Environmental Justice Takes Center Stage

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INTRODUCTION

Congratulations! After months of difficult negotiations and countless meetings on technical details, your permit application has just been approved. The state environmental agency has issued (or renewed) your facility's operating permit. You are now free to commence (or continue) vital operations, effective immediately. But, before you rush to celebrate you may want to consider whether your new (or renewed) permit can withstand a challenge based on environmental justice.

In a sense, environmental justice is not a new issue. The underlying political movement has been with us for more than two decades, and the governing legal rules have been developing throughout the 1990s. Within American industry, many sophisticated legal and regulatory advisers understood that some day, environmental justice might actually begin to affect their operations.

But it was only in 1998 that environmental justice moved to center stage. In the space of just one year, the legal and policy aspects of environmental justice drew attention from the Supreme Court, the Congress, and EPA. Four developments were especially noteworthy:

- *First*, the Supreme Court agreed to review its very first environmental justice case, a Third Circuit opinion[3] holding that EPA's Title VI regulations provide a private right of action to challenge state permitting decisions that have a disparate impact on racial minorities.
- *Second*, EPA issued a new and highly controversial interim guidance document describing how the agency will handle administrative complaints challenging state permit decisions as violative of Title VI of the 1964 Civil Rights Act.
- *Third*, the House Commerce Committee held a full-day hearing in which Republicans, Democrats, state regulatory officials, and industry representatives all joined in attacking EPA's interim guidance and the process by which it was developed.
- *Fourth*, plans to build a new $700 million chemical plant in southern Louisiana were scrapped after local opponents filed an environmental justice complaint with EPA.

After a year like 1998, the time has come to recognize that environmental justice issues are here to stay. Companies must understand these issues, decide how best to address them, and then anticipate when and where those issues will arise. The only alternative is to risk losing needed permits — even existing permits that are simply up for "routine" renewals — when environmental justice issues are raised unexpectedly.

This article is intended to provide you with a brief overview of environmental justice. It begins with a summary of the origins of the environmental justice movement, including the controversial studies that fueled the movement. The article then surveys the federal government's principal efforts to address environmental justice, beginning with President Clinton's 1994 Executive Order. It goes on to summarize the complex issues arising from complaints filed with EPA under Title VI of the Civil Rights Act of 1964, including the Supreme Court's recent decision in this area and the difficulty of determining what constitutes an illegal "disparate impact." The article then reviews the fate of environmental justice claims brought under the

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

Equal Protection clause. Finally, the article concludes with some thoughts on the future of environmental justice.

I. THE ORIGINS OF ENVIRONMENTAL JUSTICE

At the very outset, it must be understood that there is no single definition of environmental justice. On the contrary, environmental justice is a term that means very different things to different people including:

- a prohibition on *intentional* racial discrimination in the administration of environmental programs;
- the right of minority groups to *participate meaningfully* in any decision made by governmental agencies on environmental issues;
- a mandate that governmental agencies apply *equally stringent standards* and equal levels of enforcement to all of their environmental decisions; and
- a demand that governmental agencies reach *substantively equal results* in their environmental decision making, so that no minority group ever bears a "disproportionate burden" in any particular case.

Whatever definition is used, environmental justice rests on the belief that significant adverse health and environmental effects of pollution are borne disproportionately by minority and low-income communities. This belief surfaced as early as 1982, in response to the proposed siting of a PCB landfill in Warren County, North Carolina. The landfill was to be located in a poor community with a large minority population. The decision by EPA and the state to allow the landfill sparked a nationwide protest and resulted in numerous demonstrations and arrests. Although the landfill was opened, the community obtained several concessions from the state as a result of the protests.[4]

Following this North Carolina controversy, several studies of hazardous waste facilities conducted by various organizations purported to find disproportionate impacts on minorities. These studies were later criticized for their methodologies and conclusions, and some more recent studies have called into question whether such disproportionate impacts really exist. Nevertheless, these early studies are still widely cited, sometimes for their original conclusions and sometimes for much more sweeping propositions, so it is important to be familiar with them.

A. The GAO Report

The Warren County controversy caught the interest of the District of Columbia's non-voting delegate, Walter Fauntroy, who asked the General Accounting Office (GAO), an arm of Congress, to study the relationship between the siting of hazardous waste landfills and the racial and economic make-up of the surrounding communities. The resulting 1983 GAO report analyzed the demographics of the communities surrounding "off-site" landfills in eight southern states. Using census tracts as its unit of comparison, the GAO report found that three of the four "areas" where the landfills were located consisted of majority black populations. The report was very important in the development of the environmental justice movement, although the scope of the survey was limited and the meaning of the results unclear. A 1995 GAO study on nonhazardous municipal landfills found no disproportionate numbers of minority or low-income populations in the communities surrounding such landfills.[5]

B. The United Church of Christ Study

Four years later, a more ambitious study was conducted by the Commission for Racial Justice of the United Church of Christ. This 1987 study, "Toxic Wastes and Race in the United States," used zip codes to analyze demographic patterns in areas surrounding commercial hazardous waste facilities and "uncontrolled toxic wastes sites." The study

4 *See* Christopher H. Foreman, Jr., *The Promise and Peril of Environmental Justice* 17-18 (1998).
5 *See id.* at 18-20, 26-27.

concluded that race was "the most significant among variables tested in association with the location of commercial hazardous waste facilities." It also found that three of every five black and Hispanic Americans lived in communities with uncontrolled toxic waste sites.[6]

C. The *National Law Journal* Investigation

In 1992, a study published in the *National Law Journal* looked more directly at the practices of the EPA. The study found that areas with larger non-minority populations were placed on the Superfund National Priorities List more quickly than areas with larger minority populations. The study also found that judicial penalties imposed for violations of the Resource Conservation and Recovery Act were larger where violations occurred in non-minority areas as opposed to minority areas.[7]

As mentioned earlier, both the methodologies and the conclusions of these first studies have been questioned and debated by later researchers. Space does not permit us to air those debates here, but industry representatives should be familiar with the basics of these early studies and should be aware that the literature is rich with later studies that challenge their findings.

II. PRESIDENT CLINTON'S 1994 EXECUTIVE ORDER

From 1982 through 1992, the federal government took little formal action to address environmental justice concerns. Some attempts were made to enact legislation, such as then-Senator Al Gore's failed Environmental Justice Act of 1992, which would have placed a moratorium on siting facilities in certain areas identified as having significant adverse health impacts from toxic chemicals. Then, in 1992, EPA created an Office of Environmental Justice to coordinate the Agency's policies, as well as a National Environmental Justice Advisory Committee to provide independent advice to the EPA on environmental justice issues. It was not until 1994, however, when President Clinton issued an executive order on environmental justice, that a coordinated federal effort to address the issue began.

President Clinton's Executive Order 12,898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," was signed in February 1994. According to the accompanying Presidential Memorandum, the Executive Order was intended to "focus Federal attention on the environmental and human health conditions in minority communities and low-income communities with the goal of achieving environmental justice." The memorandum provides that agencies should use existing authority, such as the National Environmental Policy Act (NEPA) and Title VI of the Civil Rights Act to address environmental justice. More specifically, the Executive Order provides that federal agencies have the following responsibility:

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

The Executive Order also required most federal agencies to develop environmental justice strategies. EPA issued its "Environmental Justice Strategy" on April 3, 1995. That strategy provides for increasing outreach to minority and low-income communities and improving public participation. It also indicates that the agency will perform more research and data collection to assess environmental and health effects. Most significantly, the Strategy states that the Agency will work to "ensure that EPA's enforcement and compliance assurance activities include a focus on minority communities and low-income communities which suffer from disproportionately high and adverse human health or environmental effects."[8]

6 *See id.* at 20-22.
7 *See id.* at 23-25.
8 *The EPA's Environmental Justice Strategy* (April 3, 1995) (http://www.epa.gov/docs/oejpubs/strategy/strategy.txt.html).

Although the Executive Order is important because it focused the attention of federal agencies, including EPA, on the issue of environmental justice, the Order specifically provides that it creates no right to judicial review for non-compliance. This was confirmed by the EPA Environmental Appeals Board's decision in the watershed case of *In re Chemical Waste Management of Indiana Inc.*[9] That case arose when a facility applied for a renewal and modification of its RCRA permit in order to open a new disposal cell at its hazardous waste landfill in Fort Wayne, Indiana. Region 5 issued the permit, and the city and citizens groups challenged the permit under Executive Order 12,898.

On appeal, the Board held that the plain language of the Executive Order did not allow for judicial review. The Order states that it "is not intended to, nor does it create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any person." The Board held, however, that it could review compliance with the Executive Order "as a matter of policy or exercise of discretion." The Board also held that, under RCRA, an EPA Region must issue a permit if it meets regulatory requirements, regardless of environmental justice issues. According to the decision, however, the Regions should, as a matter of policy, increase public participation in permitting matters. Moreover, as a matter of policy, the Regions should investigate further and evaluate whether there is a disproportionate impact on minority or low-income populations that constitutes a threat to human health and the environment whenever a "superficially plausible claim" of such disproportionate impact is raised. In this case, the Board held that the Region's review of the disparate impact claim was sufficient and noted that the Board would defer to the Regions and their technical expertise in determining whether a disparate impact exists.

The Board has also extended the basic rationale of *In re Chemical Waste Management of Indiana Inc.* to several other EPA permitting programs under the Clean Air Act and the Safe Drinking Water Act. As a result, permit applicants should expect the EPA Regions to devote considerably more time and effort than they did before to investigating environmental justice concerns raised in connection with pending permit decisions.

Finally, although the Executive Order itself applies only to federal agencies, yet another Board decision issued late in 1998 held that state permit agencies administering delegated permit programs "stand in the shoes of" EPA and are bound by the same laws and procedures.[10] In that case, the Shasta County Air Quality Management District in California had issued a PSD permit, and the Board remanded the permit for further development of two issues, one of which was environmental justice. It may be that as many as a dozen states operating delegated Clean Air Act programs may become subject to President Clinton's Executive Order if the Board's decision stands.

III. TITLE VI OF THE 1964 CIVIL RIGHTS ACT

Unlike the 1994 Executive Order, which gives private parties very little opportunity to take enforcement actions, Title VI of the Civil Rights Act of 1964, together with EPA's implementing regulations, may provide an avenue for private parties to challenge state and local environmental permitting decisions in federal district court.

Title VI prohibits certain discrimination by recipients of federal funding. Section 601 provides the following:

9 RCRA Appeal Nos. 95-2, 95-3, 1995 RCRA LEXIS 16 (June 29, 1995). Mr. Steinberg, who co-authored this article, represented the permittee before the Environmental Appeals Board. *See* Michael W. Steinberg & Tim A. Pohle, ***Environmental Justice and RCRA Permits: Nothing Is Quite What It Seems***, 26 Env't Rep 1025 (Oct. 10, 1995).

10 *In re: Knauf Fiber Glass, GmbH*, PSD Appeal Nos. 98-3 to 98-20 (Nov. 30, 1998).

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[11]

Section 601 prohibits only intentional discrimination, which is probably rare and is certainly difficult to prove. Section 602, on the other hand, directs federal funding agencies to promulgate regulations that implement § 601. A badly divided Supreme Court held that an agency's § 602 implementing regulations may include a discriminatory effect or "disparate impact" standard.[12] Although the primary consequence of violating an agency's § 602 regulations would be the loss of federal funding, that may not be the end of the matter.

1. EPA's Title VI Regulations

EPA's current regulations implementing Title VI adopt such a "discriminatory effect" standard.

According to the regulations, which are published at 40 C.F.R. Part 7, recipients of EPA funding (including states and local agencies) "shall not use criteria or methods of administering [their] program which <u>have the effect of subjecting individuals to discrimination</u> because of their race, color, national origin, or sex." 40 C.F.R. § 7.35(b) (1998) (emphasis added). Additionally, states and localities applying for federal financial assistance must submit an assurance stating that programs receiving EPA assistance will comply with the Title VI regulations. 40 C.F.R. § 7.80(a).

EPA provides funding to states and to local agencies under a variety of grant programs. The statute and regulations are written broadly to include all programs and activities of an agency or department receiving EPA funding. Therefore, if a state environmental agency receives funding for one part of its environmental program, it may be subject to Title VI even for those parts of its program which receive no specific funding.

The regulations give EPA the authority to suspend or terminate funding for recipients that violate the regulations. 40 C.F.R. § 7.130. The regulations also allow private citizens to file administrative complaints alleging violations of Title VI. These complaints are processed by EPA's Office of Civil Rights (OCR). Until recently, there have been relatively few complaints filed challenging state and local permitting decisions. Due to increasing interest in environmental justice, however, and in the wake of the *Chester Residents Concerned for Quality Living* case and Shintech controversy, more complaints are expected in the future. In order to improve the manner in which EPA handles such complaints, EPA's Office of Enforcement and Compliance Assurance (OECA) issued an interim guidance document in February 1998. That interim guidance is at least a contender for the title of the most unpopular document in the history of EPA.

2. EPA's Interim Guidance on Title VI

The document, entitled *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits*, was intended to provide a framework for EPA to process and ultimately decide the merits of Title VI complaints. It was developed without consultation with, or much input from, the states or the regulated community, and it was harshly criticized by parties on all sides of the debate. Perhaps most notably, the Environmental Council of the States, an organization whose members are the heads of the environmental regulatory agencies in virtually all of the 50 states, urged EPA to withdraw the interim guidance and to give the states a greater role in formulating the policy. Although EPA is currently drafting a new policy, and the interim policy may soon be changed, many of the concepts will stay the same. Therefore, it is important to become familiar with some of the basic features of the Interim Guidance.

11 42 U.S.C. § 2000d (1994).

12 *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983).

a. When Can a Title VI Claim Arise?

Claims under this guidance can arise with state decisions on new permits, modifications to permits, and even permit renewals. New permits and permit renewals are treated the same. Modifications are treated differently but still can result in a Title VI challenge. According to the guidance, challenges to permit modifications must be based on adverse impacts cased by the modification, and modifications with neutral or beneficial impacts on human health and the environment are likely to be dismissed. Modifications that cause a net increase in pollution impacts, however, may result in a finding of disparate impact. Therefore, even if a facility is not presented with a Title VI challenge at the time of its initial permit, every time the facility makes a modification with the potential to increase pollution and every time the facility renews a permit, the potential for such a Title VI challenge reemerges.

b. What is the Time Frame for a Challenge?

According to the Interim Guidance and existing EPA regulations, complaints may be filed within 180 calendar days of final permit issuance. This limitation can be waived, however, for "good cause," such as to allow complainants to utilize the permit appeal process. This provision has been criticized by industry and the states because the 180 days is well beyond the normal public review period for permits in some states.

c. What is the Procedure for Evaluating Complaints?

Once OCR determines that a complaint states a facially valid claim, it conducts a factual investigation. Then, based on the complaint and the investigation, OCR will determine whether the permit at issue will create a disparate impact.

The Guidance spells out a five-step process for determining whether a disparate impact exists:

- **Affected Population.** OCR must determine the population which is adversely impacted by the challenged permit. OCR will "generally use proximity to a facility to identify adversely affected populations," but may also take into account the environmental medium and the impact of concern.

- **Demographic Analysis.** The race and ethnicity of the affected population is analyzed using demographic mapping technology.

- **Cumulative Impact.** OCR then calculates the Total Affected Population, taking into account the cumulative burden caused by multiple facilities in an area or caused by a pattern of disparate siting. "Ordinarily, OCR will entertain cases only in which the permitted facility at issue is one of several facilities, which together present a cumulative burden or which reflect a pattern of disparate impact." Therefore, in evaluating whether an environmental justice issue may arise in a permitting situation, *a facility must be concerned not only with its own environmental impact, but the environmental impact of other nearby facilities.*

- **Disparate Impact Analysis.** The guidance states that, at a minimum, the analysis will examine racial or ethnic characteristics within the affected population. It also indicates that it will likely include comparing the affected population to the non-affected population. But, it does not say what group of people (*e.g.*, nearby cities, the state as a whole, the nation as a whole) will constitute the non-affected population for comparison purposes. EPA has subsequently stated that it is considering three scientific models for evaluating disparate impact. The Basic Relative Burden Analysis is a simple analysis looking at the effects of releases of chemicals in pounds on the surrounding two- or four- mile radius of the facility. The Enhanced Relative Burden Analysis adds weather and wind conditions to the analysis and differentiates between fugitive and stack emissions. The Cumulative Outdoor Air Toxics Concentration and Exposure Methodology is the most complex and includes an analysis of cumulative sources of hazardous air pollutants

over large areas, including mobile sources. These models have recently been reviewed by EPA's Science Advisory Board, but no final decision has been made by EPA concerning how these models will be utilized.[13]

- **Significance**. OCR will then use arithmetic or a statistical analyses to determine the significance of any disparate impact found to exist and will evaluate whether a prima facie case of disparate impact under the Title VI regulations has been shown.

d. What Happens Once EPA Makes a Finding of Disparate Impact?

Once EPA makes an initial finding of disparate impact, the burden is on the recipient of the funding, most likely the state permitting agency, to respond. Although under Title VI the responsibility is on the agency that received the funding, the facility will obviously have an important role in responding to the disparate impact finding. There are three categories of responses that the recipient of funding can make to OCR's finding of disparate impact.

- **Rebuttal**. First, the recipient can attempt to rebut the finding of disparate impact with additional evidence and analysis.

- **Mitigation**. Another option is to mitigate the potential environmental and health effects with increased pollution control requirements or Supplemental Mitigation Projects, which are projects to address health and environmental effects that are not ordinarily considered by the permitting agency.

- **Justification**. A third option is for the recipient to attempt to justify the project to OCR despite the disparate impact. The Guidance makes it clear that a mere demonstration that the permit complies with applicable environmental regulations will ordinarily not be a sufficient justification. Instead, there must be broader governmental interests which justify allowing the permit to issue. No justification will be acceptable, however, if a less discriminatory practicable alternative exists to a challenged action.

If the recipient fails in its efforts to rebut, mitigate, or justify a permit, then OCR will make a preliminary finding of non-compliance within 180 days of the start of the complaint investigation. If the recipient does not comply within 50 days, OCR will issue a formal finding of non-compliance and within 10 days of the formal finding may, absent compliance, begin procedures to deny, annul, suspend, or terminate EPA assistance to the recipient including a possible litigation referral to the Department of Justice.

3. Title VI in the Courts: *Chester Residents Concerned for Quality Living*

Although racial discrimination claims brought under the Equal Protection Clause require a showing of intentional discrimination, EPA's Title VI regulations, as discussed above, provide a "discriminatory effect" standard. Therefore, if a private party could bring a claim under the EPA regulations, the party could state a claim merely by showing a disparate impact on minorities. The Third Circuit, in an opinion issued on December 30, 1997, in *Chester Residents Concerned for Quality Living v. Seif*[14], became the first federal appellate court to specifically hold that EPA's Title VI regulations provide a private right of action. If this conclusion were adopted by other courts, it would significantly strengthen the ability of local citizens to block permitting and siting decisions where there are concerns about environmental justice issues. In such cases, plaintiffs would no longer be required to show discriminatory intent.

Chester Residents Concerned for Quality Living v. Seif involved the issuance of a permit to operate a waste treatment facility in the City of Chester in Delaware County, Pennsylvania. Chester's population is 65% black and 32% white, whereas Delaware County as a

13 *See* Cheryl Hogue, *Environmental Justice: SAB to Begin Reviewing Methods for Determining 'Disproportionate Impact,'* BNA National Environment Daily, Sept. 3, 1998.

14 132 F.3d 925 (3d Cir.1997).

whole is 6.2% black and 91% white. The plaintiffs alleged that the Pennsylvania Department of Environmental Protection had issued seven permits for waste disposal facilities in Delaware County since 1987, five of which were located in predominantly black Chester. The complaint alleged that the process used to determine whether to grant the permit had the effect of discriminating against the African-American community in Chester by concentrating the pollution and negative health effects of the waste facility in their community. The complaint did not allege that this discrimination was intentional.

The district court dismissed two counts of the complaint which were based on the EPA regulations, holding that Third Circuit precedent had held that there was no private right of action.[15] The Third Circuit reversed that holding and remanded the case to the district court. The panel held that the district court had misapplied the relevant Third Circuit case law and that there was a private right of action implied from the regulation.

In arriving at this decision, the court first determined that there was no binding Supreme Court or Third Circuit precedent. The court discussed *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983) extensively. In that case, the Supreme Court held that Title VI itself provides a private right of action based on a showing of intentional discrimination. According to the *Chester* court, *Guardians* also held that discriminatory effect regulations promulgated by agencies pursuant to Title VI were proper. The Court in *Guardians* did not, however, specifically address whether there could be a private cause of action brought under such agency regulations. The Third Circuit found that this and other related precedent in other circuits indicated that a private cause of action could be inferred. Nonetheless, the court concluded that this case law was not strong enough to mandate a result in this case.

Therefore, the court turned to the Third Circuit's three-prong test for determining when it is appropriate to imply a private right of action from a regulation. The three parts of the test are "'(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." Finding that the legislative history and purpose of the statute and regulation supported the creation of a private right of action, the court held that the three-prong test was met and that private citizens could bring an action to enforce the regulation.

Pennsylvania sought Supreme Court review of the Third Circuit's decision, and the Supreme Court granted a writ of certiorari. But, in its brief to the Supreme Court, the citizens group argued that the case was now moot because the facility had subsequently surrendered the permit in question. The Supreme Court agreed and decided not to hear the case. The Court did not, however, allow the Third Circuit's decision to stand. Instead, it vacated the appellate court's judgment as moot and remanded the case to the Third Circuit with instructions to dismiss the case.[16]

The Supreme Court's decision thus left open the question whether EPA's Title VI regulations can provide a private cause of action. Permit applicants, permit holders, and environmental justice advocates are left to guess whether other courts will allow such a claim. By vacating the Third Circuit's decision, the Court weakened the precedential impact of that case, but the decision is nevertheless likely to encourage other plaintiffs to file such Title VI claims in the future, especially if EPA's administrative review process does not provide favorable results to permit challengers. As a result, it may not be long before the issue rises through the appellate courts and back to the Supreme Court again.

4. Title VI in Practice: Shintech and Select Steel

Two other recent high-profile Title VI challenges, the Shintech case in Louisiana and the Select Steel case in Michigan, help to illustrate how

15 *Chester Residents Concerned for Quality Living v. Seif*, 944 F. Supp. 413 (1996).
16 *Seif v. Chester Residents Concerned for Quality Living*, 1998 WL 477242 (Aug. 17, 1998).

EPA's policies work in practice. In each of these cases, vocal citizens groups filed Title VI claims with EPA to block the issuance of air permits to proposed new facilities. The results of the two cases were quite different, however. In Shintech, the facility backed down from its plans to build the facility rather than waiting for EPA's final decision, illustrating the power that even the filing of a complaint can have. In Select Steel, the company threatened to pull out and move to another city, but instead waited long enough to receive a favorable decision from EPA, dismissing the Title VI complaint.

a. Shintech

In May, 1997, Shintech Inc. received an air permit from Louisiana to build a $700 million polyvinyl chloride plastics plant near Convent, Louisiana. The Shintech facility would have brought almost 200 permanent jobs and 2000 construction jobs to economically depressed St. James Parish. Citizens groups, however, filed a complaint with EPA alleging that the facility would have a disproportionate impact on the predominately minority and low-income community.[17]

In September, 1997, EPA issued a decision rejecting the proposed permit on technical grounds. It denied the petitioners' allegation that Executive Order 12,898 required the Agency to object to the permit on environmental justice grounds as part of the Title V Clean Air Act permit review process itself. The agency did not, however, reach the Title VI question. Instead, the agency indicated that the Office of Civil Rights would investigate the matter further and urged the community, the facility, and the state to work together to resolve the dispute in the revised permit. Before Louisiana could issue the revised permit, however, Shintech decided it was not worth the trouble and withdrew its proposal to site the facility in Convent.

In addition to providing an example of how environmental justice can impact the siting of new facilities, this case also illustrates the often conflicting interests that arise in these cases amongst minority and low-income members of the community. As stated above, the facility would have brought new jobs to a community desperately in need of them. As a result, some minority organizations, including the local chapter of the NAACP, supported the company's siting of the facility in Convent.[18]

b. Select Steel

Unlike Shintech, Select Steel resulted in a decision, and thus provides a first glimpse into EPA's substantive implementation of its Interim Guidance.

In May, the Michigan Department of Environmental Quality (MDEQ) issued a Clean Air Act Prevention of Significant Deterioration (PSD) permit to Select Steel Corp., which was considering building a small steel recycling mill in Flint, Michigan. In June, a citizens group filed an administrative complaint with the Office of Civil Rights alleging that MDEQ violated Title VI in issuing the permit. The complaint alleged that the permit imposed a disparate impact on the surrounding minority community and that the permitting process was discriminatory. When EPA accepted the complaint for investigation in August, the company threatened to move to Toledo, Ohio if EPA did not issue a finding within 45 days, rather than face the potential delays in the project that could result from an extended EPA investigation.[19]

On October 30, EPA's Office of Civil Rights issued an opinion dismissing the complaint.[20] In analyzing the complaint, EPA applied its Interim Guidance. Under the Guidance, the first step in evaluating a discriminatory effect claim is to identify the population which is affected by adverse impacts from the permitting decision. According to EPA's

17 *See* Curtis Wilkie, *EPA Rejects Permit for La. Plastics Plant*, Boston Globe, Sept. 12, 1997.

18 *See id.*

19 *See* Paul Connolly, *Environmental Justice: Michigan Governor Blames EPA Policy for Company Decision to Scrap Factory Plant*, BNA Daily Environment Report, Sept. 4, 1998.

20 *See* Letter from Ann E. Goode, Director, EPA's Office of Civil Rights, to Father Phil Schmitter, Sister Joanne Chiaverini, and Russell Harding, Re: EPA File No. 5R-98-R5 (Select Steel Complaint), October 30, 1998.

opinion, this complaint failed at this initial step because there was insufficient proof of any "adverse impact" on the surrounding community. EPA evaluated the potential impact of VOCs, lead, air toxics, and dioxin on the surrounding community and found that the effects from the new facility "did not rise to the level of 'adverse.'" In performing the assessment of effects from air toxics, the agency took into consideration the potential emissions from Select Steel together with emissions from TRI facilities, a power station, and other major sources in the surrounding area. Even considering the combination of sources, EPA found there to be no "adverse" impact in the vicinity of the facility. Moreover, EPA found that the public participation process for the permit was adequate under EPA regulations and was not discriminatory. As a result, EPA dismissed the complaint.

5. Key Unresolved Issues

There are a number of issues that have not yet been answered satisfactorily that make it difficult for facilities to determine whether there is a risk that environmental justice claims will be filed based on their permit applications.

a. What is a "Disparate Impact"?

In order to determine that a disparate impact exists, it is necessary to identify and clearly define both (i) the impacted community of people and (ii) the community of people that they are to be compared with. In the employment discrimination context, the comparison groups are relatively clear. A court can compare the racial composition of an employer's work force to the racial composition of the qualified labor pool.

In the environmental justice context, however, it is difficult to identify both the impacted group and the comparison group. The impacted group can include: everyone within a certain radius of a facility, everyone in a census area or zip code, or everyone in a town or county. The comparison group can include: neighboring cities or towns, other locations considered for siting, the state as a whole, or the nation as a whole. Depending on which comparison groups one chooses, the results of a disparate impact analysis can vary drastically.

b. What Does the Disparate Impact Include?

Another difficulty not present in the employment context is identifying the impact. In an employment discrimination case the impact is clear — a job applicant was turned down or employee was not promoted. In the environmental justice context, it is often not even clear what the impact is. Should the impact be limited to actual health effects or include increased risk of such effects? Should it include aesthetics? Should the impact of multiple facilities with different owners be cumulative? Should the impact include secondary effects, such as increased traffic? These questions have not been answered clearly by the EPA or the courts.

c. Should the Potential Benefits of a Facility be Considered?

A third problem involves the potential benefits from a new facility, which may be overlooked in assessing whether or not there is a disparate impact. New development can bring many benefits to a community. New facilities can bring jobs and tax revenue. Prohibiting development in any minority areas may not be in the best interest of every community and fails to take into account these benefits. Policies which prevent development in minority communities may also interfere with EPA's Brownfields program, which is specifically designed to bring new development to low-income, urban areas.

IV. THE EQUAL PROTECTION CLAUSE

In addition to pursuing administrative complaints at the agency level, environmental justice claims can be pursued in the courts. Until the advent of Title VI litigation, discussed above, most such claims failed

because they were brought under legal theories that required a showing of intentional discrimination.

Initial attempts to address environmental justice concerns in the courts were based on alleged violations of the Equal Protection clause of the Fourteenth Amendment and were filed under 42 U.S.C. § 1983. The difficulty with these claims was that in order to succeed on an equal protection claim, plaintiffs are required to show that there was a racially discriminatory intent or purpose.[21] A mere showing of disparate impact is not sufficient, although a showing of disparate impact may be relevant as circumstantial evidence of a discriminatory purpose.[22]

In *Bean v. Southwestern Waste Management Corp.*,[23] residents sought an injunction and Temporary Restraining Order (TRO) to prevent the Texas Department of Health from granting a permit to a company to operate a solid waste facility. The complaint alleged that the permit was part of a pattern or practice of discriminatory placement of solid waste sites. The complaint also alleged that the approval of this particular permit constituted discrimination. In support of this claim, plaintiff offered statistical evidence of the historical placement of such landfills approved by the Texas Department of Health. Although the court noted that the siting of the landfill in this case may be illogical or insensitive, the court found that there was not sufficient evidence that the issuance of the permit was motivated by purposeful discrimination. Therefore, the motion for an injunction and TRO was denied.

In *East Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb County Planning & Zoning Comm'n*,[24] residents brought an equal protection challenge to the issuance of a permit to operate a private landfill in a census tract that had a majority African-American population. The court acknowledged that approval of the landfill would have a greater impact upon the majority African-American population in the census tract. The court noted, however, that the only other landfill approved by the same planning commission was not located in a majority African-American census tract. Moreover, the court found no historical pattern of discriminatory siting or any statements made by the commission which indicated an invidious discriminatory motive. Therefore, the court held that there was insufficient evidence of discriminatory purpose to succeed on an equal protection claim.

Finally, in *R.I.S.E., Inc. v. Kay*,[25] citizen groups challenged the siting of a regional landfill in an African-American community. In evaluating the citizens' Equal Protection claim, the court acknowledged that landfills had historically been placed in predominately African-American communities in the county. The court held that this evidence, however, was not sufficient to prove an equal protection violation. According to the court, "the Equal Protection Clause does not impose an affirmative duty to equalize the impact of official decisions on different racial groups. Rather, it merely prohibits government officials from intentionally discriminating on the basis of race."[26] The court found that there was insufficient evidence of such intentional discrimination and dismissed the case.

V. THE FUTURE OF ENVIRONMENTAL JUSTICE

Now that environmental justice has finally moved to center stage, it is likely to remain there for quite some time. Despite renewed skepticism about the factual and policy bases for the entire movement,[27] its political strength continues to increase.

21 *See Washington v. Davis*, 426 U.S. 229, 239 (1976).
22 *See Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977).
23 482 F. Supp. 673 (S.D. Tex. 1979), *aff'd without op.*, 782 F.2d 1038 (5th Cir. 1986).
24 706 F. Supp. 880 (M.D. Ga. 1989), *aff'd*, 896 F.2d 1264 (11th Cir. 1989).
25 768 F. Supp. 1144 (E.D. Va. 1991), *aff'd*, 977 F.2d 573 (4th Cir. 1992).
26 *Id.* at 1150.
27 *See* Christopher H. Foreman, Jr., *The Promise and Peril of Environmental Justice* (1998).

One obvious area to watch is EPA's final guidance on Title VI, expected in mid-1999. Depending on what approach EPA takes to the extremely difficult questions it has been asked to handle, the final guidance may prompt a major new wave of complaints filed over permit decisions and enforcement actions.

Another aspect of EPA also bears watching. Several of the ten EPA Regions either have issued or are developing their own individual policies on environmental justice. Current information can be found on the Regions' Web sites. Notably, these Regional policies are not limited to permitting decisions; they seek to integrate environmental justice concerns into virtually all aspects of all environmental programs. The ten Regions vary widely in their definitions of environmental justice and in their approaches to implementing it.

Another arena that bears careful watching is Congress. In recent years, proposed legislation on environmental justice have attracted significant support. Last year, for example, the "Environmental Justice Act of 1998" gathered dozens of co-sponsors in the House. This little-noticed bill would have designated as Environmental High Impact Areas certain geographic areas where the population faces particularly high exposure to chemicals. If a significant adverse health impact from environmental pollution were found to exist in such an area, then the bill would have imposed a moratorium on siting or permitting of any new toxic chemical facility (subject to certain exceptions).

A final place to watch is the states. Although only about a dozen states currently have coherent environmental justice programs, many others are in the process of developing such programs. The Environmental Council of the States is at the forefront of this activity.

In sum, the time when environmental justice was a "maybe some day" kind of issue has come to an end. It is vitally important for industry representatives to understand which of their facilities and operations have potential environmental justice problems and to monitor closely the ongoing developments in this area of the law.