The Proposed Environmental Justice Act: "I Have a (Green) Dream"

*Claire L. Hasler**

I. INTRODUCTION

In June 1992, former Senator Albert Gore and Representative John Lewis introduced legislation into the U.S. Senate and House of Representatives entitled the "Environmental Justice Act of 1992."[1] This legislation was the outgrowth of a long list of protests, studies, and cases involving a phenomenon known as "environmental racism."[2] The proposed legislation was designed to "help those people who face the greatest risk of exposure to toxic substances and pollution."[3] In addressing the Senate, Senator Gore noted that the United States

> faces disturbing inequities in the way severe pollutant problems are distributed. . . . In disproportionate amounts, toxic wastes and toxic emissions from industrial processes

* B.A. 1989, Pomona College; J.D. Candidate 1994, University of Puget Sound School of Law.

1. The Senate proposal, sponsored by former Senator Albert Gore (D-Tn.), was referred to the Senate Environment and Public Works Committee on June 3, 1992. *See* S. 2806, 102d Cong., 2d Sess. (1992). The House proposal was sponsored by Representative John Lewis (D-Ga.) and other House Democrats. *See* H.R. 5326, 102d Cong., 2d Sess. (1992); *see also* Sharyn Wizda, *Lewis Unveils Environmental Bill*, STATES NEWS SERVICE, June 3, 1992.

2. Rev. Benjamin F. Chavis, Jr., former director of the United Church of Christ Commission for Racial Justice, pioneered the concept of environmental racism in a seminal report coauthored by Charles Lee. *See* REV. BENJAMIN F. CHAVIS, JR. & CHARLES LEE, COMMISSION FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES (1987). The concept is premised on the belief that minority communities are disproportionately burdened by polluting industries and other sites hazardous to the environment and human health. *Id.* at xv.

3. 138 CONG. REC. S7489 (1992) (statement of Sen. Gore); *see also Capitol Hill Hearing, News Conference with Senator Albert Gore and Representative John Lewis and Others*, FED. NEWS SERVICE, June 3, 1992 [hereinafter *Capitol Hill Hearing*]. At this hearing, Barbara Anwar, the Executive Director of the Lawyer's Committee for Civil Rights Under the Law, stated that "the fundamental objectives of the Environmental Justice Act . . . is [sic] to provide equal protection under the law, to ensure protection for communities that have been adversely impacted already, and to ameliorate and substantially change those conditions." *Id.*

> contaminate the neighborhoods of minority communities, depressing land values and posing serious threats to the health of those in our society least empowered financially and politically to do anything about it.[4]

Although the 1992 Act eventually died in committee, several members of the House and Senate recently reintroduced two versions of the Environmental Justice Act of 1993.[5] Interest in the phenomenon of environmental racism has steadily increased and, with the advent of the new, more environmentally concerned Clinton/Gore Administration in January 1993, it is possible that Congress will pass a version of the Environmental Justice Act in the next year or two.[6] Unfortunately, in

---

4. 138 CONG. REC. S7480, S7489 (daily ed. June 3, 1992) (statement of Sen. Gore).

5. On Wednesday, May 12, 1993, Representative Lewis (D-Ga.) once again introduced the Act in the House of Representatives. *See* H.R. 2105, 103d Cong., 1st Sess. (1993). The Act was referred to the Committees on Energy and Commerce, Public Works and Transportation, Education and Labor, and Agriculture. The House version of the Act is nearly identical to the original 1992 version, with only slight modifications in phrasing and provisions.

The Senate version of the Act, however, which was introduced on Thursday, June 24, 1993, by Senators Baucus (D-Mt.), Moseley-Brown (D-Ill.), and Campbell (D-Colo.), substantially reorganized and modified the 1992 version. *See* S. 1161, 103d Cong., 1st Sess. (1993). A detailed analysis of the Environmental Justice Act of 1993 is provided in Part IV of this Comment.

6. The Clinton/Gore Administration has already demonstrated its sensitivity to and interest in the issue of racial equity in environmental matters. In December 1992, President-elect Clinton appointed Rev. Benjamin F. Chavis, Jr., to his transition team to assist in an analysis of the federal bureaus concerned with natural resources. *See UCC Racial Justice Officer Joins Clinton-Gore Team*, ORLANDO SENTINEL, Dec. 19, 1992, at D11. Chavis was later selected to serve as the Executive Director of the NAACP, where he plans to "maintain environmental justice as a key priority." *See Chavis To Take Fight for Environmental Justice to NAACP*, PLAIN DEALER (Cleveland), Apr. 10, 1993, at 6A.

Even more recently, President Clinton signed Executive Order No. 12,898, Exec. Order No. 12,898, Fed. Reg. 7,629 (1994), which is designed to ensure that the programs of all federal agencies "do not unfairly inflict environmental harm on the poor and members of minorities." John H. Cushman, Jr., *Clinton To Order Action To Undo Bias in Pollution*, N.Y. TIMES, Feb. 10, 1994, at A1. The Order, signed February 11, 1994, mandates the collection and analysis of census and pollution data by all agencies and establishes a deadline of one year for each agency to complete a strategy detailing its objectives and enforcement mechanisms to

> (1) promote enforcement of all health and environmental statutes in areas with minority populations and low-income populations; (2) ensure greater public participation; (3) improve research and data collection relating to the health of and environment of minority populations and low-income populations; and (4) identify differential patterns of consumption of natural resources among minority populations and low-income populations.

Exec. Order No. 12,898, Fed. Reg. 7,629 (1994). Although this Order represents a major acknowledgment by the executive branch that it is ready to take action, the Order appears largely symbolic in nature. The Order seems to be mainly a data-gathering

its present form, the proposed legislation will not provide an effective solution to the problem of unequal environmental burdens in the United States.

This Comment addresses the concept of environmental racism, the tools that have been used to fight it, and the proposed Environmental Justice Act of 1993. Part II begins with an examination of the evidence minority communities have relied on as proof that environmental racism exists. The evidence contained in numerous articles clearly shows inequalities in the amounts of environmental and health hazards minority communities bear, and this evidence validates the existence of pervasive environmental injustice in our society. Part III addresses the limited case law involving attempts by minority communities to challenge perceived environmental racism and assesses the effectiveness of the existing legal tools used in such cases.

Part IV of this Comment examines the text of the proposed Environmental Justice Act of 1993. This Part analyzes the Act's potential as a solution to the problem of unequal environmental burdens and identifies the Act's weaknesses in methodology and overall tone. Part V suggests the need for a more effective legislative response to the problem, both by suggesting revisions in the provisions and goals of the Act and by suggesting areas for further consideration. Finally, Part VI concludes that the Act, though a step forward in recognizing the unequal environmental and health burdens nationwide, will not be effective in its present form. It will simply not provide minority communities with effective assistance in their fight against unequal environmental burdens.

II. The Phenomenon of Environmental Racism

Section A of this Part begins by defining environmental racism and providing a background of the problem as perceived by racial minority communities and governmental agencies. Section B sets out the various studies and reports that have attempted to explore allegations of inequity in connection with

---

device, and more importantly, the effectiveness of the Order is weakened "by the fact that agencies will be required to assume the financial costs of compliance [and the fact that] it does not carry the force of law." *The EPA's Dirty Secret*, Boston Globe, Feb. 13, 1994, at 74. Accordingly, this Comment continues to maintain that a legislative response is needed, one that will provide minorities with the legal foundation on which to build a case in court.

pollution and environmentally hazardous facilities and industries.

A. Defining the Concern

Our society appears to discriminate by race in environmental policymaking, in the siting of landfills and other noxious facilities, and in the enforcement of environmental laws and regulations.[7] Minority citizens are more likely to live near unsightly sewage treatment plants, incinerators, and landfills than are white citizens.[8] Furthermore, the inequitable siting patterns and policymaking causing this imbalance are also elevating health risks in the overly burdened minority communities.[9] The Rev. Benjamin F. Chavis, Jr., coauthor of one of the initial studies linking race to environmental hazards and of the 1992 version of the Environmental Justice Act, defined the problem as environmental racism.[10]

The information contained in the above study, as well as in other reports, has spawned massive grassroots movements in the racial minority and low socioeconomic communities of our country.[11] While minority communities have historically represented "the path of least resistance"[12] in connection with the siting and operation of landfills, petrochemical plants, incinerators, smelters, and hazardous waste storage facilities, minority citizens are now banding together to block that path. In fact, Dr. Robert Bullard, a Professor of Sociology at the University of California, Riverside, has identified more than two hundred minority grassroots organizations that are actively involved in neighborhood environmental issues.[13] In each case, the citizens are united by perceived unequal treatment and insidious discrimination; their mandate is one of equity and justice regard-

---

7. *See infra* part II.B.

8. *See* Robert D. Bullard, *The Threat of Environmental Racism*, 7 NAT. RESOURCES & ENV'T 23, 24 (1993).

9. *Id.*

10. Brad Knickerbocker, *The Environmentally Disenfranchised*, CHRISTIAN SCI. MONITOR, May 14, 1992, at 11; *see also* CHAVIS & LEE, *supra* note 2, at ix (expressing the hope that the study will "be used by all persons committed to racial and environmental justice to challenge what [is believed] to be an insidious form of racism").

11. CHAVIS & LEE, *supra* note 2, at xii.

12. David Holmstrom, *Pollution in US Cities Hits Minorities Hardest*, CHRISTIAN SCI. MONITOR, Jan. 7, 1993, at 8; *see also* ROBERT D. BULLARD, DUMPING IN DIXIE: RACE, CLASS AND ENVIRONMENTAL QUALITY 4 (1990).

13. *See* Holmstrom, *supra* note 12, at 8.

ing the environmental hazards they face. The data and statistics clearly support their claim that a problem exists.

B. The Studies

Since the 1970s, several governmental institutions, nonprofit organizations, and individuals have studied the existence of disproportionate environmental burdens on the poor and minorities.[14] Although their findings illustrate that the sources and causes of unequal environmental burdens are complex and uncertain, they also demonstrate that the inequalities are pervasive enough to be a real concern.[15] In Sections 1 through 4, this Comment sets forth the major findings of four of these studies.

1. The U.S. General Accounting Office Report

An early region-oriented study of the connection between race and environmental hazards grew out of opposition to the siting of a polychlorinated biphenyl (PCB) landfill in Warren County, North Carolina in the early 1980s.[16] The predominantly African American citizens of Warren County had staged a nonviolent protest, and, though the campaign was ultimately unsuccessful, it drew national attention to the controversial practice of establishing hazardous waste storage facilities in poor and racial minority communities.[17] The U.S. General Accounting Office (GAO) responded with a report that examined the racial and socioeconomic composition of communities surrounding four landfills in three southeastern states of

14. *See* Paul Mohai & Bunyan Bryant, *Environmental Injustice: Weighing Race and Class as Factors in the Distribution of Environmental Hazards*, 63 U. COLO. L. REV. 921, 926 (1992) (indicating 16 studies that document inequitable environmental burdens along racial lines).

15. *See* CHAVIS & LEE, *supra* note 2; Bullard, *supra* note 8; Marianne Lavelle & Marcia Coyle, *Unequal Protection: The Racial Divide in Environmental Law*, NAT'L L.J., Sept. 21, 1992 (special investigation section).

16. *See* CHAVIS & LEE, *supra* note 2, at xi; *see also* U.S. GEN. ACCOUNTING OFFICE, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES 2 (1983). An earlier study, conducted by Robert Bullard of the University of California, Riverside, in 1979, found that five out of five municipal-owned landfills in Houston, Texas were located in African American neighborhoods. BULLARD, *supra* note 12, at 8. Despite these statistics, a federal judge presiding over a related lawsuit ruled that there was not a substantial likelihood of proving that the decision to grant the permit was motivated by purposeful racial discrimination in violation of 42 U.S.C. § 1983. *See* Bean v. Southwestern Waste Management Corp., 482 F. Supp. 673, 680 (S.D. Tex. 1979).

17. Rachel D. Godsil, Note, *Remedying Environmental Racism*, 90 MICH. L. REV. 394, 394 (1991).

the Environmental Protection Agency's (EPA) Region IV.[18] Using 1980 census data, the report concluded that African Americans composed the majority of the population in three out of four communities where landfills were located.[19] The report also noted that, in these communities, the majority of those whose incomes were below the poverty level were African American.[20]

Perhaps the most striking example from the GAO study involved the Chemical Waste Management hazardous waste treatment, storage, and disposal facility in Sumter County, Alabama.[21] The landfill was located in a community that, in 1980, had a ninety percent African American population.[22] This minority population also represented one hundred percent of the community that was below the poverty level.[23] Of the other communities that were located within four miles of the hazardous waste facility, one community was eighty-four percent African American, and the other was sixty-nine percent African American.[24]

The GAO study established similarly suspicious statistics, in terms of proportionate impact on minority residents, for North Carolina's Warren County landfill.[25] The report noted that the state had initially found two sites to be satisfactory for landfill purposes: the first in Chatham County and the second in Warren County.[26] The Chatham site was publicly owned; the county would not sell it, and North Carolina did not have the power of eminent domain.[27] Thus, Warren County was chosen by default. The report did not examine the racial and socioeconomic composition of the Chatham site. However, the report did note that the population of Shocco Township, the precise location within Warren County chosen for the landfill, was sixty-six percent African American as of 1980.[28]

---

18. U.S. GEN. ACCOUNTING OFFICE, *supra* note 16, at 2.
19. *Id.* at 3.
20. *Id.*
21. *Id.* at app. I, 1.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* at 7.
26. *Id.* at 9.
27. *Id.*
28. *Id.* at 7.

The GAO study also noted that several attempts were made to stop the landfill in Warren County.[29] Two lawsuits were filed to prevent the initial construction, both of which were settled in favor of the state. Furthermore, the local chapter of the NAACP, alleging racial discrimination, sought a preliminary injunction to prohibit the placement of PCBs in the county.[30] Despite the clear racial imbalance of the site, the court denied the injunction.[31] The court stated simply that there were no allegations in any of the previous hearings or suits concerning the landfill that the site choices had been motivated by race.[32]

2. The United Church of Christ Commission for Racial Justice Study

The narrowly focused and regional nature of the GAO study endowed it with limited usefulness. Seeking a more analytical, nationwide inquiry into the issue of disproportionate burdens on minority communities, the United Church of Christ's Commission for Racial Justice conducted a study in 1987 to determine the correlation between the location of hazardous waste sites and the racial and socioeconomic characteristics of the surrounding communities.[33]

The study concluded that three out of every five African Americans and Hispanic Americans live in communities with "uncontrolled toxic waste sites,"[34] or closed and abandoned sites on the EPA's list of sites posing a present or potential threat to human health and the environment.[35] The Commission discovered that the mean minority percentage of the population in communities with a single operating hazardous waste facility—twenty-four percent—was twice that of communities without such waste sites.[36] When the number of the facilities was increased to two or more, the mean minority percentage jumped to thirty-eight percent, or more than three times that of communities with no waste sites.[37]

---

29. *Id.* at 10.
30. *Id.*
31. *Id.*
32. *Id.*
33. CHAVIS & LEE, *supra* note 2, at xii.
34. *Id.* at 13.
35. *Id.* at xii.
36. *Id.*
37. *Id.*

The study illustrated what minority communities had feared all along: that the percentage of community residents that belong to a particular racial or ethnic group is a strong predictor of the level of commercial hazardous waste activity—even stronger than household income or other factors.[38] Indeed, the Commission concluded that race, not socioeconomic status, was the most significant factor relating to the presence of hazardous wastes in communities in this country, noting that the probability that such a siting pattern could occur by chance was less than one in 10,000.[39]

3. The Environmental Protection Agency Report

Concern over environmental inequity in minority communities has continued to grow in this decade. In 1990, Paul Mohai and Bunyan Bryant, professors at the University of Michigan School of Natural Resources, organized a conference to examine further the claim that racial minorities suffer disproportionate exposure to and health risks from pollution.[40] A coalition of civil rights leaders and social scientists from this conference, informally known as the "Michigan Coalition," pressured the EPA to address the problem at the federal level.[41] EPA Administrator William Reilly responded by forming the EPA Environmental Equity Workgroup to assess the evidence that racial minority and low socioeconomic communities bear a disproportionate environmental risk burden and to consider possible EPA responses to identified disparities.[42]

The result of the Workgroup's efforts was a two-volume report, released by the EPA in June 1992, on the subject of "environmental equity."[43] In Volume I, the primary document of the report, the Workgroup examined the issue of environmental inequity and the data presented in previous studies and reports, and made recommendations to the EPA, including a recommendation to give more explicit attention to environmental equity issues.[44] Volume II was a supporting document, con-

38. *Id.* at 13.

39. *Id.* at 15.

40. *See* Emilia Askari, *EPA Finds That Minorities Encounter More Pollutants*, DET. FREE PRESS, July 24, 1992, at 1A.

41. 1 U.S. ENVTL. PROTECTION AGENCY, ENVIRONMENTAL EQUITY: REDUCING THE RISKS FOR ALL COMMUNITIES 6 (1992).

42. *Id.* at 2.

43. *See id.*

44. *Id.* at 25.

sisting of the comments and criticisms submitted by technical and policy experts in response to the Workgroup's conclusions.[45]

While the report was hailed by some as the first step toward remedying the existence of serious environmental disparities, many readers criticized it as a "useless piece of material."[46] A key criticism from minority citizen organizations was the EPA's unwillingness to validate their claims of environmental racism.[47] The EPA's position on the issue was summed up by Robert Wolcott, an EPA official involved in the Workgroup. He stated that the central factor with regard to proximity to pollution is not systematic environmental racism, but rather "economic class. . . [and whether one has the] resources to locate oneself in jobs and homes that avoid exposure."[48] The report stated that the causes of disparate environmental risks "are complex and deeply rooted in historical patterns of commerce, geography, state and local land use decisions, and other factors."[49] Although the report acknowledged that "[r]acial minority and low-income populations experience disproportionate exposures to selected air pollutants, hazardous waste facilities, contaminated fish and agricultural pesticides in the workplace,"[50] the Workgroup was unwilling to acknowledge a clear connection between race and environmental hazards. The report only stated that race and income appeared to be correlated with the distribution of some types of pollutants, as with agricultural chemicals and the high level of minority farmworkers.[51] Overall, the report's main finding was that additional data on environmental health effects by race and income was needed.[52]

4. The *National Law Journal* Investigation

The most recent development in the study of unequal environmental burdens was an investigation conducted by the

45. *See* 2 U.S. ENVTL. PROTECTION AGENCY, *supra* note 41.

46. *Study Revealing EPA Discrimination in Enforcement a Surprise, Official Says,* Daily Rep. for Exec. (BNA) (Sept. 17, 1992), *available in* WESTLAW, BNA File.

47. *See, e.g.,* 2 U.S. Envtl. Protection Agency, *supra* note 41, at 81 (claiming that the EPA was "casting doubt on the existence" of the problem of environmental equity).

48. Michael Weisskopf, *Minorities' Pollution Risk Is Debated; Some Activists Link Exposure to Racism*, WASH. POST, Jan. 16, 1992, at A25.

49. 1 U.S. ENVTL. PROTECTION AGENCY, *supra* note 41, at 2.

50. *Id.* at 12.

51. *Id.* at 12, 17.

52. *Id.* at 11, 15-16. Lead poisoning was deemed an exception, however, as data unambiguously shows that more black children have high blood lead levels. *Id.* at 11.

National Law Journal (*NLJ*) and released in September 1992.[53] In addition to examining the evidence presented by earlier studies, the *NLJ* scrutinized two additional aspects of environmental inequities: cleanup and fines. Unlike the EPA's Environmental Equity Workgroup, the *NLJ* study acknowledged a clear connection between race and environmental hazards. The results of the investigation demonstrated that "the federal government, in its cleanup of hazardous waste sites and its pursuit of polluters, favors white communities over minority communities under environmental laws meant to provide equal protection for all citizens."[54] Using computer-assisted analysis of census data, the civil court case docket of the EPA, and the EPA's own record of performance in connection with 1,177 Superfund[55] sites, the *NLJ* found that the penalties assessed against polluters under the Resource Conservation and Recovery Act (RCRA)[56] at sites in predominantly white communities averaged $335,566.00.[57] This figure

53. Lavelle & Coyle, *supra* note 15, at S1.

54. *Id.* at S2. In a letter responding to the *National Law Journal* investigation, William K. Reilly, former EPA Administrator, criticized the *NLJ*'s analysis as being "flawed and too narrow in its scope to yield an accurate assessment of [the EPA's] programs." William K. Reilly, *The EPA Responds to NLJ Report*, NAT'L L.J., Jan. 25, 1993, at 16-18. He claimed that the *NLJ*'s analysis was limited to a small, unrepresentative sample of the agency's enforcement actions (i.e., civil judicial suits for penalties) and that many other enforcement actions are brought as administrative actions and criminal proceedings. *Id.* He concluded by stating that the EPA is committed to promoting awareness and sensitivity to environmental equity concerns and that, if the EPA's analyses show inequitable treatment of minority or low-income citizens, "the agency will take decisive corrective action." *Id.*

55. "Superfund" sites are those being cleaned up pursuant to the requirements of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. §§ 9601-9675 (1988). One of the main purposes of CERCLA is to provide funding and enforcement authority for cleaning up hazardous waste sites created in the past. Robert T. Lee, *Comprehensive Environmental Response, Compensation, and Liability Act*, *in* ENVIRONMENTAL LAW HANDBOOK 267, 267 (12th ed. 1993). Under EPA regulations, a site must be placed on the National Priorities List (NPL) before it is eligible for remedial action. *Id.* at 276. The EPA takes action on sites that withstand a lengthy weeding out procedure. The EPA first conducts a preliminary assessment of the site. *Id.* Assuming the need is recognized, the EPA then conducts a physical site inspection. *Id.* at 276-77. Again, assuming the need is recognized, the EPA resorts to a "hazard ranking system," by which it uses certain factors, such as the toxicity and volume of the site's wastes and the proximity of the site to things such as drinking water and populations, to determine whether the site should be placed on the NPL for cleanup. *Id.* at 277. Once the site is placed on the NPL, the EPA tackles these sites pursuant to a Superfund Comprehensive Accomplishments Plan (SCAP), which shows the allocation of the EPA's resources for each fiscal year. *Id.*

56. 42 U.S.C. §§ 6901-6992 (1988).

57. Marianne Lavelle & Marcia Coyle, lead story (untitled), NAT'L L.J., Sept. 21, 1992, at S4 (special investigation section).

contrasts sharply with the $55,318.00 figure for RCRA violators in minority communities.[58] In addition, the investigation found that the EPA chooses containment, or the walling off or capping of waste at hazardous dump sites in minority communities, seven percent more frequently than in white communities.[59] Conversely, white communities receive the preferred method of cleanup, or permanent treatment, twenty-two percent more often than containment.[60] Overall, the *NLJ* found that penalties assessed under all the federal environmental laws aimed at air, water, and waste pollution were forty-six percent higher in white communities than in minority communities.[61] An important aspect of the *NLJ* findings is that the investigation concluded that "racial imbalance . . . often occurs whether the community is wealthy or poor."[62]

The *NLJ* investigation also provided several community profiles that illustrate the disparate environmental impact on minorities. Three profiles are particularly helpful in defining the inequity problem. In Moss Point, Mississippi, a garbage incinerator exudes a rank-smelling steam that pervades this mostly African American community.[63] The incinerator is actually owned by the city of Pascagoula, a mostly white community that sits across the Escatawpa River from Moss Point.[64] In December 1991, the Pascagoula City Council decided to import and burn medical waste at the incinerator.[65] Significantly, Moss Point is already saddled with chemical plants, the odors and pollution from the International Paper mill, and the largest low-level radioactive site in Mississippi.[66]

A second example is the minority community of Chicago's Far South Side. There, residents are organizing in response to the waste sites and pollution left by the area's industrial past.[67] The residents of the area suffer from a particularly large

58. *Id.* at S2.

59. *Id.* at S6.

60. *Id.* at S2.

61. *Id.*

62. Lavelle & Coyle, *supra* note 15, at S2.

63. Marcia Coyle, *Town Fights Waste Plan*, NAT'L L.J., Sept. 21, 1992, at S9 (special investigation section).

64. *Id.*

65. *Id.*

66. *Id.* Already, African American residents of Moss Point have galvanized to fight the medical waste decision. *Id.*

67. Marianne Lavelle, *An Industrial Legacy*, NAT'L L.J., Sept. 21, 1992, at S3 (special investigation section).

number of diseases, including rashes, respiratory ailments, cancer, and infant birth defects.[68] The steel industry, which once operated in the area, left behind fifty abandoned toxic waste dumps full of highly potent chemical mixtures.[69] In addition, the area hosts landfills, industrial incinerators, and the city sewage plant.[70]

A final example of inequitable pollution burdens on minorities is an area of Louisiana known to environmentalists and health officials as "Cancer Alley."[71] The area derives its name from the approximately 130 oil and chemical plants that occupy more than 100 miles along the Mississippi River between New Orleans and Baton Rouge.[72] These industries dump an estimated 900 million pounds or more of toxins into the land, water, and air per year.[73]

Recently, some residents of this area were narrowly successful in averting the placement of an additional environmental burden in their neighborhood.[74] The environmentally controversial Formosa Plastics Corporation had made plans to build a $700 million rayon pulp processing plant, with the option of ultimately expanding to a polyvinyl chloride plant, in the predominantly African American town of Wallace, Louisiana.[75] The environmental and health risks presented by the

---

68. *Id.*

69. *Id.*

70. *Id.* The grassroots organization, People for Community Recovery, reacted to the pollution and lack of cleanup efforts by staging protests and getting signatures on petitions. *Id.* To date, they have successfully forced city and state officials to provide municipal water hookups for families that were using sulfur contaminated wells, to shut down Chemical Waste's highly noxious incinerator, and to conduct a formal health survey of the area designed to identify the need for future studies. *Id.* The biggest hurdle for the minority organization so far has been that no single site or industry is responsible for the area's pollution, and none of the fifty toxic sites was ever considered bad enough to be placed on the Superfund list. Residents hope the health assessment will demonstrate that the only real solution is a massive cleanup effort. *Id.* While common sense would seem to indicate that the cumulative effect of the dumps and industries should be afforded more weight and the entire area declared a Superfund site, residents are apparently resigned to the fact that real assistance comes more slowly to African American communities.

71. Marcia Coyle, *Saying 'No' to Cancer Alley*, NAT'L L.J., Sept. 21, 1992, at S5 (special investigation section).

72. *Id.*

73. Paul McEnroe, *Cancer Alley Blacks Charge Environmental Racism by Giant Chemical Firms*, STAR TRIB., July 21, 1991, at 1A.

74. *See* Christina Cheakalos, *LA Town Defeats Industrial Giant—Rejects Factory Along 'Cancer Alley,'* ATLANTA J., Oct. 20, 1992, at E4.

75. Coyle, *supra* note 71, at S5. The article noted that the town of Wallace was 98% African American. *Id.*

plant were fairly serious because the manufacture of polyvinyl chloride produces extremely toxic and sometimes explosive by-products, such as ethylene dichloride and chloroform.[76] Many residents of Wallace and the surrounding parish[77] communities opposed the new plant. However, other residents were enticed by Formosa's promise of money and one thousand jobs, particularly because "black communities that don't have industries are very poor communities."[78] Despite Formosa's reputation as a "consistent environmental offender,"[79] the Wallace Parish Council acceded to the company's request to rezone 1,800 acres of land from residential property to industrial property.[80] The decision allowed Formosa to buy up land in the area for its plant at a cost of about ten million dollars.[81]

Viewed in light of the concept of environmental racism, the Wallace rezoning decision of April 1990 is particularly suspect.[82] "Whether intentional or not, the . . . [Wallace] Parish Council exercised its political power to isolate, separate, and exploit the African American community of Wallace."[83] Residential property usually receives protection from zoning commissions; in this case, however, the Council decided not to force

---

76. *See* Kelly M. Colquette & Elizabeth A. H. Robertson, *Environmental Racism: The Causes, Consequences, and Commendations*, 5 TULANE ENVTL. L.J. 153, 179 (1991). Colquette and Robertson note in their article that ethylene dichloride (EDC) and chloroform can cause cancer, as well as damage to and mutations in embryos. *Id.* at 179 n.158. The vapor of EDC is highly flammable and can cause disastrous, toxic explosions. *Id.* Chloroform is also particularly invidious, as it becomes increasingly concentrated in living organisms as one moves up the food chain. *Id.* at 179 n.160.

77. A "parish" is an administrative subdivision in Louisiana that corresponds to a county in other states. THE AMERICAN HERITAGE DICTIONARY 903 (2d. College ed. 1982).

78. Coyle, *supra* note 71, at S5.

79. Colquette & Robertson, *supra* note 76, at 177.

80. *Id.* at 176.

81. Bob Warren, *Giant Rayon Plant in St. John Is Canceled—Permit Troubles, Lawsuits Blamed*, NEW ORLEANS TIMES PICAYUNE, Oct. 8, 1992, at A1.

82. Colquette & Robertson, *supra* note 76, at 176.

83. *Id.* at 180. Both Formosa and the Council were probably surprised by the force of the societal opposition. Hoping to empower the minority residents of Wallace who were opposed to the plant, environmental organizations such as the Sierra Club Legal Defense Fund and Greenpeace mobilized the grassroots opposition by alerting residents to the siting processes and to the health risks and environmental damage the Formosa plant would mean for Wallace and other communities. Bob Warren & Drew Broach, *Little Guy Won Formosa Battle, Foes Say*, NEW ORLEANS TIMES PICAYUNE, Oct. 9, 1992, at A1. After three years of bitter warfare, Formosa Plastics decided to cancel its plans in Wallace. Cheakalos, *supra* note 74. Although Formosa blamed its change of mind on the slow and demanding federal permit process and a second lawsuit filed by a neighboring owner of an historic antebellum home, residents and environmentalists claim that the company did not have the determination to continue to fight the overwhelming charges of environmental racism. Warren & Broach, *supra*, at A1.

Formosa to locate in other, industrial-zoned areas on the banks of the Mississippi River. Because the Council abandoned the area's residential zoning, residents of Wallace were placed at risk for greater health effects and the destruction of their environmental quality.[84] In Louisiana, it appears that "[t]he state offers, and industry accepts . . . cheap black lives."[85] Furthermore, while industries claim that they simply look for cheap land and cheap water, Professor Robert Kuehn of the Tulane Environmental Law Clinic claims that they also consider "the political and economic strength of the neighborhood to oppose or interfere with the company's plans."[86]

As the foregoing discussion of the four studies indicates, two decades of statistical evidence supports the allegation that there is a pervasive inequity in this country with regard to the location and cleanup of environmental and health hazards. Minority communities shoulder a disproportionate number of these burdens, a phenomenon that has become known as environmental racism. Whether intentional racism is the cause of the unequal burden is not always certain; unintentional reasons for the resulting discriminatory impact, such as economic or political considerations, are likely to play a role. Still, the statistics show a recurrent injustice along predominantly racial lines, despite basic notions of justice dictating that these overly burdened minority communities should not be the nation's "dumping ground." Minority communities have not been successful, however, in achieving such justice. Part III of this Comment describes the current difficulties minority communities face when they attempt legal challenges to their disproportionate burden of environmental and health hazards.

III. Failure of the Existing Legal Tools and Doctrines

Concerned by the disproportionate number of landfills, smelters, incinerators, hazardous waste storage facilities, and other sources of pollution located in their neighborhoods, minority communities have galvanized to seek relief from the courts. Whether they have used constitutional or statutory claims based on discriminatory intent[87] or claims involving more gen-

84. Colquette & Robertson, *supra* note 76, at 176.

85. Coyle, *supra* note 71, at S5.

86. *Id.*

87. *See infra* parts III.A, III.B.

eral allegations of environmental racism,[88] few grassroots minority organizations or citizens have been successful in the handful of cases brought to date. Section A examines the use of 42 U.S.C. § 1983,[89] a federal statutory cause of action, by minority citizens. Section B examines the use of the Equal Protection Clause of the U.S. Constitution.[90] Finally, Section C examines claims based on zoning challenges, environmental racism, and procedural violations of state environmental protection legislation.

A. Section 1983

The first case to draw attention to the racial aspect of environmental problems was *Bean v. Southwestern Waste Management Corp.*[91] Citizens of Harris County, Texas, brought suit to challenge a Texas Department of Health (TDH) permitting decision that allowed Southwestern Management Corporation to operate a solid waste facility in the area.[92] The plaintiffs sought both a temporary restraining order and preliminary injunction, arguing that racial discrimination motivated the decision to grant the permit and that such discrimination violated 42 U.S.C. § 1983.[93]

The plaintiffs had to establish four elements to obtain a preliminary injunction: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury; (3) a showing that the threatened injury to the plaintiffs outweighs the threatened harm the injunction may do to the defendants; and (4) a showing that a preliminary injunction will not dis-

88. *See infra* part III.C.

89. 42 U.S.C. § 1983 (1988).

90. U.S. CONST. amend. XIV, § 1.

91. 482 F. Supp. 673 (S.D. Tex. 1979), *aff'd*, 782 F.2d 1038 (5th Cir. 1986); *see also* Robert W. Collin, *Environmental Equity: A Law and Planning Approach to Environmental Racism*, 11 VA. ENVTL. L.J. 495, 518-33 (1992) (providing similar discussions of the cases in Sections A and B of this Part); Godsil, *supra* note 17, at 413-16.

92. *Bean*, 482 F. Supp. at 675.

93. *Id.* at 674-75. Section 1983 provides a cause of action for individuals deprived of their federal constitutional rights by state officials. The section states that

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

42 U.S.C. § 1983 (1988).

serve the public interest.[94] The court found that the plaintiffs satisfied the second of these elements, insofar as a deprivation of constitutional rights could constitute irreparable injury.[95] Furthermore, the court acknowledged that the opening of the facility would "affect the entire nature of the community—its land values, its tax base, its aesthetics, the health and safety of its inhabitants, and the operation of Smiley High School, located only 1,700 feet from the site."[96] Thus, damages would not be able to fully compensate plaintiffs for their injuries.[97]

However, the court ultimately denied the plaintiffs' requested relief because the first element was not satisfied. Using a test established in past U.S. Supreme Court decisions, the court stated that the plaintiffs had the burden of proving discriminatory intent.[98] The plaintiffs were required to show that the decision was directly attributable to an intent to discriminate on the basis of race.[99] Unfortunately, statistical evidence and the plaintiffs' two theories of liability were insufficient to show such purposeful discrimination. The plaintiffs' first theory rested on the assertion that TDH's approval of the permit was part of a pattern or practice of discrimination by TDH in the placement of solid waste sites.[100] The plaintiffs presented racial data for the seventeen sites operating with a TDH permit, which showed that about eighty-two percent (or fourteen) of the sites were located in census tracts with fifty percent or less minority population at the time of their opening.[101] Additionally, in the plaintiff's selected target area, conforming roughly to the area of the North Forest Independent School District and a newly created city council district, there were two TDH-approved sites.[102] One of the sites had less than a ten percent minority population at the time of its opening, while the other was located in a census tract with a minority population of approximately sixty percent.[103] The court con-

94. *Bean*, 482 F. Supp. at 676.

95. *Id.* at 677.

96. *Id.*

97. *Id.*

98. *Id.*

99. *See id.* (citing Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976)).

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

cluded that the data failed to establish a practice or pattern.[104] Thus, the plaintiffs did not sustain their burden. The court did suggest that more particularized data might have shown that the sites in predominantly white census tracts were still located in minority communities.[105]

The plaintiffs' second theory was that the grant of the permit constituted discrimination when viewed in the context of the history of waste site placement and the events surrounding the actual permit application.[106] The plaintiffs offered three sets of data and statistics to support their claim, but the court decided that the data was insufficient to establish a likelihood of success in proving discriminatory intent.[107] The first set of data was dismissed because it involved only two solid waste sites, and the court decided that two was not a statistically significant number.[108] The data included the racial demographics of the two proposed or existing sites in the target area and demonstrated only that the challenged site was in an area with a minority population of approximately fifty-eight percent, while the existing site had a minority population of roughly eighteen percent.[109] The court determined that no inference of discrimination could be gleaned from these statistics.[110]

The second set of statistics involved the total number of solid waste sites in the earlier defined target area. The plaintiffs demonstrated that fifteen percent of Houston's landfills were located in the target area and that the target area made up only seven percent of Houston's population.[111] The plaintiffs then argued that, because the target area had a seventy percent minority population, the disparity in environmental burdens was certainly the result of racial discrimination.[112] The court disagreed, saying that one would expect such sites to be placed in more sparsely populated areas.[113] Furthermore, the court pointed to the fact that half of the solid waste sites in the target area were in census tracts with a more than seventy percent

104. *Id.*
105. *Id.*
106. *Id.* at 678.
107. *Id.*
108. *Id.*
109. *Id.* The Court found that 42.3% of the city's solid waste sites were located in minority tracts, whereas 57.7% of the sites were located in white tracts. *Id.* at 679.
110. *Id.* at 678.
111. *Id.*
112. *Id.*
113. *Id.*

white population.[114] The court suggested that some proof that the sites affected an area larger than the census tract in which they were located is needed to prove purposeful racial discrimination.[115]

The plaintiffs' final set of data, although more compelling on its face, was also found to be insufficient. It showed that only about thirty-two percent of the sites were located in the western half of Houston, an area in which roughly three quarters of the white population lived.[116] By contrast, nearly sixty-two percent of the minority population lived in the eastern half of the city, where over sixty-seven percent of the sites were located.[117] The court recognized, however, that the location of Houston's industrial center in the eastern half of the city could explain the location of many waste sites.[118] The court also noted that, by focusing on census tracts, rather than on city halves or quadrants, the city's solid waste sites no longer appeared to be so disparately located.[119] Under this analysis, predominantly white census tracts did bear a slightly higher share of solid waste sites than minority tracts.[120]

While the court ultimately denied both the motion for preliminary injunction and the motion to dismiss, it was highly sympathetic to the plaintiffs' claims. The court stated that it "simply did not make sense to put a solid waste site so close to a high school . . . with no air conditioning . . . [or] so close to a residential neighborhood."[121] Furthermore, the court acknowledged that the "decision to grant the permit was both unfortunate and insensitive," but it reiterated the plaintiffs' responsibility to prove racial discrimination.[122] The court then noted various issues that would need to be addressed in a full trial and suggested the types of evidence that would be needed to prevail. These issues included whether sites in most census tracts (even predominantly white ones) were located next to or in minority communities, whether alternative sites were considered before the final permitting process, and whether TDH was

114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.* at 679.
119. *Id.*
120. *Id.*
121. *Id.* at 679-80.
122. *Id.* at 680.

aware of the racial composition of the neighborhood and the distribution of solid waste sites in the Houston area.[123]

B. The Equal Protection Clause

The next case to raise issues of disproportionate environmental burdens was *E. Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb County Planning & Zoning Commission*.[124] In this case, residents of Macon-Bibb County in Georgia challenged a decision of the County's planning and zoning commission on constitutional grounds of racial discrimination.[125] The plaintiffs argued that they had been deprived of equal protection of the law when the commission decided to allow the creation of a private, solid-waste landfill on property located in a census tract with a sixty-one percent African American population.[126] Using an analysis that mirrored that in *Bean*, the *E. Bibb Twiggs* court also stated that the plaintiffs failed to prove that the defendant acted with intent to discriminate.[127]

The court analyzed the plaintiffs' statistical evidence in light of the U.S. Supreme Court's decision in *Village of Arlington Heights v. Metro Housing Development Corp.*[128] In *Arlington Heights*, the U.S. Supreme Court stated that the plaintiff need not prove that a racial purpose was the sole, dominant, or even primary purpose for the challenged action.[129] Rather, the plaintiff need only show that it was a "motivating factor" in the decision.[130] Similarly, the district court in *E. Bibb Twiggs* considered several factors to determine whether invidious discrimination was a motivating factor in the commission's decision: the impact of the official action (i.e., whether it bears more heavily on one race than another), the historical background of the decision, the specific events leading up to the decision, any

123. *Id.*

124. 706 F. Supp. 880 (M.D. Ga.), *aff'd*, 896 F.2d 1264 (11th Cir. 1989).

125. *Id.* at 881. The plaintiffs had initially alleged several other claims, including procedural and substantive due process violations and an illegal taking under the 14th and 5th Amendments. E. Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb County Planning & Zoning Comm'n, 662 F. Supp. 1465, 1466 (M.D. Ga. 1987), *aff'd*, 896 F.2d 1264 (11th Cir. 1989). The federal district judge dismissed these claims for failure to exhaust state remedies and allowed only the § 1983 claim to go forward. *Id.* at 1469.

126. *E. Bibb Twiggs*, 706 F. Supp. at 881.

127. *Id.* at 884.

128. 429 U.S. 252 (1977).

129. *Id.* at 265-66.

130. *Id.*

departures from normal decision-making processes, and the legislative or administrative history of the challenged decision.[131]

The court first noted that any decision to approve a landfill in one census tract over another necessarily affects that census tract more heavily than others.[132] Furthermore, the decision will have a greater impact on the majority population, in this case an African American one.[133] Nevertheless, the court pointed to the only other commission-approved landfill, which was located in a census tract containing a majority white population, to find that there was no "clea[r] pattern, unexplainable on grounds other than race."[134]

The plaintiffs then urged the court to analyze the commission's decision "against an historical background of locating undesirable land uses in black neighborhoods."[135] The court, however, found no such historical discrimination,[136] in part because, as one commentator has noted, the court did not consider the county's history of discrimination, but rather demanded only an examination of the agency's historical discrimination.[137] The court also rejected plaintiffs' argument that the sequence of events prior to the decision illustrated discriminatory intent.[138] Because the plaintiffs could produce neither evidence of sudden changes in the zoning classifications, nor a relaxation or change in the standards applicable to the granting of permits, no specific antecedent events demonstrated that the commission clearly had a racially discriminatory motivation.[139] Furthermore, despite the commission's initial denial of the permit application because of the landfill's proximity to a residential area, the court found neither a significant departure from regular decision-making processes nor invidious racial discrimination in the commission's later decision to reconsider, and ultimately grant, the permit.[140] The court stated that, overall, the

131. *E. Bibb Twiggs*, 706 F. Supp. at 884.

132. *Id.* at 884.

133. *Id.* (quoting *Arlington Heights*, 429 U.S. at 266).

134. *Id.*

135. *Id.* at 885.

136. *Id.*

137. Godsil, *supra* note 17, at 413.

138. *E. Bibb Twiggs*, 706 F. Supp. at 886.

139. *Id.* Even a report issued by the commission 15 years earlier admitting the existence of racial discrimination in the area was insufficient. The court stated that an acknowledgment of past racism did not necessarily mean that the commission's current decision was influenced by racism. *Id.* at 885-86.

140. *Id.* at 886.

commission appeared to address the siting problem thoughtfully, making its determination based on a careful analysis of the facts and without any racially discriminatory purpose.[141] The Eleventh Circuit later affirmed the nonracially motivated nature of the commission's landfill decision.[142]

Another case involving equal protection claims in connection with the development of a landfill is *R.I.S.E., Inc. v. Kay*.[143] A community organization called R.I.S.E., Inc. (Residents Involved in Saving the Environment) consists of white and African American residents of King & Queen County, Virginia, who own property in the area of the proposed landfill.[144] R.I.S.E. was organized specifically to oppose the landfill's development.[145] The landfill proposal arose out of a joint venture with the Chesapeake Corporation that was designed to ameliorate King & Queen County's mounting waste disposal problems; Chesapeake was to build the landfill and use it for its own waste disposal, and the County was to operate the landfill in exchange for free waste disposal.[146] Chesapeake identified the 420-acre Piedmont Tract as a potential landfill site and conducted tests to establish site suitability.[147] Chesapeake then abandoned the joint venture negotiations, and, on December 11, 1989, the County board of supervisors executed a purchase option agreement with Chesapeake for the Piedmont site.[148]

The proposed landfill was met with considerable public opposition. On January 25, 1990, citizens met at the Second Mt. Olive Baptist Church to express concerns that the increased noise, dust, and odor would decrease area residents' quality of life; that property values would decline; that worship and activities at the Church would be disrupted; that major improvements in roads would be required; and that the historic Church and community in general would be "blight[ed.]"[149] The board of supervisors then held a public hearing on February 12, 1990, at which area residents presented a petition signed by

141. *Id.* at 887.

142. *See* E. Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb County Planning and Zoning Comm'n, 896 F.2d 1264, 1267 (11th Cir. 1989).

143. R.I.S.E., Inc. v. Kay, 768 F. Supp. 1144 (E.D. Va. 1991), *aff'd without opinion*, 977 F.2d 573 (4th Cir. 1992).

144. *Id.* at 1145.

145. *Id.*

146. *Id.* at 1146.

147. *Id.* at 1149-50.

148. *Id.* at 1147.

149. *Id.*

947 individuals opposing the landfill.[150] Despite public concern and opposition, the board of supervisors unanimously authorized the landfill.[151]

One of the disturbing aspects of the Piedmont site controversy is the racial demographics of King & Queen County's existing publicly owned landfills. The statistics clearly illustrate a history of disproportionate burdens on racial minorities. For example, the racial composition within a one-mile radius of the Mascot landfill, sited in 1969, was one hundred percent African American at the time the landfill was created.[152] Similarly, the Dahlgren landfill, sited in 1971, had an estimated ninety-five percent African American population living in the immediate area at the time the landfill was developed.[153] The Owenton landfill, sited in 1977, had an estimated one hundred percent African American population living within a half-mile radius of the site, and it is still a predominantly minority community.[154]

The one privately owned and operated site in the County, the King Land landfill, was developed in 1986, at a time when there was no zoning ordinance in effect and thus no need to obtain County approval.[155] Environmentally, the King Land landfill was a disaster because the operators began dumping without performing the necessary suitability tests.[156] The County responded quickly by implementing zoning laws, obtaining an injunction to prevent the operation of the landfill under a state-issued permit, and then prohibiting operation of the site under the new County ordinance.[157] King Land appealed, but the Board of Zoning Appeals refused to back down; the Board denied the permit application, finding that a landfill would cause property values in the surrounding area to decline and that King Land had "ignored environmental, health, safety, and welfare concerns."[158] It is significant that the community surrounding the King Land landfill is predomi-

150. *Id.*

151. *Id.* at 1148.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 1148-49.

156. Later tests revealed ground water pollution as a result of the landfill's operation. *Id.* at 1149.

157. *Id.*

158. *Id.*

nantly white.[159] The Board's action in shutting down the King Land site is suspicious because it was taken with regard to the landfill in a white community, but not with regard to those in minority communities.

R.I.S.E. then challenged the County board of supervisors' decision with respect to the proposed landfill on equal protection grounds.[160] After a bench trial, the district court held that the organization failed to establish that placement of the proposed landfill in a predominantly African American area stemmed from the type of intentional discrimination prohibited by the Equal Protection Clause.[161]

Although the court concluded that the placement of landfills in the county had a disproportionate impact on the area's African American residents,[162] it nevertheless stated that official action does not violate the Equal Protection Clause solely because it results in racially disproportionate impact.[163] Rather, the action must be intentionally discriminatory or shown to be motivated by discriminatory intent.[164] The court further concluded that there was nothing "unusual or suspicious" in the procedural steps or ultimate siting decision of the board of supervisors.[165] Rather, the court stated that the "[b]oard appears to have balanced the economic, environmental, and cultural needs of the County in a responsible and conscientious manner."[166] Significantly, the court noted that the Equal Protection Clause does not mandate that officials equalize the impact of their decisions on different racial groups; therefore, because the plaintiffs could not demonstrate purposeful discrimination, the court held that the landfill decision was valid.[167]

On appeal, the County board of supervisors prevailed a second time. The U.S. Court of Appeals for the Fourth Circuit affirmed the district court's determination that there was no

159. *Id.*

160. *Id.* at 1145.

161. *Id.* at 1149.

162. *Id.*

163. *Id.*

164. *Id.; see also* E. Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb County Planning & Zoning Comm'n, 706 F. Supp. 880, 884 (M.D. Ga.), *aff'd*, 896 F.2d 1264 (11th Cir. 1989).

165. *R.I.S.E.*, 768 F. Supp. at 1149-50.

166. *Id.* at 1150.

167. *Id.*

purposeful discrimination.[168] The appellate ruling apparently frees the County to go forward with its plan to lease the land it had purchased from Chesapeake to Browning-Ferris Industries (BFI), allowing BFI to begin the landfill project. However, the members of R.I.S.E. threatened to file a second lawsuit over a clause in the BFI contract with the County.[169] They maintained that the clause prevents the County from buying the land to be leased to BFI as long as the landfill issue is the subject of litigation.[170] Thus, by keeping the proposed landfill tied up in court, the members of R.I.S.E. believe they can prevent the consummation of the County/BFI deal.[171] While this plan of attack is creative, it is doubtful that the members of R.I.S.E. will have the stamina or the funds to continue to litigate the landfill question from different angles ad infinitum.

As illustrated by the cases discussed above, the Equal Protection Clause has been ineffective in the fight against both the intentional and unintentional disproportionate imposition of environmental hazards on minorities. Even when armed with demographic statistics strongly indicative of invidious racial discrimination, most minority citizens will be unable to prove the discriminatory intent required to establish a violation of either the Equal Protection Clause or 42 U.S.C. § 1983.[172] In many cases, there will be no evidence of intentional discrimination, only decisions based on the proposals of developers and the inadequacies of state regulations that impact minority communities in some way.[173] This resulting lack of a judicial remedy has led some lawyers to use the law in ingenious ways to provide assistance to minority communities.[174]

C. Other Challenges

Minority residents have also brought procedural and zoning challenges to the placement of environmentally hazardous facilities in their communities. Residents of the communities of

168. R.I.S.E., Inc. v. Kay, 977 F.2d 573 (4th Cir. 1992); *see also* Lawrence Latane III, *Appeals Court Upholds Verdict Clearing County in Landfill Case*, RICHMOND TIMES, Oct. 17, 1992, at B-4.

169. Lawrence Latane III, *Landfill Opponents Threaten Second Lawsuit Over Contract*, RICHMOND TIMES, Oct. 15, 1992, at C-3.

170. *Id.*

171. Latane, *supra* note 168.

172. *See* Collin, *supra* note 91, at 534.

173. Godsil, *supra* note 17, at 420.

174. Marcia Coyle, *Lawyers Try To Devise New Strategy*, NAT'L L.J., Sept. 21, 1992, at S8 (special investigation section).

Garyville and Mount Airy, Louisiana, unsuccessfully challenged the validity of the rezoning decision that would have allowed Formosa Plastics to build in Wallace, Louisiana.[175] The communities filed a petition for declaratory judgment and injunctive relief, naming St. John the Baptist Parish, the members of the Parish council, and the Parish president as defendants.[176] Aristech Chemical Corporation intervened on the side of the defendants.[177]

The lawsuit challenged the Parish council's decision to rezone a 432-acre tract of property, purchased by Aristech Chemical, from residential to heavy industrial.[178] The proposed rezoning would have allowed Aristech Chemical to construct and operate a chemical facility for the production and distribution of phenol, acetone, and cumene.[179] In October 1990, the trial judge dismissed the suit, finding that the council did not act arbitrarily and capriciously when it rezoned the residents' residential property.[180]

On appeal, the plaintiffs argued that the trial court erred in failing to find (1) that the rezoning was piecemeal, which requires heightened scrutiny, and (2) that the council acted arbitrarily and capriciously, insofar as it had failed to undertake a reasonable evaluation of the effects the proposed zoning would have on the health, safety, and welfare of Parish residents.[181] The appeal was ultimately in vain; the appellate court affirmed the trial court's ruling in favor of the Parish council.[182] The court stated that it understood

> the fears and concerns of the residents of St. John the Baptist Parish who live near the proposed chemical plant and who had believed that the adjoining area would remain residential. However, zoning regulations may be amended under our state law, and a property owner may not rely on the continued existence of a classification in his favor.[183]

---

175. Save Our Neighborhoods v. St. John the Baptist Parish, 592 So. 2d 908, 909 (La. Ct. App. 1991), *cert. denied*, 594 So. 2d 892 (La. 1992).

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* at 909-10.

182. *Id.* at 914.

183. *Id.*

The court stated that the plaintiffs had not sustained their burden of proof as to the arbitrariness and capriciousness of the council's decision.[184] In September 1992, the Louisiana Supreme Court refused the plaintiffs' request for another appeal.[185]

Not all such challenges, however, have met with such failure. One example, using a combination of environmental law and civil rights law, is the case of *El Pueblo Para El Aire Y Agua Limpio v. County of Kings*.[186] The case involved Chemical Waste Management, Inc.'s desire to build a toxic waste incinerator near Kettleman City, California, a community composed primarily of Latino farm workers.[187] The community already bears its share of pollution sources: Chemical Waste built and operates a hazardous waste treatment, storage, and disposal facility in the same area.[188] Whether Chemical Waste chose Kettleman City because it perceived the area's Hispanic population as unable to organize opposition is a question open for debate; Chemical Waste would undoubtedly justify its choice on more legitimate grounds.[189] However, the minority residents allege that the proposed incinerator is a clear example of environmental racism.[190]

To a certain extent, the question is moot, as the minority residents proved willing and able to oppose the project. By educating the community about the proposed project and the potential danger to human health and the area's environment, several community residents were able to start a grassroots movement in the predominantly Latino community.[191] The resulting community movement barraged the county's board of supervisors with letters of opposition in Spanish.[192] Unfortunately, the board largely ignored the opposition and approved the landfill proposal.[193] Luke Cole, an attorney with California

184. *Id.*

185. *See* Warren, *supra* note 81, at A1.

186. No. 366045 (Cal. Super. Ct. Dec. 30, 1991).

187. *See* 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, 70 (1991).

188. *Id.*

189. *Id.; see also* Miles Corwin, *Unusual Allies Fight Waste Incinerator*, L.A. TIMES, Feb. 24, 1991, at A3.

190. Katherine L. Ratcliffe, *Fusing Civil, Environmental Rights*, CHRISTIAN SCI. MONITOR, May 24, 1991, at 12; *see also* Corwin, *supra* note 189.

191. *See* Ratcliffe, *supra* note 190, at 12.

192. *See* Coyle, *supra* note 174, at S1, S8.

193. Corwin, *supra* note 189.

Rural Legal Assistance, and others[194] then assisted the residents in challenging the board's decision using a combination of environmental law and civil rights law.[195]

The "People for Clean Air and Water" fought back by filing a petition for writ of mandate against the county, challenging the board's decision on constitutional and civil rights grounds and seeking injunctive and declaratory relief.[196] In addition to charges of environmental racism by Chemical Waste Management and the county,[197] the plaintiffs argued that the environmental impact report on the proposed project did not comply with the California Environmental Quality Act (CEQA).[198]

The court ultimately ruled that the decision approving the permit for construction and operation of the incinerator had to be set aside.[199] In addition to finding inadequate analyses of air quality impacts, agricultural impacts, and alternative incinerator sites in the environmental impact report, the court expressed dissatisfaction with the lack of a Spanish translation of the environmental impact report, the public meeting notices, and the public hearing testimony.[200] Noting that approximately forty percent of the community within four miles of the proposed incinerator was monolingual in Spanish, the court

194. *See* Stephen G. Hirsch, *Big Deals, Big Suits– El Pueblo Para El Aire Y Agua Limpio v. County of Kings*, RECORDER, Feb. 14, 1991, at 2 (also representing the community were Ralph Santiago Abascal, General Counsel for California Rural Legal Assistance; Sharon Duggan, a San Francisco-based solo practitioner; and Florence Roisman of the Washington, D.C. office of the National Housing Law Project).

195. *See* Jack Viets, *Civil Rights Suite Seeks To Block Incinerator*, SAN FRANCISCO CHRON., Feb. 8, 1991, at A20.

196. *See* Hirsch, *supra* note 194, at 2. The suit alleged violations of the Civil Rights Acts of 1966 and 1968, the U.S. and California Constitutions, a county zoning ordinance, the California Tanner Act governing the siting of hazardous waste dumps, and the California Environmental Quality Act. *Id.*

197. The suit alleged not only that Chemical Waste systematically excluded the Kettleman City residents from the permit process by refusing to translate relevant documents into Spanish, but also that Chemical Waste chose Kettleman City as the site for its proposed landfill because the surrounding community is comprised of poor, Latino farmworkers. *See* Ratcliffe, *supra* note 190, at 12; Viets, *supra* note 195.

198. El Pueblo Para El Aire Y Agua Limpio v. County of Kings, No. 366045 (Cal. Super. Ct. Dec. 30, 1991); *see also* CAL. PUB. RES. CODE §§ 21000-21177 (West 1986). CEQA provides for an "environmental impact report" (EIR), a detailed informational document considered by the relevant public agency prior to its approval or disapproval of a proposed project. *Id.* § 21061. The EIR is intended to provide agencies and the public with information about the effect of a proposed project on the environment, the ways in which the significant effects of the project can be minimized, and the existence of alternatives to the project. *Id.* The necessity of submitting an EIR is, in California, determined by the lead agency involved. *Id.* § 21080.1.

199. *County of Kings*, No. 366045.

200. *Id.*

concluded that any meaningful involvement in the CEQA review process by these Latino residents was effectively precluded by the absence of Spanish translations.[201]

This decision is important because it helps ensure that monolingual minority communities receive the same access to information as do white communities. It is hoped that this will assist such communities in organizing challenges to disproportionate environmental hazards. Still, the usefulness of the decision has two limitations relating to the manner in which the rights of the minority community were vindicated. First, not every permitting and siting decision will reflect inadequacies in its environmental impact statement or notice and comment procedures. While the Kettleman City decision may alert other attorneys to clever ways to get around the lack of a more uniform statutory remedy, it also demonstrates the need for just such a remedy.

The second limitation stems from the message sent to Chemical Waste Management. Absent from the decision is a clear signal to polluting industries that it is no longer acceptable to overburden minority communities with environmental hazards. Rather, the Kettleman City decision simply warns such industries that, if they do decide to locate in such communities, they must follow adequate notice procedures and submit and provide access to proper environmental impact reports and other relevant documents. Thus, the Kettleman City residents were lucky this time, particularly so when one considers that Chemical Waste recently abandoned the entire incinerator project.[202] Had Chemical Waste not made this decision, the court's ruling would not have deterred the company's attempt to push the project forward a second time.

The biggest hurdle to judicial relief based on claims of environmental racism seems to stem from a dichotomy of thought in the United States today. While the politically powerful claim that charges of environmental racism are exaggerated, the hard statistics and community profiles seem too striking to ignore. Residents of minority communities, those who actually live in the polluted areas, continue to point to their surroundings and claim that actions (and resulting impacts) speak louder than

201. *Id.* Chemical Waste Management later appealed the superior court's ruling on its environmental impact report in an attempt to reverse the judge's determination of inadequacy. *Waste Dump Ruling Appealed*, SACRAMENTO BEE, May 21, 1992, at B3.

202. *See Firm Withdraws Its Plan for Toxic Waste Incinerator*, L.A. TIMES, Sept. 8, 1993, at A15.

words. But, to date, claims based on environmental racism are rare and ineffective. As the Kettleman City case demonstrates, the strongest claims available to grassroots organizations are those challenges based on highly technical imperfections in siting and zoning procedures. Legislators have, at least to date, been unwilling to change the laws to permit validation of the concept of environmental racism in court, and the courts have been hesitant to extend current protections in innovative ways.

Accordingly, perhaps it is time to move away from claims of environmental racism and causes of action requiring a showing of purposeful racial discrimination. Such tools have proved ineffective because claims of environmental racism are too difficult to substantiate, and, therefore, they have not ameliorated the injustice of the current unequal burdens. It might be more advantageous to enact new legislation that focuses instead on the clear inequity and injustice that exist with regard to environmental burdens. The unequal burdens among communities need to be addressed directly and immediately, not dismissed as insufficiently documented under existing theories. The proposed Environmental Justice Act of 1993, considered in Part IV, represents a move in this direction.

IV. The Proposed Environmental Justice Act of 1993: No Solution

The proposed Environmental Justice Act of 1993[203] is designed to "establish a program to assure nondiscriminatory compliance with all environmental, health and safety laws and to assure equal protection of the public health."[204] Because House Bill 2105[205] is nearly identical to the original 1992 version of the Act, was introduced prior to the companion bill in the Senate, and is more comprehensive than the Senate version, this Comment will make reference primarily to House Bill 2105.[206] Section A of this Part describes the various provisions

203. *See supra* note 5.

204. H.R. 2105, *supra* note 5; *see also supra* note 3 and accompanying text.

205. H.R. 2105, *supra* note 5.

206. Although it omits any discussion of siting moratoriums in communities already heavily burdened by environmental hazards, the Senate bill does contain an additional section articulating the findings that necessitated the introduction of the Act. *See* S. 1161, *supra* note 5, § 2. The section states that "[o]ver 3.5 billion pounds of toxic releases were reported by approximately 19,600 industrial plants in 1990, under the Emergency Planning and Community Right-to-Know Act" and that many additional toxic chemicals "posing substantial health threats as a result of releases are not being reported." *Id.* Furthermore, "[a]lthough environmental and health data of toxic

of the draft legislation, and Section B identifies the potential weaknesses and criticisms of the legislation and discusses the likely ineffectiveness of the Act if passed into law.

A. The Provisions of the Environmental Justice Act

Section 2 of the proposed Environmental Justice Act provides a list of the major purposes and policies of the Act.[207] First, the Act requires the collection of data on environmental health effects, particularly those caused by emissions in high impact areas, so that impacts on various groups and individuals can be better understood.[208] Once this is accomplished, the Act mandates the identification of areas in the nation that are subject to the highest amount of toxic chemicals.[209] Section 2 mandates that "[a]ctivities found to be having significant adverse impacts on human health in those areas of highest impact" be curtailed.[210] Furthermore, the Act intends to provide individual citizens and groups residing in high impact areas with the opportunity and resources to participate in the processes that lead to the siting and permitting of environmental hazards.[211] Overall, section 2 states the ultimate goal of the Act, which is an equitable distribution of the "significant adverse health

---

chemical releases are not routinely collected and analyzed by income and race, racial and ethnic minorities and lower income Americans may be disproportionately exposed to toxic chemicals in their residential and workplace environments." *Id.*

207. Section 2 of House Bill 2105 provides the following:

> The purposes of this Act are—
>
> (1) to require the collection of data on environmental health effects so that impacts on different individuals or groups can be understood;
>
> (2) to identify those areas which are subject to the highest loadings of toxic chemicals, through all media;
>
> (3) to assess the health effects that may be caused by emissions in those areas of highest impact;
>
> (4) to ensure that groups or individuals residing within those areas of highest impact have the opportunity and the resources to participate in the technical process which will determine the possible existence of adverse health impacts;
>
> (5) to require that actions be taken by authorized Federal agencies to curtail those activities found to be having significant adverse impacts on human health in those areas of highest impact; and
>
> (6) to ensure that significant adverse health impacts that may be associated with environmental pollution in the United States are not distributed inequitably.

H.R. 2105, *supra* note 5, § 2.

208. *Id.* § 2(2).

209. *Id.* § (1).

210. *Id.* § 2(5).

211. *Id.* § 2(4).

impacts that may be associated with environmental pollution in the United States."[212]

Section 101 of the Act provides working definitions and terminology for the legislation.[213] "Environmental High Impact Areas" (EHIAs) are defined as any of the one hundred counties "with the highest total weight of toxic chemicals present during the course of the most recent 5-year period for which data is available."[214] "Toxic chemicals" are defined to include the pollutants covered by the major hazardous waste laws in the United States.[215] "Toxic chemical facilities" are similarly defined according to the major permitting, inspection, and registration laws.[216] Finally, section 101 states that control over the administration and activities of the Act would be placed in the hands of the EPA Administrator and the Secretary of the Department of Health and Human Services (DHHS).[217]

The actual substantive material of the Act begins with section 102. First, within twelve months after passage of the Act, the EPA Administrator must publish a list in rank order of the total weight of toxic chemicals present in each county in the United States during the most recent 5-year period for which data is available.[218] From this list, one hundred counties will be designated EHIAs.[219] Next, section 102 provides the method by which the total weight of toxic chemicals is to be calculated.[220] Not only is an adjustment mandated for the relative toxicity of the chemicals, but the data would also distinguish between toxic chemicals in a contained environment and those released into the air, water, soil, or ground water.[221] These methods of calculation would be subject to public comment

212. *Id.* § 2(6).

213. *Id.* § 101.

214. *Id.* § 101(2).

215. *Id.* § 101(4). This term would include hazardous substances under CERCLA, 42 U.S.C. §§ 9601-9675 (1988), pollutants for which air quality standards have been issued under the Clean Air Act, *id.* §§ 7401-7671, pollutants for which water quality standards have been issued under the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (1988), materials registered pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136 (1988), and all substances and chemicals subject to reporting requirements under the Emergency Planning and Community Right to Know Act of 1986, 42 U.S.C. §§ 11001-11050 (1988). *Id.*

216. H.R. 2105, *supra* note 5, § 101(5).

217. *Id.* § 101(1), (3).

218. *Id.* § 102(b). The 1992 version of the Act allowed the EPA only nine months to publish the list. H.R. 5326, *supra* note 1, § 102(a).

219. H.R. 2105, *supra* note 5, § 102(b).

220. *Id.* § 102(c).

221. *Id.* § 102(c)(5).

within six months after the date of the Act's enactment.[222] Finally, the EHIA list would be revised and republished every five years.[223]

Section 201 would authorize the EPA Administrator and the Secretary of Labor, acting through the Assistant Secretary for Occupational Safety and Health, to "conduct compliance inspections or reviews of all toxic chemical facilities [in EHIAs] . . . within 2 years after the enactment of this Act, and not less than every 2 years thereafter."[224] In this way, the Act envisions that facilities with the highest potential for toxic pollution will be required to operate in compliance with applicable environmental, health, and safety regulations.

Section 301 represents a particularly interesting and innovative aspect of the Act. It would provide for "technical assistance grants" (TAGs) to facilitate access by representatives of EHIAs to public participation.[225] The grants would enable EHIA communities to disseminate information more effectively and stage successful campaigns to mandate operation moratoria and cleanups. The TAGs would be awarded to individuals or organizations that either are or may be affected by pollutants from toxic chemical facilities in EHIAs and would not exceed fifty thousand dollars.[226] Grant recipients would be required to pay a nonfederal share equal to twenty percent of the grant amount, but a demonstration of financial need would waive this requirement.[227] Only one grant per EHIA per grant period would be awarded.[228] Renewals would be determined by the EPA Administrator on a case-by-case basis.[229]

Former Senator Gore, in a Capitol Hill hearing, stressed that the funding for the TAGs would be based on the "polluters pay" principle and would not come from taxpayers.[230] Section 302 describes a system of user fees or assessments that would be placed on toxic chemical facilities in EHIAs.[231] The money obtained from these fees would be placed in a special fund, out

222. *Id.* § 102(d).
223. *Id.* § 102(e).
224. *Id.* § 201.
225. *Id.* § 301.
226. *Id.*
227. *Id.*
228. *Id.*
229. *Id.*
230. *Capitol Hill Hearing*, *supra* note 3.
231. H.R. 2105, *supra* note 5, § 302.

of which the TAGs would be financed.[232] In addition, any funds expended by the EPA to create the initial list of EHIAs would be reimbursed out of the TAG fund.[233]

Section 401 provides that, within two years after enactment of the legislation, agency heads[234]must promulgate for public comment a report identifying the nature and extent of any acute and chronic impacts on human health in EHIAs, as compared to other counties.[235] In issuing the report, the Administrator of the Agency for Toxic Substances Disease Registry of DHHS shall assist in helping to isolate the impacts of environmental pollution from other factors, such as health care availability and substance abuse.[236] DHHS shall also assist in ranking the toxic chemical risks in the EHIAs and determining the levels below which release of toxic chemicals must be reduced to avoid the adverse health impacts.[237]

The foregoing sections of the proposed legislation have a relatively prospective, preventive slant. Sections 402 and 403 of House Bill 2105 detail the more substantive, remedial aspects of the Act. "If the report under section 401 identifies significant adverse impacts of environmental pollution on human health in EHIAs . . . the President shall submit to Congress, within one

---

232. *Id.*

233. *Capitol Hill Hearing*, *supra* note 3.

234. Agency heads included are the Secretary of DHHS, in consultation with the EPA Administrator, Secretary of Labor, the Bureau of Indian Affairs, and Commissioners of the U.S. Commission on Civil Rights. H.R. 2105, *supra* note 5, § 401.

235. *Id.* ("Such impacts shall include but not be limited to cancer, birth deformities, infant mortality rates, and respiratory diseases.").

236. *Id.*

237. The report shall seek to

(1) isolate the impacts of environmental pollution;

(2) segregate the effects of other factors such as health care availability or substance abuse or diet;

(3) rank the relative risks posed by the toxic chemicals present in EHIAs and by the varied sources of toxic chemicals, both individually and cumulatively;

(4) take into account the need to remedy the impacts of pollution in high population density areas;

(5) evaluate the levels below which release of toxic chemicals, either individually or cumulatively, must be reduced to avoid adverse impacts on human health; and

(6) determine the impacts of uncontrolled releases.

As a result of the report in communities where the Administrator of the Agency for Toxic Substances Disease Registry has determined that adverse health impacts exist, the agency shall also make this information readily available to members of the community by providing information directly to the affected communities and tribal governments in the Environmental High Impact Areas about the release of toxic chemicals and the potential effects of such exposure.

Id.

year after publication of the report, proposed legislation to remedy and prevent such impacts."[238] The legislation must include the following: (1) expansion of the Emergency Planning and Community Right-To-Know Act of 1986[239] to require additional facilities or chemicals to be subject to the Act's reporting requirements; (2) means to redress regulatory loopholes under existing legislation (such as recycling exemptions); and (3) measures such as taxes on uncontrolled or controlled emissions, or restrictions on toxic chemical releasing activities within EHIAs to induce source reduction in these areas.[240] Another provision, not present in the 1992 version of the Act, mandates that within two years after publication of the section 401 report on health impacts, the EPA Administrator report to Congress, identifying "all of the changes made or recommended to be made to the Environmental Protection Agency's existing regulations, the purpose for each change, and the goals to be achieved as a result of the substantive changes."[241] The regulatory changes not made because of conflicting statutory mandates or the lack of statutory authority must also be noted.[242] The President shall then propose legislation to remedy such problems within three years after publication of the health impact report.[243]

In addition, if the report identifies any acute and chronic adverse impacts on health from environmental pollution in particular EHIAs, section 403 provides for a siting or permitting moratorium in the affected EHIAs.[244] The moratorium provision states that the "siting or permitting of any new toxic chemical facility in any [adversely impacted] EHIA shown to emit toxic chemicals in quantities found to cause significant adverse impacts on human health" will be prohibited.[245] The moratorium period must continue in such EHIAs "until the [EPA] Administrator determines, upon petition of any interested party, that the health-based levels identified pursuant to section 401(5) have been attained [in] the EHIA."[246]

---

238. *Id.* § 402(a).
239. 42 U.S.C. §§ 11001-11050 (1988).
240. H.R. 2105, *supra* note 5, § 402(a).
241. *Id.* § 402(b).
242. *Id.*
243. *Id.* § 402(c).
244. *Id.* § 403.
245. *Id.*
246. *Id.*

This moratorium provision is the only provision that provides minority communities with any true relief. It is entirely absent from the Senate bill. For this reason, the House version is much better suited to the task of correcting the problem of unequal environmental burdens. However, the effectiveness of House Bill 2105 is also severely weakened by a fairly broad exception to the moratorium provision. Section 403 states that a new toxic chemical facility may still be located or permitted in adversely impacted EHIAs during the moratorium period

> if (1) the need for the activity is shown to the Secretary [of DHHS]; (2) the owner or operator of the facility demonstrates that the facility will develop a plan and maintain a comprehensive pollution prevention program; and (3) the facility demonstrates that it will minimize uncontrolled releases into the environment.[247]

B. Criticisms and Weaknesses of the Environmental Justice Act

1. The Environmental Justice Act Lacks a Racial Nexus

House Bill 2105's failure to acknowledge any connection between race and environmental burdens provokes the first criticism. Just as the EPA's Environmental Equity report[248] was careful not to state directly that a real disparity of burdens exists between minority and nonminority communities, the Act is unwilling to face the racial issue head on and look for meaningful solutions. This failure is unacceptable, particularly when the studies and cases to date have provided ample evidence nationwide of unequal burdens along racial lines.[249] Thus, the muted tone of House Bill 2105, like the EPA's report, appears to question the validity and gravity of the nation's problem of environmental inequity.

The Act may intentionally downplay the racial aspect of the issue as a kind of political compromise. Perhaps the use of environmental racism as a mobilizing phrase in past conferences and studies has been too sensationalist, insofar as one can always point to cases of unintentional inequity not amounting to racism per se.[250] Certainly, with the law's requirement of a

---

247. *Id.*

248. *See supra* part II.B.3.

249. *See supra* parts II, III.

250. One commentator has noted that the term "racism" is highly charged and "should be a term of special opprobrium . . . [insofar as] [w]e risk having the term lose

showing of intent to discriminate, allegations of racial discrimination in the environmental context have so far proved difficult to substantiate. Furthermore, much of the statistical evidence does suggest that a degree of socioeconomic discrimination, in addition to racial discrimination, is at work in the siting of hazardous facilities and in policymaking. Consequently, the legislation may have been drafted with the recognition that, if minority citizens cry wolf too many times in connection with racism, more striking claims of racism and racial discrimination are more likely to go unheeded. Thus, the lack of a racial nexus in the Act may represent an attempt to make the Act more universally acceptable.

This idea is not without its intuitive appeal. House Bill 2105's use of the terms "equity" and "justice" arguably make some sense. Because the legislation's focus on environmental justice and equity would encompass both the racial and poverty aspects of the present inequities and because race and poverty are so often closely related in our society, it can be argued that the legislation's current terms make it better suited to the task at hand. After all, a fairness argument against overburdening racial minority communities applies with equal force to low socioeconomic communities; in both cases, these are the communities least able to deal with the burden.

Still, the complete avoidance of the connection between race and environmental burdens weakens the legislation.[251] Even if allegations of racism were set aside, the reasons for taking immediate and decisive action to protect racial minorities would remain. Even the EPA's report, which did not specifically acknowledge the problem in terms of racism, stated that "[a]lthough more information is definitely needed in order to fully understand all the ramifications of environmental injustice, the evidence is considerably more than ample that the

---

its condemnatory force by using it too often or inappropriately." Gerald Torres, *Introduction: Understanding Environmental Racism*, 63 U. COLO. L. REV. 839, 839 (1992). However, Professor Torres also recognizes that "environmental regulations . . . have a potentially racial impact and the willful ignorance of that impact may itself be racist *even if* the intention behind the rule had no racial animus at all." *Id.* at 840. It is simply not enough to "claim color-blindness where a demonstrable impact on subordinated racial groups exists." *Id.* (citing Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1 (1991)).

251. The Senate bill at least mentions the connection between race and environmental burdens in its section covering congressional findings. S. 1161, *supra* note 5, § 2(3).

problem exists."[252] The data and statistics may not prove intentional racial discrimination or blatant racism, but they clearly demonstrate inequity along racial lines. Thus, proposed legislation must acknowledge this racial connection and indicate a willingness to work toward a solution. House Bill 2105 in its present form, with absolutely no mention of race, simply does not do this. Because the legislative history of the Act discusses the racial issues presented by environmental inequity, it is strange indeed that the text of the Act completely avoids such issues.

2. The Environmental Justice Act Lacks an Immediate Response

A second criticism concerns the timeline established in the Act, which is inadequate to address environmental inequity. Currently, the proposed legislation states that the EPA Administrator will compile the necessary data and determine the one hundred EHIAs within twelve months of the Act's enactment[253] and that, within two years after enactment, the Secretary of DHHS will determine whether there are significant adverse impacts on human health in these areas.[254] Only after that determination is made does the legislation authorize congressional action; the President then has up to one year after publication of the report to submit proposed legislation to Congress.[255]

This is an excessively long time to wait for a solution. Admittedly, it will take awhile to compile the data for each county. Nevertheless, within just the initial period of twelve months, many more facilities can and will be sited throughout the country. Furthermore, during the minimum three year period between the time the EPA Administrator compiles the data and Congress passes remedial legislation, several new counties might qualify as EHIAs, and the original data would be highly outdated. This delay is unacceptable. Certain counties, like the county encompassing Cancer Alley, are obviously environmental high impact areas and would benefit greatly by an immediate, interim moratorium period.

---

252. 2 U.S. ENVTL. PROTECTION AGENCY, *supra* note 41, at 81.

253. H.R. 2105, *supra* note 5, § 102(a), (b).

254. *Id.* § 401.

255. *Id.* § 402(a).

3. The Environmental Justice Act Loses Sight of the Equity Goal

The Act's deficient treatment of environmental equity constitutes the third criticism. Both the Act and the EPA's report stress environmental equity as their goal, insofar as they both envision equalizing the burdens caused by polluting industries and factories.[256] Still, the Act does not go as far as it could toward establishing environmental equity.

Equity connotes the state of being just and fair. This is clearly a worthy goal for society, and one on which our democratic system is based. Obviously, it is impossible to enact legislation that requires every county to have a landfill or incinerator or chemical plant. There are geological and other considerations that factor into the viability of a site for such facilities. Nevertheless, pursuing the goal of equity in the environmental context promises to make all individuals better off. As areas other than poor and minority communities are required to share the pollution burden, wealthier, predominantly white communities will have a greater incentive to use their political power and financial resources to effect a decrease in overall pollution, as opposed to simply claiming NIMBY[257] for their own benefit.

Policy considerations, then, require legislation that is better able to reach the goals of fairness and equity articulated in its provisions. To begin with, the Act proposed to set aside only one hundred heavily affected counties, so as to make them eligible for TAGs and moratoria.[258] In reality, there are likely to be hundreds of counties that are truly, dangerously affected by environmental hazards and that urgently require redistribution

256. House Bill 2105 states that one of its purposes is "to ensure that significant adverse health impacts that may be associated with environmental pollution in the United States are not distributed inequitably." *Id.* § 2. Similarly, the EPA Workgroup stated that the goals behind its report included "focus[ing] the attention of EPA officials and staff on environmental equity issues." 1 U.S. ENVTL. PROTECTION AGENCY, *supra* note 41, at 4. The Workgroup recommended that the EPA review and revise its "permit, grant, monitoring and enforcement procedures to address high concentrations of risk in racial minority and low-income communities" and "incorporate [the concept of environment equity] in its long-term planning and operations." *Id.*

257. "NIMBY" is an acronym for "not-in-my-backyard" and refers generally to public opposition to local siting decisions. *See The N.I.M.B.Y. Syndrome Meets the Preemption Doctrine: Federal Preemption of State and Local Restrictions on the Siting of Hazardous Waste Disposal Facilities*, 53 LA. L. REV. 229, 229-30 (1992); *see also* Daniel M. Weisberg, Comment, *Taking Out the Trash—Where Will We Put All This Garbage?*, 10 PACE ENVTL. L. REV. 925, 926 n.8 (1993).

258. H.R. 2105, *supra* note 5, § 102(b).

of their pollution burdens. The effect of the provision as written would be to allow these counties that are still relatively heavily burdened, but not in the top one hundred, to have additional landfills and sites located in them, even though they may have several facilities already. As the Act states in section 102, changing the list of the top one hundred EHIAs takes five years, which would clearly be too late and quite inequitable for these newly burdened counties.[259]

In yet another respect, the Act is not well designed to achieve its goal of equity. While the legislation provides for a moratorium on siting and permitting in the EHIAs, it also offers a massive loophole. Instead of prohibiting absolutely the siting of new facilities and industries in an EHIA, the proposed Act mandates a moratorium on permitting and siting in the EHIAs unless "the need for the activity is shown to the Secretary [of DHHS]."[260] Notably, the Act does not require substantial hardship or a similarly strict showing of need. In fact, the Act does not provide any sort of guidance about what level or type of need the Secretary is allowed to consider. Thus, a county could be designated an EHIA, but still be subjected to further environmental risks and burdens as a result of the Secretary's decision. Was not the whole purpose of designating a county an EHIA to protect it from further disproportionate environmental degradation? The exception in section 403 of the Act defeats the whole purpose behind the EHIA designation.

A final aspect along these lines needs consideration. The Act provides for one hundred counties to act as the target areas. This emphasis on counties, as opposed to smaller units, is not well suited to achieving the equity goal. Not only are there likely to be many more than one hundred target areas, but this emphasis does nothing to address the discrimination that goes on at the more localized level (i.e., within a particular county). It is absurd to target counties when the pollution or environmental burden could be located in an African American district of a predominantly white county. As exemplified by the problems in Virginia's King & Queen County and in Louisiana's St. John the Baptist Parish,[261] the environmental inequity is often more pervasive than county by county; the unequal burdens along racial lines may run as deep as town by town or

259. *Id.* § 102(e).

260. *Id.* § 403.

261. *See supra* notes 143-171, 175-185 and accompanying text.

neighborhood by neighborhood. For example, assuming that a predominantly white county is designated an EHIA because of the extraordinary amount of environmental burdens located in its minority census tracts, the placement of a moratorium on siting and permitting in that county could even sanction the traditionally white NIMBY syndrome by prohibiting new facilities in this mostly white county.

4. The Environmental Justice Act Avoids the Siting Problem

A fourth weakness of the Act is its failure to address the siting process, which is one of the major causes of disproportionate pollution burdens in the waste management context. To develop a workable solution to this problem, one must recognize that current siting procedures have brought about inequitable siting. Currently, siting processes vary from state to state and from locality to locality within a state, and decisions are made by state or local officials. Local decision making occurs because the Resource Conservation and Recovery Act (RCRA),[262] which provides federal guidelines for all aspects of hazardous waste management and disposal, generally leaves the siting issue to the states.[263]

States tend to follow one of three basic approaches to site selection for hazardous waste facilities: super review, local control, or site designation.[264] Under the super review approach, a private developer selects a site and a state agency reviews the selection.[265] If the site is acceptable, the designated agency issues the permit, after allowing for participation by local residents.[266] In all states that utilize this procedure, a preemption clause allows the agency to ignore any local opposition if the agency is unable to eliminate it.[267]

Under the local control approach to site selection, a city or district may enact strict land use regulations to block any pollution facility.[268] Because state waste management plans do not necessarily preempt local land use decisions, the state may not

262. 42 U.S.C. §§ 6941-6949(a) (1988).

263. Godsil, *supra* note 17, at 401. Godsil also suggests that an amendment to RCRA and the model state legislation might be sufficient to prevent discriminatory siting decisions at the state level. *Id.* at 421-25.

264. *Id.* at 403; *see also* Collin, *supra* note 91, at 511.

265. Godsil, *supra* note 17, at 403.

266. *Id.* at 404.

267. *Id.*

268. *Id.* at 406. California and Florida both adhere to such an approach. *Id.*

have the power to stop consistent refusal of a city or district to bear a fair share of the pollution.[269] This method is the most harmful of the three approaches to minority communities, as the state cannot force an area to accept a hazardous facility, and the NIMBY syndrome can simply run rampant in communities with more wealth and political clout.[270]

Under the site designation approach, a state agency or board creates a list of possible sites.[271] This approach may be better suited to achieving equity than the super review approach because "the state, unlike [a private] developer, is not motivated by profit."[272] The state is far less likely to choose sites for purely economic reasons and is better suited to ensure that no one community becomes inequitably burdened.[273] Still, the site designation approach also has its problems. Municipalities, state agencies, and lobbyists from various private groups will still attempt to manipulate the system and remove their cities or counties from the list of potential sites. Thus, although minority communities are probably better off with the site designation approach, it is certainly not the answer in all cases to the problem of unequal environmental burdens.

Moreover, although minority citizens have used challenges to siting, permitting, and zoning decisions and processes as tools for challenging the disproportionate environmental burdens they must bear, cases such as *Save Our Neighborhoods*[274] and *R.I.S.E.*[275] illustrate the limits of these tools' usefulness. What the Act needs is revised siting powers and rules. A revision of the siting power left to states under RCRA would address only hazardous waste facilities; although it would give minority communities some relief from unequal waste management burdens, relief is also needed in the siting of chemical and industrial plants and other "LULUs."[276] Revisors must consider all aspects of the siting issue; only by tackling the heart of the matter will they find any real and lasting solution to environmental inequities.

---

269. *Id.*

270. *Id.* at 407.

271. *Id.* at 405.

272. *Id.* at 406.

273. Collin, *supra* note 91, at 512.

274. *See supra* notes 175-185 and accompanying text.

275. *See supra* notes 143-171 and accompanying text.

276. "LULU" refers to any locally unwanted land use. Collin, *supra* note 91, at 509.

5. The Environmental Justice Act Lacks a Meaningful Redress

a. The Act Fails To Address the Problem of Unequal Sanctions

A fifth problem with the current form of the Act is that it fails to address or remedy the inequity in assessing fines for pollution violations. The *NLJ* study concluded that companies and individuals who pollute in white neighborhoods must pay much higher fines than those who pollute in minority communities.[277] This practice encourages both the placement of hazardous industries in minority communities and the resulting pollution of those communities. Yet, the Act is entirely silent on this disturbing issue.

b. The Act Fails To Provide an Effective Legal Tool

Finally, the Act lacks a means by which disproportionately impacted citizens can seek redress and mandate enforcement of its provisions. Noting the dismal results achieved in Equal Protection Clause cases, 42 U.S.C. § 1983 actions, and claims of inadequate environmental impact statements or inadequate notice, it is apparent that a new legal tool is needed. Unfortunately, the Act provides little tangible assistance to minority citizens in their fight against unequal environmental burdens.

The one area in which the legislation is relatively strong is in its attempt to facilitate communication between citizens and their local, state, and federal governments. The TAGs would help minority residents obtain information regarding environmental hazards in their area and perhaps obtain legal counsel if litigation became necessary. By fostering information sharing, the Act would empower the disproportionately impacted citizens of the United States.

Obviously, a great deal of work will be involved in determining the one hundred counties that qualify as EHIAs and that qualify for assistance in the form of TAGs. However, it is likely that the parishes that comprise the infamous Cancer Alley, for example, would qualify as an EHIA by way of their sheer number of toxic chemical producing plants and other facilities. Other counties, such as the one incorporating Chicago's South Side, might also qualify because of their many abandoned waste sites and the manifestations of serious ill-

277. Lavelle & Coyle, *supra* note 15, at S2.

nesses in the area's residents. In addition, TAGs would assist community organizations in areas such as Kettleman City and Chicago's South Side. With money to disseminate information, mobilize public opposition, and even file suit, grassroots organizations might be able to discourage placement of environmentally hazardous facilities in their neighborhoods at the outset.

As beneficial as the TAGs would be, they would be even better if coupled with a way to effectively challenge the disproportionately burdensome decisions already in effect. Having information on projects and the money to challenge them are useful in staging grassroots opposition in the initial planning stages, but they are of much less use to these communities in challenging the decision once it has been made. This is because, as Part III demonstrated, the existing legal tools available to these communities have proved unworkable. Although the Environmental Justice Act is designed to provide "information, confidence in the system of regulations designed to protect [minority communities], and a better ability to be heard when they have concerns,"[278] it fails to achieve the third of these aims. Unless House Bill 2105 is rewritten to provide the means by which these communities can challenge the inequities they suffer and can be heard at the policymaking and judicial decision-making levels, the Act will not achieve its objectives.

V. Creating a More Effective Environmental Justice Act

One commentator suggests that legislation is needed to remedy the effects of environmental racism and to provide a cause of action for minority residents attempting to challenge siting decisions.[279] The proposed Environmental Justice Act of 1993 is not at all what that commentator envisioned. It may be a step in the right direction, but it is not powerful enough to provide any real assistance to minority communities. Minority citizens need stronger legislation that will assist them in challenging the permitting and siting of environmentally hazardous facilities at both the initial planning stages and at later stages when the projects are underway. Stronger legislation must also mandate the timely and efficient cleanup of existing and abandoned sites.

278. *Capitol Hill Hearing*, *supra* note 3.

279. Godsil, *supra* note 17, at 421-25.

Part V of this Comment addresses the revisions necessary to make the Environmental Justice Act a more effective weapon to fight environmental inequity. Section A of this Part provides suggestions for more immediacy in the Act. Section B discusses possible revisions of the Act to refocus on the goal of equity. Section C proposes a revision of the Act to include better state siting procedures that use state "fair share siting laws." Section D discusses the need for equal sanctions for equal violations. Section E addresses the concept of racial impact statements and racial impact mapping. Finally, Section F suggests that the Act include an "environmental inequity action."

A. Providing Immediacy of Action

In Part IV.B.2, this Comment discussed the proposed Act's lack of provisions that mandate immediate action. To remedy this, the authors of the Act should focus on sections 102 and 402 of the proposed Act.[280] Section 102 provides the EPA Administrator with one year to compile the data necessary to determine the one hundred EHIAs. Section 402 provides that, if the report required under section 401 identifies any significant adverse impacts of environmental pollution on human health in the EHIAs, the President shall submit to Congress proposed legislation designed to prevent and remedy such impacts up to three years later.[281] The Act then suggests several legislative responses, including the expansion of the Emergency Planning and Community Right-To-Know Act and the adoption of means to redress regulatory loopholes in other related legislation.[282]

As noted, the section 102 delay, coupled with the several year delays contemplated by sections 401 and 402, will allow new facilities to be sited and additional counties to qualify as EHIAs. This is unacceptable. Rather than postponing all action for several years, the Act should include provisions for some type of immediate response that will allow concurrent study and compilation of data. Furthermore, the legislative measures contemplated by section 402 should be enacted as part of the Act. Although smaller, piecemeal legislation often has a greater chance of passage than large, unwieldy bills, it is clear that legislative responses of the type mentioned in section 402 are needed immediately to address the problem of environ-

280. H.R. 2105, *supra* note 5, § 402.
281. *Id.* § 402(a).
282. *Id.*

mental inequity. Such legislative measures would serve to foster the idea of equity by alleviating some of the fear and skepticism of, and providing extra protection for, impacted communities. Moreover, these measures would not preclude taking additional measures once the report is finalized. Overall, providing some degree of immediacy in the Act would strengthen the legislation, ensuring that it is not merely a feel-good proposal.

B. Striving for Equity Again

In Part IV.B.3, this Comment discussed the Act's failure to remain consistent with its goal of equity. As the subsection suggested, the Act should not use counties as the target area. Counties are simply too large; by breaking the target areas into smaller components, such as cities, districts, towns, or neighborhoods, the Act would address environmental inequity at a more localized level. Because of the sheer number of these smaller components, the Act would need to be rewritten to increase the number of possible EHIAs to a level that would provide more comprehensive protection to the actual number of communities at risk. In a country the size of the United States, the Act's provision for only one hundred EHIAs is simply unrealistic and inadequate.

As a second related point, the authors of the Act must reexamine the moratorium exception.[283] To achieve the goal of equity, an absolute ban on siting and permitting, rather than a qualified ban, is needed in areas designated as EHIAs. If, however, the need for some kind of loophole is truly justified, at the very least, the language of the Act should narrow the scope of the exception as much as possible. For example, the Act could require that all alternative sites be considered and exhausted prior to requesting an exemption from the moratorium. Another suggestion would be to exclude exemptions based on increased costs, unless the Secretary of DHHS agrees that the costs of siting or permitting in an already environmentally burdened community are truly exorbitant, as opposed to merely inconvenient.

Clearly, if we are to achieve equity in the distribution of polluting facilities, a more narrowly tailored exception to the

283. The moratorium provision is conspicuously absent from the Senate bill. This provision, which provides some degree of protection for affected communities, must be included in an effective version of the Act.

moratorium provision must be developed. For example, the Act could provide that all cities and districts are eligible for polluting facilities or industries with only two exceptions: (1) proven geological or technological impossibility, and (2) the city or district already has one hazardous facility and there are other eligible locations. The goal would be to ensure that all communities must bear at least one pollution source, be it a garbage dump, toxic waste incinerator, or chemical plant. To equalize the burden further, the relative toxicity of the facility could be offset by a fee or other monetary assessment in the communities that are lightly burdened. Similarly, communities with geological limitation exemptions would have to contribute to the TAG fund under the Act.

This narrowing of the moratorium loophole might increase costs. Still, even if it raises the cost of waste disposal or industry operations, the increase would be ultimately beneficial. As the costs of finding sites for landfills and petrochemical plants that do not overly burden minorities and the poor increase, society will have a greater incentive to reduce overall pollution by recycling and by using alternative goods.

Because pollution is a growing problem to which every individual contributes, the goal of equity requires that each individual and each locality be forced to deal with it in equal shares. Restated another way, this means that no one group of individuals, such as the minority residents of our counties and states, should be forced to deal with a disproportionate share.

C. State Laws Based on Fair Share Siting

A major weakness of the Environmental Justice Act is its failure to urge each target area in the nation to carry its fair share of the environmental burdens associated with twentieth century society. This Section suggests that the Act be revised to deny funding to states that fail to adopt some type of "fair share siting" legislation. Fair share siting legislation, used in connection with environmentally hazardous industries and facilities, would reduce the disproportionate burdens on minorities and open up many predominantly white suburbs to the placement of these industries and facilities. The fair share siting legislation would be modeled after state affordable housing laws and would provide an effective alternative to both a federal siting board and many of the current state siting practices.

An excellent example of fair share siting is found in California's affordable housing legislation.[284] The legislation attempts to mandate the equitable distribution of housing burdens by prohibiting municipalities and counties from discriminating against low- and moderate-income and governmentally subsidized housing. As such, the California legislation provides a thought-provoking model for state or local fair share siting laws in the environmental equity context.

The California legislation states that each county and city must adopt a "comprehensive, long-term general plan for the physical development of the county or city."[285] These general plans must set forth "objectives, principles, standards and plan proposals" with respect to a variety of mandatory "elements."[286] One such element is the "housing element."[287] The housing element must identify adequate sites for all forms of housing and must "make adequate provision for the existing and projected needs of *all* economic segments of the community."[288]

Each housing element must include several considerations,[289] but the most relevant for the purposes of this Comment is the consideration requiring an "assessment of housing needs and an inventory of resources and constraints relevant to the meeting of those needs."[290] This consideration, in turn, requires an examination of the locality's share of the regional housing need.[291] The locality's share must include the share of the housing need of persons at all income levels, and the distribution of housing needs must attempt to "reduce the concentra-

284. *See generally* CAL. GOV'T CODE §§ 65580-65590.1 (West 1983 & Supp. 1993), *cited in* DANIEL R. MANDELKER & ROGER A. CUNNINGHAM, PLANNING AND CONTROL OF LAND DEVELOPMENT 362 (3d ed. 1990). *See also* Collin, *supra* note 91, at 544-45. Like California, the City of New York is considering a charter revision that will ensure the equitable distribution of desired and undesired public facilities (such as jails, homeless shelters, and drug treatment centers) among neighborhoods. *Id.* at 544. Presumably, this revision would also affect sewage treatment plants and various polluting industries.

285. CAL. GOV'T CODE § 65300 (West 1983).

286. *Id.* § 65302.

287. *Id.* § 65302(c); MANDELKER & CUNNINGHAM, *supra* note 284, at 362.

288. CAL. GOV'T CODE § 65583 (West 1983) (emphasis added).

289. The other factors include (1) an analysis of "potential and actual governmental constraints" on "development of housing for all income levels, including land use controls"; (2) an analysis of the "availability of financing, the price of land, and the cost of construction"; and (3) a five-year housing program that must identify "adequate sites. . . [for the] development of a variety of types of housing for all income levels." MANDELKER & CUNNINGHAM, *supra* note 284, at 363.

290. CAL. GOV'T CODE § 65583(a) (West 1983).

291. *Id.* § 65583(a)(1); *see also id.* § 65584.

tion of lower income households in cities or counties which already have disproportionately high proportions of lower income households.[292] This is the heart of the fair share legislation. The fair share for each county or city shall be determined by the appropriate council of governments, defined as single or multicounty councils,[293] based upon statewide housing need data provided by the California Dept. of Housing and Community Development.[294] The Department has the power to review and, if necessary, revise the council of government's determination of the locality's fair share.[295]

The California legislation offers some useful suggestions for similar legislation in the environmental equity context. If each state enacted some form of fair share siting legislation based on the California housing model, the problem of environmental inequity could be addressed on the national level in a way that preserves the benefits of state and local autonomy. The fair share siting legislation would work in the following manner: Like the California municipalities and counties, each target area as designated by the Environmental Justice Act would be required to adopt a comprehensive plan. Once again, it is important to note that the Act's definition of target area must be as small as possible so as to avoid abuse of the system within each target area (i.e., placing all fair share facilities in a minority corner of a neighborhood, district, town, or other smaller subdivision).

Replacing the housing elements in these comprehensive plans would be "environmental burden elements." Environmental burdens would range from landfills to petrochemical plants to hazardous waste storage facilities. Like the housing element, this environmental burden element would include several considerations:

(1) an assessment of the need for environmental burdens, including that target area's share of the regional environmental burdens;

(2) the potential and actual governmental constraints on the equalization of environmental burdens for all citizens regardless of race or socioeconomic status;

(3) the cost of construction and price of the land; and

---

292. *Id.* § 65584(a) (West 1983 & Supp. 1993).

293. *Id.* § 65582(b) (West 1983).

294. *Id.* § 65584(a) (West 1983 & Supp. 1993).

295. *Id.*

(4) an environmental equity program, which must identify sites that are not overly burdened and that will be made available through appropriate zoning.

The locality's share of the regional environmental burdens noted in the first factor would have to be provided by an entity such as the California councils of governments. The wisdom of the California model is that the council of governments is a somewhat neutral entity, at least when it is a multicounty council. This type of decision-making entity, when coupled with a review of the decision by the state's housing and community development department, decreases the NIMBY influence.

Thus, each target area would have to create an entity that would be responsible for determining its fair share of environmental burdens. As in the California legislation, this must not be a nonreviewable decision; rather, some larger entity, such as the Environmental Equity Office,[296] must be responsible for compiling and promulgating nationwide data on environmental burdens and for reviewing the shares for each target area to ensure that they are, in fact, consistent with the goal of environmental equity.

As stated previously, legitimate reasons exist for allowing certain limited exceptions to the requirement that each and every target area partake equally of the environmental burdens in our society. For example, our nation does not allow petrochemical plants or smelters to operate in the Grand Canyon, even though this puts an unequal burden on the surrounding communities. Thus, the second factor of the environmental burden element would speak to these kinds of governmental constraints and narrow exceptions to the fair share siting mandate.

The first factor is where the heavily impacted minority citizens would find their greatest protection, as they are already supporting more than their fair share. Moreover, the fourth factor would be designed to combat the NIMBY syndrome, by mandating siting in areas that have no or proportionately fewer environmental burdens and no valid geological or preservationist constraints. It is likely that areas identified according to

296. The Environmental Equity Office was created to deal with environmental impacts on racial minority and low socioeconomic communities, and it will serve as the EPA's and public's point of contact for equity issues, technical assistance, and information dissemination. *See Community Leaders Angered by EPA Report on Pollution Impacts on Poor*, Daily Rep. for Exec. (BNA) (July 24, 1992), *available in* WESTLAW, BNA File.

these factors would consist of many of the predominantly white localities that were previously able to shirk their fair share of society's environmental burdens.

Thus, fair share siting legislation at the state level would ameliorate many of the problems associated with current siting procedures. At the very least, the Environmental Justice Act should be rewritten to require fair share siting, as well as to specify the entity in charge of determining the fair share for each target area and the manner by which this share will be calculated. The Act should also specify a deadline for completion of these tasks. Furthermore, as it is probably not possible to mandate that all states adopt this type of fair share siting because of federalism constraints, the Act should strongly encourage states to adopt this approach to siting by stating that significant amounts of federal funding will be withheld from states that do not adopt such an approach. Such an approach would provide a strong incentive for voluntary state implementation of fair share siting laws to promote environmental equity.

D. Equal Sanctions for Equal Violations

In Part IV.B.5.b, this Comment discussed the fact that polluters in white neighborhoods are likely to pay much higher fines for pollution violations as compared with the same violation in minority neighborhoods. This suggests that officials and agencies responsible for imposing sanctions do not perceive the environmental quality of minority neighborhoods to be as valuable as that of white neighborhoods. To make matters worse, it often takes much longer for an environmental hazard to be placed on the Superfund priority action list for cleanup if it is located in a minority community.[297]

The Act is entirely silent on this aspect of environmental inequity. Clearly, the sanctions for violations and the time frames for cleanups should be uniformly enforced if the Act is to achieve its purpose of environmental justice. But it is difficult to suggest a revision to the Act that would remedy the problem of inequitable enforcement and sanctions. While the Act could establish a uniform schedule of fines for violations of the major pollution laws of this country that applied equally to polluters of white and minority neighborhoods, such a schedule would not address the widespread failure of agencies and officials to

297. Lavelle & Coyle, *supra* note 15, at S2.

enforce the rules equitably. Such change may well have to come from within.[298] At the very least, however, the Act should acknowledge that the discrepancy in enforcement and sanctions exists and that it provides one more example of the need for environmental justice. It should also strongly encourage, as a policy statement, the equitable enforcement of all environmental laws at all levels.

E. Racial Impact Mapping and Racial Impact Statements

Another suggestion for improving the link between the provisions of the Act and equity goals is the inclusion of provisions requiring use of "racial impact mapping" and "racial impact statements." These tools would be useful in attaining the Act's ultimate goal, whether the siting process is left in the hands of the states or placed in the hands of a federal entity.

Racial impact mapping would require the siting entity to identify the neighborhoods, census tracts, or communities that have no environmentally hazardous facilities or plants in a given target area—a county, city, or town. The siting entity would then compare these areas with locales that have one or more facilities or industries, thereby enabling the siting entity to better assess the possible inequities of its siting plans. This tool could be incorporated into a fair share siting approach because the entity in charge of determining the fair share for each target area would need to perform some type of racial impact mapping to determine existing unequal burdens. The results of the mapping would determine future permitting and siting availability in target areas.

Racial impact statements, on the other hand, would require a specific description of the racial demographics of the surrounding communities within a certain radius of the proposed site. They would, therefore, force developers and sitting entities to consider alternatives to a proposed siting decision and to acknowledge any disproportionate environmental burdens on minority communities. The racial impact statement would be required to indicate specific potential environmental impacts on surrounding minority and low-income communities. For exam-

298. Recently, Attorney General Janet Reno commented that the Justice Department will supplement the EPA's required regulatory efforts under President Clinton's February executive order to provide minority communities with equal protection from polluters. *See* Melissa Healy, *"Environmental Justice" for U.S. Minorities Is Ordered,* L.A. TIMES, Feb. 12, 1994, at 15A; *see supra* note 6.

ple, any particularly high risk to a minority community, such as the potential contamination of fish (as a result of a proposed site) in a community that consumes large quantities and has a fishing-based economy, would have to be clearly noted.[299]

Racial impact statements would be modeled after the environmental impact statements mandated by section 102 of the National Environmental Policy Act (NEPA).[300] Unlike the traditional environmental impact statement, however, which is required for "major federal actions significantly affecting the quality of the human environment,"[301] the racial impact statement would apply to a broader array of environmental burdens. The Environmental Justice Act would be revised to require a racial impact statement for each new "toxic chemical facility" as that term is defined in House Bill 2105.[302] Thus, with more facilities subject to a racial impact consideration, the Act would move closer to achieving its equity goal.

F. An Environmental Inequity Action

Part III of this Comment noted the poor results achieved by minority citizens and organizations using the Equal Protection Clause and 42 U.S.C. § 1983 to challenge environmental inequity. Although slightly more successful, even challenges based on inadequate environmental impact statements are difficult for minority groups to win because minorities often lack access to legal resources. If these challenges fail, the project is likely to go forward and minority communities have little or no possibility for redress. The Environmental Justice Act should pro-

---

299. The Puyallup Tribe, near Tacoma, Washington, is just such a subsistence fishing community. The Tribe's reservation includes a large Superfund site in the industrial area of the Port of Tacoma. Marcia Coyle, *A Way of Life Is Threatened*, NAT'L L.J., Sept. 21, 1992, at S9 (special investigation section). High pollution levels in the Tribe's fishing waters have severely damaged the Tribe's economy and cultural identity, and has contributed to increased cancer rates among its members. *Id.*

300. 42 U.S.C. § 4332(c) (1988).

301. VALERIE M. FOGLEMAN, GUIDE TO THE NATIONAL ENVIRONMENTAL POLICY ACT 117 (Quonum Books ed., 1990).

302. House Bill 2105 § 101 defines "toxic chemical facilities" as

> all facilities including federal facilities subject to a permit, inspection, or review, or registration requirement pursuant to the authority of the Solid Waste Disposal Act; the Clean Air Act; the Clean Water Act; the Federal Insecticide, Fungicide and Rodenticide Act; and the OSHA Hazard Communication Standard; as well as any facility subject to reporting obligations pursuant to the Emergency Planning and Community Right-to-Know Act.

H.R. 2105, *supra* note 5, § 101.

vide the means by which disproportionately impacted citizens can seek redress and mandate enforcement. This can be accomplished by providing a cause of action for disproportionate impact.

In one of the first articles to explore the concept of environmental racism, Rachel Godsil suggested that federal legislation should create a disparate impact cause of action to address discrimination in connection with hazardous waste facility sitings.[303] The cause of action, which would focus on the "consequences of site selection rather than the motivations,"[304] would be modeled after an amendment to Title VII suggested by the Civil Rights Act of 1990.[305] Like the two-pronged analysis in the 1990 bill, Godsil's cause of action rests on two elements: disparate impact and environmental necessity.[306]

To prove disparate impact, Godsil suggests that plaintiffs will have to demonstrate that the siting of the facility will result in a greater burden on their community due to the presence of other polluted sites or polluting industries, than on a white community.[307] This showing of greater impact is necessary because some degree of disparate impact occurs any time a hazardous waste facility is sited.[308] Once the plaintiff satisfies this initial burden, the burden would shift to the defendant to demonstrate that the hazardous waste facility siting decision is an environmental necessity.[309] Environmental necessity requires a showing that the site was environmentally suitable (according to the state's particular criteria) and, if the plaintiff contends that alternative sites were available, that it was necessary for the safe disposal of the hazardous wastes.[310]

---

303. Godsil, *supra* note 17, at 421-22.

304. *Id.* at 422.

305. *See* Civil Rights Act of 1990, S. 2104, 101st Cong., 2nd Sess. (1990). Godsil notes that this Act, which was ultimately vetoed by former President Bush, would have amended Title VII to eliminate the necessity of proving discriminatory purpose in employment discrimination cases. *See* Godsil, *supra* note 17, at 421, 421 n.207. Under the Act, an unlawful employment practice based on disparate impact exists where two elements are satisfied: The plaintiff "demonstrates that an employment practice results in a disparate impact on the basis of race, color, religion, sex or national origin," and the defendant is unable to "demonstrate that such practice is required by business necessity." *See* S. 2104, *supra*, § 4.

306. Godsil, *supra* note 17, at 422.

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.* at 422-23.

Thus, including Godsil's proposed cause of action or a similar cause of action in the Environmental Justice Act would provide greater protection to minority communities by making their burden of proof less onerous in challenging final decisions and by acknowledging the persuasive value of their statistics and data. The disparate impact cause of action would also provide a workable compromise between the present need to locate hazardous facilities and the current disproportionate burden on minority communities; if the defendant can show that a particular site is an environmental necessity, the siting decision will go forward despite the disparate impact.[311] The Act should, however, increase the reach of the cause of action to encompass all toxic chemical facilities as defined in the Act,[312] as opposed to merely hazardous waste facilities.

The significance of this cause of action can be seen by applying it to the facts of *El Pueblo*.[313] In that case, attorney Luke Cole could clearly show that the incinerator would disproportionately impact the Kettleman City residents, particularly with a hazardous waste landfill already located in the area. Chemical Waste would have a much more difficult time justifying its decision as an environmental necessity. Arguably, the residents in the *E. Bibb Twiggs*[314] and *Bean*[315] cases would receive the same benefit. Thus, the need to revise the proposed Act to include an effective means for redress is compelling.

The Act could also be revised to include an environmental equity action modeled after a proposed amendment to the Solid Waste Disposal Act[316] that is currently under review in the U.S. House of Representatives.[317] This House bill, entitled the "Environmental Equal Rights Act of 1993," provides a framework whereby

> any citizen residing in a State in which a new facility for the management of solid waste (including a new facility for the management of hazardous waste) is proposed to be con-

311. *Id.* at 423.

312. *See* H.R. 2105, *supra* note 5, § 101.

313. El Pueblo Para El Aire Y Agua Limpio v. County of Kings, No. 366045 (Cal. Super. Ct. Dec. 30, 1991).

314. Godsil, *supra* note 17, at 424. Godsil discusses the disparate impact cause of action in terms of its hypothetical application to the *E. Bibb Twiggs* case. Because of the similarity in data available to the plaintiffs, however, it is possible to make a similar argument with reference to the *Bean* case.

315. 482 F. Supp. 673 (S.D. Tex. 1979).

316. 42 U.S.C. §§ 6901-6992 (1988).

317. *See* H.R. 1924, 103d Cong., 1st Sess. (1993).

> structed in an environmentally disadvantaged community may submit a petition to the appropriate entity . . . to prevent the proposed facility from being issued a permit to be constructed or to operate in that community.[318]

The key to the legislation is that the challenge brought by petitioners would be based on "the choice of location being within 2 miles of another waste facility, Superfund site, or facility that releases toxic contaminants, *and* . . . being in a community that has a higher than average percentage of low-income or minority residents."[319]

Notably, the Environmental Equal Rights Act and its right to petition pertain only to the siting of solid waste disposal facilities. However, the Act is important because it recognizes that it is not necessarily the facility itself that burdens the community. Rather, the burden stems from the cumulative environmental and health effects brought about by a concentration of several such facilities in minority communities. Accordingly, the Act incorporates ideas of racial impact mapping and fair share siting, insofar as it is providing a petition right to communities that already have their share of environmental and health burdens.

A version of this right to petition concept should be incorporated into the Environmental Justice Act. The right to petition should extend to all toxic chemical facilities, as defined in section 101 of House Bill 2105. Not only would this addition provide minority citizens with a valuable legal tool in the initial stages of siting decisions and give them a greater chance of being heard, but it would also strengthen the TAG provision in the Act; minority communities would then have both the tool and the funds to use that tool.

Ideally, though, the Act should include both an explicit right to petition, which would operate only prospectively, and a cause of action, like that suggested by Godsil, that enables the affected communities to challenge existing facilities. While prospective remedies will ensure that the burdens minority communities bear do not get worse, other remedies are needed to equalize some of the existing injustice.

---

318. *Id.* § 7014(a).

319. *See* 139 CONG. REC. E1106, E1107 (daily ed. April 30, 1993) (statement of Rep. Collins). Note that the petitioner would also have to demonstrate that the proposed facility may have adverse health or environmental quality impacts on the surrounding community. *Id.*

VI. CONCLUSION

This Comment has attempted to demonstrate two things: First, the problem of environmental inequity is a pressing concern that requires legislative response. Second, the legislative response represented by the proposed Environmental Justice Act of 1993 does not adequately address the concern. The studies and cases illustrating the disparate environmental and health impacts on minority communities demonstrate that there is injustice in the existing siting and permitting procedures and legal tools. The Act, although a commendable effort to address these facts, will not achieve its stated goal of environmental justice or equity. As it is presently drafted, the Act lacks a racial nexus, fails to consistently pursue equitable distribution of environmental and health hazards, fails to take a hard look at the core problem of siting procedures, and fails to provide any meaningful tools of redress for affected communities as they attempt to equalize their environmental burdens in public hearings and courtrooms. Thus, only with substantial revisions will the Act achieve any true measure of environmental justice.