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ENVIRONMENTAL JUSTICE ACT OF 2008

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Mrs. BOXER, from the Committee on Environment and Public Works, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany S. 642]

[Including cost estimate of the Congressional Budget Office]

The Committee on Environment and Public Works, to which was referred the bill (S. 642) to codify Executive Order 12898, relating to environmental justice, and to require the Administrator of the Environmental Protection Agency to fully implement the recommendations of the Inspector General of the Agency and the Comptroller General of the United States, and for other purposes, having considered the same, reports favorably thereon and recommends the bill do pass.

PURPOSE AND SUMMARY OF THE LEGISLATION

The purpose of S. 642, The Environmental Justice Act of 2008 is to require the Administrator of the Environmental Protection Agency to fully implement the recommendations of the Inspector General of the Agency and the Comptroller General of the United States, and for other purposes.

S. 642 would codify Executive Order 12898, titled, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations", and eliminate the Executive Order's limitation on judicial review. S. 642 would also require the Administrator of the Environmental Protection Agency (EPA) to fully implement the recommendations of the Inspector General of the

Agency and the Comptroller General of the United States. S. 642 also contains a reporting requirement for the Agency to ensure that it implemented the bill in a timely and complete fashion.

BACKGROUND AND NEED FOR THE LEGISLATION

Background

Environmental justice focuses on the disparate impact of environmental contamination on minorities and low income people. Concerns over environmental justice were first raised over 35 years ago. In 1971 the Council on Environmental Quality's Second Annual Report to the President discussed studies that documented the geographic relationship between environmental pollution and minorities.

In 1982 Congress asked the Government Accountability Office (GAO) to conduct a study to determine if there was a correlation between the location of hazardous waste landfills and the racial and economic status of the surrounding communities. GAO found that in southeastern states, three of four commercial hazardous waste landfills were in communities with more African Americans than whites. Also in 1982, protests and lawsuits against the sitting of a toxic waste dump in Warren County, NC helped to spur an environmental justice movement.

A 1987 United Church of Christ Commission for Racial Justice study, titled "Toxic Wastes and Race," also found that toxic dumps were often located near minority communities, rather than just economically depressed areas. The study defined "environmental justice" as the "fair treatment and meaningful involvement of all people regardless of race, color, national origin or income with respect to the development, implementation and enforcement of environmental laws, regulations and policies." In 2007, the United Church of Christ updated their seminal study with the report, "Toxic Wastes and Race at Twenty: 1987–2007." This report finds that there is an even higher likelihood that racial minorities comprise the majority of individuals living in neighborhoods within 1.8 miles of the nation's hazardous waste facilities.

By 1990, in response to the concerns of environmental justice advocates, the George H.W. Bush Administration established the Environmental Equity Work Group, which eventually determined that "racial minority and low-income populations experience higher than average exposures to selected air pollutants, hazardous waste facilities, contaminated fish and agricultural pesticides in the workplace." In 1992, the George H.W. Bush Administration established the Office of Environmental Equity, now known as the Office of Environmental Justice, at the EPA.

Legal remedies have been sought, using Section 601 of Title VI of the Civil Rights Act, which prohibits government actions that disparately impact one group of people, and section 602, which requires federal agencies to implement regulations to protect these rights. The Supreme Court's decision in Alexander vs. Sandoval (2001) construed the law to not allow private individuals and organizations to file suits alleging "disparate impact" discrimination under Section 602 of Title VI. Disparate impact discrimination is unintentional discrimination that adversely affects racial groups or

other protected classes. Now one must demonstrate intentional discrimination, to prove a Civil Rights violation under Title VI.

In 1994, President Clinton issued Executive Order 12898: "Federal Actions to Address Environmental Justice in Minority Populations and Low-income Populations." (E.O.) The E.O. requires federal agencies with public health and environment programs to comply with Title VI's requirements prohibiting discrimination of race, color or national origin. States that receive federal funds from covered agencies must use that money in compliance with the E.O.

Independent bodies have criticized the EPA's failure to fully implement the E.O. In 2004, EPA's Inspector General (IG) issued a report that found the following:

- In 2001, EPA restated its commitment to environmental justice by directing the agency to conduct its programs, policies, and activities that substantially affect human health and the environment in a manner that ensures the fair treatment of all people, including minority and low-income populations.
- EPA has not fully implemented the E.O. nor consistently integrated environmental justice into its day-to-day operations.
- In the absence of established environmental justice definitions, criteria, or standards, regional and program offices have taken inconsistent steps to implement environmental justice policies, resulting in inconsistent impacts.

The EPA disagreed with the IG findings and stood by its interpretation of the E.O., which reiterated EPA's existing responsibility to protect the public, and eliminated the mandate to protect minority communities with a disproportionate amount of environmental pollution.

In 2005, the GAO studied EPA's development of the Clean Air Rules. In its report, it found that EPA devoted little attention to environmental justice. It found the following:

- Initial reports to senior staff that should have been used to "flag" environmental justice issues did not do so;
- It was unclear if environmental justice provisions were including in the early rule making process; and
- Reviews for the proposed gasoline and diesel rules generally devoted little attention to environmental justice.

In 2006, the Inspector General of the EPA produced a report indicating that the agency had failed to fully implement E.O. 12898, and had not sufficiently directed programs and regional offices to conduct environmental reviews in accordance with the E.O. The EPA is currently developing and piloting environmental justice review protocols.

In 2005, Environmental Protection Agency Administrator Stephen Johnson released a memo entitled: "Reaffirming the U.S. Environmental Protection Agency's Commitment to Environmental Justice." In this memo, Administrator Johnson defined "environmental justice" as "justice for all people, regardless of race, color, national origin, or income." He also argued that the Agency's efforts to focus on everyone, not just those members of a minority group, are in line with environmental justice.

Need for Legislation

The Committee believes that the Administrator of the Environmental Protection Agency should fully and quickly implement Ex-

ecutive Order 12898: "Federal Actions to Address Environmental Justice in Minority Populations and Low-income Populations." The Committee also believes that, given the Administrator's repeated failure to fully implement the Executive Order over a number of years, more accountability is needed to ensure that the Administrator acts quickly and decisively to address environmental justice problems.

The findings and recommendations of the independent bodies that reported on the Agency's failure to appropriately implement the Executive Order are extremely valuable. The U.S. Government Accountability Office is an independent, nonpartisan agency that works for Congress. The GAO supports Congress in meeting its constitutional responsibilities and to help improve the performance and ensure the accountability of the federal government for the benefit of the American people. The GAO accomplishes these activities by promoting accountability, integrity, and reliability. Their findings demonstrate a need for the Administrator to integrate environmental justice concerns early on and throughout the Agency's rulemaking process.

The Agency's Inspector General independent office within EPA that helps the Agency protect the environment and human health. The Inspector General's report, which acts as the Agency's watchdog, shows serious failure in the Agency's effort to consistently implement the Environmental Justice Executive Order. The Agency clearly needs more directions and accountability to ensure that it quickly and completely implements the Executive Order.

SUMMARY OF MAJOR PROVISIONS OF THE BILL

S. 642 would codify Executive Order 12898: "Federal Actions to Address Environmental Justice in Minority Populations and Low-income Populations." The bill also defines key terms associated with this Order, and would eliminate the Executive Order's limitation on judicial review.

The bill would require the Administrator of the Environmental Protection Agency to implement various recommendations from the Agency's Inspector General and the Comptroller General of the United States. The independent bodies' reports discussed the Agency's failure to appropriately implement the Environmental Justice Executive Order in the Agency's regulatory activities and programs. S. 642 also contains a reporting requirement for the Agency to ensure that it implemented the bill in a timely and complete fashion.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title

Section 1 establishes the short title of the Act as the "Environmental Justice Act of 2008".

Section 2. Codification of Executive Order 12898

Section 2 codifies Executive Order 12898: "Federal Actions to Address Environmental Justice in Minority Populations and Low-income Populations." It also defines the terms "environmental justice" and "fair treatment", and eliminates the Executive Order's limitation on judicial review.

Section 3. Implementation of recommendations by Environmental Protection Agency

Section 3 requires the Administrator of the Environmental Protection Agency to, as promptly as practicable, carry out each of the recommendations of the EPA Inspector General report number 2006–P–00034, entitled "EPA Need to Conduct Environmental Justice Reviews of its Programs, Policies, and Activities."

The section requires the Administrator to, as promptly as practicable, carry out each of the recommendations of the Comptroller General of the United States contained in report number GAO–05–289, entitled "EPA Should Devote More Attention to Environmental Justice when Developing Clean Air Rules."

The section requires the Administrator to, as promptly as practicable, carry out each of the recommendations of the EPA Inspector General report number 2004–P–00007, entitled "EPA Needs to Consistently Implement the Intent of the Executive Order on Environmental Justice."

The section also requires the Administrator to submit a report to Congress within six months of enactment of this act on the Administrator's strategy for implementing each of the recommendations in the three reports described above. Thereafter, the Administrator is required to provide Congress with a semi-annual report on EPA's progress in implementing each recommendation, and on the EPA's progress on incorporating environmental justice in the Agency's Incident Command Structure.

LEGISLATIVE HISTORY, COMMITTEE VIEWS AND VOTES

VOTES

On July 31, 2008, the Environment and Public Works held a business meeting where it considered S. 642. Senator Inhofe offered an amendment to modify the bill's definition of "fair treatment." The Committee voted down the amendment 10–9, with Senators Baucus, Cardin, Carper, Clinton, Klobuchar, Lautenberg, Lieberman, Sanders, Whitehouse and Boxer voting against adopting the amendment. Senators Alexander, Barrasso, Bond, Craig, Isakson, Vitter, Voinovich, Warner and Inhofe voted for the amendment.

On July 25, 2007, the Environment and Public Work's Subcommittee on Superfund and Environmental Health held an oversight hearing on EPA's Environmental Justice Program.

REGULATORY IMPACT STATEMENT

In compliance with section 11(b) of rule XXVI of the Standing Rules of the Senate, the committee notes that the Congressional Budget Office has found that "according to EPA, many of the activities required under this legislation are already underway. . . . S. 642 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments."

MANDATES ASSESSMENT

In compliance with the Unfunded Mandates Reform Act of 1995 (Public Law 104–4), the Committee notes that the Congressional Budget Office has said that the bill "contains no intergovernmental

or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments."

CONGRESSIONAL BUDGET OFFICE ESTIMATE

S. 642—Environmental Justice Act of 2007

S. 642 would require the Environmental Protection Agency (EPA) to fully implement certain recommendations made by EPA's Inspector General and the Comptroller General of the United States in various reports. Those recommendations include requiring EPA to consider how its programs and policies affect low-income and minority communities and to identify those programs and policies that have a disproportionately large and adverse health or environmental impact on such communities.

According to EPA, many of the activities required under this legislation are already underway. CBO estimates, based on information from EPA, that implementing this legislation would increase costs by less than $500,000 annually over the 2009–2013 period, subject to the availability of appropriated funds. Enacting the legislation would not affect direct spending or revenues.

S. 642 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

The CBO staff contact for this estimate is Susanne S. Mehlman. This estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

MINORITY VIEWS

BACKGROUND

S. 642 would codify Executive Order 12898, and for the first time in any federal law define the term "environmental justice". Included within this overall definition of environmental justice is the use of the word "fair treatment", referring to the impacts on minorities and low income communities. The bill fails to adequately define this term, yet makes this highly interpretive term law, while ignoring the cumulative factors of what is "fair". One of the major problems with this legislation is that it attempts to define the broad term of environmental justice with equally broad terminology that requires its own definitions, such as the use of "fair treatment" and "disproportionate impacts". This bill fails to clearly define the meaning of these terms which will undoubtedly cause inconsistent application and will continue to ignore the cumulative factors and net socio-economic benefits that should be considered in environmental justice considerations.

The ambiguous use of the term "environmental justice" and "fair treatment" within this legislation and the unspecified legal ramifications of codifying Executive Order 12898 will lead to a proliferation of lawsuits on environmental justice grounds, disrupt plans to revitalize economically depressed areas, and deny communities the right to decide what is in its own best interest. "Community leaders should be concerned about the health and safety of those who reside near environmental hazards. Current federal civil rights law rightly forbids policy-makers and other recipients of federal funds from considering the ethnic or racial composition of a neighborhood when making sitting, permitting or environmental enforcement decisions. Environmental justice activists, however, seek to create a federal civil rights claim every time an environmental or public health problem impacts minorities." [1]

Concerns about the erroneous assumptions and duplication of existing bureaucracy within S. 2549 prompted this September 22, 2008 letter to Chairman Boxer and Ranking Member Inhofe of the Environment and Public Works Committee, from Peter Kirsanow, a Commissioner on the United States Commission on Civil Rights:

> Aside from the unnecessary duplication of existing programs and increased bureaucracy created by this legislation, S. 642 and S. 2549 are particularly troubling because they use civil rights antidiscrimination law and policies as a vehicle for resolving complex environmental and public health issues. This legislation makes the same mistake of

[1] Of United States Commission on Civil Rights study: Not in My Backyard, Executive Order 12898 and Title VI as Tools for Achieving Environmental Justice, October 2003, Dissenting Views.

> many environmental activists in assuming that disparate impact on a local population is evidence of intentional discrimination by government agencies. Results of studies on this issue inevitably depend upon numerous variables, including the size of the study, the definition of "minority community," the aggregation or disaggregation of urban and rural communities, and control for income levels. The evidence of any correlation between environmental hazards and race is mixed at best, and there are a series of studies that show, for example, no disproportionate racial impact in environmental facility citing decisions.
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> This legislation is based on entirely erroneous assumptions that also fail to recognize that many minority communities have developed around existing environmental sites because of lower housing costs, increased employment opportunities, or both. Yet, the background of these legislative proposals leave the reader with the impression that environmental "hazards" have been thrust upon minority communities specifically because they are minority communities—that is a false presumption that lacks merit.
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> . . . The real concern in adopting S. 2549 and S. 642 is the elimination of limitations on judicial review. Under Title VI, individuals are protected from intentional discrimination. In the landmark case Alexander v. Sandoval,[2] the U.S. Supreme Court held that Title VI provides no private right of action for claims of disparate impact. In S. 2549, section 4(a) directs the federal agencies involved to conduct every program and evaluate every decision in the context of disparate impact on an individual. This effectively overturns Sandoval and will increase lawsuits, thwart the revitalization of economically depressed areas and deny communities the right to decide what is in their own best interests.

Concerns about the consequences of codifying Executive Order 12898 are not only shared by the legal and civil rights community, but also shared by many groups. Below is an excerpt from a letter sent to Members of Congress on September 19, 2008 from the United States Chamber of Commerce:

> The U.S. Chamber of Commerce, the world's largest business federation representing more than three million businesses and organizations of every size, sector, and region, strongly opposes S. 642, the "Environmental Justice Act of 2007," and S. 2549, the "Environmental Justice Renewal Act" which may be offered as amendments to must-pass legislation during the remaining days of the 110th Congress.
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> . . . In the years since President Clinton signed Executive Order 12898, titled "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," misguided environmental justice activism has delayed or permanently derailed countless projects and facilities that would have brought significant economic

[2] 532 U.S. 275 (2001).

development to minority and low-income neighborhoods. The environmental justice movement has been used to drive businesses from those areas most in need of economic stimulus and, in the process, operated as a disincentive for businesses to locate in these needy areas. The grim reality is that environmental justice, intended to sensitize policy-makers to equitable environmental considerations, has been used to harass businesses, prevent job creation, and stifle economic development in the minority and low-income areas.

S. 642 and S. 2549 would exacerbate the fundamental problems inherent in environmental justice. For example, Senator Durbin's bill would overturn the U.S. Supreme Court's decision in Sandoval[3] and codify Executive Order 12898 except for the ban on judicial review, which would create a private right of action for environmental activists to sue government and effectively block businesses from bringing economic development to blighted regions. This outcome would be particularly perverse in light of our current energy crisis, as it would promote endless litigation on the permitting of new energy facilities, such as nuclear plants, oil refineries, and coal-fired power plants. . . .

. . . Both S. 642 and S. 2549 advance the failed policies of the environmental justice movement. Rather than injecting the benefits of economic development into our national environmental policy discourse, these bills offer activists the opportunity to prevent businesses and communities from bringing jobs and economic stimulus into the poorest communities in the nation.

These complex and far-reaching bills deserve to be carefully deliberated by Congress, not rushed through the legislative process. Therefore, the U.S. Chamber urges you to oppose any attempt to offer these bills as amendments to important legislation.

There is insufficient evidence of disparate impact as negative

Studies on the demographic impact of industrial and environmental decisions are mixed. They are based upon many variables such as study size, minority community definitions and varying income levels. Advocates of this legislation assume findings which indicate racially disproportionate impacts are correct without creating a consistent decision-making process. This will lead to a single claim of the presence of disproportionate impacts as proof-positive of discriminatory intent. In addition, environmental justice claims will fail to incorporate cost-benefit analysis and risk assessment; sometimes the location of environmental hazards can be very beneficial to the local communities. For example, "increased employment opportunities, increased social services made possible by a larger tax base, and lower housing costs and real estate prices"

[3] In *Alexander* v. *Sandoval*, 523 U.S. 275 (2001), the Supreme Court considered held that there exists no private right of action to enforce disparate-impact regulations under Title VI of the Civil Rights Act of 1964.

are quite possible due to the selection of a community for a project.[4]

Environmental and public health programs in minority communities are generally not the result of racist-decision making

Health problems in minority communities are often the result of a "multitude of factors, including poverty, substance abuse, family instability, poor nutrition, and low participation rates in preventative care programs." The focus on environmental justice detracts from the real public policy solution: improving the health and safety of all communities, while consistently enforcing existing environmental laws.

Antidiscrimination law is an improper legal application for addressing environmental justice issues: Overturning Alexander v. Sandoval (2001) is the wrong approach

Title VI of the Civil Rights Act appropriately forbids intentional discrimination but S. 642 would go one step further and utilize federal antidiscrimination law incorrectly as a method of solving complex environmental problems. When evaluating environmental justice claims using disparate impact analysis, motive is irrelevant—policies are considered "discriminatory" simply because they have a disproportionate adverse impact on a protected group.[5] Although the disparate impact model may provide a useful mode of analysis in some areas of the law, the Supreme Court has cautioned that disparate impact should not be applied reflexively to all areas of antidiscrimination law."[6] Environmental justice activists do not explain this model as meaningful in the public health and environmental context, which needlessly forces disadvantaged communities into a zero-sum game: deciding between health and economic well-being.

Environmental justice actions at the Environmental Protection Agency

In the Fiscal Year 2008 House Appropriations Committee Report 110–187, EPA was directed to address and implement where needed the recommendations of the 2004 and 2006 EPA Inspector General and 2005 GAO reports. In this, July 18, 2008 report EPA states in part:

> . . . As a result of strategic efforts and lessons learned since the program began in 1992, the Agency has made steady progress towards developing coherency and cohesion in its environmental justice visions, goals, expectations, performance measurement, and comprehensive integration into Agency strategic planning. In recent years, efforts to incorporate environmental justice considerations

[4] Dissenting Views of Commissioners of United States Commission on Civil Rights study: Not in My Backyard, Executive Order 12,898 and Title VI as Tools for Achieving Environmental Justice, October 2003.

[5] Dissenting Views of Commissioners of United States Commission on Civil Rights study: Not in My Backyard, Executive Order 12,898 and Title VI as Tools for Achieving Environmental Justice, October 2003.

[6] See *Washington* v. *Davis*, 426 U.S. 229, 246–48 (1976); see also Jennifer C. Braceras, Killing the Messenger: The Misuse of Disparate Impact Theory to Challenge High-stakes Educational Tests, 55 Vand. L. Rev. 1111, 1142 (2002).

into EPA's core functions have accelerated partly in response to recommendations in the Inspector General's (IG) evaluation reports in 2004 and 2006, and the General Accounting Office (GAO) report in 2005.

EPA has made tremendous strides to understand and to integrate environmental justice into EPA's daily work. Efforts extend across the Agency's core functions, as reflected in EPA's Strategic Plan, National Program Manager's (NPM) Guidance, Environmental Justice Action Plans, program evaluation activities, and rulemaking activities, as well as to training, collaborative problem-solving efforts and disaster preparation and response activities.

EPA is learning how to measure the EJ Program's progress in a way that is accurate, meaningful, and cognizant of the unique and complex issues of environmental justice. EPA recognizes that it takes time to build a community's capacity and to identify the shared responsibilities of many levels of government. By continuously improving the EJ Program, the Agency can achieve the tangible results that make a positive impact in the health of communities disproportionately burdened by environmental hazards. . . .

Since, 1992 The EPA has made a consistent, long-term, agency-wide commitment to integrate environmental justice, promote environmental justice to external stakeholders, and provide financial assistance to address local environmental and/or public health issues.

The EPA has identified eight priorities in this area:

1. Reduction in number of asthma attacks;
2. Reduce exposure to air toxics;
3. Safe fish/shellfish;
4. Clean and safe drinking water;
5. Revitalization of brownfields and contaminated sites;
6. Reducing elevated blood lead levels;
7. Ensuring compliance;
8. Collaborative problem-solving to address environmental justice issues.

Environmental justice is evidenced in each of the EPA's strategic goals. For example, in Goal 1: Clean Air and Global Climate Change, EPA set a target to reduce exposure to indoor asthma triggers with a special emphasis on children and other disproportionately impacted populations.

In Goal 2: Clean and Safe Water, EPA commits to providing small community drinking water systems serving low-income populations training and assistance in using cost-effective treatment technologies, properly disposing of waste, and complying with standards for high-priority contaminants.

In Goal 3: Land Preservation and Restoration, EPA encourages broader use of improved sample collection techniques, analytical tools, and indicators to better address environmental justice concerns and identify areas that may suffer disproportionate impacts.

In Goal 4: Healthy Communities and Ecosystems, EPA has developed transparent, measurable, and accountable environmental justice targets, such as reducing blood lead levels in low-income chil-

dren 1–5 years old, and achieving significant environmental and public health improvement in communities through collaborative problem-solving strategies. The goals for the community collaborative problem solving grants are measured in terms of the actions taken within areas disproportionately and adversely burdened by environmental risks and harms, and the improvements in environmental and public health resulting from grants funded by EPA.

In Goal 5: Compliance and Environmental Stewardship, EPA emphasizes achieving results in all areas including those with potential environmental justice concerns through compliance assistance, compliance incentives, and monitoring and enforcement.

These efforts have been enhanced by the creation of the Environmental Justice Executive Steering Committee, which directed each national program manager and Regional Office to develop and maintain EJ Action Plans. In addition, an EJ review process was established to improve the effectiveness of the EJ programs. A training program was also created in order ensure EPA staff take environmental justice concerns into consideration when executing their tasks.

CONCLUSION

This bill would create a complex new process within all Federal Agencies that will have far reaching negative legal ramifications. The Minority would strongly oppose moving forward with this bill, without the opportunity on the Senate floor to offer amendments that address the problems with this legislation. We strongly oppose attempts to move forward with this legislation, as it makes complex changes to existing environmental laws, absent the rigor of the full parliamentary process.

JAMES M. INHOFE.

CHANGES IN EXISTING LAW

Section 12 of rule XXVI of the Standing Rules of the Senate requires the committee to publish changes in existing law made by the bill as reported. Passage of this bill will make no changes to existing law.

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