

Legal Tools for Environmental Equity vs. Environmental Justice

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In 1982, when Benjamin Chavis coined the term “environmental racism” to describe the targeting of a black community in Warren County, North Carolina for a toxic waste dump, it brought together two powerful movements – the civil rights and environmental movements – into a growing force that would eventually reach the White House and the United States Supreme Court. No one would have guessed at the time that within a 5-day span around Earth Day 2001, the legal side of the movement against environmental racism would see its brightest, and then darkest, days.

Since the early 1980s, numerous studies have looked at the correlation between environmental hazards and the race and class demographics of the communities where these hazards are located.¹ The vast majority have shown a trend toward low-income

¹ The following is a chronological list of some of the major studies demonstrating the environmental racism trend. Some of these, and additional studies, can be found at <http://www.ejnet.org/ej/>

Most are cited as described in Bradford C. Mank, “Environmental Justice and Title VI: Making Recipient Agencies Justify Their Siting Decisions,” 73 *Tul. L. Rev.* 787 n.9, 1999.

U.S. General Accounting Office, GAO/RCED-83-168, “Siting of Hazardous Waste Landfills and Their Correlation with Racial and Economic Status of Surrounding Communities,” 1983. (examining racial and socioeconomic characteristics of the communities surrounding four offsite hazardous waste landfills located in the eight southeastern states that make up the EPA’s region IV and finding that “blacks make up the majority of the population in three of the four communities where the landfills are located”)

Robert D. Bullard, “Solid Waste and the Black Houston Community,” 53 *Soc. Inquiry* 273, 279-83, 1983. (finding that although African-Americans made up only 28% of the Houston population in 1980, 6 of Houston’s 8 incinerators and mini-incinerators and 15 of 17 landfills were located in predominantly African-American neighborhoods)

Commission for Racial Justice, United Church of Christ, “Toxic Wastes and Race in the United States,” 1987. (involving the location of all 415 commercial hazardous waste facilities in the contiguous United States that could be identified through the EPA’s Hazardous Waste Data Management System, using zip code areas to define minority and nonminority areas, and concluding that “although socioeconomic status appeared to play an important role in the location of commercial hazardous waste facilities, race still proved to be more significant”)

Benjamin A. Goldman & Laura Fitton, “Toxic Wastes and Race Revisited: An Update of the 1987 Report on the Racial and Socioeconomic Characteristics of Communities with Hazardous Waste Sites,” 1994. (relying on zip code areas to find that the

communities and especially communities of color being unfairly burdened with excessive pollution from a variety of polluting industries and chemical exposures.

These studies affirmed the understanding of an environmental racism trend. While many are quick to conclude that communities of color are targeted solely because of their generally low-income socio-economic status, most of the studies have demonstrated that race is more of a factor than class. In other words, if one were to compare a middle-class community of color to a low-income white community, and look at which community is more likely to have a hazardous waste facility sited there, the middle-class community of color would have a greater chance of being targeted for such a facility. In fact, in some cases, race is a more significant indicator of pollution burdens than income, poverty, childhood poverty, education, job classification or home ownership.² Demographic studies showing disparate distribution of polluting industrial facilities have been key aspects of many environmental racism lawsuits. Such studies of

location of hazardous waste facilities reflects a national pattern of racial inequality that has gotten worse during the past decade; concentrations of racial minorities living in close proximity to toxic waste sites had increased)

Bradford C. Mank, "Environmental Justice and Discriminatory Siting: Risk-Based Representation and Equitable Compensation," 56 Ohio St. L.J. 329, 334-41, 1995. (summarizing studies finding that racial minorities and low-income persons live near pollution to a disproportionate extent)

Vicki Been & Francis Gupta, "Coming to the Nuisance or Going to the Barrios? A Longitudinal Analysis of Environmental Justice Claims," 24 Ecology L.Q. 1, 9, 19-27, 33-34, 1997. (examining 544 communities, using 1990 census data, that hosted active commercial hazardous waste treatment storage and disposal facilities and finding no substantial evidence that commercial hazardous waste facilities that began operating between 1970 and 1990 were sited in areas that had disproportionate African-American or low-income populations, but finding evidence that Hispanics were disproportionately more likely to live near such facilities)

J. Tom Boer et al., "Is There Environmental Racism? The Demographics of Hazardous Waste in Los Angeles County," 78 Soc. Sci. Q. 793, 1997. (finding that working class communities of color in industrial areas of Los Angeles are most affected by hazardous waste treatment storage and disposal facilities)

Evan J. Ringquist, "Equity and the Distribution of Environmental Risk: The Case of TRI Facilities," 78 Soc. Sci. Q. 811, 1997. (finding that Toxic Release Inventory facilities and pollutants are concentrated in residential zip codes with large minority populations)

Rachel Morello-Frosch et al., "Environmental Justice and Southern California's Riskscape: The Distribution of Air Toxics Exposures and Health Risks Among Diverse Communities," 36 Urb. Aff. Rev. 551, 552, 562, 2001. (study of the Southern California Air Basin finding that people of color had a consistently higher cancer risk due to air toxics than did whites, with Latinos having the highest risk)

Robert D. Bullard, Paul Mohai, Robin Saha, and Beverly Wright, "Toxic Wastes and Race at Twenty: Why Race Still Matters After All These Years," 38 Environmental Law Review 371, 2008. (revising the 1987 Toxic Wastes and Race study of hazardous waste facilities using newer mapping technology, and finding that the trend is still as bad or worse than it was in 1987)

² Environmental Justice report on Delaware County, Pennsylvania. http://www.scorecard.org/community/ej-summary.tcl?fips_county_code=42045

discriminatory effects are necessary since intentional discrimination is very hard to prove, except in the rare cases where inappropriate industry siting reports are leaked.^{3,4}

The growing movement against environmental racism came together in October 1991 for the First National People of Color Environmental Leadership Summit, held in Washington, D.C. Participants drafted and adopted the seventeen Principles of Environmental Justice.⁵ The Principles set forth a bold vision of what would be necessary to address environmental racism – an agenda that stood for human rights, democratic community decision-making, education, women’s and workers’ rights, health care and more, while standing against imperialism and militarism, corporate abuses, toxic and nuclear production and more.

The strength of the environmental justice movement started to gain government recognition. Initially, the controversy in Warren County, North Carolina resulted in the General Accounting Office (GAO) studying the locations of hazardous waste landfills in the southeastern United States. The 1983 study found that three of the four existing hazardous waste landfills were in African-American communities, when African-Americans constituted only 20% of the region’s population.⁶

In 1990, the Congressional Black Caucus met with the U.S. Environmental Protection Agency (EPA), accompanied by academics and activists, to discuss the

³ Cerrell Associates, “Political Difficulties Facing Waste-to-Energy Conversion Plant Siting,” Study for the California Waste Management Board, 1984. <http://www.ejnet.org/ej/cerrell.pdf> This study did not specifically mention racial criteria, but in helping California site 43 trash incinerators, it spelled out numerous other criteria for communities “more” or “less likely to resist. Of the three trash incinerators that were built in California, all ended up in predominantly Latino communities.

⁴ Epley Associates, hired in North Carolina to help site a nuclear waste dump, did a window-survey of communities and suggested that specific communities be considered or not based on race and class factors. See “Nuclear Industry Discovers Solution To Waste Problem: Bribery And Deception,” Environmental Research Foundation, November 26, 1991 (<http://www.rachel.org/?q=en/node/4191>) and Michael Heiman, “Waste Management and Risk Assessment: Environmental Discrimination through Regulation,” Urban Geography, April 1996 (<http://www.ejnet.org/ej/wmra.html>).

⁵ Principles of Environmental Justice. <http://www.ejnet.org/ej/principles.pdf>

⁶ U.S. General Accounting Office, “Siting of Hazardous Waste Landfills and Their Correlation With Racial and Economic Status of Surrounding Communities,” RCED-83-168, Jun 1, 1983. <http://www.gao.gov/products/RCED-83-168>

disparate environmental risks in low-income and minority communities.⁷ EPA created the Environmental Equity Workgroup in July 1990 in response to the presentation of findings by social scientists that “racial minority and low-income populations bear a higher environmental risk burden than the general population” and that EPA’s inspections failed to adequately protect low-income communities of color.^{8,9} An analysis of EPA’s unequal protection showed that the agency takes longer to get around to cleaning up toxic waste sites in communities of color and that penalties under hazardous waste laws were five times higher in white communities than in communities of color and 46% higher for other programs relating to air, water and waste.¹⁰

“Equity” – Derailing the Environmental Justice Movement

In June 1992, the Environmental Equity Workgroup produced a report that supported the findings that recommended the formation of an EPA office to address these disparities.¹¹ In November 1992, one year after the Principles of Environmental Justice were written, EPA formed an Office of Environmental Equity.¹² In response to public criticism, EPA changed the name of the office to the Office of Environmental Justice in 1994.^{13,14}

The “equity” versus “justice” framing is more than mere semantics. It represents the fundamental difference between the concepts of “poison people equally” and “stop poisoning people, period!” There is not a single mention in the movement-defined

⁷ “Environmental Justice – History,” African-American Voices in Congress, <http://www.avoiceline.org/environmental/history.html>

⁸ *Id.*

⁹ “Environmental Justice – Basic Information,” U.S. Environmental Protection Agency, <http://www.epa.gov/environmentaljustice/basics/ejbackground.html>

¹⁰ Marianne Lavelle & Marcia Coyle, “Unequal Protection: The Racial Divide in Environmental Law,” *Nat’l L.J.*, Sept. 21, 1992, at S1-S12. The study reviewed EPA enforcement cases from 1985 to 1991 and EPA’s response to Superfund sites on the National Priority List from 1980 to 1992. <http://www.ejnet.org/ej/nlj.pdf>

¹¹ “Environmental Justice – Frequently Asked Questions,” U.S. Environmental Protection Agency, <http://web.archive.org/web/20100408215551/http://www.epa.gov/compliance/ej/resources/faqs/index.html>

¹² *Id.*

¹³ Michael K. Heiman, “Waste Management and Risk Assessment: Environmental Discrimination through Regulation,” *Urban Geography* 17(5):400-418 n.13. <http://www.ejnet.org/ej/wmra.html>

¹⁴ Note 9 *supra*.

Principles of Environmental Justice of the notion that the goal is to simply redistribute environmental harms so that white communities have their “fair share” of pollution. Even if this “equity” vision were possible, the environmental justice movement has put forth a much deeper analysis, based on phasing out inappropriate technologies that ought not exist in any community. However, the EPA, and numerous state environmental agencies blunted and co-opted the bolder ‘justice’ agenda by setting up offices and working groups around environmental ‘equity.’

When EPA and a number of state environmental agencies cleaned up the titles of their programs, renaming them ‘environmental justice,’ they retained their ‘equity’ agenda. Today, governmental bodies and others who have followed their lead, universally define environmental justice as some version of “fair treatment and meaningful involvement.”

EPA defines 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. **Fair treatment** means that no group of people should bear a disproportionate share of the negative environmental consequences resulting from industrial, governmental and commercial operations or policies. **Meaningful involvement** means that: (1) people have an opportunity to participate in decisions about activities that may affect their environment and/or health; (2) the public's contribution can influence the regulatory agency's decision; (3) their concerns will be considered in the decision making process; and (4) the decision makers seek out and facilitate the involvement of those potentially affected.¹⁵

Without any real legislative teeth to back up these ‘equity posing as justice’ policies, environmental agencies have no tools to even try to redistribute environmental harms. Rather, they use these policies to try to look responsive to environmental justice

¹⁵ Id.

concerns when trotting them out at government-sponsored ‘environmental justice’ conferences, public meetings and hearings on pending pollution permits, and other forums.

As long as there is no blatant intentional racism to be found, the ‘fair treatment’ hurdle is deemed cleared, as the agencies have no authority to act on the distributional equity of harms concept in their ‘fair treatment’ definition.

On the ground, the ‘meaningful involvement’ still looks like the usual agency habit of ‘hold a public hearing and ignore/dismiss the comments before issuing pollution permits.’ The fourth part of the ‘meaningful involvement’ definition is sometimes made real when exceptional agency staffpeople go the extra mile to ensure that the public knows about a meeting or hearing. However, it is still far too frequent that the outreach is so inadequate, or the meeting logistics made so inconvenient, that no one from the impacted community even shows up at these ‘environmental justice’ meetings.¹⁶

Gaining Ground

The same year that EPA did the name change to ‘environmental justice,’ President Clinton, on February 11th, 1994, signed Executive Order 12898, titled “Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations.”¹⁷ The Executive Order requires each federal agency to develop an agency-wide environmental justice strategy, sets up an interagency working group that reports to the President, requires certain agency studies, and sets forth a public participation plan.¹⁸

¹⁶ At three “environmental justice” meetings held in Pennsylvania, that this author is personally familiar with, two of them (in Philadelphia and Harrisburg) involved such poor community outreach that no one in the community showed up to speak, and in Erie, Pennsylvania, where the world’s largest tire incinerator was proposed next to housing projects in the city, the “environmental justice” meeting was held – not at the high school within walking distance, where the polluter held its initial meeting – but at a suburban school five miles away, where no one in the nearby community of color managed to attend.

¹⁷ Executive Order 12898, “Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations,” February 11th, 1994. <http://www.archives.gov/federal-register/executive-orders/pdf/12898.pdf>

¹⁸ Id.

While White House-level recognition of environmental justice was a shot in the arm of the movement, the Order explicitly states that it does not go beyond current law and creates no new rights or remedies, procedural or otherwise.^{19,20} Nonetheless, the Executive Order was helpful in a groundbreaking case before the Nuclear Regulatory Commission in 1997 – perhaps the only case where an agency denied a permit to a polluting industry because of racially discriminatory impacts in the siting process.²¹

Louisiana Energy Services (LES) sought to build a uranium enrichment facility between the tiny towns of Forest Grove and Center Springs in rural northern Louisiana's Claiborne Parish. A grassroots community group, Citizens Against Nuclear Trash (CANT), formed to fight the facility, and was aided by national anti-nuclear and environmental justice groups. They challenged the proposal's permits in the administrative process before the Atomic Safety and Licensing Board (ASLB) of the Nuclear Regulatory Commission (NRC).

Founded by freed slaves after the Civil War, the two towns (with a combined population of about 250) are about 97% African-American.²² Their inhabitants live in grinding poverty, with no stores, schools, medical clinics, or businesses in the towns, and no running water in many of the homes.²³ Over 69% of the black population of Claiborne Parish earn less than \$15,000 annually, 50% earn less than \$10,000, and 30% earn less than \$5,000.²⁴ Over 31% of the black population in Claiborne Parish have no motor vehicles, over 10% lack complete plumbing in their houses, and 58% lack a high

¹⁹ Id. at 6-609.

²⁰ 47 N.R.C. 77 n.19

²¹ In the Matter of Louisiana Energy Services, L.P., 45 NRC 367 (1997). Available online at: <http://www.ejnet.org/ej/les.html>

²² Id. at 371

²³ Id.

²⁴ Id.

school education.²⁵ One would be hard-pressed to find a more underprivileged community to target for such a facility.

To find a site for their uranium enrichment facility, LES hired a company with extensive experience in industrial facility site selection.²⁶ In their siting process, they had initially narrowed a list of potential sites to 78, where the average percentage of black population within a one-mile radius of each of the sites across sixteen parishes was 28.35%.²⁷ Since the black population in Louisiana is about 32.5%, this was pretty fair to start.²⁸ However, once the list of potential sites was cut to 37, the average black population rose to 36.78%.²⁹ It rose again to 64.74% once the list of sites was narrowed to six.³⁰ At the end of the process, they managed to pick the one site with the highest percent black population of all seventy-eight examined sites (97.1%).³¹

In depositions, the consultant doing site evaluation admitted seven times that he performed his job by driving around and doing an “eyeball” assessment.³² The consultant admitted to eliminating sites from consideration because they were close to “sensitive receptors” like hospitals, schools, and nursing homes (thus eliminating communities privileged enough to have such amenities) or because the site is near a “very nice lake” with “nice homes, vacation and fishing, hunting.”³³ The ASLB found this evidence to be “more than sufficient to raise a reasonable inference that racial considerations played some part in the site selection process.”³⁴

The ASLB’s decision was powerfully worded. It state, in part:

²⁵ Id.

²⁶ Id. at 376-78

²⁷ Id. at 392.

²⁸ “Louisiana – Race and Ethnicity,” U.S. Census Bureau. <http://quickfacts.census.gov/qfd/states/22000.html>

²⁹ Note 25 supra.

³⁰ Id.

³¹ Id.

³² Id. at 395.

³³ Id. at 387-88.

³⁴ Id. at 391.

Racial discrimination in the facility site selection process cannot be uncovered with only a cursory review of the description of that process appearing in an applicant's environmental report. If it were so easily detected, racial discrimination would not be such a persistent and enduring problem in American society. Racial discrimination is rarely, if ever, admitted. Instead, it is often rationalized under some other seemingly racially neutral guise, making it difficult to ferret out. Moreover, direct evidence of racial discrimination is seldom found. Therefore, under the circumstances presented by this licensing action, if the President's nondiscrimination directive is to have any meaning a much more thorough investigation must be conducted by the Staff to determine whether racial discrimination played a role in the [] site selection process. ...the Staff must conduct an objective, thorough, and professional investigation that looks beneath the surface of the description of the site selection process in the Environmental Report. In other words, the Staff must lift some rocks and look under them.³⁵

The decision acknowledged that the obligations under the Executive Order are new to the agency and that agency staff's primary responsibilities have historically been to evaluate technical concerns, not to apply the social science skills needed to investigate whether racial discrimination played a part in a facility siting decision – skills that are far from the experience and expertise of NRC staff.³⁶ The ASLB's decision concluded with a determination that a staff investigation of the siting process, to determine whether racial discrimination played a role in that process, was essential to ensure compliance with the Executive Order, and that the Final Environmental Impact Statement was insufficient in other ways and needed to be revised.³⁷

Such a strong decision was a welcome surprise, especially coming from an agency whose very existence is financially tied to the survival of the notoriously racist nuclear industry, whose uranium mining and nuclear waste disposal burdens fall almost

³⁵ Id.

³⁶ Id.

³⁷ Id. at 412.

exclusively on black, Hispanic and Native American communities.^{38,39} Though the victory over LES in Louisiana held,⁴⁰ the legal precedent was undermined on appeal. On appeal to the NRC Commissioners, the Commission reversed the ASLB's requirement of an inquiry into racial discrimination in siting, but affirmed its disparate impact ruling, holding that no "nondiscrimination directive" exists in Executive Order 12898 and that the National Environmental Policy Act (the law requiring Environmental Impact Statements on certain federal projects) is not "a tool for addressing problems of racial discrimination."⁴¹

Title VI as a Tool for Environmental Justice

As the LES decision was playing out, the nation's first attempt to address environmental racism using Title VI of the Civil Rights Act of 1964 was moving toward the U.S. Supreme Court, fresh from an amazing victory in the Third Circuit. Chester, Pennsylvania – a small city just southwest of Philadelphia – was on its way toward being widely known as one of the nation's worst cases of environmental racism.

The mostly African-American City of Chester is home to the nation's largest trash incinerator. Adjacent to it was the nation's largest medical waste autoclave (closed after a few miserable years of operation in the mid-1990s), followed by a concrete crushing operation and a sewage treatment plant that burns all of the sewage sludge treated in the entire county. Walk a little further in this two-block section just across the tracks from

³⁸ The Omnibus Budget Reconciliation Act, as amended, requires that the NRC recover approximately 90 percent of its budget authority through fees assessed to applicants for an NRC license and to holders of NRC licenses, less monies appropriated from the Nuclear Waste Fund. See: "License Fees," U.S. Nuclear Regulatory Commission. <http://www.nrc.gov/about-nrc/regulatory/licensing/fees.html>

³⁹ "Radioactive Racism: The History of Targeting Native American Communities with High-Level Atomic Waste Dumps," Factsheet by Public Citizen and Nuclear Information and Resource Service. <http://www.citizen.org/documents/radioactiveracism.pdf>

⁴⁰ Louisiana Energy Services was indeed defeated in their efforts to build in northern Louisiana, and was subsequently kicked out of two communities they targeted in Tennessee, but they ultimately managed to build their uranium enrichment facility in Eunice, New Mexico, in a community with a Hispanic population nearly triple the national average and a poverty rate 45% above the national average. See: <http://www.ejnet.org/ej/les.html>

⁴¹ In the Matter of Louisiana Energy Services, L.P., 47 NRC 77 at 100-102 (1998).

residential homes, and you're on the property of a massive oil refinery. The list goes on and on, as the waterfront is riddled with environmental and social ills, including four power plants, another oil refinery, a paper mill, numerous chemical plants and toxic waste sites, scrapyards, waste haulers and, nowadays, a prison, a stadium and a casino.⁴²

In 1996, Chester Residents Concerned for Quality Living (CRCQL, pronounced 'circle') sued the Pennsylvania Department of Environmental Protection (PADEP) for issuing a permit to Soil Remediation Systems (SRS) – a company planning to build a facility to clean petroleum contaminated soil by burning off the contaminants.⁴³ This "soil burner" facility would have been sandwiched between the trash and sewage sludge incinerators.

The suit was brought under both § 601 and § 602 of the Title VI of the Civil Rights Act of 1964. § 601 (42 U.S.C. § 2000d) provides that:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.⁴⁴

§ 602 (42 U.S.C. § 2000d-1) authorizes and directs agencies, such as the Environmental Protection Agency, which provide financial assistance to state agencies like PADEP:

to effectuate the provisions of Section 2000d of this title... by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute....⁴⁵

The complaint alleged that PADEP's grant of the permit violated: 1) § 601 of Title VI of the Civil Rights Act of 1964; 2) EPA's civil rights regulations promulgated pursuant to § 602 of Title VI; and 3) PADEP's assurance pursuant to the regulations that

⁴² Mike Ewall, "Environmental Injustice in Delaware County, PA," ActionPA PowerPoint Presentation (2008). <http://www.ejnet.org/chester/delco-ej.pdf>

⁴³ *Chester Residents Concerned for Quality Living v. Seif*, 944 F. Supp. 413 (1996).

⁴⁴ 42 U.S.C. § 2000d ("Prohibition against exclusion from participation in, denial of benefits of, and discrimination under federally assisted programs on ground of race, color, or national origin")

⁴⁵ 42 U.S.C. § 2000d-1 ("Federal authority and financial assistance to programs or activities by way of grant, loan, or contract other than contract of insurance or guaranty; rules and regulations...")

it would not violate the regulations.⁴⁶ The District Court quickly did away with the first cause of action, citing Supreme Court precedent that § 601 applies only to intentional discrimination⁴⁷ and that CRCQL failed to allege that PADEP intentionally discriminated when granting the pollution permit to SRS.⁴⁸ The District Court dismissed the second and third claims on the basis that, while there is a private right of action under § 601, there is no such right under § 602.⁴⁹

The Chester residents appealed the ruling to the Third Circuit Court of Appeals, focusing only on the second cause of action – the core § 602 claim.⁵⁰ They won a great precedent in the process, when the appeals court reversed.⁵¹ The Court of Appeals found that the District Court misread the U.S. Supreme Court’s fractured ruling in Guardians Assoc. v. Civil Serv. Comm’n of N.Y.C.,⁵² falsely assuming that it stood for the notion that there is private right of action under § 602.⁵³

Guardians affirmed 1) that a private right of action exists under § 601 of Title VI, requiring plaintiffs to prove discriminatory *intent*; and 2) that agencies may validly promulgate discriminatory *effect* regulations under § 602.⁵⁴ The ruling did not, however, rule on the issue of whether there is a private right of action to enforce regulations promulgated under § 602.⁵⁵ In the fractured Guardians ruling, the Third Circuit stitched together two sets of opinions to infer that a five-justice majority would support a private

⁴⁶ Chester Residents Concerned for Quality Living v. Seif, 132 F.3d 925 at 927-28 (1997).

⁴⁷ Guardians Assoc. v. Civil Serv. Comm’n of N.Y.C., 463 U.S. 582 (1983); Alexander v. Choate, 469 U.S. at 287 at 292-93 (1985) (“Title VI itself directly reaches only instances of intentional discrimination.”).

⁴⁸ Chester Residents, 944 F. Supp. at 417.

⁴⁹ Id.

⁵⁰ Chester Residents, 132 F.3d at 928.

⁵¹ Chester Residents, 132 F.3d 925.

⁵² Guardians, 463 U.S. 582.

⁵³ Chester Residents, 132 F.3d at 929.

⁵⁴ Id.

⁵⁵ Id.

right of action under § 602.⁵⁶ In the dissent by Justice Stevens (joined by Justices Brennan and Blackmun), Stevens concluded with a statement that the plaintiffs “only had to show that the respondents’ actions were producing discriminatory effects in order to prove a violation of [the regulations].”⁵⁷ Justices White and Marshall found it acceptable for a plaintiff to bring a discriminatory *effect* case under § 601, so the Third Circuit inferred that they would find the same acceptable under § 602.⁵⁸ This five Justice-majority inference wasn’t enough for the Third Circuit to hold that Guardians is dispositive on the Chester case, since the Supreme Court Justices had not spoken directly to the issue.⁵⁹

With nothing dispositive in Supreme Court precedent, the Third Circuit looked at its own precedent.⁶⁰ In doing so, it found that the District Court misread a Third Circuit case in order to conclude that no private right of action exists under § 602 when, in fact, that case spoke only to whether a plaintiff must exhaust administrative remedies under § 602 before bringing a suit directly under § 601.⁶¹

With no precedent on the specific question, the Third Circuit applied its own 3-prong test for determining when it is appropriate to imply private rights of action to enforce regulations, and found that there *is* a private right of action under § 602.⁶²

With permission to proceed with an environmental racism case under Title VI, without having to prove discriminatory intent, things were looking pretty good. Not

⁵⁶ Id. at 930.

⁵⁷ Id.

⁵⁸ Id.

⁵⁹ Id. at 931.

⁶⁰ Id. at 932.

⁶¹ Id.

⁶² Id. at 933. The test looks at: (1) ‘whether the agency rule is properly within the scope of the enabling statute’; (2) ‘whether the statute under which the rule was promulgated properly permits the implication of a private right of action’; and (3) ‘whether implying a private right of action will further the purpose of the enabling statute.’ Polaroid Corp. v. Disney, 862 F.2d 987, 994 (3d Cir. 1988) (quoting Angelastro v. Prudential-Bache Sec., Inc., 764 F.2d 939, 947 (3d Cir. 1985)). In determining the 2nd and 3rd prongs, the court applied factors from Cort v. Ash, 422 U.S. 66 (1975), primarily: (1) whether there is “any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one”; and (2) whether it is “consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff.”

content to let this good precedent stand, PADEP appealed to the U.S. Supreme Court, which granted *certiorari*.⁶³ By the time the case reached the highest court, PADEP had revoked the permit for Soil Remediation Systems, the permittee whose permit challenge formed the basis of the case.⁶⁴ Both sides, fearing unfavorable precedent, asked the Supreme Court to declare the case moot, but PADEP also asked the Supreme Court to vacate the Third Circuit decision, which – over the protest of CRCQL – the Supreme Court did.⁶⁵ In a one-sentence decision, the case was vacated as moot with instructions to dismiss.⁶⁶ After all this effort, Chester residents had one less polluter to contend with, but impacted communities around the country were left again with no federal court precedent allowing a private right of action under Title VI for allegations of discriminatory effects against federally funded permitting agencies.⁶⁷ Until Camden.

Starting Over

Some of the same Philadelphia attorneys involved in the Chester case found opportunity to start over, setting precedent in the same Circuit, across the river in Camden, New Jersey – a community with a very similar story to that of Chester. In 2001, South Camden Citizens In Action (SCCIA) sued their New Jersey Department of Environmental Protection (NJDEP) under similar theories.⁶⁸

Like Chester, South Camden’s Waterfront South neighborhood is surrounded by toxic industrial threats, including a trash incinerator, a sewage treatment plant, a power

⁶³ Seif v. Chester Residents Concerned for Quality Living, 524 U.S. 915 (1998).

⁶⁴ Julia B. Latham Worsham, “Disparate Impact Lawsuits Under Title VI, Section 602: Can A Legal Tool Build Environmental Justice?” 27 B.C. Env’tl. Aff. L. Rev. 631 at 676 (2000). For a detailed accounting of the dynamics around the CRCQL Supreme Court appeal, see pp. 675-680.

⁶⁵ Id. at 676-680.

⁶⁶ Seif v. Chester Residents Concerned for Quality Living, 524 U.S. 974 (1998).

⁶⁷ Note 62 supra, at 679.

⁶⁸ S. Camden Citizens in Action v. N.J. Dep’t of Env’tl. Prot., 145 F. Supp. 2d 446 (2001).

plant, an oil refinery, and a seemingly endless array of toxic waste sites.⁶⁹ The South Camden lawsuit was over a permit granted by NJDEP to Saint Lawrence Cement (SLC) for a facility that would grind blast furnace slag, exposing the community to fine particulate matter laden with toxic metals.⁷⁰

In a lengthy, well-documented and carefully thought-out opinion, the District Court sided with the South Camden residents, concluding that:

(1) The NJDEP's failure to consider any evidence beyond SLC's compliance with technical emissions standards, and specifically its failure to consider the totality of the circumstances surrounding the operation of SLC's proposed facility, violates the EPA's regulations promulgated to implement Title VI of the Civil Rights Act of 1964; and (2) Plaintiffs have established a prima facie case of disparate impact discrimination based on race and national origin in violation of the EPA's regulations promulgated pursuant to section 602 of the Civil Rights Act of 1964.⁷¹

As in the Chester case, the plaintiffs included a § 601 claim of intentional discrimination, but didn't back it up, focusing instead on their § 602 disparate impact discrimination claim.⁷² After the Supreme Court vacated the Third Circuit's decision in Chester, the Circuit revisited the issue of whether there is an implied private right of action under § 602 of Title VI, finding in Powell v. Ridge that such a right exists.⁷³

That matter being settled law in the Circuit, the court moved on to rule on whether mere compliance with existing environmental laws and regulations is sufficient to meet the requirements of Title VI.⁷⁴ In other words, even if a corporate polluter would release pollution in amounts deemed acceptable, and permitted under environmental regulations, could that polluter still be found to be contributing to a violation of a community's civil

⁶⁹ Id. at 459-60.

⁷⁰ Id. at 450.

⁷¹ Id. at 451-52.

⁷² Id. at 471.

⁷³ Powell v. Ridge, 189 F.3d 387 (1999).

⁷⁴ S. Camden, 145 F. Supp. 2d 446 at 474.

rights under Title VI? This question strikes at the heart of what environmental justice activists have complained about for years. Environmental permitting agencies routinely give out pollution permits that are calculated to allow only a certain number of people to die of cancer (usually aiming for one in a million, but sometimes even higher odds), not to mention the non-cancer effects or those who survive cancer. This permitting regime is widely criticized for not accounting for vulnerable populations (children, the elderly, fetuses, those with compromised immune systems) and for looking at only one chemical exposure at a time. The existing permitting regime does not factor in the increased chance of illness when one's community is surrounded by dozens of pollution sources, each exposing the community to a wide array of pollutants that can even interact with one another to magnify their health impacts.⁷⁵ Rhetorically, industry and government officials pretend that an industrial facility that stays within its permit limits means that the facility is "safe" and thus not harming health. This is far from the truth.

As the District Court framed the issue: "This case presents the novel question of whether a recipient of EPA funding has an obligation under Title VI to consider racially discriminatory disparate impacts when determining whether to issue a permit, in addition to compliance with applicable environmental standards."⁷⁶ The court found that an agency *does* have such an obligation. To reach this conclusion, the court looked at the fact that permitting agencies do not look at the cumulative effects of permitting multiple polluters in a single community.⁷⁷ Since environmental laws and regulations are not yet up to this task, the court held that it is appropriate for this to be considered as part of a

⁷⁵ For a good overview of the flaws with the "risk assessment" philosophy underpinning modern environmental permitting, see the articles at: <http://www.ejnet.org/ej/riskassessment.html>

⁷⁶ *S. Camden*, 145 F. Supp. 2d 446 at 474.

⁷⁷ *Id.* at 488-90.

Title VI analysis in the permitting process.⁷⁸ The District Court also looked closely at the issue of particulate matter (soot), since the EPA was in the process of adopting stricter regulations on fine particulate matter, known as PM2.5.⁷⁹ Current regulations only cover PM10 (larger soot particles), but a substantial body of science showing major health impacts from the smaller PM2.5 pollution caused EPA to propose more stringent regulations.⁸⁰ At the time of the case, these PM2.5 regulations were not in effect and NJDEP had no legal obligation to consider this sort of pollution in environmental permitting. However, the body of science showing harm existed and was enough to prod EPA into regulatory action. The District Court held it relevant to consider within the context of a Title VI disparate impact analysis, noting that even EPA itself admits that their existing regulations on particulate matter are “inadequate to protect the public health.”⁸¹

Environmental laws and regulations often take several decades to catch up to what science tells us about the threat of pollutants on health. This is largely due to the need for a “scientific consensus” to line up enough dead bodies before regulatory and political action against a pollutant is even possible, as well as the reality of corporate campaign contributions, lobbying and lawsuits intended to block and delay implementation of new regulations. This novel “totality of the circumstances”⁸² use of Title VI to shortcut the glacial environmental regulatory process and apply modern science to community health burdens is a huge benefit to impacted minority communities, but a dramatic threat to the economic interests of corporate polluters.

⁷⁸ *Id.* at 490.

⁷⁹ *Id.* at 461-66.

⁸⁰ “PM2.5 NAAQS Implementation,” U.S. Environmental Protection Agency. http://www.epa.gov/ttnnaqs/pm/pm25_index.html

⁸¹ *S. Camden*, 145 F. Supp. 2d 446 at 498.

⁸² *Id.* at 499.

On April 19th, 2001, three days before Earth Day, the United States District Court for the District of New Jersey granted a preliminary injunction to the South Camden plaintiffs, vacating Saint Lawrence Cement’s air pollution permits, and enjoining the cement company from operating its proposed (and nearly built) facility until the NJDEP performs an appropriate adverse disparate impact analysis in compliance with Title VI to the satisfaction of the District Court.⁸³

The Earth Week celebration lasted five days.

The Courts Close the Door on Environmental Justice

On April 24th, 2001, the victory came crashing down, in an anticipated decision by the U.S. Supreme Court: Alexander v. Sandoval.⁸⁴ The case had nothing to do with environmental matters, but with a challenge to an English-only drivers license examination in Alabama.⁸⁵ The high court ruled that there is no private right of action under § 602, effectively shutting down any litigation over racially disparate impacts caused by federally-funded agencies, unless one can prove intent.⁸⁶ The 5-4 majority opinion, written by Scalia, focused on the idea that courts may no longer find that there is a private right of action to enforce federal law unless Congress intends such a right.⁸⁷

When Title VI was enacted in 1964, the Court was in the habit of creating private rights of action and provided remedies as they found necessary to effectuate congressional purpose.⁸⁸ This practice was abandoned in 1975 when the Supreme Court created a test in Cort v. Ash, setting forth four factors to determine whether Congress intended for a private right of action to exist under a statute:

⁸³ Id. at 503-05.

⁸⁴ Alexander v. Sandoval, 532 U.S. 275 (2001).

⁸⁵ Id. at 279.

⁸⁶ Id. at 293.

⁸⁷ Id. at 286.

⁸⁸ Id. at 287 (“it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose’ expressed by a statute”), citing J. I. Case Co. v. Borak, 377 U.S. 426, 433 (1964).

- (1) whether the plaintiff is one of the class for whose benefit the statute was enacted;
- (2) whether there is any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one;
- (3) whether it is consistent with the underlying purpose of the legislative scheme to imply such a remedy for the plaintiffs; and
- (4) whether the cause of action is one traditionally relegated to state law.⁸⁹

The Sandoval majority ignore most of the Cort v. Ash factors, focusing narrowly on part of the second factor when they state: “We therefore begin (and find that we can end) our search for Congress’s intent with the text and structure of Title VI.”⁹⁰ The majority points to Touche Ross & Co. v. Redington to back up their opinion that, “like substantive federal law itself, private rights of action to enforce federal law must be created by Congress.”⁹¹ While the Sandoval majority fail to point this out, Touche Ross backs up their abuse of the Cort v. Ash factors by stating that the “Court did not decide that each of these factors is entitled to equal weight.”⁹²

The Sandoval majority concludes their Cort v. Ash analysis by holding that the “rights-creating” language in § 601 (“no person ... shall ... be subjected to discrimination”) is not present in § 602, since § 602 “limits agencies to ‘effectuating’ rights already created by § 601” and since “the focus of § 602 is twice removed from the individuals who will ultimately benefit from Title VI’s protection.”⁹³ As Justice Stevens points out in a dissenting opinion longer than the majority opinion itself, it makes sense that there is no “rights-creating” language in § 602 since “it is perfectly obvious that the regulations authorized by § 602 must be designed to protect precisely the same people protected by § 601.”⁹⁴

⁸⁹ Cort v. Ash, 422 U.S. 66 (1975).

⁹⁰ Sandoval, 532 U.S. at 288.

⁹¹ Id. at 286, citing Touche Ross & Co. v. Redington, 442 U.S. 560, 578 (1979).

⁹² Touche Ross, 442 U.S. 560 at 575.

⁹³ Sandoval, 532 U.S. at 288-89.

⁹⁴ Id. at 316.

Stevens' dissent made many power arguments, shredding the majority opinion. First, he point out that the question of a private right of action under § 602 should not even be before the Supreme Court, since not a single Court of Appeals has ruled that there is no such right.⁹⁵ He lists 11 cases in 10 Federal Circuits where federal courts were all on the same page, supporting a private right of action under § 602; a 12th case suggested that the question may be open.⁹⁶

Second, he argues that the majority misinterprets Guardians, pointing out, as the Third Circuit did in Chester Residents, that there were five justices supporting the notion that “private parties may seek injunctive relief against governmental practices that have the effect of discriminating against racial and ethnic minorities.”⁹⁷

Third, Stevens argues that a proper analysis under Cort v. Ash supports the notion that there is an implied private right of action under § 602.⁹⁸ Clearly, there is no doubt that the plaintiff in a discriminatory impact case is one of the class for whose benefit the statute was enacted, and it is consistent with the underlying purpose of the legislative scheme to imply such a remedy for the plaintiffs. Stevens documents that there was legislative intent – among proponents and opponents of the Civil Rights Act of 1964 – that Title VI included a private right of action for discriminatory impacts.⁹⁹ The Supreme Court's decision in Cannon v. University of Chicago found that Congress intended a private right of action to enforce both Title IX of the Education Amendments of 1972 (a gender discrimination statute modeled on Title VI, and expected to be construed the same

⁹⁵ Id. at 295, 317.

⁹⁶ Id. at 295 n.1.

⁹⁷ Id. at 298.

⁹⁸ Id. at 311.

⁹⁹ Id. at 302 n.9.

way) and Title VI.¹⁰⁰ Stevens points out that the Cort v. Ash analysis in Cannon “was equally applicable to intentional discrimination and disparate impact claims” and that Cannon was, in fact, a disparate impact case.¹⁰¹

Fourth, Stevens argues that § 601 not limited to intentional discrimination, as the majority claims is “beyond dispute” (even though four Justices signed the dissent that disputes it).¹⁰² Stevens dissects the Court’s decisions in Guardians and Bakke and finds that Bakke did not rule directly on the matter and that Guardians mistakenly assumed that Bakke did.¹⁰³

Most significant to the resolution of South Camden is Stevens’ argument that there is still private right of action available by citing 42 U.S.C. § 1983 to reach § 602.¹⁰⁴ Section 1983 of the Civil Rights Act of 1871 imposes liability on anyone who, under color of state law, deprives a person of any rights, privileges, or immunities secured by the constitution and laws.¹⁰⁵ It is almost comical in that, for all the wrangling a private right of action under § 602, plaintiffs can still bring the same legal challenge by simply invoking § 1983 to enforce rights created by regulation, causing Justice Stevens to describe Sandoval as “something of a sport.”¹⁰⁶

The sporting continued in the South Camden case on April 24th, 2001. Sandoval had been decided that morning. That afternoon, the District Court, in a teleconference on the record, asked the parties in South Camden to brief the following two questions: (1) whether the claim could be brought as an intentional discrimination claim under § 601

¹⁰⁰ Cannon v. University of Chicago, 441 U.S. 677 (1979).

¹⁰¹ Sandoval, 532 U.S. at 298.

¹⁰² Id. at 280, 303.

¹⁰³ Id. at 307-08.

¹⁰⁴ Id. at 299-301.

¹⁰⁵ Blessing v. Freestone, 520 U.S. 329, 340 (1997).

¹⁰⁶ Sandoval, 532 U.S. at 300.

and; (2) whether the § 602 claim could be maintained by invoking § 1983, as Justice Stevens suggested.¹⁰⁷

Perhaps for the first time in any federal court, the South Camden case raised the question of “whether the same disparate impact regulations which can no longer be enforced through a private right of action brought directly under § 602 of Title VI, can be enforced pursuant to 42 U.S.C. § 1983.”¹⁰⁸ The District Court upheld its April 19th decision and injunction, finding that the disparate impact discrimination claim can be brought under § 1983.¹⁰⁹

As before, the victory was short-lived. The courtroom door shut to civil rights plaintiffs in Sandoval was to be one in a series of doors slamming shut, closing out opportunities for justice in the courts.

On appeal in the Third Circuit, the Court of Appeals had to address the question of whether a regulation can create a right enforceable through § 1983, in the absence of clear rights-creating language in the statute.¹¹⁰ Justice Stevens argued in his Sandoval dissent that the courts should apply Chevron deference in such situations, allowing agencies to create rights in regulations when interpreting broadly-worded statutes, unless the regulations are an unreasonable interpretation of the statute.¹¹¹ The Court of Appeals wasn’t thinking this way, however. They held that an administrative regulation could not create a right enforceable under § 1983 unless the right can be implied from the statute authorizing the regulation.¹¹² Using the Supreme Court’s Blessing v. Freestone test¹¹³ to

¹⁰⁷ S. Camden Citizens in Action v. N.J. Dep't of Env'tl. Prot., 145 F. Supp. 2d 505, 509 (2001).

¹⁰⁸ Id.

¹⁰⁹ Id.

¹¹⁰ S. Camden Citizens in Action v. N.J. Dep't of Env'tl. Prot., 274 F.3d 771, 781 (2001).

¹¹¹ Sandoval, 532 U.S. at 309.

¹¹² S. Camden, 274 F.3d at 774.

¹¹³ Blessing v. Freestone, 520 U.S. 329, 338 (1997). The Blessing test to determine whether a federal statute creates an individual right enforceable through § 1983 looks at the following: (1) Congress must have intended that the provision in question benefit the

see if the right can be implied from the regulation adopted under § 602 and enforced with § 1983, the Third Circuit ruled that the South Camden residents were out of luck.

The “we won’t find any rights you can enforce unless Congress clearly spelled them out for you” trend was made harder the following year, with a 2002 U.S. Supreme Court ruling in Gonzaga Univ. v. Doe.¹¹⁴ Gonzaga made the Blessing test even harder to meet, requiring that Congress intend to create a federal right, not merely intend the statute to benefit the plaintiff.¹¹⁵ Gonzaga boldly states: “[w]e now reject the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983.”¹¹⁶

The Fox Now Guards the Henhouse

With this nail in the coffin of environmental justice litigation, the courts have basically said: if you can’t prove the federally-funded agency’s discrimination is intentional, all you can do is to complain to the agency itself and ask them to hold themselves accountable. Asking the fox to guard the henhouse has been as fruitful as you might imagine.¹¹⁷ About 250 Title VI complaints were filed with EPA’s Office of Civil Rights from 1993 to 2011, the vast majority of which were dismissed or rejected.¹¹⁸

EPA’s first decision on a Title VI complaint was in 1998, ruling on a complaint against Michigan’s environmental agency for permitting Select Steel to build a new steel mill in their predominantly African-American neighborhood of Flint, Michigan. In their

plaintiff; (2) the plaintiff must demonstrate that the right protected by the statute is not so vague and amorphous that its enforcement would strain judicial competence; and (3) the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory terms.

¹¹⁴ Gonzaga Univ. v. Doe, 536 U.S. 273, 283 (2002).

¹¹⁵ Derek Black, “Picking up the Pieces after Alexander v. Sandoval: Resurrecting a Private Cause of Action for Disparate Impact,” 81 N.C.L. Rev. 356, 367 (2002).

¹¹⁶ Gonzaga Univ., 536 U.S. at 283.

¹¹⁷ Center for Race, Poverty & the Environment, et. al., “The EPA Denies Civil Rights Protection for Communities of Color,” Title VI Factsheet, September 2011. <http://www.ejnet.org/ej/tvifactsheet.pdf>

¹¹⁸ “Title VI Complaints Listing” U.S. Environmental Protection Agency, July 2011. <http://www.ejnet.org/ej/2011-07-15complaints.pdf>

decision, EPA found no discrimination. EPA assumed that the proposed steel mill would be in compliance with environmental laws, and held that complying with environmental laws means that there would be no “adverse effect” on the community. EPA further held that: “[i]f there is no adverse effect from the permitted activity, there can be no finding of a discriminatory effect which would violate Title VI and EPA’s implementing regulations.”¹¹⁹

EPA’s position in their Select Steel precedent is that there can be no violation of Title VI of the Civil Rights Act because there is no violation of environmental laws (in this case, the Clean Air Act). This contradicts the Department of Justice’s interpretation that civil rights laws are independent and that compliance is evaluated in light of anti-discrimination requirements.¹²⁰ It also contradicts common sense, since environmental laws are designed to set allow (permit) certain levels of pollution – usually without factoring in other nearby sources of pollution – and allowable pollution levels are often based on what is technically and economically possible for an industry to achieve, not on what levels are healthy for the community. The inevitable “adverse” affects on health can surely have a discriminatory effect, even if pollution levels are within permitted limits, as the court in South Camden also recognized.

Even when you win, you lose. In August 2011, EPA finally ruled on a Title VI complaint filed in 1999 over disparate impacts of methyl bromide pesticide spraying near grade schools predominantly serving Latino children in California. In the only case where EPA ever found a violation of Title VI, EPA failed to provide a meaningful remedy. After 12 years of delays, EPA secretly negotiated a settlement with the

¹¹⁹ “Select Steel Complaint: EPA Title VI of the Civil Rights Act Decision Memorandum and Report,” 1998, p.3. http://www.epa.gov/ocr/docs/ssdec_ir.pdf

¹²⁰ Brief Amicus Curiae of the United States, Save Our Summers v. Washington Department of Ecology, No. CS-99-269-RHWQ (filed Sept. 6, 2000). <http://www.cforjustice.org/wp-content/uploads/2009/03/amicus.pdf>

California Department of Pesticide Regulation, without involving the plaintiffs, and settled for additional monitoring of methyl bromide near schools, and “outreach” by the Department of Pesticide Regulation. The plaintiffs, and all future school children won no real relief from this decision, especially in light of the fact that the known cancer-causing methyl iodide had recently been approved by EPA to replace methyl bromide, making the situation even worse. EPA is supposed to withhold federal funding when it finds Title VI violations.¹²¹ Settling in secret for crumbs when it finds its first violation is not promising.

The Obama Whitehouse and his EPA Administrator, Lisa Jackson, have permitted this awful decision under their watch, while claiming to take environmental justice and civil rights seriously. EPA’s latest decision, in August 2012, confirms that EPA – even under presumably favorable political leadership – is not a place to find justice. In Padres Hacia una Vida Mejor v. Department of Toxic Substances Control, the Center for Race, Poverty and the Environment had to sue EPA to finally get the agency to decide on the case filed 18 years earlier, in 1994. Only when the court imposed a deadline on EPA, did EPA finally act on complaint – by dismissing it.¹²² The complaint alleged discrimination with regard to the fact that all three of California’s hazardous waste landfills are in low-income Latino communities. EPA absolved the federally-funded agencies that permitted the facilities because they were not actually involved in siting the facilities. Such an interpretation is quite dangerous, since state permitting agencies rarely pick the sites, but do decide whether to grant permits for where corporations seek to build polluting facilities. Stunningly, EPA also found that the three hazardous waste landfills did not

¹²¹ Angelita C. v. California Department of Pesticide Regulation, Title VI Complaint No. 16R-99-R9. See decision and related documents on <http://www.ejnet.org/ej/>

¹²² Padres Hacia una Vida Mejor v. Department of Toxic Substances Control, Title VI Complaint No. 1R-95-R9. <http://www.epa.gov/ocr/TitleVIcases/decisions/>

harm public health despite unexplained birth defect clusters and high infant mortality rates. In coming to this conclusion, EPA failed to evaluate the impacts of diesel trucks coming to the facilities, even though the agency had awarded a California group, Greenaction, a grant to work with one of these communities specifically on diesel pollution issues.¹²³

The 12-18 year delays are not uncommon. EPA is required to accept for investigation or deny a Title VI complaint within 20 days, and within 180 days of accepting one, must issue preliminary findings from its investigation. However, many complaints have languished 15 years or more without any agency response.¹²⁴ In 2003, the U.S. Commission on Civil Rights found that EPA lacked an effective system for investigating the growing backlog of complaints.¹²⁵ In 2009, the Ninth Circuit Court of Appeals ruled against EPA in the first case related to the backlog of Title VI complaints, noting a “consistent pattern of delay by the EPA” and that the delays in that case “appear, sadly and unfortunately, typical of those who appeal to [EPA] to remedy civil rights violations.”¹²⁶ In 2011, a Deloitte Consulting LLP report on EPA’s Office of Civil Rights showed that their backlog problems continue.¹²⁷

“Environmental Justice” Legislation

After several years of frustration, with courts refusing to hear environmental racism claims on the merits, and EPA failing to respond to Title VI complaints, some

¹²³ Eiji Yamashita, “EPA awards grant to environmental group: Greenaction Campaign to Conduct Outreach on Impact of Diesel Emissions,” Hanford Sentinel, December 10, 2011. http://www.hanfordsentinel.com/news/local/epa-awards-grant-to-environmental-group/article_856323fa-22d5-11e1-894b-001871e3ce6c.html

¹²⁴ Center for Race, Poverty and the Environment, “EPA Fails to Enforce Civil Rights Act,” Press Release, August 25, 2011. <http://www.ejnet.org/ej/angelitac-crpe-pr.pdf>

¹²⁵ U.S. Commission on Civil Rights, “Not in My Backyard: Executive Order 12,898 and Title VI as Tools for Achieving Environmental Justice,” October 2003, pp.55-62. <http://www.usccr.gov/pubs/envjust/ej0104.pdf>

¹²⁶ Rosemere Neighborhood Association v. EPA, 581 F.3d 169 (9th Cir. 2009), pp.13509-10. <http://www.ca9.uscourts.gov/datastore/opinions/2009/09/17/08-35045.pdf>

¹²⁷ Deloitte Consulting LLP, “Evaluation of the EPA Office of Civil Rights – Final Report,” March 21, 2011. http://www.epa.gov/epahome/pdf/epa-ocr_20110321_finalreport.pdf

environmental justice activists have sought to legislatively “fix Sandoval.” In 2006, Senator Menendez (D-NJ) introduced S. 4009, the Environmental Justice Enforcement Act of 2006.¹²⁸ In 2008, on the 7th anniversary of the Sandoval ruling, Senator Menendez reintroduced the bill as S. 2918, and Congresswoman Solis (D-CA) introduced the same, as H.R. 5896.¹²⁹ The legislation has not been reintroduced in either the 111th or 112th Congress (2009-2012).¹³⁰

The Environmental Justice Enforcement Act essentially overturns key findings in Sandoval and a whole string of cases preceding it, by creating a clear statutory right to sue for disparate impacts under § 601.¹³¹ The recipient of federal funds that is accused of discriminatory impacts may escape liability if they “demonstrate that the challenged policy or practice is related to and necessary to achieve the nondiscriminatory goals of the program or activity alleged to have been operated in a discriminatory manner.”¹³² A plaintiff may also prove discrimination by demonstrating that a less discriminatory alternative policy or practice exists, and that the recipient of federal funds refuses to adopt such alternative policy or practice.¹³³ The legislation also clearly spells out rights to recovery. Plaintiffs bringing claims based on disparate impact may recover equitable relief, attorney’s fees (including expert fees), and costs.¹³⁴ Those bringing claims of intentional discrimination may also recover compensatory and punitive damages, though punitive damages are not available against governmental bodies.¹³⁵

¹²⁸ Library of Congress website. <http://thomas.loc.gov>

¹²⁹ Id.

¹³⁰ Id.

¹³¹ S. 2918, Environmental Justice Enforcement Act of 2008.

¹³² Id.

¹³³ Id.

¹³⁴ Id.

¹³⁵ Id.

While framed as an environmental justice bill, the Environmental Justice Enforcement Act is not limited to environmental claims. It would reopen doors to private disparate impact claims of any sort that are “on the basis of race, color or national origin.”¹³⁶ Perhaps if the rest of the civil rights movement were aware of this, or if the Obama administration’s actions were as serious about combating discrimination as his words, the legislation would have been reintroduced and made more of a priority since President Obama took office.

While passage of the Environmental Justice Enforcement Act would be a huge victory for civil rights, its impact on achieving environmental justice would be fairly small, in the big picture. It is hard for most community environmental justice to bring Title VI cases without having free legal help as the groups in Chester and Camden did. The number of communities that can bring claims is also limited, since such cases are only likely to succeed where there are blatant racial disparities, comparable to Chester and Camden. Many other “environmental justice” communities don’t share such stark demographic disparities, and some are likely to be seen as arguable, such as where major polluting facilities are planned in poor, rural white areas adjacent to prisons housing mostly racial minorities, as is the case in a community recognized as an “environmental justice” community near Gilberton, Pennsylvania.¹³⁷ Since Title VI provides no protection for class discrimination, many impoverished and heavily impacted communities, like those suffering in West Virginia’s mountaintop removal mining regions, are left without legal protection. Some have argued that the future direction of

¹³⁶ Id.

¹³⁷ See: <http://www.ultradirtyfuels.com>. In response to comments by Mike Ewall of ActionPA, the Department of Energy, in their Environmental Impact Statement, recognized the prison population as an environmental justice community, but pretended that they would not be impacted by the coal-to-oil refinery proposed adjacent to them because the pollution would be within legal limits, along the flawed lines of the aforementioned Select Steel decision.

environmental justice law needs to include protections for victims of economic discrimination.¹³⁸

Even with a private right of action on race and class discrimination, the legal tool lends itself to a one facility at a time, one community at a time, solution. With the systematic onslaught of pollution and unnecessary industries, it would be more appropriate for the environmental justice movement to be pushing for broader policy-level changes, not unlike the Environmental Justice Enforcement Act's "prove discrimination by demonstrating that a less discriminatory alternative policy or practice exists" idea – but one where people could sue if the government permits a company to operate a technology where a less polluting alternative technology or practice exists. Currently, under the National Environmental Policy Act, certain federally funded or sponsored projects must do an Environmental Impact Statement that is supposed to include an analysis of alternatives, but there is no requirement that the project proponents actually adopt any of the better alternatives they write up in the impact statement.

Until we see the day when these broader policies are politically possible, we must take advantage of every opportunity to protect every community from environmental harm – especially those that are made easy targets because of actual or perceived political powerlessness. A renewed Title VI option would be a weak tool toward 'equity.' A wave of lawsuits would, at best, start to redistribute environmental harms, with some polluting projects turning their sights on communities with a larger white population. Any distributional equity would mostly pertain to locating new polluters, as such litigation isn't likely to dislodge and relocate existing industries. Thus any 'equity' that

¹³⁸ Uma Outka, "Environmental Injustice and the Problem of the Law," 57 *Me. L. Rev.* 209, 246-248 (2005).

could come by redistributing environmental harms would do little to change the existing disparate patterns.

When corporate polluters are chased out of a community, most give up after targeting one or two communities. Some are more persistent. Sometimes they turn around to threaten a more privileged community that might have the power to win broader reforms. In 1998, a company named PhilPower Corporation sought to build a wood waste incinerator in Delaware. They targeted one community after another – ultimately targeting five communities. Most were communities of color, but when they tried to set foot in a suburban white community, that was enough to get state legislation moving that ultimately banned incinerators statewide in 2000.¹³⁹

This is an ideal example of where equity can be a step toward justice. However, more typical examples from other, more famous, environmental justice battles didn't turn out so well. In the Louisiana Energy Services example, the company tried three more times, twice in whiter communities in Tennessee, where they were defeated both times, ultimately to land in a low-income, 45% Hispanic community in New Mexico. While this is more 'equitable' than the company's initial target, it is still environmental racism and it will still do grave harm to the environment and the people who live in the region around Eunice, NM. Another notorious example, well-known in the environmental justice movement, is that of Shintech – a Japanese company that sought to build a PVC plastics factory in Convent, Louisiana, in a region known as “cancer alley” due to the high concentration of petroleum refineries, chemical and plastic production facilities. While the battle against Shintech stopped them from locating in Convent, they ultimately

¹³⁹ Senate Bill 280 of 2000. <http://tinyurl.com/65tabfc>

got a facility built – albeit smaller – in a largely white community in another county in the region.

Environmental Equity is Impossible

Given the unequal routes of exposure to various toxic pollutants, even those released in white communities will be disproportionately impacting people of color.

Some racial minority subpopulations (notably poor Asian-Americans, Native Americans and urban African-Americans) consume more fish – and some, more contaminated kinds or parts of fish – than is average in the U.S., and thus suffer higher exposure to toxic mercury, dioxins and PCBs from fish consumption.¹⁴⁰ This would be true even if every smokestack releasing these pollutants were in an affluent white community, as the pollutants (and fish) travel before the uneven exposures are felt.

PCBs and dioxins travel quite a distance, accumulating at the highest levels around the Earth's poles. Indigenous people living in the Arctic Circle subsist necessarily on a diet heavy in animal fat, where these toxins accumulate at high doses. A study of North American dioxin pollution impacting eight sites in the Canadian Arctic found that U.S. sources – particularly three trash incinerators in Iowa, Pennsylvania and Minnesota – were the greatest contributors of dioxin to these Arctic Circle communities.¹⁴¹ An earlier study accidentally found the highest levels of PCBs in breast milk were in Indigenous women in the Canadian Arctic.¹⁴² The researchers were seeking out a remote control group for their study, but learned that the global travel of these

¹⁴⁰ Toxicology Excellence for Risk Assessment, "Comparative Dietary Risks: Balancing the Risks and Benefits of Fish Consumption," U.S. Environmental Protection Agency, 1999. EPA 823/R-99-018. <http://www.tera.org/Publications/CDR%20Chapter5.pdf>

¹⁴¹ Commoner, et al. Long-range Air Transport of Dioxin from North American Sources to Ecologically Vulnerable Receptors in Nunavut, Arctic Canada. North American Commission for Environmental Cooperation. 2000. http://www.cec.org/Storage/57/4969_dioxrep_en.pdf

¹⁴² Dewailly E, Nantel A, Weber JP, Meyer F., "High levels of PCBs in breast milk of Inuit women from Arctic Québec," Bulletin of Environmental Contamination and Toxicology 43 (5) 641-646, 1989. http://www.osti.gov/energycitations/product.biblio.jsp?query_id=1&page=0&osti_id=6614926

highly toxic chemicals were causing them to provide the highest doses to the native peoples to our north.

Water fluoridation is another example where toxic exposure cannot be made equal. While it is urban communities (and thus more people of color) that are most often fluoridated, and thus disproportionately exposed to the hazardous chemicals used to fluoridate water supplies, the chemicals – even within the same community – cause more of an impact on people of color than whites. Fluoride helps the body absorb toxic lead, which is well-known to affect the brain in ways that cause diminished IQ, learning disability, violent behavior and increased likelihood of cocaine addiction. The fluoride-induced increase in lead exposure, apparently due to racial differences in how the body handles different minerals, is most pronounced in blacks, and also affects Hispanics more than whites.¹⁴³

The “environmental equity” goal of redistributing harms is not only impossible, but is largely undesirable. For the worst environmentally harmful industries, such as nuclear reactors, combustion-based power plants and incinerators and the like, there are alternatives that are generally cheaper, zero-emission and which produce far more jobs. For these types of harmful industries, it’s proper to say “Not in Anyone’s Backyard.” Such a position fits with the Principles of Environmental Justice.

The equity concept only belongs to bringing fairness in the distribution of socially beneficial things (such as access to parks and public transit, or availability of fresh produce in urban “food deserts” – each of which have been tackled as environmental justice issues), and in socially necessary facilities that carry some risk (such as recycling

¹⁴³ Roger D. Masters, “The Social Implications of Evolutionary Psychology: Linking Brain Biochemistry, Toxins, and Violent Crime,” Chapter 2 in Richard W. Bloom and Nancy K. Dess, eds., “Evolutionary Psychology and Violence: A Primer for Policymakers and Public Policy Advocates,” (N.Y.: Praeger/Greenwood, 2002).
http://www.actionpa.org/fluoride/Masters_SocialImplicat_published.pdf

facilities, where the siting should be made more equitable and the impacts should be insulated from residential land uses).

Given this, it does not make sense to pose legislative solutions in terms of environmental justice. Most “environmental justice” policies have actually been “equity” policies weakly designed to redistribute harms. Such policies are usually so weak that they just focus on increased “public involvement” (hearings where you still generally get ignored before pollution permits are granted), but sometimes go as far as establishing protocols that discourage agency permitting of new polluting facilities in designated “environmental justice” communities.

While it’s good to discourage the concentration of new polluters where existing polluters are already concentrated – mainly low-income communities and communities of color – it hardly goes far enough. There is still the matter of existing polluting facilities, and no one has seriously proposed uprooting polluting industries in order to relocate some of them in wealthy, white suburbs. Clearly, that would prove politically impossible (for the same reasons that created the demographics of environmental racism in the first place), and any such effort, even if legal, would be economically ridiculous and politically divisive. If there were economic resources (and political will) to relocate polluting industries, then those funds would be better put into replacing the polluting technology with non-pollution alternatives. It is more strategic to help more privileged communities understand how they are also affected by pollution, and to use that awareness to create a solidarity to work toward broader solutions.

Equity policies designed to redistribute beneficial things (parks, groceries...) are good and should simply be framed honestly as equity policies. A law designed to ensure

equitable enforcement of environmental laws would be most helpful, and would also fairly fall in the “equity” realm.

Policies that are truly about environmental justice are unlikely to be framed in such terms, as they would look like laws that help everyone by transitioning from various polluting practices to clean ones. Examples would include laws designed to replace toxic chemical use with safe alternatives, or laws banning incineration or removing subsidies for dirty energy. The beneficial impacts of such laws would most affect the communities of color who suffer the disproportionate impacts, but the laws themselves would not need to be framed in terms of environmental justice or with any race-based language. This is just as well, and advisable, considering the “color-blind” approach – as misguided as it is – that courts have tried to take with such issues as affirmative action.

As we sharpen legal tools to achieve environmental justice for all, we must not sell short and settle for equity of harms disguised as justice. As Martin Luther King, Jr. knew, injustice anywhere is a threat to justice everywhere.¹⁴⁴

¹⁴⁴ Martin Luther King, Jr., Letter from Birmingham Jail, April 16, 1963.