focus not only on minority and low-income communities but also "the similar existing system elements" located in non-minority and non low-income areas as well.[253] The FTA decided that absent discrimination one should expect 60% of the depots to be located in predominantly minority areas[254] Because *only* eleven of the nineteen depots (57.89%) were in predominantly minority communities, the FTA found there was no disparate impact.[255] The FTA did find, however, that of the 205,228 people living within a half mile of a depot, 143,326, or 69.83%, were minority

---

[250] *See id.* at 31–33.

[251] *See id.* at 32–33. The Counterresponse also downplayed the cost of land argument as a vicious cycle that starts with land prices being low because of a large minority population and then attracts noxious land uses that keep prices down so that more noxious land uses come. *See id.* at 27.

[252] Letter of Finding, *supra* note 140, at 5. It used data from the 2000 Census to look at demographic characteristics of communities within a half mile of the bus depots of NYCT and MTA Long Island Bus. *Id.*

[253] *Id.* The DOT Order states:

> In making determinations regarding disproportionately high and adverse effects on minority and low-income populations, mitigation and enhancements measures that will be taken and all offsetting benefits to the affected minority and low-income populations may be taken into account, as well as the design, comparative impacts, and the relevant number of similar existing system elements in non-minority and non-low-income areas.

U.S. Dep't of Transp., Order to Address Environmental Justice in Minority and Low-Income Populations, 62 Fed. Reg. 18,377, 18,380 (Apr. 15, 1997).

[254] Letter of Finding, *supra* note 140, at 6. A "predominantly minority" community was one that had a minority population over 59.45%. *Id.*

[255] *See id.* Of the 21 depots in question, two were located in non-residential areas that had 14 people or fewer living within a half mile of the depot, so they were not included in the analysis. *Id.*

residents, which was 15% higher than one would expect with an overall 59.45% minority population.[256]

If the depots were equally distributed by income, then 19%, or four out of nineteen, would be in areas with predominantly low-income populations.[257] The FTA found, however that eleven out of the nineteen depots (57.89%) were in areas with predominantly low-income populations and that 28.18% of the people living within a half mile of a depot were below the poverty line, which was 9.25% greater than one would expect to find if depots were distributed evenly by income.[258]

Despite this strong evidence that both minority and low-income residents disproportionately lived near MTA bus depots, the FTA concluded that the disparity was due primarily "to demographic patterns that have emerged after the depots were constructed and MTA is not responsible for these changes."[259] This conclusion is a variation of the "coming to the nuisance theory." As mentioned earlier, this type of theory is weakened by empirical studies such as Been and Gupta's and by acknowledging the market failures involved with housing discrimination and segregation.[260]

(3) *Impact of the Depots on Nearby Communities*

Even if there was disproportionate siting, if there was no harm then the MTA could not have violated any Civil Rights Act regulations. WE ACT alleged that the MTA's placement, expansion, and operation of diesel bus depots and parking lots had the effect of exposing Northern Manhattan residents to "to disproportionately high health risks from diesel exhaust."[261] The FTA did not find evidence that NYCT bus depots had exposed Northern Manhattan residents to disproportionately high health risks.[262] This was because it found bus emissions to be responsible for only a small part of total ambient air pollution and because there was no empirical evidence showing that the air pollution

---

[256] *Id.*

[257] *Id.* at 9.

[258] *Id.*

[259] *Id.* at 10.

[260] *See supra* text accompanying notes 29–31; *see, e.g.*, Been with Gupta, *supra* note 29; Denton, *supra* note 34, at 1205.

[261] Complaint, *supra* note 11, at 9.

[262] Letter of Finding, *supra* note 140, at 10–11.

caused by buses housed in depots located in predominantly minority or low income communities was higher than the pollution caused by buses housed in depots located in other communities.[263]

(4) *Public Involvement in MTA Decision-Making*

Another set of factors the DOT regulations consider in determining overall compliance with Title VI is minority community involvement in decision-making, namely: minority representation on decision-making bodies, information dissemination provided to minority communities, and the use of multi-lingual notices.[264] Public participation in decision-making and the ability to access information are very important EJM goals, as they are necessary to community concerns being heard. Executive Order 12,898 makes increasing public participation one of the focuses of its environmental justice strategy.[265] Also, Executive Order 13,166 requires federal agencies to draft Title VI guidance that allows information access to Limited English Proficiency (LEP) persons so as to not discriminate on the basis of national origin.[266] The WE ACT Complaint accused the MTA of not notifying the public of the board meeting in which its capital plan for 2000–2004 was introduced and approved, allowing no opportunity for WE ACT and others to comment.[267] It was in this capital plan that the MTA stated its intention to site all new bus parking lots adjacent to existing depots, thus further impacting surrounding communities.[268]

NYCT's policy, according to the MTA's Opposition, was to "solicit public opinion on proposed capital projects."[269] In further cooperation with the FTA, the MTA also provided the investigators with its LEP announcements and policies.[270]

---

[263] *Id.* at 10.

[264] *See* URBAN MASS TRANSP. ADMIN., U.S. DEP'T OF TRANSP., CIRCULAR 4702.1: TITLE VI PROGRAM GUIDELINES FOR URBAN MASS TRANSPORTATION ADMINISTRATION RECIPIENTS III-7 (1988), *available at* http://www.fta.dot.gov/documents/Circular_4702.1.pdf.

[265] Exec. Order No. 12,898, 59 Fed. Reg. 7629, 7630 (Feb. 11, 1994).

[266] Exec. Order No. 13,166, 65 Fed. Reg. 50,121, 50,121 (Aug. 11, 2000).

[267] Complaint, *supra* note 11, at 8.

[268] *Id.*

[269] Respondents' Submission in Opposition to the Complaint, *supra* note 147, at 22.

[270] Letter of Finding, *supra* note 140, at 12–13. President Clinton's Executive Order 13,166 stated the federal goal of improving accessibility to federal funds

Despite the apparent disregard of executive orders and violation of DOT policy, the FTA found that it was sufficient that the MTA was determined to have fulfilled DOT requirements to "accord full and fair participation of all potentially effected communities in the agency's decision-making process," for subsequent decisions and in their notice for the 2005–2009 capital plan.[271] Only 2 out of 23 MTA Executive Board members and 2 out 32 MTA Permanent Citizens Advisory Committee members were identified as minorities, but because appointments to these positions are political, the FTA's only comment was to encourage the MTA to advise those officials in charge of member selection of the DOT regulations.[272] The FTA also found the MTA to have taken reasonable strides in providing meaningful access to LEP community members.[273]

(5) *Mitigation, Off-Setting Benefits, and Alternatives*

The MTA argued that even if WE ACT had established a prima facie case, the MTA was within compliance because it had taken important steps to mitigate diesel emissions, had provided vital off-setting benefits to minority and low-income communities, and had no comparably effective alternative site options that would result in less disparate impacts.[274]

The MTA mitigated diesel bus emissions by switching to ultra-low sulfur diesel fuel and by drastically improving its bus fleet through the replacement of older buses, retro-fitting of diesel buses with new filters, and addition of CNG and hybrid-electric buses.[275] It also provided off-setting benefits by creating reliable, efficient public transit and helping to keep costs down by

and services for LEP persons who would otherwise be eligible to receive them. Exec. Order No. 13,166, 65 Fed. Reg. at 50,121.

[271] Final Letter, *supra* note 155, at 4–5; Letter of Finding, *supra* note 140, at 12.

[272] FEDERAL TRANSIT ADMINISTRATION OFFICE OF CIVIL RIGHTS, U.S. DEP'T OF TRANSP., TITLE VI COMPLIANCE REVIEW OF THE MTA NEW YORK CITY TRANSIT 31–32 (2003) *available at* http://www.fta.dot.gov/documents/NYCTFinalReport.doc.

[273] Final Letter, *supra* note 155, at 5.

[274] *See* Respondents' Submission in Opposition to the Complaint *supra* note 147, at 2–3.

[275] *See* Respondents' Submission in Opposition to the Complaint, *supra* note 147, at 24–26; *see also* Letter of Finding, *supra* 140, at 14.

minimizing deadheading.[276] The MTA claimed further that Manhattan lacked suitable alternatives, because of land being too expensive, too small, not correctly zoned, and located in overly congested areas.[277]

The FTA found that the MTA had taken significant steps in minimizing and mitigating negative impacts of diesel exhaust through the improvement of its bus fleet.[278] Though WE ACT provided examples showing that proximity to the diesel bus depots did not correspond to necessarily better or more extensive service as compared to neighborhoods not near depots and asserted that community residents' share of the benefits could not justify their share of the environmental and health burdens, the FTA determined that the adverse effects of depot locations were nonetheless offset by the benefits to minority communities of having efficient public transportation within their communities.[279] Based on the demographic patterns in the population data, the FTA hypothesized that one to two depots would need to be shut down or relocated out of predominantly minority and low-income communities to get to a position where MTA depots were distributed evenly.[280] The FTA concluded, however, that the MTA had provided sufficient evidence to show that it would not be practical to do this.[281]

(6) *FTA Conclusions*

FTA conclusions were based primarily on the findings that 1) bus depots were not disproportionately located in predominantly minority communities; 2) there was no evidence that ambient air pollution caused by the buses housed in depots located in predominantly minority and low-income communities was greater than the air pollution caused by the buses housed in depots located in other communities; and 3) there was mitigation, offsetting

[276] Respondents' Submission in Opposition to the Complaint, *supra* note 147, at 38.

[277] Respondents' Submission in Opposition to the Complaint, *supra* note 147, at 44.

[278] Letter of Finding, *supra* note 140, at 17.

[279] *See* Petitioner's Counterresponse, *supra* note 169, at 23, 35; Letter of Finding, *supra* note 140, at 17.

[280] *See* Letter of Finding, *supra* note 140, at 15.

[281] *See id.* at 17.

benefits, and a lack of alternatives.[282] The FTA, following DOT guidance in considering "any disparate impacts of grantees' policies and procedures as well as mitigation efforts, off-setting benefits, and the practicality of alternatives to current practices," concluded that the MTA and NYCT were in violation of neither Title VI's discriminatory intent nor disparate impact standards.[283] At the same time, however, because the FTA found that more minority and low-income residents lived within close proximity to MTA bus facilities than non-minority and affluent residents, it was concluded that NYCT needed additional oversight.[284] Therefore, the FTA pledged to closely monitor MTA and NYCT proposals that might have adverse disparate impacts on minority and low-income communities.[285]

Though the FTA did not find discriminatory intent or disparate impact, it acknowledged a responsibility to avoid, minimize, and mitigate the impacts of future depot decisions on minority and low-income communities.[286] The FTA said it would work to make sure that future MTA depot projects follow NEPA requirements that call for an Environmental Assessment or Environmental Impact Statement when the social, economic, or environmental impacts of a given project are significant or are not well established.[287] DOT guidelines also require that transit providers file a Fixed Facility Impact Analysis,[288] (FFIA) assessing the potential effects of a construction project on minority

[282] *See id.* at 16–17.

[283] *Id.* at 17.

[284] *See id.* at 16–17.

[285] *Id.* at 17. The Letter of Finding gave WE ACT sixty days to furnish any further information that might cause the FTA to reconsider its findings and conclusions. *Id.* at 18. WE ACT did not provide any further information within 60 days of having received that letter, so the FTA took no further action. Final Letter, *supra* note 155, at 5. Swati R. Prakash says WE ACT did not attempt to provide any additional information to the FTA because it knew that, with its limited resources, it could not possibly do the necessary research in the very short, 60 day period that the FTA provided. Telephone Interview with Swati R. Prakash, *supra* note 101.

[286] Letter of Finding, *supra* note 140, at 10.

[287] *Id.* at 7, 10.

[288] A Fixed Facility Impact Analysis is used to assess the potential effects of a construction project on minority communities, and "[all] applicants, recipients, and subrecipients [for construction projects] are required to . . . provide" one. URBAN MASS TRANSP. ADMIN., U.S. DEP'T OF TRASP., *supra* note 264, at III-1, III-2.

communities.[289] NYCT had not submitted an FFIA for past projects that were categorically excluded, but in the future, the FTA said NYCT must include an FFIA with its application for Categorical Exclusion.[290] Though the FTA found that WE ACT had not shown that the diesel buses were harming Northern Manhattan residents, the FTA did express concern about the bus idling issues that WE ACT raised and promised to monitor NYCT's plans to minimize the problem.[291]

These are valuable commitments to environmental justice advocates. The FTA did in fact make some recommendations that would benefit minority and low-income communities going forward. The DOT supplies billions of dollars to the MTA's Capital Budget and that means that the MTA must pay attention to the FTA's requirements and even to its recommendations. It would have been nearly impossible to get this kind of focused response from an agency like the FTA about one of its fund recipients, and it would have been just as hard to send a message about committing to behavioral changes to the MTA to which the MTA would be as likely to listen, without an EJM strategy that included legal action.

III. ADMINISTRATIVE COMPLAINTS CAN HELP THE EJM PUSH FORWARD

Administrative complaints have some drawbacks, especially compared to a successful litigation, but under certain circumstances administrative complaints provide substantial benefit to environmental justice advocates.

A. *Empowerment Tools*

Because EJM litigation has faltered in the face of negative precedent, community empowerment takes on an even more vital role. Many residents of minority and low-income communities feel marginalized and powerless to stop the environmental harms

[289] The FFIA should include: the predicted impact on minority neighborhoods and minority business establishments ("MBEs") during and after building, predicted negative environmental impacts, a list of MBEs and households that construction will affect, other major changes or impacts minority residents might feel, and what is being done to mitigate negative social, economic, or environmental impacts. Letter of Finding, *supra* note 140, at 7.

[290] *Id.* at 7–8.

[291] *Id.* at 11.

that threaten them. Empowering the community means giving community members the power to enforce their own rights to health and safety. Grassroots EJM organizations can provide an ongoing vehicle for community participation in important decisions that affect them.[292] Local environmental victories can broaden into enabling community members to redefine their understanding of power relationships and allow them to create new roles for themselves in other political and economic struggles in which they have previously been marginalized.[293]

Something is missing in the fight to protect community members' rights to health and safety, however, without access to a legal process. Sheila Foster, lead pro-bono counsel for WE ACT during the complaint process, explains:

> [W]e initiated the Title VI action less out of an expectation of winning than out of a desire to leverage the promise of the law to hold MTA/NYTA accountable for its decisions. Residents impacted by bus depots have tried hard work through the prescribed channels for community participation in land use and other decisions only to find themselves excluded from the structures and processes where the real decisions are made.[294]

Engaging the legal system complements community organizing. If a group like WE ACT can rely on an administrative complaint, it might go a long way in supplementing WE ACT's empowerment strengths and increase the possibility of achieving environmental equality and well-being.

B. *Administrative Complaint as a Tool*

Are administrative complaints worthwhile for environmental justice plaintiffs? At first blush, WE ACT did not get meaningful change in response to its complaint. Even if administrative complaints turn out to be the only formal legal action environmental justice organizations can take, that does not necessarily make them worth the time and money required to bring one. Still, given that administrative complaints can force fund recipients to acknowledge environmental justice proponents, cause parties to negotiate, increase the likelihood of future compliance, further empower minority and low-income communities, and

---

[292] *See* Foster, *supra* note 123, at 779.

[293] *See id.*

[294] Foster, *supra* note 2, at 6.

provide the EJM its missing legal tool, administrative complaints can be very worthwhile environmental justice strategy.

There are several drawbacks to administrative complaints. First, in some circumstances environmental justice administrative complaints might appear to be a waste of resources. The type of research and analysis that is necessary to support a complaint like WE ACT's can be very costly, requiring scientific research, statistical analysis, and thoughtful legal argument. Many environmental justice organizations may have difficulty raising enough money to produce a complaint that will persuade an agency that a violation of Title VI regulations has occurred. Even those groups that are fortunate enough to have pro bono assistance must view that assistance as a limited resource.

Second, an administrative investigation is not an adversarial process and this process may limit the opportunity for environmental justice groups to have their say. WE ACT was not contacted once during the entire FTA investigation.[295] The FTA received all of its additional information from the MTA, and WE ACT was only given a chance to respond after the FTA had already submitted a Letter of Finding.[296] It is plausible that there will be a bias in favor of the fund recipient if the investigating body structures the administrative process to give the fund recipient greater access to the decisionmaker.

Third, as mentioned earlier, the investigation of a complaint is often a discretionary process. If the FTA had based its decision to investigate on the WE ACT Complaint, it would arguably be within its authority to dismiss the Complaint and investigation immediately based on a lack of timeliness.[297] Section 603 of Title VI does provide judicial review over agency actions pursuant to § 602, but it may be prohibitively expensive for environmental justice plaintiffs to rely on this protection, and courts are likely to defer to the agency on discretionary decisions.[298]

---

[295] Telephone Interview with Swati R. Prakash, *supra* note 101.

[296] *Id.*

[297] *See* Department of Transportation Effectuation of the Title VI of the Civil Rights Act of 1964, C.F.R. § 21.11(b) (2006).

[298] *See* 5 U.S.C. § 706(2)(A) (2006); 42 U.S.C. § 2000d-2 (2006); *see also, e.g.* Nat'l Motor Freight Traffic Assoc. v. Interstate Commerce Comm., 590 F.2d 1180, 1184 (D.C. Cir 1978) (stating: "the 'arbitrary and capricious' standard requires a reviewing court to defer to an agency's judgment so long as it has a rational basis.").

Finally, administrative complaints often suffer from a lack of available remedies. A lawsuit can request legal damages such as money for reparations or equitable remedies like a temporary or permanent injunction. The only consequence explicitly mentioned in § 602 for a fund recipient who has been found to have not complied with agency Title VI regulations is that the agency can terminate its grant.[299] Indeed, Swati Prakash, Health Director of WE ACT, says WE ACT never had any expectation of winning the investigation because they did not believe that the FTA would possibly find one of its recipients, who was granted almost $5 billion for the years 2000 to 2004, to be guilty of violating Title VI regulations.[300] The relationship between administrative agency and fund recipient will almost inevitably be a strong one. The organizations will often be in constant contact with each other about non-investigation matters. The administrative agency will already have been overseeing the recipient while it has been allocating these billions of dollars.

So then why did WE ACT file the Complaint to begin with and why would an environmental justice plaintiff ever go through the trouble of filing a complaint? There are several reasons an administrative investigation is attractive to an environmental justice organization, particularly when compared to taking no action at all.

First, the administrative complaint may slow down an undesirable project and thereby secure access for the organization. Swati Prakash says that WE ACT was hoping to slow down the MTA's development of outdoor parking lots and was trying to get a serious response from NYCT, which had for the most part ignored WE ACT's communications.[301] An administrative complaint may put the parties on the same playing field, even if the field is not completely level. If an environmental justice group feels that it is not being respected, or even acknowledged, by its adversary, then an administrative complaint, like a lawsuit, may force the other side to pay some attention.

---

[299] *See* 42 U.S.C. 2000d–1 (2006). Furthermore, "such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found," unless otherwise authorized by law. *See id.*

[300] Telephone Interview with Swati R. Prakash, *supra* note 101.

[301] *Id.*

Second, filing an administrative complaint sets up the possibility of negotiations between community organization and fund recipient. Though the bargaining chips might not be stacked as high, a settlement beneficial to the environmental justice organization can still be achieved. And in fact, the investigation may very well result in constructive outcomes for the environmental justice group. Knowing that an administrative agency is watching may lead to better behavior from the fund recipient. Although it may be coincidence, NYCT started taking certain policies relating to environmental justice more seriously right around the time of the investigation. For instance, it began providing more planning notices in Spanish.[302]

Third, an administrative action may result in better compliance going forward. At the completion of the investigation, the administrative agency may also require the recipients to take various actions to ensure compliance. Positives did come out of the FTA's investigation of the MTA. The FTA agreed, in contrast to the MTA, that there was a statistically significant difference between the number of minority and non-minority residents living near NYCT depots.[303] It made sure that NYCT was working to limit bus idling.[304] The FTA also required NYCT to start including environmental impact reports in its applications for Categorical Exclusion.[305] Though the FTA ultimately determined that NYCT had not discriminated, it also reviewed NYCT's reasoning for not converting the Manhattanville depot to a CNG bus depot.[306] Further, because it found the disproportionate results, the FTA promised additional oversight for the MTA and NYCT to make sure of their continued compliance.[307] It is unlikely that, through grassroots organizing alone, a community group would be able to get such a focused response from a funding agency like the FTA. This gives real value to the administrative complaint process.

Fourth, administrative complaints may lead to valuable symbolic gains. Even small victories can have an effect on the empowerment of a previously marginalized community. Opening

[302] *See generally* Final Letter, *supra* note 155, at 4.
[303] Letter of Finding, *supra* note 140, at 6–7.
[304] *Id.* at 17.
[305] *Id.* at 8.
[306] *Id.* at 17.
[307] *Id.*

up a dialogue with a powerful fund recipient can give more confidence to a fledgling community group and can give a chance to better understand its adversary to a more established group like WE ACT. There may also be some comfort in knowing that an administrative agency is explicitly aware of the disparate impacts affecting a community and that the agency has affirmed its § 602 mandate.

Finally, as stated in earlier in Part IIIA, access to a legal process complements community organizing. As grassroots organizers are empowering residents to speak out for their rights, the ability to enlist the legal system helps to force decision-makers to be held accountable for their actions.

Administrative complaints, though not as powerful as lawsuits, serve environmental justice advocates as a legal tool that can combat market and political process failures. Whether an administrative complaint makes sense will depend on the circumstances. Regardless, administrative complaints do offer real benefits to the environmental justice plaintiffs that use them.