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South Camden and Environmental Justice: Substance, Procedure, and Politics

by Jeffrey M. Gaba

In two recent decisions styled *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*,[1] Judge Stephen M. Orlofsky of the U.S. District Court for the District of New Jersey has seemingly put some teeth in the environmental justice movement. The judge not only found that private parties have a cause of action for violation of the U.S. Environmental Protection Agency's (EPA's) Title VI environmental justice regulations,[2] but, based on the failure of the New Jersey Department of Environmental Protection (NJDEP) to properly consider environmental justice issues, he vacated air quality permits issued by the NJDEP and enjoined operation of a cement plant in Camden, New Jersey.[3]

Although the finding of a private cause of action is the most striking aspect of the opinions, there are a number of other fascinating implications of these decisions. First, in applying Title VI civil rights legislation to environmental permitting, the judge apparently applied a new, general environmental standard of "no significant adverse affect" for permit decisions that disproportionately affect minority communities. Thus, a new standard may have been added to the roster of environmental standards and acronyms.

Second, the specific Title VI violation found by the judge was the failure of the NJDEP to assess disparate environmental impacts of its permitting decision. The opinion, however, nowhere discusses the substantive authority that state permit writers have to either deny or condition environmental permits based on a finding of disparate adverse impact. Based on EPA's positions on its own permit authority and EPA's Title VI guidance, it is quite likely that states have minimal legal authority to take such actions.

Even if this is the case, however, the *South Camden* decisions and EPA's Title VI regulations will still be important tools in the environmental justice movement. At a minimum, Title VI requirements will require states to use whatever authority they have to minimize environmental impacts of permits creating disparate impacts. Perhaps more significantly, a Title VI assessment, whether compelled by private parties through a private cause of action or by EPA through its Title VI authority, will be an important political tool.

Environmental Justice and Title VI

One of the most interesting developments in environmental law has been the growing appreciation of the distributional justice concerns of environmental pollution. Fueled by a series of studies that suggest environmentally harmful activities, such as waste disposal sites or polluting industries, are disproportionately located in minority communities,[4] civil rights and environmental justice advocates have increasingly brought attention to the potential discriminatory application of environmental laws. The major, although not exclusive, focus of environmental justice concerns has involved the permitting by state and federal officials of harmful facilities in minority neighborhoods.[5]

Although the environmental justice movement has focused the attention of the environmental community on a critical injustice, the movement has been limited by a lack of legal tools to address the issue.[6] Environmental justice claims based on violation of the Equal Protection Clause face the almost insurmountable burden of proving discriminatory intent.[7] Executive Order No. 12898, issued by President William J. Clinton, requires federal agencies to consider environmental justice issues, but the Executive

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1. No. 01-702, 2001 WL 392472 (D.N.J. Apr. 19, 2001) (South Camden I); No. 01-702, 2001 WL 491965 (D.N.J. May 10, 2001) (South Camden II).
2. 40 C.F.R. pt. 7 (2000).
3. On June 15, 2001, the Third Circuit lifted the district court's injunction that prohibited operation of the cement plan; the court indicated doubt about the district court's decision that a private cause of action existed under §1983 of the Civil Rights Act to assert a violation of Title VI regulations. *See* LEGAL INTELLIGENCER, June 20, 2001, at 3. Briefs have been filed and an expedited ruling on the merits could be issued by late summer. *See* section entitled The *South Camden* Decisions, *infra*, for a discussion of the district court's holding.
4. *See generally* Bradford C. Mank, *Environmental Justice and Discriminatory Siting: Risk-Based Representation and Equal Compensation*, 56 OHIO ST. L.J. 329 (1995); Vicki Been, *What's Fairness Got to Do With It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001 (1993).
5. Separate issues have been raised about discriminatory enforcement of environmental laws. In 1992, the *National Law Journal*, for example, published the result of its investigation of federal enforcement of environmental law suggesting that the federal government is less responsive to environmental needs in minority communities. NAT'L L.J., Sept. 21, 1992, at S2.
6. *See generally* Karen Smith, *How the Legal System Has Failed the Environmental Justice Movement*, 12 J. NAT. RESOURCES & ENVTL. L. 325 (1996-1997).
7. *See* Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977); East Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb County Planning & Zoning Comm'n, 896 F.2d 1264 (11th Cir. 1989).

Order itself creates no private right of action and provides no new authority for agencies to address environmental justice concerns.[8]

Perhaps the most promising tool for addressing environmental justice concerns has been Title VI of the Civil Rights Act of 1964.[9] Title VI generally prohibits discrimination by parties receiving federal funds. Section 601 directly provides that no person shall "on the ground of race, color, or national origin, be denied the benefits of, or be subjected to discrimination under any activity" covered by Title VI.[10] Section 602 authorizes federal agencies to effectuate the provisions of section 601 "by issuing rules, regulations, or order of general applicability."[11] Although the U.S. Supreme Court has held that a violation of the prohibition in §601 requires proof of discriminatory intent,[12] the Court's opinions have generally held that agencies are free to establish Title VI regulations that prohibit activities by recipients of federal funds that have discriminatory effects.[13]

EPA in 1984 issued its Title VI environmental justice regulations (EPA Title VI regulations) pursuant to §602.[14] These regulations, found at 40 C.F.R. Part 7, expressly provide that "[n]o person shall be excluded from participation in, be denied the benefits of, or subjected to discrimination under any program or activity receiving EPA assistance on the basis of race, color, national origin . . . ."[15] The regulations implement this general prohibition through a test based on discriminatory impacts. The regulations expressly provide that a recipient of federal funds are prohibited from:

> [U]sing criteria or methods of administering its program which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, national origin, or sex.[16]

Upon a finding of a violation of these regulations, EPA may withdraw funding to the recipient.[17]

One major focus of the environmental justice movement has been implementation of these requirements by EPA. EPA has faced a growing number of petitions by private parties seeking to have EPA act against state environmental agencies receiving EPA funding.[18] These petitions are generally based on claims that the state agencies' activities, particularly permitting decisions, have discriminatory impact. Additionally, in response to Executive Order No. 12898, EPA has increasingly addressed, if not acted on, environmental justice concerns in its own permit decisions.[19]

What has been lacking has been a cause of action by citizens groups directly against the allegedly discriminating state agency or the offending facility. The availability of such a cause of action was the main focus of the *South Camden* decisions.

The *South Camden* Decisions

The *South Camden* decisions involve a challenge to a decision by the NJDEP to issue air permits to a proposed cement processing plant to be operated by St. Lawrence Cement Co. (SLC) in the Waterfront South neighborhood of Camden. Waterfront South is overwhelmingly a minority community. Sixty-three percent of the residents are African American, 28% are Hispanic, and 9% are non-Hispanic whites. Forty-one percent of the residents are children.[20] Although located in the "Garden State," it is fair to say that Waterfront South is not a garden spot. It is, as described by the judge, "a popular spot for locating industrial facilities."[21] The neighborhood, prior to the proposed operation of the cement refinery, already contained a large number of waste disposal and recycling facilities, a sewage treatment plant, a power plant, and two Superfund sites.[22]

The proposed cement facility would contribute to existing pollution in the neighborhood. The facility itself would directly emit particulates, mercury, lead, manganese, nitrogen oxides, carbon monoxide, sulfur oxides, and volatile organic compounds. It would also indirectly increase the pollution burden in the area from trucks serving the facility. The opinion states that, annually, there would be 35,000 inbound

8. Exec. Order No. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 Fed. Reg. 762 (Feb. 11, 1994), ADMIN. MAT. 45075. Section 1-1 of the Executive Order states that agencies are to implement its policies "to the greatest extent practicable and permitted by law . . . ." Section 6-608 states that the Executive Order is not intended to create any private rights. *See* In re Chemical Waste Management of Ind., 6 E.A.D. 66, ADMIN. MAT. 40392 (EPA EAB June 29, 1995) (discussing the legal implications of Exec. Order No. 12898).
9. 42 U.S.C. §§2000d et seq.
10. *Id.* §2000d.
11. *Id.* §2000d-1.
12. *See* Alexander v. Sandoval, 121 S. Ct. 1511 (2001); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).
13. *See Sandoval*, 121 S. Ct. at 1511; Guardians Ass'n v. Civil Serv. Comm'n of New York City, 43 U.S. 582 (1983).
14. U.S. EPA, Nondiscrimination in Programs Receiving Federal Assistance From the Environmental Protection Agency, 49 Fed. Reg. 1656 (Jan. 12, 1984) (codified at 40 C.F.R. pt. 7 (2000)). In 1998, EPA issued "interim guidance" on application of these regulations. U.S. EPA, INTERIM GUIDANCE FOR INVESTIGATING TITLE VI PERMITS (1998) (available from the ELR Document Service, ELR Order No. AD-3660). *See* Maura Lynn Tierney, *Environmental Justice and Title VI Challenges to Permit Decisions: The EPA's Interim Guidance*, 48 CATH. U. L. REV. 1277 (1999). EPA recently issued two "draft" guidance documents that further expand on implementation of the Title VI regulations. U.S. EPA, Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Draft Recipient Guidance) and Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Draft Revised Investigation Guidance), 65 Fed. Reg. 39650 (June 27, 2000) (available from the ELR Document Service, ELR Order Nos. AD-4517 (Draft Recipient Guidance) and AD-4516 (Draft Revised Investigation Guidance) [hereinafter Draft Title VI Guidance]. One document provides guidance to recipients of federal funds on compliance with their Title VI obligations. The other provides guidance on EPA's investigation of environmental justice complaints. *See* Bradford C. Mank, *The Draft Title VI Recipient and Revised Investigation Guidances: Too Much Discretion for EPA and a More Difficult Standard for Complainants?*, 30 ELR 11144 (Dec. 2000).
15. 40 C.F.R. §7.30 (2000).
16. *Id.* §7.35(b).
17. *Id.* §7.130.
18. One commentator has noted that as of 1999, EPA had received 67 administrative complaints claiming disparate environmental impacts under Title VI. David D. Duncan, *Environmental Justice and Permitting: Cases Applying EPA's Guidance and Regulations*, ENVTL. REG. & PERMITTING, Summer 1999, at 105, 108. As of June 1, 2001, the website for EPA's Office of Environmental Justice lists far more than that number. *See* U.S. EPA, *Title VI Complaints, at* http://www.epa.gov/ocrpage1/t6complnt.htm (last visited June 1, 2001).
19. *See* Duncan, *supra* note 18.
20. *South Camden I*, No. 01-702, 2001 WL 392472, slip op. at 10.
21. *Id.* at 1.
22. *Id.*

truck deliveries to the facility and 42,000 outbound truck deliveries from the facility.[23]

Although health and environmental justice concerns were raised during the permit process, the NJDEP's general position was that its actions satisfied environmental justice obligations because the permits would assure compliance with EPA's health-based national ambient air quality standards (NAAQS). The NJDEP conducted no site-specific health assessment on the impact of the proposed facility.[24]

In *South Camden I*, the judge held, based on prior Third Circuit cases, that citizens had a direct cause of action under §602 of Title VI to sue the state for violating EPA's Title VI regulations. Applying a preliminary injunction standard, the judge also held that the plaintiff had established a likelihood of success on the merits. In reaching this conclusion, the judge held that the plaintiffs had met their burden of proving that the proposed facility would have a disproportionate and significant "adverse affect" on the community and that this affect was "caused" by the criteria. Although SLC offered economic justification for the impact, the court held that there was insufficient evidence to rebut the existence of the significant adverse impact.

Five days after the issuance of *South Camden I*, the Court issued its opinion in *Alexander v. Sandoval*.[25] On a 5-4 vote, the Court in *Sandoval* held that there was no private cause of action under Title VI for violation of agency regulations issued under §602. The Court assumed, but did not address, the issue of whether agencies had the authority under §602 to promulgate Title VI regulations that prohibit conduct based on discriminatory "impact" as opposed to "intent."

Not to be outdone (or undone), Judge Orlofsky, in *South Camden II*, quickly issued an elaborate and well-reasoned opinion that held that the plaintiff could rely on 42 U.S.C. §1983 as an independent cause of action to assert that New Jersey's practices violated EPA Title VI regulations. Section 1983, among other things, prohibits states "under color of law" from depriving citizens of rights secured by the "Constitution or laws," and the court concluded that EPA's Title VI regulations created "a federal right" that could be enforced through a §1983 action. Allowing an amendment of the original complaint to allow plaintiffs to plead §1983, the court reaffirmed the substantive holdings in *South Camden I* regarding violation of the EPA regulations.

23. *Id.* at 3-5.

24. According to the opinion, the NJDEP considered:

> [O]nly whether the facility's emissions would exceed technical emissions standards for specific pollutants, especially dust. Indeed, much of what this case is about is what the NJDEP failed to consider. It did not consider the level of ozone generated by the truck traffic to and from the SLC facility, notwithstanding the fact that the Waterfront South community is not currently in compliance with [NAAQS] established by EPA for ozone levels, nor did it consider the presence of many other pollutants in Waterfront South. It did not consider the pre-existing poor health of the residents of Waterfront South, nor did it consider the cumulative environmental burden already borne by this impoverished community. Finally, and perhaps more importantly, the NJDEP failed to consider the racial and ethnic composition and population of Waterfront South.

Id. at 2.

25. 121 S. Ct. 1511 (2001).

Some Environmental Implications of *South Camden* and Title VI

Perhaps the most significant aspect of the *South Camden* decisions is the finding of a direct private action against state practices that violate EPA's Title VI regulations. Although the direct Title VI cause of action was rejected in *Sandoval*, there is considerable support for the district court's conclusion that §1983 provides an alternative ground for the private cause of action.[26] But even in the absence of a direct private cause of action, EPA's Title VI regulations may continue to be significant since the Court has not disputed the federal agencies' ability to enforce Title VI regulations through appropriate mechanisms.[27] Thus, EPA may continue to put pressure on states to comply with the regulations through threats of funding withdrawal, and private parties still have the ability to petition EPA to act against states that are alleged to have violated the regulations.

The application of EPA's Title VI regulations in *South Camden* has other perhaps more significant implications for environmental law.

Does Title VI Create a New Broadly Applicable Environmental Standard of "No Significant Adverse Affects"?

Environmental lawyers are familiar with the variety of environmental standards contained in federal environmental statutes. The NAAQS in the Clean Air Act (CAA) are set on a standard of "requisite to protect the public health" with an "adequate margin of safety."[28] Water quality standards under the Clean Water Act are established to achieve the fishable/swimmable standard of §101(a)(3).[29] The general standard for establishing conditions for hazardous waste disposal facilities is "necessary to protect public health and the environment."[30] Some of these standards can form the basis for direct permit conditions; others are used to establish standards that are then translated into permit restrictions; others are merely hortatory with limited or no legal significance. One of the most striking aspects of the *South Camden* opinions (at least to this environmental lawyer) is the court's use of Title VI to establish a new, generally applicable, environmental standard of "no significant adverse affect."

In *South Camden I*, the court evaluated compliance with EPA's Title VI regulations based on an assessment of whether the permit would have a "disparate impact" on a minority population. Based on case law interpreting "disparate impact" in other contexts, the court held that plaintiffs must establish that a facially neutral practice "detrimentally affects persons of a particular race to a greater extent than other races."[31] Applying this standard, the court in *South Camden* held that plaintiffs could likely prevail on a claim

26. *See id.* at 1527 (Stevens, J., dissenting).

27. It remains to be seen whether the Court will continue its current position that federal agencies may adopt "disparate impact" regulations under §602 to implement a "discriminatory intent" standard under §601.

28. 42 U.S.C. §7409(b)(1), ELR STAT. CAA §109(b)(1).

29. *See* 40 C.F.R. §131.10 (2000).

30. 42 U.S.C. §6923(a), ELR STAT. RCRA §3003(a) (Resource Conservation and Recovery Act (RCRA)).

31. *South Camden I*, No. 01-702, 2001 WL 392472, slip op. at 34.

that the state had violated EPA's Title VI regulations based on an unrebutted showing that plaintiffs would suffer disproportionate significant "adverse affects" that were "caused" by the NJDEP's permitting practices.

The court quite properly concluded that the mere assurance that the source would not violate national health-based air standards would not assure the absence of local adverse health effects. Anyone familiar with the methodology and scope of NAAQS knows that this is self-evident. Thus, the court found that the NJDEP had erred by not conducting a site-specific assessment of the extent to which the residents of Waterfront South would be "adversely affected" by permitting the proposed facility.

What is remarkable is the source and scope of this requirement to assess localized adverse affects. The court did not conclude that the CAA required a site-specific assessment of air quality; nor did it conclude that the appropriate standard for assessing localized air quality impacts was any standard found in the CAA or other environmental statute. Rather, the court held that New Jersey would likely be found in violation of a Title VI regulatory standard of significant "adverse affects." Thus, the Title VI "disparate impact" analysis became the standard for assessing environmental adequacy of the state's permitting actions.

Application of such a Title VI "no significant adverse affect" standard could have broad applicability. Nothing in the court's analysis nor in EPA's Title VI regulations, for example, limit the application of the "no significant adverse affect" standard to consideration of the types of affects regulated by the funded agency.[32] In *South Camden I*, the main focus was the air quality impacts associated with the issuance of air permits, but presumably all environmental impacts could be considered whether or not related to the jurisdiction of the funded agency. Thus, if a state agency receiving EPA funding issues an air quality permit, the water quality impacts of the proposed facility would now be subject to the Title VI standard. Once there is a federal funding handle through EPA's grant program, any state permit will presumably be potentially subject to the broad-ranging Title VI standard.

Nor is it clear that the application of EPA's Title VI regulations is limited to consideration of the types of environmental impacts that are generally regulated by EPA. If aesthetic or recreational loss is viewed as a "significant adverse affect," permits issued by state agencies receiving EPA funds would presumably be subject to a Title VI review for such impacts. Plaintiffs in *South Camden*, in fact, claimed that the permitting of the proposed cement plant would adversely affect their "quality of life." The court rejected plaintiffs' motion for a preliminary injunction on this claim, not because such an affect would not be covered by EPA's Title VI regulations, but because the claim was unsupported by the record.[33] Similar "quality of life" concerns also formed the basis of a claimed violation of EPA's Title VI regulations in *New York City Environmental Justice Alliance v. Giuliani*.[34] In *Giuliani*, plaintiffs argued that New York City's proposed sale or destruction of city lots containing community gardens would violate EPA's Title VI regulations. The opinion did not identify the nature of EPA's funding that related to the city's sale of city property, but EPA's regulations are open to the construction that regardless of the funding source the recipient may not engage in practices having discriminatory affects unrelated to the funding itself.

Finally, actions by states funded by any other federal agency that has similar Title VI regulations would also now be subject to a similar environmental review. The reason EPA's regulations were at issue in *South Camden* was not because there were environmental impacts but because the state program was funded by EPA. Environmental impact considerations may now be relevant in any state program receiving funds from federal agencies with similar regulations.

Thus, under the court's analysis, EPA's Title VI regulations (and potentially other federal regulations) allow the court to undertake a wide-ranging inquiry into the environmental impacts of a proposed facility untethered to any statutory environmental standard.

Does Title VI Grant New Substantive Authority to Deny or Condition Private Permits?

Although the *South Camden* opinions are surprisingly circumspect on this issue, it appears that the state's Title VI failure was its decision not to undertake any additional assessment after finding compliance with the federal NAAQS. Thus, it was the "criteria or methods" that violated the regulations. The court's remedy was to enjoin the proposed facility from operating "until the NJDEP performs an appropriate adverse disparate impact analysis in compliance with Title VI."[35] The court said nothing about what is to happen after the NJDEP performs such an analysis. Assuming that a properly performed analysis identifies disparate impacts, the court failed to consider whether the state could deny the permit or impose enforceable conditions beyond those authorized by existing environmental statutes.

This raises the question of whether Title VI itself provides substantive legal authority to prevent those impacts. Although never discussed by the court in *South Camden*, EPA has taken the position that EPA itself has no authority to prevent or mitigate environmental justice concerns other than the authority found in its environmental statutes. In *In re Chemical Waste Management of Indiana, Inc.*,[36] EPA's Environmental Appeals Board (EAB) held, in the context of the permitting of a hazardous waste facility under the Resource Conservation and Recovery Act (RCRA), that the Agency could incorporate environmental justice concerns only within the limits of its statutory authority under RCRA.[37] The EAB, however, identified two areas under

32. EPA's Title VI regulations prohibit fund recipients from engaging in practices that subject "individuals to discrimination" *or* "have the effect of defeating or substantially impairing accomplishment of the objectives of the program . . . ." 40 C.F.R. §7.35(b). Thus, it appears there could be a violation of EPA's Title VI regulations for discriminatory impacts unrelated to the particular EPA funding program. Once there is a federal funding handle through EPA's grant program, any state permit will presumably be subject to this Title VI standard.

33. *South Camden I*, No. 01-702, 2001 WL 392472, slip op. at 36.

34. 214 F.3d 65, 30 ELR 20703 (2d Cir. 2000).

35. *South Camden I*, No. 01-702, 2001 WL 392472, slip op. at 53.

36. 6 E.A.D. 66, ADMIN. MAT. 40392 (EPA EAB June 29, 1995).

37. The EAB stated that:

> [I]f a permit applicant meets the requirements of RCRA and its implementing regulations, the Agency *must* issue the permit, regardless of the racial or socio-economic composition of the surrounding community and regardless of the economic effect of the facility on the surrounding community.

6 E.A.D. at 73, ADMIN. MAT. at 40394 (emphasis in original).

RCRA in which EPA had significant discretion to address environmental justice issues. These included expanded public participation and the "omnibus" authority in §3005(c) of RCRA that allows EPA to impose permit conditions "necessary to protect human health and the environment." Beyond that, EPA had no authority under RCRA to deny or condition permits because of discriminatory impacts.[38] Subsequent decisions of the EAB have affirmed this limitation on EPA's authority substantively to address environmental justice concerns.[39]

These EAB decisions do not involve a consideration of EPA's authority under Title VI; §602 and EPA's implementing regulations do not apply to EPA. Rather, the EAB opinions have largely focused on an analysis of EPA's authority substantively to address environmental justice concerns under Executive Order No. 12898. But it is unlikely that Title VI or EPA's Title VI regulations grant states greater authority to address environmental justice concerns than EPA has itself.

EPA's *Draft Title VI Guidance* largely ignores the issue of authority substantively to address disparate impacts.[40] The guidance encourages fund recipients to reduce or eliminate disparate adverse impacts and suggests a variety of possible remedial actions. The guidance is silent, however, on the source of such authority simply stating that EPA "expects that remedial measures that reduce or eliminate alleged disparate impacts will be an important focus of the *informal resolution process*."[41] EPA's earlier *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Interim Guidance)*, issued in 1998, stated that the *Interim Guidance* did not alter the substantive authority possessed by funded agencies.[42]

In the absence of authority under Title VI, the extent of a state agency's ability to either deny or condition a state-issued permit based on environmental justice concerns is likely to turn on the particular authority granted by other federal or state laws.[43] Even with omnibus authority to protect human health and the environment, it is not clear that states could impose permit conditions (or deny a permit) because minorities were subjected to disproportionate levels of pollution if the emission limits otherwise satisfied the environmental criteria.

The court's failure to consider the state's ability substantively to address the environmental justice issues is perhaps the most unsatisfying part of the *South Camden* decisions. Certainly such an analysis seems relevant to the issue of "causation"—are the state's permitting practices "causally" linked to the disparate impact? It is certainly clear, as the court noted, that the disparate impacts in the community would not arise "but for" the NJDEP permit. It may also be the case that facility-siting decisions are in fact discriminatory. It is less clear that the NJDEP had the authority to prevent those impacts by denying or conditioning the permit.

Is Title VI a Political Rather Than a Legal Tool for Environmental Justice?

To the extent that it forces permitting authorities to assess and document disparate adverse impacts, EPA's Title VI regulations will likely have three significant effects. First, if an assessment indicates disparate impacts, states may be in violation if they have not taken all available means to minimize this impact. This will, however, focus on the state's legal authorities under other statutes.

Second, identification of potential environmental concerns is likely to result in increased opportunities for public participation in the permit process. Whatever limits there are regarding the states' ability to impose substantive permit limitations, there should be little issue that states can provide broader opportunities for public participation in appropriate cases. EPA's *Draft Recipient Guidance* encourages "meaningful public participation and outreach."[44]

Third, and perhaps more importantly, Title VI may force the public airing and recognition of disparate impacts and environmental injustice. The remedy following such a showing is likely to be more political than legal.[45] Information has its own power, and political pressure will almost certainly follow from state documentation of impacts. Voluntary acceptance by the permittee of restrictions to minimize impacts is likely.[46] Additionally, "voluntary" abandonment of proposed facilities by the applicant in the face of local opposition is also possible.[47] Information produced by Title VI analysis may also form the impetus for subsequent changes to law to allow greater restrictions on facilities producing disparate impact. All in the environmental commu-

38. In discussing the scope of authority provided by the "omnibus" authority in RCRA, the EAB stated:

> [I]n response to an environmental justice claim, the Region would be limited to ensuring the protection of the health or environment of the minority or low-income populations. The Region would not have discretion to redress impacts that are unrelated or only tenuously related to human health and the environment, such as disproportionate impacts on the economic well-being of a minority or low-income community.

6 E.A.D. at 75, ADMIN. MAT. at 40394 (internal footnote omitted).

39. *See, e.g.*, In re Envotech, L.P., 6 E.A.D. 260, ADMIN. MAT. 40454 (EPA EAB Feb. 15, 1996); In re EcoEléctrica, L.P., 7 E.A.D. 56, ADMIN. MAT. 40632 (EPA EAB Apr. 8, 1997).

40. *See supra* note 14.

41. Draft Title VI Guidance, *supra* note 14, at 39662 (emphasis added).

42. EPA's Office of Civil Rights, however, apparently has taken the position that state permitting decisions that result in a "discriminatory effect" violate EPA's Title VI regulations even if the permitting authority does not have the substantive legal authority to deny or condition the permits based on the discriminatory impacts. *See* U.S. EPA OCR Investigative Report for the Title VI Administrative Complaint File No. 5R-98-R5 (Aug. 17, 1998) (the Select Steel report) (cited in South Camden I, No. 01-702, 2001 WL 392472, slip op. at 28 (D.N.J. Apr. 19, 2001)). One article describes EPA's 1998 *Interim Guidance* as stating that EPA's Office of Civil Rights "will consider discriminatory impacts regardless of whether the permitting agencies are themselves independently authorized to guard against such impacts...." Richard J. Lazarus & Stephanie Tai, *Integrating Environmental Justice Into EPA Permitting Authority*, 26 ECOLOGY L.Q. 617, 627 (1999).

43. *See* Lazarus & Tai, *supra* note 42 (interesting evaluation of sources of authority in federal environmental laws to address environmental justice concerns).

44. *See* Draft Title VI Guidance, *supra* note 14, at 39658.

45. *See* Alice Kaswan, *Environmental Justice: Bridging the Gap Between Environmental Laws and "Justice,"* 47 AM. U. L. REV. 221 (1997) (discussing the role of environmental justice claims in achieving "political justice").

46. In *South Camden I*, the court mentions that the owners of the proposed cement facility had agreed to alter truck routes to minimize the impacts on the community.

47. One of the most public battles over environmental justice involved the siting of the proposed Shintech plastics facility in a predominately minority community in Louisiana. The company ultimately abandoned their attempts to have the facility permitted in that area. *See* Mank, *supra* note 14, at 11150.

nity are aware of the power of public information.[48] Thus, the ultimate effect of the application of EPA's Title VI regulations (either through a private cause of action or through EPA decisions) may be more political than legal.

Conclusion

The *South Camden* opinions raise important civil rights issues regarding the availability of a private cause of action for violation of Title VI regulations. For the environmental community, the opinions also have interesting implications for the environmental standards to be used in judging a Title VI "disparate impact" claim. The opinions are far less satisfactory in assessing the substantive effects of EPA's Title VI regulations on state permit decisions. Indeed, the opinions deal more with *assessing* rather than *addressing* environmental justice concerns.

It would, however, be a mistake to underestimate the potential impact of a broad Title VI requirement to assess the site-specific environmental impacts of proposed facilities on minority communities. Not only will such an assessment form the basis for an expansive use of existing environmental authority, but it will also provide the political power of voice and visibility to environmental justice issues.

48. The public disclosure of toxic release information under the Emergency Planning and Community Right-To-Know Act, 42 U.S.C. §11023, ELR STAT. EPCRA §313, has produced powerful political pressures to reduce emissions. The environmental impact statement requirements of the National Environmental Policy Act, 42 U.S.C. §4332, ELR STAT. NEPA §102, although construed by the Court as essentially a procedural statute requiring documentation and disclosure of significant adverse environmental impacts, is still a powerful environmental tool.