

February 2012

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Rachel Paras

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Recommended Citation

Paras, Rachel (2003) "Relief at the End of a Winding Road: Using the Third Party Beneficiary Rule and Alternative Avenues to Achieve Environmental Justice," *St. John's Law Review*. Vol. 77 : No. 1 , Article 6. Available at: <https://scholarship.law.stjohns.edu/lawreview/vol77/iss1/6>

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RELIEF AT THE END OF A WINDING ROAD: USING THE THIRD PARTY BENEFICIARY RULE AND ALTERNATIVE AVENUES TO ACHIEVE ENVIRONMENTAL JUSTICE

RACHEL PARAS[†]

*And where the wind and the sun once dictated the course of evolution, the near future of this planet resides in the mind and action of man. The balancing of and the struggle between greed, compassion, fear, and intelligence will now determine the destiny of all life on Earth.*¹

INTRODUCTION

The Fourteenth Amendment of the United States Constitution provides that no state shall “deny to any person . . . the equal protection of the laws.”² Ideally, equal protection should also extend to the safety and use of one’s physical environment.³ For several decades, minority and low-income

[†] J.D. Candidate, June 2004, St. John’s University School of Law; B.A., 1990, Hofstra University.

¹ Charles Lynn Bragg, unpublished speech, at <http://www.ecology.com/quote-week/home.htm> (last visited Apr. 4, 2003). Mr. Bragg studied at the University of California at Los Angeles, Pierce College and Los Angeles City College. His work has been exhibited internationally in galleries and as illustrations for magazines and environmental conservation campaigns.

² U.S. CONST. amend. XIV, § 1. The full text of the amendment provides:
No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

³ See Linda D. Blank, *Seeking Solutions to Environmental Inequity: The Environmental Justice Act*, 24 ENVTL. L. 1109, 1136 (1994) (stating that “[t]he fundamental right to a clean, safe environment cannot exist only for the wealthy [and] non-minority members of our society”); Errol Schweizer, *Interview with Robert Bullard*, EARTH FIRST!, July 6, 1999 (“[E]nvironment is everything: where we live, work, play, go to school, as well as the physical and natural world. And so we can’t separate the physical environment from the cultural environment.”). As one of the major researchers and organizers of the environmental justice movement, Dr. Robert Bullard is also the author of many books and articles, a frequent speaker,

communities have been disproportionately exposed to pollution and environmental risk.⁴ This problem has been called "environmental racism"⁵ and has been defined as "[a]ny policy, practice, or directive that, *intentionally or unintentionally*, differentially impacts or disadvantages individuals, groups, or communities based on race or color . . . [as well as the] exclusionary and restrictive practices that limit participation by people of color in decision-making boards, commissions, and staffs."⁶

and a pioneering scholar, as well as an advocate and activist. *See id.*

⁴ Seventy-five percent of all commercial hazardous waste landfills in the southeastern United States are located in predominantly African-American neighborhoods. *See* Blank, *supra* note 3, at 1110 (citing U.S. GEN. ACCOUNTING OFFICE, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES 3 (1983)). Furthermore:

[I]n 1986 the United Church of Christ's Commission on Racial Justice conducted a major study which analyzed the relationship between race and the location of hazardous waste sites across the nation. The study discovered that race is the single best predictor of where commercial hazardous waste facilities are located. The report further concluded that it was virtually impossible for the disproportionate distribution to have occurred by chance and that the underlying factors related to race affected the location of waste facilities. Some of these underlying factors are: (1) the availability of cheap land, often located in minority communities; (2) the lack of local opposition, often resulting from minorities' lack of political resources; and (3) the lack of mobility of minorities resulting from poverty.

Carolyn Graham & Jennifer B. Grills, *Environmental Justice: A Survey of Federal and State Responses*, 8 VILL. ENVTL. L.J. 237, 261 n.23 (1997) (citations omitted). Activism occurred as early as the 1960s and 1970s; however, it went unnoticed by policy makers, mainstream environmentalists, and the media. *Id.* at 239.

⁵ The term "Environmental Racism" was first used in 1987 by Rev. Dr. Benjamin Chavis, former executive director of the National Association for the Advancement of Colored People (NAACP) and a long time civil-rights community organizer and activist. Chavis reportedly coined the term as he was preparing to present a report on toxic waste sites and race in the United States: "[I] was trying to figure out how [I] could adequately describe what was going on. It came to me—environmental racism. That's when I coined the term. To me, that's what it is." Richard J. Lazarus, *Innovations in Environmental Policy: "Environmental Racism! That's What It Is,"* 2000 U. ILL. L. REV. 255, 257. The phrases "environmental racism," "environmental equity," and "environmental justice" are often used interchangeably even though each phrase has its own meaning. For a brief but thorough discussion of these subtleties, see Graham & Grills, *supra* note 4, at 238 n.6.

⁶ Michael Fisher, *Environmental Racism Claims Brought Under Title VI of the Civil Rights Act*, 25 ENVTL. L. 285, 289-90 (1995) (quoting Dr. Robert Bullard). Dr. Bullard explained in an interview in 1999 that:

All of the issues of environmental racism and environmental justice don't just deal with people of color. We are just as much concerned with

Part I of this Note presents a brief history of the environmental justice movement that arose to combat environmental racism. Part II discusses the rise and possible fall of Title VI of the Civil Rights Acts of 1964 as an avenue of relief for environmental justice plaintiffs. Part II.B includes a brief discussion of the possibility of using § 1983 for environmental justice suits. Part III presents a possibility for plaintiffs to achieve environmental justice and resurrect a private cause of action as third party beneficiaries to the contracts between funding recipients and the federal government. Part IV discusses the continued viability and availability of preliminary injunctions and criminal prosecutions in the pursuit of environmental justice. Part V concludes that although environmental justice plaintiffs may not have the direct path of a suit under Title VI, all roads to justice have not been closed.

I. ENVIRONMENTAL JUSTICE: A BRIEF HISTORY AND METAMORPHOSIS

“While environmentalists have traditionally battled to protect endangered species . . . nontraditional environmentalists have struggled to protect and preserve a different endangered species: people of color and low socioeconomic status.”⁷ Environmental justice⁸ calls for uniform environmental and

inequities in Appalachia, for example, where the whites are basically dumped on because of lack of economic and political clout and lack of having a voice to say “no” and that’s environmental injustice. So we’re trying to work with groups across the political spectrums; democrats, republicans, independents, on the reservations, in the barrios, in the ghettos, on the border and inter-nationally to see that we address these issues in a comprehensive manner.

Schweizer, *supra* note 3. See generally ROBERT BULLARD, DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY (1990).

⁷ Graham & Grills, *supra* note 4, at 237; see also Schweizer, *supra* note 3 (“I think that’s where the environmental justice movement is more of a grassroots movement of ordinary people who may not see themselves as traditional environmentalists, but are just as much concerned about the environment as someone who may be a member of the Sierra Club or the Audubon Society.”).

⁸ While the problem is referred to as environmental racism, the term “environmental justice” refers to the solution. See Michael D. Mattheisen, *Applying the Disparate Impact Rule of Law to Environmental Permitting Under Title VI of the Civil Rights Act of 1964*, 24 WM. & MARY ENVTL. L. & POL’Y REV. 1, 3 (2000). The United States Environmental Protection Agency (EPA) defines environmental justice as “the fair treatment and meaningful involvement of all people regardless of race, ethnicity, income, national origin, or educational level with respect to the

health conditions across races and income levels.⁹ As a leading environmental advocate explained, “[T]he environmental justice movement is about trying to address all of the inequities that result from human settlement, industrial facility siting and industrial development.”¹⁰ Members of the movement seek to assist minority and disadvantaged socio-economic communities that receive a disproportionate share of toxic waste and other health hazards.¹¹

Although some activism occurred during the 1960s and 1970s,¹² the national environmental justice movement fully emerged in 1982 when a series of protests were staged in Warren County, North Carolina, to prevent the siting of a polychlorinated biphenyl (PCB) landfill in an overwhelmingly low-income and minority community.¹³ In 1983, as a result of the Warren County protests, the United States General Accounting Office (GAO) conducted a study concerning the problems of environmental injustice.¹⁴ The study was conducted in eight large southern states¹⁵ and concluded that three out of

development, implementation, and enforcement of environmental laws, regulations, and policies.” COMM. ON ENVTL. JUSTICE, INST. OF MED., TOWARD ENVIRONMENTAL JUSTICE: RESEARCH, EDUCATION, AND HEALTH POLICY NEEDS, at Introduction and Executive Summary (1999), available at <http://www.nap.edu>.

⁹ See Mattheisen, *supra* note 8, at 3.

¹⁰ Schweizer, *supra* note 3. “While the unfair distribution of locally undesirable land uses (LULUs) is the issue most frequently raised by environmental justice plaintiffs, there are other manifestations of environmental racism, including failure to enforce clean air or clean water policies.” Amanda C.L. Vig, Note, *Using Title VI to Salvage Civil Rights from Waste: Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925 (3d Cir. 1997), 67 U. CIN. L. REV. 907, 910 n.28 (1999).

¹¹ See Blank, *supra* note 3, at 1110.

¹² See Graham & Grills, *supra* note 4, at 239.

¹³ Civil rights activists, government officials, religious leaders, and local residents joined together to march. See Robert D. Bullard, *Race and Environmental Justice in the United States*, 18 YALE J. INT’L L. 319, 328 (1993). These protests led to the arrest of more than 500 people, and among those arrested were Dr. Benjamin Chavis Jr., Executive Director of the United Church of Christ Commission for Racial Justice; Dr. Joseph Lowery of the Southern Christian Leadership Conference; and Walter Faunty, congressman for the District of Columbia. *Id.*; THURGOOD MARSHALL SCH. OF LAW, ENVTL. JUSTICE CLINIC, ENVIRONMENTAL JUSTICE HISTORY (1996), available at <http://www.tsulaw.edu>.

¹⁴ See U.S. GEN. ACCOUNTING OFFICE, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES (1983) [hereinafter GAO Study]. This study was reportedly conducted at the request of Congressman Walter Faunty, who was arrested at the protests. See Bullard, *supra* note 13, at 328.

¹⁵ See Bullard, *supra* note 13, at 328. The states that comprised EPA region IV consisted of Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina,

every four landfills were located near predominantly minority communities.¹⁶

Several subsequent studies have heightened the concern for environmental inequities and have added national exposure and validity to the movement.¹⁷ Countless volumes of academic discussion and suggested solutions have followed.¹⁸ In addition, citizens trying to protect their communities from discriminatory environmental practices have brought state and federal lawsuits.¹⁹ Executive validation of the movement's importance

South Carolina, and Tennessee. *Id.*

¹⁶ GAO Study, *supra* note 14, at 1–6.

¹⁷ See COMM'N FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE U.S. (1987) (concluding that communities with greater minority percentages of the population are more likely to be the sites of commercial hazardous waste facilities); Marcia Coyle & Marianne Lavelle, *Unequal Protection: The Racial Divide in Environmental Law*, NAT'L L.J., Sept. 21, 1992, at S10 (indicating that it took the EPA twenty percent longer to place abandoned sites located in minority communities on the national priority action list and that polluters of those neighborhoods paid fifty-four percent fewer fines than polluters of white communities); Paul Mohai & Bunyan Bryant, *The Michigan Conference: A Turning Point*, 18 EPA J. 9, 10 (1992) (discussing the significance of the 1992 University of Michigan's Symposium on race poverty and the environment and its findings that minorities bear a disproportionate burden of pollution in America because their land is cheaper and because these communities tend to have little political clout due to the residents' lack of time, money, organization, and political knowledge). See generally Michele L. Knorr, Comment, *Environmental Injustice: Inequities Between Empirical Data and Federal, State Legislative and Judicial Responses*, 6 U. BALT. J. ENVTL. L. 71 (1997).

¹⁸ See, e.g., Bullard, *supra* note 13; Sandra Geiger, *An Alternative Legal Tool for Pursuing Environmental Justice: The Takings Clause*, 31 COLUM. J. L. & SOC. PROBS. 201 (1998); Graham & Grills, *supra* note 4; Knorr, *supra* note 17; Lazarus, *supra* note 5; Bradford C. Mank, *Environmental Justice and Title VI: Making Recipient Agencies Justify Their Siting Decisions*, 73 TUL. L. REV. 787 (1999); Janet Siegal, *Negotiating for Environmental Justice: Turning Polluters into "Good Neighbors" Through Collaborative Bargaining*, 10 N.Y.U. ENVTL. L.J. 147 (2002); Vig, *supra* note 10.

¹⁹ See *S. Camden Citizens in Action v. N.J. Dep't of Env'tl. Prot.*, 274 F.3d 771, 775–76 (3d Cir. 2001) (alleging that cement facility in operation under air quality permit issued by New Jersey Department of Environmental Protection would have disparate impact on plaintiffs in violation of Title VI); *New York City Env'tl. Justice Alliance v. Giuliani*, 214 F.3d 65, 67 (2d Cir. 2000) (seeking to restrain city from selling any one of 600 community gardens because it would have a disparate impact on New York's minority communities); *Rozar v. Mullis*, 85 F.3d 556, 559–60 (11th Cir. 1996) (protesting building of waste landfill near minority community less than three miles from existing one); *Chester Residents Concerned for Quality Living v. Seif*, 944 F. Supp. 413, 415 (E.D. Pa. 1996), *rev'd*, 132 F.3d 925, 937 (3d Cir. 1997), *vacated as moot*, 524 U.S. 974 (1998) (alleging that issuance of a permit to operate facility in predominantly African-American community violated plaintiffs' civil rights); *Bean v. Southwestern Waste Mgmt. Corp.*, 482 F. Supp. 673, 675 (S.D. Tex.

came in 1994 when President Clinton issued Executive Order 12,898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*,²⁰ to serve as a guide to federal agencies promulgating environmental regulations.²¹ In addition to the Executive Order, President Clinton wrote a companion memorandum which emphasized that “[e]nvironmental and civil rights statutes provide many opportunities to address environmental hazards in minority communities and low-income communities.”²² Indeed, because the environmental justice movement is so intertwined with civil rights,²³ many plaintiffs have sued under the Equal Protection Clause and Title VI of the Civil Rights Act of 1964.²⁴ In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,²⁵ however, the Supreme Court held that in order to prove a violation of the Equal Protection Clause plaintiffs must prove discriminatory intent or purpose.²⁶ The Court listed five factors that must be proven in order to find a violation: (1) disproportionate impact, (2) the historical background of the challenged decision, (3) the specific antecedent events, (4)

1979) (contending that the state department's decision to issue permit for waste disposal facility was motivated by racial discrimination).

²⁰ Exec. Order No. 12,898, 3 C.F.R. 859-60 (1994), *reprinted as amended in* 42 U.S.C. § 4321 (2000).

²¹ *Id.* The order did not have the force of law nor could it be enforced if agencies chose not to follow it. *Id.* It provides, in pertinent part:

To the greatest extent practicable and permitted by law . . . each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing . . . disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States . . .

Id. For a similar order issued by President Clinton six years later, see Executive Order No. 13,148, *Greening the Government Through Leadership in Environmental Management*, 36 WEEKLY COMP. PRES. DOC. 891 (Apr. 26, 2000).

²² William J. Clinton, *Memorandum on Environmental Justice*, 30 WEEKLY COMP. PRES. DOC. 279 (Feb. 11, 1994).

²³ See *supra* notes 2-6, 17 and accompanying text.

²⁴ The Civil Rights Act of 1964 § 601, 42 U.S.C. § 2000d (1994) (Title VI) provides:

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.

Civil Rights Act of 1964 (codified as amended at 42 U.S.C. § 2000d 1994).

²⁵ 429 U.S. 252 (1977).

²⁶ *Id.* at 264-65.

departures from normal procedures, and (5) contemporary statements of decision makers.²⁷

II. THE RISE AND POSSIBLE FALL OF TITLE VI AS AN AVENUE OF RELIEF FOR ENVIRONMENTAL JUSTICE PLAINTIFFS

A. *Title VI and Sandoval: How Did We Get Here?*

The high burden of proof established by *Arlington Heights* has been nearly insurmountable in the environmental justice context.²⁸ Due in large part to the failure of cases brought on Equal Protection Clause grounds, scholars²⁹ and plaintiffs seeking environmental justice had hoped that Title VI would be a possible avenue of relief for their claims.³⁰ Then the Supreme Court decided *Alexander v. Sandoval*.³¹ In the spring of 2001, the *Sandoval* Court held that there is no private right of action to enforce disparate impact regulations promulgated under Title VI of the Civil Rights Act of 1964.³² Although *Sandoval* was not

²⁷ *Id.* at 265–68.

²⁸ See *Residents Involved in Saving the Env't (R.I.S.E.), Inc. v. Kay*, 768 F. Supp. 1144, 1149–50 (E.D. Va. 1991) (finding that, although the placement of landfills in two minority communities disproportionately affected African-American residents, the impact was not intentional and therefore did not violate the Equal Protection Clause), *aff'd mem.*, 977 F.2d 573 (4th Cir. 1992); *E. Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb County Planning & Zoning Comm'n*, 706 F. Supp. 880, 886 (M.D. Ga. 1989) (allowing placement of a landfill in an African-American community despite evidence of disparate impact because the plaintiff failed to show that “race was a motivating factor”), *aff'd*, 896 F.2d 1264 (11th Cir. 1989); *Bean v. Southwestern Waste Mgmt. Corp.*, 482 F. Supp. 673, 677–81 (S.D. Tex. 1979) (finding that statistics upon which plaintiffs relied to show pattern of racial discrimination in placement of waste facilities was not enough to prove disparate impact or discriminatory intent); see also Knorr, *supra* note 17, at 105 (“The burden of proving intentional discrimination is virtually impossible in environmental injustice cases.”).

²⁹ For a detailed and optimistic discussion of Title VI's utility to environmental justice plaintiffs, see Vig, *supra* note 10, at 920–34.

³⁰ See *Chester Residents Concerned for Quality Living v. Seif*, 944 F. Supp. 413 (E.D. Pa. 1996), *rev'd*, 132 F.3d 925, 937 (3d Cir. 1997), *vacated as moot*, 524 U.S. 974 (1998). The Third Circuit became the first court in the country to hold that there is a private cause of action under Title VI. *Seif*, 132 F.3d at 936.

³¹ 532 U.S. 275 (2001).

³² *Id.* at 293. This Note will not discuss whether or not there should be a private cause of action under Title VI. For thorough discussions of this issue see generally Fisher, *supra* note 6; Bradford C. Mank, *Is There a Private Cause of Action Under EPA's Title VI Regulations?: The Need to Empower Environmental Justice Plaintiffs*, 24 COLUM. J. ENVTL. L. 1 (1999); Mattheisen, *supra* note 8; Julia B. Latham Worsham, *Disparate Impact Lawsuits Under Title VI, Section 602: Can a*

an environmental justice suit,³³ one can assume the broad application of this decision.³⁴ Plaintiffs alleging discriminatory effects against state environmental agencies that receive financial assistance from the United States Environmental Protection Agency (EPA) will be limited to administrative avenues because of the lack of a private cause of action under Title VI.³⁵

Prior to its decision in *Sandoval*, the Supreme Court debated whether Title VI provided a right of action for intentional discrimination alone or for discriminatory effects as well.³⁶ Initially, the Court held that discriminatory effect, absent intent, is actionable.³⁷ In a later decision, the Court fragmented over the required standard of proof for a Title VI violation.³⁸ In yet another decision, the Justices divided again over the applicable standard.³⁹ It was not until *Alexander v. Choate*,⁴⁰ a case involving the Rehabilitation Act, that the Supreme Court "provided a clear, unanimous statement" regarding disparate impact and Title VI.⁴¹ "[W]hile Title VI

Legal Tool Build Environmental Justice? 27 B.C. ENVTL. AFF. L. REV. 631 (2000).

³³ The case involved a suit against the Alabama Department of Public Safety as a recipient of federal financial assistance and its policy of administering state driver's license exams only in English. *Sandoval*, 532 U.S. at 278-79. Respondent *Sandoval* brought the suit to challenge this policy, arguing that it violated a DOJ regulation "because it had the effect of subjecting non-English speakers to discrimination based on their national origin." *Id.* at 279.

³⁴ See Avi Brisman, *EPA's Disproportionate Impact Methodologies—RBA and COATCEM—and the Draft Recipient Guidance and Draft Revised Investigation Guidance in Light of Alexander v. Sandoval*, 34 CONN. L. REV. 1065, 1065 (2002).

³⁵ See *Sandoval*, 532 U.S. at 289 ("Section 602 empowers agencies to enforce their regulations either by terminating funding to the 'particular program, or part thereof,' that has violated the regulation or 'by any other means authorized by law.'"); see also Brisman, *supra* note 34, at 1065.

³⁶ See Mattheisen, *supra* note 8, at 10-12.

³⁷ See *Lau v. Nichols*, 414 U.S. 563, 568-69 (1974) (finding a violation of Title VI because an English language requirement for graduation had a disparate impact on non-English-speaking Chinese students).

³⁸ See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 318-19 (1978). Dicta in *Bakke* suggested that Title VI violations require discriminatory intent. See *id.*

³⁹ See *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 593 (1983). In *Guardians*, the Court considered a written examination required for entry into the police department and its disparate impact on the pass rates of blacks and Hispanics as compared to whites. *Id.* at 585. The Court determined that although this policy was facially neutral, proof of discriminatory effect was enough to establish a Title VI violation. *Id.* at 593.

⁴⁰ 469 U.S. 287 (1985).

⁴¹ Mattheisen, *supra* note 8, at 11.

itself prohibits only intentional discrimination, federal agencies may . . . prohibit unintentional discriminatory effects by adopting a disparate impact standard in the regulations they issue to implement Title VI."⁴² Until *Sandoval*, this statement seemed promising for environmental justice plaintiffs.⁴³ Justice Antonin Scalia, writing for the majority in *Sandoval*, stated that there is no private right of action in federal court to enforce disparate impact regulations promulgated under Title VI.⁴⁴

B. *Environmental Justice Plaintiffs, Title VI, and § 1983*

In the same year as *Sandoval*, an environmental justice suit brought by neighborhood groups challenging the siting of a cement facility in a minority neighborhood in South Camden, New Jersey, was the source of three significant and intricate Title VI decisions.⁴⁵ The neighborhood groups won the first two decisions in district court against the New Jersey Department of Environmental Protection (NJDEP),⁴⁶ complete with a finding that a private right of action existed to enforce Title VI disparate impact regulations through § 1983 of the Civil Rights Act⁴⁷

⁴² See *id.*; see also *Alexander*, 469 U.S. at 292–94. Because the Rehabilitation Act and Title VI are so similar, *Alexander* has been regarded as interpretive of Title VI. *Id.* at 293 n.7 (“Section 504 was patterned after and is almost identical to, the antidiscrimination language of § 601 of the Civil Rights Act of 1964” (quoting S. REP. NO. 93-1297, at 39 (1974), reprinted in 1974 U.S.C.C.A.N. 6373, 6390–91)).

⁴³ See *supra* notes 29–30.

⁴⁴ See *Alexander v. Sandoval*, 532 U.S. 275, 285–86, 291 (2001) (rejecting *Lau*'s interpretation of § 601 as reaching beyond intentional discrimination and finding that a private cause of action, not authorized by Congress, cannot be created by a regulation).

⁴⁵ *S. Camden Citizens in Action v. N.J. Dep't of Env'tl. Prot.*, 145 F. Supp. 2d 446, 450 (D.N.J. 2001) [hereinafter *SCCIA I*], *rev'd*, 274 F.3d 771 (3d Cir. 2001) [hereinafter *SCCIA III*], *cert. denied*, 122 S. Ct. 2621 (2002); *S. Camden Citizens in Action v. N.J. Dep't of Env'tl. Prot.*, 145 F. Supp. 2d 505 (D.N.J. 2001) [hereinafter *SCCIA II*], *rev'd*, 274 F.3d 771 (3d Cir. 2001), *cert. denied*, 122 S. Ct. 2621 (2002). The first of the three cases was decided on April 19, 2001, which was only six days before the *Sandoval* decision on April 24, 2001. See *SCCIA I*, 145 F. Supp. 2d at 446.

⁴⁶ See *SCCIA I*, 145 F. Supp. 2d at 497; *SCCIA II*, 145 F. Supp. 2d at 549.

⁴⁷ See 42 U.S.C. § 1983 (2000), which provides, in relevant part:

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

Id.

against recipients of the EPA's funding.⁴⁸ Almost immediately after *Sandoval*,⁴⁹ the United States Court of Appeals for the Third Circuit reversed the district court's decision, holding that in light of *Sandoval*, there is no private right of action in federal court to enforce Title VI disparate impact regulations through § 1983.⁵⁰ In *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*, the court held that an administrative regulation could not create an enforceable interest under § 1983 where the authorizing statute had created none.⁵¹ Accordingly, inasmuch as Title VI proscribed only intentional discrimination,⁵² the plaintiffs did not have an enforceable right under § 1983 to challenge the EPA's disparate impact discrimination regulations.⁵³

Although plaintiffs in *Sandoval* did not bring suit under § 1983,⁵⁴ Justice Stevens did address the possibility of such a suit in his impassioned dissent.⁵⁵ He stated, "[T]o the extent that the majority denies relief to the respondents merely because they neglected to mention 42 U.S.C. § 1983 in framing their Title VI claim, this case is something of a sport."⁵⁶ He went on to hypothesize that similarly situated plaintiffs in the future "must only reference § 1983 to obtain relief."⁵⁷ Despite how simple Justice Stevens made this sound,⁵⁸ cases and scholars have disagreed over the possible success of proving a violation of § 1983.⁵⁹ The reality remains that, without a private cause of

⁴⁸ See *SCCIA I*, 145 F. Supp. 2d at 497; *SCCIA II*, 145 F. Supp. 2d at 549.

⁴⁹ Within hours after the *Sandoval* decision, Judge Orlofsky, who authored *SCCIA I*, asked counsel to address the impact of *Sandoval* on the decision. See Bradford C. Mank, *South Camden Citizens in Action v. New Jersey Department of Environmental Protection: Will Section 1983 Save Title VI Disparate Impact Suits?*, 32 ENVTL. L. REP. 10454, 10455 (2002).

⁵⁰ See *SCCIA III*, 274 F.3d at 774.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ See *Alexander v. Sandoval*, 532 U.S. 275, 279 (2001). Plaintiffs' claim was brought only under Title VI. See *id.*

⁵⁵ See *id.* at 300 (Stevens, J., dissenting). Justices Souter, Ginsburg, and Breyer joined in the dissent. See *id.* at 293.

⁵⁶ *Id.* at 299-300.

⁵⁷ *Id.* at 300.

⁵⁸ It is the author's belief that in his attempt to 'swipe' at the majority, Justice Stevens may have oversimplified the reality of a successful suit under § 1983.

⁵⁹ See *Powell v. Ridge*, 189 F.3d 387, 403 (11th Cir. 1996) (holding "that a § 1983 suit is not incompatible with Title VI and the Title VI regulation"); *Harless v. Duck*, 619 F.2d 611, 618 (6th Cir. 1980) (finding enough evidence to support a

action under Title VI or a guarantee of success under § 1983, environmental justice plaintiffs must look for new avenues to obtain relief.

C. *Administrative Suits and Federal Agency Review*

Environmental justice plaintiffs have had and still have the option of filing administrative complaints with the EPA.⁶⁰ Positive features of this avenue are its relative simplicity⁶¹ and cost effectiveness.⁶² Often, filing an administrative complaint is enough to persuade a private permittee to relocate.⁶³ Proponents of this avenue also contend that relief might be more easily obtained through an agency than through decisions from the Reagan- and Bush-appointed federal judiciary.⁶⁴ Some negative aspects of the administrative option are that complainants do not have the right to participate in the EPA's investigation,⁶⁵ to present evidence or witnesses,⁶⁶ or to be informed of the status of

§ 1983 claim in a Title VII claim); Mank, *supra* note 49, at 10456 (discussing § 1983 as a possible way to enforce Title VI regulations); *cf. SCCIA III*, 274 F.3d at 790 (concluding that "a federal regulation alone may not create a right enforceable through § 1983 not already found in the enforcing statute"); Geiger, *supra* note 18, at 212 (noting that scholars "unanimously agree" that "the high burdens in proving discriminatory intent [in § 1983 suits] prevent meritorious consideration of environmental justice issues' ") (citations omitted).

⁶⁰ See Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Draft Recipient Guidance) and Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Draft Revised Investigation Guidance), 65 Fed. Reg. 39,650 (June 27, 2000). The Draft Revised Guidance describes how the EPA will investigate and resolve formal complaints. *Id.*

⁶¹ A person only has to write a letter to any EPA office alleging a discriminatory action or effect by a funding recipient and the EPA assumes responsibility from that point forward. See Luke W. Cole, *Civil Rights, Environmental Justice and the EPA: A Brief History of Administrative Complaints Under Title VI of the Civil Rights Act of 1964*, 9 J. ENVTL. L. & LITIG. 309, 314-15 (1994). The letter "must allege discrimination on the basis of either race, color or national origin; and must identify the discriminatory program or activity receiving the EPA assistance. The complaint should also describe the discriminatory action or activity that spawned the complaint." *Id.* at 319 n.38 (citations omitted).

⁶² See *id.* at 321. A person or group wishing to file a complaint does not need to hire a lawyer, and there is no filing fee. *Id.*

⁶³ See Mank, *supra* note 32, at 23.

⁶⁴ See Fisher, *supra* note 6, at 315-16.

⁶⁵ See Cole, *supra* note 61, at 321; Mank, *supra* note 32, at 23.

⁶⁶ See Draft Recipient Guidance, 65 Fed. Reg. 39,650, 39,672; see *supra* note 60. Investigation of Title VI complaints is not an adversarial process between complainant and recipient. Thus, there is no right of appeal. See *id.*

their case.⁶⁷ Another disadvantage of seeking an administrative remedy is that the EPA has never concluded that a recipient was in violation of Title VI.⁶⁸ Essentially, the "EPA does not represent the complainants, but rather the interests of the Federal government, in ensuring nondiscrimination by its recipients."⁶⁹ Additionally, EPA administrators have limited remedial authority⁷⁰ and desire to punish funding recipients who are noncompliant.⁷¹

In sum, due to the foreclosure of a private cause of action under Title VI,⁷² the high burden of proof for a § 1983 suit,⁷³ and the limited remedial scheme for an administrative complaint,⁷⁴ environmental justice plaintiffs may find these avenues insufficient. It is time for environmental justice plaintiffs to be creative and "win the justice game" through a series of base hits instead of trying for the elusive grand slam.

III. USING THIRD PARTY BENEFICIARY LAW TO ACHIEVE ENVIRONMENTAL JUSTICE

A. *Legal Obligation and Duty Defined*

As one of the most well-known contracts scholars⁷⁵ explained:

[T]he term "obligation" . . . has meant the entire group of jural relations created by certain facts, usually expressions of agreement [The narrowing of the term has made it] come to be an almost exact synonym of the term 'legal duty' If a

⁶⁷ Cole, *supra* note 61, at 323. (explaining that the informal nature of the procedure makes it easy for complainants to "be shut out of the process").

⁶⁸ See Worsham, *supra* note 32, at 664.

⁶⁹ Draft Recipient Guidance, 65 Fed. Reg. at 39,672.

⁷⁰ See Draft Revised Investigation Guidance, 65 Fed. Reg. at 39,669 ("The primary administrative remedy described in the regulations involves the termination of EPA assistance to the recipient.").

⁷¹ See *id.* ("EPA encourages the use of *informal resolution* to address Title VI complaints whenever possible."). Other limits on the EPA's referrals to the Department of Justice are discussed *infra* in Section IV.

⁷² See *supra* Section II.A.

⁷³ See *supra* Section II.B.

⁷⁴ See *supra* Section II.C.

⁷⁵ Arthur Linton Corbin (1874–1966). A long-standing member of the Yale Law School faculty, Corbin wrote various treatises and law review articles regarding contract law.

duty (obligation) exists, it is a duty to some person who has a right against the one subject to the duty.⁷⁶

The law of contracts attempts “the realization of every expectation that has been induced by . . . [the making of] a promise.”⁷⁷ Indeed, as one of the most influential law review articles ever written explained, one of the chief rationales for protecting the reasonable expectations of parties is to facilitate reliance on agreements.⁷⁸

B. *The Recognition of Third Party Rights*

In 1859, the New York Court of Appeals in *Lawrence v. Fox* defied the prevailing rules of contractual liability by holding that a third party to a contract who had no obligation under it could, nevertheless, enforce it.⁷⁹ As the case law has evolved in this country,⁸⁰ this rule has been adopted in almost every jurisdiction,⁸¹ and it is generally accepted that an action may be maintained on a contract by one who had no part in creating it.⁸²

A party is a third party beneficiary⁸³ if the contract manifests the parties' intentions to confer upon him the benefit of the promised performance.⁸⁴ This manifestation creates a

⁷⁶ ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1.1 (1993).

⁷⁷ *Id.* (“[T]his is not the only purpose . . . but it is believed to be the main underlying purpose.”).

⁷⁸ See Lon L. Fuller & William R. Perdue, *The Reliance Interest in Contract Damages: I*, 46 YALE L.J. 52, 59–62 (1936); see also RESTATEMENT (SECOND) OF CONTRACTS § 2(1) (1981) [hereinafter RESTATEMENT] (“A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.”). See generally Steven J. Burton & Eric G. Anderson, *The World of a Contract*, 75 IOWA L. REV. 861 (1990).

⁷⁹ See Anthony Jon Waters, *The Property in the Promise: A Study of the Third Party Beneficiary Rule*, 98 HARV. L. REV. 1109, 1111 (1985).

⁸⁰ See, e.g., *Septembertide Publ'g, B.V. v. Stein & Day, Inc.*, 884 F.2d 675 (2d Cir. 1989); *Grigerik v. Sharpe*, 721 A.2d 526 (Conn. 1998); *Bay v. Williams*, 1 N.E. 340 (Ill. 1884); *Seaver v. Ransom*, 224 N.Y. 233, 120 N.E. 639 (1918).

⁸¹ See Waters, *supra* note 79, at 1111–12. In a number of states the obligation of a promisor to a third party beneficiary is founded on general legislation. See, e.g., W MICH. COMP. LAWS § 600.1405 (2002); W. VA. CODE § 55-8-12 (2002).

⁸² See CONTRACTS: CASES AND MATERIALS 857 (E. Allan Farnsworth et al. eds., 6th ed. 2001) [hereinafter CONTRACTS].

⁸³ A third party beneficiary is also known as an ‘intended beneficiary’ as opposed to an ‘incidental beneficiary’ who has no rights under the contract. See RESTATEMENT, *supra* note 79, § 302 (1), (2) (Intended and Incidental Beneficiaries).

⁸⁴ See Orna S. Paglin, *Criteria for Recognition of Third Party Beneficiary Rights*, 24 NEW ENG. L. REV. 63, 70 (1989); see also RESTATEMENT, *supra* note 78, §§ 302, 304, 308.

duty in the promisor to perform the promise, and the intended beneficiary may enforce that duty.⁸⁵ The intended beneficiary need not be specifically identified⁸⁶ but must be a person or in a class of persons clearly intended to be benefited by the contract.⁸⁷ Generally, a third party beneficiary is entitled to the same rights and remedies as the contracting parties.⁸⁸ As one scholar noted, "This non-consensual liability is usually based on considerations of justice and efficiency."⁸⁹ The next section will explore how this rule may be used to protect the intended beneficiaries of public environmental programs in which there are EPA funding contracts.

C. *Application to Environmental Justice Plaintiffs*

Title VI of the Civil Rights Act prohibits discrimination on the basis of race, color, or national origin in programs or activities receiving federal financial assistance.⁹⁰ The statute also authorizes each federal department and agency to effectuate the provisions of the title by issuing regulations consistent with achieving the objectives of the statute.⁹¹ The EPA's regulations

⁸⁵ See RESTATEMENT, *supra* note 78, § 304.

⁸⁶ See *id.* § 308 (Identification of Intended Beneficiaries) ("It is not essential to the creation of a right in an intended beneficiary that he be identified when a contract containing the promise is made.").

⁸⁷ See *Montana v. United States*, 124 F.3d 1269, 1273 (Fed. Cir. 1997) ("The intended beneficiary need not be specifically or individually identified in the contract, but must fall within a class clearly intended to be benefited thereby."); RESTATEMENT, *supra* note 78, § 302(1)(b).

⁸⁸ See *Chase Manhattan Bank v. Iridium Africa Corp.*, 197 F. Supp. 2d 120, 139-40 (D. Del. 2002) ("In some narrow circumstances a third party beneficiary may seek rescission of a contract although it was not a principal party to the contract. . . . [A] third party beneficiary is not entitled to rights greater than those of the contracting parties."). Contract remedies include: specific performance, expectation (compensatory) damages, reliance damages, restitution, and consequential damages. See CONTRACTS, *supra* note 82, at 451; see also RESTATEMENT, *supra* note 78, § 307 (Remedy of Specific Performance) ("Where specific performance is another appropriate remedy, either the promise or the beneficiary may maintain a suit for specific performance of a duty owed to an intended beneficiary.").

⁸⁹ Paglin, *supra* note 84, at 64.

⁹⁰ See *supra* note 24.

⁹¹ The Civil Rights Act of 1964 § 602, 42 U.S.C. § 2000d-1 (2000), states: Each Federal Department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d (§ 601) of this title with respect to such program or activity by issuing rules,

under Title VI⁹² explicitly codify the disparate impact, or discriminatory effect, standard.⁹³ Under these regulations, if there is discriminatory impact, then arguably it is the means by which the program is administered that produced the impact.

In order for a funding recipient,⁹⁴ typically a state or local agency,⁹⁵ to receive assistance,⁹⁶ it must first fill out an application⁹⁷ along with an assurance stating that, with respect to its programs or activities that receive EPA assistance, it will comply with the requirements of the governing regulations.⁹⁸ After being approved for funding, each "Assistance Agreement Recipient" receives a congratulatory letter which states: "As a reminder, this assistance agreement is a legal document between EPA and your organization . . . you are required to comply with all applicable provisions of 40 CFR Chapter 1, Subchapter B"⁹⁹ This particular provision prohibits discrimination and

regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.

Civil Rights Act of 1964 (codified as amended at 42 U.S.C. § 200d (1994)).

⁹² See 40 C.F.R. pt. 7 (2002).

⁹³ 40 C.F.R. § 7.35(b) states:

A recipient [of federal funds] shall not use criteria or methods of administering its program which *have the effect* of subjecting individuals to discrimination because of their race, color, national origin, or sex, or *have the effect* of substantially defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, national origin, or sex.

Id. (emphasis added).

⁹⁴ See 40 C.F.R. § 7.25 (2002):

Recipient means, for the purposes of this regulation . . . any instrumentality of a State or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance.

Id.

⁹⁵ See Cole, *supra* note 61, at 314.

⁹⁶ See 40 C.F.R. § 7.25, which states:

EPA assistance means any grant or cooperative agreement, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which EPA provides or otherwise makes available assistance in the form of: 1) Funds; (2) Services of personnel; or (3) Real or personal property or any interest in or use of such property.

Id.

⁹⁷ Applications available at <http://www.whitehouse.gov.omb/grants/sf424.pdf> (last visited January 30, 2003).

⁹⁸ See 40 C.F.R. § 7.80(a) (2002).

⁹⁹ Congratulatory letter, available at <http://www.epa.gov/ro2earth/cgp/grid31>.

discriminatory effects on the basis of race, color, national origin, or sex.¹⁰⁰

As Justice Scalia once explained, federal-state funding agreements are “in the nature of a contract.”¹⁰¹ When the state promises to provide certain services for which the federal government promises to give the state funds, the person who receives the benefit of the exchange of promises between the two is a third party beneficiary.¹⁰² He went on to explain that, within the context of federal-state contracts, he was willing to leave open the possibility of a third party beneficiary action because the issue had not been raised.¹⁰³

1. Validity of the EPA Regulations

The Supreme Court has repeatedly upheld the validity of the EPA's regulations and their “effects” standard.¹⁰⁴ The Court has found that the regulations “do more than merely prohibit grant recipients from administering the funds with a discriminatory purpose; they require recipients to administer the grants in a manner that has no racially discriminatory effects.”¹⁰⁵ Interestingly, the Court reiterated this presumption of validity in *Sandoval*, stating that “regulations promulgated under § 602 . . . may validly proscribe activities that have a disparate impact on racial groups, even though such activities are permissible under § 601.”¹⁰⁶

2. Minorities as Intended Beneficiaries; the Creation of Enforceable Rights

Although contract law does not require that the intended beneficiary be identified,¹⁰⁷ the language of the EPA regulations

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¹⁰⁰ 40 C.F.R. pts. 30–49 (2002).

¹⁰¹ *Blessing v. Freestone*, 520 U.S. 329, 349 (1997) (Scalia, J., concurring) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)).

¹⁰² *See id.*

¹⁰³ *See id.* at 350.

¹⁰⁴ *See Alexander v. Sandoval*, 532 U.S. 275, 281–82 (2001); *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 591–92 (1983); *Lau v. Nichols*, 414 U.S. 563, 568 (1974); *see also SCCIA III*, 274 F.3d 771, 790 (3d Cir. 2001); *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925, 930 (3d Cir. 1997), *vacated as moot*, 524 U.S. 974 (1998).

¹⁰⁵ *Guardians*, 463 U.S. at 642 (citing *Lau*, 414 U.S. at 568).

¹⁰⁶ *Sandoval*, 532 U.S. at 281.

¹⁰⁷ *See supra* note 86.

clearly identifies the people intended to be benefited or protected—minorities and people of color.¹⁰⁸ Because funding recipients are not able to actively discriminate against these groups, these groups are arguably intended to receive the benefit of not being adversely affected by the discriminatory siting or operation of facilities.

3. Enforceability of Third Party Beneficiary Rights

Once a beneficiary is intended under the third party rule, its rights are as enforceable as though it were a party to the original contract.¹⁰⁹ When state or local agencies receive federal financial assistance from the EPA, it must agree to comply with the “discriminatory effects” standard of EPA’s regulations,¹¹⁰ thereby making minorities the intended beneficiaries of the funding contracts. Accordingly, if facilities are not being sited or operated in a way that avoids ‘discriminatory effects,’¹¹¹ as third party beneficiaries, the minority communities located near the facilities should have a legal right to enforce the contract between the state or local agency and the EPA.

This third party beneficiary right was recognized in an early civil rights case in Louisiana.¹¹² Plaintiff school children in a parish school district, though unnamed and undetermined,¹¹³ were recognized to have the right as third party beneficiaries¹¹⁴ to enforce the stipulation in the contract between the parish

¹⁰⁸ Although the regulations specifically describe discriminatory effects on the basis of sex, this Note will focus on the discriminatory effects on the basis of race, color, and national origin.

¹⁰⁹ See *supra* note 88 and accompanying text.

¹¹⁰ See *supra* notes 94–99 and accompanying text.

¹¹¹ See Mattheisen, *supra* note 8, at 34.

Although environmental permitting *per se* has no effect on the distribution of facilities, particular standards and practices used to issue permits may. . . [T]he disparate impact rule may be violated where a particular standard or practice used in issuing environmental permits causes facilities to be located in proximity to particular populations [or] if the standard or practice is not programmatically justified, and there is no feasible, comparably effective alternative that has a less disproportionate effect.

Id.

¹¹² *Lemon v. Bossier Parish Sch. Bd.*, 240 F. Supp. 709 (W.D. La. 1965), *aff'd*, 370 F.2d 847 (5th Cir. 1967). For a detailed discussion of this and other third party recognition cases, see Waters, *supra* note 79, at 1183–92.

¹¹³ See *Lemon*, 370 F.2d at 849–50.

¹¹⁴ See *Lemon*, 240 F. Supp. at 713–14.

school board and the United States government which required that federal money be used to build schools in a non-discriminatory way.¹¹⁵ The district court held that these contracts rendered plaintiffs members of the "class consisting of all Negro children eligible to attend Bossier Parish Schools,"¹¹⁶ and both the district court and the Fifth Circuit held that plaintiffs had a cause of action as third party beneficiaries of the funding contract.¹¹⁷

Similarly, this third party right was upheld in a case brought by a resident in a nursing home against the home's owner and operator.¹¹⁸ The resident alleged that the home was planning to discharge or transfer her for "other than medical reasons" which would have violated Medicaid regulations.¹¹⁹ The home's owner had agreed to abide by the state's conditions and Medicaid regulations¹²⁰ in order for the state to receive federal funds.¹²¹ Plaintiff was held to be entitled to enforce the Medicaid regulations as a third party beneficiary¹²² of the "provider's agreement" between the nursing home operator and the state.¹²³

This case has particular relevance to environmental justice plaintiffs. As one scholar noted, this case is "an excellent example of the way in which plaintiffs can use the third party beneficiary rule to secure the private benefits of a public program in the absence of a private right to enforce the statute itself."¹²⁴ Indeed, plaintiffs have successfully used the third

¹¹⁵ See *id.* at 713. The contracts provided that the "school facilities" built with the federal money were to be made available to plaintiff children "on the same terms, in accordance with the laws of the State in which Applicant is situated, as they are available to other children in Applicant's school district." *Id.*

¹¹⁶ *Id.* at 714.

¹¹⁷ See *Lemon*, 370 F.2d at 850; *Lemon*, 240 F. Supp. at 713. The plaintiffs only sought injunctive relief. *Id.* at 711.

¹¹⁸ See *Fuzie v. Manor Care, Inc.*, 461 F. Supp. 689, 689-90 (N.D. Ohio 1977).

¹¹⁹ *Id.* at 692.

¹²⁰ See *id.* at 693.

¹²¹ *Id.* at 697-98.

¹²² *Id.* at 701.

¹²³ *Id.* at 697-98.

¹²⁴ *Waters*, *supra* note 79, at 1187. This case has additional relevance because government funded nursing homes are not the "State" for Fourteenth Amendment purposes. See *Blum v. Yaretsky*, 457 U.S. 991, 1003-05 (1982) (holding that the fact that a private nursing home is "subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment"). The third party beneficiary alternative provides plaintiffs with an opportunity to prove liability where they may not have been able to previously. See *Fuzie*, 461 F. Supp. at 697-98.

party beneficiary rule in the context of education,¹²⁵ health care,¹²⁶ public welfare,¹²⁷ and housing.¹²⁸ Since there may no longer be a private cause of action under Title VI,¹²⁹ environmental justice plaintiffs still have the contract governed by the EPA regulations on which to sue, to force compliance by violating facilities, and to be awarded equitable and compensatory damages.¹³⁰

D. Remedies for Minorities as Third Party Beneficiaries

There are two fundamental assumptions courts make in enforcing promises.¹³¹ The first assumption is that the law is concerned with redressing the breach and not with punishing the breaching party.¹³² The second assumption is that the relief granted should protect the nonbreaching party's expectation interest by putting that party in the position it would have been had the contract been performed.¹³³ In the cases discussed thus far in support of the third party beneficiary rule,¹³⁴ the plaintiffs were seeking either injunctive relief¹³⁵ or restitution.¹³⁶ This

¹²⁵ See *Lemon v. Bossier Parish Sch. Bd.*, 240 F. Supp. 709 (W.D. La. 1965), *aff'd*, 370 F.2d 847 (5th Cir. 1967).

¹²⁶ See Jackie Huchenski & Linda Abdel-Malek, *HIPAA's Lack of Private Right to Sue Not a Total Bar*, NAT'L L.J., June 19, 2000, at B20.

¹²⁷ See *Fuzie*, 461 F. Supp. 689 (N.D. Ohio 1977); *cf.* *Hodges v. Atchison, Topeka & Santa Fe Ry. Co.*, 728 F.2d 414, 416 (10th Cir. 1984) (reasoning that plaintiff could not maintain a third party beneficiary action under federal contracts made pursuant to § 503 of the Rehabilitation Act of 1973 because this theory was "but another aspect of the implied right of action argument").

¹²⁸ See *Holbrook v. Pitt*, 643 F.2d 1261, 1261 (7th Cir. 1981) (tenants sued as third party beneficiaries of contract between United States Department of Housing Urban Development (HUD) and landlords); *Zigas v. Superior Court*, 120 Cal. App. 3d 827, 831 (Cal. App. Dep't Superior Ct. 1981) (same).

¹²⁹ See *infra* Part II.A.

¹³⁰ See *infra* Section III.D.

¹³¹ See CONTRACTS, *supra* note 82, at 1.

¹³² *Id.*; see also *United States Naval Inst. v. Charter Communications, Inc.*, 936 F.2d 692, 696 (2d Cir. 1991) ("[T]he purpose of damages for breach of contract is to compensate the injured party for the loss caused by the breach."); *cf.* *Vernon Fire & Cas. Ins. Corp. v. Sharp*, 349 N.E.2d 173, 185 (Ind. 1976) (allowing punitive damages in the insurer/insured context where plaintiff could prove defendants behaved tortiously).

¹³³ See CONTRACTS, *supra* note 82, at 1-2; see also *Conagra, Inc. v. Nierenberg*, 7 P.3d 369, 385 (Mont. 2000) (holding that appellant was entitled to expectation damages that would measure what he would have made if his product had been sold as promised).

¹³⁴ See *supra* notes 112-23 and accompanying text.

¹³⁵ See *Lemon v. Bossier Parish Sch. Bd.*, 240 F. Supp. 709, 711 (W.D. La.

section explains why environmental justice plaintiffs should be entitled to these two types of relief as well as the full range of contract remedies.

1. Specific Performance/Injunction

The most direct form of equitable relief for breach of contract is specific performance.¹³⁷ By ordering the promisor to render the promised performance, the court attempts to produce the same effect as if the contract had been performed.¹³⁸ Within the environmental justice context, specific performance could come in the form of a court order requiring the funding recipient to comply with the "discriminatory effects" standard of the EPA regulations that bind the recipient's funding contract.¹³⁹ For example, in *South Camden Citizens in Action (SCCIA) v. New Jersey Department of Environmental Protection (NJDEP)*,¹⁴⁰ a community organization in a minority neighborhood sued the state environmental protection agency and its commissioner claiming that the state agency's decision to issue an air pollution permit for a cement processing facility would have a racially discriminatory impact.¹⁴¹ Had SCCIA sued as a third party beneficiary under the funding contract between the EPA and NJDEP, it would have had to prove that this siting would have "discriminatory effects" on the surrounding neighborhood in order to show a breach of that contract. If the court saw fit to grant specific performance as a remedy,¹⁴² NJDEP would have

1965), *aff'd*, 370 F.2d 847 (5th Cir. 1967).

¹³⁶ See *Holbrook v. Pitt*, 643 F.2d 1261, 1263 (7th Cir. 1981).

¹³⁷ E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 12.5 (2d ed. 2001) [hereinafter FARNSWORTH]. A party to a contract has the right to demand specific performance. See CONTRACTS, *supra* note 82, at 451-52. A court may order specific performance instead of, or in addition to, a judgment for money damages if the contract can still be performed and money cannot sufficiently compensate the plaintiff. *Id.* A court may decline to order specific performance of a contract if "damages would be adequate to protect the expectation interest of the injured party." *Id.*; see also RESTATEMENT, *supra* note 78, § 359.

¹³⁸ See CONTRACTS, *supra* note 82, at 451.

¹³⁹ See RESTATEMENT, *supra* note 78, § 307 ("Where specific performance is otherwise an appropriate remedy, either the promisee or the beneficiary may maintain a suit for specific performance of a duty owed to an intended beneficiary."); see also *supra* note 96.

¹⁴⁰ *SCCIA I*, 145 F. Supp. 2d 446 (D.N.J. 2001).

¹⁴¹ *Id.*

¹⁴² See CONTRACTS, *supra* note 82, at 452 ("[E]quitable relief is discretionary.").

had to rescind the permit granted to the facility and re-issue it in such a way as to avoid these “discriminatory effects.”¹⁴³

An alternative to specific performance may be an injunction¹⁴⁴ through which the court directs the party to refrain from doing a specified act.¹⁴⁵ This remedy is granted most often in cases in which specific performance may be difficult to supervise or “objectionable on some ground.”¹⁴⁶ Under the facts of *South Camden*, an injunction could have stopped the siting of the cement facility¹⁴⁷ or stopped continued construction or operation of the facility if it was being operated in violation of the “discriminatory effects” standards of the EPA regulations.

2. Expectation Damages

Along with any equitable relief, a court may also award money damages.¹⁴⁸ One type of money damages is expectation damages.¹⁴⁹ The amount of an expectancy award is measured by the promisee’s expectation interest¹⁵⁰ in an attempt to put the promisee in the position in which he would have been had the contract been performed, in other words, give the promisee “the benefit of his bargain.”¹⁵¹ The expectation interest is based on the actual value that the contract would have had to the injured party had it been performed,¹⁵² rather than on the hopes of the injured party at the time the contract was created.¹⁵³

¹⁴³ See *SCCIA I*, 145 F. Supp. 2d at 451.

¹⁴⁴ This is different from a preliminary injunction, which will be covered below in Part IV.

¹⁴⁵ See *CONTRACTS*, *supra* note 82, at 453 (“A court will not, however, grant an injunction unless the remedy in damages would be inadequate.”).

¹⁴⁶ *FARNSWORTH*, *supra* note 137, § 12.5.

¹⁴⁷ *SCCIA I*, 145 F. Supp. 2d at 446.

¹⁴⁸ See *FARNSWORTH*, *supra* note 137, § 12.5; see also *Gildow v. Smith*, 957 P.2d 199, 201 (Or. Ct. App. 1998) (citing an Oregon statute that allows for money damages, specific performance, or both).

¹⁴⁹ See *CONTRACTS*, *supra* note 82, at 1–2.

¹⁵⁰ *Id.*

¹⁵¹ *RESTATEMENT*, *supra* note 78, § 344(a); see *CONTRACTS*, *supra* note 82, at 469 (Measuring Expectation).

¹⁵² See *FARNSWORTH*, *supra* note 140, § 12.1.

¹⁵³ Section 347(b) of the restatement includes consequential and incidental damages that occur as result of the breach in the calculation of expectation interest. See *RESTATEMENT*, *supra* note 78, § 347 (Measure of Damages in General); see also *Hadley v. Baxendale*, 156 Eng. Rep. 145, 145 (1845) (describing consequential damages as those that “may fairly and reasonably be considered either arising naturally . . . from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made

In *New York City Environmental Justice Alliance (NYCEJA) v. Giuliani*,¹⁵⁴ plaintiffs sought to restrain New York City from transferring or bulldozing the 1,100 city-owned parcels comprising nearly 600 community gardens on the grounds that any such sale or changed use of the parcels would have a disproportionately adverse impact on the city's minority residents¹⁵⁵ in violation of the EPA's regulations.¹⁵⁶ The plaintiffs also asserted that because the city had accepted more than \$9,000,000 in federal grants to assist residents in creating and maintaining gardens on these parcels, any proposed sale or change would constitute a violation of the grant agreement.¹⁵⁷ Had the city performed its duty with the \$9,000,000 grant,¹⁵⁸ the plaintiffs could have reasonably expected the money to be used to assist them in creating and maintaining gardens on the parcels of land.¹⁵⁹ Plaintiffs alleged that the city breached its promise by attempting to sell these parcels of land instead of cultivating them.¹⁶⁰ As successful third party beneficiaries to the contract granting the funds,¹⁶¹ plaintiffs would be entitled to the money earmarked for maintenance and cultivation of the land¹⁶²

the contract, as the probable result of the breach of it").

¹⁵⁴ 214 F.3d 65 (2d Cir. 2000).

¹⁵⁵ For the purposes of this Note the word "minority" will be used. The specific groups named in the suit were the city's African-American, Asian-American, and Hispanic residents. *See id.* at 67.

¹⁵⁶ *See id.* The plaintiffs also asserted violations of the regulations promulgated under the Housing and Community Development Act (HCDA), 14 U.S.C. § 1437 (2000). *Id.*

¹⁵⁷ *Id.* The grants were received from the United States Department of Housing and Urban Development, which is not governed by the EPA regulations at issue. *Id.* For the purpose of discussing "expectation damages," however, the theoretical underpinning is the same.

¹⁵⁸ *See id.* (alleging that the city did not use the money as promised).

¹⁵⁹ *Id.* This, in fact, was what plaintiffs did expect. *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Plaintiffs failed in *NYCEJA* because they used non-scientific measures to establish a prima facie case of disparate impact. *See id.* at 69-72. Plaintiffs' use of destroying "open space" as the criteria for determining disparate impact, based on plaintiffs' limited definition, did not meaningfully measure the impact of defendants' actions on minority communities compared with the impact on non-minority communities. The plaintiffs would bear the same burden to prove discriminatory effects in a meaningful way if they were to prove breach of the contract governed by EPA regulations. *See id.*

¹⁶² This is plaintiffs' expectation interest. *See* FARNSWORTH, *supra* note 137, § 12.1.

and any incidental and consequential damages that flowed naturally from the city's breach.¹⁶³

3. Reliance Damages

A court may grant reliance damages if the promisee has changed its position to its detriment in reliance on the promise.¹⁶⁴ The third party beneficiary may, for example, have incurred expenses in reliance on performance¹⁶⁵ or have lost opportunities to make other contracts.¹⁶⁶ The third party beneficiary's injury consists of being worse off than if the promise had not been made.¹⁶⁷ "The law might protect this interest by putting the plaintiff back in the position in which it would have been had the promise not been made."¹⁶⁸

In *Chester Residents Concerned for Quality Living v. Seif*,¹⁶⁹ plaintiff city residents and a non-profit public interest corporation sued the Pennsylvania Department of Environmental Protection and funding recipients, alleging violations of the Civil Rights Act of 1964 and the Federal EPA's regulations promulgated pursuant thereto in connection with the

¹⁶³ See *supra* note 137.

¹⁶⁴ See CONTRACTS, *supra* note 82, at 14; see also RESTATEMENT, *supra* note 78, § 349 (Damages Based on Reliance Interest) ("[T]he injured party has a right to damages based on his reliance interest, including expenditures made in preparation for performance or in performance, less any loss that the party in breach can prove with reasonable certainty the injured party would have suffered had the contract been performed."). Farnsworth distinguished between "essential reliance," reliance that consists of preparation for and performance of contract in question, and "incidental reliance," preparation for collateral transactions that a party plans to carry out when the contract in question is performed. FARNSWORTH, *supra* note 137, § 12.1. For the purposes of this Note, both types will be included in the general heading of "reliance."

¹⁶⁵ See RESTATEMENT, *supra* note 78, § 349.

¹⁶⁶ See *id.*; see also Fuller & Perdue, *supra* note 78, at 74 (indicating that if lost opportunities are counted, the connection between expectation damages and reliance damages will depend "upon the extent to which other opportunities of a similar nature were open to the plaintiff").

¹⁶⁷ See CONTRACTS, *supra* note 82, at 14.

¹⁶⁸ *Id.* Measuring damages by the reliance interest is supposed to pose fewer problems of causation than measuring expectation in the case of out-of-pocket losses. See FARNSWORTH, *supra* note 137, § 12.1. One scholar has argued that reliance "provides the smallest imaginable recovery short of refusing to enforce the promise at all. In fact, it provides a level of recovery smaller than the recovery dictated by the strongest case for enforcing a contract." Michael B. Kelly, *The Phantom Reliance Interest in Contract Damages*, 1992 Wis. L. Rev. 1755, 1775-76.

¹⁶⁹ 944 F. Supp. 413 (E.D. Pa. 1996) [Seif I], *rev'd*, 132 F.3d 925 (3d Cir. 1997) [Seif II], *vacated as moot*, 524 U.S. 974 (1998).

process employed for the issuance of permits for construction of waste facilities.¹⁷⁰ The City of Chester had a population that was 86.5% white and 11.2% black with the highest concentration of industrial facilities located within the African-American portion of the city.¹⁷¹ Plaintiffs argued that the process defendants used to determine whether to grant a waste facility permit had discriminatory effects, concentrating the burden of pollution and its consequent negative health effects within the African-American community of Chester while leaving the white section virtually pollution free.¹⁷² The trial court in *Seif* granted defendants' motion to dismiss and held that there was no private right of action under the EPA regulations.¹⁷³

If plaintiffs had been successful third party beneficiaries¹⁷⁴ to the federal funding contract and were awarded reliance damages, the damages could have been measured by the cost to Chester residents of moving into or staying in the affected neighborhood. For example, while minority residents relied on the nondiscriminatory execution of the permit issuance process, they bought or occupied homes in Chester.¹⁷⁵ Meanwhile, waste facility permits were being issued in a way that would have discriminatory effects and dangerous health effects on their communities,¹⁷⁶ in breach of the EPA regulations that bind the funding contracts.¹⁷⁷ In order to put the residents back in their pre-contract position, the state agency issuing permits should reimburse them for what it cost them to buy and maintain their homes.¹⁷⁸

¹⁷⁰ *See id.* at 414. In particular, at issue was the grant of a waste facility permit to Soil Remediation Services, Inc., to open such a facility in the City of Chester in addition to the many facilities already there. *Id.*

¹⁷¹ *Id.* at 414-15.

¹⁷² *Id.* at 415. For a detailed analysis of the census statistics, see Wesley D. Few, *The Wake of Discriminatory Intent and the Rise of Title VI in Environmental Justice Lawsuits*, 6 S.C. ENVTL. L.J. 108, 110-12 (1997).

¹⁷³ *Seif I*, 944 F. Supp. at 417-18.

¹⁷⁴ Plaintiffs were not successful in district court but did prevail in the Third Circuit on their original claims. *See id.* at 418; *Seif II*, 132 F.3d at 937.

¹⁷⁵ *See Seif I*, 944 F. Supp. at 415.

¹⁷⁶ *Id.* ("Of all the cities of [Pennsylvania], Chester has the highest infant mortality rate . . . and the highest death rate due to certain malignant tumors."). The heightened toxicity was a result of the number of plants and their close proximity to low income, minority residential neighborhoods.

¹⁷⁷ *See supra* notes 92-100 and accompanying text.

¹⁷⁸ *Supra* note 164. For a detailed discussion of how a court calculates reliance damages, see *Sullivan v. O'Connor*, 296 N.E.2d 183, 186-90 (Mass. 1973).

Another measure of reliance damages is “opportunities lost.”¹⁷⁹ For example, Chester residents relied on the agency to administer federal funds in a nondiscriminatory way,¹⁸⁰ and they may not have protested this particular agency’s siting decisions earlier in the process or moved out of Chester in the hopes that all parties to the agreement would comply. After the dangerous and discriminatory siting decisions became clear, Chester residents had essentially lost the opportunity to either protest the original grant of federal funds or become more active earlier in the siting process, for which courts may attach a monetary value.¹⁸¹ Additionally, Chester residents might have stayed in their homes awaiting compliance. Even if residents did choose to move after the disclosure of the discriminatory siting process,¹⁸² there would certainly be a marked decrease in the value of their homes in light of the dangers inherent in their neighborhood which can also be quantified in damages.¹⁸³

4. Restitution

Perhaps the remedy best suited to third party claims dealing with intended benefits of “public”¹⁸⁴ programs is restitution.¹⁸⁵

¹⁷⁹ See FARNSWORTH, *supra* note 137, § 12.6a (“Although opportunity costs have received increasing attention in scholarly writings, they have been largely ignored by courts. There are, nonetheless, situations in which it is appropriate to count lost opportunities in reliance damages.”); see also *Grouse v. Group Health Plan Inc.*, 306 N.W.2d 114, 116 (Minn. 1981) (holding that plaintiff was due reliance damages because of lost employment opportunity). The author maintains that *Seif* presented an appropriate situation for an opportunity cost award.

¹⁸⁰ See *Seif I*, 944 F. Supp. at 415.

¹⁸¹ See *Grouse*, 306 N.W.2d at 116.

¹⁸² See *Seif I*, 944 F. Supp. at 415.

¹⁸³ See FARNSWORTH, *supra* note 137, § 12.16a:

[I]n some cases the promisee will not be able to show that another opportunity was available when the promise was made, or that he knew of and would have seized the opportunity if one was available, in others the promisee can overcome these obstacles and should be allowed to count lost opportunities.

Id.

Based on this line of reasoning, if residents can show they would have moved but for their belief in compliance and that there was a difference in the price offered before the siting and after, plaintiffs’ reliance damages should factor in this difference.

¹⁸⁴ These programs are not public in the way ‘public utilities’ such as electricity and water are public and available to the population as a whole. See *Koch v. Consol. Edison Co.*, 62 N.Y.2d 548, 559, 468 N.E.2d 1, 7, 479 N.Y.S. 2d 163, 559 (1984) (finding that residents of City of New York were precisely the consumers for whom contract was made between city agency and Con Edison); CORBIN, *supra* note 76,

"The promisee has a restitution interest if it has not only relied on the promise but has conferred a benefit on the promisor."¹⁸⁶ This interest will be protected by "putting the promisor back in the position in which it would have been had the promise not been made."¹⁸⁷ As one scholar noted:

When a link in the chain of distribution of new property rights—a school board, a nursing home operator, or a landlord—has received federal funds to be spent for the benefit of an identifiable group, there is a benefit conferred. When the promisor fails to distribute the promised benefits, he is unjustly enriched by reason of an infringement of another person's interest.¹⁸⁸

Applying the theory of new property rights and unjust enrichment in public programs¹⁸⁹ to the facts of *SCCIA*, explained in Part III.D.1, the result could have been much better for the residents of South Camden.¹⁹⁰ Had they sued as third party beneficiaries¹⁹¹ to the federal-state funding contracts¹⁹² and been granted restitution damages, they would have been entitled to compensation.¹⁹³ For example, NJDEP received federal funds in return for its compliance with the discriminatory effects standard of the EPA regulations which,

§ 805 (Contracts with a Municipality for the Benefit of the Inhabitants). *But see* *H.R. Moch Co. v. Rensselaer Water Co.*, 247 N.Y. 160, 165, 159 N.E. 896, 898 (1928) (holding that contract between a city and a water company to furnish water at the city hydrants benefits the public incidentally, not immediately; therefore, plaintiff could not recover under third party beneficiary rule). These programs are public to a specifically defined class of third parties based on geographical placement of facilities. *See Waters, supra* note 79, at 1204.

¹⁸⁵ *See* RESTATEMENT, *supra* note 78, § 370 ("A party is entitled to restitution . . . to the extent that he has conferred a benefit on the other party by way of part performance or reliance."); *see also id.* § 371 (Measure of Restitution Interest).

¹⁸⁶ CONTRACTS, *supra* note 82, at 15; *see also* RESTATEMENT, *supra* note 78, § 370.

¹⁸⁷ CONTRACTS, *supra* note 82, at 15.

¹⁸⁸ *Waters, supra* note 79, at 1209; *see generally* Charles A. Reich, *The New Property*, 73 *YALE L.J.* 733 (1964).

¹⁸⁹ *Waters, supra* note 79, at 1207.

¹⁹⁰ *See SCCIA III*, 274 F.3d 771, 791 (2d Cir. 2001). The district court's order granting preliminary injunction and injunctive relief was reversed and remanded. *Id.*

¹⁹¹ Plaintiffs tried to enforce EPA regulations under § 1983. *SCCIA III*, 274 F.3d at 774.

¹⁹² NJDEP received federal money. *Id.* This had to be the case in order for them to have an action under § 602. *See supra* part III.C.

¹⁹³ *See* RESTATEMENT, *supra* note 78, § 371.

according to the above posited theory,¹⁹⁴ is a benefit conferred on the identifiable group of minority residents.¹⁹⁵ When NJDEP failed to administer these funds so as to avoid discriminatory effects, it was unjustly enriched by infringing on the residents' property interest in the promise.¹⁹⁶ NJDEP, therefore, owes restitution to the residents in the manner and amount necessary to prevent unjust enrichment¹⁹⁷ or as justice may require.¹⁹⁸

As this section has made clear, environmental justice plaintiffs may often be better off, both monetarily and in their burden of proof, to sue as third party beneficiaries to the federal-state funding contracts of the EPA. Although this theory will not yield a sweeping policy decision or civil rights verdict per se, broad decisions are only one way to achieve justice. It can perhaps be more effective to steadily chip away at the very basis of why facilities are where they are in the first place—money. The next part provides a brief overview of two additional types of relief that have been and continue to be available to environmental justice plaintiffs.

IV. THE CONTINUED AVAILABILITY OF PRELIMINARY INJUNCTIONS, CRIMINAL PROSECUTIONS, AND PARALLEL PROCEEDINGS

Environmental enforcement in the United States is an extraordinarily complex matter.¹⁹⁹ Enforcement can come in the form of civil actions for the imposition of a penalties²⁰⁰ or injunctive relief,²⁰¹ or it can take the form of criminal prosecutions²⁰² that result in heavy fines for corporations²⁰³ and

¹⁹⁴ See *Waters*, *supra* note 79, at 1209.

¹⁹⁵ See *id.*

¹⁹⁶ *Id.*

¹⁹⁷ RESTATEMENT (SECOND) OF RESTITUTION § 1 (Tent. Draft. No. 1, 1983).

¹⁹⁸ *Waters*, *supra* note 79, at 1209.

¹⁹⁹ DANIEL RIESEL, ENVIRONMENTAL ENFORCEMENT, CIVIL AND CRIMINAL § 1.01 (2002).

²⁰⁰ See Clean Water Act (CWA) § 309(d), 33 U.S.C. § 1319(d) (2000). In addition to civil penalties imposed by courts, the EPA often has authority to assess penalties through a statutorily mandated administrative process using the same criteria as is applied to other civil penalties. See, e.g., *id.* § 309(g)(3), 33 U.S.C. § 1319(g)(3). The EPA's penalties are not binding on the courts once the case develops beyond settlement negotiations, but the hope is that courts will apply them in their consideration of the size of the judicial penalty. RIESEL, *supra* note 199, § 4.03 (Statutory Criteria).

²⁰¹ RIESEL, *supra* note 199, § 1.01.

²⁰² See Daniel Riesel, *Corporate and Individual Criminal Liability Arising from*

prison sentences for individuals.²⁰⁴ Because a detailed discussion of these two topics could each be the subject of a separate article, each will be covered briefly in this section as useful alternatives for environmental justice plaintiffs. It is also important to note that the major national environmental statutes²⁰⁵ and the Federal Sentencing Guidelines²⁰⁶ together afford substantial discretion to the EPA,²⁰⁷ the Department of Justice (DOJ),²⁰⁸ and the courts²⁰⁹ to create remedies for environmental violations, including combinations of criminal, civil, and administrative sanctions.²¹⁰

Environmental Crimes, C352 ALI-ABA 281 (1988); Steven A. Herman, *Administration Submits Legislation Which Provides New Tools to Protect the Public from Environmental Crimes*, NAT'L ENVTL. ENFORCEMENT J., Oct. 1996, at 19.

²⁰³ See Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6928(a), (c), (h) (2000) (discussing administrative penalty of up to \$25,000 per day for violation of compliance order or other requirement); § 6928(d) (criminal penalties).

²⁰⁴ See Riesel, *supra* note 202, at 300 ("Individuals can become liable for crimes committed by a corporation."); see also The Clean Air Act (CAA), 42 U.S.C. § 7413(a) (2000). The CAA's criminal provisions have been strengthened to include maximum felony penalties of up to five years imprisonment. The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) (also known as the SUPERFUND) carries a penalty of up to three years imprisonment. Under the Federal Sentencing Guidelines, the offense of "knowing endangerment resulting from mishandling hazardous or toxic substances, pesticides, or other pollutants brings a mandatory sentence of fifty-one to sixty-three months in prison without the possibility of parole.

²⁰⁵ See, e.g., CERCLA, 42 U.S.C. §§ 9601-9675 (2000); RCRA, 42 U.S.C. § 6928 (2000); Clean Water Act (CWA), 42 U.S.C. § 1311(a) (2000); CAA, 42 U.S.C. § 7413 (2000).

²⁰⁶ See RIESEL, *supra* note 199, § 1.07 n.4 (discussing the Federal Sentencing Reform Act, 18 U.S.C. § 991). The statute provides that if Congress does not act on the Commission's recommended sentences, they automatically become law and are binding on federal judges for the crimes covered by the Guidelines. One of the few areas of regulatory crime the Commission has dealt with is in environmental regulation. *Id.*

²⁰⁷ See RIESEL, *supra* note 199, § 1.05A (Agency Decisions and Rule Making).

²⁰⁸ See DEPARTMENT OF JUSTICE, GUIDELINES: FACTORS IN DECISIONS ON CRIMINAL PROSECUTION FOR ENVIRONMENTAL VIOLATIONS IN THE CONTEXT OF SIGNIFICANT VOLUNTARY COMPLIANCE OR DISCLOSURE EFFORTS BY THE VIOLATOR (July 1, 1991).

²⁰⁹ Courts, however, will largely apply judicial deference to agency decisions unless they are arbitrary, capricious, or manifestly contrary to the statute. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-46 (1984). A court may not substitute its own interpretation for that of the administrator of an agency. *Id.*

²¹⁰ See Kevin A. Gaynor & Thomas R. Bartman, *Criminal Enforcement of Environmental Laws*, 10 ENVTL. LITIG. 297, 298 (1999) (explaining how environmental statutes authorize both civil and criminal enforcement actions for the same violations of their provisions through "parallel proceedings").

A. Preliminary Injunctions

In many environmental justice cases, plaintiffs have sought a preliminary injunction at the outset of the suit.²¹¹ A preliminary injunction is intended to preserve the status quo and prevent irreparable injury to the plaintiff during the course of litigation by prohibiting the defendant from doing the act which is in dispute.²¹² This device is particularly helpful to environmental justice plaintiffs because, while the suit is pending or in the process of being litigated, they will not incur additional losses or heightened toxicity to their neighborhood before final adjudication on the merits.

The four factors courts consider in determining whether a preliminary injunction should be granted are "(1) the probability of plaintiffs' success on the merits, (2) irreparable nature of harm to the plaintiff(s), (3) the balance of hardships between the parties, and (4) in environmental cases, the public interest."²¹³ As one court noted, "The four considerations applicable to preliminary injunction decisions are factors to be balanced, not prerequisites that must be met."²¹⁴ Indeed, the various circuits have applied the standards for granting a preliminary injunction differently and have been more likely to grant one in certain types of pollution cases than in others.²¹⁵ Despite this tendency, however, a past record of environmental violations by a defendant may predispose a court to find that irreparable harm is likely.²¹⁶ Although not a permanent answer to the problem of

²¹¹ See, e.g., *Rozar v. Mullis*, 85 F.3d 556 (11th Cir. 1996); *Lucero v. Detroit Pub. Sch.*, 160 F. Supp. 2d 767 (E.D. Mich. 2001); *Bean v. Southwestern Waste Mgmt.*, 482 F. Supp. 673 (S.D. Tex. 1979).

²¹² See *Lucero*, 160 F. Supp. 2d at 779.

²¹³ See RIESEL, *supra* note 199, § 5.03.

²¹⁴ *Id.*; see *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987) (concluding that when environmental harm is "sufficiently likely, therefore the balance of harms will usually favor the issuance of an injunction to protect the environment").

²¹⁵ See RIESEL, *supra* note 199, § 5.03. Riesel points out that it may be more difficult to demonstrate irreparable injury in air and water pollution cases because "a penalty is tantamount to shutting down an industrial polluter." *Id.* However, "when a plaintiff seeks to obtain speedy compliance with a permit for a state implementation plan which does not require the drastic economic dislocations associated with the shutting down of industrial facilities, he or she will have an easier time demonstrating irreparable injury." *Id.*

²¹⁶ *Id.* (citing *Natural Res. Def. Council v. Texaco, Inc.*, 2 F.3d 493, 506 (3d Cir. 1993) in which the court held that the decade-long history of substantial non-compliance at Texaco's refinery helped demonstrate irreparable injury to plaintiffs).

environmental racism, the availability of preliminary injunctions may enable environmental justice plaintiffs to reduce the cumulative effects of discriminatory siting and operation of facilities²¹⁷ while they litigate the suit. Assuming success on the merits, this can lead to a substantial decrease in toxic discharge²¹⁸ and construction of new waste facilities in minority neighborhoods.²¹⁹

B. Criminal Prosecutions

Perhaps the most important current aspect of environmental enforcement is its increasing criminalization.²²⁰ As two scholars have noted, this trend may be due in part to the enactment of the Pollution Prosecution Act of 1990,²²¹ which mandated the EPA's hiring of two hundred environmental criminal investigators.²²² Currently, almost every environmental statute has some provision for imposing criminal liability.²²³ EPA referrals of criminal cases to the DOJ have steadily increased over the past two decades, and criminal fines have reached an all

²¹⁷ A preliminary injunction is for the duration of the suit and will be lifted if plaintiffs are not successful. *See Rozar v. Mullis*, 85 F.3d 556, 565 (11th Cir. 1996); *Bean v. Southwestern Waste Mgmt.*, 482 F. Supp. 673, 678-79 (discussing the clustered siting of waste facilities in minority neighborhoods).

²¹⁸ *See supra* RIESEL, note 199, § 5.03. Plaintiffs can use expert testimony to demonstrate that the added contaminants introduced by the unlawful discharges may result in "irreversible adverse increments to health." *Id.*

²¹⁹ *See Sierra Club v. Larson*, 769 F. Supp. 420, 424 (D. Mass. 1991) (refusing to enjoin construction of proposed ventilation system because it was not going to begin for a number of years, which precluded a finding of imminent harm to plaintiffs required to prove irreparable injury).

²²⁰ RIESEL, *supra* note 199, § 1.01; see Barry Meier's article on the Environmental Protection Agency's criminal enforcement unit, WALL ST. J., Jan. 7, 1985, at A1. (noting that from 1983 to 1985, the unit helped convict sixty individuals and companies of criminally violating EPA statutes which was three times as many as in similar periods in EPA history).

²²¹ 42 U.S.C. § 4321 (2000).

²²² 42 U.S.C. § 7413(c)(4); *see also* Gaynor & Bartman, *supra* note 210, at 264.

²²³ *See, e.g.*, Clean Air Act, 42 U.S.C. § 7413(c) (2000); Clean Water Act, 33 U.S.C. § 1319(c)(3) (2000); Resource Conservation and Recovery Act, 42 U.S.C. § 6928(e) (2000); Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601(32) (2000). Each act prescribes criminal penalties differently. For example, the CWA counts criminal violations on a per day basis, while the CAA follows the Alternative Fines Act, 18 U.S.C. § 3571, and doubles maximum criminal fines in the event of a second conviction, and the RCRA has criminal penalties more severe than those prescribed under the Alternative Fines Act; *see also* RIESEL, *supra* note 199, § 4.01 (discussing the fine structure of the statutes and Alternative Fines Act).

time high.²²⁴ The obvious drawback for environmental justice plaintiffs is the necessity of relying on the EPA to actually refer their suits to the DOJ for criminal prosecution. Predicting whether the government will pursue a violation civilly, administratively, or criminally is difficult.²²⁵ Although courts have liberally construed the environmental statutes' criminal penalties, there are no bright lines by which environmental justice plaintiffs can determine the initial "prosecution-worthiness" of their case.²²⁶

C. *Parallel Proceedings*

The major environmental statutes²²⁷ authorize both criminal and civil enforcement actions for the same violations, which

²²⁴ See Gaynor & Bartman, *supra* note 210, at 264 ("Criminal fines in 1997 totaled a record \$169.3 million.").

²²⁵ See *id.* at 265.

²²⁶ *Id.* Gaynor & Bartman noted that during the period from 1984–1990, seven environmental statutes formed the basis for almost every environmental criminal prosecution. It would seem that the EPA might be more willing to refer to the DOJ if the complaint is based upon one of the seven. *Id.*; see also Mark A. Cohen, *Environmental Crime & Punishment: Legal/Economic Theory & Empirical Evidence of Enforcement of Federal Environmental Statutes*, 82 J. CRIM. L. & CRIMINOLOGY 1054, 1073 (1992). Although environmental justice plaintiffs may have no way of predicting whether the EPA will refer their case to the DOJ, it may be comforting to know that the legal rule of holding a corporation liable for the acts of its agents applies in the environmental context. See *Apex Oil Co. v. United States*, 530 F.2d 1291, 1293, 1295 (8th Cir. 1976) (finding that employee's knowledge of corporate defendant's repeated oil spills into the Mississippi River was imputed to the corporation, and therefore, the corporation was criminally liable under the Water Pollution Control Act). Similarly, an individual can become liable for crimes committed by corporations if she is guilty of "personal misconduct," she aided and abetted the corporation's misconduct or she is "a person with responsibility in the business process resulting in the . . . crime." See Riesel, *supra* note 202, at 300; see also *United States v. Marathon Dev. Corp.*, 867 F.2d 96, 97, 100 (1st Cir. 1989) (upholding conviction of real-estate business under CWA, based on the actions of its Senior VP in causing dredging and filling of protected federal wetlands without a permit). A person is guilty of aiding and abetting if she "affirmatively associates himself in some way with a criminal venture." Riesel, *supra* note 202, at 301; see also *United States v. Carr*, 880 F.2d 1550, 1551 (2d Cir. 1989) (holding civilian maintenance foreman at military base criminally responsible under CERCLA for ordering employees to dispose of paint by dumping it into a dirt-filled pit). A substantial consequence of a guilty plea under an environmental statute is suspension and debarment of the defendant from federal contracts, and grant and loan programs. See Riesel, *supra* note 202, at 301. Under certain statutes, the defendant is automatically debarred until the EPA certifies that the conditions giving rise to the violation have been corrected. *Id.*

²²⁷ See, e.g., RCRA, 42 U.S.C. § 6928(g) (civil penalty up to \$25,000 per day for violation of any statutory or regulatory requirement); *id.* § 6928(d) (criminal

gives the EPA and the DOJ the option of pursuing both simultaneously in a "parallel proceeding."²²⁸ In appropriate situations, civil injunctions are issued to prevent further harm and to begin cleanup procedures, while criminal penalties are exacted to further punish the "wrongdoer."²²⁹ Within the context of environmental justice, this device could clearly be of tremendous importance to an affected area, particularly one with a high concentration of facilities, provided the EPA sees fit to pursue it.

CONCLUSION

From its beginning to the present day, the environmental justice movement has faced its share of social obstacles and legal impediments. Part I of this Note described this battle. Since the veritable closing down of Title VI by the Supreme Court as discussed in Part II, it is incumbent upon environmental justice plaintiffs to avail themselves of private rights of action which they may not have used previously. One of these ways, as described in detail in Part III, is the third party beneficiary rule. Its origins as an equitable solution make it particularly appealing to plaintiffs who, for reasons beyond their control, may have a difficult time achieving the justice they deserve. Part IV explained that, in addition to this remedy, plaintiffs also have other equitable and criminal remedies available to them. Although these remedies may not give environmental justice plaintiffs the sweeping civil rights policy decisions they seek, perhaps it is time for the movement to pursue available remedies instead of looking down pathways that are presently closed. Using the third party beneficiary rule, intended beneficiaries of public programs who have been denied access to the courts previously, can seek their remedy. In other words, it is time for environmental justice plaintiffs to use this rule as an alternative to the increasingly unavailable private statute-based cause of action to gain access to justice that has long been denied.

penalties).

²²⁸ Gaynor & Bartman, *supra* note 210, at 297.

²²⁹ See Riesel, *supra* note 202, at 318.