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The Role of Title VI in *Chester Residents v. Seif*: Is the Future of Environmental Justice Really Brighter?

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THE ROLE OF TITLE VI IN *CHESTER RESIDENTS V. SEIF*: IS THE FUTURE OF ENVIRONMENTAL JUSTICE REALLY BRIGHTER?

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With industrial growth comes social and economic advancement—we hope. But, what many people do not realize is that some people must live in a polluted environment so that others may live in an advanced, modern world. The recent societal movement, called "environmental justice," has grasped this problem—a problem which many of those who enjoy the fruits of the modern world hardly know exists.

Environmental justice, also known as environmental racism, is defined as "any policy, practice, or directive that differentially affects or disadvantages (whether intended or unintended) individuals, groups, or communities based on race or color."[1] The concept is based on the idea that, while hazardous land uses are a necessity, nobody wants to live near them.[2] As a result, according to environmental justice advocates, locally undesirable environmental land uses (LULUs), including hazardous waste facilities, solid waste disposal sites, and contaminated industrial sites, are disproportionately located in minority communities.[3] A political, as well as socio-economic phenomenon, environmental racism results from the lack of political clout and the lack of financial and legal resources of minorities to fight the location of these facilities.[4] Exacerbating the problem, many of these hazardous facilities provide much needed jobs for the community.[5]

It was not until President Clinton's declaration of commitment to the environmental justice fight, in 1994, that this issue started to gain

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[1]Natalie M. Hammer, Comment, *Title VI as a Means of Achieving Environmental Justice*, 16 N. ILL. U. L. REV. 693 (1996) (quoting Robert D. Bullard, *Environmental Racism and "Invisible" Communities*, 96 W. VA. L. REV. 1037 (1994)).

[2]Hammer, *supra* note 1, at 693. This concept is referred to as "not-in-my-backyard," or NIMBY. *See, e.g.*, Eileen Gauna, *Federal Environmental Citizen Provisions: Obstacles and Incentives on the Road to Environmental Justice*, 22 ECOLOGY L.Q. 1, 33 (1995).

[3]Daniel Kevin, *"Environmental Racism" and Locally Undesirable Land Uses: A Critique of Environmental Justice Theories and Remedies*, 8 VILL. ENVTL. L.J. 121 (1997).

[4]Hammer, *supra* note 1, at 693 n.10.

[5]*Id.* at 693.

major recognition.[6] Even so, environmental justice actions have been conspicuously scarce in the case law. This Comment centers on the recent and perhaps influential Third Circuit case, *Chester Residents Concerned for Quality Living v. Seif* (*Chester Residents*). Part I of this Comment will explain the facts, issues, and procedural history of *Chester Residents*. Next, the history of environmental justice claims, including administrative actions and equal protection claims, as well as the evolution of the citizen suit, will be presented in Part II. Part III will discuss in more detail the Third Circuit's analysis and basis for its ruling. Finally, Part IV will present a more detailed analysis of the *Chester Residents* decision and how it fits into the environmental justice context. Included in this discussion will be possible repercussions of the decision and problems which the decision leaves unresolved. While the decision in *Chester Residents* is groundbreaking, because it is a case of first impression (no other circuit court has decided the issue at hand), the future of environmental justice claims under Title VI remain precarious.

I. CHESTER RESIDENTS FILE A CITIZEN SUIT UNDER TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

A. Background

The non-profit corporation Chester Residents Concerned for Quality Living ("CRCQL") brought suit in the Eastern District of Pennsylvania against the Pennsylvania Department of Environmental Protection ("PADEP") and James M. Seif, in his capacity as Secretary of PADEP.[8] CRCQL alleged that PADEP discriminates in the process by which it grants waste facility permits.[9] Specifically, the original complaint asserted that PADEP's grant of the permit violated: (1) section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C.

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[6]Steven A. Herman, *Enforcement Helps Realize EPA's Commitment to Environmental Justice to Improve People's Lives*, 12 NO. 9 NAAG NAT'L ENVTL. ENFORCEMENT J. 9 (1997). President Clinton stated that his administration would be committed to the basic proposition of equal environmental protection for everyone regardless of race or income. He declared that their goal would be to "ensure that all communities and persons across this nation live in a safe and healthful environment." Exec. Order No. 12,898, 59 Fed. Reg. 7,629 (1994) (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations).

[7]Chester Residents Concerned for Quality Living v. Seif, 132 F.3d 925 (3d Cir. 1997) [hereinafter *Chester Residents*].

[8]*Id.* at 927.

[9]*Id.*

§2000d *et seq.*; (2) the EPA's civil rights regulations, 40 C.F.R. § 7.10 et seq.; promulgated pursuant to section 602 of Title VI; and (3) PADEP's assurance pursuant to the regulations that it would not violate the regulations.[10] This case represents the appeal concerning Count Two of the District Court's ruling to the United States Court of Appeals for the Third Circuit.[11]

CRCQL based its findings of discrimination on the fact that, since 1985, five waste facility permits for sites in Chester (which is in Delaware County near Philadelphia) have been approved while only two sites have been approved in the rest of the county.[12] Delaware County has a population which is 86.5% white and 11.2% black, while the town of Chester itself, has a population which is 65.2% black and 33.5% white.[13] The five facilities to be located within Chester would increase the total permit waste capacity by over 2,000,000 tons per year.[14] This is in addition to the DELCORA plant, operating in Chester, which "had a permit for a sewage waste facility to treat 44,000,000 gallons of sewage a day and an air quality permit to incinerate 17,500 tons per year of sewage sludge."[15]

B. Procedural History

The Eastern District of Pennsylvania dismissed the suit on November 5, 1996 for failure to allege discriminatory intent as required by section 601 of Title VI.[16] The judge, however, entered the dismissal

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[10] *Id.*

[11] *Id.* at 928.

[12] Chester Residents Concerned For Quality Living v. Seif, 944 F. Supp. 413, 415 (E.D. Pa. 1996) [hereinafter *Chester I*].

[13] *Id.* at 414.

[14] *Id.* at 415.

[15] *Id.*

[16] *Id.* at 413. Section 601 of Title VI states that discriminatory intent is a necessary element. Since the plaintiff in *Chester Residents* did not amend the complaint to show discriminatory intent on the part of PADEP, the case was dismissed with prejudice on this issue. On the other hand, Section 602 of Title VI leaves open the possibility that if a disparate impact on a minority group can be shown, then there may be a private right of action. Basically, section 602 authorizes agencies to distribute federal funds to promulgate regulations implementing section 601. In 40 C.F.R. § 7.35(b) (1998), the EPA promulgated such an implementing regulation:

> A recipient shall not use criteria or methods of administering its program which have the effect of subjecting individuals to discriminate because of their race, color, national origin, or sex, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, national origin, or sex.
> 40 C.F.R. § 7.35(b) (1998).

This regulation incorporates a discriminatory effect standard. Therefore, if an agency or group

without prejudice so that CRCQL could amend the complaint to assert discriminatory intent.[17] In addition, the judge issued an order certifying the question of what must be alleged in the complaint to the Third Circuit, conditioned on the court's granting of permission to appeal.[18] The Third Circuit initially denied CRCQL's petition for leave to appeal on its complaint on January 30, 1997 and remanded the case to the lower court.[19] When CRCQL declined to amend its complaint, the district court judge dismissed it with prejudice, clearing the way for a direct appeal to the Third Circuit.[20] The district court also dismissed the CRCQL's other claims under EPA regulations,[21] citing the Third Circuit's ruling in *Chowdhury v. Reading Hospital & Medical Center*.[22] The district court understood *Chowdhury* as holding that regulations promulgated by the United States Environmental Protection Agency under section 602 of Title VI of the Civil Rights Act do not create a private right of action.[23] The district court interpreted *Chowdhury* as saying that more than discriminatory *effects* must be shown in order for a private citizens group to maintain an action against a federally funded agency; rather, discriminatory *intent* under section 601 of Title VI must be shown.

The primary issue on appeal was whether a suit by private citizens may be maintained under section 602 of Title VI.[24] In other words, can a citizen group maintain an action by showing discriminatory effect rather than outright intent to discriminate?[25] In a multi-faceted opinion, the Third Circuit Court of Appeals overturned the district court's ruling. On December 30, 1997, the Third Circuit ruled that the CRCQL did in fact have a private right of action under section 602 of Title VI.[26] While the Third Circuit stated that the district court had misinterpreted its ruling in *Chowdhury*, ultimately the court

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receiving federal funds does not adhere to these regulations, then this funding may be cut off, and a citizen suit may be maintained. Chester Residents Concerned for Quality Living v. Seif, 132 F.3d 925, 928 (3d Cir. 1997). *See also* 40 C.F.R. § 7.35(b) (1998). This issue will be discussed in detail later in the comment.

[17] *Chester I*, 944 F. Supp. at 418.

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.* at 417-418.

[22] Chowdhury v. Reading Hospital & Medical Center, 677 F.2d 317 (3d Cir. 1982).

[23] *Chester I*, 944 F.Supp. at 417.

[24] Chester Residents Concerned for Quality Living v. Seif, 132 F.3d 925, 927 (3d Cir. 1997).

[25] *Id.*

[26] *Id.*

found that more was needed upon which to base its ruling.[27] Subsequently, after investigating the United States Supreme Court's ruling in *Guardians Association v. Civil Service Commission*,[28] the Third Circuit decided that while supportive, *Guardians* was not dispositive.[29] Finally, the court further supported its ruling on its own precedent: the three-prong test for determining when it is appropriate to infer a private right of action to enforce regulations, established in *Polaroid Corp. v. Disney*.[30]

II. HISTORY OF THE ENVIRONMENTAL JUSTICE MOVEMENT

Before delving into the Third Circuit's analysis, it is important that a brief overview of the environmental justice movement is provided. Again, *Chester Residents* is essentially a case of first impression. The use of Title VI as a route for the environmental racism plaintiff is a fairly new trend.[31] Before the use of Title VI, there were a few, ultimately unsuccessful, alternatives for the environmental racism plaintiff.

A. Common Law Nuisance Claims

One of the most basic alternatives is the nuisance action, based on common law property rights.[32] Problems associated with proving causation and procedural obstacles, such as statutes of limitations, often bar recovery.[33] Another disadvantage of the nuisance action is the fact that relief is in the form of damages rather than injunctive relief.[34] Thus, while the plaintiff apparently is being

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[27] *Id.*

[28] Guardians Ass'n v. Civil Service Comm'n, 463 U.S. 582 (1983).

[29] *Chester Residents*, 132 F.3d at 931.

[30] *Id.* at 933 (citing Polaroid Corp. v. Disney, 862 F.2d 987, 994 (3d Cir. 1988)).

[31] *See*, Steven A. Light & Kathryn R.L. Rand, *Is Title VI a Magic Bullet? Environmental Racism in the Context of Political-Economic Processes and Imperatives*, 2 MICH. J. RACE & L. 1 (1996). In this article the authors encourage the feasibility of Title VI as a solution for environmental racism plaintiffs, but stress that ultimately, the real solution lies in a total change in our political and socio-economic processes, perhaps requiring a grass-roots movement.

[32] *See* Twitty v. North Carolina, 527 F. Supp. 778 (E.D.N.C. 1981), *aff'd mem.*, 696 F.2d 992 (4th Cir. 1982).

[33] Hammer, *supra* note 1, at 700 (citing Michael Fisher, *Environmental Racism Claims Brought Under Title VI of the Civil Rights Act*, 25 ENVTL. L. 285, 310 n.116 (1995)). Causation was often difficult to prove because of the lack of data concerning the connection between the alleged damaging pollution and health problems. In addition, courts had difficulty finding an activity unreasonable which was done pursuant to a valid environmental permit.

[34] *Id.*

compensated for any property damage he sustained, the polluting activity would still continue without an injunction to halt it.[35] The awarding of property damages does not help the plaintiff who has suffered health problems which are very real, but difficult to assign an adequate monetary value.

B. Statutory Citizen Suits

Another route taken by environmental justice plaintiffs is that authorized by the federal or state statutes themselves.[36] Most of the environmental statutes contain citizen suit provisions authorizing citizen suits, which in effect give the citizen-plaintiff "attorney general status" to sue on behalf of other members of the community.[37] The substantive basis of this type of lawsuit does not involve racial discrimination, but it is, at the least, a way of halting the operations of a facility.[38] The plaintiff in the present case, CRCQL, actually attempted this route to no avail.[39] The plaintiff sued Delcora, a sewage treatment plant, for violating the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, by failing to comply with a Pennsylvania state odor emission regulation.[40] CRCQL also alleged that Delcora violated the Pennsylvania Air Pollution Control Act, 35 P.S. §4001 *et seq.*[41] Actions under environmental law statutes have not been particularly successful, either. The lawsuits tend to be too broad, preventing them

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[35]*Id.* (citing Michael Fisher, *Environmental Racism Claims Brought Under Title VI of the Civil Rights Act*, 25 EVNTL. L. 285, 310 n.117 (1995)). This is assuming there is actual property damage. The limit to damages instead of injunctive relief defeats the purpose of the entire lawsuit if the hazardous activity can continue as usual after the lawsuit. Also, damages tends to reward one plaintiff instead of many, i.e. with citizen suits, a plaintiff sues on behalf of several people in hopes of ceasing the hazardous activity. *Id.*

[36]*Id.* The primary statute which gives the public a voice is National Environmental Policy Act (NEPA). 42 U.S.C. §§ 4321-4370d (1989 & Supp. 1995). This statute contains many procedural limitations that can be used to challenge a siting decision. Hammer, *supra* note 1, at 701 (citing Hope Babcock, *Environmental Justice Clinics: Visible Models of Justice*, 14 STAN. ENVTL. L.J. 3 (1995)).

[37]Gauna, *supra* note 2, at 40-41. "Although private attorney general status is not without controversy, private enforcement remains an important part of environmental regulation." *Id.* at 41.

[38]Hammer, *supra* note 1, at 700 (citing Richard J. Lazarus, *Pursuing "Environmental Justice:" The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787, 828 (1993)).

[39]Chester Residents Concerned For Quality Living v. Delcora Sewage Treatment Plant, No. 94-5639, 1994 WL 618476 (E.D. Pa. Nov. 8, 1994).

[40]*Id.* at *1.

[41]*Id.* at *1.

from addressing problems of a more local nature.[42] In addition, the relief offered under federal environmental statutes tends to be either an equitable remedy or a civil penalty.[43] While equitable remedies are in many cases preferred, civil penalties, on the other hand, may be problematic because the Supreme Court has ruled that the money must be paid to the federal treasury.[44] In addition, often the focus of the lawsuit is on a single permit or site and does not take into consideration the impact of surrounding sites.[45] Therefore, it is possible to have several sites in a vicinity, each adhering to NEPA standards, but, in the aggregate, causing environmental problems.[46]

C. The Fourteenth Amendment

The Equal Protection Clause of the Fourteenth Amendment has also been an avenue taken by environmental justice plaintiffs.[47] The problems with this course of action are apparent in the case at hand. Even though the plaintiff, CRCQL, did not bring this suit under the Equal Protection Clause, the same problems inherent in proving a Title VI claim are inherent in proving discrimination under the Equal Protection Clause. First, the plaintiff must show that the governmental entity made a decision with the intent of discriminating against a minority or a protected group.[48] Because of practical reasons, meeting this requirement is a nearly impossible endeavor.[49] The Supreme Court, however, has also held that if discriminatory effect can be

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[42]Hammer, *supra* note 1, at 702 (citing Hope Babcock, *Environmental Justice Clinics: Visible Models of Justice*, 14 STAN. ENVTL L.J. 3 (1995)).

[43]*Id.* (citing Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49 (1987)).

[44]*Id.* Again, equitable penalties are many times preferred because a plaintiff may get an injunction, which will help the entire community. A civil penalty paid to the treasury, on the other hand, will inevitably be diluted and have less of a chance of having a direct benefit to the citizens.

[45]*Id.* at 702 (citing James S. Freeman & Rachel D. Godsil, *The Question of Risk: Incorporating Community Perceptions into Environmental Risk Assessments*, 21 FORDHAM URB. L.J. 547 (1994)).

[46]*Id.*

[47]The Fourteenth Amendment states that "no state shall...deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST., amend. XIV, § 1.

[48]Hammer, *supra* note 1, at 702-703. *See also*, Washington v. Davis, 426 U.S. 229, 239 (1976); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264-266 (1977).

[49]Quite simply, it is difficult to compile the evidence and data necessary to prove that a defendant intentionally discriminated against a minority or protected class. Many courts require such a showing of intentional discrimination; often times, a mere showing of disparate impact to prove discrimination is simply not enough.

shown, then a claim may be successful without showing intentional discrimination. In *Village of Arlington Heights v. Metropolitan Housing*,[50] the Supreme Court stated five categories within which discriminatory effect may suffice for maintaining an equal protection claim.[51] These standards, however, may be difficult to meet. If the defendant can state an equally satisfactory non-discriminatory explanation for the law, then the plaintiff's claim can easily be defeated.[52] Illustrating an example of this problem in the environmental justice field is *Bean v. Southwestern Waste Management Corp.*[53] This case clearly showed disparate impact, but the lack of a direct discriminatory effect still served as a bar to prosecution.[54] The court would not accept the circumstantial evidence of an African American highschool located 1,700 feet from a landfill as direct enough evidence of a discriminatory effect to maintain an equal protection suit.

The main problem with the Equal Protection Clause as a route for the environmental justice plaintiff is the difficulty in showing discriminatory intent.[55] Even though the Supreme Court has stated that disparate discriminatory impact can be shown in order to maintain an Equal Protection action, the fact that the defendant can give almost any acceptable non-discriminatory explanation for the disparate impact places a heavy burden of proof on the plaintiff.[56] So, there may be a disproportionate impact on a minority community, but most plaintiffs have failed in providing a direct enough link between the alleged discrimination and the defendant's actions.

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[50] *Village of Arlington Heights*, 429 U.S. at 266.

[51] *Id.* at 264-68. The five categories are: (1) whether the impact is racially disparate, (2) the historical background of the decision, (3) the sequence of events that led to the decision, (4) any departures from the normal decision-making process, and (5) the legislative or administrative history.

[52] *See* Washington v. Davis, 426 U.S. at 239. Vocabulary and reading exams for incoming police officers tended to discriminate against minority and impoverished candidates. The state's goal, however, of having "literate and well-spoken officers" proved to be a satisfactory response to the discriminatory effect of the tests.

[53] Bean v. Southwestern Waste Management Corp., 482 F. Supp. 673, 675 (S.D. Tex. 1979).

[54] *Id.* In *Bean*, a solid waste disposal facility was located within 1,700 feet of a predominately African-American high school which did not have air conditioning. Even though the Supreme Court found this to be "unfortunate and insensitive," the circumstantial evidence did not establish discriminatory intent as required by *Arlington Heights*.

[55] Hammer, *supra* note 1, at 705.

[56] *See* Washington v. Davis, 426 U.S. at 239.

D. Title VI of the Civil Rights Act of 1964

Title VI provides a private right of action to people who can show that they have been discriminated against on the basis of race, national origin, or color in programs receiving federal funding.[57] Section 601 of Title VI requires the plaintiff to prove discriminatory intent on the part of the governmental entity as a necessary element of an action for monetary relief under this act.[58] Like in the equal protection cases, the problems inherent in proving intentional discrimination end up defeating even legitimate claims.[59] Also similar to equal protection claims, Title VI provides a way in which a plaintiff can maintain a suit by showing mere discriminatory effect.[60] Section 602 authorizes agencies to distribute federal funds to promulgate regulations implementing section 601.[61] As revealed by the language in the EPA's implementing statute, 40 C.F.R. § 7.35(b), agencies receiving federal funding may not enforce practices which have the "effect" of discrimination based on race, color, national origin, or sex.[62] In order to enforce this regulation, applicants for EPA assistance must submit an assurance with their applications stating that they will comply with these guidelines. If an applicant accepts the EPA's financial assistance, then the applicant impliedly accepts the obligation not to discriminate.[63]

In the environmental justice realm, showing discriminatory effect may be quite difficult, as demonstrated by *Coalition of*

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[57]Hammer, *supra* note 1, at 706.

[58]The Supreme Court construed Section 601 of Title VI as requiring a showing of intentional discrimination in order for plaintiffs to maintain an action for monetary relief. Guardians Ass'n v. Civil Service Comm'n, 463 U.S. 582, 598 (1983). *See also* Alexander v. Choate, 469 U.S. 287, 293 (1985).

[59]In *Guardians*, for example, the Supreme Court held that Black and Hispanic members of city police department's "last-hired, first-fired" policy were not entitled to compensatory relief in absence of showing intentional discrimination. *Guardians Ass'n*, 463 U.S. at 582.

[60]Section 602 of Title VI authorizes agencies to distribute federal funds to promulgate regulations implementing section 601. Because the EPA has promulgated such an implementing regulation, any agency receiving federal money from the EPA, but which discriminates based on race, color, national origin, or sex, may lose its federal funding. Stated in the EPA's implementing regulation, if a program has the *effect* of discriminating against a minority group then action can be taken, such as cutting off federal funding. Chester Residents Concerned for Quality Living v. Seif, 132 F.3d 925, 928 (3d Cir. 1997). *See also* 40 C.F.R. § 7.35(b) (1998).

[61]*Chester Residents*, 132 F.3d at 928. *See also* Section 602 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-1 (1992).

[62]40 C.F.R. § 7.35(b) (1998).

[63]*Chester Residents*, 132 F.3d at 927. *See also* 40 C.F.R. §7.80(a)(1) (1998).

Concerned Citizens Against I-670 v. Damian.[64] In *Damian,* a citizen group, composed mainly of African Americans who lived near a proposed highway construction site, sued state and federal officials, in federal district court, for violating public involvement requirements of regulations promulgated under the Federal-Aid Highway Act.[65] The district court held that the government officials met their burden of justifying the location of the proposed highway.[66] In addition, plaintiffs failed to show that there were any appropriate alternatives to the proposed construction site.[67] In conclusion, if a defendant in a Civil Rights Act case can enumerate satisfactory reasons for the location of a site in response to the charge of discriminatory effect, then the plaintiff will lose if an equally satisfactory alternative to the defendant's siting choice is not offered.

Some courts have denied relief after balancing the relative hardships on all the parties involved. In *Goshen Road v. U.S. Department of Agriculture,*[68] a citizen group filed an action under Title VI and NEPA, seeking declaratory and injunctive relief to prevent operation of a nearby wastewater treatment facility.[69] On the citizen group's motion for a temporary restraining order, the court used a "balancing of hardships" test, which in this particular case tilted in favor of denying the order.[70] Even assuming that the plaintiffs suffered irreparable harm as a result of the continued operation of the wastewater facility, the court ruled that the defendant, if the plant were closed, would bear more of a hardship than the plaintiffs, as would the general public in not having such a facility.[71] This case is a prime illustration of a minority group forced to suffer the brunt of environmental contamination so that the community at large can reap the benefits of a wastewater treatment facility.

One more significant problem associated with suits brought under Title VI concerns the measuring of disparate impact.[72] Most of the past studies have used methods of measurement such as zip codes

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[64]Coalition of Concerned Citizens Against I-670 v. Damian, 608 F. Supp. 110 (S.D. Ohio 1984).

[65]*Id.* at 112.

[66]*Id.* at 127.

[67]*Id.* at 127-28.

[68]Goshen Rd. Envtl. Action v. United States Dep't of Agric., 891 F. Supp. 1126 (E.D. N.C. 1995).

[69]*Id.* at 1127.

[70]*Id.* at 1132.

[71]*Id.*

[72]Hammer, *supra* note 1, at 709.

or census tracks, but these pre-set units of measurement really have no connection with the location or effect of the hazardous facility, thereby causing the results to be artificial.[73] Consequently, this renders the results easily manipulated by courts and agencies.[74] For example, "[w]hen the plaintiffs in *Bean* used census tracts as the unit of measurement, the court suggested that a more closely tailored unit of measurement might have helped their case."[75] "In contrast, in *East Bibb*, the court relied on census tracts and rejected plaintiffs' use of a larger commission district as the unit of measurement."[76] Until a standardized system of measuring disparate impact is agreed upon, the present inconsistencies apparent in the case law will continue to plague Title VI and equal protection claims.

III. THE BASIS FOR THE THIRD CIRCUIT'S DECISION IN *CHESTER RESIDENTS*

A. The Court's Investigation of Supreme Court Rulings—*Guardians & Alexander*

No other court has ruled on the precise issue presented in *Chester Residents*.[77] The issue, as defined by the Third Circuit, is "whether a private right of action exists under discriminatory effect regulations promulgated by federal administrative agencies pursuant to section 602 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq*."[78]

The Third Circuit first looked to the Supreme Court for guidance on whether a citizen suit could be maintained by showing discriminatory impact pursuant to Section 602 of Title VI.[79] The Supreme Court has ruled as follows in previous case law: "(1) a private right of action exists under section 601 of Title VI that requires

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[73] *Id.* (citing Michael Fisher, *Environmental Justice Claims Brought Under Title VI of the Civil Rights Act*, 25 EVNTL. L. 285, 323 (1995)).

[74] *Id.*

[75] *Id.* at 709 n.155 (citing Bean v. Southwestern Waste Management Corp., 482 F. Supp. 673, 680 (S.D. Tex. 1979)).

[76] *Id.* (citing East Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb County Planning & Zoning Comm'n, 706 F. Supp. 880, 884-85 (M.D. Ga. 1989)). While both *East Bibb* and *Bean* involved claims under the Equal Protection Clause, the problem of measuring the discriminatory impact is equally problematic in Title VI cases.

[77] Chester Residents Concerned for Quality Living v. Seif, 132 F.3d 925, 936 (3d Cir. 1997).

[78] *Id.* at 927.

[79] *Id.* at 928.

plaintiffs to show intentional discrimination; and (2) discriminatory effect regulations promulgated by agencies pursuant to section 602 are valid exercises of their authority under that section."[80] The Supreme Court, however, did not explicitly address whether a private right of action exists under discriminatory effect regulations enacted pursuant to section 602.[81] Nevertheless, the Third Circuit said that, although not explicitly decided by the Supreme Court in *Guardians*,[82] it can be inferred that relief could be granted in discriminatory effect cases. The Third Circuit based this inference on the fact that five Justices said that injunctive and declarative relief are available in discriminatory effect cases.[83] However, because the Supreme Court did not directly address this question, the *Chester Residents* court would not hold that *Guardians* was dispositive of the present appeal.[84]

The Third Circuit also considered *Alexander v. Choate*,[85] the case in which the Supreme Court clarified its holding in *Guardians*.[86] The court, however, did not agree with CRCQL's argument that *Alexander* stands for the proposition that *Guardians* should be read to allow private plaintiffs an action under a disparate impact standard.[87] The Third Circuit stated that, because the Supreme Court spoke in the passive voice ("could make actionable"), that it could only infer a private right of action.[88] The Third Circuit found no direct authority in *Alexander* that either confirmed or denied the existence of a private right of action, and it did not want to base its entire decision on the holdings in *Guardians* and *Alexander*.[89]

B. Third Circuit Investigates Its Own Precedent: The Interpretation of *Chowdhury* and the *Polaroid* Three-Prong Test

Because the Third Circuit could not find any direct authority with the Supreme Court's decisions, it decided to look towards its own precedent. The district court relied on the Third Circuit's decision in

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[80] *Id.* at 929 (citing Alexander v. Choate, 469 U.S. 287, 292-94 (1985)).
[81] *Id.* at 929.
[82] Guardians Ass'n v. Civil Service Comm'n, 463 U.S. 582 (1983).
[83] *Chester Residents*, 132 F.3d at 931.
[84] *Id.*
[85] Alexander v. Choate, 469 U.S. 287 (1985).
[86] *Chester Residents*, 132 F.3d at 931.
[87] *Id.*
[88] *Id.*
[89] *Id.*

Chowdhury v. Reading Hospital & Medical Center[90] in denying the plaintiffs a private right of action.[91] The Third Circuit, however, held that the district court had erred in interpreting *Chowdhury* as holding a private right of action does not exist under the regulations promulgated by EPA pursuant to section 602.[92] Rather, the holding in *Chowdhury* states that neither section 602 nor its implementing regulations expressly gives private plaintiffs a role in the *administrative* proceeding after initiation of a complaint.[93] In addition, *Chowdhury* held that a plaintiff should not be required to pursue an administrative complaint prior to filing a complaint under section 601.[94] In essence, the *Chowdhury* decision really did not address the issue at hand. Therefore, *Chowdhury*, too, was held not to be dispositive of the appeal.[95]

The court then turned to the three-prong test it laid out in *Polaroid Corp. v. Disney*.[96] The test requires the court to consider the following factors when deciding whether or not to imply a private right of action: "(1) 'whether the agency rule is properly within the scope of the enabling statute'; (2) 'whether the statute under which the rule was promulgated properly permits the implication of a private right of action'; and (3) 'whether implying a private right of action will further the purpose of the enabling statute.'"[97] When applying this test to the facts in *Chester Residents,* the court decided that the first prong was satisfied by the EPA's discriminatory effect regulation; rather, the decision of the court relied on the second and third prongs.[98]

1. Second Prong: Did the statute under which the rule was promulgated properly permit the implication of a private right of action?

The court ultimately rejected the defendant's argument that implying a private right of action would be inconsistent with the legislative scheme that makes EPA a "gatekeeper" to enforcement.[99]

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[90]Chowdhury v. Reading Hospital & Medical Center, 677 F.2d 317 (3d Cir. 1982).
[91]*Chester Residents*, 132 F.3d at 932.
[92]*Id.*
[93]*Id.*
[94]*Id.*
[95]*Id.*
[96]*Id.* at 933 (citing Polaroid Corp. v. Disney, 862 F.2d 987, 994 (3d Cir. 1988)).
[97]*Id.* (quoting *Polaroid*, 862 F.2d at 994) (citations omitted).
[98]*Id.*
[99]*Id.* at 934-36.

The state developed this argument based on the numerous procedural requirements laid out in section 602.[100] The Third Circuit, however, countered this argument with a more convincing argument that the procedural requirements are necessary to provide notice to recipients of federal funds that their funding may be terminated if they do not comply with the requirements laid out in Title VI.[101] Therefore, the court concluded that these are notice provisions and safeguards to "cushion the blow" of potentially losing funding.[102] Significantly, the loss of federal funding is a consequence which can only be brought about by an agency and not through a private citizen suit.[103] Thus, the implication that a private citizen may maintain an action would not be inconsistent with the procedural safeguards of providing notice to the potential defendant.[104]

2. Third Prong: Would the implication of a private right of action further the purpose of the statute?

The court looked at *Cannon v. University of Chicago*[105] to determine that the third prong was satisfied because the implication of a private right of action under section 602, plus the EPA regulations will further the dual purposes of Title VI.[106] The dual purposes of Title VI are to "(1) combat discrimination by entities who receive federal funds; and (2) provide citizens with effective protection against discrimination."[107] The Third Circuit held that a private right of action would further these purposes by giving citizens private attorney general status in order to enforce section 602.[108] In conclusion, the court held that the third prong was satisfied.[109]

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[100] *Id.* at 934-35.
[101] *Id.*
[102] *Id.* at 936.
[103] *Id.*
[104] *Id.*
[105] *Id.* at 934 n.12. *See also* Cannon v. University of Chicago, 441 U.S. 677 (1979). Although *Cannon* dealt with Title IX, the Court determined that the drafters of Title IX intended it to be modeled after Title VI of the Civil Rights Act of 1964; simply substitute the word "sex" in Title XI to replace the words "race, color, or national origin" in Title VI.
[106] *Chester Residents*, 132 F.3d at 936.
[107] *Id.* (citing *Cannon*, 441 U.S. at 704).
[108] *Id.*
[109] *Id.*

IV. ANALYSIS OF THE THIRD CIRCUIT'S DECISION IN *CHESTER RESIDENTS*

The Third Circuit's decision in *Chester Residents* is groundbreaking and has the potential of opening the door more widely for similar complaints; however, as with many cases of first impression, particularly controversial ones, it is difficult to consider this a clear victory for more than the time being. While there are many positive aspects to this decision, there remain many questions unanswered and many problems unresolved.

A. Positive Aspects of the Decision

The Third Circuit was very thorough in its analysis of the existing body of law and how it justified its decision in light of that law. It was valiant in attempting to find roots in previous decisions for a case that, in essence, presents a completely new issue. With a creative use of both Supreme Court cases and it's own precedent, the Third Circuit was able to find other decisions which at least partially supported its ruling; therefore, perhaps in the aggregate, the decisions put forth by the Third Circuit will support its ruling in *Chester Residents*. Is that not how courts decide issues of first impression? The plaintiff, CRCQL, used inferences taken from *Guardians* and *Alexander* to support its argument that the Supreme Court has implied that a private right of action exists under disparate impact regulations.[110] The Third Circuit recognized the merits of CRCQL's arguments, but it was wise in ruling that neither *Guardians* and *Alexander* were dispositive of the issue on appeal. Seemingly, basing a decision on an inference or implication and not on an issue directly before a court would heighten the danger of reversal. By using its own test, the *Polaroid* three-prong test, the Third Circuit was able to narrow the issues and apply more Supreme Court decisions to the facts at hand.[111] The test was clear and provided a framework within which the Third Circuit could work.

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[110] *See generally* Chester Residents Concerned for Quality Living v. Seif, 132 F.3d 925 (3d Cir. 1997).

[111] *See id.*

B. Considering *Chester Residents* Within a Broader Context — *Brownfields.*

Perhaps most significantly, the decision has provided a voice for the citizens who are affected the most by environmentally hazardous sites. Although the case at hand does not deal directly with "Brownfields,"[112] it is worth considering this case within the brownfield context in order to appreciate some of the potential repercussions.

In many ways, the redevelopment of brownfields is in direct conflict with the goals of environmental justice. According to Professor Kirsten Engel of Tulane Law School, it depends upon how one interprets environmental justice goals.[113] For example, according to the "market-based" theory, there does not exist as much of a conflict.[114] Such advocates believe that redeveloping a brownfield in a depressed or minority section of a city by building another factory will serve as an economic building block for the community.[115] According to this theory, the best thing that can happen to citizens in disadvantaged areas is more jobs.[116] On the other hand, proponents of the main opposing theory, a more "right-based" theory, would disagree on the theory that the building of yet another factory will provide a cyclical effect: a vicious cycle in which disadvantaged citizens would be forced to exchange their health for jobs.[117] According to this theory, while depressed communities might be provided jobs, again they are forced to carry on a lower standard of living, which is actually dangerous to their health, and more than likely, the site will become yet another brownfield in twenty or so years—whenever the factory closes. Professor Engel does suggest some solutions.[118] The main solution which involves the *Chester Residents* decision is quite simply

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[112]Brownfields, according to U.S. EPA, are "abandoned, idled, or under-used industrial and commercial sites where expansion or redevelopment is complicated by real or perceived environmental contamination." U.S. EPA, OFFICE OF PUBLIC AFFAIRS, BASIC BROWNFIELDS FACT SHEET (1995). The goal of both scholars and business people is to some extent, the development of these sites so that they may become productive pieces of land, therefore preventing the use and subsequent possible contamination of "greenfields" (undeveloped and uncontaminated lands). Kirsten H. Engel, *Brownfield Initiatives and the Requirements of Market-Based, Rights Based, and Pragmatic Conceptions of Environmental Justice*, Unpublished Topical Outline, Journal of Natural Resources & Environmental Law 1998 Symposium on Brownfields (on file with the *Journal of Natural Resources and Environmental Law*).

[113]*Id.*

[114]*Id.*

[115]*Id.*

[116]*Id.*

[117]*Id.*

[118]*Id.*

community involvement in the decisions, such as brownfields, which so intimately effect these communities.[119] Admittedly, by the time a case gets to trial, community involvement may have failed at some point. But, allowing a citizen group to maintain a suit can serve to promote community involvement and hopefully trickle down to the earlier stages of a transaction. Arguably, if a community is aware that it has a legal remedy, then perhaps the community will feel more confident in getting involved earlier in the decision process—before it gets to trial. This is, therefore, one context in which the *Chester Residents* decision may have some significant repercussions.

On the other hand, there are many reasons why the *Chester Residents* decision falls short. It should be noted that these shortcomings cannot be blamed on the Third Circuit; certain issues simply were not before the court at this juncture. Rather, this analysis seeks to prove the point that environmental justice claims under Title VI still have quite a ways to go. No doubt, determining that a citizen group can maintain an action under section 602, based on disparate discriminatory effect, is very significant. As discussed earlier with the equal protection claims and other Title VI claims, the plaintiff still has the hurdle of actually *showing* discriminatory effect.[120] The Third Circuit has reversed and remanded the district court's decision, meaning that the CRCQL must now show that there is a disproportionate discriminatory effect.[121] Then, if the PADEP can give any reasons justifying the siting of the facility, CRCQL must come up with a feasible alternative.[122] Therefore, while the Third Circuit's decision initially seems to lighten the plaintiff's burden by not having to prove discriminatory intent, this lightening of the burden is somewhat misleading.

Another drawback with the decision is that under Title VI, the citizen group must sue an agency which receives federal funding. Often, this agency will be a state agency, like in the present case, which simply is in charge of the licensing. For the most part, such

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[119] *Id.* Professor Engel's other two suggestions are as follows: (1) completion of government or independent research studies demonstrating that environmental liability is responsible in substantial measure for the lack of development of brownfield sites; (2) that the local community be afforded real economic opportunities, like jobs, job training, and opportunities for new or spin-off business start-ups—as part of any redevelopment proposal that reduces cleanup standards or immunizes any potentially responsible parties.

[120] *See* Coalition of Concerned Citizens Against I-670 v. Damian, 608 F. Supp 110 (S.D. Ohio 1984).

[121] Chester Residents Concerned for Quality Living v. Seif, 132 F.3d 925 (3d Cir. 1997).

[122] *See id.*

agencies are created to improve the environmental situation, by creating regulations and procedures to keep industry in check. Therefore, in many cases, the industry in charge of creating environmental hazards escapes the brunt of the blame and responsibility. It is true that the particular factory may lose its permit, but at this point, the chances of relocating to another minority community are very high. One must also acknowledge the fact that these industries can lose a significant amount of money by having to relocate; one cannot argue that the industry, factory, or other business will not be damaged in some way. However, if a factory is not sued directly, but rather through the agency which licensed it, much of the effect of such a lawsuit is lost.

Ultimately, this case is groundbreaking because it decided an issue which has never been before a court as high as the United States Court of Appeals. It provides a voice for the citizens involved in such litigation, not only technically by allowing them to maintain an action, but also on a wider scale. Such a notable decision has the opportunity to educate the public concerning the problems of environmental justice that the residents of Chester live with every day. Even if this case is eventually overturned, this type of decision can create publicity which in the long run may prove to be even more effective. This may be just a start—but, it is a good one.

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Since the writing of this comment, the United States Supreme Court granted *certiorari* to hear *Chester Residents*.[123] For a short time, *Chester Residents* was destined to be the first environmental justice case of its kind to go to our nation's highest tribunal. This destiny, however, changed when Pennsylvania regulators withdrew the controversial permit to build a waste treatment facility in Chester County, Pennsylvania.[124] This effectively rendered the issue, upon which the Supreme Court was to rule, moot. In response to the withdrawal of the permit, the Chester Residents Concerned for Quality Living filed a motion on July 29, 1998 with the Supreme Court asking that the case be dismissed because the issue was now moot. The Court agreed with Chester Residents and vacated the suit without comment.[125]

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[123]Chester Residents Concerned for Quality Living v. Seif, 118 S.Ct. 2296 (1998).

[124]*Round the States Supreme Court Dismisses Pa. Lawsuit on Permitting Waste Treatment Plants*, HAZARDOUS WASTE NEWS, August 24, 1998 WL 10239936.

[125]Chester Residents Concerned for Quality Living v. Seif, 1998 WL 477242 (U.S. August 17, 1998).

What does this mean for *Chester Residents* and environmental justice? First, the fact that the Supreme Court granted *certiorari* clearly shows that the high court finds this to be an important and opportune issue. In addition, granting the Chester Resident's motion to vacate is very significant—it basically means that the Supreme Court was willing to set aside the issue, rather than overturning the Third Circuit's decision—a move that could prove devastating to the future of environmental justice. So, environmental justice advocates certainly cannot be too disappointed about the Supreme Court's decision—it leaves the Third Circuit's ruling intact and gives environmental justice advocates more time to plan their next move.