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Environmental Justice in Rural Communities

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ENVIRONMENTAL JUSTICE IN RURAL COMMUNITIES

PART ONE: RCRA, COMMUNITIES, AND ENVIRONMENTAL JUSTICE

ROBERT B. WIYGUL*

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FLORENCE T. ROBINSON***

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PART ONE: RCRA, COMMUNITIES, AND ENVIRONMENTAL JUSTICE

I. INTRODUCTION

Frankly, law review articles on environmental justice and hazardous waste facility siting are a dime a dozen these days. Indeed, this subject has recently become the focus of considerable legal scholarship.¹ We count a total of at least twenty-five articles, covering a

1. Edward Patrick Boyle, Note, *It's Not Easy Bein' Green: The Psychology of Racism, Environmental Discrimination, and the Argument for Modernizing Equal Protection Analysis*, 46 VAND. L. REV. 937 (1993); Robert D. Bullard, *The Threat of Environmental Racism*, 7 NAT. RESOURCES & ENV'T 23 (1993); Anthony R. Chase, *Assessing and Addressing Problems Posed by Environmental Racism*, 45 RUTGERS L. REV. 335 (1993); Leslie Ann Coleman, Note, *It's the Thought that Counts, the Intent Requirement in Environmental Racism Claims*, 25 ST. MARY'S L.J. 447 (1993); Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN. L. REV. 739 (1993); Pamela Duncan, *Environmental Racism, Recognition, Litigation, and Alleviation*, 6 TUL. ENVTL. L.J. 317 (1993); Robert M. Frey, *Environmental Injustice: The Failure of American Civil Rights and Environmental Law to Provide Equal Protection from Pollution*, 3 DICK. J. ENVTL. L. & POL'Y 53 (1993); Michael Greenberg, *Proving Environmental Inequity in Siting Locally Unwanted Land Uses*, 4 RISK ISSUES HEALTH & SAFETY 235 (1993); Richard J. Lazarus, *Pursuing "Environmental Justices": The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787 (1993); Rodolfo Mata, Note, *Inequitable Siting of Undesirable Facilities and the Myth of Equal Protection*, 13 B.C. THIRD WORLD L.J. 233 (1993); Carolyn M. Mitchell, *Environmental Racism: Race as a Primary Factor in the Selection of Hazardous Waste Sites*, NAT'L BLACK L.J. 176 (1993); Luke W. Cole, *Remedies for Environmental Racism: A View from the Field*, 90 MICH. L. REV. 1991 (1992) [hereinafter Cole, *Remedies*]; Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 619 (1992); Robert W. Collin, *Environmental Equity: A Law and Planning Approach to Environmental Racism*, 11 VA. ENVTL. L.J., 495 (1992); Kevin Gover & Jana L. Walker, *Escaping Environmental Paternalism: One Tribe's Approach to Developing a Commercial Waste Disposal Project in Indian Country*, 63 U. COLO. L. REV. 933 (1992); Paul Mohai & Bunyan Bryant, *Environmental Injustice: Weighing Race and Class as Factors in the Distribution of Environmental Hazards*, 63 U. COLO. L. REV. 921 (1992); Peter L. Reich, *Greening the Ghetto: A Theory of Environmental Race Discrimination*, 41 U. KAN. L. REV. 271 (1992); A. Dan Tarlock, *Environmental Protection: The Potential Misfit Between Equity and Efficiency*, 63 U. COLO. L. REV. 871 (1992); Gerald Torres, *Understanding Environmental Racism*, 63 U. COLO. L. REV. 839 (1992); Naikang Tsao, *Ameliorating Environmental Racism: A Citizen's Guide to Combatting the Discriminatory Siting of Toxic*

broad spectrum from economic theory² and statistical proof³ to straightforward recountings of the roots of the environmental justice movement.⁴

There is not much that two practicing lawyers like your authors can do to improve on this wealth of theoretical writing. What we can offer is the perspective of those representing clients who seek some form of “environmental justice.”⁵ This article—and the more important accompanying essay by Florence Robinson, a courageous citizen-activist from Alsen, Louisiana—is essentially to give an advocate’s perspective on the current hazardous waste facility permitting system and how it needs to change.

We should emphasize that we come at this question as advocates for communities that are currently grappling with facility siting proposals. Many of the people for whom we work, and many of those who are likely to read this article, have immediate problems that require immediate solutions. So while we prescribe some changes in substantive law as long term cures, we are also concerned with what can be accomplished to help communities within the framework of existing law.

In this article we will focus first on the special character of hazardous waste facilities and the conjunction between facility siting and environmental justice, second on the shortcomings of the current regu-

Waste Dumps, 67 N.Y.U. L. REV. 366 (1992); Regina Austin & Michael Schill, *Black, Brown, Poor & Poisoned: Minority Grassroots Environmentalism and the Quest for Eco-Justice*, 1 KAN. J.L. & PUB. POL’Y 69 (1991); Kelly M. Colquette & Elizabeth A. H. Robertson, *Environmental Racism: The Causes, Consequences and Commendations*, 5 TUL. ENVTL. L.J. 153 (1991); Rachel D. Godsil, Note, *Remedying Environmental Racism*, 90 MICH. L. REV. 394 (1991); R. George Wright, *Hazardous Waste Disposal and the Problems of Stigmatic and Racial Injury*, 23 ARIZ. ST. L.J. 777 (1991); Richard A. DuBey et al., *Protection of the Reservation Environment: Hazardous Waste Management on Indian Lands*, 18 ENVTL. L. 449 (1988).

2. See Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 YALE L.J. 1383 (1994).

3. E.g., Greenberg, *supra* note 1.

4. See, e.g., Austin & Schill, *supra* note 1.

5. Someone else offering this perspective is Luke Cole, a California Legal Services attorney who has done some of the pioneering work in the field of environmental justice. See Cole, *Remedies*, *supra* note 1.

latory regime, and finally we ruminate about possible solutions to these problems.

II. HAZARDOUS WASTE FACILITY SITING AND ENVIRONMENTAL JUSTICE

A. *Background*

What we know about generating hazardous waste has far outpaced what we know about its dangers. Our nation produces approximately 1,400 trillion pounds of hazardous waste per year.⁶ In 1991 alone, American companies reportedly released 3.39 billion pounds of hazardous and toxic chemicals into the environment.⁷ Consumers continue to demand many goods—some essential to our basic quality of life—that either contain toxic substances or result in the creation of hazardous waste. Thus, disposing of the nation's waste is one of the most complex and critical challenges facing modern industrial society.

In the aftermath of the highly publicized hazardous waste problems at Love Canal, residents of communities located near hazardous waste facilities have begun to question the health risks and other dangers associated with these facilities.⁸ Consequently, the location of hazardous waste treatment, storage, and disposal facilities—often referred to as “RCRA” facilities, because they are regulated under the Resource Conservation and Recovery Act—has generated significant controversy and outcry from communities across the country.

6. KRISTEN SCHAFER, WHAT WORKS NO. 2: LOCAL SOLUTIONS TO TOXIC POLLUTION 8 (The Environmental Exchange 1993).

7. *Id.*

8. SCHAFER, *supra* note 6, at 17. Love Canal was an abandoned hazardous waste dump located in a working class community in Niagara Falls, New York. In 1978, buried toxic chemicals percolated to the surface and were detected in the indoor air of local houses. In 1980, the Federal government evacuated residents after health research linked high miscarriage rates to the contamination.

B. What Makes Hazardous Waste Facilities So Special?

Hazardous waste facilities are only one kind of dangerous facility in our industrial society. To put it in the language of the literature, they are only one locally unwanted land use, or "LULU," among many.⁹ What is it about hazardous waste facilities that makes them so special, that makes us fear them with such special urgency, and that makes communities reject them with a vehemence found in few other controversies? Equally important, why is it that we believe that the communities which are targeted for these facilities deserve special consideration, and special solicitude?

Some very practical reasons exist. First and most obviously, the materials going into hazardous waste facilities are by definition, hazardous. Few other types of facilities flaunt their danger in their very name. Come hell or high water, a RCRA facility is going to be dealing in things that will be a problem if they are released into the environment. These facilities are subject to special regulation precisely because the materials they handle pose chronic and acute health threats. Accidental as well as routine releases of hazardous substances may impact the health of the individuals living in a community. These same releases can contaminate soil, groundwater, and surface water, threatening the health of citizens long after the facility has closed.¹⁰

A related reason that hazardous waste facilities are different is the relative lack of knowledge concerning their long-term effects; the Resource Conservation and Recovery Act (RCRA)¹¹ itself is a creature of the last two decades, and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)¹² is of even shorter duration. While there is little data available regarding the long-

9. Frank Popper is credited with introducing the term "LULU" in a 1983 article. Frank J. Popper, *LULU's*, 73 *RESOURCES* 2 (1983).

10. See generally 42 U.S.C. § 6901 (1988).

11. Pub. L. No. 94-580, 90 Stat. 2795 (1976) (codified as amended at 42 U.S.C. §§ 6901-6992k (1988 & Supp. IV 1992)).

12. Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended by the Superfund Amendment and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-449, 100 Stat. 1613 (1986), at 42 U.S.C. §§ 9601-9675 (1988 & Supp. IV 1992)).

term performance of hazardous waste landfill design, it is clear that some of the constituents could remain dangerous for many years. Most other properly run industrial facilities do not entail such long-term risk. In addition, and rather surprisingly given the emphasis placed on combustion as a means of dealing with hazardous waste during the Reagan-Bush era, there is little information available about the pollutant outputs of hazardous waste incinerators.¹³

A slightly less obvious reason some communities are leery of hazardous waste dumps is that these facilities, despite being touted as economic development vehicles for rural areas, carry with them secondary risks in the form of decreased property values, adverse effects on the local economy, and increased infrastructure costs. Several studies have found rather marked property value effects stemming from the construction of RCRA facilities.¹⁴

The hazardous substances sent to the dump must be transported along the community's roadways and railroads, and thus, these facilities can pose problems well beyond the boundaries of the facility itself. For a community to properly protect its citizens, resources have to be directed at monitoring and emergency response costs. All of these efforts entail real costs, inescapably associated with any hazardous waste handling facility. Whether the facility will pay for them directly or through taxes is not a sure thing.¹⁵

13. See ENVIRONMENTAL EFFECTS, TRANSPORT AND FATE COMMITTEE, U.S. EPA: REPORT ON THE INCINERATION OF LIQUID HAZARDOUS WASTES (1987); see also U.S. EPA, DRAFT STRATEGY FOR COMBUSTION OF HAZARDOUS WASTE IN INCINERATORS AND BOILERS AND FURNACES (May 18, 1993), reprinted in [24 Current Developments] ENV'T REP. (BNA) 157 (May 21, 1993) [hereinafter EPA INCINERATOR STRATEGY].

14. See, e.g., GERALD E. SMOLEN & GARY MOORE, ECONOMIC EFFECTS OF HAZARDOUS WASTE LANDFILLS ON SURROUNDING REAL ESTATE VALUES IN TOLEDO, OHIO (Ohio State Univ. Center for Real Estate Education & Research, Feb. 1991); V. Kerry Smith & William Desvougues, *The Value of Avoiding a LULU: Hazardous Waste Disposal Sites*, 68 REV. ECON. STAT. 293 (1986). It should be noted, of course, that some folks would benefit from a decrease in property values—for example, through reduced rents.

15. Several commentators state that hazardous waste facilities bring a relatively limited numbers of jobs and have only limited tax benefits for the jurisdictions in which they are located. See Lawrence S. Bacow & James R. Milkey, *Overcoming Local Opposition to Hazardous Waste Facilities: The Massachusetts Approach*, 6 HARV. ENVTL. L. REV. 265, 266 (1982); A. Dan Tarlock, *Anywhere But Here: An Introduction to State Control of Hazardous Waste Facility Location*, 14 LAND USE & ENVTL. L. REV. 533, 534-35 (1983); see

The anecdotal experience of Emelle, Alabama—home to Chemical Waste Management's immense hazardous waste facility—demonstrates the perception that toxic dumps can become the single largest employer in a community, driving away other businesses.¹⁶ Local citizens at

also DAVID MORRELL & CHRISTOPHER MAGORIAN, *SITING HAZARDOUS WASTE FACILITIES: LOCAL OPPOSITION AND THE MYTH OF PREEMPTION* 55 (1982) (one of the most striking aspects of hazardous waste facilities is the unequal distribution of risks and benefits).

16. ROBERT D. BULLARD, *DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY* 69-73 (1990). Sumter County is located in the heart of Alabama's poor "black belt." This predominantly African-American area has a high poverty rate. Unemployment rates run high because of the decline in the county's agricultural economic base. It is not uncommon in many African-American communities to have one-third of the workforce unemployed. These depressed conditions and cheap land have attracted polluting industries, particularly waste disposal companies to the county. In 1978, Chemical Waste Management constructed the nation's largest hazardous waste treatment, storage, and disposal facility in Emelle, a small rural African-American community in the center of Sumter county. Local residents contend that the facility was foisted on the Emelle community without their input. In fact, in 1978, no African-American from Sumter County held public office or sat on any decision-making board at the state, county, or local level. "The Emelle hazardous waste site has not brought an economic renaissance to this poor blackbelt county." Between 1984 and 1987, the Emelle landfill received nearly forty percent of the toxic waste disposed of nationwide under the Federal Superfund program. Within the last eight years, the Emelle site received an average of 463,977 tons of hazardous waste annually. In 1989 alone, it received more than 700,000 tons of waste. The facility has been plagued with on-site fires, off-site water contamination, federal penalties for environmental violations, and more. *Id.* at 65. Some local citizens complain that the presence of the facility in Emelle has adversely affected the quality of life in the county and has deterred businesses from moving in. See Conner Bailey & Charles E. Faupel, *Movers and Shakers and PCB Takers: Hazardous Waste and Community Power*, 13 SOC. SPECTRUM 89, 106 (1993).

Another anecdotal example of the effects of a large hazardous waste facility is Alsen, Louisiana. Alsen is an unincorporated community located on the Mississippi River north of Baton Rouge, Louisiana. The town is located at the northern end of the so-called "Cancer Alley," an eighty-five mile stretch of the river between Baton Rouge and New Orleans where one-quarter of the nation's petrochemicals are produced. Alsen is a century-old, predominantly African-American (98%) community. "It developed as a rural community of black landowners to its present status as a stable, working-class suburban enclave." Rollins Environmental Services operates the fourth largest commercial hazardous waste site in the nation adjacent to the Alsen community. Alsen residents contend they had no input in the decision to site this facility in their community. Neighbors complain that noxious odors from the facility have affected their gardens, fruit trees, and livestock. Moreover, residents have lodged a host of health complaints stemming from the facility's emissions. In 1987, some Alsen residents received undisclosed settlements from Rollins as the result of a class action lawsuit. Nonetheless, the community's pollution problems persist. BULLARD, *supra* note 16, at 65-68.

Emelle state that their county has become a “hazardous waste junkie,” depending on hazardous waste for much of its revenue.¹⁷ Some states have recognized the economic dangers inherent in hazardous waste facilities and have enacted statutes requiring compensation to be paid to communities forced to host a dump.¹⁸

Aside from these “hard” technical risks, there has been growing evidence of another class of risks associated with hazardous waste facilities. Perhaps the best way to introduce these effects is to suggest that, in the eyes of most ordinary people, including the authors, hazardous wastes are not just ordinary dangerous things—they are dangerous things about which the ordinary citizen knows nothing or very little. Few of us know exactly what they look like. We know that in other places they have vaporized into the air, or seeped into groundwater, or found their way out to contaminate the soil. We have no control over them, and often, we may not know they are present until they have done their damage. They can perhaps be best analogized to evil spirits. Such invisible, malicious agents are simply more terrifying than known dangers that can be controlled to some degree.¹⁹

It is also important to recognize that hazardous waste facilities are, in common parlance, dumps. They are a place where the castoffs—the wastes of society—are placed. The good stuff is all somewhere else, where regular folks live. We think that little authority is needed for the proposition that living in a dump is not considered desirable.²⁰

Thus, when a rural community is told, implicitly or explicitly, that it should welcome a hazardous waste disposal facility because that is

17. BULLARD, *supra* note 16, at 71; *see also* Bailey & Faupel, *supra* note 16, at 107-08.

18. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 21D, § 12 (Law. Co-op. 1988); MISS. CODE ANN. § 17-18-37(3) (Supp. 1993) (allowing host community to negotiate for percentage of gross receipts from state-owned hazardous waste facility).

19. For the underpinnings in social science of these ruminations of the authors, *see infra* notes 18, 19.

20. *See* Richard Walker, *The Return of the Repressed: Freudian Theory, Hazardous Waste Siting, and Public Resistance*, in PSYCHOSOCIAL EFFECTS OF HAZARDOUS TOXIC WASTE DISPOSAL ON COMMUNITIES 239, 251 (Dennis L. Peck ed., 1989) [hereinafter PSYCHOSOCIAL EFFECTS] (“The answer to the question, What makes waste different?, is simple: It is waste.”).

the only sort of economic development the community can get, it is really being told "you are good enough to be our dump, but that's all you're good enough to be." No one reacts very well to that sort of message, no matter how it is sugar coated.

The authors have observed these phenomena among citizens in just about every place that is host to, or has been targeted for the siting of, a large hazardous waste facility. Backing up this anecdotal evidence, a growing body of sociological study suggests that pollution and the threat of pollution routinely causes social and psychological changes in communities, families, and individuals.

By far, the largest amount of work has been done in the area of social reactions to actual incidents of pollution.²¹ The findings of these studies are remarkable in their consistency. The perceived threat of toxic pollution—even when the individual or community in question is not directly contacted by the toxin—results in a breakdown of social structures in the community, the family, and the individual.²² The literature seems to contain no case studies finding a contrary result.

The results of these studies are not very remarkable because they largely boil down to common sense. When a community, a family, or an individual is placed under stress, problems arise. Sometimes those problems are very severe, and indeed they can be life-threatening.

There is also more recent work, of particular relevance to the siting of hazardous facilities, suggesting that pollutant releases can have social effects regardless of *whether or not there is actual contact with the pollutants*.²³ This is by no means counterintuitive. As Dr.

21. See, e.g., Christopher Dyer et al., *Social Disruption and the Valdez Oil Spill*, 12 SOC. SPECTRUM 105 (1992); Donald G. Unger et al., *Living Near a Hazardous Waste Facility: Coping with Individual and Family Stress*, 62 AM. J. ORTHOPSYCHIATRY 55 (1992); MICHAEL R. EDELSTEIN, *CONTAMINATED COMMUNITIES: THE SOCIAL AND PSYCHOLOGICAL IMPACTS OF RESIDENTIAL TOXIC EXPOSURE* (1988); Kurt Finsterbusch, *Community Responses to Exposure to Hazardous Waste*, in *PSYCHOSOCIAL EFFECTS*, *supra* note 20, at 57; Duane Gill & Stephen Picou, *Toxic Waste Disposal Sites as Technological Disasters*, in *supra* note 18, at 81; B. Cuthbertson & J. Nigg, *Technological Disaster and the Nontherapeutic Community*, 19 ENV'T. & BEHAVIOR 462 (1987); MARTHA R. FOWLKES, U.S. FEDERAL EMERGENCY MANAGEMENT AGENCY, *LOVE CANAL: THE SOCIAL CONSTRUCTION OF DISASTER* (1982).

22. See FOWLKES, *supra* note 21; Dyer et al., *supra* note 21.

23. See Steven Picou & Duane Gill, *Long-Term Social Psychological Impacts of the*

Kai Erickson has noted, one of the bases for the sociological problems associated with toxic contamination is that individuals are forced to live with a continuing, unresolved threat.²⁴ What could better describe the situation of a family, an individual, or a community living in proximity to an unwanted hazardous waste dump?

This is a brief sketch of some of the reasons why communities dislike and fear hazardous waste dumps. We believe it is important to note that the negative consequences discussed here are not, with perhaps the exception of social consequences, inevitable. Rather, they are matters of *risk*. It is possible to debate the degree of risk associated with hazardous waste facilities, but it is not possible to debate the fact that these environmental, economic, and social risks exist. The question we are asking in this article is whether our regulatory system is adequately taking these risks into account, particularly in the context of siting RCRA facilities in communities of color. As we argue in the next section, the current regulatory process deals with only one category of these risks. In the final section, we take the position that a fair siting system should deal with the other risks and that such an accomplishment would not involve radical changes.

III. RCRA FACILITIES AND THE ENVIRONMENTAL JUSTICE MOVEMENT

RCRA facilities—no doubt in part as a result of the special character outlined above—have played a special role in the development of what has come to be known as the environmental justice movement. Hazardous waste facilities were early foci for the studies that have helped to call attention to the unequal distribution of environmental burdens in our society.

In 1987, Dr. Benjamin Chavis, then director of the United Church of Christ's Commission for Racial Justice (UCC), now executive direc-

Exxon Valdez Oil Spill on Prince William Sound Communities (unpublished manuscript on file with the authors).

24. See Kai Erikson, *A New Species of Trouble*, in COMMUNITIES AT RISK 11, 16 (1991); Kai Erikson, *Toxic Reckoning: Business Faces a New Kind of Fear*, HARV. BUS. REV., Jan.-Feb. 1990, at 118.

tor of the NAACP, coined the term “environmental racism” to describe the findings of a growing number of studies documenting that poor communities and communities of color in the United States are disproportionately affected by pollution and environmental hazards.²⁵ In particular, anecdotal evidence and studies show that RCRA facilities are disproportionately sited in communities of color, particularly in the rural communities of the southern Blackbelt.²⁶

The South’s history of unbridled development, lax regulations, economic poverty, and racial discord has led to an influx of polluting industry. In the 1970s, four southern states led the nation in attracting polluting industries such as paper, chemical, and waste disposal firms.²⁷ Some commentators believe that many industrial firms, especially waste disposal companies, tend to locate facilities in politically and economically impoverished areas in the South upon the presumption they will encounter little if any protest from the local community.²⁸

Whatever the reasons, when the entire Southeastern United States is examined, considerable evidence exists to support the idea that RCRA facilities and similar hazardous facilities, particularly in the South, are disproportionately located in communities of color. For example, in 1987 there were a total of 27 hazardous waste landfills operating in the continental United States.²⁹ One-third of these landfills (nine in total), representing nearly 60% of the nation’s landfill capacity, were located in Alabama, Louisiana, Oklahoma, South Carolina, and Texas.³⁰

25. See U.S. GEN. ACCOUNTING OFFICE, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND SOCIOECONOMIC STATUS OF SURROUNDING COMMUNITIES (1983) [hereinafter GAO STUDY]; COMMISSION FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES (1987) [hereinafter TOXIC WASTE AND RACE REPORT]; Marianne Lavelle & Marcia Coyle, *Unequal Protection: The Racial Divide in Environmental Law*, NAT’L L.J., Sept. 21, 1992, at S1.

26. See BULLARD, *supra* note 16, at 39-40.

27. *Id.* at 33.

28. *Id.*

29. *Id.* at 40.

30. *Id.*

Given these statistics, it is perhaps not surprising that one of the seminal events of the environmental justice movement arose out of an attempt to site a hazardous waste dump. In 1982, national civil right activists, black elected officials, and environmental and labor leaders converged on a small, rural town in North Carolina to launch the first national environmental protest against the location of a hazardous waste facility.³¹ The North Carolina state officials and the EPA selected the town of Afton, in Warren County, North Carolina, as the site for disposing of more than 32,000 cubic yards of polychlorinated biphenyl or PCB-contaminated soil.³² "While the area's shallow water table made the siting environmentally unsound, it was the demographics of Warren County which caused residents and outsiders alike to protest the chosen location."³³ One of the poorest counties in the state, Warren County was also the center of the state's largest African-American community.³⁴

Notwithstanding the public demonstrations, the landfill was ultimately sited in Warren County. However, the campaign brought national attention to the issues surrounding the siting of hazardous waste facilities in poor communities and communities of color.³⁵ The campaign also prompted a series of studies examining the correlation between race, socioeconomic status, and the distribution of environmental hazards in the United States.

The first study was conducted by the United States General Accounting Office (GAO) in 1983 at the request of District of Columbia Congressman Walter Fauntroy, who had participated in the Warren County protests.³⁶ The GAO study surveyed the location of off-site hazardous waste landfills in the eight southeastern states comprising EPA's Region IV.³⁷ This study concluded that three out of four commercial hazardous waste sites in the region were located in predomi-

31. *Id.* at 35.

32. *Id.* at 35-36.

33. SCHAFER, *supra* note 6, at 40.

34. *See* BULLARD, *supra* note 16.

35. *Id.* at 38.

36. *Id.*

37. GAO STUDY, *supra* note 25, at 1-3.

nantly African-American communities, and that all communities with such facilities were economically depressed.³⁸

The second study, prepared by the UCC in 1987, has become a landmark in the field and possibly the most frequently cited analysis of the racially discriminatory pattern of siting RCRA facilities. The UCC augmented the regional scope of the GAO study and published the first comprehensive national report documenting the demographic patterns associated with the location of commercial hazardous waste facilities and uncontrolled toxic waste sites across the United States.³⁹

The study concluded that race was the most significant factor among variables tested in association with the location of commercial hazardous waste facilities and that this practice represented a "consistent national pattern."⁴⁰ Although socioeconomic status played an important role, race was a more predominant factor.⁴¹ Moreover, "communities with the greatest number of commercial hazardous waste facilities have the highest composition of racial and ethnic residents."⁴² In fact, the UCC study found that three out of the five largest commercial hazardous waste landfills in the United States, which account for forty percent of the total estimated commercial landfill capacity in the nation, were located in majority African-American and Hispanic communities.⁴³

The concentration of uncontrolled or abandoned toxic waste sites also disproportionately affected minority communities. According to the UCC report, three out of every five Black and Hispanic Americans live in communities with uncontrolled toxic waste sites.⁴⁴ Indeed, more than fifteen million African-Americans and more than eight mil-

38. *Id.*

39. TOXIC WASTE AND RACE REPORT, *supra* note 25, at 3.

40. *Id.* at xiii.

41. *Id.*

42. *Id.*

43. *Id.* at xiv. Notably, the UCC study revealed that household incomes and home values were significantly lower when communities with waste facilities were compared to communities in the surrounding region without facilities. *Id.* at xiii.

44. *Id.* at xiv.

lion Hispanic-Americans live in communities with uncontrolled toxic waste sites.⁴⁵

The GAO and UCC reports spawned considerable debate among government officials, academics, and community activists about the inequitable distribution of environmental hazards. One of the leading groups of scholar-activists—the Michigan Group—formed as a result of a national conference focusing on environmental justice issues held at the University of Michigan in January 1990.⁴⁶ The conference participants presented various reports studying the distribution of environmental hazards by race and income.⁴⁷

More importantly, the Michigan coalition presented the overwhelming data compiled at the conference to EPA Administrator William Reilly in a series of meetings and urged the agency to undertake an internal investigation of the distributional effects of its siting.⁴⁸ In response to this call, the EPA established an “Environment and Equity” working group to evaluate data and determine the extent to which environmental exposure and risks affect a particular segment of the population.⁴⁹

The working group released its “Environmental Equity” report in June 1992, including a series of findings and recommendations with respect to environmental justice issues.⁵⁰ Most notably, the report concluded: (1) “that there are clear differences between racial groups in terms of disease and death rates,” and (2) that current data indicates disparities in “exposure to some environmental pollutants by socioeconomic factors and race.”⁵¹ The report, however, found that there was insufficient data to link the two critical findings and stressed that exposure is not synonymous with health effects.⁵² Indeed, data are not collected by race and socio-economic status “[f]or disease[s] that are

45. *Id.*

46. Lazarus, *supra* note 1, at 802-03.

47. *Id.*

48. *Id.* at 803-04.

49. *Id.*

50. *Id.*

51. *Id.* See also ENVIRONMENTAL EQUITY WORKGROUP, U.S. EPA, ENVIRONMENTAL EQUITY: REDUCING RISK FOR ALL COMMUNITIES (1992).

52. Lazarus, *supra* note 1, at 804.

known to have environmental causes.”⁵³ The one caveat is lead—a significantly higher percentage of African-American children are afflicted with lead poisoning.⁵⁴

Some commentators believe that the report was nothing more than political window dressing and therefore fell short of its stated mission. For example, one activist has stated that “[t]here is no acknowledgment of the problem; there is no analysis of what is causing the problem and an inadequate analysis of how to address the problem.”⁵⁵

Another significant study was published by the National Law Journal (NLJ) in September 1992. According to this report, there has been an institutional pattern of neglect by the EPA in its enforcement of environmental law based on race and income.⁵⁶ The NLJ, in an eight-month investigation, studied the connection between race and socio-economic status and the enforcement of environmental law.⁵⁷ The NLJ reviewed every environmental lawsuit concluded in the past seven years and every residential toxic waste site in the twelve-year-old Superfund program (1,777 in total), and concluded that the EPA, in its remediation of hazardous waste sites and its pursuit of polluters, discriminates against minority communities.⁵⁸ Specifically, the NLJ report concluded that: (1) penalties against environmental law violators in minority communities are lower than those imposed for violators in largely white communities; (2) under the Superfund program, abandoned hazardous waste sites in minority communities take twenty percent longer to be placed on the “National Priorities List,” triggering technical and legal action, than in white areas; (3) the EPA chooses

53. *Id.* at 805.

54. *Id.* Lead poisoning is the number one environmental problem affecting children in the United States. According to the Agency for Toxic Substances and Disease Registry, more than three million children—one in six—have levels of lead in their blood high enough to cause significant impairment of their neurological development. Lead poisoning is most prevalent among the least privileged; more than half of low-income, black children are afflicted.

55. Lavelle & Coyle, *supra* note 25, at S12 (quoting the critical comments mounted against the EPA Equity Report by Richard Moore, an environmental justice activist of New Mexico-based Southwest Network).

56. *Id.* at S2.

57. *Id.*

58. *Id.*

“containment,” the less preferred remediation method at hazardous waste dump sites, seven percent more frequently at minority sites, and the preferred permanent treatment twenty-two percent more often at sites in largely white communities; and (4) the racial imbalance often occurs whether the community is wealthy or poor.⁵⁹

Finally, in response to the growing body of evidence documenting the disparate impacts of hazardous waste and pollution on the communities of color and the poor, in September of 1993, the United States Commission on Civil Rights⁶⁰ and its Louisiana Advisory Committee⁶¹ published a fact-finding report reviewing the disproportionate siting of hazardous and industrial facilities in poor, predominantly minority communities in Louisiana, particularly in the region straddling the Mississippi River between Baton Rouge and New Orleans known as “Cancer Alley.”⁶² This was the first time the Commission or a

59. *Id.* at S1.

60. The United States Commission on Civil Rights is an independent, bipartisan, fact-finding agency of the executive branch established under the Civil Rights Act of 1957 to investigate and collect information on allegations of discrimination or denial of equal protection under the laws of the Constitution and the laws and policies of the Federal government because of color, race, religion, sex, age, handicap, or national origin. The Commission may hold fact-finding hearings and issue subpoenas for the production of documents and the attendance of witnesses at such hearings. The Commission generally submits reports of its findings and recommendations to the President and the Congress. The Commission may also refer complaints that it receives to the appropriate government agency for action. The Commission is composed of eight Commissioners, four of whom are appointed by the President and four by the Congress to serve six-year terms.

61. The Commission has a state advisory committee from each state and the District of Columbia to assist it with its fact-finding, investigative, and information dissemination functions. The state advisory committees also produce reports on issues of local and regional concern. Each state advisory committee is composed of citizens who are knowledgeable about local and state civil rights issues. The Louisiana Advisory Committee has 10 members who are nominated by the Commissioners or the regional director to serve two-year terms.

62. This is the name given to the 130 river miles between New Orleans and Baton Rouge by medical researchers who study the area's record number of deaths by cancer. One fifth of the nation's supply of petrochemicals is produced along this industrial corridor, where 136 petrochemical plants and seven refineries are located—an average of almost one every mile. According to a report prepared by the EPA's Office of Pollution Prevention and Toxics in May of 1993 on emissions in the corridor, 90% of the total industrial emissions are released in areas largely populated by minorities. Louisiana ranks first in the nation in the amount of toxic wastes it discharges into the overall environment (air, water, and land), and it has more commercial dumpsites than any other state.

State Advisory Committee investigated discrimination in the administration of environmental policies and practices.⁶³ Starting in April 1990, the Louisiana Advisory Committee began a comprehensive survey of environmental problems that disproportionately affect minority communities in Louisiana, consulting with governmental agencies, environmental groups, industry representatives, and others on these issues.⁶⁴ The Advisory Committee also interviewed approximately fifty persons from divergent perspectives to gather background information and held a two-day fact-finding meeting in the final phase of its investigation, inviting thirty-two persons from government, industry, public interest, health care, social science and other sectors, as well as members of the general public to participate and provide data.⁶⁵ The report concluded that minority communities in the Louisiana industrial corridor are overwhelmingly impacted by hazardous and industrial facilities under the current state and local siting system.⁶⁶ Moreover, the report found that state and local officials failed to establish regulations and safeguards to ameliorate the high concentration of hazardous waste and industrial facilities and the attendant risks in these areas.⁶⁷ The Advisory Committee report recommended that, among other things that:

[t]he state develop comprehensive regulations to balance environmental costs and benefits along with social, economic, and aesthetic values of affected communities;⁶⁸

Local governments ensure that zoning decisions provide sufficient protection for affected communities, and reconsider the process of appointing

63. LOUISIANA ADVISORY COMM. TO THE U.S. COMM'N ON CIVIL RIGHTS, *THE BATTLE FOR ENVIRONMENTAL JUSTICE IN LOUISIANA: GOVERNMENT, INDUSTRY AND THE PEOPLE* (1993) [hereinafter *LOUISIANA ADVISORY COMM. REPORT*].

64. *Id.* at 2.

65. *Id.*

66. *Id.* at 63.

67. *Id.*

68. *Id.* This recommendation stems from *Save Ourselves, Inc. v. Louisiana Env'tl. Control Comm'n*, 452 So. 2d 1152, 1154 (La. 1984), where the Louisiana Supreme Court held that the state Constitution imposes a public trust duty on all state agencies and public officials to protect the environment. The court held that the public trust obligation requires "an agency or official, before granting approval of proposed action affecting the environment, to determine that adverse environmental impacts have been minimized or avoided as much as possible consistently with the public welfare." *Id.* at 1157.

citizens to zoning boards and commissions so that racial minorities are represented in the decision-making process; and⁶⁹

The state Department of Health establish a database to study the distribution of pollution and exposure and the potential health effects on the basis of race, ethnicity, and income.⁷⁰

The Advisory Committee submitted the report to the Commission, urging the Commission to advise the EPA and other federal agencies to comprehensively review Louisiana's siting regime and general policies and practices, particularly actions affecting low-income and minority communities in the state. Moreover, the report requested that the EPA certify that the state's policies are in compliance with Title VI of the Civil Rights Act of 1964 and other federal civil rights laws.⁷¹

Not all members of the state Advisory committee concurred with the report's conclusions. In a dissenting statement, one member noted that the primary purpose of the investigation had been to determine whether environmental decisions, including siting by the state and local government in Louisiana, are racially motivated or based on intentional racial discrimination.⁷² The dissenter criticized the investigative process, asserting that when the committee found no evidence of purposeful racial discrimination in the environmental context, the investigation and inquiry should have been concluded.⁷³

These studies are by no means the end of the road. Indeed, the study of environmental justice issues seems to be entering a new

69. LOUISIANA ADVISORY COMM. REPORT, *supra* note 63, at 64.

70. *Id.* at 65.

71. *Id.* at 67.

72. *Id.* at 69, App. A, Dissent to the Environmental Equity Report of the Louisiana Advisory Committee. By a nine-to-one vote, the Louisiana Advisory Committee agreed to submit the report to the Commission for follow-up actions.

73. *Id.* The United States Commission on Civil Rights temporarily suspended further distribution of the report until it investigates objections raised by an industry lawyer, alleging that, among other things, several witnesses, who supplied testimony and written materials at the fact-finding hearing, "manufactured" evidence for use in ongoing litigation, and that there was an insufficient number of witnesses representing industry at the fact-finding hearing. See, Letter from William Treeby to Bobby Doctor, "The Battle for Environmental Justice in Louisiana . . . Government, Industry, and the People," (Oct. 21, 1993). On March 4, 1994, the commission voted to resume distribution of the report, finding no evidence of impropriety or violations of procedure.

phase, with researchers identifying and seeking to correct gaps in the data of previous studies.⁷⁴ Other scholars are seeking to clarify the content of “fairness” in the distribution of environmental costs and benefits, as a step toward proposing workable remedies to the inequities that have been identified.⁷⁵

One particularly significant study was released just as this article was going to press. This study, performed by a group of researchers at the University of Massachusetts at Amherst, looked at the demographics of the census tracts containing or abutting a large national sample of hazardous waste treatment, storage, and disposal facilities.⁷⁶ This study was a significant change from the methodology used in the UCC study, which looked at zip codes—a larger unit of analysis—rather than census tracts. The Massachusetts researchers found that on a national level, the census tracts actually containing TSD facilities were not more likely to contain high numbers of minority residents.⁷⁷ The researchers also found, however, that those census tracts included in a 2.5 mile radius around the TSD facilities *did* have significantly higher minority populations.⁷⁸ In addition, the study found that hazardous waste disposal facilities in the southeastern states were in fact more likely to have disproportionately high minority populations in the areas surrounding them.⁷⁹

We note these studies here because the attempt to define the content of fairness in facility siting is an important one for the practicing

74. See Been, *supra* note 2. Professor Been reviews and supplements the data from two previous studies, including the GAO STUDY, *supra* note 25, to determine whether the LULU's in question were initially sited in poor and minority areas, or whether poor and minority people “came to the LULU” as a result of market dynamics such as falling land values. She concludes that the data indicate that siting practices bear some responsibility for disproportionate siting, but that more study is needed. *Id.* at 41-42.

75. See Vicki Been, *What's Fairness Got to Do With It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001 (1993); Greenberg, *supra* note 1.

76. Douglas L. Anderton et al., *Hazardous Waste Facilities: Environmental Equity Issues in Metropolitan Areas*, 18 EVALUATION REV. 123 (1994).

77. *Id.* at 134-35.

78. *Id.* at 135.

79. *Id.* This study and Professor Been's work demonstrate the difficulties of analyzing disparate impacts from facility siting. See also *infra* note 102.

advocate. Indeed, the concept of fairness will underpin many of the arguments raised in opposing polluting or hazardous facilities, regardless of the statutory or regulatory scheme under which those arguments are made.

In a real sense, however, the practitioner's job differs from that of the theoretician. The advocate is faced with current circumstance—the dump about to be sited, the community without adequate defenses. There is little or no time to debate the broader implications of the arguments that are advanced or to shepherd policy changes through the political process. There is some ethical obligation to ignore those broader implications, if that is necessary to advance a client's interests in a particular case.⁸⁰ So, while the work of theoreticians on environmental fairness in siting is in general important to us, we must also attempt to achieve workable, short-term solutions within the ambit of existing law.

IV. ENVIRONMENTAL LEGISLATION FOR HAZARDOUS WASTE SITING

Based on the previous sections of this article, it is clear that there are special considerations, and special negative impacts, associated with hazardous waste disposal facilities. There is also significant evidence that those negative impacts are falling largely on poor communities and communities of color. How do the current statutes regulating hazardous waste facility siting deal with this situation? As we shall see, these statutes simply fail to address the disparate impacts of siting. For that reason, and because our present regulations have created a system where citizens are required, as a practical matter, to represent one side of the argument in a highly technical and expensive adversarial process, current law helps to keep existing siting patterns in place. Congress has enacted two major laws relevant to the siting of hazardous waste facilities and standards for the treatment, storage, and disposal of

80. See generally MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 (1980) ("The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law."); Randolph E. Paul, *The Lawyer as a Tax Advisor*, 25 ROCKY MTN. L. REV. 412, 418 (1953) ("The job entrusted to [the lawyer] by his client is to use all his learning and ability to protect his client's rights, not to help in the process of promoting a better . . . system.").

hazardous waste—the Resource Conservation and Recovery Act of 1976 (RCRA)⁸¹ and the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA).⁸²

RCRA creates a “cradle-to-grave” management approach to regulating the production, storage, transportation, treatment, and disposal of hazardous waste.⁸³ Under RCRA, states may elect to administer qualified hazardous waste programs or be subject to federal preemption. Under a delegated program, siting authority is consigned to the states. The state hazardous waste programs must be in compliance with EPA regulations under RCRA to obtain federal approval.⁸⁴ Once the EPA ratifies a state program, the state assumes the primary responsibility of enforcement, though the EPA maintains its enforcement authority under RCRA.⁸⁵

The EPA has enunciated criteria essential to the development of a qualified state program: (1) the designation and listing of hazardous wastes controlled under the program;⁸⁶ (2) the implementation of a tracking or “manifest” system to monitor wastes transported from their point of origin to an off-site management facility;⁸⁷ and (3) the regulation of existing and new off-site and on-site facilities through a permit program with compliance and enforcement mechanisms.⁸⁸

With respect to the location of hazardous waste facilities, RCRA bans the disposal of hazardous waste in certain land formations and land disposal of some categories of liquid waste.⁸⁹ In addition, RCRA defines minimum technological standards for any waste sites. Significantly, RCRA explicitly provides little other positive guidance in terms of siting standards.⁹⁰ The EPA has, however, promulgated one impor-

81. 42 U.S.C. §§ 6901-6992k (1988 & Supp. IV 1992).

82. 42 U.S.C. §§ 9601-9675 (1988 & Supp. IV 1992).

83. Duncan, *supra* note 1, at 339.

84. *Id.*

85. *See* 40 C.F.R. § 272 (1993).

86. 40 C.F.R. § 271.9 (1993).

87. 40 C.F.R. § 271.10 (1993).

88. 40 C.F.R. §§ 271.14 to 271.15 (1993).

89. Duncan, *supra* note 1, at 339 n.79 (citing 42 U.S.C. §§ 6921-6939 (1988 & Supp. IV 1992)).

90. *Id.*

tant *negative* siting mandate under RCRA: states may not allow a blanket local veto of facility siting.⁹¹

RCRA also directs the EPA and the states to promulgate rules that encourage public participation (i.e., mandatory public hearings and comments) and provide access to information (adequate public notice and full disclosure of risks).⁹² The law again gives little guidance on what level of public input is “adequate.”

CERCLA also plays an important role, albeit indirectly, in hazardous waste facility siting. Although CERCLA’s primary purpose is to fund the investigation and remediation of hazardous waste sites, it also requires as a condition of receiving federal superfund money that each state prepare a semiannual Capacity Assurance Plan (CAP). This plan must assure that the state has adequate capacity for dealing with the hazardous waste generated within its borders for the next twenty years.⁹³ The state can meet the capacity assurance requirements in several ways. For example, it can agree to develop new disposal capacity within the state, or it can make agreements with private parties.⁹⁴

The Capacity Assurance Planning process obviously has the effect of encouraging the development of hazardous waste disposal capacity. This is not surprising, since one of the purposes of the CAP process seems to be to make sure that the so-called “NIMBY” syndrome does not completely derail the development of new hazardous waste facilities.⁹⁵

91. See 40 C.F.R. § 272 (1993). Also noteworthy is *Geo-Tech Reclamation Indus., Inc. v. Hamrick*, 886 F.2d 662, 666-67 (4th Cir. 1989) (invalidating a provision of the West Virginia Solid Waste Management Act that ostensibly allowed local veto of siting proposals based on public sentiment). At issue in *Geo-Tech* was a statute authorizing the Director of the West Virginia Department of Natural Resources to deny a permit for the operation of a landfill if granting it would be significantly adverse to public sentiment. The court held the provision unconstitutional in the absence of any standard by which the Director was to evaluate adverse public sentiment. *Id.*

92. 40 C.F.R. § 271.1(c) (1993).

93. 42 U.S.C. § 9604(c)(9) (1988).

94. *Id.*

95. See U.S. EPA, OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE DIRECTIVE 90100a (October 16, 1989); *Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d 781, 784 (4th Cir. 1991).

In recent years, however, something has happened that the architects of the Capacity Assurance Planning process probably did not anticipate. Demand for hazardous waste treatment facilities has largely dried up. Industries have made greater than anticipated strides in hazardous waste reduction, and the volume of hazardous waste flowing to existing facilities has dropped.⁹⁶ One large hazardous waste handler, WMX Technologies, recently had the investment quality of its debt instruments put under review by Standard and Poors.⁹⁷

In addition, the Clinton Administration has reversed Reagan and Bush policies on the incineration of hazardous waste. In May of 1993, EPA Administrator Carol Browner announced the Administration's new "combustion policy."⁹⁸ This was a combination of tougher standards for existing incinerators and cement kilns burning hazardous waste, and what amounted to a moratorium on the permitting of new hazardous waste burners. The affects of these changes were pronounced. Six major incinerator projects were canceled within six months of the announcement of the new policy.⁹⁹ To our knowledge, only one incinerator project is presently seeking permits within the United States. Landfills generally seem to be headed for the same fate. Very few hazardous waste landfills seem to be presently seeking permits.

The upshot of these changes is that one of the premises of the present system of hazardous waste facility siting—that NIMBYism must be quashed in order to site desperately needed facilities—is open to serious question. It also means that for some time in the future, facility siting may well be driven by factors other than unmet need for disposal capacity. New hazardous waste facilities will presumably draw hazardous waste only by capturing market share from existing competitors. As explored in the final section, this change has implications for the advocate for communities faced with dumps.

96. See *S&P Places Debt of Waste Management Firms Under Review*, WALL ST. J., Sept. 7, 1993, at A5.

97. *Id.*

98. See EPA INCINERATOR STRATEGY, *supra* note 11.

99. Paul Kemezis, *Consolidation Continues in Hazwaste Incineration Industry*, ENV'T WEEK, Oct. 7, 1993, at 3.

V. WHERE THE CURRENT SYSTEM LEAVES THE CITIZEN

Conspicuously absent from the federal RCRA scheme discussed above, and consequently absent from virtually all state RCRA programs, is a means for having disparate impacts on the poor and people of color taken into account in the hazardous waste facility siting process. The distribution of environmental risks among groups of people is simply not a part of the RCRA scheme at the national level, or in most states.¹⁰⁰ Neither are state regulators, in our experience, much interested in making distribution of risks a part of that siting system.

As several commentators have pointed out, this is not especially surprising. RCRA and related environmental laws were supposed to be colorblind. Accordingly, when these statutes operate to place hazardous facilities in communities of color without any analysis of distributional impacts, they are only performing as they were designed to perform.¹⁰¹

A further natural consequence of this system is that it can be manipulated most readily by those with regulatory sophistication and access to lawyers and consultants, which will generally be those with some financial interest in siting a facility. If the siting decision is essentially a function of technical factors such as geological suitability and facility design, then the entire process inevitably becomes simply a technical dialogue between regulatory agency staff and the applicant. Any problems between the state regulators and the applicant are worked out prior to the time a permit or draft permit is issued for a facility. Citizens are often left, with whatever resources they can muster, to make the argument that the facility should not be sited.

The opportunities given citizens to make these arguments are often inadequate, particularly in the context of a technical permitting process

100. We note here that we are not concerned, at least in this article, with whether the RCRA siting policy is a significant factor, the significant factor, or just some kind of factor in producing the disparate impacts on people of color shown by the studies discussed earlier. We are primarily concerned that the system will perpetuate these disparate impacts by simply ignoring them.

101. See Duncan, *supra* note 1, at 354; Cole, *Remedies*, *supra* note 1, at 1995.

like that for a hazardous waste facility. Comment periods often are triggered only when a permit or a draft permit has been drafted and proposed, and may be a short forty-five days.¹⁰² This is precious little time for ordinary citizens to evaluate and make comments on what is generally a multi-volume, extremely technical document, and is not at all in keeping with the sort of process that is appropriate for so momentous and irreversible a decision as siting a hazardous waste facility.¹⁰³

Again, this is hardly a surprising result. The statutes themselves were configured in a way intended to surmount the "NIMBY" syndrome. What is perhaps most surprising is that so few proposals to site hazardous waste facilities have been successful. Nonetheless, this system is clearly not one that is fair to any community, particularly poor communities and communities of color, and it needs to change. In the next section, we discuss some ways this could happen.

VI. PROPOSED LEGISLATION AND A FEW MODEST PROPOSALS

In the preceding sections, we have seen that hazardous waste disposal facilities can have significant negative impacts on their host communities, and that at present, at least in some parts of the country, those negative impacts are being disproportionately borne by people of color. We have seen that at the federal level and in most states, the current regulatory regime for RCRA facilities effectively takes only one limited category of risks into account, and indeed is more-or-less geared towards overcoming community resistance to RCRA facilities. If we are not to perpetuate and even exacerbate the siting disparities in this area, the system has got to change.

Here are some suggestions. First, we look at possible broad changes in the approach taken to facility siting. These changes could benefit all communities, but they are particularly aimed at benefitting commu-

102. *E.g.*, S.C. CODE REGS. § 61-79.124.10(b)(1) (1989) (stating that the public is entitled to 45 days notice of draft permit).

103. *See* Collin, *supra* note 1, at 513 ("Full participation requires that communities have adequate notice, accurate information and an understanding of the communal and individual risks involved.").

nities of color. Second, we examine pending legislation and how it could be helpful. Finally, a few ruminations on where advocates for communities facing dumps can look until changes are made.

Overall, any hazardous waste facility siting system should make the need for the facility a touchstone in the permitting process. In other words, alternatives to the facility must be considered. These alternatives must include reductions in hazardous waste production per se (i.e., whether the facility must be in anyone's back yard). If there is a feasible alternative, there should be no facility.¹⁰⁴

Second, if a facility is necessary, a realistic assessment of who benefits and who loses from its construction must be made. This is one means—perhaps a crude one, but still a means¹⁰⁵—of redressing the imbalance in political power that is at the root of hazardous waste facility siting problems. Anyone who works with grassroots environmental problems knows that the old cliché “knowledge is power” has a lot of truth in it. Our present system simply does not do enough to insure that ordinary citizens have adequate knowledge about the potential effects of a hazardous waste facility on their community.

Among the information that should be available to citizens *through the permitting process* is information about the demographics of the area to be affected by the facility and the area to be served by the facility. If the citizens in the relevant area of impact¹⁰⁶ are already burdened with environmental risk—whether health risks, social risks or economic risks, and whether from a concentration of hazardous waste

104. Of course, the question of the “feasibility” of alternatives raises broad questions of economics and policy. For example, at what point does waste minimization become so expensive that it crosses the line into infeasibility? We do not pretend to address these difficult questions.

105. Some commentators have stated that informational requirements like these have not done much to make governmental decision-making better or more responsive. Been, *supra* note 73, at 1063-68 n.351 (citing several dissatisfied commentators). In some cases this is true, but in others the authors have found impact statements and other informational requirements to be extremely important tools for citizens, both for influencing agency action and for organizing the community. Consequently, we believe that informational requirements like these must be included in any fair siting process.

106. We do not, in this article, suggest the appropriate area of impact to be considered. This is a subject that has engendered some controversy, and may well vary from case to case.

dumps and similar facilities, or from being singled out to host the only hazardous waste dump or dumps for a particular area—then that factor should be part of the information taken into account in permitting decisions.

A particularly important part of this expanded review of costs and benefits will include a full and fair evaluation of the psychological and other social impacts of a facility. Looking at social impacts as part of environmental decision-making is not a novel idea, and some statutes already require some consideration of the social and economic effects of government action. Good examples are state statutes requiring that state Environmental Impact Statements include consideration of social impacts.¹⁰⁷ Although these requirements may sometimes be honored more in the breach than the observance, it is significant that they now exist and are an integral part of the environmental protection schemes of many states. Of course, several state hazardous waste facility siting statutes already have something like this requirement. For example, Kentucky explicitly requires that “psychic costs” be considered in siting hazardous waste facilities.¹⁰⁸

On the federal level, the Outer Continental Shelf Lands Act¹⁰⁹ also explicitly recognizes the need for information on the social impacts of resource-related actions. The Outer Continental Shelf Lands Act Amendments of 1978 contain a requirement that the Secretary of the Interior collect baseline data and perform studies on, among other things, the social impacts of OCS development.¹¹⁰ Again, the federal government may have done at best a lackadaisical job of living up to this commitment,¹¹¹ but the idea that extensive government interven-

107. *See, e.g.*, HAW. REV. STAT. § 43-3 (1991); MD. CODE ANN., NAT. RES. § 1-301(b) (1989); *cf.* MISS. CODE ANN. § 17-18-15(d) (Supp. 1993) (requiring consideration of social factors in choosing location for state hazardous waste facility); *Save Ourselves, Inc. v. Louisiana Env'tl. Control Comm'n*, 452 So. 2d 1152, 1157 (La. 1984) (finding state constitutional requirement of balancing of environmental costs and benefits).

108. *See* KY. REV. STAT. ANN. § 224.46-830(2)(a) (Michie 1991); *see also supra* note 107.

109. 43 U.S.C. §§ 1331-1356 (1988 & Supp. IV 1992).

110. *See* 43 U.S.C. §§ 1346(a), (b) (1988).

111. As recently as 1991, the Minerals Management Service of the Department of the Interior had done virtually no work on the sociological impacts of OCS development in the Gulf of Mexico, the area that has seen over 90% of United States OCS oil and gas activi-

tion in natural resources development or related areas carries with it the responsibility to review social effects is explicit. Other federal statutes also prescribe—or at least permit—consideration of local economic and social impacts in resource-related decision-making.¹¹²

One criticism we can imagine being leveled at the idea of taking social impacts into account is the notion that social impacts are largely subjective, and consequently, unworthy of being considered in the regulatory process. Society should not let the sensitive and the goofy demand that their foibles be taken into account in regulating this or any other form of commerce, the argument would run.¹¹³

We would suggest that this argument—defined above in rather exaggerated terms—fails in both ethical and utilitarian term. First, adequate hazardous waste disposal capacity has been clearly identified as a social good that is to be encouraged. When the state proposes to place burdens on the few for the good of the many, we believe a heightened duty exists to insure that those burdens are recognized, avoided where possible, and distributed fairly and mitigated when they cannot be avoided.¹¹⁴

Making social effects a part of the siting process is also pragmatic. There is very little controversy that these effects are going to manifest themselves. There is likewise little possibility that citizens can be readily “educated” to accept an unwanted hazardous waste facility. In these circumstances, it hardly makes sense to simply write off social effects as unworthy of consideration.

ty. See ROBERT GRAMLING & WILLIAM FREUDENBERG, OIL IN TROUBLED WATERS: PERCEPTIONS, POLITICS AND THE BATTLE OVER OFFSHORE DRILLING 114-16 (1994).

112. See 16 U.S.C. § 1533(b)(2) (1988); 50 C.F.R. § 424.19 (1992) (stating the Endangered Species Act requirement that “probable economic and other relevant impacts” be considered in designating critical habitat for endangered species); 36 C.F.R. § 219.5 (1993) (requiring that interdisciplinary teams charged with preparing national forest management plans “shall integrate knowledge of the physical, biological, economic and social sciences”).

113. The Department of Energy has taken this stance with respect to taking into account social impacts from the siting of radioactive waste depositories. See General Guidelines for the Recommendation of Sites for the Nuclear Waste Repositories, 49 Fed. Reg. 47,714, 47,747 (1984) (adopting 10 C.F.R. § 960.5.2-6 (1993)).

114. See generally R. George Wright, *State Action and State Responsibility*, 23 *SUFFOLK U. L. REV.* 685 (1989).

Indeed, this is particularly so when the hazardous waste facility is proposed for an area where community structures, citizens, and families are already under some stress as a result of poverty, racial status, the presence of other toxics-emitting facilities, or other factors. Adding to these burdens without considering the consequences is not, from a practical standpoint, sound policy.

What needs to happen if, after a realistic assessment of need and full consideration of all impacts, there is a determination that additional capacity is warranted? Fundamentally, the approach of overriding local authority should be abandoned altogether, and communities should be allowed a local veto of a proposed facility.¹¹⁵

They should also be allowed plenty of time within which to exercise this veto. Presently, many states allow little more than thirty days notice that a proposed permit is to be issued. Accordingly, citizens with jobs and families have little time to digest, critique, and comment on such a highly technical document in a matter which may well change the future of their community.

Adequate technical assistance to communities in assessing the information garnered through the permitting process is also an absolute necessity because the hazardous waste facility siting process is an adversarial process; fairness dictates that citizens should have the tools to adequately defend their interests in that process. This means hiring economists, engineers, and lawyers with expertise in hazardous waste facilities and the permitting system.

At this point, if the community says yes to the facility, compensation for negative impacts would be appropriate. There are several permutations to such compensation, and we will not discuss them here. Other commentators have thought more coherently about these issues than we have, and their ideas should be explored.¹¹⁶

115. There are a number of ways that this could be done, but the safest and surest would probably be a referendum, with adequate time for the electorate to become familiar with the issue.

116. See, e.g., Michael B. Gerrard, *Fear and Loathing in the Siting of Hazardous and Radioactive Waste Facilities: A Comprehensive Approach to a Misperceived Crisis* (1993) (unpublished manuscript, on file with authors).

None of the measures outlined above, procedural and informational, is a panacea. None of them can immediately cure all of the problems associated with siting hazardous waste disposal facilities or the disparate impacts that have arisen out of the existing system. Taken together, however, they could be a start.

Taken together, they will also make it much more difficult to site hazardous waste facilities. This is a good point, then, at which to reconsider this fair question: What is it that makes hazardous waste so special? Any industrial facility can potentially wreak some havoc on a community, and no doubt the humble corner grocery has some effect on the surrounding neighborhood. Why foist all the special regulations on the hazardous waste dump?

We would submit that the preceding sections of this article demonstrate that very good reasons exist to pick on the hazardous waste dump. Aside from governmental interventions, RCRA facilities indeed have a special character that deserves special treatment. Other industrial facilities do not generally have the social and economic effects associated with hazardous waste facilities. People in traditionally disempowered, poor, rural communities deserve protection from these negative effects and deserve the opportunity to decide for themselves, on the basis of full information, whether they want a hazardous waste dump in their community.

The other fair question that these changes would raise is this: What happens if nobody sites any hazardous waste facilities at all? Won't this lead to capacity shortages, fly dumping, and all the other evils the CAP system was intended to surmount? Frankly, given a system incorporating local control and compensation, we doubt that this would happen. There probably are volunteer communities out there which, given local control and adequate compensation, would accept hazardous waste facilities. Given the current capacity glut in the incineration and landfill markets, this is certainly a subject we have time to study more closely.

Several bills currently pending before Congress address discriminatory siting of hazardous waste facilities. These bills offer some additional protection for citizens, especially those in communities of color. At least in their present form, however, they do not take into account

the full effects of a hazardous waste facility on the surrounding community, nor do they offer adequate opportunity for citizen enforcement. In addition, some aspects of these bills need to be examined closely to insure that they do not harm the people they were intended to help.

A. *The Environmental Justice Act*

The Environmental Justice Act¹¹⁷ is perhaps the best known legislative initiative dealing with environmental justice issues, in part because of the overwhelming support it has garnered from prominent environmental justice leaders such as Dr. Benjamin Chavis and the bill's original sponsors, Representative John Lewis (D-Ga.) and then Senator, now Vice President, Al Gore, when it was first introduced in 1992. The cornerstones of the legislation are the identification of environmental high impact areas (EHIAs), a health impact study in the EHIAs to be conducted by the United States Department of Health and Human Services, and Technical Assistance Grants for EHIAs.

The bill attempts to address some common hurdles that minority and poor communities face when they are dealing with the siting of a RCRA or other polluting facility—lack of information on the cumulative and synergistic effects of pollution, a shortage of resources to protect community interests, and little or no legal remedies to adequately guard the local concerns. Moreover, the underlying goal of H.R. 2105 is to provide additional opportunities for citizen participation in confronting the disparate impacts of pollution. Consequently, H.R. 2105 seeks to collect baseline data on environmental health effects in areas of high impact and to establish remedial programs and technical assistance grants for communities in distress. This legislation would be a good step toward closing the information and resource gaps that have stifled community efforts to address siting issues.

117. Rep. John Lewis (D-Ga.) and Sen. Albert Gore (D-Tenn.) initially introduced the Environmental Justice Act in 1992. See H.R. 5326 & S. 2806, 102d Cong., 2d Sess. (1992). Rep. John Lewis reintroduced the Environmental Justice Act of 1993, and Sen. Max Baucus (D-Mt.) introduced companion legislation in the Senate. See H.R. 2105 & S. 1161, 103d Cong., 1st Sess. (1993).

Nonetheless, the bill overlooks a category of rights that are vital to achieving its intent—legal remedies. Without a citizen enforcement provision, communities cannot compel the EPA, public health, and other agencies to fulfill their duties within the ambitious timeframe of the bill. A citizen suit provision would provide a safety net for citizens to be triggered only when the agencies fail to comply with the law, thereby endangering the public health and environment of impacted communities.

B. The Environmental Equal Rights Act

The Environmental Equal Rights Act¹¹⁸ is also a significant piece of legislation that would provide citizens with an administrative forum for objecting to the discriminatory siting of hazardous waste facilities. The legislation would establish a petition process before an administrative body allowing any citizen to prevent the issuance of an operating permit if the proposed facility would be located in an environmentally-disadvantaged community and could adversely affect the human health or environmental quality of that community.¹¹⁹ An environmentally-disadvantaged community is defined as an area within two miles of the proposed facility that: (1) is populated by predominantly low-income and/or minority individuals;¹²⁰ and (2) is the existing or former site of an RCRA facility, a municipal solid waste facility, a superfund site, or any industrial manufacturing complex with major toxic releases.¹²¹ The petition denying the issuance of the permit must be granted unless the project proponent can show that no alternative locale is available within the state that would pose fewer risks to human health and the environment than the proposed facility, *and* the proposed facility will not release contaminants in amounts that

118. H.R. 1924, 103d Cong., 1st Sess. (1993) (Rep. Cardiss Collins (D-III.) introduced this bill on April 29, 1993, to amend the Solid Waste Disposal Act (42 U.S.C. §§ 6901-6992 (1988)).

119. *Id.* at sec. 3(a), §§ 7014 (a), (b)(1)-(2).

120. *Id.* at sec. 3(a), § 7014 (d)(1)(A)(i)-(ii).

121. *Id.* at sec. 3(a), § 7014 (d)(1)(B)(i)-(v).

are likely to increase the cumulative impact of contaminants on the affected community.¹²²

H.R. 1924 would create crucial procedural rights for citizens addressing the siting of RCRA facilities in poor and minority communities that already have multiple sources of pollution. H.R. 1924, however, does not protect communities that are slated for their first RCRA facility or major expansions or modifications of existing facilities, both of which may have equally damaging effects on the communities least capable of dealing with such impacts.

Although the bill creates an equitable forum and burden-shifting process for examining potential adverse health and environmental impacts of siting on a host community, H.R. 1924 should be expanded to encompass socio-economic impacts and cumulative risks on the host community. As outlined above, these are among the significant impacts of hazardous facilities left unaddressed by present law.

H.R. 1924 also arbitrarily restricts the definition of an environmentally-disadvantaged community to encompass only the area within two miles of a proposed facility. In many instances, this definition will not encompass threatened poor and minority communities. Waste facilities have the potential to seriously impact communities beyond the two-mile radius, and more factors should be examined to determine the appropriate zone of impact for each potential risk (e.g., health and safety risks, social impacts, and economic consequences) associated with a hazardous waste or other facility.

Finally, the right to object to the siting of a hazardous waste facility is limited to citizens residing in the state where the new facility would be sited. This limitation fails to consider the severe impact of interstate pollution and is inconsistent with other environmental laws, where citizen suit provisions allow any citizens to commence litigation.¹²³ It also fails to take into account what we call the "state line

122. *Id.* at sec. 3(a), § 7014 (b)(3)(A)-(B).

123. Federal environmental citizen suit provisions include: Section 7002 of the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6972 (1988); Section 310 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9659 (1988).

syndrome,” in which waste disposal facilities are frequently proposed for political subdivisions bordering another state. All citizens within the area of impact should be allowed the right to object.

One aspect of the Environmental Justice Act needs careful thought. As noted earlier, hazardous waste facilities have the potential to harm adjacent property values.¹²⁴ Designating an area as an “Environmental High Impact Area” could have the same effect. This is a subject that should be fully considered before any such legislation is passed.

In sum, the Environmental Equal Rights Act extends important procedural rights, previously unavailable to communities, and provides a workable framework. Nonetheless, H.R. 1924 would benefit from these key modifications in order for this legislation to effectively fulfill its goal of providing citizens with additional protection against discriminatory decision-making.

VII. WORKING WITH THE SYSTEM NOW

Of course, the grassroots advocate cannot wait for an overhaul of the existing system. Despite the glut of capacity in the market, some dump projects continue to lurch forward, driven by market distortions of one kind or another. Here are a few practical suggestions for dealing with these projects.

First and most obviously, through grassroots political activism.¹²⁵ Although state environmental agencies have typically been insensitive to the problems faced by people of color and the poor, they can and do respond to pressure from elected representatives and the public. Some state laws permit consideration of some of the impacts cited above.¹²⁶ Even if your state law does not, bringing these impacts to the public’s attention is one of the most effective tools for the community.

124. See *supra* note 12 and accompanying text.

125. We generally agree with Luke Cole’s idea that the usefulness of the law and lawyers in this context is fairly limited, and that the only way these fights really get won is through community empowerment. See Cole, *Remedies*, *supra* note 1.

126. See *supra* note 105.

A second means of working within the present system that has some potential to be useful, at least in cases involving communities of color, is invoking EPA's oversight powers. Title VI of the 1964 Civil Rights Act forbids discrimination in the administration of programs that receive federal funding.¹²⁷ The EPA's regulations implementing Title VI explicitly set forth a discriminatory *effect* rather than a discriminatory *intent* standard.¹²⁸ This obviously allows the grassroots advocate to deal with actual effects rather than motivations, which is a significant improvement over other existing civil rights causes of action.¹²⁹ In addition, the case law construing Title VI holds that if a disparate impact is shown, the defendant must show that a legitimate reason exists to justify the discriminatory impact.¹³⁰

Title VI is extremely important in the RCRA context because virtually all delegated state RCRA programs receive a substantial amount of federal funding under Section 3011 of RCRA. While the EPA has in the past shown little willingness to use its Title VI oversight responsibilities, it has recently announced that it will investigate the possibility of Title VI violations in the delegated RCRA programs of Mississippi and Louisiana.¹³¹ Such investigations—if conducted vigorously and in good faith by EPA—represent an important new avenue for citizen activists and grassroots advocates.

127. 42 U.S.C. § 2000d (1988).

128. The EPA regulations implementing Title VI state:

A recipient 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 defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, national origin, or sex.

40 C.F.R. § 7.35(b) (1992) (emphasis added).

129. Most other civil rights claims, for example under the Equal Protection Clause of the Constitution, require some showing of discriminatory intent. This has been identified as one of the reasons why claims of discriminatory siting based on such causes of action have consistently failed in the past. See Duncan, *supra* note 1, at 341-54 (discussing cases dealing with Equal Protection Clause and Constitutional arguments).

130. *E.g.*, NAACP v. Medical Ctr., Inc., 657 F.2d 1322, 1331-37 (3d Cir. 1981).

131. John H. Cushman Jr., *U.S. to Weigh Black's Complaints About Pollution*, N.Y. TIMES, Nov. 19, 1993, at A16. The authors are representing citizens of both communities in these investigations.

Finally, we would suggest that the remarkable changes we have seen in the hazardous waste disposal market indicates that grassroots advocates may, for the next several years, have a chance to insulate their states from new incinerators and dumps. It may well be that the dominant reason for the location of hazardous waste facilities in the next few years will be state hazardous waste disposal taxes. If the siting of new facilities in a state is to be determined by marginal cost of disposal, advocates should be looking hard at convincing state legislatures to keep disposal taxes at a level comparable to that of other states. A number of recent cases, including one from the United States Supreme Court, have struck down state waste disposal taxes that discriminate against out-of-state waste as violative of the Commerce Clause.¹³² The field has been left open, however, for even-handed disposal taxes reasonably related to state goals. Advocates for communities vulnerable to hazardous waste facilities could use this flexibility on behalf of their clients by making sure that state hazardous waste taxes are at least up to regional norms.

VIII. CONCLUSION

The system of hazardous waste facility siting that has grown up under our current statutes has not been one that is good for any community. In particular, this system does little to take into account the real impacts on poor communities and communities of color. This needs to change, particularly in light of the growing evidence that hazardous waste facilities have special impacts.

Over the long haul, the changes needed are systemic. We believe that the change in the broad directions indicated above is clearly justified, and indeed is only common sense. The current state of the hazardous waste market may give us all some unexpected leisure to think about how these and other changes can be properly effected. It will be up to us as advocates to make sure that it does.

132. See *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 2009 (1992); Richard J. Roddery & Glenn C. Secher, *Recent Developments with RCRA Subtitle D and Commerce Clause Cases After the Hunt and Fort Gratiot Decisions*, 25 URB. LAW. 797 (1993).

PART TWO: ALSEN—FROM RURAL TO RUIN AN EXAMPLE OF ENVIRONMENTAL RACISM

I. INTRODUCTION

The small community of Alsen provides an excellent example of how environmental racism can affect an area. However, before I discuss Alsen and its many problems, I feel it is important to first, briefly explain what environmental racism means to me, and second, distinguish environmental racism from environmental injustice. Environmental racism is a subtle form of racism that has not so subtle effects. It often has historical roots, where the initial problem was created many years ago by society's racism, with the practices then becoming entrenched in the system or institutionalized. In contrast, environmental injustice is broader than environmental racism because it includes Whites, as well as People of Color. In environmental injustice, socioeconomic class is the over-riding issue. Just as with environmental racism, it may have historical roots, and the practices may also become entrenched in the system. Political power, or the lack thereof, is the common thread interwoven between both concepts.

II. A BRIEF HISTORY OF ALSEN: ITS PEOPLE AND ITS LAND

Alsen is a very old community. Before the Civil War, Mount Pleasant plantation sprawled along the river just north of what is now Alsen. There was also a riverboat landing on the Profit Island Chute, called Springfield Landing, and a road (Springfield Road), which led through the swamp and up the bluff to what is now U.S. 61 (Scenic Highway). The original cemetery for Alsen was near the old Springfield Landing.

Following the Civil War, newly-freed slaves from the plantation and other near-by areas settled in Alsen. They originally settled on both sides of what is now Highway 61, but as time progressed, most moved east of the highway where they formed a tight little community

with good, old-fashioned family values. One can still find the remains of old homesites back in the swamp. According to Walter Wright, a long time resident of the community who used to live west of Scenic Highway, when the first chemical company moved in during the 1950s, “they ran us out of the swamp.”

The people of Alsen were very close to the land. They grew vegetables and fruits in their gardens and hunted and fished in the nearby bountiful Devil’s Swamp. Devil’s Swamp was once a very productive ecosystem with great biodiversity. Its waters produced a wide variety of fish and shell fish—from the bottom feeders (catfish and crawfish) to the pelagic varieties (bass). Wild game was plentiful, including ducks, geese, wild turkeys, deer, squirrels, ‘coons, ‘possums, alligators, turtles, doves, muskrats, and others. Many varieties of water fowl nested in the swamp, such as egrets, herons, hawks, eagles. In addition, song bird species were plentiful at all seasons. A neighbor of mine, Brother Pate, who has hunted and fished the swamp for years, tells of seeing various waterfowl, “with their little babies lined up on the tree limbs. You would see them as you paddled by in your boat.” Predator species were also present including bob cats, foxes, martins, black bears, and Florida Panthers (the latter two species were spotted in the swamp as late as the mid-1970s). Its forests contained stately old cypress trees, oaks, gums, magnolias, dogwoods, and tupelo and were filled with perennials such as muscadine and blackberries. Wildflowers such as trumpet vine, honeysuckle, trillium, and butterweeds were abundant.

The bountifulness of the swamp spilled over into the community. In the spring of the year, children would line the deep ditches on either side of the main road through Alsen, armed with nothing more than a length of string and a piece of old meat for catching crawfish. These children could take home dinner for a whole family. Another long-time resident, Abram Sanders, talks of the year the crawfish were so plentiful they were all over the place. “People filled tin tubs with crawfish. All you had to do was scoop them up in your own back yard.” According to Brother Sanders, in another year in which a lot of rain fell, catfish were so abundant in the ditches that you just had to scoop them up.

Life in Alsen was idyllic. Many of the houses were in the shadows of a pecan grove. Stately oaks stood throughout the community, each dripping with Spanish Moss. People lived on family plots, some of which had been held for generations. Children played up and down the streets from yard to yard. Residents looked out for all of the children. When I moved to Alsen in 1971, this situation still existed, and Alsen children were some of the best behaved children in the parish. I know, because I went from school to school, and thus had the opportunity to compare the children.

Unfortunately, no school was built in the community until 1952. Prior to that time, according to resident Alice Cage, grades one through three met in a church across the highway. Grades four through six met in another church "further up the highway." This would amount to a walk of several miles for some children because no bus service was provided. The children continued to walk long distances to school until the current Alsen Elementary School was built in 1952.

About two miles north of the main road of Alsen, a Mr. Davis moved his family down from Mississippi and purchased just under twenty acres of land. They lived on a dirt road called Samuels Road, which was eventually paved and became U.S. Highway 61. Across the street from them a "borrow pit" was dug, and the dirt was used to build the overpass for the highway. This borrow pit eventually became the community "swimming hole."

III. FROM RURAL TO RUIN

Then, in 1964, Tim Alexander came to town, and Alsen has never been the same. He and a local land owner opened the borrow pit for the dumping of toxic chemicals by industries (Dow, Ethyl, Co Polymer, Uniroyal, Allied Chemical, American Hoechst, Exxon Chemical, Rubicon Chemical, Shell Chemical, and U.S.S. Chemical). The family that lived 800 feet across the highway was never consulted or warned about the dangers of the pit, and the children continued to swim in the pit as they had done previously. According to one brother in the family, "You were dirtier after you came out of the pit than before you went in." Some of the children from the family recall playing with "tarry balls."

This pit, called Petro Processors Incorporated, became a nuisance almost immediately. In April of 1965, an official of the East Baton Rouge Parish Health Unit contacted the Louisiana State Board of Health "regarding the possibility of a health problem" at the PPI site. Despite this warning, however, the health of the people of Alsen was ignored for almost twenty-eight years until a fence was built around the pit in 1991. However, the Petro Pit continued to be a nuisance. Regular burning occurred at the pit. The industries reported that fires were set only when the wind blew out of the Southeast so that the smoke would blow over the swamp. However, one of the ladies east of the pits recalls thick black smoke coming into her house on a regular basis. She reports, "You couldn't keep it out, and everything it touched turned black. You couldn't breathe." Finally, one hot day in an act of frustration and desperation, she locked herself in the car, with the windows rolled up. Her children came home from school and found her there.

The remaining twenty-eight years at Petro Processors has been one long, bungling horror after another, committed by industry and various governmental officials. The original site filled up very quickly and overflowed into the nearby bayou. In 1968, it was "closed," and a second site was opened one and one-half miles away. This site, the Brooklawn Site, consisted of a bluff area, lagoons, and a cypress bayou. According to my neighbor, Brother Pate, "Cypress Bayou had some of the best bass fishing in the country." Not only was the bass fishing ruined, but the cypress trees were killed as well. One Alsen resident claims that when Petro was opened on Brooklawn, a fence was placed across the road, preventing residents from visiting the grave sites of the original cemetery. This cemetery can no longer be found—the grave sites presumably buried beneath toxic waste.

The insanity continued, and over the years, both pits continued to overflow into the Bayou Baton Rouge, which meanders for nine miles through Devil's Swamp before finally emptying into the Mississippi River. In 1969, the dike surrounding the Brooklawn site broke and sent hundreds of thousands of gallons of contaminants across Devil's Swamp and into the Mississippi River. Over 100 head of cattle feeding in the swamp on the Ewell farm died within a few days. In 1987, at the urging of Agency for Toxic Substances and Disease Registry

(ATSDR), the Louisiana Department of Health and Hospitals half-heartedly posted Devil's Swamp Lake, a popular fishing spot, with "No Fishing" and "No Swimming" signs. However, the signs were facing the shore, and many fishermen approached the lake by boat from the river. Further, the signs were submerged during high water. Neither have the signs been maintained and, by 1991, the land-based signs were practically covered with vegetation.

The poor management of the waste site was duly noted by one of the dumpers, Ethyl Corporation, in 1969. They feared that PPI's less-than-first-class handling and disposal of wastes could result in some catastrophe for which Ethyl might be held liable. Nevertheless, Ethyl continued to use the site. This clearly indicates that the industries were aware of the dangers posed by their wastes, and that the wastes were not being handled properly. So much for their claim of innocence when Superfund Law came into effect.

PPI stopped receiving chemical wastes in 1980, and in 1983, it was placed on the NPL (National Priorities List of Superfund). In 1983, TERA Corporation, an engineering firm, concluded that because of the high clay content of the underlying and surrounding soils of the Petro Scenic site, the waste could be safely secured on-site.¹ Today, the wastes have migrated off-site a considerable distance beneath a four-lane divided highway and onto someone else's property.

While the Superfund sites developed, other industries moved into the community. They included: five chemical plants, a calcined coke plant, a secondary lead smelter, a tank car company, a rail switching yard, a paint and solvents company, a brickyard, a manufacturing company, a pipe company, a commercial hazardous waste company that has both an incinerator and landfills, and numerous waste pits. Additionally, we are impacted by a chemical plant two and one-half miles north of Alsen, and heavily impacted by a paper mill five miles north of us. Both facilities dump into the river or the swamp.

Most of these facilities moved in during the fifties and sixties when African-Americans in Louisiana were denied voting access.

1. TERA CORPORATION, EXECUTIVE SUMMARY: SITE CHARACTERIZATION AND CLOSURE PETRO-PROCESSORS OF LOUISIANA, INC. (1983).

Therefore, we were never consulted, considered, or given the opportunity for input on the nature of our neighborhood because of our race. After a few industries were located here, the area was considered an industrial zone, thus opening the door for the others to locate here. Our community received all of the adverse impact of industry and none of its benefits. This pattern had become entrenched in the system. This is clearly environmental racism.

Our community has a small White population. Most of the White residents have been in Alsen for thirty or more years and moved here for a variety of reasons. My next-door neighbor was a butcher and an avid sportsman. He had hunted and fished Devil's Swamp for many years, and when he retired, he built out here to be close to the swamp he loved so dearly. He was also one of the early and persistent "whistle-blowers" on the pollution of the swamp. Others moved into the area because they loved living in the country. They wanted to be near Devil's Swamp. They, like the African-Americans in the community have invested a lifetime of earnings in their dream homes, only to have the dream turn into a nightmare, as property values plummet, health declines, and loved ones sicken and die. This is environmental injustice.

The people of this community are of modest income, and our homes represent the largest investment of our lives. We cannot easily move out. We cannot sell our houses, and we are trapped by mortgages, or the inability to start paying a new one (many of us are retired, or near retirement). Our reasons for moving to Alsen have been ruined. Our community is impacted by over twenty percent of the Toxic Release Inventory chemicals reported for East Baton Rouge Parish. It receives more than forty-five percent of the reported air pollution. The incinerator emits HCl, a very strong acid. This increases the rate of corrosion of machinery and metals in our community, adding to the costs of maintenance. We suffer many environmental ills from the pollution, but this is strongly denied by government. This is environmental injustice.

IV. TRYING TO CURE ALSEN'S ILLS

What are these ills we suffer? The cancer rate is high. There are nine families on Springfield Road, consisting mainly of adults. Four of these nine families have suffered cancers, including two families with multiple cancers and two families with cancer deaths, all within the last six years! There were other cancers on this street not included in the six year period from 1987 to 1993. More than 80% of the community suffers respiratory problems, including: asthma (21%), breathing difficulties, and sinus problems. Rashes are common (8%). Spontaneous nose bleeds, including severe hemorrhaging occurred in 1991, and continue to the present. Many also suffer frequent headaches, irritated eyes, noses, sore throats, arthritic-like pains (including children), bleeding gums, and a host of other illnesses. Rare illnesses and birth defects have also been found to exist in the community. For example, some residents have been diagnosed with granulomatous angiitis, an immune system disorder, and there have also been babies born with their internal organs on the outside of their bodies.

Attempts to get government to act responsibly toward this community seem futile. Brother Pate once reported a black, oily condition of the Bayou Baton Rouge to a governmental official. The official pointed out the black, hairy caterpillars common to our oak trees in the spring, and said the bayou was black because the worms were using it to go to the bathroom. "You sure got them trained well," quipped Brother Pate. When Brother Pate found dead fish on his trout line that looked as if they had been scalded, he was told "if the fish hadn't been caught, they could have swum to clean water." These type of responses are not unusual when citizens try to get information, or report problems of a toxic nature. When our councilman wrote to the Secretary of the Department of Environmental Quality (DEQ) expressing our concerns about the pollution, Kai Midboe responded by saying that "the air quality of Alsen is in compliance, and is consistent with other industrial zones in the state." Remember, Alsen was a rural community until industries were forced upon us. In October of 1993, I complained of "fumes" that awakened me with a pounding headache each morning between two and five. The office of air quality of DEQ responded with pages of data and told me that there was nothing "un-

usual” in our air. We were told that our water was of good quality, and that we had nothing to worry about.

The White communities have had some success in closing dangerous sites. For example, a hazardous waste landfill in a neighboring parish was closed down by Dr. Paul Templet, a much praised DEQ secretary under the Roemer Administration. The reasons given were that the facility had serious ground water contamination, was too close to residences, and had a very bad environmental history.

However, when our community made a strong push to close down the hazardous waste facility (Rollins), we were unsuccessful. We held meetings, marched, had press conferences, wrote letters, and brought two bus loads of citizens to the hearing. Community members from the young to great-grandmothers testified on the terrible impact of the facility. In spite of all of this, Rollins was granted a permit, even though it also had serious ground water contamination, was too close to too many residences as well as schools, and had a terrible environmental record. Dr. Templet noted that the state needed Rollins because it was the only commercial hazardous waste incinerator in the state. Whether this decision was racially tainted or not (racism can color our subconsciousness such that we make racist decisions without intent), it had a clearly discriminatory effect. The citizens of Alsen were forced to be “sacrificial lambs” for the greater good of the rest of the state.

V. CONCLUSION

After 29 years of suffering, our plight is still ignored, and we see no relief in sight. Any discussion of “zero toxic emissions” invariably leads to comments about the economy and jobs. Instead, industries continue to expand and to further degrade our environment. More pipelines are dumping in the river, a new industrial park is planned for our community, a wood recycling plant is trying to locate here, and the lead smelter has become a commercial hazardous waste facility. In addition, Rollins is applying for a new landfill, the swamp is under consideration as a new Superfund Site, and now, the Superfund Site wants to build an incinerator. Will there ever be any justice for Alsen?