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ENVIRONMENTAL JUSTICE AND TSD SITING POLICIES: TITLE VI IS THE PLAINTIFFS' NEWEST AND BEST WEAPON, BUT WILL IT SUCCEED IN MISSOURI

by Don Willoh and Tom Collins

I. INTRODUCTION

"Environmental justice" is the term used to define the legal and social movement to redistribute the benefits and burdens of policies that have environmental implications.¹ Wade Henderson, director of the Washington office of the National Association for the Advancement of Colored People (NAACP), has been quoted as saying that environmental justice is "... the cutting edge of a new civil rights struggle."² While environmental justice is a broad term that has been used to cover such various societal issues as nuclear waste disposal, international trade agreements and hazardous waste siting policies,³ this paper will focus solely on the latter.

In Missouri, as well as throughout the United States, the vast majority of hazardous waste treatment, storage and disposal facilities (TSDs) are in predominantly minority neighborhoods. Although several studies have concluded

that discrimination plays a role in the siting of TSDs, these studies have been challenged as incomplete or inaccurate.⁴ Partly as a result of this conflicting research, lawsuits alleging that waste facilities have been placed in minority neighborhoods for discriminatory reasons have been largely unsuccessful.⁵

Advocates of the environmental justice movement believe that Title VI of the 1964 Civil Rights Act provides plaintiffs with a weapon to challenge siting practices that they view as discriminatory.⁶ Title VI has not yet been used as a cause of action in this context. Presently, only the Equal Protection and Takings clauses of the Constitution, and Title VII of the 1964 Civil Rights Act have been used by plaintiffs in this context, but with very limited success.⁷

This paper provides background information on the disproportionate burden placed on minority communities with reference to several studies, including an

analysis of Missouri sites. It then examines proposed legislation and case law attempting to deal with the problem, emphasizing cases using the Equal Protection clause of the United States Constitution. Other alternatives are also discussed. Using these cases, this paper attempts to predict the advantages and limitations of Title VI as a cause of action. The paper suggests that alleging a Title VI violation in factual contexts where Title VI has not been previously used is likely to lead to conflicting court decisions and uncertainty that will do little to promote environmental justice in the siting of hazardous waste facilities. To achieve environmental justice, in the siting of hazardous waste facilities, Congress and state legislatures will have to take the issue away from the courts by enacting legislation that provides a mechanism to ensure the even distribution of benefits and burdens.

II. BACKGROUND

In 1971, Environmental Protection Agency (EPA) head William Ruckelshaus publicly stated that even though the agency had at its disposal a powerful enforcement tool, Title VI of the 1964 Civil Rights Act, the EPA would not use it because it was not relevant to its mission of cleaning up the environment.⁸ Since that fateful declaration, the environmental concerns and problems of minority communities largely have been ignored by the EPA, the judicial system, and the American political process. The consequences of this EPA policy have been dramatic, as several studies have shown.⁹ In 1983, the General Accounting Office (GAO) published one of the

¹ This new area of law bears a variety of names - most commonly, environmental racism, environmental justice, and environmental equity. Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 Nw. U. L. Rev. 787, 790 (1993).

² Marcia Coyle & Marianne Lavelle, *Unequal Protection: The Racial Divide In Environmental Law - A Special Investigation*, NAT'L J., Sept. 21, 1992 at S2.

³ Lazarus, *supra* note 1, at 790.

⁴ *Id.* at 796.

⁵ *Id.*

⁶ *Id.* at 834.

⁷ See *infra* notes 91-92 and accompanying text. See also *infra* note 105.

⁸ *Hearings Before the U.S. Commission on Civil Rights 146-56 (1971)* [testimony of William Ruckelshaus, Administrator of the United States Environmental Protection Agency].

first studies of how environmental mismanagement affected various population groups. After surveying hazardous waste sites in the southeastern United States,¹⁰ the GAO reported that African-Americans made up the majority of the population in three of four waste site areas.¹¹

An off-referred to study conducted by the United Church of Christ Commission for Racial Justice (UCC) followed the GAO report in 1987. The UCC study examined population centers with two or more hazardous waste facilities or one of the five largest landfills and found a mean minority population of 35%.¹² Population centers without similar environmental hazards had a mean minority population of 12%.¹³

In a 1992 report, the National Law Journal (NLJ) surveyed 1177 Superfund toxic waste sites. The NLJ reported that placement on the Superfund list was faster for sites in white communities than in non-white communities; cleanups were faster in white communities; and penalties were higher in predominantly white areas than in non-white areas.¹⁴ For instance, the average Resource Conservation Recovery Act (RCRA) fine imposed on areas with a predominantly white population was \$335,566, compared to \$55,318 in black neighborhoods.¹⁵

As a result of these studies and changes in the political climate, the EPA is playing catch-up and will soon be a major player in the new environmental justice arena.¹⁶

The EPA has quietly signaled its break with the policy of the Ruckelshaus years that civil rights had little relevance in an environmental context. The director of the EPA's new Office of Environmental Equity, Dr. Clarice Gaylord, stated in March of 1993 that neither EPA policy nor the agency's interpretation of existing precedent stood in the way of civil rights-based environmental suits.¹⁷ Dr. Gaylord also claimed that her office was "re-visiting" civil rights statutes as a means of enforcing environmental justice.¹⁸

Congress has made several start-and-stop attempts to forge an environmental justice policy. In 1992, now Vice-president Al Gore and Representative John Lewis introduced the "Environmental Justice Act of 1992" in both the House and the Senate.¹⁹ The bill failed to pass, but spurred the introduction of another bill, Senate Bill 171. This bill passed the Senate in May 1993, and called for the elevation of the EPA to cabinet-level status.²⁰ One of the major provisions of the bill was to create a new Office of Environmental Justice²¹ in

an effort to improve EPA's response to environmental racism problems.²² The counterpart to that bill in the House, H.R. 3425, cleared the House Government Operations Committee on November 4, 1993.²³ The EPA Cabinet bill was withdrawn in February 1994 after the Democratic leadership failed to pass a rule limiting floor amendments to the bill.²⁴

The Clinton Administration also has become a player. The White House is currently working on drafts of an executive order purported to require accelerated use of Title VI as a means of removing environmental burdens felt unequally by minority communities.²⁵ The administration apparently feels a sense of urgency. A White House spokesperson pointed out that an executive order is more advantageous than legislation because of its relative speed in implementation.²⁶

President Clinton signed Executive Order No. 12898 on February 11, 1994, directing EPA and other agencies to identify and address the "disproportionately high and adverse human health or environmental effects of its programs, policies, and activities."²⁷ The order has been criticized as ineffective for a number of reasons, but primarily because it does not address what is a disproportionate effect.²⁸ The order will

⁹ See *infra* notes 10 and 12.

¹⁰ U.S. GEN. ACCOUNTING OFFICE, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES 1 (1983).

¹¹ *Id.* See Robert D. Bullard, *Examining the Evidence of Environmental Racism*, 2 LAND USE FORUM 6 (Winter 1993) [explaining the GAO Report].

¹² UNITED CHURCH OF CHRIST COMMISSION FOR RACIAL JUSTICE, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES (1987).

¹³ *Id.*

¹⁴ Coyle & Lavelle, *supra* note 2, at S2.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Stephen C. Jones, *Inequities of Industrial Siting Addressed*, NAT'L J., Aug. 16, 1993, at 20.

¹⁸ *Environmental Equity - House Considers Need for Bill to Combat Racism*, BNA NAT'L ENV. DAILY, March 8, 1993.

¹⁹ S. 2806, 102d Cong., 2d Sess. (1992) and H.R. 5326, 102d Cong., 2d Sess. (1992).

²⁰ *Senate Votes to Elevate Agency to President's Cabinet, Eliminate CEQ*, BNA NAT'L ENV. DAILY, May 5, 1993.

²¹ *Id.*

²² *Cabinet Status, Environmental Justice Will Improve Agency, Former Official Says*, BNA NAT'L ENV. DAILY, Nov. 8, 1993 (reporting comments by F. Henry Habicht, former deputy EPA administrator).

²³ *Bill to Elevate EPA to Cabinet Level Clears Government Operations Committee*, BNA NAT'L ENV. DAILY, Nov. 8, 1993 [hereinafter *Bill to Evaluate EPA*].

²⁴ *EPA: House Overturns EPA Cabinet Bill Rule, Leadership Pulls Bill, Next Step Unclear*, BNA NAT'L ENV. DAILY, Feb. 4, 1994.

²⁵ *Congressional Black Caucus Seminar Says Research, Immediate Action Needed*, BNA NAT'L ENV. DAILY, Sept. 20, 1993 [hereinafter *Black Caucus Seminar*].

²⁶ *Bill to Elevate EPA*, *supra* note 23.

²⁷ Exec. Order No. 12,898 (1994).

²⁸ *Environmental Justice: Difficulty Predicted for Demonstrating Effectiveness of Clinton Executive Order*, BNA NAT'L ENV. DAILY, Dec. 8, 1994.

give EPA no legal basis for denying a hazardous waste permit based on a finding of environmental inequity alone.²⁹

III. MISSOURI SITES

A brief examination of Missouri sites yields interesting results. The 1990 Census Bureau reported that Missouri had a white population of 87.67% and a non-white population (including African-Americans, American Indians, Asians, Hispanics, and "others") of 12.33%.³⁰ According to the Missouri Department of Natural Resources (MDNR), however, in the population centers nearest the fifty-five sites on Missouri's Registry of Uncontrolled or Abandoned Hazardous Waste Sites, 69.45% of the population is white and 30.55% is non-white.³¹ Of the fifty-five sites, twelve exist in the more crowded and predominantly non-white urban areas of St. Louis, Missouri, and Kansas City, Missouri.³²

Currently, according to the MDNR, fifty active or proposed TSD hazardous waste facilities exist in Missouri. Of those sites, twenty-four are commercial facilities³³ and twenty-six sites are

private.³⁴ Of the twenty-four commercial sites, seven (29.17%) are in the metropolitan Kansas City, Missouri area.³⁵ Of the twenty-six private sites, nine (34.62%) are located in the metropolitan St. Louis or Kansas City areas.³⁶

The five active or proposed sites in the St. Louis metropolitan area are private facilities, three of which are in predominantly non-white communities.³⁷ The site with the smallest non-white population is the Mallinckrodt waste facility at Mallinckrodt and 2nd Streets, where the immediate surrounding community is 58.42% non-white.³⁸ The site with the largest non-white population is the GMC Truck and Bus facility at Natural Bridge and Union, where 98.92% of the population is non-white.³⁹ The other two sites in the St. Louis metropolitan area are in predominantly white communities, but the non-white population is still greater than the state average of 12.33%.⁴⁰ Interestingly, of the five St. Louis sites, the GMC Truck and Bus site affects the largest number of people and also has the highest minority population.⁴¹

Of the sites in Kansas City,⁴² only one of the ten is in a community where

the minority population is 50% or greater. The communities surrounding six of the ten sites, however, have a minority population greater than the state average of 12.33%.⁴³ The site surrounded by the largest population is 46.2% non-white.⁴⁴ Analysis of the Kansas City and St. Louis sites suggests that the racial composition of the population is related in some way to the location of the hazardous waste sites.⁴⁵

This survey of Missouri sites is only a primitive indication that racial inequities may exist in siting policies. Clearly, more research is needed to establish causal links between siting policies and the groups that are most harmed by them.⁴⁶ The director of the National Institute of Environmental Health Sciences recently told the Congressional Black Caucus that the institute had committed to spend \$30 million in the next five years on such studies.⁴⁷ Despite this commitment of resources, several speakers at the same seminar stated their belief that much more research would still be needed.⁴⁸ One of those speakers, Ted Shaw of the NAACP's Legal and Educational Defense Fund, cautioned that the lack of

²⁹ *Id.*

³⁰ U. S. BUREAU OF THE CENSUS, STATE AND METROPOLITAN AREA DATA BOOK, 1991 [1991].

³¹ Missouri Registry of Uncontrolled and Abandoned Hazardous Waste Sites.

³² *Id.*

³³ Facilities that receive compensation for management/disposal of other producers' wastes. *Id.*

³⁴ Facilities that manage/dispose of their own wastes - some of these are owned by such well-known names such as American Cyanamid, Dow Chemical, GMC, Mallinckrodt, McDonnell-Douglas, and Ralston-Purina. *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ The population breakdowns around these sites were computed at one square mile by the East-West Gateway Coordinating Council in St. Louis. East-West Gateway based their computations on the 1990 Census Bureau Report.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ 20.66% of the population is non-white in the area surrounding the Sigma site at Utah and South 2nd, and 20.30% of the population is non-white surrounding the other Sigma site at Pontiac and Dekalb. *Id.*

⁴¹ 29,126 people live within one square mile of the GMC site. The next highest population concentration is the Sigma site at Pontiac and Dekalb, where 18,563 people live within one square mile of the hazardous waste site. *Id.*

⁴² Information for the Kansas City sites was prepared by the Mid-America Regional Council, 600 Broadway, Kansas City, Missouri.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ In rural Missouri, the statistics indicate that income, rather than race, plays a role in siting policy. For example, the average white population surrounding the seventeen rural, private sites is 93.20% of the total. In eight of those seventeen areas, the percentage of families that have an income below the poverty line exceeds the state sub-poverty line percentage. The average white population surrounding the seventeen rural, commercial sites is 92.48%. In ten of those areas, the percentage of families that have an income below the poverty line exceeds the state sub-poverty line percentage.

⁴⁶ *Black Caucus Seminar, supra* note 25, at 1.

⁴⁷ *Id.* (paraphrasing a statement by Kenneth Olden, director of the National Institute of Environmental Health Sciences).

⁴⁸ *Id.*

definitive studies should not be used as an excuse to delay efforts to begin addressing these inequities immediately. Mr. Shaw called for more active enforcement of already existing state and federal laws, specifically urging the EPA to pursue polluters using civil rights-based lawsuits.⁴⁹

IV. LEGAL THEORY

A. Equal Protection

Few cases have focused on environmental racism issues. In 1971, the same year William Ruckelshaus told Congress that the EPA had little relationship with the civil rights movement, a local environmental group sought to enjoin federal, state, and local governments from constructing an interstate highway through Harrisburg, Pennsylvania.⁵⁰ In *Harrisburg Coalition Against Ruining the Environment v. Volpe*, the Coalition alleged that the highway's construction in the predominantly African-American area of Harrisburg would constitute a violation of the residents' Fourteenth Amendment equal protection rights and the 1964 Civil Rights Act.⁵¹ The Coalition presented evidence that the planned path for the highway was through a park used predominantly by blacks and that it was this reason that the park was allowed to deteriorate.⁵² The District Court found that the evidence offered by the Coalition was insufficient to sustain

either claim.⁵³

The Supreme Court addressed the issue in *Arlington Heights v. Metropolitan Housing Corp.*⁵⁴ This 1977 decision made clear that the Equal Protection Clause of the Fourteenth Amendment would not be the best weapon to win environmental racism suits.⁵⁵ In that case, Metropolitan Housing Corp. alleged that its request to rezone a portion of Arlington Height as a multi-family dwelling was denied for discriminatory reasons.⁵⁶ The Court found for Arlington Heights, holding that Metropolitan's statistical proof, offered to show a disparate impact on African-Americans, was not enough by itself to substantiate a Fourteenth Amendment claim.⁵⁷ The Court required some proof of intent to constitute a showing of the "invidious racial discrimination" needed to succeed in a Fourteenth Amendment claim.⁵⁸

The first suit to deal with discriminatory disposal facility siting policies, decided in 1979, was *Bean v. Southwestern Waste Management Corp.*⁵⁹ In that case, Bean alleged that the Texas Department of Health (TDH) granted a permit to construct a solid waste disposal plant in Bean's neighborhood primarily because the proposed site was predominantly populated by African-Americans.⁶⁰ The federal district court found that the statistical proof offered by Bean was not enough to show

that TDH had engaged in a pattern or practice of discrimination.⁶¹ The court based its ruling on evidence that of the seventeen solid waste sites in Houston operated by the TDH, 82.4% of the sites were located in areas where minorities comprised 50% or less of the population.⁶² The court left open the possibility that discrimination may be shown with "more particularized data" that would suggest the actual neighborhoods affected by the sites were predominantly minority-populated.⁶³

Three cases heard in Florida federal courts suggest a more successful form of attack on environmental racism.⁶⁴ The plaintiffs in all three cases alleged that the allocation of municipal services had a disparate impact on minorities. The plaintiffs offered as proof evidence that the bulk of the services provided went to predominantly white neighborhoods.⁶⁵ Beginning in 1981, with *Dowdell v. City of Apopka, Fla.*, the plaintiffs asserted that the City failed to pave roads, install storm water drainage facilities, install sewerage facilities, and to provide parks and recreation facilities in black neighborhoods in the same manner as provided in white neighborhoods.⁶⁶ The plaintiffs argued this constituted a violation of the Fourteenth Amendment's Equal Protection Clause and of Title VI of the 1964 Civil Rights Act.⁶⁷ The district court found that an inference of

⁴⁹ *Id.*

⁵⁰ *Harrisburg Coalition Against Ruining the Environment v. Volpe*, 330 F.Supp. 918, 921 (M.D. Pa. 1971).

⁵¹ *Id.*

⁵² *Id.* at 926.

⁵³ *Id.*

⁵⁴ 429 U.S. 252 (1977).

⁵⁵ *Id.* at 265.

⁵⁶ *Id.* at 254.

⁵⁷ *Id.* at 265.

⁵⁸ *Id.*

⁵⁹ 482 F.Supp. 673 (S.D. Tex. 1979).

⁶⁰ *Id.* at 674-75.

⁶¹ *Id.* at 677.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Dowdell v. City of Apopka, Fla.*, 511 F.Supp. 1375 (M.D. Fla. 1981); *Baker v. City of Kissimmee, Fla.*, 645 F.Supp. 571 (M.D. Fla. 1986); *Ammons v. Dade City, Fla.*, 783 F.2d 982 (11th Cir. 1986).

⁶⁵ *Dowdell*, 511 F.Supp. at 1377; *Baker*, 645 F.Supp. at 572; *Ammons*, 783 F.Supp. at 1289.

⁶⁶ *Dowdell*, 511 F.Supp. at 1377.

⁶⁷ *Id.*

discrimination could be drawn in this case.⁶⁸ The court pointed to evidence offered that Apopka had historically responded more favorably to requests by white residents for services and that blacks were under-represented in the city's government and administration.⁶⁹ The court granted the plaintiffs' injunctive relief under both claims.⁷⁰ Significantly, the court noted that while the plaintiffs here had shown an intent to discriminate, some courts had interpreted Title VI to allow proof of discrimination upon a showing of "discriminatory effect" alone.⁷¹

In 1986, another class of plaintiffs in *Baker v. City of Kissimmee*, claimed that the discriminatory deprivation of municipal services had violated their Fourteenth Amendment rights.⁷² In this case, however, the plaintiffs made no Title VI claim.⁷³ The plaintiffs prevailed after proving first, a disparate impact and then, the existence of other factors⁷⁴ that allowed the court to conclude discriminatory intent was present in the allocation of the services.⁷⁵ The court noted the necessity for proof of intent to sustain a Fourteenth Amendment claim, but said nothing about Title VI requirements.⁷⁶

Continuing in 1986, the decision in another successful municipal services case, *Ammons v. Dade City, Fla.*, was upheld when the Eleventh Circuit Court of Appeals refused to overturn the district court's finding of intentional discrimination as clearly erroneous.⁷⁷ On facts similar to *Dowdell*, the appellate court agreed with the district court that the evidence⁷⁸ offered at trial was enough to show a disparate impact and found the requisite "correlation between municipal services disparities and racially tainted purposiveness" sufficient for a finding of discriminatory intent.⁷⁹ This court restated the principle, however, that impact alone was not enough to prove intent.⁸⁰ Notably, the plaintiffs in this case never plead a violation of Title VI, but only of the Fourteenth Amendment.⁸¹ Consequently, there is no conflict between *Ammons*, *Baker*, and *Dowdell* as to the *Dowdell* court's statement that impact alone may be enough in Title VI cases.

Returning to disposal facility siting policies, the plaintiffs in the 1989 case of *East-Bibb Twiggs Neighborhood v. Macon-Bibb Planning*, alleged violations of 42 U.S.C. § 1983, and the Fifth and

Fourteenth Amendments of the U.S. Constitution.⁸² The allegations stemmed from Macon-Bibb County's grant of a conditional use permit to a waste landfill operator, Mullis Tree Service, Inc.⁸³ The plaintiffs complained that Macon-Bibb issued permits to build the landfill in a largely African-American community, resulting in a discriminatory impact on that community.⁸⁴ The Eleventh Circuit affirmed the district court's ruling against the plaintiffs, finding that while plaintiffs may have had a cause of action under the Equal Protection Clause, plaintiffs did not offer sufficient evidence of an "improper racial animus" that would satisfy the intent requirement of the Fourteenth Amendment.⁸⁵

Another direct attack on a county's landfill siting policies likewise failed in *R.I.S.E., Inc. v. Kay*.⁸⁶ The plaintiffs offered evidence that King and Queen County of Virginia obtained a purchase option to buy land near a predominantly black area and that this land was to be used as a landfill site. Plaintiffs also offered evidence of the historically disparate treatment of area blacks.⁸⁷ Citing *Arlington Heights*, the court noted that evidence of disparate impact is not

⁶⁸ *Id.* at 1383-84.

⁶⁹ *Id.*

⁷⁰ *Id.* at 1384.

⁷¹ *Id.*

⁷² *Baker*, 645 F.Supp. at 572.

⁷³ *Id.*

⁷⁴ The other factors cited by the *Baker* court are the reasonable foreseeability of a discriminatory impact, the legislative and administrative history of the service allocation policies, and knowledge of a discriminatory impact on the minority residents. *Id.* at 588.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Ammons*, 783 F.2d at 982.

⁷⁸ The factual findings of the district court cited by the *Ammons* court were that: 1) Dade City's assessment policy was neither uniform as to its application nor inclusive of all city streets; 2) liens were never collected on a significant portion of the streets assessed; 3) black citizens in one subdivision were required to pay assessments in advance of paving, while no white residents were required to pay in advance at any time. *Ammons v. Dade City, Fla.*, 594 F.Supp 1274, 1289 (M.D. Fla. 1984).

⁷⁹ *Ammons*, 783 F.2d at 987 (quoting *Dowdell v. City of Apopka*, 698 F.2d 1181, 1185-86 (11th Cir. 1983)).

⁸⁰ *Ammons*, 783 F.2d at 988.

⁸¹ *Id.*

⁸² 896 F.2d 1264 (11th Cir. 1989).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 1266 (quoting the district court in *East Bibb-Twiggs Neighborhood Ass'n v. Macon-Bibb County Planning & Zoning Commission*, 706 F.Supp 880, 887 (M.D. Ga. 1989)). The Fourteenth Amendment Equal Protection Clause claim was apparently the only claim that survived to be heard on its merits; the 42 U.S.C. and Fifth Amendment claims apparently failed on procedural grounds.

⁸⁶ 768 F.Supp 1141 (E.D. Va. 1991).

⁸⁷ *Id.* at 1143.

enough to maintain a constitutional rights claim.⁸⁸ The court also denied the plaintiffs' Fourteenth Amendment claim, that they deserved protection of their property values or their general health and environmental well-being. The court found that "...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."⁸⁹ The court seemed persuaded by evidence that the defendants, King and Queen County Board of Supervisors, made efforts to prevent any significant damage or interference to the black community.⁹⁰

As the foregoing discussion illustrates, the Equal Protection Clause of the Fourteenth Amendment often has been used by plaintiffs in attempts to achieve environmental equity. With the exception of the Florida municipal services cases, the Equal Protection Clause has been largely unsuccessful. The primary difficulty with maintaining such a suit is meeting the high level of proof, a showing of intentional discrimination, required by *Arlington Heights*.⁹¹ This level of proof is difficult for a plaintiff to meet when the alleged cause of the harm is an environmental imbalance, especially when there is no statistically significant basis for the imbalance, or when there is no documentation that the involved

environmental agency or governmental entity has a historic practice of discrimination.⁹²

While evidence of environmental impact is insufficient, in and of itself, to maintain a Fourteenth Amendment claim, courts have allowed the introduction of such evidence as a "starting point" which can be bolstered with additional evidence, such as: 1) the effect of the "official action"; 2) the historical background of the decision; 3) the specific sequence of events leading up to the challenged decision; 4) any departures from normal procedures; 5) any departure from normal substantive criteria; and 6) the administrative history of the decision. Unless one or more of these factors are present, a court is not likely to find the requisite intent.⁹³ The lack of success of these suits suggests that the courts consider this to still be a lofty pinnacle of proof to reach. The *Arlington Heights* test has the practical effect of making environmental equity suits based on the Equal Protection Clause unwinnable.⁹⁴

Many states have an equal protection clause similar to that in the federal Constitution. The task here is to find if the clause has been interpreted by the state courts or legislatures to allow a showing of intent based on impact alone. Missouri's equal protection clause reads "[A]ll persons are created equal and are entitled to equal rights

and opportunity under the law."⁹⁵ No Missouri cases have interpreted this clause in the environmental equity context, but two cases suggest Missouri's equal protection clause requires proof of discriminatory intent.⁹⁶

B. Title VIII

Some commentators have suggested that Title VIII of the Civil Rights Act, also known as the Fair Housing Act, may be a more successful approach.⁹⁷ Title VIII bars discrimination based on race, color, religion, sex, familial status or national origin in the sale or rental of a dwelling or in providing related services.⁹⁸ There is much confusion as what constitutes a claim under Title VIII. Courts have yet to adequately define "services or facilities" and who qualifies as a potentially liable deliverer of those services.⁹⁹

The most significant advantage of Title VIII is that discriminatory impact alone may be sufficient to establish liability.¹⁰⁰ In *Keith v. Volpe*, the Ninth Circuit affirmed a lower court's ruling for plaintiffs in an action under Title VIII, even though the plaintiffs did not present direct proof of an intent to discriminate.¹⁰¹ The court qualified its opinion, however, saying it had not decided if "discriminatory effect" alone was enough.¹⁰² Title VIII has the potential to be a powerful tool for plaintiffs, although few courts have answered all of the

⁸⁸ *Id.* at 1143-44.

⁸⁹ *Id.* at 1150.

⁹⁰ *Id.* at 1147.

⁹¹ *Arlington Heights*, 429 U.S. at 265.

⁹² See Note, *Remedying Environmental Racism*, 90 MICH. L. REV. 394, 410 (1991).

⁹³ *R.I.S.E., Inc.*, 768 F.Supp. at 1143.

⁹⁴ Lazarus, *supra* note 1, at 830.

⁹⁵ Mo. CONST. of 1945, art. I, § 2.

⁹⁶ *King v. Swenson*, 423 S.W.2d 699, 705 (1968). The Missouri Supreme Court stated that the purpose of both the federal and Missouri equal protection clauses was to "prevent invidious discrimination." In *Arlington Heights*, the U.S. Supreme Court said discriminatory intent was required to prove invidious discrimination. *Arlington Heights*, 429 U.S. at 266.

⁹⁷ Lazarus, *supra* note 1, at 839.

⁹⁸ Civil Rights Act of 1968, 42 U.S.C. § 3604(b) (1988). Private actors are not immune under these suits, since there is no requirement that the defendant receive federal financial subsidization, as required by Title VI. Lazarus, *supra* note 1, at 840.

⁹⁹ Lazarus, *supra* note 1, at 840.

¹⁰⁰ *Id.* at 839-41.

¹⁰¹ *Keith v. Volpe*, 858 F.2d 467 (9th Cir. 1988).

¹⁰² *Id.* at 482.

interpretive questions Title VIII has raised.¹⁰³

C. Title VI

Title VI states that: "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."¹⁰⁴ The critical difference between Title VI and the vastly unsuccessful Equal Protection Clause is that plaintiffs generally are not required to show intent to discriminate.¹⁰⁵ Although the United States Supreme Court has been unclear on this issue at times,¹⁰⁶ a Title VI suit has a better chance of escaping the intent requirement of the Fourteenth Amendment cases. Professor Lazarus believes that allowing discriminatory impact to sustain a Title VI cause of action encourages settlement.¹⁰⁷ When a Title VI plaintiff is able to show a discriminatory impact, the burden theoretically shifts to the defendant to offer a legitimate, non-discriminatory reason for the site's location.¹⁰⁸ This encourages defendants to settle rather than meet a shifting burden of persuasion.¹⁰⁹

Title VI has three significant limitations. First, the potential defendant class may be limited in Title VI claims by the "federal financial assistance" requirement,¹¹⁰ although one commentator has noted that most states have programs that determine the allocation of environmental "benefits and burdens," and that many of these programs receive significant federal financial support.¹¹¹ The financial assistance requirement is analogous to the "state actor" requirement in Fourteenth Amendment Equal Protection claims, which may be satisfied by a "nexus" relationship between the state and the defendant. This vague test is based on the case's individual circumstances.¹¹² Because Title VI is dependent on a somewhat bright-line test as opposed to the vague nexus standard in Equal Protection claims, Title VI plaintiffs may have more success in environmental cases.

The second limitation concerns the plaintiff's remedy.¹¹³ Title VI appears to have been successful in cases involving the allocation of "municipal services." These cases are closely related to environmental racism cases.¹¹⁴ The usual remedy in the municipal services cases has been injunctive in nature; money

damages are the exception rather than the rule.¹¹⁵ Professor Lazarus speculates that this limitation will be insignificant because Title IX of the Education Act Amendments of 1972 and Title VI have similar constructions.¹¹⁶ The Supreme Court has ruled that money damages are available in Title IX cases, suggesting that they may likewise be available in Title VI cases.¹¹⁷

The third and most obvious limitation on Title VI is its uncertain success in the environmental racism context. Professor Lazarus suggests that

courts may be more willing to grant relief under Title VI than under equal protection because the focus of the lawsuit is, at least superficially, the provision of governmental benefits as opposed to the redistribution of environmental risks. To that extent, a Title VI lawsuit is more analogous to equal protection challenges concerning provision of municipal services ... than to those suits which more overtly seek a judicial redistribution of 'harmful' environmental risks.¹¹⁸

It is difficult to separate the concept of "benefits" in a Title VI environmental

¹⁰³ Another alternative for those who have been slighted in the allocation of housing may be 42 U.S.C. § 1982. Helen Hershkoff, *Environmental Equity: The New Frontier of Civil Liberties*, 2 LAND USE FORUM 23, 26 (Winter 1993). Again, the threshold of proof needed to meet the intent requirement is unknown, but those minority communities that have suffered lowered property values deriving from the siting of disposal and landfill facilities may find a cause of action here. *Id.* at 26. The statute arguably creates a property right in property values that cannot be abrogated by either the public or private actor. *Id.*

Along the same lines, the takings clause of the Fifth Amendment has been suggested as the basis of a cause of action by some commentators. *Id.* The problems with the takings clause are: 1) state action is required; 2) the field of possible defendants; and 3) the extent to which a property right will be within the protection of the Fifth Amendment. *Id.* Theoretically, a plaintiff may argue that a Fifth Amendment property right includes a sustainable level of property values, freedom from contaminated water and air, or even freedom from the stench of a nearby landfill. *Id.* The takings clause is, like Title VIII, an untried weapon in the environmental equity context and its worth is unknown.

¹⁰⁴ 42 U.S.C. § 2000(d) (1988).

¹⁰⁵ Lazarus, *supra* note 1, at 834. (citing *Lau v. Nichols*, 414 U.S. 563 (1974)).

¹⁰⁶ *Guardians Ass'n v. Civil Service Comm'n*, 463 U.S. 582, 584 n.2 (1983) (three justices found that Title VI still required proof of intent, but gave deference to the agency's view requiring only disparate impact. So even if this view prevails in future cases, the EPA has only to set a disparate impact standard as its policy to sustain a Title VI claim).

¹⁰⁷ Lazarus, *supra* note 1, at 838, n.234.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 835.

¹¹¹ *Id.*

¹¹² *Jackson v. Metro. Edison Co.*, 419 U.S. 345 (1974).

¹¹³ Lazarus, *supra* note 1, at 836.

¹¹⁴ See *Beon*, 482 F.Supp. at 673

¹¹⁵ *Id.*

¹¹⁶ Lazarus, *supra* note 1, at 836.

¹¹⁷ *Id.* (citing *Franklin v. Gwinnett County Pub. Schs.*, 112 S. Ct. 1028 (1992)).

racism action from the concept of "judicial redistribution" of environmental risks in an equal protection-based action. In either case, the same conflict exists. On the one hand, fairness dictates an equitable sharing by the population as a whole of the burdens created by hazardous wastes in our society. On the other hand, judicial restraint prevents the judicial branch from invading the legislatures' domain of allocating societies' benefits and burdens. The success of Title VI cases, as in many other areas of the law, will depend on whether the court hearing the case is an activist court or prefers to defer to the appropriate legislative body. However, given the recent push by Congress, the White House, and the EPA to actively curb environmental racism, the chances for a successful Title VI claim may never be better.

V. CONCLUSION

The previous discussion suggests three related conclusions: 1) Lawsuits filed by or on behalf of people who claim to have suffered harm due to discriminatory waste facility siting practices will increase in number in the future; 2) these lawsuits increasingly will allege Title VI violations; and 3) Title VI plaintiffs have some likelihood of being able to sustain their complaints based on a showing of disparate impact alone. However, several questions remain. Answers to these questions will be crucial to the outcome of these cases and will significantly affect waste management policy decisions in the United States.

A. Income

Minority groups in this country are poorer, based on percentage of

population, than the majority white population.¹¹⁹ Notwithstanding the "one man, one vote" principle of political equality, a certain political advantage exists in the democratic process for those participants with greater spending power. Given these two assumptions, a plaintiff may have difficulty challenging a hazardous waste siting policy as discriminatory when that plaintiff is both a member of a minority group and poor. A court may require a showing that the hazardous waste site was created in that plaintiff's neighborhood solely because of the plaintiff's race. It may be that the site location was chosen based on the lack of political spending power of the community instead of on that community's racial composition. Title VI does not include in its list of protected classes those below the poverty line.

B. Other Contributing Causes

Minorities are more susceptible than whites to a variety of medical conditions due to differences in the places they live, their diets, and their work conditions.¹²⁰ A plaintiff may not win a lawsuit for damages for a medical condition the plaintiff claims results from living near a hazardous waste site. A court may find convincing the defense's statistical evidence that the plaintiff's injury may also have been caused by the plaintiff's poor diet or working conditions. In sum, causation is still problematic in Title VI cases.

C. Timing

Does it matter whether the area was first a minority community and then the site for a hazardous waste facility or if the area was first a hazardous waste site and then became a minority

community? The few studies correlating waste sites with population have not considered the population breakdown at the time the siting decisions were made.¹²¹

A court may not hold accountable a corporation or government entity that sited a waste facility in a deserted area or racially neutral area that later became a predominantly minority community. This situation could occur when the waste site leads to lower property values, subsequent "white flight," and then an increased minority population in the area. As a defense, this "coming to the nuisance" doctrine may not prevail since a majority of jurisdictions no longer recognize its worth.¹²²

D. Community Involvement

Charles J. McDermott, Director of Government Affairs for Waste Management, Inc., notes that while community involvement is important in siting policies, too much community involvement may have undesirable results.¹²³ Mr. McDermott fears that "[i]f the risks of hosting waste facilities are routinely exaggerated, it is likely that only the voiceless will play host to such necessary activities."¹²⁴ He argues that hazardous waste has to go somewhere, and competing communities will fight to keep the waste out of their area.¹²⁵ Assuming someone will have to win and someone will have to lose, the poorer and minority communities are likely to be the losers. This argument certainly has merit, but having limited community involvement is certainly preferable to a situation where the siting decision is made in a political back-room without any significant community input.

¹¹⁸ *Id.* at 839.

¹¹⁹ *Id.* at 795.

¹²⁰ *Id.* at 806.

¹²¹ Charles J. McDermott, *A Waste Manager's Perspective*, 2 LAND USE FORUM 12, 14 (Winter 1993).

¹²² *Fischer v. Atlantic Richfield Co.*, 774 F.Supp 616, 620 (W.D. Okla. 1989); *Patrick v. Sharon Steel Corp.*, 549 F.Supp 1259, 1267 (N.D. W. Va. 1982) (describing the "coming to the nuisance" doctrine as an outdated defense rejected in the majority of jurisdictions).

¹²³ McDermott, *supra* note 121, at 15.

¹²⁴ *Id.*

¹²⁵ *Id.*

E. Settlement

Professor Lazarus believes the use of Title VI will encourage settlement of environmental racism suits.¹²⁶ If this is true, the question arises as to whether settlement is a desirable result. Conceivably, a minority plaintiff could settle with the defendant corporation or government entity for reduced damages because the plaintiff needs the money or does not have the finances to continue the lawsuit. As a result, sites may not be moved or shut down, and defendants may not be publicly forced to accept responsibility, thereby proliferating discriminatory siting policies. These defendants may be willing to accept the risk of a lawsuit that can be quickly and quietly settled out of court rather than spending the time and effort to consider minority groups in their siting decisions.

VI. AN ALTERNATIVE PROPOSAL

RCRA does not require TSDs to be equally distributed among the population.¹²⁷ One simple solution to the problem of inequitable siting policies is to amend RCRA to require EPA to consider whether certain population groups are being unfairly impacted by these TSDs. Currently, RCRA requires certain information to be submitted in a TSD permit application: 1) the hazardous wastes to be transported, treated, stored or disposed; and 2) the site at which such hazardous wastes will be transported, treated, stored or disposed.¹²⁸ This writer would propose the addition of a third statutory requirement for RCRA permit applications. As amended, RCRA § 6925 should read:

(b) Each application for a permit under this section shall contain such information as may be

required under regulations promulgated by the Administrator, including information respecting

(1) estimates with respect to the composition, quantities, ...

(2) the site at which such hazardous waste ...; and

(3) the community in which the site in (2) will be located. Information regarding the community shall include the ethnic, racial, gender, age and income characteristics of the community, as well as any other characteristics determined to be relevant by the Administrator. Failure to submit any required information under this subpart will result in the automatic rejection of the application.

This information requirement is not an overwhelming burden on the applicant since it is easily obtainable in census tract reports publicly available. Under this proposal, Congress also should prohibit the EPA from granting a permit unless the location of the TSD impacts proportionately on the country's population or unless the TSD permit is required to protect human health and the environment. In other words, the TSDs scattered throughout the country should reflect the country's population. If the United States is 80% Caucasian and 20% nonwhite, 80% of the TSDs should be in predominantly white areas and 20% of the TSDs should be in non-white areas. EPA should attempt to distribute TSD permits to reflect other population characteristics as well. This proposal is designed to force all population groups to fairly share the burdens associated with TSDs.

This writer's proposal also would add a cause of action under RCRA's

citizen suit provision that would make failure to submit this demographic information a violation of § 6925 and thus actionable under § 6972(a)(1).¹²⁹ Thus, if a private plaintiff meets the requirements of § 6972(b), the plaintiff may sue for injunctive relief, attorneys fees and court costs.

Under this proposal, EPA would be required to consider the impact on the population surrounding the applicant facility. As a nondiscretionary duty, EPA's violation would be actionable under § 6972(a)(2). If EPA fails to take into account the impact on the surrounding population, someone in that population has standing to bring a suit to force EPA to reconsider the application and recover its attorneys fees and court costs.

This proposal gives those unfairly exposed to the risks associated with TSDs a ready-made cause of action that can result in the non-issuance of the permit. The threat of an automatic rejection for failing to disclose the community-characteristic information creates an incentive for the permit applicant to consider those impacted by the proposed facility. The problem of inequality in the sharing of environmental burdens is a social issue. It is important that the decision-makers, primarily EPA, the states and facility-owners, consider who the TSDs are likely to impact as well as what environmental hazards they pose. To date, these decision-makers have not taken a look at the "big picture." It is time they did so. President Clinton's executive order takes a step in the right direction, but does not go far enough. If the decision-makers will not look at the big picture on their own, it is necessary to require them to do so through an absolute legislative mandate, as this proposal envisions.

¹²⁶ Lazarus, *supra* note 1.

¹²⁷ 42 U.S.C. § 6925.

¹²⁸ *Id.*

¹²⁹ 42 U.S.C. § 6972.