

U.S. COMMISSION ON CIVIL RIGHTS

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HEARING

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Friday,

February 8, 2002

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The Commission convened in Room 540, at 624 Ninth Street, N.W., Washington, D.C., at 8:30 a.m., Mary Frances Berry, Chairperson, presiding.

PRESENT:

MARY FRANCES BERRY, Chairperson
CRUZ REYNOSO, Vice Chairperson
JENNIFER C. BRACERAS, Commissioner
CHRISTOPHER EDLEY, JR., Commissioner
ELSIE M. MEEKS, Commissioner
VICTORIA WILSON, Commissioner
LESLIE R. JIN, Staff Director

STAFF PRESENT:

LENOLA ALLEN-SOMMERVILLE
KIMBERLY ALTON
CAROLE BARRETT
LYNWOOD BATTLE, JR.
CAROL BERG
LEANNA BROWN
PHILLIP CALDWELL
DEBRA CARR
KI-TAEK CHUN
IVY DAVIS
BARBARA DELAVIEZ
MONIQUE DENNIS-ELMORE
TERRI DICKERSON
BOBBY DOCTOR
JOHN DULLES
PAMELA A. DUNSTON
BETTY EDMISTON
LEO GOTO
GILBERT GUITERREZ

LIBRARY
U.S. COMMISSION ON CIVIL RIGHTS

STAFF PRESENT: (CONT.)

GEORGE M. HARRISON
MELVIN JENKINS
STELLA KIM
WYATT KIRK
JUNE LITTLER
ANASTASIA LUDPEN
SOCK-FOOM MACDOUGALL
TRAVIS MCCLAIN
KATHERINE MITCHELL
PAMELA MOYE
DAVID MUSSATT
JENNY PARK
MARC PENTINO
KIRK PERRY
PETER REILLY, ESQ., Parliamentarian
KWANA ROYAL
JOHNNY SMITH
MARCIA TYLER
AUDREY WIGGINS
DAVID WONG
AUDREY WRIGHT
MIREILLE ZIESENISS

COMMISSION ASSISTANTS PRESENT:

KRISTINA ARRIAGA
LAURA BATIE
PATRICK DUFFY
KIMBERLY SCHULD
KRISHNA TOOLSIE

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(10:27 a.m.)

CHAIRPERSON BERRY: This hearing of the United States Commission on Civil Rights will now come to order. First, I want to swear in all the court-reporters, clerks, interpreters, and signers.

Could the court-reporters, clerks, interpreters, and signers, come forward to be sworn in. You have to be sworn in for the hearing. Everybody assembled? Okay.

(All court-reporters, clerks, interpreters, and signers were sworn.)

CHAIRPERSON BERRY: Before returning to your seats, could a sign interpreter ask if anyone is in need of interpretation.

(A sign interpreter did as directed.)

CHAIRPERSON BERRY: Thank you. First, we are going to have a document return by an EPA records custodian. At this time, we request that the representative from the EPA who was subpoenaed to supply documents to the Commission come forward to present those documents.

Counsel, please proceed in accepting the documents and entering them into the record at this time.

MR. REILLY: Thank you, Madam Chair. Are you a representative from the EPA?

MS. HIGGINBOTHAM: Yes, my name is Karen

Higginbotham, and I am Acting Director of the EPA's Office of Civil Rights.

MR. REILLY: Okay. And what is the status of the records that you are bringing us?

MS. HIGGINBOTHAM: Today, we have three boxes of documents which are in part responsive to your request for records, and we are still working on producing other documents in response to your request. And we have spoken to your office with respect to completing that production of records.

MR. REILLY: Very good. Madam Chair, can those be entered into the record?

CHAIRPERSON BERRY: Yes. Thank you for taking the time to respond to the subpoena today. This will be entered in the record and you are now excused. We had sign-out procedures, but I know that you are testifying later, and so you can't sign out. You have to stay.

Now, I will go to the opening statements. Good morning and welcome to this public hearing. I am Mary Frances Berry, Chairperson of the Commissioner, and I will be presiding over this hearing.

We will have testimony until five o'clock as indicated by the agenda, and before I say a little bit more about the scope of the hearing, let me introduce myself further and other members.

In addition to serving as Chair, my day job is that I

am the Geraldine R. Siegal Professor of American Social Thought, and a Professor of History and Adjunct Professor of Law at the University of Pennsylvania, in Philadelphia.

And today we have joining us Commissioner Braceras, Commissioner Christopher Edley, Commissioner Elsie Meeks, Victoria Wilson, and Abigail Thernstrom, and the Vice Chair of the Commission, Cruz Reynoso.

Could the other Commissioners briefly introduce themselves, beginning with Commissioner Edley. Just say something about yourself.

COMMISSIONER EDLEY: I'm Christopher Edley, and I am a Professor at Harvard Law School, and co-director of the Civil Rights Project at Harvard.

CHAIRPERSON BERRY: Commissioner Meeks.

COMMISSIONER MEEKS: I am Elsie Meeks, and I am the Executive Director of First Nations, a WESA (phonetic) corporation, which is a national Indian development organization, and I have been involved in Indian development issues, economic development, for many, many years.

CHAIRPERSON BERRY: Commissioner Wilson.

COMMISSIONER WILSON: Thank you, Madam Chair. My name is Victoria Wilson, and I am a senior editor and vice president, and associate publisher of the Alfred Knopf Publishers in New York City, where I have been for many decades.

CHAIRPERSON BERRY: Okay. Vice Chair.

VICE CHAIRPERSON REYNOSO: Yes, I am Cruz Reynoso, and Bouchaver (phonetic) and Byrd, Professor of Law, at the University of California at Davis, and special consult with the firm of Kate Shoulder (phonetic).

CHAIRPERSON BERRY: And then finally I would like to introduce our staff director, Les Jin, and our deputy general counsel, Deborah Carr, who is somewhere behind me.

Environment justice is the attainment of environment rights for all, including an end to discrimination in environmental policy making that disproportionately burdens people's color, women, children, and the poor.

The movement has a number of objectives in that regard, and it has become a national concern, consistent with the belief that invidious discrimination is illegal, and what we should do is undo legally sanctioned segregation and discrimination.

Some people believe that environmental justice is the cutting edge of a new civil rights struggle. Today's hearing is a continuation of the January Commission hearing on environmental justice, and related Title VI issues.

During the January session, we heard from academics, community advocates, industry experts, and others regarding these issues. Experts described segregated housing patterns, and how housing segregation contributes to high rates of asthma and lead poisoning.

The Commission heard testimony on the impact of pesticides on hispanic migrant farm workers, and increasing rates of cancer and other illnesses. We have heard from community representatives frustrated by not being able to participate in environmental decision making processes because of language barriers, and social preferences, and other obstacles. A Public Health witness talked about the link between public health and the environment, and the consequence of a growing divide between health policy on the one hand and environmental decisions.

Many issues were raised and several questions were left unanswered, and we also note that most of the people who were here in January applauded the 1994 Presidential Executive Order that incorporates environmental justice into the missions of all Federal agencies.

Also, many people commended EPA Administrator Christine Whitman's commitment to the principles of environmental justice as expressed in her August 2001 memorandum.

So today is a continuation, where we here from representatives of Federal agencies. As required by law, notice of this hearing was first published in the Federal Register on January 11th, 2002, and a copy of that notice and any other relevant notices will be introduced into the hearing record, and have been supplied to all persons scheduled to appear.

The Commission's authority to conduct this theory emanates from our statute started in 1957, and the Commission

submits reports containing findings and recommendations for corrective legislative and executive action to the President and to the Congress.

To enable the Commission to fulfill its duties, Congress has empowered the Commission, or a subcommittee thereof, to hold hearings and issue subpoenas for the attendance of witnesses and the production of documents.

And consistent with Commission practice, all witnesses within this jurisdiction have been subpoenaed to attend today's hearing. That doesn't mean that they were unwilling or wouldn't come. We subpoena people whether they are willing to come or not, and some want to be subpoenaed, and others we just don't draw distinctions between the two, and that is for the benefit of the witnesses.

We will schedule approximately 15 witnesses, and the majority are Federal Government reps. All were selected due to their knowledge or experience with the issues that we are discussing.

In addition to the scheduled witnesses, there will be a limited opportunity for concerned persons to testify during an open session at the end of the day. And before we proceed, I want to stress the functions and limitations of this Commission.

As the Supreme Court of the United States explained, the Commission does not adjudicate, and it does not hold trials, or determine anyone's civil or criminal liability. It does not

issue orders, nor does it indict, punish, or impose legal sanctions.

It does not make determinations depriving anyone of life, liberty, or property. In short, the Commission does not and cannot take any action which will affect an individual's legal rights.

The Commission takes very seriously, however, its mandate to find facts which may be used subsequently as a basis for legislative or executive action designed to improve the quality of life of all the inhabitants of these United States.

I am certain and my colleagues join me in the hope that this hearing will help to educate us about the civil rights problems in the nation, the report that we do, and let me address briefly the technical aspects of the hearing.

The record of this hearing will remain open for 60 days for inclusion of materials sent to the Commission at the conclusion of the hearing. Anyone who desires to submit information relevant to these proceedings may do so during this time period.

Second, there is a Federal Marshal in the audience. The Commission's procedures require their attendance at all its hearings. These marshals have developed security measures that will help to preserve the atmosphere of dignity and decorum in which our proceedings are held.

Federal Law protects all witnesses before this Commission. It is a crime, punishable by a fine of up to \$5,000, and imprisonment for up to 5 years, or both, to interfere with a witness before the Commission. I want to thank you for your attention, and indicate that I intend to try to get back into the time limits and adhere to them.

Now, please direct your attention to Vice Chairman Reynoso, who will read the statement of the rules for this hearing. Vice Chair Reynoso.

VICE CHAIRPERSON REYNOSO: Thank you, Madam Chair. At the outset, I would like to emphasize that the observations that are about to be made concerning the Commission's rules constitute nothing more than brief summaries of significant provisions.

The rules themselves should be consulted for a fuller understanding. Copies of the rules which govern this hearing may be obtained from a member of the Commission staff upon request.

Scheduled witnesses appearing during the course of this hearing have been supplied a copy. Staff members will be available to answer any questions that arise during the course of the hearings.

The Commission is empowered by statute to hold hearings and act at such times and places as it deems advisable. The hearing is open to all, and the public is invited and urged to attend.

As Chairperson Berry indicated, all witnesses appearing today within the Commission's jurisdiction have been subpoenaed for this hearing. Everyone who testifies or submits data or evidence is entitled to obtain a copy of the transcript on payment of costs.

In addition, within 60 days after the close of the hearing, a person may ask the Commission to correct errors in the transcript of his or her testimony, and such requests will be granted only to make the transcript conform to the testimony presented at the hearing.

If the Commission determines that any witnesses' testimony tends to defame, degrade, or incriminate any person, that person, or his or her counsel, may submit written questions, which at the direction of the Commission may be put to the witness.

Such persons also have a right to request that witnesses be subpoenaed on his or her behalf. All witnesses have the right to submit statements prepared by themselves or others for inclusion in the record, provided that they are submitted within the time required by the rules.

Any person who has not been subpoenaed will be permitted at the discretion of the Commission to submit a written statement in this public hearing. Any such statement will be reviewed by the members of the Commission and made a part of the record.

The Chair has already advised you that Federal Law protects all witnesses at the Commission hearing. The witnesses are protected by code sections which make it a crime to threaten, intimidate, or injure witnesses on account of their attendance at government proceedings.

The Commission should be immediately informed of any allegations relating to possible intimidation of witnesses. I emphasize that we consider this to be a very serious matter, and we will do all in our power to protect witnesses who appear at the hearing.

Finally, I should note that these rules are drafted with the intent of ensuring that Commission hearings be conducted in a fair and impartial manner.

In many cases the Commission has gone significantly beyond Congressional requirements in providing safeguards for witnesses and other persons.

We have done so in the belief that useful facts are best developed in an atmosphere of calm and objectivity. We trust that such an atmosphere will prevail at this hearing. Let me stress, however, that with respect to the conduct of every person in this hearing room, whether testifying or not, all orders by the Chairperson must be obeyed.

Failure by any person to obey an order by Chairperson Berry or the Commissioner presiding in her absence, will result in the exclusion of that individual in the hearing room, and criminal

prosecution by the U.S. Attorney when required.

As previously noted, unless otherwise indicated, each session of this hearing will be open to the public. All are welcome to attend and thank you very much, Madam Chair.

Panel One - Overview

CHAIRPERSON BERRY: Thank you very much, Vice Chair.

Mr. Peter Reilly, with the Office of General Counsel, has called the first two witnesses forward. Could Mr. Luke Cole and Mr. Richard Lazarus, could you please stand so that I may swear you in.

(The Witnesses were sworn.)

CHAIRPERSON BERRY: Please be seated. Mr. Cole, who is the General Counsel of the California Rural Legal Assistance Foundation Center on Race, Poverty, and the Environment, has had a rather distinguished record working for low income communities, and workers, on these issues, and has publications on the subject.

He graduated cum laude from Harvard Law School, and has an undergraduate degree from Stanford. Professor Lazarus is the John Carroll Research Professor Law at Georgetown, where he teaches environmental law and natural resources, and Federal hazard waste legislation, and torts, and anything else that they get him to reach.

He has a distinguished record, and has worked in the Justice Department and in various offices there, including the Environmental Natural Resources Division, and Solicitor General,

and serves on Boards related to issues of the environment.

He is an undergraduate chemistry graduate and economics, and educated at the University of Illinois and Harvard Law School. If you could please -- each witness may make a 10 minute presentation, about 10 minutes, or maybe a little less. How about 8 minutes. Is that all right with you?

MR. COLE: Trying to catch up?

CHAIRPERSON BERRY: Yes, I am trying to catch up on my time. I want to catch up here. And then Mr. Cole will be followed by Professor Lazarus.

MR. COLE: Thank you, Madam Chair.

CHAIRPERSON BERRY: Mr. Cole.

MR. COLE: Thank you, Madam Chair, and Justice Reynoso. I am going to try and be even briefer than 8 minutes in the interest of getting into some back and forth with the Commission.

I have four brief points to make here this morning. The first is that environmental hazards in the United States are inequitably distributed by race and income.

The second is that the U.S. Supreme Court, in a series of decisions hostile to civil rights, has eliminated the ability of private plaintiffs to enforce the disparate impact standard under Title VI of the Civil Rights Act of 1964.

The third is that Federal Agencies simply are not enforcing Title VI, and the fourth is that this Commission can

play a crucial role in pressuring these Federal Agencies to enforce the disparate impact standard.

First, environmental hazards in the United States are not distributed equitably by race or income. This intuitive idea has been borne out by more than four decades of empirical studies which have examined the distribution of environmental hazards from air pollution, to water contamination, to pesticide poisoning, to occupational exposure to hazards, to under-enforcement of environmental laws.

Sheila Foster and I, in our recent book, "From the Ground Up: Environmental Racism and the Rise of the Environmental Justice Movement," include an annotated bibliography of more than 70 empirical studies which have looked at the impacts of a variety of environmental hazards, and determined that there is disparate impact on the basis of race, and that there is disparate impact on the basis of income.

They indicate that race is an independent predictor of exposure to environmental hazards than income, and that also race is a stronger predictor in those studies that looked at both race and income.

The second point that I would like to make is that the U.S. Supreme Court, in a series of decisions hostile to civil rights, has eliminated the ability of private plaintiffs to enforce the disparate impact standard, although every Federal Agency has a disparate impact standard, and although Congressional

intent in passing Title VI of the Civil Rights Act of 1964 was clear that it was going to include situations of disparate impact.

And that the Justice Department, based on that legislative history, drafted in 1964 and 1965 the model disparate impact regulations that have been promulgated by every Federal agency.

The Supreme Court has cut away private plaintiff's ability to enforce the disparate impact standard in the case last April of Alexander v. Sandoval.

When plaintiffs -- my clients -- in the South Camden Citizens in Action suit attempted to enforce the disparate impact standard through Section 1983, the Third Circuit, relying on Supreme Court precedent in Sandoval, also blocked that avenue.

So the disparate impact standard has been taken off the table by the Federal Courts. Where does that leave us? Only Federal Agencies can enforce their own disparate impact regulations at this point.

The problem is, and what I hope we get into today, is that Federal Agencies simply are not enforcing Title VI, and their own disparate impact regulations.

After 13 years of work in this field, I can point to perhaps one situation involving a case that Richard Lazarus later worked on back in the 1980s in the Department of Transportation, where a Federal Agency actually took action, formal action, on behalf of civil rights complainants in a Title VI complaint.

The U.S. EPA, despite receiving 124 separate civil rights complaints on environmental justice matters, has never decided a case in favor of a civil rights complainant.

And, in fact, out of the 124 cases, has decided exactly one on the merits. And that was against the civil rights complainant. Civil rights complaints on environmental justice matters that are filed with Federal Agencies disappear into these agencies, and languish for years, while the very real discriminatory impact that is being complained of continues unabated.

Administration after Administration comes in and promises task forces, expedited handling of cases, et cetera, et cetera. I am sure that you will hear some more about that from the agencies this afternoon.

But the bottom line is that Federal Agencies are not enforcing civil rights laws. The U.S. Civil Rights Commission can play a crucial role in pressuring these Federal Agencies to begin enforcing their own disparate impact regulations by shining a bright light on the complete failure of these agencies to do any enforcement.

And hopefully the Commission can galvanize some action. Today's hearings are an important first step in bringing some accountability to civil rights enforcement by Federal Agencies, particularly at the U.S. Environmental Protection Agency.

And because there is a documented disparate impact of environment, and because the Federal Courts have closed off private plaintiffs' ability to attack those hazards, and because Federal Agencies are the only ones who can do that, we hope that you will work with us to ensure that they do. Thank you.

CHAIRPERSON BERRY: Okay. Thank you.

Professor Lazarus.

PROFESSOR LAZARUS: Thank you, Chair Berry, and Justice Reynoso, and Commissioners, and thank you for the opportunity to testify here. I have submitted some fairly lengthy prepared testimony.

And I am simply am not going to be outdone by Luke Cole. I am going to make it three points instead of four points.

The three points are this. The first is that environmental law itself can be the source of the kind of social injustice which is a concern to Federal civil rights law.

The second is that within existing civil rights law, and existing environmental law, there are statutory authorities already in place capable of providing substantial redress to these problems.

The third is that notwithstanding these existing authorities, any governmental effort to invoke them will face considerable challenges from within and without the government.

Turning to the first point; that is, the potential for environmental law itself be part of the problem, and not just

a solution to racial injustice. For years, most of our involved, including myself, in environmental lawmaking thought that it was safe to assume that the implementation of Federal environmental law would not have any adverse discriminatory effect.

That environmental law would at least be neutral, and that it would likely be progressive in its impact. To the extent that there was reason to believe that minority communities and low income communities were in the first instance the disproportionate subject of pollution, the neutral application of laws should disproportionately favor them rather than the contrary.

We were wrong. What we failed to consider were several countervailing factors, and I am simply going to mention here two. The first is that the environmental laws are not parieto optima.

In other words, they do not make everybody better off and nobody worse off. Society as a whole is much better off because of our nation's commitment reflected in these statutes. But not everybody is better off.

What the environmental statutes do, and correctly do, is reduce environmental risks, but they don't eliminate environmental risks altogether. And they have the necessary effect of shifting environmental risks over time, and over space.

A statute which controls air pollution will necessary create some land disposal from the ash which is generated from the air pollution controls.

A water treatment plant creates a sludge, which then has to go somewhere.

A land disposal problem creates incinerator emissions in the air, and what you end up with as a result of the statutes are residual environmental risks, and not no risks, but residual risks from here, and from here, and from here, and from here.

And those residual risks naturally seek out the path of least regulatory resistance, and then tend as a result to aggregate following that path to one place, and often to one time.

And the selection of that place is influenced by conscious and subconscious racist attitudes, and it is influenced by economic and political forces which are often neutral in appearance, but ultimately traceable to the vestiges of past discrimination.

That is true for most other areas of allocation of benefits and burdens, and environmental law unfortunately is no exception. The second reason is that the environmental protection laws are not themselves self-executing.

Compliance with the statutes depends upon enforcement, and depends upon meaningful enforcement. By their nature, it is really hard to comply with Federal and Environmental statutes. It is hard to understand Federal and Environmental statutes and regulations.

And for that reason, it is hard to comply with them, and the standards are tough, and the responsibility for complying

with them is often fragmented among many players.

It requires meaningful enforcement to ensure that people attempt and achieve compliance. But the enforcement resources have never been commensurate to the task.

And as a result, where compliance is achieved, and the extent to which compliance is achieved, often depends upon the allocation of scarce enforcement resources.

But where those enforcement resources have historically been allocated has depended upon who has access to these persons making the decisions about where to allocate those enforcement resources, and who has connections, and who has the know how, and who has the clout, where the inspectors are likely to go and willing to go, and where they feel safe to go, and where they feel comfortable to go.

And the unfortunate upshot has been that we have ended up with the aggregation of sites with all these residual risks in certain areas, and we have little oversight enforcement.

The worst areas with the littlest enforcement.

The affected communities also lack the expertise, and the legal resources to invoke the very important citizen suit provisions in these statutes. Not everyone can become an expert in environmental law. It is very inaccessible, but the result is that many of the communities most affected don't have Luke Coles, and they don't have people with expertise or willing to invoke these statutes on their behalf, and the statutes themselves are

very tough if you know how to use them.

My second broad point is that existing civil rights law, environmental law, and statutory authorities, address many of these concerns. As Luke suggested, Title VI plainly has widespread application and implementation of much environmental law.

The Federal statutes are almost without exception very heavily dependent upon State and local implementation. And those State and local agencies responsible for implementation are almost always the recipients of Federal financial assistance.

The nondiscrimination mandate of Title VI accordingly applies to their activities, and that extends to the agencies like the EPA and others with their disparate impact regulations.

And those disparate impact regulations, in-turn, apply to permitting decisions, to the allocation of enforcement resources, and to settlements and the benefits produced from those settlements.

There are similarly untapped statutory authorities under existing environmental statutes which address environmental justice concerns. There is language in these statutes which allows for greater consideration of aggregation, including synergistic and cumulative environmental effects.

There is language in the existing statutes which allows for greater consideration of the differences between communities, and how we may have to fashion our environmental

standards in recognition of the fact that we have different kinds of communities, and we have different vulnerabilities, and different kinds of subsensitive populations.

The classic example is water quality standards, depending upon fish intake, and which varies in communities, and varies in different cities, often based upon racial identification.

Finally, we have language in existing statutes which allows for permit considerations, and permit conditions, and enforcement remedies which address disparities, enhance public participation, promote community compliance oversight, and ensure the return of the real economic benefits of a facility to the community itself.

My final and third point is no one should pretend that this is easy. It is not easy to apply Title VI disparate impact and environmental law context. The reasons for the difficulty are several, and I am going to highlight just one.

And that is causation in environmental law is very problematic and difficult. There are multiple public and private decision makers that often decide where the impacts occur.

It is hard to decide who is responsible for the aggregate effect when you have so many different players. It is very hard to decide what the relevant universe of impacts is, and it is very hard to decide who the relevant universe of regulators is, or the regulated.

And what impacts are covered, and what sources should be covered, and what to do about permit renewal. Finally, there are very powerful institutional forces that create friction against any kind of change.

Addressing environmental justice runs counter to the movement to streamline governmental processes, and to make law clearer. Addressing environmental justice runs counter to Federalism concerns, because it calls for more Federal oversight of the States.

Environmental justice and addressing it runs counter to the greater reliance on tradeable admissions policies, which depend upon the fungibility of emissions and environmental justice questions that.

It will take vigilance and dedication to overcome the institutional obstacles that stand in the way. For that same reason, I am pleased that this Commission has taken on the issue.

It takes commitment to the goals that Federal Civil Rights Law expresses, and it will take persistence in implementation, and it will take passion in their promotion. In short, it will take what this commission is supposed to be all about. Thank you.

CHAIRPERSON BERRY: Thank you very much, Professor Lazarus. Mr. Reilly, you have questions?

MR. REILLY: Thank you very much, Madam Chair. I will

address questions to each of you, but just jump in at any time, because today's hearing is supposed to be a conversation.

First, Mr. Cole. A good portion of your opening remarks focused on Title VI. I just want to ask you about a particular Title VI complaint. It was filed by the New Mexico Environmental Law Center against the New Mexico Environmental Department.

And I believe that it was filed in 1999, and was dismissed in 2001. Do you know what this case was about and why it was dismissed?

MR. COLE: My understanding is that the case was a challenge to a permit issued by the New Mexico Department of Environmental Protection, or maybe the Department of Environmental Management. I forget the acronym there.

And that it was dismissed by the USEPA because of a State Court action invalidating a separate permit issued by Bernalillo County to the same facility. The EPA claimed that the case was in litigation, and thus dismissed, or rejected. It didn't dismiss the complaint. It rejected the complaint.

MR. REILLY: Okay. Thank you. This question is actually directed to both of you. Some argued during the Commission hearing this last month that implementing environmental justice laws can cost jobs, and inhibit economic development.

They debated whether it was worth it. Could both of you comment on that?

PROFESSOR LAZARUS: That is a concern that I have often heard as well, and it is a concern that one has heard about environmental law for all time. Generally my response is two-fold.

In the first instance, almost invariably the actual burdens that are projected by the regulated community that will result because the application for environmental statutes are tremendously exaggerated in the first instance.

And the costs turn out to be much less than people ever thought. The second is that in terms of the actual economic benefits of the facility, it is very rare indeed that the actual community itself enjoys those economic benefits which are often promised in return for the facility.

What environmental justice has achieved in many areas where settlements have been reached is that it has actually achieved a much better sort of ability for the facilities and the regulated to negotiate with the communities, and work with the communities, to actually work out the situations where you actually not deny the facility altogether, but have the facility there with better assurance that compliance will actually happen.

And better assurance that the community will participate in meaningful decisions that affect the community's livelihood, and better decisions will ensure that some of the economic benefits of the facility actually are enjoyed by the community.

What people often forget is that the economic issues are not just of concern to the industry. These communities care a lot about economics. They care a lot about it, and they also care a lot about public health.

And they are not trying to shoot themselves in the foot. They know what they are doing here, and their legal representatives know what they are doing here.

And that is that they are trying to achieve a result which is fair to them, but they are paying attention to the economics, and they are trying to make sure that they get the public health protection that the statutes promise.

And that when these facilities do comply with those statutes that they also receive the economic benefits which are all too often proved to be illusory in reality.

MR. COLE: I want to give the Commission four concrete examples that we can draw some lessons from in exploding the myth that it is jobs versus the environment, or that environmental justice costs jobs.

Tulare County, California, and Justice Reynoso is probably familiar with Tulare County. It is the number one dairy county in the country. More than 700,000 dairy cows.

The dairy industry we have recently challenged on environmental justice grounds several mega-dairies, massive 25 or 30,000 cow dairies there. And the dairy industry has said you were costing jobs.

Well, Tulare County has more cows than any other county in the country, and it also has the third highest unemployment rate in the State of California. So if the dairies were equal to employment, that would not be the case.

It's simply a myth. Convent, Louisiana; it's on the industrial corridor between Baton Rouge and New Orleans, and often referred to as "Cancer Alley." There was a big environmental justice fight around the Shintech plant that was scheduled to go in there in the late 1990s.

Well, when Shintech came in, the big pitch to the community was we are going to bring jobs in, and the people of Shintech looked around, and they said, you know, when the first industrial plant came in here, and you told us that, we believed you.

And the second plant came in here and told us that, and we believed you. This is the 13th industrial plant in convent. We have more industrial plants than any other community along the entire industrial corridor.

And we also have the highest level of unemployment. The "jobs go to the community" idea is a myth, and I will get to some of the reasons for that in a moment.

The Lancer Energy Recovery Facility or incinerator was slated for South Central Los Angeles in the 1980s to create jobs in the community so the community of South Central Los Angeles was told, and they were going to build a huge incinerator

there not far from the intersection of Florence and Normandy made famous in the Rodney King uprising.

Well, to build this \$280 million incinerator, which would create 12 jobs for community residents, mostly janitorial jobs, because Los Angeles is such a polluted air basin, they had to buy offsets, pollution offsets.

So they were going over to East Los Angeles and they were going to close down a series of furniture manufacturers, costing 240 jobs in East Los Angeles, to create the 12 jobs in South Central Los Angeles.

Finally, a case that I understand you heard some about in the January commission hearing, South Camden, New Jersey.

The St. Lawrence Cement Plant was brought in, and it was touted as jobs for the community.

Well, that cement plant, a \$50 million plant, occupying 12 acres of prime waterfront industrial property in Camden, was creating 16 jobs, and 8 jobs for Camden residents. Not residents of the neighborhood, but of Camden as a whole.

Now, that 12 acre site could have been used for a significantly less polluting, more labor intensive, industry there. These conflicts illustrate three realities behind the jobs versus the environment myth.

Reality Number 1 is that if there are jobs, they don't go to the community residents. In Lancer, the incinerator in South Central L.A., they needed engineers. There were not a

lot of unemployed engineers in South Central Los Angeles. That was not the job pool.

The second is that in many of the situations the incentives offered by the local jurisdiction to attract the jobs ensured that those jobs will never go to the community residents, and let me explain what I mean.

In Convent over the years to attract these big industrial companies the local parish had given so many tax rebates and tax write-downs to the industry coming in that the entire educational system was under-funded.

The students suffered and the graduates of the educational institutions in that parish did not have the educational capacity to then take the jobs at the plants. The plants said we can't hire anyone from here because they don't meet our educational qualifications.

Bringing in the plant itself ensured that nobody in the community could get those jobs. Finally, bringing in a plant may actually cost jobs. This happens in a couple of ways.

In the Lancer case, there would have been a direct loss because of pollution offsets, they would have had to shut down plants in one area, and cost jobs in East L.A. to create jobs in South Central L.A.

But more often what happens is the opportunity costs. As I mentioned in Camden, there may be a direct opportunity cost. That prime real estate is being used by a very capital intensive

operation, a very pollution intensive operation, and where it could be used by a labor intensive less-polluting operation.

And historically what has happened, and what will happen in the future in these communities is that there is an opportunity cost from companies, less polluting companies, and more labor intensive companies, that won't locate in these neighborhoods.

If I am a local Chamber of Commerce and I am trying to attract good clean industry to my town, and they say, well, what is your industrial base, well, we are host to the toxic waste dump. Why don't you come on down and locate your plant here, too. Well, actually, we would prefer to go somewhere else.

Or we are host to the largest industrial dairy farm in the country, 48,000 cows, and we can set you up with prime real estate right next to their manure lagoons. The jobs are going to go elsewhere.

CHAIRPERSON BERRY: All right. Go ahead and ask your question.

MR. REILLY: I just have one additional question for both of you. Is environmental justice primarily about race, or is it primarily about income? This was heavily debated last month.

CHAIRPERSON BERRY: And could we get sort of brief answers.

PROFESSOR LAZARUS: I think it is primarily about both. I think it is very hard -- I mean, I think it is about

both, but that it is very important that it is not just about income, and that race itself as Luke suggested is a very powerful source of the explanation for the problem.

I think income is itself a very distinct problem, and the Civil Rights Commission obviously is concerned, and has certain kinds of criteria that they are concerned about, which is race, which is one of the classifications.

We don't have a general civil rights law for the poor. We have general civil rights law which prohibits discrimination based upon certain classifications, including race.

And race in this area really is significant. If you look at the studies, and even the studies that tend to question and be skeptical, if you read their studies closely, and if you don't just look at their conclusions, and at the beginning of the studies, and if you read the studies, they find race as well.

And they may find race less than some others, but there is hardly anyone that doesn't say that it is not race at all. Professors like Vickie Bean, if you read it closely, she will also say that she will find race in some areas.

If you looked at Kip Viscusi (phonetic) of Harvard Law School, and Jay Hamilton of the Duke Law School, they tend to be more skeptical. If you read their books, you will also see that they also do find racial.

They don't emphasize it, and the press releases on

them, if you read the studies, they are straight enough scholars, and if you actually read their data and read their conclusions, you will see that they acknowledge it as well.

MR. COLE: The answer as Richard said, it is both, but race has consistently found to be a stronger predictor of exposure to environmental hazards than income.

And Sheila Foster and I in my book, and we examined over 70 empirical studies. Now, there is a great danger in trying to aggregate the results of those because some were studies of cities, and air pollution, and some were studies nationally of water contamination.

But I am going to try and aggregate the results anyways. In my rough calculations from our research of these 70 studies, 38 studies found disparate hazards by race.

And five studies found that there were not disparate hazards of this particular -- whatever sort the study was looking at by race. And 15 studies found hazards were disparate by income, and where 4 studies found that there were not disparate by income.

And 27 studies found that they were disparate by both race and income. Those that found race and class independent predictors, six said that race was a stronger predictor, and two said that income was a predictor. Two studies said it was only race and not income, and one study said only income, and not race.

MR. REILLY: Thank you, Madam Chair.

CHAIRPERSON BERRY: All right. We will briefly see if any of the Commissioners have any questions. If you do, you will have one question each before we go on to the next one. Commissioner Meeks.

COMMISSIONER MEEKS: I just wonder, has there been a good example of a community and an industry working together that brought about a good solution; that there was community participation, and there was consideration from the industry?

PROFESSOR LAZARUS: I mean, I think there was some very creative solutions that had happened. I can't give you one, but I have a footnote in one of my law articles that actually lists some of the very creative solutions that occurred.

There was one in California, and there is another one in Connecticut, an article that is called "Environmental Racism" in the University of Illinois Law Journal from a couple of years ago, and it lists some of the creative remedies that industry and communities have worked out using Title VI quite often as leverage to exact more of a win-win situation.

My concern of course is that with the recent Sandoval decision that the loss of the threat of private enforcement, that we are going to see far fewer of those. It is not going to require the leverage imposed by the Federal agencies, and Federal agencies here are very reluctant.

Their remedies are much less effective than a private enforcement action because they are very reluctant at the end of

the day to cut off funding to a State environmental regulatory agency.

But there have been some very creative things done by industry and by communities, but mostly with the threat of Title VI looming over the horizon.

CHAIRPERSON BERRY: Commissioner Thernstrom.

COMMISSIONER THERNSTROM: I just want to get this straight. Are the two of you saying that there is never a tradeoff between jobs and solutions, and that this is a non-issue?

MR. COLE: Basically. I mean, there are economic tradeoffs in every decision we make, but what I am saying is that on balance the economic benefits of protecting the communities are much greater than allowing the communities to be polluted.

PROFESSOR LAZARUS: I would never say there is never a tradeoff, but my point is that the tradeoff is far less than is often suggested. That the costs are tremendously exaggerated on the one side, and the benefits dramatically underestimated on the other, but not that there is not a tradeoff.

CHAIRPERSON BERRY: Commissioner Edley.

COMMISSIONER EDLEY: I guess I would be very interested, and perhaps you could send this to us rather than responding right now if that would be more appropriate, in your suggestions about appropriate legislative responses, one, to Sandoval; and, two, to the longstanding bipartisan inability of Federal Agencies to aggressively implement environmental justice

norms?

I think the premise of my question is that that latter problem ain't going to be fixed by our million dollar spotlight or million Klieg light, and that is what experience and history suggests.

There may be some incremental changes here and there, but whatever party is running the executive branch, it seems to be very difficult for the reasons that you alluded to, to get aggressive enforcement.

So I am wondering if you have any thoughts now or later about how the statutes might be changed to improve the picture somewhat.

MR. COLE: I think we need a Civil Rights Restoration Act of 2002 to undo the very real damage that the Supreme Court has done in the last 5 years, and that has then been trickling down through Federal Courts.

And that would make statutory the ability to enforce a disparate impact standards. Now, I am a realist. Is that going to happen in this Congress? No. Is that going to happen under this President? Possibly.

His father passed the Civil Rights Restoration Act of 1991, recognizing the very real damage that the Supreme Court decisions of the late '80s had done.

CHAIRPERSON BERRY: Did you have a question?

VICE CHAIRPERSON REYNOSO: No, my question is

actually related -- well, as I understand it, Alexander is a statutory, and not a constitutional, decision.

MR. COLE: That's true.

VICE CHAIRPERSON REYNOSO: And I would also join in suggesting that if the two of you or each of you individually can put in writing your suggestions, I think that would be very helpful.

CHAIRPERSON BERRY: Commissioner Braceras.

COMMISSIONER BRACERAS: My question is a bit of a follow-up also. In the absence of any legislative reform, and while one is waiting for a potential legislative reform, I am curious as to how your litigation strategy has changed, and what other tools or hooks you might use?

I know that the South Camden case, at least in the Third Circuit, closed out the possibility of 1983. But I am wondering whether you think that is still viable in other Circuits, and whether there might be other legal hooks that you are pursuing.

MR. COLE: I think Section 1983 is viable in the Sixth Circuit, and clearly not the Eighth, Eleventh, or Third at this point. What many of us have done for many years is rely on State environmental laws as our best tool for achieving environmental justice. There are good strong laws, and --

COMMISSIONER BRACERAS: I'm sorry, but State civil rights laws?

MR. COLE: State environmental laws. There are good strong laws, and Judges know how to enforce them, and they are non-controversial, and that is the best bet. But to attack the disparate impact, we need civil rights laws.

PROFESSOR LAZARUS: The environmental laws on the books are very strong if you have got good legal representation behind you.

CHAIRPERSON BERRY: Okay. All right. Thank you very much for this panel. I thought it was very interesting, and I thought that the article that you wrote, Professor Lazarus, was interesting. Your stuff was interesting, too, Mr. Cole, but I had never even thought about all those other provisions in environmental law as being relevant to this until I read the piece.

MR. COLE: Madam Chair, can I just make one point, which is that focusing on environmental justice and enforcing the disparate impact standard, is focusing resources on a problem area.

And a lot of people think, well, we shouldn't treat any one people specially, and we should treat everybody the same.

But I want to try and use an analogy here, and I am hoping that this will work.

We want to protect all Americans from terrorism. Now, how do we do that? We as a country look at where there has been a disparate impact from terrorism. We go after airline

travel, and that is where we put our resources, our security resources.

Now, there is no argument that many millions of more people travel by car, by truck, by bus, but we put our resources into airline travel, because that is where we have identified the problem.

And nobody is suggesting that we shouldn't do that, or that we should focus the same resources on cars, and trucks, and buses. The reason that we are focusing on airline travel is that that is the way that we can solve the problem faster. By addressing where the disparate impact happens, we can protect all Americans more easily.

CHAIRPERSON BERRY: All right. Thank you very much.

I won't ask a question, but I will just say that left out of this was the politics of it, and most of which you said could have been said by any area of civil rights that we had up here.

If we had people from the Education Department, they wouldn't have been willing to cut off funds, and you would find that there is no -- because I used to do that, and we couldn't cut off funds.

But it was very interesting indeed, and let's see what the people from the government who have to enforce it have to say. Thank you for your time, and you are excused. And we do have sign-out procedures, and the staff will walk you through them.

Our second panel, if we can get this together, consists of representatives from the U.S. Environmental Protection Agency. During this panel, the EPA will discuss how it incorporates environmental justice into its programs and policies, including how environmental justice concerns are concerned in the permitting process.

And how the impact of its Brown-Fields program is measured, and what monitoring and accountability measures exist for Brown Fields and other programs; and EPA's role in lead paint removal and abatement.

We will also learn about Title VI enforcement efforts at EPA, and the handling of Title VI environmental justice complaints. Debra Carr, who is our next General Counsel, has handled this part, and I have already asked that the witnesses come up here.

And could the witnesses, the Honorable Linda Fisher, Mr. Barry Hill, Mr. Charles Lee, Karen Higginbotham, and Ms. Gail Ginsberg, please stand.

(The witnesses were sworn.)

Panel Two: U.S. Environmental Protection Agency

CHAIRPERSON BERRY: Thank you very much. Please be seated. The panel will make a presentation in which Deputy Administrator Fisher will begin, and then be followed by the others, with they having knowledge of how much time they have agreed to testify.

Linda Fisher is the Deputy administrator as I said of the EPA, and she has at EPA before I think if I am not mistaken. And then she went out to work in the big world of for profit sector for six months as I recall correctly, and is back now as deputy administrator.

Are we going to begin with Ms. Fisher? Is that how it goes?

MS. CARR: Yes.

CHAIRPERSON BERRY: Ms. Fisher, could you please proceed.

MS. FISHER: Thank you, Madam Chairman. I have been told that I am a recidivist to government service. I want to thank the Chair and the Commission for holding this hearing today and providing us with the opportunity to discuss the Environmental Protection Agency's very strong commitment to civil rights and to environmental justice.

I would like to introduce to you my colleagues from EPA who will be with me here today. On my left is Barry Hill, who is the Director of our Office of Environmental Justice; and to my right is Gail Ginsberg the National Chair, EPA's task force on Title VI.

Next to her is Karen Higginbotham, who is the Acting Director for our Office of Civil Rights; and to her right is Charles Lee, who is the Chairman of the Inter-Agency Working Group on Environmental Justice.

The thought, and the vision, and the passion of environmental justice at EPA has lightened the hands of these people who have done a tremendous amount about moving this issue forward. And it is my privilege to appear before you today with them.

When I interviewed for the job of Deputy last year with Governor Whitman, the very first issue that she raised was with me was the civil rights challenges that face our agency.

It was obvious to me from the way that she talked about these challenges that she had already given them a lot of thought, and had some very clear ideas about how she wanted them addressed.

That's why it was not surprising to me that under her leadership the EPA has reaffirmed its obligation to assure that every American, no matter where they live, and no matter what the color of their skin, and no matter what their economic circumstances are.

Everyone has the right to live in a clean, safe environment, and to receive the benefits of environmental protection. When it comes to protecting the environment and safeguarding public health, there should be no second-class citizens in our country.

Similarly, we have affirmed this unwavering commitment to providing at EPA a workplace that is free from discrimination. Governor Whitman and I have no tolerance for

discrimination in the workplace. And where it exists, we will try to root it out.

Over the past year, EPA's senior leadership has made these goals top priorities. Governor Whitman has been very deliberate about communicating her commitment to environmental justice and to a just and fair workplace to every EPA employee.

And as is her style, she has not just relied on pronouncement from on high, but has been leading the charge. For instance, last September, she was among the first to take the agency's two day civil rights training course for all EPA managers, a course developed and implemented at her direction.

That example has led to over 500 of our managers having completed the training already. We expect to have 1,600 managers and supervisors trained by this June.

In addition, in May, we distributed to our entire workforce the agency's anti-discrimination policies, and to ensure that every employee received this information, we require them to sign an acknowledgement form.

And we have included this as part of our new hiring orientation procedures. Of course, as we work to ensure a just workplace today and tomorrow, we must also address the lingering problems from the past.

Governor Whitman believes that persons who believe that they have been subject to unfair treatment in the workplace deserve a speedy resolution of that complaint.

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Governor Whitman believes that persons who believe that they have been subject to unfair treatment in the workplace deserve a speedy resolution of that complaint.

That is why in May, she appointed a special case closure team, charged with eliminating our Title VII cases. I am pleased to report that as a result of that effort, 90 percent of the serious delinquent complaints which have been pending when we took office have been investigated or completely processed at the agency level.

In addition, the Administrator, when she took office, found that the agency faced a substantial backlog of Title VI complaints. This backlog was unacceptable.

To address it, she established the Title VI task force, and gave its 13 members the responsibility and authority to review and investigate, and recommend resolution of these complaints.

Despite the complexity of the issues involved, we have been able to reduce by one-third that backlog. I am pleased to report that the EPA is devoting significant efforts to achieving a better integration between Title VI and America's environmental laws.

For example, we expect to finalize our Title VI draft recipient guidance this spring, and we are evaluating our investigations guidance by applying it to our current ongoing investigations.

As you will hear from my colleagues, our efforts to address the Title VI challenges we face, and advance the principles of environmental justice are comprehensive,

transparent, and visionary, and we have made significant progress in implementing the recommendations that were contained in the your 1996 report.

I should point out that environmental justice goes far beyond Title VI. It encompasses how we as an agency interact with Americans in every corner of our country. No community should become an environmental dumping ground because it lacks the resources to stand up for its own environmental health.

Governor Whitman has affirmed this principle in a memo to EPA leadership that was issued this past August. She requested their continued support and commitment in administering our environmental laws, and implementing the regulations to assure that environmental justice is in fact secured for all communities and persons.

And to assist EPA managers in addressing issues of fairness, justice, and equity, we are in the process of developing a handbook that will provide them with the practical advice on how to advance these principles in everything that the agency does.

As the Administrator has stated on numerous occasions, integrating environmental justice into our work is one of our top priorities. The commitment is also reflected in our determination, despite some recent court decisions, to prevent disparate impacts from environmental decisions on American communities.

The EPA has an important responsibility in ensuring

that every child in every neighborhood in America is protected from environmental dangers. Taken together, our efforts to ensure that EPA meets its obligations to all Americans reflects our fundamental belief in the principles of fairness, equality, and environmental justice.

And they must be successfully integrated into every one of our programs and policies. These principles need to inform all decisions that we make and all actions that we take. They do not and cannot stand separate and apart.

They need to be embedded into the very fabric of our agency's culture and structure. That, Madam Chairman, is our goal and our commitment. We have a ways to go, but we are committed to meeting that goal. Thank you.

CHAIRPERSON BERRY: All right. Thank you very much. There will be questions, but first we go on to Mr. Hill. I think Mr. Hill is next; is that right?

MR. HILL: Yes.

CHAIRPERSON BERRY: Oh, I see. Powerpoint. Great.

MR. HILL: If I can just get this thing to work.

VICE CHAIRPERSON REYNOSO: It is giving you instructions.

CHAIRPERSON BERRY: It says, "click." He clicked.

MR. HILL: Madam Chair, that is the problem, relying on all of this new stuff. It may not work.

CHAIRPERSON BERRY: Technology.

MR. HILL: Let me just go forward with the presentation, and not worry about this at this point.

CHAIRPERSON BERRY: We have the sheets, right?

MR. HILL: Yes. Yes, you do.

CHAIRPERSON BERRY: So we can look at those if we want to.

MR. HILL: Madam Chairperson, and Members of the Commission, thank you so much for allowing the agency to talk about the issue of environmental justice. The focus of my briefing is to talk about the distinction between Title VI and environmental justice, and frequently asked questions that are posed to assess the agency, and the importance of studies that were prepared by the National Academy of Public Administrators, and the Environmental Law Institute. And then I will talk a little bit about the future. There is unquestionably an overlap between Title VI and environmental justice. However, they are two distinct programs as a practical matter. On the left, we have the Title VI world, where it takes into consideration race, color, and national origin.

You also must have Federal funding for that issue to be addressed. On the right-hand side, the larger circle, all Americans. But we are focusing particularly on minority and lower income communities, and as Luke said earlier, there are 76-80 studies that have consistently said that minorities and low income communities are disproportionately exposed to environmental harms

and risks. That represents the environmental justice world.

Now, there are various allegations of instances of environmental injustice. We have listed seven, and the seventh on page five is a dispute over the siting of pollution generating facilities.

This is what generally people understand or equate to environmental justice, facilities being sited in a particular community. Luke talked about South Camden, and many of the other places. 'Single versus multiple approach?'

However, if you look at the other six things that are listed, a dispute over the method of cleanup at a site, and how clean is clean? How far must you dig into the ground to remove the soil. Should it be 10 feet, and should it be 6 inches. How clean is clean? That is a very important issue as far as communities are concerned. Arguments regarding the approach to cleanup, 'should it be done based upon media?' or 'should many issues, many environmental issues, be addressed at the same time?' If you look at these communities all across the country, and all across the world, you can see that they are inundated with these facilities. Luke talked about St. James Parish and 13 pollution generating facilities in one particular community.

That is a major problem. Do you address one facility, or do you address all at the same time? Now the one thing that comes up in each and every one of these things that are listed is environmental law. And going back to environmental law.

And as Luke said, the focus is on State environmental law, and that is the best bet. That is the way to go. But you also must think in terms of Federal law.

For the purposes of this briefing, I listed environmental justice litigation. That is slide number 6. There are three different types of environmental justice litigation.

The first is 'Anti-discriminatory Law Approach, using the equal protection clause of the 14th Amendment, which provides that 'no state shall deny to any person within its jurisdiction the equal protection of the laws.'

Now, plaintiffs, in order to prevail, must show discriminatory intent. There has been no case in the environmental law area that has been successful claiming discriminatory intent, while proving discriminatory intent. It has not happened.

The 'Title VI Approach,' which is the subject of this particular hearing, prohibits using Federal Government funding that discriminate on the basis of race, color, or national origin.

This area of law is in flux as Luke and Professor Lazarus talked about, and at this particular point it is the Federal Government that must pursue disparate impact regulations for that approach to work.

The third approach is 'Environmental Law.' Luke, in one of his articles, called it 'environmental law, with a twist.'

Basically, you are using existing environmental law to address

the concerns of these communities to ensure that laws are equally enforced.

Luke talked about the fact that that is the best bet.

From the point of view of the Agency, it is, in fact, the best bet. So, there are two frequently asked questions since there is no independent environmental justice statute on the Federal level. There may be a couple in the States, like California, Arkansas, and Louisiana. So the first question that is asked is, 'Are there statutory authorities and the implementing regulations that allow EPA to consider environmental justice as a viable policy issue in the permitting context?' We are focusing on permitting, because that is the subject of many of the complaints, and that is the first question. The second question is that, 'Assuming that there is authority, assuming that there is a statutory authority, how can the EPA integrate this, as a practical matter, from an administrative, from a management, point of view?'

The first question -- the statutory authority question -- has been addressed by the EPA General Counsel. The memorandum was the first time that the Chief Legal Officer of the Agency said that within existing environmental law, environmental justice is in fact embedded. You can integrate and you can address environmental justice. The ninth slide says that environmental justice is embedded, and Gary Guzy, the General Counsel, said to look in the area of integrating environmental justice into these major laws: RCRA, the Clean Water Act, the

Clean Air Act, the Safe Drinking Water Act, and the Marine Protection Research and Sanctuaries Act. So the first question has been addressed. Now, the second question, well, how do you do it from an administrative point of view. This is where the NAPA study was important, the National Academy of Public Administrators.

They issued their report in December of 2001, and it says environmental justice and EPA permitting, reducing pollution in high risk communities is integral to the agency's permission. That is the title of their report.

NAPA has a reputation for objective analysis, a reputation for tackling very difficult issues, in a thorough and comprehensive manner. If you look at the 11th slide, there are five strategies we believe exist as far as successfully integrating environmental justice into the way in which the Agency does business.

It starts with 'Advice and Recommendations.' The Agency utilized the advice and recommendations that were issued and prepared in this report environmental justice and the permitting process by the NEJAC, the National Environmental Justice Advisory Committee. They specifically said look at the legal authorities of EPA. The second state is 'Analysis.' We have legal and we have administrative analysis. The legal analysis was done by Gary Guzy, what I talked about a few minutes ago. The administrative analysis was done by NAPA, with their

December report. The next stage is 'Training,' and once you say this can be done, how is it that permit writers on a daily basis in the Federal Government, and in the State Governments that have delegated programs, how can they take environmental justice into consideration as they look at the application, and they make determinations, or they set conditions for issuing this particular permit?

Obviously, the people who do this on a daily basis need training, and the Agency is in the process of developing training for RCRA, the Clean Air Act, the Clean Water Act, and permit writers, to demonstrate how environmental justice can be integrated.

You have Implementation in the next stage, and the whole notion of accountability from the top down, from the Administrator, Linda Fisher, and each and every person at EPA, including permit writers.

Finally, you have 'Evaluation.' How is this going to be examined? The Inspector General's Office is going to be asked to look at these three major areas, these three major programs, to determine whether or not they have successfully integrated environmental justice in the way in which they do business in the permitting area.

The next slide talks about the importance of the ELI study, the Environmental Law Institute, which is the leading think tank in environmental law and policy, not only in the United

States, but around the world.

Now, they placed their prestige on the line and they issued a report in December of last year, 'Opportunities for Advancing Environmental Justice and Analysis of EPA Statutory authority.' It builds upon the request or the recommendation that was made by NEJAC.

It builds upon the work that was done by Gary Guzy in his December 2000 memo, and what ELI did was that they examined each and every law that is administered by the EPA.

This is being examined by the Office of the General Counsel, and as Richard said, the law is kind of difficult. These statutes are kind of difficult to understand, and we understand that at the Agency. The second part of the ELI study is to develop a handbook for citizens to interpret these laws in such a way that citizens can understand and implement, and use these laws to address their concerns.

The next slide, Number 13, is looking at all the other statutes above and beyond RCRA, the Clean Air Act, and the Clean Water Act. The same analysis, and the same approach, and training, implementation, and evaluation, will be done.

The future. Where is the Agency going? At the beginning of this hearing, you talked, Madam Chairperson, about how the Administrator's memorandum, the August 9th memorandum, was hailed by everyone at the previous hearing, because it really sets the tone. It is a directive. If you look at the words on the

piece of paper, those are incredibly beautiful sounding words. The future is to make those words come to life.

All of the things that she has laid out in her memorandum, Section A, conducting our programs and policies in a manner that ensures a fair treatment of all people, including minority populations, and/or low income populations.

Section B. Ensuring equal enforcement of protective environmental laws for all people.

Section C. Ensuring greater public participation in the Agency's development and implementation of environmental regulations and policies.

And, Section D, improving research, data, and data collection for agency programs.

And, she says, in sum, that environmental justice is the goal to be achieved for all communities and persons across this nation.

Finally, she talks about the NEPA, which is the basic environmental law which sets the tone for the entire Federal Government; and her quote is that Congress could not have been any clearer when it stated that it shall be the continuing responsibility of the Federal Government to assure for all Americans, quote, safe, helpful, productive, and aesthetically and culturally pleasing surroundings.

My colleagues here with me sitting at the table, and my colleagues back at the Agency, we are in the process of

implementing this particular memorandum because it is, in fact, viewed as a directive. That is how we view it, and that the future of environmental justice in the Agency. Thank you so much.

CHAIRPERSON BERRY: All right. Thank you very much.

Is Mr. Lee next? Mr. Lee, please.

MR. LEE: Thank you, Madam Chairperson. I, too, want to express my appreciation to the members of the U.S. Commission for Civil Rights for this opportunity to testify before you.

I am the Associate Director for Policy and Interagency Liaison for the EPA's Office of Environmental Justice, and I have the privilege of chairing the Interagency Working Group on Environmental Justice.

The Interagency Working Group on Environmental Justice was established by Executive Order 12898, which was signed in 1994. I would focus my comments and the bulk of my written testimony is going to focus on the activities in the past couple of years, which have to do with the interagency working groups development of a collaborative model to address environmental justice issues.

In May of 2000, the 11 Federal Agencies in the Interagency Working Group, IWG for short, announced the beginning of 15 demonstration projects. They are a part of an Environmental Justice Interagency Action Agenda.

These demonstration projects followed the strategy of collaborative and constructive problem solving advocated by the

Office of Environmental Justice.

The underlying premise of this Action Agenda is that a collaborative model can indeed be an effective method for comprehensively and proactively addressing the interrelated environmental, public health, and economic, and social community-based concerns collectively known as environmental justice issues.

The IWG, in partnership with various stakeholders, including community organizations, industry representatives, State, local, tribal government, and others, established these projects to test this underlying premise.

There are four reasons why we believe this strategy represents a significant contribution to advancing the goal of environmental justice for all people.

One, establishment of the IWG was recommended strongly by environmental justice groups and community representatives because issues of environmental justice are multi-dimensional and invariably cross agency lines.

The IWG started to development mechanisms that comprehensively address these range of interrelated environmental, health, economic, transportation, housing, and other concerns. This requires greater cooperation and coordination among Federal agencies.

Two, because environmental justice issues are often complex local issues, which require a comprehensive and proactive strategies, it is critical that impacted communities play a role

in defining solutions. This requires local visitation, capacity, and partnerships.

Three, as Barry Hill mentioned, it is the goal of the Office of Environmental Justice to integrate environmental justice within the core missions of EPA and other Federal Agencies.

To this end the goal of Environmental Justice rests upon greater utilization of existing statutory authorities not only in the EPA, but in other Federal Agencies as well.

And, four, evolving solutions to often complex environmental justice concerns require proactive solutions in which all stakeholder groups play a role to their solution.

The success of such efforts depends greatly upon the level of understanding, trust, and partnership that exists among different groups. It is therefore important that these demonstration projects have received enthusiastic and widespread endorsement from all stakeholder groups, community, industry, and others.

You will note that Sue Briggum in her testimony on January 11th pointed to this as a model that should be looked at.

Another example of this is the recent National Environmental Policy Commission's report to the Congressional Black Caucus Foundation, and the Environmental Justice Brain Trust, which was convened by Congressman James Clyburn.

It reads that, "the IWG demonstration projects are particularly significant. They point to the potential to problem

solving across stakeholder groups in a constructive and collaborative manner, building relationships, avoiding duplicated efforts, and leverage, instead of wasting resources."

The IWG intends these demonstration projects to promote Federal Support of solutions that begin in and remain in the communities. Two, coordinate Federal, State, local, and tribal governments, with comprehensive community-based planning processes.

Three coordinate activities and multiple government and private entities to use resources more effectively. Four, develop a template for integrated and holistic local solutions to environmental justice issues.

And, five, to serve as a platform for advocating and demonstrating innovation in government at all levels. To date, these 15 demonstration projects have accomplished a wide range of successes, including the following.

Establishing strong working partnerships of more than 150 organizations and 11 Federal Agencies. Securing commitments of more than \$15 million in public and private funding to address a range of issues.

Three, augmenting existing boundary redevelopment initiatives to fully meet the quality of life and economic development needs of diverse communities.

Four, using innovative approaches to foster local capacity and partnership building through alliance of community

and faith-based organizations, develop community-based planning and envisioning, and leveraging of existing resources.

Using alternative dispute resolution and consensus building processes to address as appropriate cases of conflict or potential conflict. Next, addressing children's health issues in a number of minority, low-income, and tribal communities.

And lastly identifying some key elements of a systematic model for holistic integrating and collaborative problem solving. I am going to just mention a few, because of the time, of the specific examples.

In Spartanburg, South Carolina, a holistic community cleanup and revitalization effort involving many Federal agencies is taking place with a community-based organization of over fourteen hundred members named "Re-Genesis."

In Puerto Rico, there has been developed a comprehensive strategy to address asthma. In Barrio Logan, which is a Mexican-American community in San Diego, through a facilitative process, 20 organizations have come together to address air quality, children's health, and land use issues.

And this has resulted in the U.S. Department of Housing and Urban Development working with the City of San Diego to secure a million dollar grant on lead hazard controls for Barrio Logan.

In Chicago, in the West Garfield section, Bethel New Life, which is a faith-based development organization, the

executive director's -- Mary Nelson -- model for their work is turning environmental liabilities into community assets and opportunities.

In Alaska, the Metlakatla Indian community is undergoing a process of cleaning up contaminated sites and a redevelopment plan that also involves alternative dispute resolution to address the allocation issues of liability between Federal Agencies.

In New York City, an effort to address the use of alternative fuels has resulted in the U.S. Postal Service committing \$1.93 million to alternative fuel clean natural gas vehicles and there are many more.

The design and commitment of more than 150 parties in 11 Federal Agencies to participate in the national environmental justice demonstration projects underscores the potential to create a problem-solving methodology capable of addressing environmental justice issues.

While we are cognizant that not all environmental justice issues are good candidates for collaborative processes, progress to date has shown in the short period that these projects have achieved measurably improved conditions through locally organized cooperative efforts.

Although circumstances of every project and issue is different, the shared elements to achieve progress in meeting these goals suggest that an underlying reliable model for

collaborative problem solving can be identified.

Therefore, we wish to share with the Commission the fact that the IWG is going to undertake a selection of another round of demonstration projects in Fiscal year 2002.

In conclusion, Madam Chairperson, I wish to say that there is indeed some good news on the environmental justice front.

We believe that there exists an integrated cooperative problem-solving method capable of addressing the multi-faceted interdependent environmental, public health, economic, and social concerns known as environmental justice.

I would like to make an observation from the vantage point of a person who has been privileged to have played an instrumental role in the emergence of environmental justice as a significant national issue.

As many of you know, I wrote the seminal report "Toxic Waste and Race in the United States," and participated in most of the key national developments associated with environmental justice over the past two decades.

During the January 11th hearing, the Commission grappled with the many difficult issues associated with environmental justice, some of which include the need to address both environmental and economic concerns, and reunifying the fields of public health and environment, and the desire expressed by all members of your community panel for truly meaningful and collaborative processes.

Madam Chairperson, you noted that while the issues associated with environmental justice were complex, contentious, intractable, and wide ranging, the emergency of environmental justice as an issue was a major positive development in the latter part of the 20th century.

Having worked on these issues for nearly 25 years, I want to say that while these issues are indeed complex, contentious, intractable, and wide ranging, they also are solvable.

And as a result of the work that that Interagency Working Group on Environmental Justice, a tangible collaborative model to achieve environmental justice has emerged, the elements of which are being understood, defined, and beginning to be replicated.

Moreover, not only do we believe these issues to be solvable, but we are beginning to see important successes that make a difference in the quality of life with distressed communities.

This is in my opinion a development of extraordinary significance, and one that we all -- community, industry, government, and society as a whole -- can benefit from.

We look forward to working with all parties who are desirous to address these important issues. Thank you.

CHAIRPERSON BERRY: Now, Mr. Lee, you took up everybody else's time. I forgot to look at the clock, and you

went over twice as long as you were supposed to talk. It was very interesting, and so I was distracted.

MR. LEE: I'm sorry.

CHAIRPERSON BERRY: And then I looked up and realized that you had gone 5 minutes over. I should have told you to put it in the record, but that was very interesting. Ms. Higginbotham, please.

MS. HIGGINBOTHAM: Good morning, and thank you for the opportunity to appear before the Chairperson and the esteemed Members of the U.S. Commission on Civil Rights today.

My name is Karen Higginbotham, and I am the Acting Director of the Office of Civil Rights at the U.S. Environmental Protection Agency. On July 2nd, 1964, Congress passed the Civil Rights Act of 1964, the most comprehensive piece of civil rights legislation since reconstruction.

The Title VI Civil Rights Act prohibits discrimination in all Federally-funded programs and activities, and specifically Title VI provides that no person in the United States shall on the grounds 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.

To prevent recipients from using Federal funds to subsidize racial discrimination, Congress authorized and directed Federal Agencies to implement and enforce Title VI in their

Federally-funded programs.

EPA exercised its authority in coordination with the Department of Justice by promulgating Title VI regulations in 1973, as amended. Recent questions have arisen about whether Federal Agency regulations prohibiting disparate impacts remain valid in light of the Supreme Court decision in Alexander v. Sandoval, and the Third Circuit's decision in South Camden Citizens in Action v. New Jersey DEP.

In those decisions the courts held that there is no private right of action for private parties to enforce the disparate impact regulations in courts under Title VI, and 14 USC Subsection 1983, respectively.

Neither Sandoval nor South Camden invalidated Title VI, or the Title VI disparate impact regulations. So Federal Agency's obligations to enforce the statute and regulations remain in effect.

And as a result, parties may continue to file administrative complaints with Federal agencies, including the EPA, alleging disparate impact in violation of Title VI regulations.

Since 1993, the Office of Civil Rights has received approximately 124 Title VI complaints. Of these 124 complaints, 83 have alleged adverse disparate impact for environmental permitting or alleged discrimination in the permitting process.

To date the EPA has accepted 36 complaints for

investigation, with an additional 10 complaints under review for acceptance, rejection, or referral, to another agency.

Of the complaints accepted, 29, or roughly 80 percent, were permit related. In 1996, the U.S. Commission on Civil Rights recommended that the EPA issue guidelines consistent with those called for by the DoD coordination regulations.

Specifically, the Commission called for guidelines that include detailed complaint procedures. Moreover, the EPA has received increasing requests for assistance by EPA recipients on how they can assure compliance with Title VI on the EPA's implementing regulations.

As a first step in addressing these growing needs for guidance in this area, the EPA issued its internal interim guidance for investigating Title VI administrative complaints and challenging permits in February of 1998.

Stakeholders raised concerns that the interim guidance is vague, lacks clarity, definitions, and failed to provide direction on critical issues. The Office of Civil Rights rewrote the guidance in an attempt to be more responsive to feedback and criticism received on the interim guidance.

On June 27th, 2000, the Office of Civil Rights published the draft revised investigating Title VI administrative complaints challenging permits, or for short, the draft revised investigation guidance, and the draft Title VI guidance for EPS systems recipients administering environmental permitting

programs, or in short, the draft recipient guidance, in our Federal Register.

The draft revised investigation guidance explains how the EPA will investigate and resolve formal complaints of discrimination that allege adverse disparate impacts from environmental permitting.

It also explains to communities and recipients the types of concerns that Title VI addresses and their role in the investigation process. The Office of Civil Rights developed the draft recipient guidance at the request of the States.

It is written for the recipients of EPA financial assistance to implement environmental permitting programs. The draft recipient guidance provides a framework to help recipients address situations that might otherwise result in the filing of complaints alleging violations of Title VI in EPA's Title VI regulations.

It is intended to offer suggestions to assist State and local recipients in developing approaches to activities that address Title VI concerns. The draft documents provide more detail and clarify than interim guidance. Plain language is used and more details are provided in areas where comments suggested that it was needed.

We believe that the draft guidance documents generally strike a fair and reasonable balance between the EPA's strong commitment to civil rights, and the practical aspects of

operating permitting programs.

The Office of Civil Rights continues to refine the guidance documents in response to feedback provided by both its internal and external stakeholders, while we continue to engage with senior management of the agency on a number of policy decisions with respect to the investigation's guidance document.

And we expect to release the draft recipients guidance in its final form by the late spring.

CHAIRPERSON BERRY: Would you try to sum up, Ms. Higginbotham, please. You are over, too, but we are going to try to not go as far over, as we need to ask questions, and that is the problem. You will get some questions, and we will enter your entire statement in the record.

MS. HIGGINBOTHAM: Okay. With respect to the Commission's recommendations and the Agency's pre-and-post awards grant reviews that was done in 1996 report, it should be noted that we have an overall agency awareness of weaknesses in our grants programs. and that we have undertaken significant progress in restructuring the grants organization, function responsibilities, the overall politics and processes.

And overall we believe that Agency direction with respect to the grants program in our civil rights program will provide us with the opportunity to better leverage all agency resources and our commitment to the Title VI program.

CHAIRPERSON BERRY: Okay. And we will enter

everybody's entire statement in the record. I should have said that before, and that is without objection. Ms. Ginsberg, please.

MS. GINSBERG: Thank you. Good morning, although I think it is about time to say good afternoon.

VICE CHAIRPERSON REYNOSO: Two minutes to go.

MS. GINSBERG: Thank you for the opportunity to discuss the EPA's Title VI task force. My name is Gail Ginsberg, and I am privileged to serve as Chair of the Task Force on detail from my official position as the Region V regional counsel in our Chicago office.

Your staff director is a distinguished alum of our office. In May of 2001, Administrator Whitman announced the formation of the Title VI task force. The task force was charged with the responsibility for resolving the backlog of title VI cases.

And those cases alleged violations of Title VI of the Civil Rights Act of 1964. The task force has been in operation since approximately mid-July of 2001. We have 13 full-time personnel from the EPA's Offices of Enforcement, General Counsel, Regional Counsel, Solid Waste, Water, and Civil Rights.

Together the task force members have experience in most of the EPA's program areas. There are also two civil investigators who provide assistance to the task force on an as needed basis.

In addition, we call upon the technical policy and

legal advice available in any of EPA's offices. The task force has been allocated funds to retain contract support as well in order to assist in our investigations.

By creating this task force, the Administrator devoted significant resources to eliminate EPA's Title VI backlog.

As of the creation of the task force, the agency had 66 open Title VI complaints, and 21 of the complaints had been accepted for investigation.

And 45 complaints at that time were still under review, meaning that the EPA had not yet made a jurisdictional determination whether to accept them for investigation, reject them, or refer them to another agency for appropriate action.

This jurisdictional review is conducted pursuant to EPA's Title VI regulations, which are found at 40 CFR Part 7. As of January 31st, 2002, the backlog had been reduced from 66 to 42 complaints.

And actually since then we have gone down another. We are now down to 41 complaints of the original 66. And 34 had been accepted for investigation, and actually now it is 35, which means that we have two cases remaining under review pending receipt of clarifying information.

And five cases which we have put in a suspense status because there is collateral litigation concerning those complaints that may impact the Title VI complaints.

At the time that the task force was created, as you

may know, the EPA was subject to a legislative rider which prohibited the agency from using appropriated funds to implement or administer the interim Title VI guidance for permit related complaints until that guidance was finalized.

The EPA construed that prohibition from the Congress to extend also to the June 2000 draft investigative guidance. As a consequence, for a period of 3 years, commencing in October of '98, the EPA could not act on most of the permit related complaints, Title VI complaints, pending before the Agency.

There were approximately 25 such complaints, which was nearly 40 percent of the backlog, placed in limbo by operation of that rider. With the removal of the rider in EPA's 2002 appropriations bill, which was signed just this past fall, the task force has now been able to conduct jurisdictional reviews on those complaints.

With a very few exceptions that will be resolved in the near future, all the EPA Title VI complaints and the backlog have been reviewed for jurisdictional sufficiency, and the complainants have been notified whether or not the agency will investigate their Title VI complaints.

While no decisions on the merits have yet been issued as a result of task force operations, investigations are under way on most of the accepted complaints, and the task force expects to propose resolution of a number of those complaints in the near future.

It will still be the responsibility of Ms. Higginbotham as acting director of the Office of Civil Rights to render those determinations in accordance with our regulation.

We estimate the task force will need to be in existence for approximately two years to eliminate the backlog of complaints. And any new complaints that come in after the creation of the task force will be handled by the Office of Civil Rights.

As you know, most Federal environmental regulatory programs can be and are administered by States in some manner. And EPA provides funding to State Agencies to administer those environmental programs, which is the scenario that usually brings Title VI into play.

The complaints on our Title VI docket involve most of EPA's major regulatory programs, and some complaints include more than one program or statute. Complaints involving permits predominate, but we also have complaints regarding alleged discriminatory public participation processes, and disproportionate enforcement.

Some complaints are site specific, but others make claims on a State-wide basis. In addressing the backlog of Title VI complaints, the task force looks to the statute, EPA's regulations, existing case law, analytical methodologies used by other EPA programs, and the draft investigative guidance published in June of 2000.

The draft guidance, while still under development in response to public comments, does represent EPA's best thinking on the issues raised on Title VI complaints.

I want to mention just in conclusion that although we do investigate these cases leading to determinations, we have a very strong emphasis on alternative dispute resolution, and attempting to come to informal resolution or voluntary compliance agreements in the context of the investigation.

Our goal is not to withdraw Federal funding, which does not really address the problems addressed in these complaints, and we would much rather reach a resolution which addresses the real environmental problems that these cases present.

Thank you for your time and attention, and I will be pleased to take questions.

CHAIRPERSON BERRY: Thank you very much. Counsel, could you please proceed with questions.

MS. CARR: Thank you. I think the first question we must address is something that we heard about in the first panel, and that is in the space of increasing obstacles to access courts to litigate issues of Title VI violations and environmental justice.

That that avenue has been closed, and you heard Luke Cole talk about how it is his assessment that in order for communities and vulnerable populations to seek redress that it is

imperative now for Federal agencies to become more aggressive in taking administrative steps.

I would like to know what EPA's position is now in light of Sandoval, and in light of the South Camden case, in terms of what it will do to either more aggressively withdraw funding, deny permits, or take other sanctions, since courts have seem to be not the place for these matters to be solved.

CHAIRPERSON BERRY: Who are you asking?

MS. CARR: This would be for Ms. Fisher.

MS. FISHER: Let me answer it a couple of different ways, and then ask my colleagues to join in. First of all, as I think Karen said in her testimony, we don't believe that those court cases have at all affected the ability of private citizens to bring administrative actions under Title VI.

And our agency will continue to review those aggressively as they come in. On a broader prospective, I think the discussion that Barry had about the steps that we are taking to integrate environmental justice issues into how we implement our programs is the way that we would see getting a lot of better adherence, in terms of how we implement our programs, to environmental justice concerns.

And he outlined the process that we are going through to both understand our legal requirements, train our people, and implement our programs in a way that will address these concerns.

So I think that those are probably the two main directions that

we see going ahead.

MS. CARR: Just a quick follow-up question to that, please.

CHAIRPERSON BERRY: All right. Go ahead, please.

MS. CARR: Communities have been concerned that the review process within EPA takes in some cases years for there to be a decision, and looking at the data about how cases are disposed, the vast majority of the complaints within EPA are dismissed, mostly for jurisdictional reasons.

So communities are faced with no access to the courts, and an administrative process that is more inclined to dismiss or reject complaints than it is to accept, investigate, and levy sanctions. How do you respond to that criticism?

MS. FISHER: Well, clearly the time frame and the backlog was unacceptable, and that's why the Administrator put together the task force that Gail has been heading to address that backlog, and it is our hope that both of the lessons that we have learned from those cases, as well as moving forward, our communities in the future won't have that delay.

It was unacceptable, and we are trying to do something about it. I think from my perspective the importance of looking at environmental justice beyond just Title VI is to address some of the issues that you have raised, where the cases might not meet all of the requirements that are found in Title VI.

There might not be Federal funding of a State

involved. They might have missed some of the other things. I think that's where we see the importance of looking at environmental justice through our environmental statutes as a compliment to Title VI.

And not having communities have to rely solely on Title VI to have those issues addressed.

MS. CARR: Ms. Ginsberg.

MS. GINSBERG: I was actually going to say pretty much what Linda said, that the task force was created in response to our acknowledged recollection or recognition that these delays had been too long, both in terms of doing investigations, and even giving preliminary responses to complainants about whether their complaints met jurisdictional requirements.

I understand your point that most of the cases we have disposed of have been on jurisdictional grounds, but I think we are obligated to follow our regulations and to apply those jurisdictional criteria.

But at least by giving people jurisdictional determinations, they know what the status of their case is now, which they did not for the past 7 or 8 years.

MS. CARR: One of the comments that NEJAC submitted to the draft Title VI guidance was that some of the jurisdictional requirements and reasons for dismissing complaints were quite technical and quite narrow.

That a complainant could show that the State was

receiving Federal funds, but a complaint could be dismissed for failure to provide an appropriate name contact, phone number, and those kinds of things. And that was part of the NEJAC criticism.

And the case that was mentioned, and the complaint that was mentioned earlier in Panel One out of New Mexico, advocates seemed to believe that that case is a good example of how EPA may be quick to dismiss, versus equally quick to investigate.

The advocates' view in the New Mexico case is as one where EPA dismissed the complaint for jurisdictional reasons, when in fact there were no jurisdictional issues. That it was dismissed because there was litigation or an appeal of an unrelated permitting issue.

And so how would you respond to that, that what we have now is the EPA looking for technical violations, minor violations, to dismiss cases and shrink its backlog?

MS. GINSBERG: I actually think just the opposite is true. We work very hard to find jurisdictional grounds to accept complaints. A lot of our complaints are filed by Pro Se complainants, and we work with them in repeated correspondence, e-mail, telephone, to try to help them give us the information that we need to make a positive jurisdictional determination.

And we only reject a complaint on jurisdictional grounds, where we have exhausted all efforts to make that jurisdictional finding. One of the hardest things sometimes is to

determine actually whether we have a recipient of Federal funding, and it sometimes takes us months to figure out whether an alleged recipient really did get Federal funding or do not.

And we work very, very hard at that. The New Mexico case is a little different. In the New Mexico case, there was a permit challenged in the Title VI complaint.

There was related, and not unrelated, but related litigation that didn't invalidate the complaint, or the permit, but ruled from the Supreme Court of New Mexico that the zoning variance had been improperly and illegally given.

So that although the permit rate remained in effect, it could never become operational by virtue of the zoning decision. If in the future something happens while that permit is still in effect, and I think it goes to 2007, if something happened on the zoning front that allowed the original permit to become operational, that complaint could come back to us, because then we would be able to evaluate the disparate impacts that were alleged as a result of that complaint or of the permit.

But since the permit can't ever go into operation, there is nothing for us to investigate absent some change on the zoning decision from the New Mexico Supreme Court.

MS. CARR: Assuming that things unfold as you have laid out, will this case be given priority or will it go through the normal processing channels if it is going to be reviewed as a permitting situation as listed?

MS. GINSBERG: Well, I have no way of speculating when or if that zoning ruling may change. If the task force does its job and raps up this backlog, the Office of Civil Rights should be able to process new incoming complaints in a very expeditious manner.

And we all hope that that will occur. Since the task force was created, only five new complaints have come in and the Office of Civil Rights has been dealing with them. So it is certainly our anticipation that new complaints in the future will be dealt with expeditiously.

MS. CARR: One final question in this area, and this is to Ms. Fisher. My first question included a part that you answered, but a second part that I am not quite sure I understood.

But the question was is the EPA going to change its approach and philosophy? You said earlier that EPA did not view sanctions, either the withdrawing of funds or the denying of a permit, as a real answer to a complaint.

The alternative dispute resolution approach by many advocates, and that is the approach that you think really gets to the heart of the issue, many advocates have said that that process puts communities at a disadvantage, because in alternate dispute resolution communities don't really have access to the kinds of technical and scientific information that would put them on equal footing with the companies and State agencies that they are having a disagreement with.

Advocates also say that the dispute resolution approach isn't in their long term best interests because there is no record of a case by case, and complaint by case, and complaint by complaint, approach.

And so therefore there is no record showing -- you know, a systemic pattern in a particular place, and no legal precedent that is being created that other communities could rely on.

So understanding that dispute resolution seems to work to the disadvantage of communities, and why won't EPA look at being more aggressive with imposing sanctions or with withholding funds.

MS. FISHER: Let me say two things, first, talking about the withholding of funds. Many of our programs that are delegated and implemented by the States have a provision that allows EPA to withdraw the program if they don't implement them, and Title VI carries that.

And it is a very difficult across-the-board penalty, if that is the right word, to impose on the state. And sometimes, and perhaps not even in the best long term interests of the environment, because it pulls those programs back to the federal agency that hasn't necessarily got the instantaneous access to resources to put down in that state, and solve those problems.

Our approach generally has been let's build the states up and make them strong, and then we will have more people

to address environmental justice, as well as environmental problems.

I think the reason that it was Gail in her statement, I believe, that talked about withholding of funds, that is something that you do to the State. It doesn't necessarily and immediately help the community.

And the ADR process, I would actually take issue with you. I think frequently our experience has been that it does bring the community together. It does improve the opportunities for public participation and allows for a much more community-based resolution, probably in a quicker time frame than if you actually went to the states and withheld funding.

I think the threat of that and the kind of political or public embarrassment if you will is important, and I think that state take that seriously.

The other thing that I would like to say is that from a precedential point of view, the agency does look at its track its track record with the results of ADR processes, and we try to build on them and use them in other cases.

So the fact that it might not constitute a legal precedent that you might get out of a true enforcement process is probably a true statement. But in terms of our precedent and what we learned from these sites, and how we would carry them, that information to other sites, it is very valuable and we consider it carrying forward lessons learned.

CHAIRPERSON BERRY: Counsel, do we have information on how many ADRs they have done so we can see what the communities think about it? Do we know?

MS. GINSBERG: We have at this point two of our complaints, where the parties have agreed to go into formal ADR. We have a number of complaints -- and in fact one that was just resolved this week, where the complainant and the recipient got together on their own without benefit of any intermediary and resolve the complaint.

I think it is important to point out that ADR has always entered into on a voluntary basis. We do not compel parties into ADR and the parties must agree before they enter ADR.

Another example is that the recipient indicated an interest in ADR, and the complainant said it was not interested, and that case is not going to ADR. We will investigate that case.

So it only occurs where the parties are willing and think that they will achieve something mutually beneficial as a result of going through ADR, and if ADR fails, and if they go through the process and they don't come through resolution, it comes back to us to investigate. So people don't lose their rights to ADR. They really gain more access to the process.

MR. HILL: Let me add something to this. If you look at the notion of the remedy that is sought through Title VI, the Agency, even if it goes through the entire process, what it can do is withdraw funds only.

However, at the same time, the communities are still experiencing the environmental harms and risks. So the question is, as Richard said earlier, Professor Lazarus, there are many opportunities where the community, the industry, the State and local governments, get together to address the environmental harms and risks.

Luke Cole mentioned the Shintech situation. That is Shintech-I, where Shintech sought to be sited in St. James Parish. There was a big national concern about what was happening.

It didn't work, because Shintech applied for the permit, the air permit, and then it sought to get the community involved. That is the typical way of doing things.

Shintech had invested a considerable amount of money, millions of dollars, with consultants buying property, so on and so forth. They decided that it didn't work this way. So they relocated to Plaquemine, Louisiana.

And they said that before we apply for the permit, they are going to get community input. In addition to that, they are going to hire a mediator/facilitator to address the concerns of the community prior to applying for the permit.

In that situation, Shintech-II worked. The facility is up and operating, and the environmental concerns have been addressed, and any other concerns that the community has had have been addressed.

That is a win-win for everyone involved under those

circumstances. Mediation does, in fact, work. It is voluntary, and people can sit at the table and resolve their disputes.

CHAIRPERSON BERRY: Okay. You may proceed.

MS. CARR: Just a couple of more questions actually, and then I will pass the panelists to the Chair for Commissioner questions. But, Mr. Hill, you said that ADR is a process where people mediate and negotiate their complaints.

I just would move on by saying what that process does is put communities in the position of negotiating and bargaining away their health concerns. Leaving the ADR issue, let's move on to the NAPA report that Mr. Hill mentioned in his presentation.

The NAPA report made some very specific findings and recommendations to EPA about better incorporating environmental justice into its mission. One of the observations of the report was that EPA seems to lack accountability measures.

That there are no clear standards for management and staff, and that there are no clear goals for performance, and there are no measures at the end of the day to gage how effective any of these programs really are.

And so the question here is has EPA, Ms. Fisher, responded to that criticism by putting in specific checks, guidelines, and measures, to guide it when we talk about how effectively EPA has been in advocating for environmental justice.

And how effective some of the programs that Mr. Lee mentioned have been, in terms of bringing environmental justice to

communities. And if these measures are in place, are there any sanctions, or steps, or remedial measures, that EPA will take if performance is sub-par or there is noncompliance.

MS. FISHER: Yes. Let me ask Barry Hill to address that because that has been part of the work that his office has done as we have moved to implement and integrate environmental justice into our programs.

MR. HILL: As I said earlier, the NAPA report was issued in December of last year. On January 24th, the Environmental Justice Executive Steering Committee of the Agency met.

The Executive Steering Committee is comprised of the Deputy Assistant Administrators of all of the program offices, and the Deputy Regional Administrators of each of the 10 regional offices.

These individuals are the senior management of the Agency. One of the things that we did talk about obviously was the NAPA study. And, the word 'accountability' was focused upon by the senior management of the Agency.

It was so important that what we did was that we created a task force made up of myself, the Inspector General's office, the Deputy Assistant Administrator from the Office of International Affairs, the Deputy Regional Administrator from the region, Region 9, to put together this whole notion and examine the word 'accountability,' and how it can be applied from the top

down.

So, the Agency, at this particular point, is looking at this very seriously, and consciously making an effort so that it can be coordinated and understood by each and every employee in the Agency.

And not only as I said earlier from the Administrator on down, I talked about the permit writers, and how are they accountable, and how can they be held accountable by their superiors.

So this is a word that is being -- that is not going to be bandied about loosely, and it is going to be implemented, and it is going to be followed seriously.

MS. CARR: In addition to trying to define accountability, are there specific recommendations that are being looked at, and what are those, and when could we expect clear recommendations out of this task force?

MR. HILL: The task force, we will be meeting. We are scheduling a conference call I think within the next two weeks, and we are going to get back to the steering committee.

The next meeting is going to be the first week in May, and that is when we are going to do a presentation to the rest of the steering committee about how we view the word 'accountability,' and how it can be applied, as a practical matter.

MS. CARR: How many times has this task force and

steering committee met? At what level are the members represented, and at what political level? How high, in terms of political rank, with the EPA or the members on the steering committee and task force?

MR. HILL: Well, as I said, the Deputy Regional Administrators and the Deputy Assistant Administrators, they come right below Linda. And the Assistant Administrators in the various program offices.

MS. CARR: So this is incredibly high up in the hierarchy of the Agency. How often do they meet?

MR. HILL: Since I came to the Agency in November of 1998, we have not met. And the reason why was in my opening statement to the executive steering committee, I said it is ironic that we are meeting at this particular point in time.

But it really is indicative of the fact that prior to this particular time we did not have anything to say to each other. We did not have anything to move on until this particular point.

And so that's why I gave you the various steps; the recommendations, the analysis, the training. We are at the training stage and at the implementation stage. That's where they come into play, with the use of the word 'accountability,' and applying it as a practical matter.

So at this particular point, we are moving forward aggressively to make sure that the recommendations that are in the

NAPA report, the recommendations that are in the ELI report, and all of these effort as far as training and other things, will begin to take place.

MS. CARR: Let me ask or go to one other area before we go into the Commissioner's questions. The NAPA report also found that EPA, in spite of the work that is going to be done by the steering committee and task force, has not actually as a culture come to embrace and incorporate environmental justice as part of its core mission.

And it made some specific recommendations about how to do that. Have any of those recommendations about how EPA could better incorporate environmental justice as part of its core mission been adopted by the EPA? And I guess the question would be to Ms. Fisher.

MR. HILL: I guess I can answer that one, too. As I said, the ink on the NAPA report is just beginning to get dry. We have not had the opportunity to move forward at this particular point.

And talking about changing of attitudes, if you look back at what President Eisenhower said as it relates to the civil rights laws, he said that you can change the laws, but you can't change the hearts and minds of men.

And that was an interesting concept and an interesting approach. What we are doing at the Agency is not necessarily seeking to change the hearts and minds of people, but

making sure that they take into consideration environmental justice in their decision-making processes on a daily basis.

But this is not only at EPA, but this is at all other federal agencies. This whole notion of trying to make sure that environmental justice is a consideration, the Administrator, when she was going through her confirmation hearings, the thing that she said was that environmental justice will be at the forefront of every decision that is made by EPA employees.

What has been taking place since she has come on board as Administrator is consistent with that particular statement. So again it is not a question of changing the way in which people are what they feel inside, and changing the way in which they do their jobs.

MS. CARR: I should never say one last question, but

--

MS. FISHER: Can I just add that changing culture of any large organization is difficult as anyone in the room knows who has worked for a large organization.

But I think the August memorandum that the Administrator signed was to send a very clear direction of how important she felt environmental justice was, and what we needed to do as an agency to integrate that into our programs and our philosophy, and our mission. And I think that the work that Barry's office is doing is trying to bring life to that.

MS. CARR: The memo that you referenced was quoted by

Mr. Hill when he talked about how the Administrator really felt, and that we should be providing in addition to a safe environment, an aesthetically and culturally pleasing environment.

Part of that would seem to be a consideration for a kind of social, economic, and cultural factors when we talk about environmental justice. But it doesn't seem that the EPA regulations take those factors into consideration when it is reaching a determination about environmental impact.

Why is that if the assessment is limited to help impact, and it does not appropriately reflect environmental concerns, and the long term economic impact that is facing a facility?

MS. GINSBERG: Well, I think -- and I will let Barry address this, too. But I think I would begin by saying that we have the laws that have been given to us by Congress and interpretations by the courts.

There has been some pushing of the envelope, but we need to be cautious that as we push that envelope that we don't incur backsliding. As I think Professor Lazarus said, the environmental laws are very difficult.

It is a very complex set of laws and regulations that we administer, and in many instances as Luke Cole said, it is really the State authorities that are somewhat broader.

For example, States have nuisance laws that don't exist at the Federal level, and are in a better position to

accomplish some of what you are talking about. And not to mention the fact that as I mentioned, most of the laws that we administer are delegated to the States.

And the States are really in the forefront of administering and implementing environmental laws. So a lot of the action does occur at the State level where there are broader authorities. Barry, do you want to add to that?

MR. HILL: Yes. Another way of looking at it, is that when you think in terms of environmental justice and in understanding environmental justice, what is it, it really takes into consideration four broad areas:

You have health indicators, economic indicators, social indicators, and environmental indicators. They are very much intertwined, and interrelated. If you look at any community across this country and across the world, and you use those four areas, you can make a determination as far as what's happening in that community, and who lives in the community.

Now, in order to address those concerns, it can't simply be just EPA. It has to be other Federal agencies, like HHS dealing with health; and like HUD dealing with housing; and Transportation dealing with those kinds of issues, and Commerce dealing with economic development.

And looking at and addressing the problems in a holistic method, that is what environmental justice involves. So your comment is well taken, and the Agency has taken this into

consideration in defining what environmental justice is, and assessing it, but also addressing it. It is not just an environmental issue.

MS. CARR: Just a comment. I was hoping for -- and this is not a question. I was hoping from this panel to hear specific recommendations from you about how to address the concerns that we have talked about.

I was hoping to hear out of this panel the EPA's action plan for approaching environmental justice issues from this point forward. But it seems what we have is an agency whose culture is still resistant to incorporating the idea fully.

And what we have based on what I have heard so far, is an agency that is doing a lot of soul searching and defining of concepts, and without having a lot of concrete things by which people can judge the success or failure of environmental issues.

CHAIRPERSON BERRY: Well, I would not want to reach any conclusions yet, counsel, but I myself would like to ask some questions if my colleagues will indulge me.

I usually don't do this. I usually wait until they finish, but I am dying to ask you 2 or 3, and so if you will indulge me, then I will do this. The first thing is, and my question is just rather nuts and bolts, practical things, so that I can get a feel for how much we can expect to see from you in the next two years, let's say.

And I know how tough these things are, and first of

all, of the EPA budget, what percentage is devoted to enforcing Title VI? What percentage of the EPA budget is in the Office of Civil Rights with this task force and the various inner-agency agreements?

And what percentage of your budget would you say is devoted to these tasks? The overall budget of EPA, I'm sure you - well, the overall budget, the entire budget of the EPA, what is it?

MS. FISHER: It is about 7.8 billion, I think.

CHAIRPERSON BERRY: So, \$7.8 billion, right?

MS. FISHER: Yes.

CHAIRPERSON BERRY: And the Office of Civil Rights, we should be able to figure out what the budget of that is.

MS. HIGGINBOTHAM: Approximately \$1.9 million.

CHAIRPERSON BERRY: So, \$1.9 million out of seven something billion dollars. Okay. And the budget of the Office of Civil Rights in 1993 was \$1.8 million. So it has not increased more than \$100,000 if I can count, or whatever, since that time.

And \$1.9, I don't know what percentage that is of \$7 billion, but it can't be very much, and that was before your time.

And keep in mind that I am not blaming any particular folks for this. I am just trying to get a picture of it.

And in addition to the \$1.9 in the Office of Civil Rights, how much would you say you are spending on, let's say, these committees, or the staff from somewhere else?

There are 13 people who are on this task force that you have, Ms. Ginsberg.

MS. GINSBERG: Right.

CHAIRPERSON BERRY: And even if we were to say that all of them we could attribute to civil rights enforcement, although from what you said, they may be doing other things.

MS. GINSBERG: No, no. They are all doing it full-time.

CHAIRPERSON BERRY: Right. And if we took the maximum Federal salary, and I don't know what that is, but 120 or whatever it is, and if they are all making the top Federal salary, and multiplied that, that would probably give us maybe no more than another million dollars if we were to do that, and I am just being generous.

So how much -- if you look at the amount of money that is being spent on these issues, and Professor Lazarus talked about how complex they are, and that they need a lot of brain power, mind power, and time to analyze, this is the amount of money that is being spent.

Now, I am wondering in terms of the rhetorical commitment -- and I know that Federal officials make rhetorical commitments; that's what they are supposed to do to various issues, and there are a whole array of issues and subjects that EPA has to work on.

But how are we in two years when this task force

closes down, and you tell us that in two years the backlog will be finished, you hope, and that the task force, that OCR will take care of these issues, how are they going to do that when we found in our 1996 report that OCR didn't have the resources to enforce Title VI then, and that they had very little or practically nothing to use to go out and monitor the States to see if they were enforcing Title VI and doing compliance reviews.

And that was before your time and they didn't have it, and earlier reports of this Commission said exactly the same thing. And now we are saying that they have got 1.9, and then you have the task force, and it is going to disappear in two years.

And then they are supposed to take over the burden and do this.~ What does EPA plan to do between now and two years from now to make sure that OCR at that time is staffed up and ready to go with whatever you implement through Mr. Hill's work, and everybody else's work, so that we are not sitting here the next time we call in EPA, and there will be some other faces, and maybe some other people up here?

And then ask them what they are doing, and all they do is read the same statistics after the rhetorical commitment? Ms. Fisher, could you please address that question first since you are a leading official in the agency? You are a leader in the agency.

MS. FISHER: Everybody comes to me for money. Well, there is a few pots you left out.

CHAIRPERSON BERRY: Okay.

MS. FISHER: And I believe since 1993 that we split off and put in the Office of General Counsel a separate section to deal with civil rights issues. Those monies I don't think are reflected in what you have there.

CHAIRPERSON BERRY: And how many people is that?

MS. FISHER: Charles, do you happen to know? I don't.

MR. LEE: Eleven.

MS. FISHER: Eleven.

CHAIRPERSON BERRY: So let's throw in another million. Pretty soon we are talking real money, and we are getting up there.

MS. FISHER: And Barry's office is budgeted at what, 4.5 million?

MR. HILL: Yes.

CHAIRPERSON BERRY: And he spends his whole time on these issues?

MS. FISHER: And all those people do. So it is a bigger pool, and admittedly perhaps not as high as you or I would like to see. I think there is additional -- there are additional resources that we hope to leverage.

There are resources in the regions that aren't counted in those totals. We have 10 regions in the country. Some of the specifics that you talked about as we move through our

training program, we will look not just to the people in the office represented here to be carrying out the environmental justice mandate.

But it will be done through our permit writers throughout the country, and so there will be a lot of work done by the Offices specifically assigned to these tasks. But a lot of it will also be carried out by people who are implementing the Clean Air Act, or the Clean Water Act, or the hazardous waste laws.

So I think my vision is that as this becomes much more part of our operating culture, the offices that I have enumerated will drive the environmental justice, and will steer those initiatives. But the responsibility for implementing them really will be shared by more.

And having said all of that, I think you have raised some good issues. And I think the one most on point is as Gail finishes her responsibilities, and that backlog is dealt with, the Office of Civil Rights and the counterpart to that office in the General Counsel's program, have the resources to be sure that we don't get behind again, and to manage those cases as we go forward.

And I think that is something that I will certainly take a look at.

CHAIRPERSON BERRY: And also engage in compliance reviews in OCR?

MS. FISHER: Yes.

CHAIRPERSON BERRY: Because as you pointed out earlier, that is a big part of the program, and the States get the money, and they are out there, and someone has to monitor to see what they are doing.

MS. FISHER: Yes.

CHAIRPERSON BERRY: And if the staff aren't there, they obviously -- they could not do it before, and so they obviously would not be able to do it again.

MS. HIGGINBOTHAM: Actually, Madam Chair, we have actually identified specific resources to initiating actions to start our compliance policy. And also as part of that compliance policy is the monitoring of grants.

And it is our intent to leverage other agency resources if you will through our entire grants program, and to have an overall agency approach to implementing a full compliance program. So you may not see the dollars or the actual resources to count it in the Office of Civil Rights.

But for us, we have hired people on board this year who are here right now working on development of a compliance program, and also a training component to help the grants program do the monitoring of the grants.

CHAIRPERSON BERRY: How many States have done compliance monitoring, or have reports on, or assessments, in the last year on Title VI?

MS. HIGGINBOTHAM: I'm sorry?

CHAIRPERSON BERRY: States that have EPA funds, Title VI compliance, to either monitor or report, and find out what they are doing? That's what I mean by compliance reviews.

MS. HIGGINBOTHAM: I understand the compliance reviews, Madam Chairman.

CHAIRPERSON BERRY: Yes, but you just didn't hear me? Okay. All right.

MS. HIGGINBOTHAM: I wasn't sure what the question was.

CHAIRPERSON BERRY: Okay.

MS. HIGGINBOTHAM: Our office has not done any compliance reviews in the past year.

CHAIRPERSON BERRY: Okay. I just wanted to know. We don't -- we find often that the amount of money that is appropriate for civil rights enforcement is much less. It is much less in every agency and in every budget.

COMMISSIONER WILSON: Including this one.

CHAIRPERSON BERRY: Including this one, and no agency that gives out money has enough money in its civil rights office. I mean, the one in HHS, for example, is minuscule, and has been for years.

We have been calling attention to deficiencies in the budgets for years. So we are not picking on you. We are just pointing out that that is one of the realities and you can't expect anything to get done. Commissioner Wilson. Yes?

MS. FISHER: Let me just say that in preparing for this hearing that I think we have made a lot of progress across the agency in a number of ways in dealing with environmental justice.

This is probably one area that we need to do some more work on, in terms of how we are really going to be effective in working with the states. So whether that is a budget answer, or an implementation issue, it is one that I think we need to do more work on.

We have focused on some of the other things first, and so hopefully when we come back in a couple of years, you will see an increase in improvement.

CHAIRPERSON BERRY: Thank you. Yes, Commissioner Wilson?

COMMISSIONER WILSON: Thank you, Madam Chair. First, I just want to clarify that what I was just saying was that the budget that we have overall to work with in the U.S. Commission on Civil Rights, and not what we, the Commission of Civil Rights, spend on civil rights.

I would like to thank you all for coming here, and it has been very interesting to hear what you have had to say. I am heartened to see that there is this task force, even though it will be disbanded in two years, and let's hope that it won't be needed in two years.

I have to say that I have heard a lot of general talk

here today, and perhaps we should have started off with this, but I would be interested to know, Linda Fisher, what your definition is for the agency of environmental justice?

MS. FISHER: We have --

COMMISSIONER WILSON: No, no, not Mr. Hill.

MS. FISHER: No, I know. We were talking about as we prepared for the hearing the difficulty in coming up with very clear and precise definitions that we could all understand and agree, and implement throughout our programs.

So that's why I looked at him, and in defining not only exactly what it means, but then how it applies, and what is the precision that you need, is difficult.

COMMISSIONER WILSON: And to whom does it apply. But that is sort of the easy part. But try the first part.

MS. FISHER: Well, I think that generally speaking we see it as an agency as being sure that our laws, our environmental laws, are implemented and carried out in a way that provides equal protection to -- equal environmental and health protection to all citizens throughout the country.

And that they are not implemented in a way that allows or provides for, or tolerates, or creates, environmental dumping grounds.

COMMISSIONER WILSON: Does anyone want to amend that or --

CHAIRPERSON BERRY: She's the boss and they can't do

that.

COMMISSIONER WILSON: No, you are disqualified. I have heard what you have to say. That is the reason that I am asking the question.

MR. HILL: Well, maybe I am the best person to give the answer then.

COMMISSIONER WILSON: I don't know. If you are specific.

MR. HILL: Very.

COMMISSIONER WILSON: Okay.

MR. HILL: It is really right in the August 9th memorandum on how environmental justice is defined by the Agency to two components, fair treatment and meaningful involvement.

And what Linda was saying about enforcing the laws equally and not making any environmental dumping grounds are aspects of it, are manifestations of it. But the basic definition are those two components, fair treatment and meaningful involvement.

COMMISSIONER WILSON: Okay. I have two more questions. The second question is has the EPA documented examples of environmental injustice within your programs, and if so, could you please give some examples of what they are, and what they have been?

MR. HILL: Documenting examples of environmental justice?

COMMISSIONER WILSON: Injustice.

CHAIRPERSON BERRY: Have you ever seen any?

COMMISSIONER WILSON: I think there is plenty to go around. It's just has it reached your agency.

MR. HILL: Well, in the slide show that I wanted to give, the various instances in each and every one of those things that are on page 4 and page 5 of the presentation are actual problems.

Let me just take one of them. Let's say five, the notion of proximity, and the effects of pollution on approximate populations, versus the adverse health effects on the populations living downstream.

That came from a situation that occurred in Upstate New York. You have the St. Regis Mohawk Reservation that is downstream from three industrial plants; General Motors, and Alcoa, and I can't remember the other one at this particular point.

As a result of decades of emitting contamination, the tribal lands have been contaminated. At this particular point, any crops grown on the reservation are suspect because it is so contaminated. They can't fish.

So how do you address that issue, and how do you clean up that particular site? At the same time, the community living upstream from those three plants, the 6,000 people have been hired by those three facilities.

And only 10 or 12 of the employees of those three facilities are Native Americans. So in that situation, you have the Native Americans disproportionately exposed to environmental harms and risks without receiving the benefits of those three facilities being there.

That is an environmental justice issue, and in answer to your question of documentation if you will of environmental injustice, and that's why I say each and every one of those examples are real life situations.

MS. GINSBERG: Could I try a separate approach? Based on my regional experience where I have been doing enforcement work for the last 10 years, as Luke Cole and Richard Lazarus said, there is or there are volumes of studies that document environmental injustice.

And it is intuitive that there are issues and situations that need to be addressed. In putting together an enforcement program, and trying to be mindful of the situations that minorities and low income people experience, we attempt to use those factors in determining where to bring enforcement actions, and what kind of remedies to seek in enforcement actions.

One of the things that we have been most successful in doing in our enforcement program is using supplemental environmental projects that can offset penalties that a company would pay to do something positive for the community.

And when we have that opportunity, we consult and

bring in the community to help us develop projects that directly respond to their needs that will resolve an enforcement action.

Now, there has to be some nexus to the violation that the company has committed, but we try to bring in the community and have them help us resolve those cases so that they can get some benefits, some direct benefit out of the remedy to some enforcement actions.

And we have been quite successful across the country in doing that, and I have the personal experience in Chicago.

COMMISSIONER WILSON: I don't know if any of you had representatives who were at our meeting in January listening to people who came to testify. Over and over, and over again, they said the same thing about Title VI and the EPA, and frustration, and I have to tell you that it was extremely -- it was distressing, and it was heartbreaking.

And I can see that you are trying and you are making efforts, but when President Eisenhower was quoted as saying you can't change the hearts and minds of men, leaving out of course 50 percent of the human race, I have to say that I totally disagree with that statement, because without changing the hearts and minds of men and women, you don't have change in society.

It is not all made by law, and it is made by illumination and evolution, and a change of attitude is really what I think is at the heart of this issue, and I wish you had had some people here to --

MS. FISHER: We did.

COMMISSIONER WILSON: You did? That's good.

MR. LEE: Can I respond to your question?

COMMISSIONER WILSON: Yes.

MR. LEE: And I was here.

COMMISSIONER WILSON: Good.

MR. LEE: And actually I have been through many, many communities throughout the many years that I have dealt with this issue. And that was before I came to work at the EPA about 3 years ago.

And I think that the question that you asked is a very good one. And actually it is not -- well, I think you can answer on one level with a whole host of different examples.

And then on another level, I think we need to talk about answering or asking the right questions in order to answer your questions in such a way that it really leads to making some difference.

And I would just say that "Toxic Waste and Race" is -- well, just one -- well, one of the seminal events dealing with environmental justice took place in Warren County in 1982. "Toxic Waste and Race" was published in 1987.

And no more than 5 or 6 years later, or -- well, no, about 4 years later, EPA establishes an Office of Environmental Equity in 1992. And two years later, the President signs an Executive Order, and there is all this other activity that is

going on.

And there isn't a whole lot of time, and the point that I was trying to make is that these are in fact very complicated kind of questions. And I think that I would answer your question by saying, one, I think that our ability to analyze these issues -- and the question that is most often asked about whether a community is or is not an environmental justice community, I think falls short of what we need to or how we need to understand this.

And that's because there are in fact issues in environmental justice embedded in a whole lot of other issues. So the question is more precise when you are understanding that.

So some of the studies that are in fact much more precise, in terms of understanding environmental justice, is looking at more than just in the proportion or composition of populations.

For example, Manuel Pastor, from the University of California at Santa Cruz, has found that rates of change, of ethnic change, and the placement of noxious facilities, is correlated. And he coined the term, "ethnic churning."

And Dr. Hamilton, down at Duke University, found a relationship between the placement of noxious facilities, and the number of people that vote.

And so we needed to have I think more precise analytical lenses. I think that if on the context of where Barry

and Linda are coming from, in terms of integrating environmental justice with the functions

-- you know, the regulatory, and other functions of EPA, such as permitting and many other things, we have to find the right analytical tools, such that it becomes really useful to the permit writer.

And so I think we needed to do that, and when it comes down to it, you know, these would apply to a lot of other types of situations. I mean, you will hear I think this afternoon that many of the environmental justice issues are going to come around in a nexus in terms of transportation.

And transportation issues, which are involved in land use and infrastructure, and all different kinds of questions are just one example of where we need to have more and better analytical lenses. So that is on the one hand.

On the other hand, I think that the discussion around Title VI is an extraordinarily important one I think, but the other discussion that has not really yet come to the fore yet is the fact that when Linda and Barry talk about all the other tools that are available, in terms of existing statutory authorities, and I am not just talking about EPA, but all the other agencies, what we are talking about really is creating a toolbox that is broad-based and applies, and that can be useable for the various kinds of situations that are out there.

So I think that in the evolution of the discussion of

environmental justice, the issue of Title VI came to the fore, and it has been grabbed on to as if though it was the only remedy. And there is a phrase that goes, you know, if you only had a hammer, then everything is a nail.

And where in fact -- and so how helpful is that to the problems that really exist in these communities. So that when the point is made about the remedy in Title VI and its relationship to the actual conditions -- I mean, that is the point, and I think we need to get a better understanding of that.

And then I think in terms of this tool box, this tool box is not just a regulatory tool box. It is a tool box that has included in it all kinds of different things, and in effect the discussion around collaborative processes and the bringing to bear of all of the kinds of agencies and statutory authorities, and in terms of transportation, and housing, and everything else that has to do with environmental justice, and the bringing to bear the health and research kind of needs for environmental justice that you talked about on January 11th, are all part of this puzzle.

I would say that it is very important that part of this does involve creating a dialogue that is very much collaborative and gets to the heart of a lot of issues or values.

CHAIRPERSON BERRY: Well, Mr. Lee, we are going to have to --

MR. LEE: So I think the development of a tool box

that includes all of those are really very important. And I would say that if you look at the history of environmental justice, from the point of view of once it came to bear, or once it came forth, to now is a very short period of time.

And we have got a lot way to go, and that is not just government, but everyone else involved in this as well.

CHAIRPERSON BERRY: Was it your statement, Ms. Ginsberg, I think it was -- and I forget who made the statement, and whether it was Ms. Ginsberg, or -- well, I think it was you, but was it your statement that the ADR process worked in the Shintech's case in Louisiana, and that that was one of the places --

MS. GINSBERG: No, Mr. Hill talked about the Shintech situation.

CHAIRPERSON BERRY: Was that your statement, Mr. Hill?

MR. HILL: Yes.

CHAIRPERSON BERRY: So your statement under oath is that the ADR process worked in the Shintech's case in Louisiana and that the community and the company in this process -- that the community did not feel disadvantaged, and the process worked, and that is an example of a successful process at a time in which the community did not feel that it was advantaged about; is that your statement?

MR. HILL: My statement is this. I was talking about

Shintech One in St. James Parish, and then I was explaining Shintech Two in Plaquemine, Louisiana. In Plaquemine, Louisiana, the process did work as it relates to mediation. So in that sense, yes, my statement was accurate.

CHAIRPERSON BERRY: So you disagree that in Plaquemine, Louisiana, that there were a series of community consultations and strong opposition from the community, which forced Shintech to move its facility to West Baton Rouge Parish.

And that there were several complaints from many residents in West Baton Rouge Parish that Shintech has not followed through on many of its promises that it made. So would you deny that any of this is the case?

MR. HILL: Well, I am saying that in Plaquemine, Louisiana, and I don't know where West Baton Rouge Parish is as a practical matter.

I don't know, but from what I understand, there have been no Title VI complaints filed against Shintech in Plaquemine, Louisiana. That's true. That's an accurate statement, but I don't know anything about West Baton Rouge, or anything like that.

CHAIRPERSON BERRY: My question was as it relates to Plaquemine, Louisiana, was there strong opposition from the community which remained throughout this process; and that ADR was not necessarily a process which the community felt benefited it as an example of the success of the ADR process. That is my question.

Is that an example of the success of the ADR process in your view?

MS. GINSBERG: Chairman Berry, you understand that there was Shintech One, and then there was Shintech Two?

CHAIRPERSON BERRY: I understand.

MS. GINSBERG: Shintech One was a problem situation, and Shintech Two worked, and as Mr. Hill said, there have been no complaints filed with respect to Shintech Two.

CHAIRPERSON BERRY: But I didn't ask you if there were complaints filed. I asked you whether there was opposition in Shintech in Plaquemine, Louisiana?

MR. LEE: I will say this. I mean, you know, the evolution of the Shintech case from the point of view of the company as it -- you know, as it viewed the St. James Parish part of that history, and as it was forced to leave and went to Plaquemine.

And I think that Shintech as a corporation learned a whole lot, and it will state that it made significant mistakes in approaching St. James Parish. Now, the situation in Plaquemine is not necessarily black and white either.

It is a complicated situation, and there is in fact groups that were opposed to the siting of Shintech in Plaquemine.

Now, I think -- and here it becomes a question where the full complexity of this I think needs to be examined.

And I think it would do you well to ask some of the

mediators who were involved in that situation to get from them how they saw this all unfold. I will say this, that one of the persons being Don Edwards, from Justice and Sustainability Associates, and Meridian Institute being another, that they had written into their agreement with the two companies involved, which is Dow Chemical and Shintech, certain conditions around which the concerns of the communities have to be heard.

And the process being totally transparent in that sentence, right? And the --

CHAIRPERSON BERRY: Mr. Lee, we can follow up on that. My only question -- and we have to break before we have the 1:30, but I just wanted to know whether in the context of the ADR discussion we were having the alternative dispute resolution, where counsel asked whether communities sometimes might feel disadvantaged.

And as a matter of fact, I think that she had that discussion with you, Ms. Fisher, whether the Shintech case that someone else mentioned, and not you, Ms. Fisher, that as an example, could we look at Shintech One or Shintech Two as positive examples where communities did not feel disadvantaged.

And that was my question, because the impression that I got from the discussion was that this was a positive example, and I just wanted to know whether that is your statement and that is what you stand by.

And that if we look at Shintech One, and Shintech

Two, we will find positive examples of the community and the companies getting along without undue disturbance on the part of the communities at the end of the day, and that was the only thing that I asked.

And so the answer to that is yes or is the answer to that no?

MR. HILL: The answer to that is yes.

CHAIRPERSON BERRY: The answer to that is yes?

MR. HILL: Yes. Shintech One was a disaster, and Shintech Two was a better experience as far as all the stakeholders involved.

CHAIRPERSON BERRY: Okay. Does anyone have a question that they want to ask?

VICE CHAIRPERSON REYNOSO: I have three questions and I would like to ask that you answer them in writing, and I would like for the staff to send me a copy of the answers.

Question Number 1 is the EPA going to make a recommendation to the Administration to itself make a recommendation to Congress to clarify the law that individuals in fact can proceed under Title VI?

Two, could you give me examples of negotiations where the EPA has established or suggested conditions before a permit was granted or areas in which the EPA was involved, and changes were made in the negotiation process that got the end process a lot closer to the issue or to the conclusion of having environmental justice.

And, three, have you considered or would your law permit if you had proper regulations, to have an office of advocates? That is, an office where a complaint is brought to you, and you would actually provide assistance to the complainant to understand the complexities of the issue.

And in proper circumstances, even reimburse the complainant's for their efforts, and particularly their attorneys?

What I have in mind is that in California the Public Utilities Commission, for example, has a process of actually reimbursing folk who bring complaints to them.

And I believe it is under the notion that if those complaints are upheld, or they are of assistance to the Commission, the public weal will have been advanced. I just want to be sure that you understand my questions. Are the questions clear?

MS. GINSBERG: I understand 1 and 3, but I am not sure that I understand two.

VICE CHAIRPERSON REYNOSO: Well, two -- well, the testimony was that the only power that we have is to terminate funding to States. But I know that States can be responsive if one says, look, you are doing things wrong, or your plant is wrong.

But if you change it in A, B, and C, then we will fund you and agencies are often responsive to that. So I assume that you have had those sorts of experiences. And I would just

like to see some examples of those sorts of experiences. That's all.

MS. GINSBERG: Okay. That's helpful.

VICE CHAIRPERSON REYNOSO: Okay. Great. Thank you, Madam Chair.

CHAIRPERSON BERRY: Mr. Meeks.

COMMISSIONER MEEKS: I just have one really quick question, and it is on a little bit different subject, and it relates to a later panel. You talked about your inter-agency and working with inter-agencies. But to what extent do you work with other agencies, such as BIA and U.S. Fish and Wildlife?

And I am thinking of two particular instances; on the BIA's environmental assessments, and in the Pacific Northwest, Snake River and Columbia River, breaching of the dams and salmon issues. So if you could get back to me in writing on that.

MS. GINSBERG: This is on environmental issues in general?

COMMISSIONER MEEKS: Yes. Yes.

CHAIRPERSON BERRY: Okay. All right. Well, I want to thank you very much for coming to be with us today, and you are now excused. We have some sign-out procedures for witnesses, and a member of our staff will assist you through them. And we will recess until 1:30. Thank you.

VICE CHAIRPERSON REYNOSO: Thank you very much.

(Whereupon, at 1:12 p.m., a luncheon recess was

taken.)



(1:41 p.m.)

CHAIRPERSON BERRY: The hearing will come to order again. I want to apologize for the -- well, actually, it is a brief delay. We ended up late on the last session, but I want to go ahead and start in the interest of your time.

First, let me swear in the newly arrived support staff, if there are any signers, or court-reporters, or clerks, who need to be.

(Discussion off the record.)

CHAIRPERSON BERRY: Okay. Good. Then the sign language interpreter please ask if there is anyone who needs sign language interpretation.

INTERPRETER: No.

CHAIRPERSON BERRY: Thank you. Also, there will be an open session today around 5:15, where persons who are or feel affected by environmental pollution hazards or contaminations can speak to the Commission, and can tell the Commissioners of their concerns.

And those persons will have talked to the Commission staff members about three o'clock today, and they will be put on a list as the staff talks to them, and they will be able to speak to the Commission.

This first panel today, or this afternoon, is from the U.S. Department of Housing and Urban Development, fondly

called HUD. This panel of HUD representatives will explain how HUD incorporates environmental justice principles into the agency's overall mission.

The Commission has a particular interest in how environmental justice complaints are handled, HUD's role in the Brownfields redevelopment project, and its impact on low income residential housing.

And HUD's assessment of the relationship between segregated housing patterns and the environmental justice related issue of lead paint poisoning. And I do know also that we already have some materials that were submitted showing the Secretary of HUD's commitment on all of those issues, and we have taken note of those.

Mr. Reilly, could you please announce who the witnesses are.

MR. REILLY: Madam Chair, our witnesses are already before us, and they are Mr. Nelson Bregon, Deputy Assistant Secretary of Grant Programs at HUD; Assistant Secretary Roy Bernardi, Community Planning and Development at HUD; and Mr. David Jacobs, Director of Healthy Homes and Lead Hazard Control, at HUD.

CHAIRPERSON BERRY: Could you please -- I know that you are sitting down, but could you please stand up because I have to swear you in.

(The witnesses were sworn.)

Panel Three: U.S. Department of Housing and

Urban Development

CHAIRPERSON BERRY: Thank you very much. Please be seated. The documents that were provided voluntarily by HUD for this meeting will be placed in the report of this hearing.

I also wanted to point out to you, and the staff should have told you this, that the only reason why we subpoenaed you was because we subpoena everybody. It had nothing to do with your unwillingness, willingness, and the only reason why we subpoena up and down the line, and then negotiate about subpoenas for folks like you, is because people who don't want to come, we subpoena.

And people who do want to come, but they are scared, and want to cover a subpoena, we subpoena them. So it doesn't really matter. So it has nothing to do with the idea that you weren't willing to tell us anything about what HUD is doing.

Each witness will make a 10 minute presentation or may make a 10 minute presentation. Mr. Bernardi will be first, followed by Mr. Bregon, and Mr. Jacobs. Mr. Bernardi, please.

MR. BERNARDI: Well, good afternoon, Commissioner Barry, and Commissioners. I am pleased to be here. My name is Roy Bernardi, and I am the Assistant Secretary for Community Planning and Development at the Department of Housing and Community Development.

And I am here with two of my colleagues from the Department, Mr. Nelson Bregon, who is the Deputy Assistant

Secretary for Grants Programs; and David Jacobs, who is the Director of our Healthy Homes and Lead Hazard Program.

They will be discussing specific areas of the Department's efforts to further environmental justice. And prior to my being asked to join the Department, I had served as auditor of the City of Syracuse for five terms, and then twice had the honor of being elected Mayor of the City of Syracuse.

The quality of life within Syracuse was central to my administration, and I implemented a number of new initiatives to promote the revitalization of our urban neighborhoods.

I improved the City's safety environment by working to bring the number of violent crimes to their lowest levels in a decade. My Administration expanded youth opportunities, especially for minorities; and initiating after school tutoring programs, offering new recreational activities and summer camps.

And we computerized neighborhood centers. I used aggressive code enforcement strategies to initiate a nationally recognized program for landlords, for chronic offenders, and implemented the first of its kind landlord training and assistance program to clean up decaying and neglected neighborhood properties.

Those were many of the challenges that I confronted as mayor, and I was also President of the New York State Conference of Mayors, and I worked very closely with my fellow mayors, intertwined with environmental justice considerations.

We appreciate the opportunity the Commission has afforded us to tell you about the important work that the Department of Housing and Urban Development is doing in this field.

Secretary Martinez and his team, and our team, were committed to achieving the goal of healthy living in housing environments for all. The Office of Community Planning and Development, which I had the privilege to direct, seeks to develop viable communities by promoting integrated approaches that provide decent housing, a suitable living environment, and expand economic opportunities, especially for low and moderate income people.

The primary means towards this end is the development of partnerships among all levels of government and the private sector, including the not for profit and the for profit organizations.

CPD seeks to encourage the empowerment of local residents by helping to give them a voice in the future of their neighborhoods; stimulate the creation of community-based organizations, and enhance the management skills of existing organizations so they can achieve greater production capacity.

Just very quickly, that as Mayor of Syracuse, I put together an organization called "Tomorrow's Neighborhoods Today," and we took our city and we divided it into eight sections.

And what we did is that we empowered the people to tell us what they needed, and what they wanted in their

neighborhood. And fortunately we were able to secure at that time some resources from HUD, and those projects and those programs that people wanted in the eight sections of our city were able to be realized.

The means for developing public/private partnerships are largely a number of grant programs as you all know. For our purposes here today, the most significant are the Community Development Block Grants, particularly the Colonias set-asides.

And the Empowerment Zones, and the Enterprise and Renewal Communities, and our Brownfield economic development initiative. The last three weeks, I have been traveling the country with the announcement of the seven new Empowerment Zones, and 40 new Renewal Community Zones.

And I think that this is a good demonstration of what we do at HUD. These programs obviously are given through a competition to distressed neighborhoods in our country.

And what we are able to do there is to use tax incentives to encourage business people to create jobs, economic opportunities for people in those zones, and those are the poorer zones in the country.

And this program has been successful in the first Empowerment Zone designation and the second, and we are looking forward to having success with the third Empowerment Zone and the Renewal Communities.

And I say this because I firmly believe that economic

opportunity, giving people an opportunity to create their own wealth, where they can take care of themselves, and where they can take care of their families, and build schools, and build neighborhoods.

And it all has to be done in unison with not only government, but the private sector. And our department is fully committed to decent, safe, and sanitary housing.

To that end, HUD, in cooperation with our program participants and other Federal agencies, has implemented a number of approaches to identify and address environmental concerns in the neighborhoods, and encourage State and local governments to use Federal funding that HUD provides to support activities to assure environmental justice.

The previous Administration laid the foundations for the Department's environmental justice policies and programs. Pursuant to the order of 1995, the Department identified priority initiatives to integrate environmental justice issues in the context of urban environmental management and community development.

These priorities are childhood lead-based paint poisoning, and David Jacobs is our expert in that area; Brownfields redevelopment and Colonias; and my colleagues will address HUD's ongoing efforts in these areas.

I am pleased to submit for the record a file of documents, and index thereto, that was voluntarily produced by the

Department. The original set, along with six copies, were provided to the Commission earlier this week.

The hundreds of pages of documents consisting of budget summaries, grant applications, reports, articles, and general information, demonstrate HUD's strong and longstanding commitment to ensure that Americans from all walks of life have an opportunity to live in a healthy environment.

At this time, I would respectfully request that the documents found in Tabs 1 through 31, and the index thereto, be made part of the record of this hearing. I know there will be questions, and we will try to answer those questions for you today.

And if not, we will be happy to provide full responses in writing; and now I would like to turn the microphone over to David Jacobs, HUD's Director of the Office of Healthy Homes and Lead Hazard Control. David.

DR. JACOBS: Thank you, Assistant Secretary Bernardi.

I would also like to thank the Commission for the opportunity to appear before you today to discuss HUD's activities in the area of childhood lead poisoning prevention, and also other diseases that we think are also related to housing quality.

My name, as you heard, is Dr. David Jacobs, and I am the Director of the HUD Office of Healthy Homes and Lead Hazard Control. Before joining HUD 6 years ago, I was on the faculty at the Georgia Institute of Technology, where I conducted a variety

of research projects on public health, and residential lead hazard detection, and hazard control.

Today, I would like to present some of the recent data that we have accumulated, and reported by the Centers for Disease Control and Prevention.

We know that childhood lead poisoning is indeed preventable. We know the causes of it, but we also know that far too many children are poisoned each year, and we also know that minority and low income populations shoulder an excessive share of the risk.

I won't go on at great length about the toxicology of lead other than to note that the National Academy of Sciences has summarized the evidence exhaustively.

There is widespread consensus in the scientific community that lead poisoning causes declines in I.Q., and also causes a variety of neurobehavioral effects, and many other adverse effects, kidney and liver disease, reduced stature, and on and on.

Lead is one of those metals that performs no useful biological value in the body, unlike iron and zinc, and calcium. It is a toxin, and it is also clear that the major high dose source that remains today for most children in this country is old lead-based paint in the U.S. housing stock.

Secretary Mel Martinez has indeed made this issue one of his priorities. As a result of that priority, we have

increased HUD's lead hazard control budget, first by 10 percent in the year 2002, which was indeed appropriated by Congress.

Another 15 percent increase is included in the President's budget request for 2003, which was released earlier this week. He has also provided my office with more staff to increase our grants management operations, and our enforcement capacity, our public outreach activities, and so on.

We have also fully implemented our new regulation for Federally assisted housing, which incorporates new methods of modern lead hazard control that are grounded in sound science, and in fact reorient the way in which we have approached this problem.

Historically in this nation, we have dealt with lead poisoning primarily after the child has already been exposed. Under this new regulation, we take action by looking at houses before the child is poisoned, and before the exposure occurs, and before the damage is done.

That is indeed a sea change in the public health community, and is known as primary prevention. We think it is more important to screen and test houses, and not just treat children after the fact. Most physicians will tell you that the only treatment for lead poisoning is exposure prevention. HUD also played the leading role in developing the first ever Federal inter-agency strategy to eliminate this disease in 10 years. This was published by the President's task force on children's environmental health and safety risks in March of 2000. It also

contained an inter-agency budget request for this purpose.

That report showed that the solution to what is a public health problem actually lies in the realm of housing. That is, fixing houses and removing lead-based paint hazards before they can expose children. Before the HUD lead hazard control grant program began in 1990, only one State in the nation had a significant lead hazard control program, and that was Massachusetts.

Since then, the HUD grant program is now active in over 200 jurisdictions, and we eliminate lead-based paint hazards in thousands of homes annually. All of our grantees, which are State and local governments, are required to work with community groups, including environmental justice groups, to ensure that we reach homes that are indeed at the highest risk.

Along with the grants program that we operate, we have also enforced the Federal lead-based paint disclosure regulations. With EPA and the Department of Justice, we have won recently the first two criminal convictions against landlords who had violated their duties to disclose lead-based paint hazards to tenants in their units.

Our enforcement actions have cleaned up over 160,000 units that have lead-based paint hazards. Our efforts we believe are working, and more importantly, we believe that we have the data to prove it.

The Centers for Disease Control reported last

December that from 1996 to 1999 children's blood lead levels in this country declined by 25 percent. Furthermore, HUD has completed a new housing survey which showed that the number of houses with lead paint declined from 64 million housing units in 1990, to 38 million today.

I don't think that any of us who have been in this field for a while expected the decline to be quite that large, but indeed it was. Finally the CDC reports that the number of poisoned children declined from 4 million children in the late '70s, to 1.7 million in the late 1980s, to under a million from the time period of '91 to '94.

CDC is expected to report new national prevalence estimates in 2004 as part of its National Health and Nutrition Examination survey. But the fact is that we still have 1.6 million housing units that are low income, and that contain lead-based paint hazards, and are occupied by children under the age of six.

And that same CDC report also showed that in some high-risk neighborhoods the prevalence rate is up to 27 percent of the children in those neighborhoods.

That is simply unacceptable. The Department believes that we must do more and we must not stop until every child in this country has the opportunity to grow up in a lead-safe home.

We also think that other diseases, childhood diseases, may also be related, at least in part, to housing

conditions, and we are taking action there, too, through our Healthy Homes Program.

Childhood asthma rates have more than doubled over the last decade, and I don't think the scientific community understands yet why this is happening, and what the risk factors are.

But we are at HUD researching some of those housing related factors that we think might be related to asthma, and demonstrating whether or not housing-based interperogations can be eliminated.

As part of that effort, HUD completed the very first nationwide estimate of the allergen burden in the U.S. housing stock as part of our lead survey. We didn't just look at lead in other words. We looked at triggers in houses that we think also contribute to the asthma situation.

As an example, in Boston, our public housing residents there are working in a participatory research project with Harvard, Tufts, and community groups to assess their own health conditions, and their own housing conditions, to try and determine what conditions in those houses may in fact be exacerbating or contributing to asthma and other diseases.

Our Healthy Homes Program now has funded approximately two dozen demonstration and research projects to find the answers not only to asthma, but to mold induced illness, and other previously unrecognized problems.

We are doing some notable work in Cleveland, where the first diagnosis was made by a pulmonologist of pulmonary hemosiderosis, which was first linked to stachybotrys (phonetic), the toxigenic mold that was prevalent in those basements in Cleveland.

These infants that had died had been misdiagnosed for the most part according to this one physician as having Sudden Infant Death Syndrome. When he did the lung sections, he determined that there were lesions that were not consistent with Sudden Infant Death Syndrome, and were more consistent in fact with mold exposure.

I would like to close with highlighting one other crucial statistic from the housing survey that we just completed, and I would note that we have also submitted that survey for the record.

We found that about 18 percent of moderate and upper income housing has lead-based paint hazards. But we also found that 41 percent, of low income housing, has lead-based paint hazards.

But only 17 percent of government supported housing has lead-based paint hazards, and so in other words, government supported housing appears to have the same lead-based paint prevalence rates as what you find in upper and moderate income housing.

So from the lead standpoint anyway, government

housing is often the safest housing for children. Now, why did that happen? That happened because, first, we did the science, and we determined how the exposures occurred, and we determined what forms of abatement actually worked.

We built the programs across the nation, and we built the infrastructure among local governments to carry out this kind of activity in a responsible and scientifically valid manner.

We relied on parents and community groups to put a face on this problem, and to build the partnerships with local governments, and the private sector to get the job done.

Now, we are clearly not finished. We have a ways to go, but I believe that we are well on our way. We must focus on high risk and low income neighborhoods, and on unsubsidized housing.

And that is precisely the housing stock that we have targeted through the HUD lead-hazard control grant program. I believe that too many families are still unaware of the risks, and I hope that Commissions, such as the Commission on Civil Rights, will help us find ways to do even more to ensure that we put an end to this disease.

In closing, I would like to submit my written testimony for the record as well. Thank you very much again for the opportunity to appear before you to discuss this important problem.

And I would now like to turn it over to Nelson

Bregon, the General Deputy Assistant Secretary for the Office of Community Planning and Development at HUD.

MR. BREGON: Thank you, Dave. Good afternoon, Chairperson Mary Frances Berry, and Members of the Commission. My name is Nelson Raphael Bregon, and I am the Deputy Assistant Secretary for Grant Programs in the Office of Community Planning and Development within the U.S. Department of Housing and Urban Development.

I started my career with HUD some 22 years ago in the Department's Chicago field office, where I was a community planning and development representative. In that position, I was responsible for working directly with the African-American population, as well as the hispanic population, to ascertain that the program benefits that were being channeled through our department had a direct impact in those communities.

Mainly, I worked with the Community Development Block Grant Program, and the Urban Development Action Grant Program, kindly known as UDAGP in HUD, and the Section 108 loan guarantee program.

Throughout my professional career at HUD, I have been a senior deputy director of the Office of Action Grants in Washington, D.C., and I have been the Director of the Office of Economic Development and Empowerment Service, with direct oversight of the Empowerment Zone and Enterprise Communities programs.

I have been a senior vice president at Ginnie Mae, in the Office of Community-Based Securities, and now I am the Deputy Assistant Secretary for Grant Programs.

I left the Department for a period of time to become the Director of the National Development Council, a 501(c)(3) corporation that specializes in working with cities, counties, States, in developing and implementing community and economic development delivery systems.

I have an undergraduate degree in Urban Studies from the Inter-American University of Puerto Rico, and I did my graduate work in Urban Planning at Kent State University, Ohio.

I am pleased to be here this afternoon as the Commission continues its examination on environmental justice issues. I am here to discuss how two of HUD's programs, the Brownfields Economic Development Initiative, which we refer to as BEDI, and our Colonias initiative, demonstrates HUD's true commitment to the principles of environmental justice.

Under the BEDI program, Brownfields are considered to be abandoned, idled, under used properties, including industrial and commercial facilities, where expansion or redevelopment is complicated by real or sometimes perceived contamination.

Brownfields sites may include abandoned factories, and other industrial facilities. HUD's Brownfields economic development initiative provides competitive grants to eligible recipients to attract other public and private financing, in order

to assist in the redevelopment of these sites.

HUD has its first Brownfields economic development initiative competition in 1998. At that time, we had \$25 million in funding for this initiative.

Since then, HUD has invested over a hundred-million dollars in 84 different projects nationwide. These projects have leverage over \$600 million in other public and private financing.

Then, as now, we include in the notice of funding availability or NOFA, in its rating and selection criteria, specific language under the environmental requirements section concerning environmental justice.

By the same token, under the soundness of approach rating factor, which is one of the five factors which we use when we rate and rank an application to determine whether it gets funded or not, we clearly indicate that HUD expects that projects presented for BEDI funding will integrate environmental justice concerns and provide demonstrated benefits for affected communities and their residents.

This expectation is being brought forth by requesting that applicants describe to the extent to which their projects will integrate environmental justice concerns so as to assess the community's true commitment to this most important community and urban development issue.

Environmental justice and Brownfields are inextricably linked and at the heart of the environmental justice

movement is recognizing the interconnectedness of the physical environment and the overall economic, social, human, cultural, and spiritual health of a community.

HUD considers our Brownfields programs to be a positive affirmation to communities, and the State and local governments that want to revitalize their communities and neighborhoods, provide jobs, stimulate ripple effects, economic development, and over the long term provide for attractive environments, which in turn attract better housing and lead to better quality living environments for low and moderate income residents of our cities.

In addition to my management and oversight responsibilities over this community development, block grant, and the home program, as well as the Brownfields program, I served on the Department's Colonias Task Force.

Colonias, as you might know, are severely distressed, rural, unplanned, predominantly unincorporated settlements, located along the 2,000 mile border between the United States and Mexico.

Colonias populations are overwhelmingly Mexican-American, young, unskilled, almost universally low, and very low income individuals, and frequently are farm and migrant workers.

Colonias communities are characterized by grossly substandard housing, limited road access, poor drainage, and inadequate or non-existing water, and/or sewer facilities, in many

instances.

The living conditions in these communities are comparable to favelas, or squatter settlements, in many developing countries. A priority of Secretary Martinez, the Secretary appointed a task force in February of 2001 within HUD to development strategies to increase the impact of our programs in the colonias.

The Secretary also personally visited the Colonias in July of 2001, and he came back, and he met with all the senior staff in the Department, and he made sure that we at the senior level took into consideration the impact that our programs are having in the Colonias, and how to better impact our efforts in these communities.

Currently, HUD has invested \$2 million through a grant competition and has 10 percent set aside for Colonias in the States' Community Development Block Grant.

To date, HUD's resources have gone to provide infrastructure improvements, such as streets, drainage, water, and sewer facilities, housing rehabilitation, as well as consumer education on land and housing purchases.

The Fiscal Year 2003 budget of the Department of Housing and Urban Development proposes a new \$16 million budget allocation to support the development of Colonias.

The program is called the Colonias Gateway Initiative. The objective of the Colonias Gateway Initiative will

be to improve coordination, forge partnerships, and build capacity in support of U.S.- Colonias communities along the U.S. Mexican border.

Thank you very much, and this is the end of my opening remarks.

CHAIRPERSON BERRY: Thank you very much. Counsel, would you proceed with your questions.

MR. REILLY: Thank you, Madam Chair.

CHAIRPERSON BERRY: Well, first of all, we do accept documents and your written testimony will be entered in the record, and we appreciate it. Thank you. Go ahead.

MR. REILLY: Thank you, Madam Chair. I would direct questions to each of you. However, we want this to be a conversation, and so anyone can jump in at any time.

The first set of questions will be directed to the Assistant Secretary, and to Mr. Bregon, and then we will turn to Dr. Jacobs. So for the first question, last month at our hearing, and also earlier this morning, there was a good deal of discussion on whether there has been a reluctance of Federal Government agencies to enforce Title VI complaints with respect to environmental justice.

With that in mind, Mr. Bernardi, do you know the number of Title VI complaints HUD has received?

MR. BERNARDI: Yes. The Department has received less than a dozen Title VI complaints alleging environmental justice issues. The few Title VI environmental justice complaints that

have been filed with the Department have also been filed with other Federal agencies, including the EPA, the Department of Defense, and the Department of Transportation.

And we are committed to working with these agencies on a coordinated effort on these complaints.

MR. REILLY: When you work with these other agencies do you take the lead or do they take the lead, or does it depend on the complaint?

MR. BERNARDI: Well it depends on the complaint, on the form of the complaint. But the complaint in our agency comes through the Office of Fair Housing and Equal Opportunity.

And I would like to add that most of the Title VI complaints that have been filed have been resolved. In many instances --

MR. REILLY: When you say most, can you be a little bit more specific?

MR. BERNARDI: Well, we have two that are outstanding right now. We have two that are in the investigation process, and I believe the others have been settled.

Sometimes the parties reach a private settlement, and in some cases there was no HUD funding involved in the project.

MR. REILLY: Okay. Has HUD ever to your knowledge withheld any grant funding due to Title VI concerns, or any other penalties such as that?

MR. BERNARDI: I don't have the answer to that.

Nelson, do you know that?

MR. BREGON: That would be Fair Housing and Equal Opportunity.

MR. BERNARDI: We would be happy to get back to you though with that information.

MR. REILLY: Okay.

CHAIRPERSON BERRY: And could you submit that, the answer to that question for the record, please. I think the answer is no, but could you.

MR. REILLY: Okay. Great. Last month, the Commission heard testimony about public housing projects being located near toxic waste sites. And the Dallas Morning News has reported that 40 percent of government public housing projects nationwide are within a mile of at least one toxic waste site.

Do you know if HUD collects data that would allow the Commission to verify this 40 percent statistic?

MR. BERNARDI: I don't, but when you talk about public housing, obviously you are all familiar with our Hope VI program, and what we are trying to do with the public housing that was constructed back in the '60s, and the concentration of poverty, and the concentration in areas that are perhaps environmentally unsound.

And our Hope VI funding for the 2003 fiscal year, I am happy to report, is \$574 million, the same as it was or is for this year, 2002, and as you all know, that is a very competitive

program.

And we have been able to have some very significant successes with that program, demolishing public housing that had high density. And let's say you had 150 units, and you took that down, the people that lived there have obviously the opportunity to return back to that area, and to go somewhere else.

And what we were replacing it with, which I am really pleased, is no longer the approach of keeping people concentrated.

We are giving people a choice, and we are doing townhouses, and we are doing open spaces.

And we have mixed income people, and basically breaking down the public housing as it is and as we know it. I mean, Cabrini Green in Chicago, and Nelson's area, I mean, we all saw the devastation that that caused, and building those high-rises.

And I think we just gave a significant grant to Mayor Daley in the City of Chicago not long ago. And quite candidly, all the money is used. We have thousands of applications for the better than \$500 million.

MR. REILLY: The Hope VI Program that you just referred to was also extensively written about in the Dallas Morning News, and they reported that nearly half of the projects are within a mile of toxic air polluters.

Do you have any information confirming that, or any kind of statistics on that?

MR. BERNARDI: I don't, but if we don't have it at our department, we will make sure that the other agencies will put it together and get it to you.

MR. REILLY: Okay. Now, it is my understanding that HUD cannot construct or site public housing. Is that correct? That basically it is HUD money that is used to modernize and rehabilitate, and maintain existing housing. Is that a fair assessment?

MR. BERNARDI: HUD does not propose the sites for housing. We evaluate the proposals made by the applicants.

MR. REILLY: So you evaluate those proposals. So those siting decisions are made on a State and local level?

MR. BERNARDI: Yes.

MR. REILLY: Do you have the -- well, in terms of your oversight function or responsibility, can you -- what is your -- you know, what kind of influence can you have in those decisions if you determine that they are locating some of those sites in regions that would be unhealthy, in terms of environmental justice concerns, and what can you do about that?

MR. BERNARDI: Well, it states whether HUD or a State or local government performs the environmental review, and the review must include compliance with the Federal environmental laws that apply to Federally assisted projects. Nelson, do you have anything --

MR. BREGON: Yes, we must clarify something; that HUD

is not funding any more construction of public housing units. As the Assistant Secretary mentioned, the only program that we have right now is the Hope VI Program, where we are really tearing down those public housing projects, and providing a funding mechanism for this to occur.

In the decisions as to where the new Hope VI projects go, Assistant Secretary Bernardi is correct. We do not make that decision. It is the applicant who makes that decision as to where the replacement housing for the Hope VI would go.

MR. REILLY: Okay.

MR. BERNARDI: But the encouragement is always there obviously to have it, and we don't want to replace something with what is already there. I mean, we want to have a better quality of life, and better housing.

We want to make it more family oriented, and more intimate for the people that we are trying to assist in these situations. And some of the examples that I have seen are absolutely magnificent, and taking down that old public housing structure.

And then with the community, with the local entity, with the State -- and as I talked about earlier in my opening presentation, Tomorrow's neighbors Today, letting the members of that community determine what kind of housing they would like, and where they would like it.

MR. REILLY: Okay.

MR. BREGON: I think another thing that is very important to bring to your attention is the fact of the opportunities that Hope VI brings to the residents of public housing.

As Assistant Secretary Bernardi mentioned, in many instances we may have 150 families, and 150 units that are being replaced with perhaps 50 units. What that does is provide an alternative for those residents of the public housing to either remain in those units, in the 50 units that are replacing the 150, or go elsewhere with vouchers or Section 8 certificates.

And they have that option, and what we have seen in the Department in many instances, and my personal experience in --

MR. REILLY: Just to interrupt, but when you given them that Section 8 certificate, is that limited to two years? That came up earlier today by one of our regional heads. Is there a time limitation on those vouchers?

MR. BREGON: That I really don't know. I know that there are vouchers, and I know that there are certificates, and I know that is for public and Indian housing programs.

It is not a CDBG program, and so I would not be able to answer that, but we could find the answer for you.

MR. REILLY: Okay.

MR. BREGON: It might be that it could be two years or five years. I am not sure.

MR. REILLY: Okay.

MR. BREGON: But what that does is that it provides an alternative for these residents to move elsewhere if they want, and if they want to move to a suburban community, for instance.

Now, my experience in Chicago was that a lot of the residents did not want to move away from the communities. They felt that they were part of the fabric of the community, and they did not want to move away.

They had many community ties, and so this program really provides alternatives for the residents to either remain in their communities if they wish to do so, or go elsewhere.

MR. BERNARDI: I mentioned earlier the Empowerments Zones and Renewal Communities. I try to look at this and see the big picture that we envision. When you talk about -- we were talking about Hope VI, and now we are talking housing.

But at the same time, with the Empowerment Zones and the Renewal Communities, you get investors to invest in these communities. I mean, the infrastructure is there, and the people are there.

And many times, many of the residents of these communities, even if they had employment somewhere else, and then maybe transportation then becomes an issue.

Then you link it with the Brownfields, and the 108 loan guarantees, and what we would really like to do, and what our goal is obviously, is to take the distressed -- every neighborhood should have equal opportunity.

Take these distressed neighborhoods, and using all of the programs that are within CPD and all of HUD, and raise the housing standards. Find employment for these people, and have business people commit to those neighborhoods. And when you do that, all the infrastructure of the parks, the schools, and everything, follows.

MR. REILLY: Okay. And you talked a little bit earlier about community input. Just back to the Hope VI. I know that one of the major complaints from the residents in that area is that they have been displaced.

There must be some community outreach and community meetings about that. How are their views incorporated in your decisions on going forward with processes like that?

MR. BERNARDI: Well, as Nelson indicated, if people want to go back to that location, or go back to wherever the new construction is going to take place, and it would be best that we try to honor that.

And there are people, because of historical reasons or because of family reasons, that want to be in the neighborhood, and you find that with the older people. They just don't want to live where they have been.

And you try to honor that, and then also you provide the vouchers for people, and some people do want to go somewhere else, and you just try to balance it.

But obviously you try to balance it with the wishes

of the people that you are displacing, and if there are 150 units, 150 families there, and we are only building 50 to 75 units in replacing that, we work hand and glove with the local community, and with the community development organizations, to make sure that we try to get everyone what they would like.

Now, does it work all the time? Probably not, but we do the best that we can with it.

MR. BREGON: And if I may, our experience has been that even in Hope VI projects, there is a myriad of financing mechanisms that are brought in to make a development occur.

Our experience is that many communities contribute community development block grants, for instance, or HOME monies, to Hope VI projects. What that does is that a community that is proposing CDBG's money in one of the Hope VI programs, they have a requirement of preparing what we call a consolidated plan.

And as part of that plan, citizens are given the opportunity through the Citizens Participation mechanism to opine.

There is a requirement of public hearings, and so the citizens in our community must participate in these public hearings in order to have their voices heard.

And there is a mechanism in place, and we are very strict in enforcing the citizens participation requirements, and in our programs, our grantees submit certifications to us evidencing that in fact they have gone through the citizen's participation program.

And if there is any indication to us that that has been violated, we definitely go out and look at it, and if need be, penalize a community, and tell them that they must go through the Citizens Participation process before submitting an action plan to us.

MR. BERNARDI: The CDBG program, which I can speak of directly from experience as the Mayor of the City of Syracuse, and we received our approximate \$9 million, nothing occurs until the Commission that sits in place in our city -- and that is a representative of all of the neighborhoods in our city, they make the determination as to what they would like to see done with all of the CDBG dollars.

Obviously, it goes through the legislative process after that, but quite candidly, I thought it worked very, very well with the public hearings, and everyone had an opportunity to participate and indicate what they would like to utilize those dollars for.

And as you all know, the majority of that has to be used for low and moderate, and 70 percent of it has to be used that way, and you have to adhere to that. And quite candidly, as a mayor, and as a council, that is what you want to do, and that is what you should do.

And we at HUD, we monitor that, and we take a look at those comprehensive plans, and those yearly statements that they provide to us. And we are finding that in most communities that

people adhere to it.

We have had some difficulties with timeliness with some of our grantees, which is very difficult. I think that this year's budget, if you take a look at 2003, we are very pleased considering the circumstances that the country is facing right now.

And I think that we at HUD did very, very well. We have an increase in some of our departments, and where most people thought that it would be less.

But the fact remains that when I went to OMB to fight for the 2003 budget, the first thing they always tell us is that, well, in CDBG, you have \$300 million that is untimely spent by certain jurisdictions.

So what we try and do -- and we don't want to take anything away from that, and we want to help communities, and so between our local offices, and between headquarters here, we coordinate, and we stay in constant contact with our grantees to make sure that all of the dollars, regardless of the program, that they are utilized right to the last penny.

And I can proudly say in Syracuse that we never had a dollar taken away from us. We spent it all.

MR. REILLY: Okay. good. One quick follow-up on location of some of these housing projects near toxic waste sites.

It has been reported that the higher the percentage of minorities within a project, the more likely it was to be located near a

toxic threat.

So in other words -- and this is again reported by the Dallas Morning News that did some extensive investigations on this, and they reported that while half of all families in mostly minority developments lived within a mile of toxic factories, only one-third of the families in mostly white developments did.

Do you keep statistics that would enable us to verify or challenge what was reported by the Dallas Morning News?

DR. JACOBS: Most of the statistics that are held with regard to exposures from hazardous waste sites is the duty of the Agency for Toxic Substances and Disease Registry in Atlanta.

We will look and see whether HUD keeps an independent data source, but it seems to me that it is that agency's principal duty to do that.

MR. REILLY: Okay. If you cannot find it could you help us find those through them, those statistics?

MR. BERNARDI: We will do everything that we can to find that information for you.

MR. REILLY: Okay. Great. If we could turn for a moment to Brownfields. You mentioned that there were several factors, and I believe five, that are rated and ranked in the competition, and environmental soundness is one of the factors.

Could you describe a little bit about how much weight is given to that as a factor? I mean, is there a certain threshold, or are people given an advantage because they --

MR. BERNARDI: Nelson is going to read it chapter and verse, but obviously it is a factor. There are points that are allocated. Environmental justice concerns have to be met, and Nelson, I will turn it over to you for that.

MR. BREGON: Sure. You are right, Mr. Reilly. In our -- when we evaluate a proposal for the BEDI program, this is a very competitive grant program. I would have \$25 million, and historically the demand has been much more than the supply of financing that we have for this undertaking.

What we do is that in our NOFA, we have published the application selection process, and it is an open process. So we give a fair advantage to everyone if you will, and telling them exactly how we rate and rank the proposals that are submitted to us.

There are five grading factors, and the first one -- and I will give you the points, as this is open information, and public information. The rating factor number one is capacity of the applicant and the relevant organizational experience of the applicant.

In most instances, under the BEDI program, the applicants are the political jurisdictions or grantees -- the cities, the urban counties -- that can apply for these monies. That gives them 15 points for that criteria.

The second criteria is the distress and the extent of the problem. This is our most heavily weighted selection

criteria, and this is 40 points. Here we look at the extent to which there is need in the community for the proposed project that is being requested.

Factor Number 3 is the soundness of approach, and that is 25 points. There specifically we indicate the following.

We say that to the extent to which your response to this factor takes into account certain site selection, planning, and environmental issues.

Further, you are cautioned against proposing projects on sites where the nature and degree of environmental contamination is not well quantified, or that are the subject of ongoing litigation, or environmental enforcement.

Furthermore, we also indicated in that section that to the extent to which your project will integrate environmental justice concerns, provide demonstrable benefits for affected communities and their residents.

So that is 25 points in the application among other factors that we look under that category. So because of the competitive of his grant program, if for some reason the applicants do not really address this issue to our satisfaction, what we see historically is that those are the ones that do not get enough points to get funded.

So it behooves all our applicants -- and when we provide technical assistance through our field offices, we zero in on issues like this, and it is imperative that our applicants

focus on elements, such as environmental justice and environmental concerns, in order for them to be competitive.

If you want, I can go through the other two factors that we take into consideration.

MR. REILLY: That was very helpful. And there is also citizen participation through public hearings for that?

MR. BREGON: Absolutely. The way that the BEDI program works is that BEDI must leverage Section 108 loan guarantees, and they're in tandem. So when a community proposes to use Section 108 loan guarantees which is part of the CDBG program, they must hold at least two public hearings; one in preparation of the proposal.

And then after they hear the comments, and after the recipients hear the comments of the citizens, they are to go back to the citizens and inform them how their concerns were integrated in the proposal.

MR. REILLY: Okay. Thank you. I want to turn to Dr. Jacobs, but with the remainder of these questions, I am sure that everybody might want to have some input.

Now, Dr. Jacobs, last month the Commission heard testimony from Dr. Robert Bullard, an expert on environmental justice issues. And Dr. Bullard made the following statement with respect to race and lead poisoning, and I want to just read a quote.

"If you look at who is poisoned, these children are

of color. It is not just a poverty thing. Race trumps income when it comes to childhood lead poisoning. A middle income, African-American child, is more likely to be lead poisoned than a low income white child."

First, do you have a reaction to Dr. Bullard's comment; and second, does HUD collect data that would help this Commission sort through this question?

DR. JACOBS: The data on blood lead levels do show that African-American children living in older housing, where lead paint is both more concentrated and coats more surfaces, are at much higher risk.

That number is 21 percent during the time period of '91 to '94. For low income children living in older housing, it falls to 16 percent; and for all children living in older housing, it is 8 percent.

So clearly African-Americans on a blood lead level basis are ,at higher risk. In our new housing survey, we did record data on race and ethnic groups in the housing units that we surveyed, and this is a random sampling of the entire U.S. housing stock.

And surprisingly what it showed was that the -- and again I will have to get with you for the precise figures, but I believe it was 22 percent of housing occupied by whites had lead-based paint hazards.

And 25 percent of housing units occupied by African-

Americans had lead-based paint hazards; and then among other ethnic groups, it was 40 percent.

MR. REILLY: How about hispanics?

DR. JACOBS: I don't have that off the top of my head, but the point that I am making is that the degree of risk in housing units by race does not appear to be significantly different between African-Americans and white families.

But it is different compared with other ethnic groups and whites. So that was a surprising finding. We don't know what it will mean until we look at the new blood lead data that CDC will release in 2004.

It may be that in fact we have been more successful than we had been in targeting housing units occupied by high risk African-American families for intervention through our grant program.

But I think for a definitive answer, in terms of actual exposure, we will need to wait for the CDC data. But I think that is good news in the housing surveys. And I should clarify what years.

The CDC blood lead data is from the '91 to '94 time period. The housing survey data is from the year 2000. So there is a time gap there, and what we will need to do is match the housing survey data that we got in 2000 with the next CDC report in 2004.

There is some preliminary CDC data, but their sample

was not big enough to look at blood lead levels in subpopulations, such as African-Americans, or Hispanics, or others.

MR. REILLY: Okay. If you could provide us with that data, and if it also includes Hispanic Americans and Asian Americans, and whatever other racial and ethnic groups you have?

DR. JACOBS: I will do that.

MR. REILLY: Okay. Great. How does HUD ensure that recipients of HUD lead abatement funds comply with the Code of Federal Regulations? And I ask this because there was testimony before the Commission last month that in Albany, New York, the lead abatement contractors did not have proper training or proper credentials.

DR. JACOBS: We did see the transcript, and we acted upon it quickly as soon as I found out about it. We contacted the City of Albany to find out exactly what was going on, and I can submit for the record if you wish documentation they sent to us showing the actual certificates of the workers who had been employed in the lead hazard control grant programs.

We do monitor all of our grantees to ensure that they do comply with the requirements, and we want to be sure that the work is done properly. And if it is not done properly, it can in fact make exposures worse. So we do act quickly when we receive reports like this, whether it is from a Commission hearing, or a complaint, or whatever.

We investigate promptly, and of course our staff also

goes out to each of our grantees on a periodic basis, and will actually visit some of the specific homes to make sure that the treatments are effective.

MR. REILLY: Okay. Were you going to add something? I didn't want to cut you off.

DR. JACOBS: Just that we have about 200 grantees that are now active. There are a fraction of them that fail to perform adequately as with any particular program, and we have a variety of measures that we can do.

I do not like to take funds away, but we will place non-performing grantees on high risk. In some cases, it is housing and health departments not collaborating properly, and so we will take steps to ensure that that collaboration happens.

And we will provide technical assistance and in extreme cases we will move the grant to another unit of government so that it actually proceeds. But I have to say that the overwhelming evidence here is that the program is working.

We have done the nation's largest residential lead hazard control research project following 2 thousand homes over a period of years.

And then we looked at the effect of dust, lead and blood levels of children living in those units, and found that they had declined, even though all of the lead paint is not removed from all of the houses.

But we do control the exposures and it appears to be

working. But I have to tell you that as with any program, it is imperative that we continue on and ensure compliance. But, based on our assessment of the Albany situation, there does not appear to be any violation of any of the requirements.

MR. REILLY: Okay. Thank you. Thank you, Madam Chair.

CHAIRPERSON BERRY: Sure thing. Does anyone have any questions?

COMMISSIONER WILSON: The question is that in the first episode of our hearing on environmental justice, several members of various panels made a point over and over again about asthma, and saying that -- I think one of the quotes was that -- I should have brought the transcript, but one of the quotes was that environmental justice stopped at the door of houses.

And I wondered have you done any studies on asthma and the prevalence of asthma as a condition, a major serious condition in these areas?

DR. JACOBS: The Centers for Disease Control has documented the asthma prevalence rates, and it is clear again that African-Americans and children are at higher risk. What is not known is what is causing the increase. Whether it is a multitude of other exposures, and whether there is some genetic change that is going on, and whether there are conditions in housing that are contributing to it.

We are engaged heavily in doing the research to try

and find out if allergen triggers or moisture incursion, or changes in the way we have constructed housing in the past, are somehow contributing to this increase in exposure.

I sit on an advisory body to look at asthma rates, and the Federal Government is -- the National Institutes of Health is pursuing the medical treatment, and compliance with new medications, and research on that front.

And we are looking at housing, and the EPA is looking at some of the environmental factors that appear to be associated with asthma. We feel that there are promising treatments, and changes that can be made to housing.

And what we are doing is testing them in trials now to determine whether or not in fact we do see a decline in asthma rates if we incorporate these changes in houses. That is part of our Healthy Homes Research Program.

COMMISSIONER WILSON: Well, if I am not mistaken, which God only knows I could be, the inference was that in part it was due to the proximity of the industrial plants where these houses were placed, and that they were in close proximity to those plants.

DR. JACOBS: All I can tell you is that there is a growing debate going on in the medical community over what is causing it. Is it because children now are growing up in cleaner homes, and therefore do not develop the antibodies that ordinarily would combat foreign bodies that are brought in and result in

sensitization? Asthma, after all, is a sensitization type of disease.

So that debate continues, and there is active research. I can't give you a precise answer on exactly whether it is due to nearby industrial sources, or housing conditions, or genetic factors. All of those are under considerable research.

Where we are at with asthma and housing is where we were with lead, say, two decades ago, where there were no standards for how to effectively do lead abatement.

The idea was that we should just get the lead out of the house, and not worry about how much dust it creates and how do you tell if the house has been adequately controlled, and how it should be maintained.

None of those standards were clear. We now know those standards for lead, and we need to find out what those standards should be for asthma. We won't know until we do the research and test it.

And so I think clearly we have some work ahead on us on the asthma front.

CHAIRPERSON BERRY: Commissioner Meeks.

COMMISSIONER MEEKS: Yes. I know that HUD is doing all they can do, but I also know that HUD works with the local housing authorities, and I can think of a number of instances where the local housing authorities are poorly run, and poorly managed, and aren't even accessing the funds that they should be.

And so as a result, it is the community members that suffer, and so I just wondered -- and especially in this issue of lead and asthma, and all of those things, how are you working with the housing authorities to make sure that the job is really getting done, and it goes beyond just disease, and it goes on to housing availabilities, and the same issue.

DR. JACOBS: I will address it initially from the lead front. Our strategy in the new HUD regulation has been to integrate the way in which we require lead hazard controls to be done for all of HUDs recipients, whether it is a housing authority or community development agency, or whatever, so that lead is not a sort of afterthought or an odd thing that is out there on its own. So, for example, when we award a voucher to an individual and they find a house that they would like to move into, and we subsidize the rent in that house, we require that unit go through a housing quality inspection.

And which is above and beyond, or different if you will, than the ordinary local code inspection. Part of that HQS inspection involves a visual determination of whether or not the paint is intact, and if it is not, then the landlord is required to repair that before the unit can be subsidized.

And we require what we call a clearance test, which is a dust lead test, after the job has been done to make sure that the unit does not increase exposures for the child.

If a housing authority fails to perform its HQS

inspections properly, then there are a variety of sanctions that the Department can take to ensure that the inspections are done properly.

I would point out that it is not just the HUD lead hazard control grant program that provides funds for lead. Most of our housing programs also do lead work, but it is not broken out as a separate line item.

So for public housing, they do lead abatement at the time of modernization, but it simply is part of the rehab costs, and rehab done under the community development program, they are required to undertake lead hazard controls, when a unit is rehabilitated.

So it is sort of integrated into the normal housing finance, maintenance, and rehab systems that we have in place the blocks to make sure that they work, and it is part of our oversight function and monitoring to ensure that our recipients, whether they are housing authorities or others, comply with the terms of their grant agreements.

COMMISSIONER MEEKS: You know, on the question that counsel asked you about, about whether you have knowledge of the number of housing developments that are built near hazardous waste sites, or emissions, and supposedly the Dallas newspaper had pretty good information on this and you don't seem to.

Well, I mean, why don't you I guess is my question?

MR. BREGON: Our programs -- for instance, under the

Community Development Block Grant, we don't see housing production under that program. Under the Community Development Block Grant, which is our flagship program, with about \$4.5 billion in funding, what we see is that communities use these monies to rehabilitate through grants or loans to low and moderate income residents.

So there is no new housing construction on the community development block grant program. So that is why we don't have that data. So, most communities, what they do, is use CDBG money for rehabilitation purposes.

It could be major rehab, substantial or moderately rehabilitation. Now, as Dr. Jacobs indicated, any time that a community uses CDBG monies or HOME monies to rehab a unit, then those units -- the recipient is responsible for ascertaining the degree of lead poisoning potential.

So they do an inspection, and if there is loose paint, that has to be taken care of, and there are different thresholds for the amount of money that is put into the unit. So if there is, for instance, \$25,000 or more, then the whole unit has to be lead abated if you will.

So that is why in our office we don't have the type of information as to whether the units that are being produced are located, because we do not do any housing production under our programs.

And the only ones that we do is only the SHOP program, and perhaps, Mr. Bernardi, you are more familiar with

that than I am, and then you can talk about what we do there as it relates to housing construction.

MR. BERNARDI: Well, that is housing construction, but as most of you know, that for organizations, such as Habitat for Humanity, and we have tripled that budget from \$22 million to \$65 million.

About 38,000 homes in 2003, I believe, but there the same conditions apply. The property that is acquired by the dollars that we provide to the organization, infrastructure work is done and there is also environmentalals that are done on that property to make sure that the house is constructed there on a safe environment.

I guess the answer to your question is we will look and sure if maybe FHA or maybe somewhere else in HUD that there is that kind of information that you would like, and we will try to get it to you.

COMMISSIONER MEEKS: Well, I just think it should have some impact on -- that you should have knowledge of that, and that it has some impact, and construction is what the issue is.

Now, I don't know if that referred to the construction of new homes or not, but it is probably rehabilitation.

CHAIRPERSON BERRY: Okay. Yes, Vice Chairperson Reynoso.

VICE CHAIRPERSON REYNOSO: In terms of the questions

asked about asthma, the testimony as I remember it expressed concern that most of the testing of air quality was done in the neighborhood. That is, outside the house, and that's why there was testimony that the concern ends at the door.

But the testimony that we had was that the construction and maybe evolution of the housing has very often created worse air inside the house than outside the house, and that thus far, at least the testimony if I remember it correctly, was that there has been no intervention by HUD, again even to start testing the air inside the houses.

And I think the testimony was why is that not being done if it may be affecting asthma and these other health issues.

One, was the testimony correct; and, two, what is your response to your testimony? That is how I remember it.

DR. JACOBS: Well, we are in fact performing those measurements, and you right to say that there have been changes in the way in which we build houses. Building envelopes are tighter, and they are more -- they contain moisture more.

Some people theorize that their houses are moister, which causes microbial growth, for example. So we are engaged in a variety of measures, and obviously that has trade-offs with energy efficiency, which may cause higher utility bills.

So there are issues with regard to affordability and safety that we always take a hard look at. But we are doing the measurements. I don't know who told you that we are not, but we

are in fact doing them.

We are trying to interpret what they mean. There are -- I would point that there are no standards other than for settled dust in lead, and lead in paint and soil, for interior contaminants.

VICE CHAIRPERSON REYNOSO: The implication was that you can't really start thinking seriously until you know what the facts are. So you are proceeding to get the facts and that's good.

I have a couple of broader questions. One has to do with rent subsidies. There has been a series of articles in the local newspaper from the Sacramento area in California about many of the subsidized rental subsidy programs being terminated by -- particularly by large companies that have units for rent.

And the reports have been expanded to areas like the Bay Area, which is such high rent areas. And I guess my question is that what from a HUD point of view is happening in that regard, particularly if folk are eligible to get their certificates, and they get their certificates, there is nothing to rent.

So what happens to those folk in high rent areas like the Bay Area, but apparently it is even happening in not so high rent areas, like Sacramento. And it has been sort of big headlines and articles there.

MR. BREGON: Well, you are correct. There are some high rent markets where we are really facing a problem with

affordable housing, and I think that is why we are seeing tripling of our budget in programs such as SHOP to assist not-for-profit, such as Habitat, and then Enterprise, and LISC, to do housing production, affordable housing production.

Our HOME program, which is another flagship of CPD's program, the Department's program, has about \$1.8 billion in financing made available to participating jurisdictions, and we encourage under this program for the participating jurisdictions to work with not for profits, and faith-based organizations, to do more housing production.

It is a problem, and we are aware of it, and the only way we are going to be able to solve it is by increasing our affordable housing production with programs such as HOME, and CDBG, and directly assisting our communities to produce more affordable housing. But it is a problem, sir.

VICE CHAIRPERSON REYNOSO: Thank you. My last question again is a broad one. One concern of the Commission has been that -- well, there has been a lot of debate in Congress about more block funding. How do you then make sure that civil rights laws that are still on the books are being enforced?

And I was very pleased to hear the testimony about the emphasis at HUD on the Colonias, because it has been a terrible problem. And all the things that were listed were really very encouraging.

But I have this question for you, and it goes to

Title VI, which basically says don't fund anything that is discriminatory, and presumably it says use your muscle to make sure that that doesn't happen.

As you know, the Colonias were created by local governments looking the other way while private property owners then illegally subsidized those places, and didn't put in the infrastructure that you folks are now worried about, et cetera.

Wouldn't it be proper for HUD to get together with some of those community governments and say, hey, you have already established these, but our rules are if we see more colonias being developed, we are not just going to worry about the colonias.

And you are gong to come to us for subsidized renting, and for other housing effects, and deciding on whether or not we are going to help you with that, we are going to look at what other illegalities you are involved in, and that end up being discriminatory in making those decisions.

In other words, it seems to me that Title VI gives you a lot of power to look at a broad issue, and how much of that I guess is going on at HUD, and I get a sense from your testimony that you have individual projects, and you look at those projects and say, well, does this meet our criteria.

So, for example, you have not looked much at -- is that development happening in a place that is close to an environmentally deficient site, because somehow that doesn't come in within the narrow confines of what you are looking at.

And so what is happening in HUD to sort of have you sit back and take a look at these broader issues, and to say, hey, our job is to basically beef up housing, and health, and so on, and there are other things that affect it.

And where folks come to us for help, and ought we not use our muscle to say, hey, wait a minute, you folks are helping to create these problems, and then we come later and try to correct them.

So is there some sort of long term planning, some intra-agency discussions about those things?

MR. BERNARDI: Talking about inter-agency discussions, Secretary Martinez and Secretary Thompson from HHS, talk about housing for the homeless, and the services that are needed.

And they have met, and we have reactivated the Inter-Agency Council on the homeless involving 15 governmental agencies.

And you are absolutely correct. We need to cross sectional lines and make sure that everyone is involved in the homeless situation:

For example, if we provide the emergency shelter, and the transitional housing, and then the permanent housing, then where is HHS? How can we best have that person who is homeless, or that family that is homeless, take them out of homelessness, and give them the proper counseling that they need, and job training, and employment.

We mentioned block grants, and our history with the CDBG and HOME, which I can speak of, it works well. Now, you are always going to have entities out there that are going to try to break the rules, but that's where really oversight comes in.

That is where Secretary Martinez, who is committed to making sure that HUD operates as efficiently as possible, and that we have our field offices out there, and there is some realignment that is being done out there to follow through and make sure that all of the rules and all of the regulations that we have in place are being adhered to.

The Colonias, they have been there for a long period of time, and you are absolutely right. Individuals have taken advantage of these poor people, and basically have them in a situation where they are not free.

And we have committed \$16 million in this budget this year. It is a situation that is very complex, very difficult, and all I can tell you is that we are committed to try and do something about it.

VICE CHAIRPERSON REYNOSO: I guess from my knowledge of the politics in South Texas, I wouldn't be surprised if Colonias are being created right now, you know, and so I am thinking to myself how can at least HUD use its power to at least prevent future sins, as well as sins?

MR. BREGON: Commissioner Reynoso, you are correct. I mean, that is a problem that is very overwhelming. Secretary

Martinez went out and he came with tears in his eyes, and he met with us, and he says, you know, I never knew that we had American citizens living under these conditions.

I mean, he was very alarmed by his findings, and the development of the Colonias as you know, one thing that we do is that if there is Federal monies involved, then we have better leverage.

But once they start using our money, that is where we come in. Right now we have forced the border States to set aside 10 percent of CDBG to go into the Colonias. Once we do that, then Title VI does get triggered, and we do look at what they are doing with the Colonias.

We also are telling States exactly what you say, Commissioner Reynoso. Don't expect us to come after you have developed this uninhabitable communities, and then expect the Federal government, at the taxpayers expense, to build all the infrastructure.

There is not enough money in all of the Federal budget to do all of this. We are talking about billions and billions of dollars. But we have been working with the States.

For instance, as a result of Secretary Martinez going to Texas and talking to the Texas legislation, the Texas voters have overwhelmingly approved by 67 percent two constitutional amendments that will mean that \$175 million will be going to the colonias for infrastructure.

So now the citizens of Texas are seeing this as a problem, and that it behooves them to take care of this because it is no longer Federal dollars that are being earmarked for this. It is State dollars. Now it is hurting their pockets.

So I think that by us working with the States, and the border counties, and in cities, where we have been working very closely like with El Paso, Texas. I meet with Mayor Caballero not too long ago, and we talked about the problems there.

They have an Empowerment Zone, and we also designated the County of El Paso as a renewal community. Again, these are programs in which the communities are really empowered, because under the Empowerment Zone, for instance, it is the community that develops the strategy.

And unlike CDBG, where the community just goes to a public hearing, and says, well, gee, these are our priorities. Under the Empowerment Zone Program, it is the community that develops the strategy, and brings the strategy to the table.

So they know what the problems are, and they recommend what the solutions to those problems should be, and that is what is incorporated in those strategies.

CHAIRPERSON BERRY: Did you have a question?

COMMISSIONER MEEKS: Yes. I have not heard any of you mention anything about NAHASDA.

MR. BREGON: About what? I'm sorry.

COMMISSIONER MEEKS: About NAHASDA, Native American Housing, and whether these same sort of things are happening within NAHASDA.

DR. JACOBS: We have been involved in two projects through our Healthy Homes Programs. One is for funding in Alaska to look at some of the mold issues that are prevalent there through the Cold Climate Research Center, along with some of the Inuit tribes up there.

In addition, the Centers for Disease Control, when they performed an assessment of the Turtle Mountain situation, which was again a mold outbreak, the tool that they used was developed by a Healthy Homes grantee, which was HUD money.

So the tools are coming on-line, and those are two examples of the types of things where we did take action in Native American housing.

COMMISSIONER MEEKS: You were approached by the Housing Authority, the tribal housing authority?

DR. JACOBS: Yes, I believe there were a number of Federal agencies that got involved, and of course the Healthy Homes Program is a competitive grant program, and we did make the award to Alaska, because part of what we look at is do you have a good cross-section.

Do you have medical folks, and do you have people from the community, and do you have a good design so that you can draw some conclusions at the end of it? And then of course we do

work with NAHASDA through the Office of Public and Indian Housing to try and make sure that they have lead-based paint requirements as well.

COMMISSIONER MEEKS: And just one last thing, and I am about out of time, but I just got a couple of e-mails that indicated that Empowerment Zones, that funding was going to be discontinued for Empowerment Zones?

And now I hear that you are talking about there is a number of them going to be approved?

MR. BERNARDI: Round Two Empowerment Zones, and there is no funding proposed in the 2003 budget. Last year, I believe, there was \$45 million for the Round Two recipients.

Each one of those recipients has received approximately \$20 million to date, and we found that the majority of the money has not been spent. They have done a good job, and they have got their plans and their programs in place, but they really have not accessed the money. They have not drawn down on it.

We are encouraging them to use the tax incentives, and the renewal communities in the third round of Empowerment Zones, the seven communities that were designated, there was no money in the budget for that.

I think we will see what happens with the way they use these tax incentives, and then again the budget is proposed, and the budget goes to Congress, and they will have the final say.

CHAIRPERSON BERRY: I wonder what that means. Anyway, I had one last question, but it is time for our break, and so I will ask you to respond to it in writing, please. I will ask the Assistant Secretary to coordinate this.

I would like to know how the programs that we have been talking about coordinate with the housing -- with the civil rights office in HUD, the Fair Housing Office, in Title VI enforcement as it relates to environmental justice.

And if you could just describe the relationship. I have in mind things like pre-award clearance, and post-award clearance, and compliance reviews, and strategic planning of the kind that the vice chair was talking about when he said do you coordinate these things.

And if you could just submit to us a statement about that, and if you could describe that process for us and how it works in terms of coordination, I would appreciate that. Could you do that for us?

MR. BERNARDI: I would be happy to do that.

CHAIRPERSON BERRY: All right. I want to thank you then very much for coming. We appreciate it. There are some sign-out procedures that the staff will walk you through, and thank you very much, and we will now break until 3:15.

(Whereupon, at 3:06 p.m., the hearing was recessed, and resumed at 3:23 p.m.)

CHAIRPERSON BERRY: May I have your attention,

please. Will everyone take his or her seat. We are ready to convene. Will the sign language interpreter ask if there is anyone who is in need of sign interpretation. Thank you.

We now have a panel of witnesses representing the U.S. Department of Transportation. The Department of Transportation will discuss environmental justice as it is incorporated into its programs and policies, including public transportation and highway construction.

Ms. Jenna Park, from our Office of General Counsel, has already called the witnesses; the Honorable Jennifer Dorn, Ms. Gloria Shepherd, and Mr. Mark Brenman. Could you please, although you are already sitting down, could you please stand and raise your right hands?

(The witnesses were sworn.)

Panel Four: U.S. Department of Transportation

CHAIRPERSON BERRY: Thank you very much. Please be seated. Each of the witnesses will make a 7 minute presentation, and in which they will introduce themselves and make a presentation. Ms. Dorn will be followed by Ms. Shepherd. Could you please proceed, Ms. Dorn.

MS. DORN: Yes. Absolutely. Good afternoon. Thank you, Chairperson Berry, and Vice Chairperson Reynoso, and Members of the Commission. I appreciate the opportunity to provide this statement on environmental justice concerns in the context of the Federal Mass Transportation Program.

I am particularly pleased to be here with my colleagues from the Office of the Secretary and from the Federal Highway Administration, and am pleased to be a part of a department that has so proactively taken these matters of environmental justice into fruition at the State, and local, and at the Federal levels. So it is my pleasure to be here.

The Federal Transit Administration was created in 1964, and it does as you know provide substantial Federal funding to assist States and local agencies in financing the planning, the development, and improvement of mass transportation projects, and facilities.

We take pride in serving the public by enhancing their mobility, thereby helping them create more liveable communities throughout the nation. Indeed, one of our goals in FTA's strategic plan is to protect and enhance communities and the natural environment affected by transit.

Public transportation improves the sustainability and the liveability of communities through investments in transportation facilities, and reduces the amount of transportation related pollutants released into the environment.

During the past 35 years the Federal Government, and State and local governments, have acted as partners in funding public mass transportation. In the year 2001, for example, FTA grants totaled \$6.2 billion, which represented about 20 percent of the nation's total annual expenditures in mass transportation,

with the balance provided by State and local governments, passenger fares, and other transit revenues.

The Congressional intent in enacting the Federal Transit Laws is to assist localities in solving their public transportation and mobility problems. State and local transit authorities are entrusted with making decisions on the details of projects that receive Federal funding under Chapter 53 of our statutes.

The framework places a priority on local decision making in transit planning and operations. Under the FTA program, prospective recipients submit applications for funding of eligible projects. As is typical under Federal grant making statutes, the FTA must be satisfied that a variety of requirements have been met prior to the grant award.

To receive a grant, an applicant must comply with Federal planning, and program requirements, and so certify in its application for assistance. These include adherence to regulatory requirements involving planning, public participation, environmental reviews, labor protection, private enterprise participation, and notably Federal civil rights laws.

In-turn, the FTA must make numerous findings as a prerequisite to awarding a capital grant. Federal Transit law requires that grantees provide an adequate opportunity for the presentation of views by persons with a social, economic, or environmental interest in a proposed project.

Project approvals require compliance with the National Environmental Policy Act, and with joint Federal Highway, Federal Transit Administration environmental and planning requirements, and the applicant's assurance of compliance with civil rights laws, and other cross-cutting Federal requirements.

In carrying out its responsibilities, the FTA has long implemented the requirements of statutes, such as Title VI, and NEPA, in a manner that reflects its commitment to environmental justice and the prohibition on discrimination in Title VI.

And together with the Federal Highway Administration, we have worked with our grant recipients proactively to ensure that meaningful community participation in the transportation planning process occurs at a sufficiently early stage to effect development of transportation projects selected for implementation.

We understand the importance of avoiding disproportionately high adverse impacts on minority and low income populations. Finally, in concert with the Federal Highway Administration, the FTA has actively promoted partnership with State DOTs, and MPOs, or Metropolitan Planning Organizations, and transit providers, to advance EJ Title VI consideration in transportation decisions.

We believe wholeheartedly that early inclusive and meaningful public involvement will help ensure the purposes of

Title VI and will help make a community vital, safe, and the people in it moving to the places that they want to go.

We also in addition to this public education and involvement in the planning process, we seek to encourage assessing the distribution of benefits and burdens of transportation investment.

In other words, knowing the impacts prior to the plan being put in place, and these are proposed in both long range plans and short range programs at the community level.

Despite this careful, lengthy, public process, disputes can arise. Accordingly, our rules provide that an aggrieved person with an environmental justice concern may file a complaint under DOT's Title VI regulations.

Generally, the Departmental Office of Civil Rights forwards complaints accepted for investigation to a specific DOT operating administration, such as FTA.

DOT's regulations require investigations, findings, attempts to achieve voluntary compliance, which we believe is the most successful for all parties.

And if all else fails, an opportunity for a hearing prior to suspension or termination of financial assistance. The FTA has relied on a multi-disciplinary team of civil rights specialists, engineers, planners, and attorneys, to investigate and resolve these often complex and difficult complaints.

This approach has proven successful and has served as

a model for the department, and in fact many success stories did not perhaps start successfully, but as a result of these ongoing discussions, mediating and moderating, and consensus building, we get the best project for all parties involved.

The FTA allocates resources among four major civil rights programs for which it has responsibilities. The Americans With Disabilities Act, DOT's DBE program, EEO, and Title VI. Title VI currently has several Title VI complaints in various stages of investigation, and because of these ongoing investigations, we cannot address specific complaints today, of course.

We are, however, committed to resolving these complaints equitably, and as promptly as the circumstances allow.

Title VI and DOT's implementing regulations require that the matter be resolved by informal means whenever possible.

Such resolution is consistent also with Federal Transit laws' emphasis on local solutions to local problems. FTA has the expertise and the desire to work with the parties to achieve a workable solution.

The difficulty that we sometimes have is getting the parties to the negotiating table. In our view, voluntary process is most likely to produce a satisfactory outcome.

The alternatives to a negotiated resolution are time consuming, and costly to all parties and do not result in public transportation projects that serve our very ultimate purpose,

which is to get people where they need and want to go. Would you like me to stop now, because I realize --

CHAIRPERSON BERRY: Yes, could you please sum up? We will let you sum up though.

MS. DORN: That's fine.

CHAIRPERSON BERRY: And your entire statement will be included in the record.

MS. DORN: Great. I appreciate that, and only to say that this department and the Federal Transit Administration are indeed committed, and in fact our fundamental core purpose is serving the needs of the underserved. And so we seek to do that in as equitable manner as possible. Thank you very much.

CHAIRPERSON BERRY: And there will be some questions here in a moment.

MS. DORN: That's fine.

CHAIRPERSON BERRY: Thank you. Ms. Shepherd, please.

MS. SHEPHERD: Thank you, Madam Chairperson Berry. My name is Gloria M. Shepherd, I am the Director of the Office of Human Environment for the Federal Highway Administration.

Prior to that, I was with the Maryland Department of Transportation as a staff director; and prior to that, I was the Deputy Director of Planning and Preliminary Engineering for the Maryland State Highway Administration.

And before that I was with the New York State Department of Transportation, as Chief of Staff for Transportation

for the Maryland State Department of Transportation. I lay that background not because I want to indicate where I have been necessarily, but to show that I have a number of prospectives on this issue, as well as planning issues and transportation.

While it is important to understand the Federal program, it is also important to be on the receiving end and understand the State and local prospectives, and I think that brings a distinct advantage to this position.

As Ms. Dorn indicated, FHWA and FTA have been working collaboratively and have taken a cooperative and comprehensive approach to implement Title VI, and environmental justice throughout our programs.

We have particularly focused on the planning process, because the planning process is the fundamental activity because it is where the process begins. The project process lags the planning process, and as we know to be perfectly honest, once you have gotten to the project process, it is very late in the process and a lot of decisions have been made.

That's why we focus particularly on the planning process, because we try to get public involvement and the concepts of Title VI and environmental justice in the front end, before the decisions have been made.

The cornerstone of our program has been in training, the training of our headquarters staff, the FHWA divisions' staff, and FTA staff, the State people, local people, and the

Metropolitan Planning Organizations.

We believe that education is the true infrastructure of any program, and the better educated transportation professionals are on these issues, the better the outcome of our processes and projects will be.

Over the past two years, FHWA and FTA have jointly developed several Title VI and environmental justice tools for transportation practitioners. The first thing that we developed was a technical assistance manual, and I will leave this with you so you can review it.

As you can see, this is quite an extensive manual that we use, and we have taken it out to 49 States, and we have one State remaining, to educate people on the background of Title VI, and environmental justice, and also to tell them explicitly what is expected of them as far as the implementation of Title VI and environmental justice.

There are not be any hidden secrets on what is expected with regard to implementing Title VI because this document lays it out for them. We do not tell staff explicitly what to ask, but indicate that these are the types of questions that you should be asking to get at this type of information.

And these are the types of answers you should be receiving. We think that people should be well informed about the information that they are imparting and the expectations that we are laying out for them.

We also developed a brochure, a brochure; which provides a general summary for policy makers, citizens, and agency staff, to help them understand Title VI and environmental justice.

And we have developed it in both English and Spanish, because the changing demographics dictate that we provide information to our constituents in a number of different languages.

We also developed a fact sheet which provides general information about frequently asked questions on Title VI and environmental justice. Our approach is that there is no question that is too simple.

People don't have a lot of information, -- and to our surprise, our workforce was not well informed about even the basics of Title VI and environmental justice. So we laid the information out for them.

We also developed a website where the information we developed is housed, and our website is available to the public so they can go and access the information. If they don't have access to computers, we have it in hard copy. We see many requests from many different groups asking us to send the information to them.

We also developed case studies; a document that basically provides information on different types of planning and project development, right of way acquisition, community impact, and public involvement, activities that have gone on in various geographical areas throughout the country. The purpose of the

case studies is to provide information so people can understand what other places are doing, and what has worked effectively.

It also provides information on ineffective practices, and things that they might not want to try to implement. We also developed a Title VI environmental justice training and education package a two day training course, which we have implemented as part of our National Highway Institute, the training arm for the Federal Highway Administration. This course is also open to our Federal transit partners.

The final thing that we have developed recently is our planning and certification review tracking. One of the things that we do is that we visit the various Metropolitan Planning Organizations and our divisions, and track the implementation of Title VI and environmental justice in the various transportation plans.

Jenna Dorn referred to the long range plan and the regional transportation plans, and those are at least multi to 20 year plans. We track how they are implementing environmental justice and Title VI in those planning processes, and if we find weaknesses in their implementation, we document them.

We call them corrective actions, and we set a time frame for them to correct the deficiencies. We then go back out within the stated time frame to see how they are doing in implementing the remedies to their deficiencies.

These efforts have taken substantial staff time, and

significant financial resources. The Office of Human Environment alone has spent over a million dollars over the last 2 years implementing all the things that I have said that we have done, and will continue to spend a lot of dollars and human resources to continue our efforts.

We are also expanding our efforts to look at the relationship between transportation and health related issues. We know that we haven't accomplished everything we want, and we know that we have a ways to go, but we continue to work on it.

CHAIRPERSON BERRY: All right. Thank you very much. And there will be questions. Mr. Brenman, please.

MR. BRENMAN: Chairperson Berry, Vice Chairperson Reynoso, and Members of the Commission, thank you for inviting me here today. I appreciate the opportunity to provide this statement on environmental justice concerns in the context of the mission of the Department of Transportation.

I am the senior policy advisor for civil rights in the Office of the Secretary, and represent the Department on the inner-agency environmental justice working group, which is coordinated by the Environmental Protection Agency, and many of my colleagues on that group are behind me today.

The Department has been very active in the environmental justice area as you have heard from the Federal Transit Administrator, Janet Dorn, and from Gloria Shepherd, the Federal Highway Administration's Director of the Office of Human

Environment.

DOT was one of the first Federal agencies to issue an environmental justice policy and strategy order, in compliance with the Executive Order on environmental justice.

The DOT order was issued in 1997, and applies to all of the activities of the Department. Administrative complaints that come to DOT on the subject of environmental justice are handled under Title VI of the Civil Rights Act of 1964, if they allege discrimination on the basis of race, color, or national origin by a recipient of Federal financial assistance from DOT.

The Department receives relatively few Title VI complaints. This may in part be due to our outreach efforts and requirements for early community involvement in transportation planning as you have heard Gloria and Ms. Dorn talk about.

A major instrument for this public participation are the efforts by the Metropolitan Planning Organizations to consider their local demographics, the transportation needs of their communities, and the benefits and burdens of transportation projects and planning on those communities.

These MPOs as they are known are responsible for administering a continuing and comprehensive, and cooperative planning process in the urbanized areas. FTA and the Federal Highway Administration's joint instructions concerning Title VI and environmental justice and certification reviews of these MPOs illustrate the considerations that have been incorporated in this

process.

Complaints come to DOT in three major ways. The first is that we receive complaints directly from the Department of Justice. People also file complaints with the Departmental Office of Civil Rights, and also people can file complaints directly with the operating administrations, like the Federal Transit Administration, and the Federal Highway Administration.

If the last case occurs, then the operating administration provides information on the complaint to my office, the Departmental Office of Civil Rights. In each case, we record information about the complaints in a database, and we refer it to the appropriate operating administration for action.

In some complaints the allegations concern more than one mode of transportation. In those cases, the Departmental Office of Civil Rights meets with all the concerned operating administrations to coordinate who will conduct the investigation, and how it will be carried out.

Some complaints concern recipients of more than one Federal Department, or issues that cross over the jurisdictions of more than one department. In these cases the Department of Justice frequently coordinates the case handling.

Environmental justice complaints can be difficult and time consuming to resolve. They often present novel legal issues. They may require expertise from a variety of programmatic areas, such as finance, planning, statistical analysis, civil rights,

engineering, and law.

Sometimes these complaints reflect longstanding controversies in local land use, and may result in serious in serious and fundamental community debates. There are also few legal precedents to follow in environmental justice cases.

This is very much an evolving area of the law, and we encourage the resolution of problems at the most local level possible. We have opened discussions with our department's senior dispute resolution counsel, with the Environmental Justice inter-agency working group, and with the Environmental Conflict Resolution Institute, to assess the desirability of using alternate dispute resolution mechanisms in environmental justice cases.

This proposals and these concepts have been well received, and we have successfully used mediation in at least two major environmental justice complaints. Thus, our approach to environmental justice concerns consists of several methods, including investigation, alternate dispute resolution, public involvement, and participation, and Metropolitan Planning Organizations certification reviews, training, case studies, promulgation of best practices, and sponsoring conferences where we bring parties, and many different viewpoints, together.

We are committed to listening to all of our stakeholders. We know that transportation touches the lives of everyone in the United States, and can be a major factor in

ensuring the health and welfare of all Americans. I am happy to answer any questions that you may have.

CHAIRPERSON BERRY: Thank you. Counsel, could you proceed to questions.

MS. PARK: Yes. Thank you, Madam Chair. This question is for Ms. Dorn. In your statement, you stated that one of the goals that FTA is to protect and enhance communities, and the natural environment affected by transit. Can you describe what that means and how you actually carry that out?

MS. DORN: Well, inherent in public transportation is the opportunity to make better use of resources so that pollutants are less, and so that greater numbers of people are served, et cetera. The uniqueness however of each community is dependent on how they want to configure that public transportation opportunity.

But in the main, it provides choices for people who don't have choices, or people who would prefer to take mass transit mode rather than relying on cars or other kinds of vehicles.

So it is often said that -- and particularly in this post-911 debate, that when you have seen one airport, you have seen one airport. The same is true with transit agencies and communities all over the country. That when you have seen one transit agency, you have seen one transit agency.

There are so many options that public transportation can mean in a single community, and so many differing geographic

and economic patterns, that it is very difficult to have a cookie cutter answer as to what is the premium, optimum system of public transportation in a community. But we know that it must be a fulsome kind of system to respond to the community needs.

MS. PARK: Okay. In our previous hearing in January, one of the concerns that was raised was with the disparity in funding, and more specifically talking about Los Angeles, and New York, and I understand that there are two lawsuits that were involving Los Angeles and New York City, in relation to health funding, and money was spent on light rail system, versus inner-city diesel buses.

And I understand that there is a consent decree that was signed in L.A. What are you doing to rectify this type of funding disparity?

MS. DORN: Well, I wouldn't want to speak to either specific case. One is under a consent decree and the other has yet to be resolved, the issue of New York. I don't believe that one has to do with funding disparity, but rather other issues about maintenance facilities, et cetera.

But in each of these matters, as I think all of us have indicated, the importance of trying to resolve these issues across the bargaining, negotiating, mediating, moderating table, that is how you get the issues resolved.

Obviously there are a lot of options that we could potentially have mandates on, and which may not be specifically

appropriate for a certain situation, but we believe that the case by case approach and encouraging the parties to sit down and resolve their disputes are really important.

Well, you know, when my colleague, Mr. Brenman, mentioned about many times there are serious fundamental debates within communities about local transportation decisions, those debates aren't always between the low income and the higher income, or a certain population of race.

Sometimes they are even within those communities. So it is a very complicated set of mostly local issues. So we are committed at the Department of Transportation to aggressively enforcing the laws, and trying to resolve these complaints.

And each, as I mentioned before, has a different set of facts and a different set of circumstances, and a different set of players. Sometimes we can't get them to the negotiating table, and so time is sometimes what it takes.

MS. PARK: Now, in your statement, you also mentioned that once the funding is given out to the local and State transit systems that decision making is really within the local -- you know, that you rely on them to decide what to do with it. But what sort of oversight --

MS. DORN: May I correct that though? We have a number of requirements any time a public transportation or projects receive Federal funds through the local planning process.

First of all, we insist that there be public planning

or a public involvement process so that they can determine what is appropriate to meet all of the needs.

In addition to that, I think that my colleagues had mentioned the importance of the MPOs and trying to ensure that they know the specific demographics of their long term and short term plans.

We have certification processes for MPOs, and the Metropolitan Planning Agencies, and we have certification processes for the kinds of submissions under the Civil Rights Act.

So there are many kinds of requirements. We don't just give the money out and say whatever you think. It is far from that. We believe there should be a local decision making process with extensive public involvement, and our laws ensure that that happens, and our oversight does its very level best to make sure that that is what happens in every local community.

So I just wanted to correct the impression that we just don't give it out and say it is your decision. We believe that the kind of project should be determined locally, but within the confines of the civil rights, and environmental laws. That's very important.

MS. PARK: How much oversight do you have over the funding that you give?

MS. DORN: I would say that it is considerable. I can only speak for the Federal Transit Administration, but my

limited knowledge of other modes of transportation, we have a number of strengths.

MS. SHEPHERD: We do the same. What happens is that there are two things that trigger our involvement. What Jenna said is accurate for the Federal Highway Administration also. The money passes from the Federal Government, to the States.

And if they have done something to trigger interstate access, or if they have a project where there is Federal funding involved, then they come under our scrutiny. Basically they have to comply with specific environmental process.

However, decisions about: how to spend the money, what the make-up of the projects is, the recommendation of the location of the projects with certain approvals, etc. are really their decisions.

The decisions about the nature of the projects, and those kinds of issues, are really up to the State and local governments.

MS. PARK: And how do you ensure that the recipients of the fund are using the fund properly to ensure environmental justice?

MS. DORN: Well, just from the perspective of the Federal Transit Administration, I would just like to give you an example. Major capital programs, for example. Anything that is in excess of 25 million Federal dollars go to our project.

We have a very strict set of criteria in terms of

rating that project. We have many projects in the pipeline, and not all of which are funded, and so the rating process weeds out the better projects, and we hope the best projects.

And a part of that analysis includes that we need to ensure that there is an equitable level of service. That is a part of the rating process, and then once the Federal funds are distributed, we have oversight contractors who go in to ensure that in fact those criteria continue to be met.

So I feel speaking for the Federal Transit Administration that we have one of the more aggressive and effective oversight programs, and one of the more comprehensive sets of planning requirements perhaps in all of government.

MS. SHEPHERD: And on the Highway side, we have also -- well, when they go through their planning process, we approve their overall plans, and so we see those well in advance.

Also -- like I said, if the action triggers Federal scrutiny, because they have either spent Federal dollars, or they have triggered interstate access, and you are talking about the project level, which is much further down the road than the planning level, then they trigger NEPA.

Once NEPA is triggered, we have to approve the projects ultimately. The NEPA process requires the Federal Highway Administration action on the highway projects.

MS. PARK: What is the consequence for misusing the funds? Are fundings ever withdrawn or suspended?

MS. DORN: That's right. That is an option under the law.

MS. PARK: That is an option under the law, but how often is that option actually used?

MS. SHEPHERD: Not often from our perspective, because once we identify a deficiency, and corrections have to be addressed, usually they understand the implications of losing the Federal dollars, and they address the deficiency.

MS. PARK: Has it ever happened in the last two years, where funding was withdrawn?

MS. DORN: For reasons of environmental justice?

MS. PARK: Right.

MS. DORN: No.

MS. SHEPHERD: No, and not for any reasons that I can think of.

MS. DORN: Me neither, and while that certainly is an option, that certainly is not a goal that would serve the spirit of environmental justice. So what we seek is that a local transit agency has enough funds to provide adequate service to all populations, and that is our goal.

If we withdraw the money, then there is no service. So while the power of the purse is a very -- and as my colleague has said, can be a very persuasive tool, and we don't have to necessarily wield it over anyone. They know who signs those significant checks, and it is the public and the Federal taxpayer.

MS. PARK: Now, Ms. Shepherd, you talked about the planning process where the public can participate in the decision making. Now, when we talked to you, you mentioned that there are two phases to a transportation project. One is the planning process, and the second is the project process; is that correct?

MS. SHEPHERD: That's correct.

MS. PARK: And you also stated that while there is ample timing for the public to participate in the planning process once the project has gone through the project process, that there isn't really an opportunity for the public to participate.

MS. DORN: No, no, there is an opportunity, but understand that the decision is a lot further down the road, because what happens is that as you are going through the planning process, you have looked at a lot of information, and you have gathered a lot of findings, and that gives you a lot of information about your different alternatives.

While those alternatives -- well, you start the NEPA process and those alternatives are not considered. They are not carried over. And still you have ideas about issues, and issues about alignment, and things that are more solidified by the time that you get to the project process.

And you actually set up time frames by the time that you get to the NEPA process. So while there are public hearings during the NEPA process, and throughout the NEPA process, and there are certainly opportunities for people to come to those

public workshops and public meetings, and to voice their opinions.

And really you are talking about -- I mean, you are at the point where the transportation officials are looking at specific alignments. So what they are doing at that point is that they are providing feedback on the potential of a project that has already been narrowed somewhat.

And the planning process, which has a long horizon in transportation -- it goes out 20 years -- it gives people a lot more time to voice their input. The problem though as I stated earlier in our conversation with the planning process, it is hard to get people interested in the planning process because it is so long.

They are not interested hardly in the planning process. I mean, it is hard to keep someone's attention for 10 and 20 years. I mean, they can't see it, and they can't feel it, and there is nothing there.

I mean, you are talking about something that may happen in my lifetime or not in my lifetime. So it is not narrow, and it is not focused enough. So people say come to me when it is real, and when you have something to show me.

Well, we have got something to show you, and it is already has defined lines. It is either going to be here, here, here, here, or here. And you have to give your opinion within the realms of what is at that point.

So the point is that by the time that you get to the

NEPA process, it is more limited than the planning process. However, the problems in the planning process is that it is so far out that it is a vision.

MS. PARK: Thank you, Madam Chair.

CHAIRPERSON BERRY: Okay. If I could get my colleagues to indulge me, I would like to ask some questions of the panel first. I usually let everybody ask first.

COMMISSIONER WILSON: You have already said that once before.

(Laughter.)

CHAIRPERSON BERRY: I usually do, but these are different or peculiar circumstances. As I sit here, I am very discomfited by what I am hearing, and it has nothing to do with you personally, or your commitment.

It has to do with the institution concerns that we weigh heavily on everybody who has been before us, and all the people who always come before us for officials charged with the responsibility.

The first thing is, and I would like to engage Mr. Brenman in this questions, because he has been in HHS for a long time, or HEW, and now he is in Transportation, and he has been around these places.

MR. BRENMAN: But I started with them when I was 12 years old.

CHAIRPERSON BERRY: If you get any Federal officials

before this panel, or before Congress, or anywhere, that has a program responsibility, and there is a civil rights responsibility for fund cutoff and use of Federal funds under Title VI or any of the statutes.

They all have the power to cut off funds, but no one ever cuts off funds. When I was running education programs, Federal education programs, I was very familiar with examples in my domain, where before someone had tried to cut off funds to a State, or to someone, and what happened when they tried to do that, the political repercussions.

And one time back in the Nixon Administration, I cut off some Federal funds briefly to somebody, and it was very interesting to see what happened before they got them back two days later.

But anyway the question I would ask you is -- and the answer always is when you ask a Federal official is that if you were to do that, it would of course hurt the program.

How could we deliver education if we in fact cut off the ideas to deliver education, and not to cut off education. The idea is to deliver -- who else was before us before -- housing, and not to cut off funding for housing. The idea is to deliver transportation.

What is the purpose of all of these fund termination things in these statutes when everyone knows that no one will ever use it? Philosophically, at least, do you think they serve any

purpose, at least in the area of responsibility where you are now, or should we just pretend that they don't exist and stop asking people questions about them?

MR. BRENNAN: Well, thanks for the softball question.

As I was mentioning to the Vice Chairperson, I worked for the Office for Civil Rights in HEW, and in the Department of Education for many years, and that agency is probably the most vigorously enforcer of Title VI in the Federal Government, and is probably the premier civil rights office in the Federal Government.

And even in that office that handled a lot of Title VI cases, very, very, few cases ever went to the point of threatening a fund cutoff. First of all, in the course of doing an investigation, in a relatively small percent of cases, there was found to be discrimination.

And then even after discrimination was found, there was an opportunity given to the recipients to negotiate the case out and settle, and the cases would normally settle at that point.

And there were very few cases that did not settle, and where we had to issue a notice of opportunity for hearing, the cases would then probably settle after that notice of opportunity for hearing was given.

And then in very few of those cases where the settlement did not arise, and the cases actually went to a hearing, the cases would frequently settle in the course of the

hearing.

So that while the Federal fund cutoff is sometimes referred to as the nuclear bomb of civil rights enforcement, for some reason it is peculiarly effective. I mean, maybe it is the deterrent effect.

You know, like we used to talk about nuclear weapons during the Cold War, but it does seem to keep recipients on the straight and narrow to some extent, and recipients of Federal funds get accustomed to receiving those Federal funds.

And sometimes in rare cases, they even threaten to give up their Federal funds so that they won't come under the jurisdiction of the Federal Civil Rights Laws.

And yet although I have heard that threat many times over the years, I have never seen a single recipient actually give up its Federal funds. I mean, I remember one school district in California that only got \$624 a year in Federal funds, and it threatened to give up those Federal funds to keep my office from so-called interfering in its day to day operations.

And yet even they could not bring themselves to give up \$624 in order to keep the Feds away from the door. So I would have to say that strangely enough, and this is a strange and mysterious world that we live in, that Federal fund cutoff threats does seem to be effective.

It has sometimes been proposed that there be other remedies introduced into the civil rights laws, something less

than the complete fund cutoff, like a fine, or partial withdrawals.

And indeed administrative law judges at administrative hearings can do that, or if cases get referred to the Department of Justice for litigation under Title VI, Federal District Court Judges have much greater powers at equity than do administrative agencies.

So there are some other possibilities there. But I would say all in all, strange as it may seem, that threat of Federal fund cutoff does seem to be effective.

CHAIRPERSON BERRY: Now, the other thing is that we found in our 1996 report on the enforcement of Title VI, in which we looked at all of the Departments, and in every other report that the Commission has done over the years on Federal civil rights enforcement, we have found that the Department of Transportation's civil rights office is inadequately funded. Does that surprise you?

MR. BRENMAN: That the --

CHAIRPERSON BERRY: We found that the office is adequately staffed and funded.

MR. BRENMAN: And you are referring to my office, the departmental office?

CHAIRPERSON BERRY: The Office of Civil Rights. Does that surprise and shock you?

MR. BRENMAN: No, and I would have to say that I

don't think that our office as it presently stands is understaffed and underfunded. There was a time -- I came in 1995 as part of the new management team, but we have staffed up very substantially since then.

And I think we are doing a much better job, and we work very closely with the civil rights staffs and the civil rights offices, and the other operating administrations.

For example, Ms. Shepherd is the Director of the Office of Human Environment for the Federal Highway Administration, but the Federal Highway Administration also has an Office of Civil Rights. Working for Ms. Dorn is an Office of Civil Rights in the Federal Transit Administration.

CHAIRPERSON BERRY: Right. We looked at all of those in our report, and we found that they all were. Does anyone know the budget for the Department of Transportation?

MR. BRENMAN: The entire budget overall? I don't know, but I can tell you how much the Transportation Equity Act for the 21st Century was, but that is not just the Department. That is surface transportation, and --

CHAIRPERSON BERRY: Well, I know that it is billions of dollars, and does anyone have any idea what the budget for the Civil Rights Enforcement is within the Department of Transportation? That is for all the programs in the Department of Transportation.

I mean, we can look it up, but my only point is that

if you do look it up, you will find that it is a very small percentage of the total budget, because most of the budgets are devoted to grant programs and funds that are given to recipients, and States, and programs, which is as it is supposed to be.

But you will also find that there, as in every other department, that there are serious questions that we have raised in fact about whether there is enough in the way of funding to keep track of all of the different grant programs and the like.

But that is not the question that I wanted to ask, and we will plug in the numbers there in the record without objection ourselves on the budget, because it is in the budget I just thought that maybe somebody knew how much is in each one of the administrations, and how much for the department, and what percentage of that is for civil rights enforcement.

The question that I want to ask is this. The Commission has over the years found that when a department does not receive a large number of civil rights complaints about areas in which there is a lot of public discussion of complaints that people have about that particular area, that very often it means that the public doesn't know that they could file a complaint with the department, and they don't know that it has anything to do with civil rights complaints.

And that is one thing that we found, which is interesting in terms of the number of complaints that you say you have received, which are very small. The second thing is that the

information on the lawsuits that have been filed by people as it relates to programs in the Department of Transportation, and particularly in highway transit.

The Los Angeles one that was mentioned earlier, and the one in West Harlem, and there is one in Massachusetts Bay, and the Transportation Authority, the "Big Dig" project.

These lawsuits that people are bringing under Title VI, did the department know and were you aware that these issues related to these particular cities and programs existed before the people filed the lawsuit, or was it just that nobody knew anything about it, and oops, one day somebody filed a lawsuit, and you wondered why are they doing that. We don't understand what is going on here.

MR. BRENMAN: I mean, I can respond in part. With the Los Angeles Metropolitan Transit suit, I know a number of the attorneys who brought that suit. There is Robert Garcia, who is with the NAACP, LDF, and then with the Environmental Defense, and now with the city project in Los Angeles.

And Bill Lan Lee was involved in that suit, and Connie Rice, and they built a very vigorous and active, and productive coalition of community groups there, and were very successful in bringing those matters.

And I have put on presentations for transportation groups, including FTA and highway people with Bob Garcia. So we worked pretty closely together, and I think there was just a

magnificent group that got together and brought that suit.

And I think that they did a far better job than any of us bureaucrats could have done. There is just no substitute for the wonderful kind of coalition building that they did, and they also put together an unusual knowledge of both Title VI and environmental issues, and environmental justice issues that very few people in the United States have.

And including that there are people like Peggy Shepherd in West Harlem, who have that kind of knowledge, too. And there are so many issues out there in the world, and there are very capable people.

And certainly we as bureaucrats don't have all the answers to those issues. There are a lot of routes of redress and those routes, with people like Bob Garcia have taken in Los Angeles, it is entirely appropriate that they had that tremendous success in getting greater quantity and quality of services for people.

CHAIRPERSON BERRY: Mr. Brenman, I find that answer absolutely astounding. Here is a small tiny organization, nonprofit, with the resources that it has, and the amount of money that it takes to put together a lawsuit.

And all the people out there in the country, if you just read the news clips as we do, who have problems in their local communities with transit authorities, and problems with communities being served and undeserved, and the like.

And instead of your department being proactive, and trying to go out there and giving me an answer which says that we read the same news clips that you do, and we know that there are all these places out there, and we are trying to find out what is going on, and see if we can help these folks.

And if the answer is that they all have to get a nonprofit law firm that has some resources, and can mobilize the community to get them together, when it is the responsibility of the Federal Government under Title VI to deal with these issues -- I mean, that is just absolutely astounding.

I mean, I know that there are issues in the communities. We get the news clips, and we follow these things, and if I get the news clips and I know, then I don't understand why the Department of Transportation doesn't know and doesn't do something about it, rather than waiting for Bob Garcia and Connie Rice, and all the rest of them to go all over the country and try to help people who are in these communities.

Do you know what the budget of those non-profits are?

I mean, they hardly have any money, compared to the little tiny money that you have over in Transportation. I just found that absolutely astounding.

MS. DORN: Well, I would not agree with my colleague in this respect, because I believe the Department is very aggressive to the degree possible that one can get visibility into the local situation.

And while we, too, read the press, and we do far more than that, and I would suggest that there are many ways in which we can help understand what the local issues are.

And we try to bring it to their attention early on as we see it. That doesn't mean that we have a perfect oversight system, and nor does it mean that the complainants, just because they get press, are correct.

This is a very difficult and complicated matter, and I don't think that this enforcement issue has been totally resolved, in terms of our effectiveness. I think we have an effective oversight program, and we are vigilant and committed to working it through.

But I would not presume that simply because, and nor do I think you were saying this, simply because a local interest group gets a lot of press claiming that a problem is a problem, our responsibility is to ensure, number one, the facts of that situation and try to make sure that it is not a problem.

If it is a problem, I as an administrator, if I determined that there was a clear cut case of willful violation of an important law -- and every law is important, but a significantly impactful law, like environmental justice, and there was no willingness or political wealth, small p, to comply with that law, I would have very little hesitation to recommend to the Secretary, or to do it if it was my authority, to remove the funds.

I do think that there are countless examples that will never come to the light of day, or be recorded in the press, of how the power of the purse, just by the local entities knowing that their funds may be in jeopardy, or that they could get negative press that would result in the project not going forward, that they sit down at the table and talk about how to modify a station in a low income area to be responsive by having a day care center.

There are probably 150 cases of that kind of creative problem solving, hopefully incentivized by us in the Federal arena, for those problems to be resolved. So I guess I would just have to take issue with the approach of my colleague with respect to the answer to that specific question.

MS. SHEPHERD: I would like to chime in also, because we are out there in the field often. One of the things that I would encourage you to do is when you look at the budgets, you may want to look beyond the Office of Civil Rights because civil rights activities are not funded only from the civil rights offices.

You have to look in other places. Like my office is not the Office of Civil Rights, yet I spent a million dollars on it over 2 years. Metropolitan Planning and Natural Environment, my counterpart, spend countless dollars on environmental justice and Title VI.

So I just want to encourage you to look beyond the

Civil Rights Office. As a matter of fact, I can't be successful with environmental justice and Title VI without Metropolitan Planning.

It is almost like affirmative action being successful without affecting the personnel system. It can't happen. They have to be married. They interrelate, and affect each other.

The way to get success in one is to work the other very well, and that is the way that Title VI and environmental justice is, but that's an aside. Most of the times we do know a lot of the cases that are going on in the different parts of the country.

However, that is the purpose of giving corrective actions. I mean, you are out there, and you are noting that there are problems because a citizen has complained, or a State or something has gone wrong that has triggered our attention indicating that we need to go out.

In my office, we try to go out and give technical assistance, training, document their deficiencies, and put specific actions in place on the record that says that you need to correct this public involvement, analysis, documentation, wherever the problem lies, by a certain point in time.

Sometimes those actions take a lot longer than the citizens would like, and they are right to a certain extent. I mean, maybe these conditions have gone on for 10 and 20 years. However, the point is that we have been out there from that

particular time trying to set in motion some corrective actions.

All of this doesn't mean that they have to wait for us to go back out within 2 months, 2 years, 3 years, whatever the designated time is for us to go back and review those corrective actions.

They do have a right to sue, and a lot of them like to circumvent and just go -- well, not circumvent, but they don't want to wait those 2 years or 3 years, or they said we have waited too long. We are going to bring a lawsuit.

That is their prerogative, and there is nothing that we can do. But that doesn't mean that we have not been out there trying to remedy the situation.

CHAIRPERSON BERRY: Just to be clear, I was not suggesting that you should cut off people's funds in every case. I was simply suggesting that perhaps you might be aware of these problems, and you answered the question.

MS. SHEPHERD: Well, we are aware. Let me give you an example of where we are.

CHAIRPERSON BERRY: I understand your testimony now, and I understand.

MS. SHEPHERD: All right.

CHAIRPERSON BERRY: But what I would like to do based on what you just said about the budget is instead of us plugging in the figures, I would like to ask Mr. Brenman on behalf of the Secretary's office to pull together the numbers on what the

department sees as what it is spending on civil rights enforcement, and turn it into us, rather than us pulling it together.

And if you would do that, and could we ask you to do that and submit it for the record before the record closes?

MR. BRENMAN: Certainly. No problem.

CHAIRPERSON BERRY: We would appreciate that. And then I have no further questions beyond that. Do others have questions that they need to ask? If not, let me then thank the panel very much for being with us, and say that there are some sign-out procedures that the staff will walk you through, and you are excused.

MR. BRENMAN: Thank you.

CHAIRPERSON BERRY: And then we will call the next panel. We have a panel of witnesses representing the U.S. Department of the Interior, and let there be order in the room, please.

The Department of Interior will focus on its trust responsibilities with Native American tribes, and how environmental decisions are made that impact tribal lands.

The Honorable Neal McCaleb, Mr. Jerry Gidner, and Dr. Willie Taylor, are with us. Could you please raise your right hands.

(Witnesses sworn.)

Panel Five: U.S. Department of the Interior

CHAIRPERSON BERRY: Thank you very much. Please be seated. Each witness may make a seven minute presentation, and Assistant Secretary McCaleb will start, followed by Mr. Gidner, and Mr. Taylor. The Honorable Neal McCaleb, could you please proceed.

MR. MCCALED: Thank you very much, Madam Chairman. My name is Neal McCaleb, and I am the Assistant Secretary of Interior for Indian Affairs, with direct responsibility for the Bureau of Indian Affairs, the Office of Indian Education, the American Indian Trust, and some other Indian-related activities within the Department of Interior.

And I have submitted a written statement for the record, and so I am just going to speak extemporaneously.

CHAIRPERSON BERRY: Well, your statement will be included in the record.

MR. MCCALED: The Bureau of Indian Affairs is a major bureau within the Department of Interior, and the Department of Interior is the major custodian of 20 percent of the land mass in the United States, and it includes all of our park systems, the Bureau of Land Management, which has a substantial portion of the Western portion of the United States, Fish and Wildlife Service, to mention a few.

I am going to confine my remarks to the Bureau of Indian Affairs and the area from which I have some experience and responsibility. Since you want me to visit about trust, I am

going to have to trust somewhat at the beginning with the original relationship between the Indian tribes and the United States, the fledgling United States, which in its constitution established a unique relationship with the tribes under Article I, Section 8, which says that nobody can have any commercial activity, or any intercourse with the tribes, except the United States.

And it was further clarified in the nonrecourse statutes. A number of treaties were reached with the tribes as the western frontier moved west, and tribes gave up their land in consideration of certain treaty responsibilities.

Many of the treaties were reached originally for protection against "white man's disease, as much as anything, in order to isolate the tribes from the white community, which had decimated the tribal populations in the colonial times, as well as they wanted to keep their sovereign governments within boundaries, and within limits that they could define so that their authority would be supreme.

That policy carried on through the end of the 18th century and through most of the 19th century, ending in the plains tribes wars, basically the last so-called battles in 1891, and the last major battle was in 1876.

And that's when the treaty period ended, was in 1876, and after that there were no more treaties with the tribes. But the United States maintained the retained sovereignty of the tribes.

And from that point forward, or actually prior to that point, began to act as a trustee in a trustee-ward relationship with the tribes and the several Indian individuals of the United States.

In 1887, it was determined that the Indian policy was driven by the concept that the Indians should be allotted a certain amount of land, provided with the various utensils, and basically a mule and a plow, and they would become farmers.

And each member of the tribes were allotted 160 acres, and in the case of my mother, who was allotted in 1904, and minors were allotted 80 acres. The allotment process went on from 1887 through 1934, when it was decided by Congress that it was a failed policy, and was stopped in 1934.

At that point the Indian estate had been diminished from the original treaty deminimized area of 150 million acres down to about 50 million acres. Since 1934, since the end of the allotment process, it has grown slightly by about 10 percent. It is now 56 million acres.

Of that, 11 million acres are individual allotments, allotments made as far back as 1887, and then fractionated to the heirs over the 114 years in the interim. Some Indians had the privilege or were given the privilege of holding their land in fee-simple, which was the case in my family.

I sold my inheritance, my allotment, in 1955, in order to finance my way through college, which seemed to be a

reasonable investment at the time. As I said, 11 million acres are still held in trust by the United States.

And then they hold 45 million acres in trust for the 560 tribal, Federally recognized, tribal governments throughout the United States. In 1934, with the end of the allotment era, the Indian Reorganization Act was reinstated, and up until that time the philosophy of the government was basically the liquidation of the tribal estate, and the liquidation of the tribal governments.

And in the case of my own tribe, the Chickasaw Tribe, that tribal government was essentially liquidated in 1906 as a predicate for Oklahoma coming into the Union as a State.

Tribal leadership was maintained in title only, and in the early 1970s, as a result of the Indian Reorganization Act, a number of tribal governments were reinstated and recognized as sovereigns.

In 1975, we moved to the policy of the Indian Self-Determination and Education Act, which basically said tribes should be making their own decisions and to the greatest extent possible in the determination of what their future ought to be.

And to devolve down from the BIA and the Federal Government to the greatest extent possible, to the tribal government level, the responsibility of running those governments, and actually devolving down them the funds.

We now are at 54 percent of all funds to the Bureau

of Indian Affairs now currently go directly to the tribal governments, who decide how that money is going to be spent. It is just like a block grant if you please to the tribes.

We have as a result of these Acts two types of trust accounts. One is the individual Indian money account, which is much in the news these days for poor management, and the other are the tribal accounts. We have a responsibility to consult with the tribes on any Federal action that affects those tribal governments under Executive Order 13175, which has been in effect since 1975.

The mission of the BIA is two-fold. One is that of trustee to administer these trusts, and to preserve, protect, and maintain, and optimize the revenues for the trusts for the beneficiaries. The other is to devolve to the tribal governments the responsibility and the money for the operation of their own accounts.

Those two concepts come in tension as you might expect to some degree. We have a large scope of operations, including social services, law and order, roads, schools, trust resource management for land, wood, and water, and housing.

Most of the housing is done by the Housing and Urban Development Agency, but we have a housing improvement program which is basically housing renovation.

We do build and maintain detention facilities, both adult and juvenile, and a major portion that is set aside is Indian water rights, because under the Witters Principle, all

reservation and Indian land water rights are superior and prior to any other water rights.

And we have to assert those water rights in the interest dominions over people who may be utilizing those resources for their own purposes; good purposes, but that they own those water rights. And I am out of time, and so I will stop right there.

CHAIRPERSON BERRY: Okay. Thank you very much. Mr. Gidner, please.

MR. GIDNER: I do not have a prepared statement.

CHAIRPERSON BERRY: Okay.

MR. GIDNER: So I am available for questions.

CHAIRPERSON BERRY: All right. Mr. Taylor.

MR. TAYLOR: Most of my prepared remarks have been inserted into Mr. McCaleb's statement.

CHAIRPERSON BERRY: Who is going to tell us about the environmental justice responsibilities?

MR. TAYLOR: Well, that's what I intend to do.

CHAIRPERSON BERRY: You are going to do that? Okay.

DR. TAYLOR: The Department of Interior, as was stated, is primarily a land managing agency. We manage approximately 20 percent of the nation's land mass, and that translates to approximately a half-a-billion acres.

The largest land managing bureau inside the Department is the Bureau of Land Management, but we also have

other land management agencies, including the Park Service, Fish and Wildlife Service, and the Bureau of Reclamation.

The Bureau of Indian Affairs also has land management responsibilities as well. Now, those are the five biggest agencies inside of the Department of the Interior, and inside of those land management agencies, you will see that there are differing types of responsibilities that they have. For example, preservation in the Park Service, and multiple use in the Bureau of Land Management, for the most part. And in terms of enjoyment by the public, hunting, fishing, as well as wildlife viewing occurs on wildlife refuges. BIA has responsibility for the trust management of lands.

Outside of those agencies, we also have the Office of Surface Mining. They are responsible for the oversight of the coal mining in the United States, we also have the Minerals Management Service (MMS), they are the collector of royalty revenues for minerals on public lands on shore and on the outer continental shelf.

In addition to those agencies in Interior, we have the U.S. Geological Survey. They are the premier science agency inside the Department, in terms of geophysical, as well as biological, research.

Again, those are the major bureaus inside of the Department, and what you will see there is a variety of missions and goals, and the purpose of the Office of the Secretary is to

try to make all of bureaus speak with one voice, and that sometimes is a daunting challenge.

I want to talk specifically about environmental justice, and what we have done as a department. First of all, the department had an environmental justice strategic plan in 1995, and we would point you to our website, but it is not up at the moment.

We have supplied that plan to the Commission. We have also done a couple of reports in terms of the kinds of projects that we have done, and that has been submitted to the Commission, and I hope that will go into the record.

I will not repeat those accomplishments, but I think if you go through the whole strategic plan, and there is a lot there. Our plan can be boiled down to three parts.

What we aim to do at the Department of Interior is to cooperate with our fellow Federal agencies, and local governments, to develop and to implement environmental justice policies.

One of our primary missions is to protect cultural and natural resources and ensure that any adverse environmental impacts from development are mitigated.

And finally we must fulfill our trust responsibilities towards American Indians and Native Alaskans. Again, what I have given you is a set of activities that we have undertaken, and I would just like to highlight a couple of those.

One has been the work that we have done with the

Interagency Working Group (IWG), which is chaired by EPA. I have had the honor of being the Departmental Representative to the Interagency Working Group, and I think that Charles Lee and Barry Hill, have both revitalized that working group, and got some energy and some action into that group.

The Department of the Interior participated in 4 of the 15 demonstration projects of the IWG that I believe you heard about this morning. So again I won't go through those, but it is part of our testimony.

We have approximately 70,000 employees, and a half-a-billion acres of land. We are a very decentralized agency. So to tackle an issue like environmental justice, we have individual coordinators for each one of the bureaus.

We have environmental justice coordinators, and we have them in each bureau, and in some cases we have them in each region of the bureaus, because the Department is in fact fairly regionalized, with most of our activities out west.

Again, once we get up on our website you would see our regional contacts however, I can supply you with that information if you are interested. In addition, the environmental justice DOI contacts were published in the EPA agency contact guide, which I believe you have in the record as well.

I chair the group of individual DOI agency environmental justice coordinators, and that's the way we attempt to bring some consistency across the Department on how we deal

with environmental justice.

We have adopted CEQ's guidance on incorporating Environmental Justice in NEPA Compliance documents, but before that, we had DOI guidance on this topic which was issued by incorporating my office.

The departmental working group of EJ Coordinators exists to exchange information best practices. And let me close with that.

VICE CHAIRPERSON REYNOSO: Very good. Counsel.

MS. PARK: Thank you. Mr. McCaleb, there was a report done by the Federal Inter-agency Working Group, which was published in January of 2001, and it had various recommendations, one of which was to utilize the NEPA process to promote environmental justice.

And so I just would like to know how BIA is then using the MEPA process to improve environmental justice.

MR. MCCALED: I think I would like to defer to Mr. Gidner to answer that, because that is his primary responsibility.

MR. GIDNER: The report that you are talking about was a report from the Inter-Agency workgroup on the Environmental Justice Roundtable need it August 2000. Both BIA and DOI were heavily involved in organizing that and carrying it out.

And just as general background, the working group is spending a lot of time right now deciding how to respond to all of the recommendations in that report. And DOI and BIA are both

involved in that process as well.

But specifically with the NEPA question, the Bureau of Indian Affairs does have a NEPA handbook, which you had asked me to bring a copy, and which I have.

We also follow the EPA's guidance on incorporating environmental justice into NEPA analysis, and that is the way that those issues are analyzed for our new projects that we do NEPA for.

MS. PARK: And so at this point none of the recommendations have been actually resulting in policy at DIA; is that correct?

MR. GIDNER: That's right. The working group is still deciding what their response to those recommendations should be.

MS. PARK: How about the funding recommendation that there be a budget for environmental justice for Native Americans, and DOI, and I guess BIA, too? Has that been incorporated? Is there a separate funding dedicated to environmental justice projects?

MR. GIDNER: No, there is not, except to the extent that basically all the budget that goes to land management, and all the budget that goes to improving the environmental condition of our facilities, all the budget that goes for environmental management, which would include BIA projects or tribal projects, all of that in essence is money that is spent addressing

inequities in environmental contamination.

And generally for all of our land management, what we do is we are trying to address inequities that have been taking place over hundreds of years as Mr. McCaleb was mentioning.

But generally with the environmental management budget, we have a budget of approximately \$10 million every year, and every penny of that is directly or indirectly spent on a project to improve environmental conditions in Indian country.

MR. MCCALED: Really, strictly from a larger standpoint, you have to start from the Indian point of view, that from a historical point of view that environmental justice is a conflicted statement.

There has been no justice in the environment for Indians, and they have been disenfranchised from their land base, and the land base that they have had left in many cases was considered the least desirable, and in some cases they were fortunate enough, even though it looked undesirable at the surface, they were sitting on top of large mineral reserves, such as the Osage Nation.

And they have extracted those mineral reserves over the years, and in that process created some environmental problems of their own, and one of our responsibilities is to go back in and to address these historical problems, and many of them are mental extractions, not the least of which is the Ottawa County site, the Eagle Pritchard mining site in Ottawa County, which is the number

one super fund site in the nation.

I mean, there is mountains of 700 million tons of lime, of lead-laden chaff, that was the product of those mines, and it is laying on top of the ground and the EPA has been addressing that along with the BIA.

And it is the tunnels that are now filled with water, and there is hundreds of miles of tunnels that go into Kansas and Missouri, as well as northeastern Oklahoma, that have filled with water, and the water is very acid. It has a high acidity. It is orange when it comes out.

And it goes into Tar Creek, and it has killed off all of the aquatic life, and it is the number one super fund site in the nation. So we have to address those kinds of issues, and we spend a substantial portion of our budget.

The other aspect of environmental justice from an Indian point of view is that they are not -- Indians are not full participants in the economic prosperity of this country.

I mean, you look at the health conditions. They have the highest infant mortality rate, and the lowest age attainment rate, and the highest rate of diabetes, and the highest suicide rate.

Those are environmental problems that are products of their environment, and that is what our entire department is providing services, and not too effectively I might add over the past century, to address those problems.

So in a way almost our entire budget for the department is for environmental justice, and to try and raise the living standard, the quality of life, and the expectation that has so decimated the expectation of Indian America, and resulted in the hopelessness and despair that has created a high rate of alcoholism, the highest in the nation, and one of the highest rates of unemployment.

MS. PARK: How do you resolve environmental claims when they involve individual tribal members against the tribal council?

MR. MCCALED: I'm sorry. I understand the individual claims, but did you say have we been involved in that?

MR. PARK: Right. How do you resolve that? What role do you play in that?

MR. MCCALED: Well, first of all, we respect the sovereign of the tribes, and on Indian reservations that land that is held in trust is their sovereign land base.

Their laws, for example, are in effect. The State laws have no effect in the area. The Federal laws do have effect, like NEPA, for example. We are charged with the responsibility of the NEPA process.

If an individual brings a grievance, an individual Indian, and the community brings a grievance against his tribal council, we don't involve ourselves in the resolution of that unless it becomes a civil rights grievance. Is that fairly

stated?

MR. GIDNER: That's fair.

MR. PARK: What happens if it is a civil rights grievance?

MR. MCCALED: I'm going to let you respond to that. My experience there is a grand total of 7 months.

MR. GIDNER: Well, my experience is 50 months, and I have not been involved in anything like that. We often get comments from individual Indians on environmental matters as part of the NEPA process, and to the extent that there is public participation, any individual, Indians as well as any other affected or interested person can submit comments that are taken into account.

MR. MCCALED: Let me give you an example that I may know about, and that is about the hog farm on the Rosebud Reservation, because the tribe has been on both sides of that issue, suing us and joining us in the defense.

The circumstances were this. That a private developer wanted to come in and create a fairly extensive hog raising operation. And we did approve a finding of no significant impact, and approved the lease.

And they built a small portion of it and started it, and then it was determined that the Assistant Secretary of Interior for Indian Affairs, who was my predecessor, didn't have the authority -- well, that may not be stated quite right.

But we wanted to go back and do a full-blown NEPA, and that a lawsuit was brought by the members of the community -- not the tribe, but the members of the community -- against the Bureau of Indian Affairs.

And we took the position that -- and I have this a little bit backwards, and help me on this, Jerry.

MR. GIDNER: And let me back up just a little bit and perhaps even my answer to the previous question. In that case, it was not so much a grievance of the individuals against the tribal council.

I mean, they had a grievance against our decision to approve the FONSI. In that case our Agency Superintendent approved the FONSI and environmental assessment, and we approved the lease.

The individuals, an organization of citizens, which were not entirely Indian, but also the local Audobon Society, et cetera, were involved. They did sue us in District Court, challenging the lease on one basis, which was that the NEPA was insufficient, and we reviewed the NEPA process that had been done by the agency, and we decided at the central office that in fact an environmental impact statement should have been done.

The Assistant Secretary took -- Mr. McCaleb's predecessor, took the rather extraordinary action of writing to the tribe and saying the lease is void ab initio because the NEPA was not sufficient, and this requires an environmental impact

statement.

On the basis of our voiding the lease the citizens group suit, which was in the District Court in Washington here, was dismissed. The pork production company and the tribe sued us in District Court in South Dakota, alleging that, one, the Assistant Secretary did not have that authority; and, two, the NEPA process, and the environmental assessment was in fact sufficient.

The District Court ruled in favor of the tribe and the hog farm company, finding that the Assistant Secretary did not have that authority, and that the environmental assessment was sufficient, and also issuing an injunction preventing Interior from taking any actions to prevent the construction of the hog farm.

Then there was a tribal election and the new tribal government decided that they weren't so keen on the hog farm, and they issued -- and I should also say that the Department of Interior appealed the District Court's decision, and that is still on appeal. That has not been resolved by the Appellate Court.

The tribe had an election, and the new government went to tribal court and got a tribal court temporary restraining order prohibiting the company from completing construction.

They also changed their position in the lawsuit and joined BIA as defendants in that suit, rather than they had been plaintiffs in the suit before. The hog farm company went back to

the District Court and got an injunction essentially overruling the tribal court injunction, and enjoining the tribe from taking any action to prevent construction of the hog farm, and that is where that stands today.

MR. MCCALED: The suit now today is styled, Sun Prairie v. McCaleb and the Rosebud Tribe, et al. So we went through this by way of showing that these are fairly complex relationships, in which their are dynamic, and not only complex, but dynamic and changing.

And there are occasions when most of our work is done at the agency level, and which is at the tribal level where the agency superintendent reviews and makes these decisions, and at the regional level. We have 12 regions in the country.

Occasionally, we have an instance like this where we feel like it is necessary for the central office to step in, which we did here, and the assistant secretary voided the lease, which was an extraordinary activity.

MS. PARK: I just have one more question. It is a two-fold question. One, what percentage of DIA's NEPA process resulted in FONSI, meaning Finding of No Significant Impact?

And what avenues are there for the tribal members, or the public, to appeal that; and how often is FONSI overturned?

MR. GIDNER: I don't have the exact numbers, but we take literally hundreds of thousands of actions a year that require NEPA, because any raising of a lease or right-of-way, any

of those actions, and which there are hundreds of thousands across the country that we approve, all of those require some sort of NEPA analysis.

Now, most of those -- well, they would be satisfied by a categorical exclusion, which is a simple one-page checklist.

I'm sorry, but there are some provisions in our regulations that allow us to essentially do a one-page document that says this is excluded because it is a certain sort of category.

For example, if a piece of property has been leased for agriculture before, and now we are renewing a lease, and leasing it to somebody else, the use of the land is not changing, and only the lease holder is changing.

That is a categorical exclusion, and the environmental impact of that does not change. So you can use a categorical exclusion for that, which does not even reach the level of an environmental assessment.

MR. MCCAULEB: They are basically de minimis activities or de minimis changes.

MR. GIDNER: Right. And I would probably -- and I can get you more numbers on this, but I guess most of our activities are categorical exclusions. But we do hundreds of environmental assessments every year for other projects.

And I would say it is probably hundreds. And I say we do it. We have the responsibility of doing it, and we don't have the funding to do it, and usually if a tribe is working with

somebody to develop a project that requires NEPA analysis, either the tribe or the proponent of the project has to fund the environmental assessment.

And then we review it and if we believe it is satisfactory, we adopt it as our own and sign off on it. And then we do probably less than 10 environmental impact statements at any given time, but we have some significant ones going on at any given time.

And as far as the appeal of the FONSI, people have 30 days from the signing or the taking of the action, and not the signing of the FONSI, but the signing of the lease, or whatever the underlying action is that we prepared the NEPA for.

And they have 30 days from that to appeal to the Interior Board of Indian Appeals, and I have no idea how many FONSI are overturned, but I can't think of any offhand, except the hog farm one we were just talking about.

MR. PARK: Okay. Thank you, Madam Chair.

CHAIRPERSON BERRY: All right. Thank you very much. Commissioners, do you have any questions?

COMMISSIONER MEEKS: Yes, I do.

CHAIRPERSON BERRY: Commissioner Meeks.

COMMISSIONER MEEKS: How many EAs did you say that you review a year or that you have on your desk at any given time?

MR. GIDNER: On my desk, thankfully none. And let me explain how this system works. We do have 12 regional offices as

Mr. McCaleb said, and 85, or I believe it is 85 agencies and field offices.

Most of the NEPA work is done at that level, and the sign-off for the environmental assessment will be done either at the agency superintendent level, or the regional director level.

Each of our 12 regions has somebody who is designated as a NEPA coordinator, and who would oversee the whole NEPA process. Some of our agencies have somebody, and not all of them, and where they don't, then usually the region would step in and help.

COMMISSIONER MEEKS: And there is adequate funding for the Eas?

MR. GIDNER: No. No.

COMMISSIONER MEEKS: Have you requested adequate funding?

MR. MCCALED: Well, let me speak to that directly. I just got kind of drug (sic) through the cactus patch in a Congressional hearing yesterday, because we haven't asked for more people to do our Bureau of Acknowledgement and Research, and which is a process that we go through for people to assert their tribalness.

And we have to do -- well, we are running way behind on that, and clearly we are inadequate on that. What I told them, and what is the answer to both of these questions. We have a very large and very serious level of responsibility that relates to the

health and safety of the individuals.

And we provide essential government activities like law and order, roads, and we don't provide health anymore. That is by the Indian Health Service. It was in the Bureau up until the '50s.

So our budget is about \$2.3 billion overall, and the tribal advisory board to the Bureau of Indian Affairs is estimated in real needs at \$7 billion. So we have to do some prioritization.

In other words, everything gets funded short. Everything gets funded short.

COMMISSIONER MEEKS: I know. Well, I have some questions that I really have to ask you, and it concerns environmental justice issues, especially on the Snake River dams and the Columbia River Basin.

And I guess my question is will BIA and DOI take a stance on breaching those dams?

MR. MCCALED: Well, first of all, you have to understand that the BIA and its sister agency, the Bureau of Reclamation, which is the operator and builder of that particular dam, I think, have had different interests on these.

And many times we take different positions. The Fish and Wildlife Service, for example, takes a position many times from the Bureau of Reclamation when they want to build a dam, or extend an irrigation channel.

And us, when we want to build a road, the Fish and Wildlife Service may decide that our road construction somehow is going to impact fish and aquatic resources, which are tremendously important to our clients also, because a lot of them are still doing subsistence fishing in the Pacific Northwest.

So as it relates specifically to the Snake, and the breaching of that dam, our regional director has done an extensive study on that, a Mr. Stanley Speakes, and has in fact personally spoken in favor of breaching the dam.

That has not been the policy of the Central Office yet. We just are not that far along with it, but --

COMMISSIONER MEEKS: Well, so many people there believe that Federal policy is leaning towards or leaning in favor of the States having more influence there, and I just wondered what your --

MR. MCCALED: Well, that is -- well, tribal interests and State's interests have historically been in tension. Well, not in tension, in outright conflict.

And tribal interests are very suspect any time that we begin to champion the State's interests, because they have done very poorly in State Courts. You will find that when a tribe brings a lawsuit, it will almost always be in Federal Court and rightly so.

COMMISSIONER MEEKS: Well, I am really glad to hear you say this. I am an enrolled member of the Ogawalasee Tribe,

and so my last question is when are we going to get our lease checks?

MR. MCCALED: Well, your lease checks on grazing leases are in the mail. We have the capability to know what to write, and how to write the checks for grazing leases. So they should be forthcoming immediately.

We brought our system up, and the court allowed us to bring our system up, and the Office of Information Management Systems in Reston is up and running, and we have been issuing checks on grazing leases.

We have issued a total since January of 12,000 checks totaling about \$4 million plus. What we have not done is we have not had the capability to issue the checks on the mineral leases, because the mineral management system has not been brought up yet.

The Court has not permitted this, and so we can write checks, but we don't know who to write them to, and how much to write them for. We are going to try to remediate that, and we are just going to take the bull by the horns so to speak, and we are going to average the last three lease checks, and we are going to write a check for 50 percent of that to get that check in the mail, and get a partial payment made until we get those systems up.

COMMISSIONER MEEKS: Well, Mr. McCaleb, I am very glad to hear that you are not in favor of turning more influence over to the States. I mean, you know what a huge outcry that

would be from all the tribes.

MR. MCCALED: And let me hasten to add that for one of the big -- and it is an environmental issue, an environmental justice issue, that tribes want to add to their land base.

They want to acquire, and they go off the reservation many times and acquire land, and then ask to have it put into trust so that it comes under the umbrella of that sovereign immunity, and it permits them to do a variety of things not permitted under State law, and not the least of which is to run Class III gaming operations.

That is very controversial in the non-Indian community, and so we are promulgating regulations right now which try to provide for the tribes' sovereign interests, but also provide for some input from the local community for off-reservation land acquisition policies. It is going to be a very difficult issue for us.

CHAIRPERSON BERRY: Mr. Vice Chair.

VICE CHAIRPERSON REYNOSO: I just have one broad question. You folks all represent the Department of Interior and not just the BIA, and Mr. McCaleb, you properly said that the environmental issues relating to Indians or Native Americans, relates to the history and in many ways the deprivation of what those tribes and those individuals had in terms of economic resources, cultural resources, and so on.

And my question to you is this, or to any of you, is

that the Department of Interior has as all of you indicated, jurisdiction over a tremendous number of acres; a great land base, and a lot of the resources that our country has.

And part of that, and part of your jurisdiction, has to do with BIA and the Indian tribes. Have the various units of the Department of Interior gotten together to see how in some ways within the jurisdiction of the Interior Department that we can do somewhat better about trying to equalize or make better the resources that the Indian tribes or individual Indians have with respect to all of the jurisdiction the Department of Interior has?

Thus, for example, we have tribes that have cattle ranches, and I know that you folks lease out hundreds of thousands of acres in non-Indian land for cattle grazing.

Is there some sort of way where some of those resources can be used for the benefit of some of the Indian tribes or individual Indians? In other words, I just see all these massive resources that the Interior has, and part of it has to do with Indian tribes.

And yet somehow there is not a connection between all those resources that are vast, and the diminutive resources for the historic reasons that you pointed out that have been left for the Indian tribes?

MR. MCCALED: I would say that the progress in this area is incremental progress. This is a brand new administration, and although the Secretary has been there a year, and I was the

first appointed Assistant Secretary, and that wasn't until July 4th.

And the last one was just confirmed by Congress last month. So she has just now gotten a full house of her senior managers. We have been building a cooperative team, and in government, as in private enterprise, people with defined circumscribed areas of responsibility tend to get focused within the boundaries of that, and aren't too sensitive about what their sister agency may be doing.

Secretary Norton has been very careful to try to create a coordinated team, including in the six months or almost seven months that I have been there, we have had two major retreats.

And where all of the senior management has gotten together and tried to identify just the kinds of things that you are talking about. Not only for the interests of Indians, but -- well, I mean, Indians have negative environmental impacts in other areas with the Fish and Wildlife Service.

I mean, Indians fish with gill nets, and under the Bolt decision, and that is an anathema to the Fish and Wildlife Service. But that is part of their sovereign treaty that they had.

VICE CHAIRPERSON REYNOSO: Excuse me, but if they had some other economic resources maybe they wouldn't have to do that.

MR. MCCALED: Amen.

VICE CHAIRPERSON REYNOSO: But if they had other resources, maybe they would not have to have overgrazing that they do have, et cetera, et cetera.

MR. MCCALED: I agree. I will give you an example when I said incremental progress. The Yakima Pueblo had several tens of thousands of acres in which they owned the surface, but they didn't own the minerals.

And the transaction in the twilight of history that I don't understand, a corporation called the Enzi Corporation ended up on a checkerboard and owned all the minerals.

And Congress just passed a bill whereby BLM would do a land swap for BLM minerals off-reservation, and give the Yakima Pueblo back the entire --

VICE CHAIRPERSON REYNOSO: Fee simple.

MR. MCCALED: That's right. Exactly. Right on target. And we are going to be looking at doing the same thing on the Northern Cheyenne. The State of Montana is proposing to mine coal in the Otter Creek areas, and not on the reservation.

But you can almost throw a rock and hit it from the reservation. So we have been working with the Northern Cheyenne tribe and with the Bureau of Land Management, and with the State of Montana, to try to create a settlement agreement for the tribes to mitigate the impacts of environmental justice for the tribes that will be impacted, in terms of employment, and in terms of remediation or outright cash, and the land swap just like we did

at Yakima with the Great Northern.

It used to be the Great Northern Railroad. So these are a couple of small victories, but we need many, many more.

CHAIRPERSON BERRY: Commissioner Meeks.

COMMISSIONER MEEKS: Yes, I just have one question that I forget that I would like to ask, and this is to Mr. Gidner.

You know, on the issue at Rosebud, how do you think that things could have been done differently there so that there could have been more community participation?

I mean, I understand the issue, and it was President Wilson at that time that wanted economic development, a definitely needed thing. But obviously there wasn't enough community participation, although I think the reservations probably were split down the middle on whether they should do it or not.

But is there any way that could have been done differently, that whole process, so that it didn't end up in court?

MR. MCCALED: Let me answer that question. These kinds of issues are very contentious, and I am from Oklahoma. The panhandle of Oklahoma is very sparsely populated, and it is getting worse sparsely populated, because it won't support the populations there.

And they have started extensive hog farming operations in the panhandle, and it has divided the community out there. And people have weathered the dust storms, and their

houses were buried up to their eaves, and stayed through that.

And the descendants are leaving now because of the hog farms, and we had the very best talent in the State doing environmental impact statements, and some of them came up with diametrically opposed conclusions.

These are political questions. This was finally resolved in the passage by the State Legislature, one of the more stringent environmental quality laws regulating hog farming, and for that matter, chicken operations in the eastern portion of the State.

So although these are dealt with administerially, they were ministerial kinds of solutions that we have to deal with. They are very clearly political decisions, and Rosebud was.

It finally changed because they had a new election, and got a new council in, and we were with the council when we gave the FONSI, and then it was boosted up to the national level, and the Assistant Secretary decided that this was not the right thing to do.

And they started doing a full-blown NEPA and canceled the lease. I mean, that is a pretty tough move to take, and just to say King's X. This deal is off, and notwithstanding your commitment economically that you have made out there. That's why Sun Valley sued us.

They are very difficult questions and we try to serve

our clients' interests, and on the margins sometimes it is not easy to tell. And somebody mentioned something about the trade-offs between economic development and environmental justice.

And on the margin, it gets very obscure sometimes, and the people who are going to benefit from the jobs. I am sure that the same argument probably would have been made in Quapaw, Oklahoma, in the 1920s when they were hauling lead out of those mines, and zinc.

And in the Second World War when they provided a tremendous amount of the lead for the ordnance by which we won the Second World War. It was essential. But nothing was done to mitigate the impact on the environment and the community.

And there is no environmental justice there. We are desperately trying in Oklahoma to solve that problem.

CHAIRPERSON BERRY: How many jobs are people supposed to get out of the hog farm thing? What was the projection on the economic benefit of the hog farm enterprise?

COMMISSIONER MEEKS: It was 22 or something.

MR. GIDNER: There was a figure, and I don't remember what it was. It was not extraordinarily high.

COMMISSIONER MEEKS: It was 22 or something.

CHAIRPERSON BERRY: That's the testimony that we had this morning, that usually when someone says you are going to get a whole lot of jobs, it doesn't turn out to be as many as everybody is standing around and talking about.

MR. MCCALED: The unemployment in Indian country is abysmal. In South Dakota, the average is approaching 80 percent unemployment. The best reservation in the State is the Lower Brule, which has 43 percent unemployment. That is the jewel as far as the economy goes.

CHAIRPERSON BERRY: Which Indian reservations have the lowest unemployment? Are there any that have full employment?

MR. MCCALED: Yes, there are that have full employment. I would say the Salich Kutena (phonetic) has one of the lowest unemployment in the Flathead Reservation. They have taken over the -- they operate their whole BIA operation.

They have one BIA employee up there, and he is the superintendent. He is there to sign the papers. The tribal chairman the other day said in front of the House Committee, he said that we call him our "Maytag Man."

CHAIRPERSON BERRY: And where are they?

MR. MCCALED: Northwestern Montana.

CHAIRPERSON BERRY: Okay. So they have got water rights and what, mineral rights?

MR. MCCALED: Yes. Well, wait. They have got a dam, and they generate power, and they have agriculture, and they have got a well-rounded economy. And there are other tribes in Montana not very far away that have 75 percent unemployment.

COMMISSIONER MEEKS: Right. Browning.

MR. MCCALED: Browning. That is an excellent

example.

CHAIRPERSON BERRY: Okay. Well, we want to thank you very much for coming, and tell you that there are some sign-out procedures that the staff will walk you through. We appreciate this, and you are excused.

MR. MCCALED: Thank you very much.

(Whereupon, at 5:12 p.m., the hearing was recessed and resumed at 5:15 p.m.)

CHAIRPERSON BERRY: We will now begin the Public Forum Open Session, where Commissioners hear testimony from concerned persons who were not scheduled as witnesses. We have three witnesses for this session who signed up and who were screened by the staff.

Also, we would like to say that the record of the hearing will be open for 60 days during which additional statements may be submitted. We will have -- each person will have 3 minutes to present their testimony, and if we could have come forward together Mary O'Lone, from the Lawyers Committee for Civil Rights Under Law; and Janet Wiper, from Lawyer's Committee for Civil Rights Under Law; and Kevin Kamps, from the Nuclear Information and Resource Service.

(The witnesses were sworn.)

Public Forum

CHAIRPERSON BERRY: All right. Thank you. Could we begin the testimony with Ms. Mary O'Lone.

MS. O'LONE: My name is Mary O'Lone, and I am the Director of the Environmental Justice Project at the Lawyer's Committee for Civil Rights Under Law. And I would like to thank the Commission for allowing this public commentary, but also for looking into the issue of environmental justice in the United States.

And I am glad to be able to bring the prospective of the Lawyer's Committee for Civil Rights under Law, a civil rights litigating organization, to your attention. We were a national civil rights organization formed in 1963 to involve the private bar in assuring the rights of all Americans.

And for 39 years the Lawyers Committee has represented victims of discrimination in virtually all aspects of life. And in 1991, the Lawyer's Committee formed its environmental justice project to represent communities of color in environmental and civil rights matters.

Our approach to this issue has been to litigate and advocate, using as our tool Federal Civil Rights Laws, the U.S. Constitution, as well as environmental and other law.

What I would like to talk about a little bit briefly are some of the things that we have already heard testimony about, about environmental justice and the sources of environmental injustices.

And you have heard testimony in January, and I was here for that hearing, as well as this morning, about some of the

causes, but I think it is important to reiterate them.

That there are pressures brought on by economic development, dwindling natural resources, and available land, often resulting in citing decisions and actions which disproportionately impact the health and the environment of minority citizens.

Segregated housing and urban planning schemes designed decades ago, and I guess even hearing from the transportation department -- you know, transportation planning schemes, that remain the root of decisions to site industries and to run highways through communities of color.

Also, low income, rural, and minority communities, particularly in areas with large tracts of undeveloped land that they were talking about in the industrial corridor down in Louisiana, are prime targets of disposal sites of unwanted solid hazardous and nuclear wastes, as well as huge petro-chemical facilities.

Minority communities are often the unwilling receptors of hazardous wastes, site incinerators, and industrial correction facilities. And that residents of environmentally contaminated areas often experience cancer, heart rate disease, asthma, birth defects, and other environmental aggravated illnesses at higher rates than the general population.

Now, I would just like to focus on four recommendations that we have for Federal agencies generally as

they implement civil rights laws and their civil rights responsibilities.

And the first is one that there was a lot of discussion about this morning, and that is agencies need to enforce the civil rights laws in environmental justice communities, and there seems to be a reluctance, which I think you recognized, for agencies to either affirmatively or effectively as possible implement these laws.

And to me at this point in time it is almost inexplicable, because for years we have been enforcing -- the Federal Government has been enforcing voting rights cases and fair housing cases, but it just has not done it in the environmental justice context.

And what we hear is that it is just too complicated. But as a result of this, many communities have lost out on vast legal resources and governmental support, which should have been deployed on their behalf to deal with these civil rights violations.

The second recommendation is that recipients of Federal financial assistance should evaluate the impacts of their decisions and taking race into account, and it doesn't happen, and from what I have heard from Federal agencies is we will ask them to look at race after we find a problem with discrimination and that is too late.

And as a result what you have is no State agencies,

particularly in the context of environmental programs, are really looking at these kinds of issues, because there is no credible threat of enforcement from the Federal agencies.

You know, they are talking about alternative dispute resolution to solve problems, but they are not talking about pulling permits, or changing permit conditions. It is all sort of let's get to the table and talk about these things, but there is no hammer at the other side of it.

So nothing is happening, and I am concerned that nothing else will happen. The third is to adopt a precautionary principle with regard to health impacts. And in 2000, before the National Academy of Sciences, Administrator Whitman endorsed the idea of a precautionary principle to protect natural resources.

And we believe that this precautionary principle should also be adopted in the context of health impacts. And in particular the idea is that civil rights offices, when investigating complaints about health impacts in communities of color, should also use a precautionary principle.

They should acknowledge that there are inherent uncertainties, which they do, and this is the whole idea, and that this is so complicated that we can't figure out what to do.

And then instead they should recognize that it is easier to prevent these problems up front than to resolve them afterwards. And that they should shift the burden away from those who are advocating protection to those who are trying to propose

an action that may be harmful.

And the bottom line there is that when a civil rights office is investigating environmental or human health impacts, and they don't know the effects of it, and they don't know the synergistic effects of these exposures, or they don't know the cumulative effects of these exposures, then they should consider it harmful.

And not wait the 20 years for people to develop cancer, or lupus, or any of these other I think environmentally caused diseases. And then the last one, which I think you have already covered a lot about, is building protections into the alternative dispute resolution process.

There was a lot of discussion today about recipients and communities coming together to reach an agreement, but I didn't hear anything from the Federal agencies about whether these agreements actually meant that they had eliminated discrimination.

Instead, it was let's get together and talk, and maybe we can come up with something, and everybody will just go away. There was nothing mentioned that I heard that talked about the Federal Agency's responsibilities to enforce Title VI.

And just as a general matter, I think some of the concerns that we have about the alternative dispute resolution process is the unequal playing field, which I think you all recognized as well.

And the idea of access to information and who has

access to technical resources. And before agencies seemed very anxious to employ ADR, and they think it is great and they are very excited about it. But they need to make sure that the process that they develop puts into place some safeguards to protect communities.

Because without those there will always be problems with these. Now, we will be submitting more detailed comments in writing that address these issues and others that we have heard during the course of the two hearings.

CHAIRPERSON BERRY: All right. Thank you very much.

Ms. Wiper.

MS. WIPER: I am Janette Wiper, and I am also from the Lawyer's Committee, and I litigate environmental justice cases on behalf of communities of color based on the Equal Protection clause, Title VI, and Title VIII.

And although today's discussion has been focused primarily on Title VI enforcement in the context of EPA, I wanted to focus my comments on EPA's liability under the Equal Protection Clause, which I think was missing from today's discussion about the policies, task forces, and programs, and everything that was touched upon.

And first and foremost, the EPA needs to administer its programs in accordance with the equal protection clause. Although the intent standard is hard to meet, there are two theories of liability that are viable theories that the EPA needs

to pay attention to.

The first is EPA's decisions have the potential to perpetuate segregation, and this could arise in the context of a remedy selection process under Super Fund, as well as their patterns and practices of permitting.

The second is EPA's potential to authorize or ratify the intentional discrimination of others; and this can arise either in its permit decisions or its approval of delegated programs.

Given these potential liabilities under the Equal Protection Clause, which I think are very important to address in the report, I have a few recommendations for EPA specifically.

First, EPA needs to demonstrate its civil rights compliance at a minimum. It should not just consider, but it should document, the demographic characteristics of the communities affected by its decisions. It refuses to do so even though its Title VI regulations require it, and it just has not done so thus far.

And in particular the EPA needs to identify communities that were established under de jure segregation. And any facilities or sites that are located in these areas should be subject to heightened scrutiny in its decision making process to avoid perpetuating segregation.

Perpetuating segregation or discriminatory zoning of land use should as a justification to deny a permit, amend a

remedy, or change a decision. To date the EPA has never changed a decision on its own to protect a community's civil rights. They said they don't have the authority to do so.

Secondly, the EPA needs to take responsibility to enforce Title VI, and at a minimum, it should aggressively investigate the complaints that it receives, but to be more proactive, it needs to adopt a Title VI compliance review process, which is long overdue.

It also needs to periodically review its delegated programs for compliance in civil rights laws, and such compliance should serve as a condition for delegation of the programs to the States, as well as a justification for withdrawing or revoking such programs.

Again, the EPA keeps saying that it doesn't have the authority to do so. You know, refusing to recognize its obligation under the Equal Protection Clause.

And the last point that I wanted to bring up in response to what happened today, or what I noticed today, was based on the budget of the Office of Environmental Justice, which is implementing an unenforceable Executive Order, and the Office of Civil Rights, which is implementing a Federal Civil Rights Statute, which is almost one-third of the Office of Environmental Justice. And I think that sums up EPA's EJ policy and plan is.

CHAIRPERSON BERRY: Okay. Thank you very much. Mr. Kamps.

MR. KAMPS: Yes, thank you. Thanks for this opportunity. I did turn in this testimony to the staff.

CHAIRPERSON BERRY: We will include it in the record.

MR. KAMPS: Thank you. My organization is Nuclear Information and Resource Service, and my name is Kevin Kamps, and I serve there as a nuclear waste specialist. And our organization is an information clearinghouse for citizens concerned with nuclear power and radioactive waste issues.

And for a very long time some of our clients and our members have been Native Americans, who have been facing nuclear waste dumps that are targeted at their reservations or their communities if they live off the reservation.

And two of these proposed dumps are really coming to a head at this point, and the one that is especially focused upon in this testimony is the proposed high level nuclear waste dump at the Skull Valley Goshute Indian Reservation in Utah.

And just in the last month the Nuclear Regulatory Commission has published a final environmental impact statement on this proposal, and I didn't bring the document, but in a document this thick, there is only a couple of pages on environmental justice impacts.

And that is really hard to believe, because really the heart of this matter is an environmental justice issue. High level nuclear waste is the most deadly toxin ever produced by humankind, and in the United States right now there is about

40,000 tons of this material at commercial nuclear reactors.

And that is the amount that is being proposed to go on this reservation. The Skull Valley Goshutes are 125 members, and only 25 who live on the reservation, and although the amount of money be offered to the tribal council is officially a secret, some of the members of the tribe have told us that the amount of money is \$50 million that is being offered to this destitute community.

There is one final round of licensing hearings coming up in April, and the woman who is pictured on this paper, Margene Bullcreek, is the grass roots organizer against the dump.

She has an environmental justice contention before the Nuclear Regulatory Commission, and she has had a lot of difficulty obtaining legal representation. She herself has no financial resources to assist in her fight, and so it has been very difficult.

And I just wanted to show that this is a pattern though. Ever since 1987 nuclear waste has been targeted on Native American reservations predominantly for disposal. So this is a tremendous environmental justice issue.

The other dump that is really moving forward at this time is the Yucca Mountain, Nevada, proposed dump, which would be the permanent burial site, as opposed to this proposal, which is supposedly an interim, temporary parking lot for nuclear waste before it is sent to Yucca Mountain to be buried.

And it looks like on this Saturday that Energy Secretary Abraham is going to send his recommendation to President Bush that Yucca Mountain be opened as the national burial site for high level nuclear wastes.

And to our surprise, it looks like President Bush may give his approval as early as Monday, and this is a project that has been 20 years in the works. So 20 years of Department of Energy scientific investigations, and 20 years of public comment, most of which is opposed.

So we are really shocked of the quick turnaround time. And again this is Native American land. This is Western Shoshone Indian lands by the Treaty of Ruby Valley of 1863, but that treaty has been abrogated and is not recognized at this point by the United States.

So we would like to just bring this to your attention and I will try to follow up with further materials to turn into you during the 30 days, including testimony from these affected communities.

MR. MCCALED: All right. Thank you very much. This has been very useful, and thank you for bringing it to our attention, and thank you for the additional information that will be useful as we prepare the report.

And you may submit any other comments that you have for the record so that they can be used. We extended the deadline today at the Commission meeting from 30 days to 60 days. So

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that's why I keep saying 60 days instead of the normal 30 days.

Thank you very much for coming.

This concludes our hearing for today, and we appreciate the attendance and participation of all who were here, and without objection, this hearing is adjourned.

(Whereupon, at 5:32 p.m., the hearing was concluded.)