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ENVIRONMENTAL RACISM AND HAZARDOUS FACILITY SITING DECISIONS: NOBLE CAUSE OR POLITICAL TOOL?

By Christopher Billias¹

INTRODUCTION

In order to site a facility considered undesirable, the entity seeking approval usually must overcome a "not in my backyard" objection from the local community.² That same entity will face even more serious obstacles when the proposed facility has an environmentally hazardous character with the potential of affecting both the health and welfare of the community.³ Reality dictates, however, that these undesirable facilities must be sited somewhere. The question of where is a source of major debate today, and it is a question not easily answered.

Further complicating the problem is the fact that this dilemma will continue to expand in the future. Increasing populations and finite boundaries mean more communities will have to face possible local siting of a hazardous facility. Population growth, however, is just one constituent of many factors causing the demand for sites to outstrip the supply of available locations. In addition, the Environmental Protection Agency (EPA) estimates that eighty percent (80%) of existing hazardous waste landfills will shut down by the year 2012 because of limited capacity and increasing costs of complying with environmental standards.⁴ Consequently, the future need for landfill sites will compete with hazardous facilities for precious few locations.

A number of historical factors have influenced site selection. Most prominent among these are economic feasibility and the degree of public opposition to proposed facilities.⁵ These two factors, however, become less important when business entities either expand existing sites or seek new locations in poor, politically powerless minority communities.⁶ This strategy led to the development of the environmental justice movement, thus drawing national attention to the phenomenon Reverend Benjamin F. Chavis, Jr., Director of the United Church of Christ,⁷ calls "environmental racism."⁸ Chavis defines environmental racism as the disproportionate imposition of environmental hazards on minorities, both intentional and unintentional.⁹

As publicity surrounding environmental racism grew, the executive branch of the United States government became involved by promulgating Executive Order 12898.¹⁰ This order requires agencies to consider the impact of their actions on minority and economically disadvantaged communities.¹¹ A decision by the Atomic Safety & Licensing Board (ASLB) of the Nuclear Regulatory Commission was the first time a government agency officially acted under this order.¹²

In this matter, the ASLB blocked a facility siting plan by denying Louisiana Energy Service L.P.'s (LES)¹³ license application to build a centrifuge enrichment plant in Claiborne Parish, Louisiana.¹⁴ The case drew media attention because local grass-roots opposition effectively halt-

¹Candidate for *Juris Doctor*, Washington and Lee University School of Law, 1998. I wish to thank Professor Paul Thomson for his assistance and insight, and Cortland Putbrese and Elizabeth Garcia for their invaluable editing comments and support.

²Lawrence S. Bacow & James R. Milkey, *Overcoming Local Opposition to Hazardous Waste Facilities: The Massachusetts Approach*, 6 Harv. Envtl. L. Rev. 265, 266 (1982).

³Throughout this paper, hazardous facilities are defined as those that release, or have the potential of releasing, hazardous substances into the environment sufficient to create serious health and environmental problems.

⁴Environmental Protection Agency, Office of Technical Assessment, *Facing America's Trash: What Next for Municipal Solid Waste?* 3 (1989).

⁵Sidney M. Wolf, *Public Opposition to Hazardous Waste Sites: The Self-Defeating Approach to National Hazardous Waste Control Under Subtitle C of the Resource Conservation and Recovery Act of 1976*, 8 B.C. Envtl. Aff. L. Rev. 463, 475-85 (1980).

⁶Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 Nw. U. L. Rev. 787, 806-11 (1993) (arguing that once a particular site becomes the locus for hazardous activity, there is a historical

favoring of the siting of more such activities in the area since these existing activities provide a surface "neutral" reason for subsequent siting determinations.). Minority communities are defined as those geographic regions with high concentrations of minority residents.

⁷The United Church of Christ is a human rights organization run by Chavis.

⁸Commission for Racial Justice, United Church of Christ, *Toxic Wastes and Race in the United States: A National Report on the Racial and Socioeconomic Characteristics of Communities with Hazardous Waste Sites*, ix-x (1987).

⁹*Id.* at ix.

¹⁰Exec. Order No. 12,898, 3 C.F.R. 859 (1995), reprinted in 42 U.S.C. § 4321 (1994).

¹¹*Id.*

¹²Wilson Dizzard III, *Citing Environmental Racism, NRC Board Bars LES License*, *Nucleonics Week*, Vol. 38, No. 19, Thursday, May 8, 1997.

¹³Louisiana Energy Service L.P. is a consortium composed of general partners Duke Power Co., Urenco, Fluor Daniel, and Northern States Power Co., and limited partner Entergy Louisiana Inc.

¹⁴Dizzard III, *supra*, note 12.

ed LES, despite the fact that LES had invested thirty-two million dollars and seven and one-half years of time attempting to have the siting approved.¹⁵ Interestingly enough, in selecting Claiborne Parish, LES considered a Louisiana law, promoted by an African-American state senator, that subsidizes new industrial development in economically deprived areas.¹⁶ In a similar vein, environmental justice advocates blocked the siting and development of a facility by Shintech, Inc., in St. James Parish, Louisiana, frustrating gravely needed economic development in that region.¹⁷

These examples demonstrate that there are two competing perspectives with contrary goals that must be addressed when considering the issue of environmental racism. One perspective, typically adopted by business and government entities, is to locate hazardous facility sites in regions that are both economical and politically advantageous. Their incentive to the community is the promise of jobs and economic development for the area. The other perspective, utilized by environmental groups, is to advance environmental racism as a tool for preventing hazardous facility sitings. As an incentive to the community, environmental organizations offer political and financial support to local groups which oppose these facilities.

The problem with these two perspectives is that both fall short in directing the minority community towards overall improvement. When entities seek locations for hazardous facilities, the promised jobs and economic development often do not balance the equities in relation to the potentially hazardous burdens of the facility. Those groups which seek to prevent facility sitings ignore the tangible economic benefits that a siting entity can offer if properly regulated. These are benefits which may not be forthcoming to the community by alternative means. The purpose of this paper is to draw out these inadequacies and to propose an alternative solution which will ultimately benefit the minority community.

Part I of this paper analyzes the development of environmental racism by surveying scientific studies

dealing with this issue. Part II examines the actions taken by the executive and legislative branches in response to environmental racism. Part III focuses on the judicial reaction to environmental racism. This section further provides a synopsis of case law in this area. Part IV explores the contrast in positions between business and environmental groups in Louisiana. Part V discusses potential political manipulation and misuse of environmental racism. Part VI provides recommendations and proposes an alternative solution to environmental racism claims. This section will examine whether such claims are the most advantageous way of remedying a perceived inequity.

I. THE GENESIS OF ENVIRONMENTAL RACISM

A. Proponent's Arguments

In response to the demonstrations and media attention surrounding the 1982 Warren County, North Carolina hazardous waste siting,¹⁸ the General Accounting Office (GAO) began to investigate hazardous waste landfills located in the southeastern United States.¹⁹ The GAO released a study the following year which found a strong correlation between socio-economic/racial composition of a community and siting of hazardous waste landfills. Specifically, the report concluded that these landfills were consistently sited in areas populated primarily by African-Americans in the poorest economic class.²⁰ As a result of the GAO report, the United Church of Christ Commission for Racial Justice (UCC) conducted a nationwide study of the effects of environmental racism.²¹ The results of this more comprehensive study demonstrated that race was the most consistent factor in the location of commercial waste treatment facilities and uncontrolled toxic waste sites.²² The UCC study found there were two areas of major concern. First, locations with more than one operating facility had more than three times the percentage of minority residents than areas without such facilities.²³

¹⁵ *Id.* Support for the local group came from national environmental organizations such as the Nuclear Information & Resource Service and the Sierra Club Legal Defense Fund. *Id.*

¹⁶ *Id.*

¹⁷ *Civil Rights Not the Role of the EPA*, Baton Rouge Advocate, September 23, 1997, at 6B.

¹⁸ This event involved the siting of a hazardous landfill in a primarily African-American community which was publicly and vehemently opposed by the community and a number of prominent civil rights leaders, some of whom were arrested for their civil disobedience. A congressional representative from the District of Columbia, Walter E. Fauntroy, made the request for the survey after he was arrested at the demonstration.

Rachel D. Godsil, Comment, *Remedying Environmental Racism*, 90 Mich. L. Rev. 394, n.3 (1991).

¹⁹ *Id.* at 394.

²⁰ U.S. General Accounting Office, *Siting of Hazardous Waste Landfills and Their Correlation with Racial and Economic Status of Surrounding Communities* (1983).

²¹ Commission for Racial Justice, United Church of Christ, *Toxic Wastes and Race in the United States: A National Report on the Racial and Socioeconomic Characteristics of Communities with Hazardous Waste Sites* (1987).

²² *Id.* Uncontrolled waste sites include closed and abandoned sites the EPA had cited as hazardous. *Id.*

²³ *Id.* at 13.

Second, nearly sixty percent (60%) of Latinos and African-Americans live near an uncontrolled toxic waste site.²⁴

Subsequent researchers have reached similar conclusions to that of the UCC study. Professor Robert Bullard, one of the leading researchers in the environmental justice movement, authored a study titled *Dumping in Dixie*.²⁵ In this work, Bullard discovered that African-American communities contain sixty percent (60%) of the South's hazardous waste disposal capacity, while constituting only twenty percent (20%) of the population. He also found that three out of five of the nation's largest hazardous waste landfills are located in predominantly African-American or Latino communities.²⁶

Following these findings, various researchers conducted national and state studies to measure the degree of, and problems posed by, environmental racism.²⁷ According to a number of these commentators, the evidence suggests that race plays a significant role in the distribution of environmental hazards.²⁸ The work of these researchers succeeded in drawing national attention to the issue of environmental racism.

B. Opponent's Response

The early studies have spawned a number of skeptics. For example, some researchers question the methodology of the UCC study, finding it controversial and somewhat unsound.²⁹ Other commentators have found a lack of evidence in earlier studies which would demonstrate

that race was the sole predictor in the siting of hazardous facilities.³⁰ A prominent researcher advocates market dynamics, not intentional discrimination, as the key factor in assessing environmental racism.³¹ This scholar demonstrates that proponents' studies are deficient because they do not consider whether host communities are disproportionately poor or minority at the time of site selection or *after* site selection.³² If evidence of environmental racism appears after the siting, then there is no intentional discrimination by the siting entity.³³

Further complicating the issue for environmental justice advocates are two recent studies which refute altogether the notion that siting decisions are more likely to be made in minority neighborhoods. The first study was completed by sociology professors Douglas Anderton and Andrew Anderson at the University of Massachusetts, Social and Demographic Research Institute (SARDI).³⁴ In contrast to the work of the UCC, the SARDI study utilized census tracts, not zip codes, to determine the boundaries of a community.³⁵ The use of census tracts had the effect of including only those areas directly around the hazardous sites, unlike the broad areas within the zip code region.³⁶ With this new methodology in place, the SARDI study found no statistically significant differences in the percentage of minorities in communities with a facility versus those that did not.³⁷

The Hazardous Waste News reported another study completed by the University of Chicago Irving B. Harris Graduate School.³⁸ This comprehensive study considered both government-approved and historical hazardous

²⁴*Id.* at 13, 41-44.

²⁵Robert Bullard, *Dumping in Dixie: Race, Class, and Environmental Quality* (1990).

²⁶Adam Swartz, *Environmental Justice: A Survey of the Ailments of Environmental Racism*, 2 Howard Scroll Soc. J. Rev. 35, 37 (1994).

²⁷See Paul Mohai & Bunyan Bryant, *Environmental Injustice: Weighing Race and Class as Factors in the Distribution of Environmental Hazards*, 63 Colo. L. Rev. 921 (1992) (citing sixteen studies that provide systematic information about the social distribution of environmental hazards); Vicki Been, *What's Fairness Got to Do with It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 Cornell L. Rev. 1001, 1009-15 (1993).

²⁸Mohai & Bryant, *supra* note 27 (finding that race and income demonstrate a clear and unequivocal class and race bias in the distribution of environmental hazards).

²⁹See Lazarus, *supra* note 6, at 802 n.56.

³⁰Daniel Kevin, "Environmental Racism" and *Locally Undesirable Land Uses: A Critique of Environmental Justice Theories and Remedies*, 8 Vill. Envtl L.J. 121 (1997).

³¹Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?* 103 Yale L.J. 1383 (1994). Been posits the theory that siting of undesirable facilities lowers property values, mak-

ing housing more affordable for low-income and minority households whose choices are otherwise limited by economics or racial discrimination in the housing market, causing the neighborhood to become poorer and populated by a higher percentage of racial minorities than existed prior to the siting of the facility. *Id.*

³²*Id.* at 1384-5.

³³Thomas Lambert & Christopher Boerner, *Environmental Inequality: Economic Causes, Economic Solutions*, 14 Yale J. on Reg. 195 (1997) (arguing that economic factors, not siting discrimination, are behind claims of environmental racism, and that a policy that compensates individuals living near industrial sites is the key to securing environmental justice).

³⁴Douglas Anderton & Andrew B. Anderson, *Evaluation Review*, Vol. 18 No. 2, April, 1994.

³⁵*Id.*

³⁶*Id.*

³⁷Andrew B. Anderson et al., *Environmental Equity: Evaluating TSD Siting Over the Past Two Decades*, Waste Age, July 1994, at 83-4; see also Vicki Been & Francis Gupta, *Coming to the Nuisance or Going to the Barrios? A Longitudinal Analysis of Environmental Justice Claims*, 24 Ecology L.Q. 1, 7-8 (1997).

³⁸*Hazardous Waste News*, Vol. 19 No. 19, May 19, 1997.

waste sites.³⁹ After analyzing the data, the study concluded there was no evidence of environmental racism against African-Americans.⁴⁰ The net effect of these studies is to “muddy the waters” for the advocates of environmental racism by calling into question whether valid scientific measurement is possible.

II. EXECUTIVE AND LEGISLATIVE RESPONSES

A. Executive Response: Executive Order No. 12898

In February 1994, President Clinton issued Executive Order No. 12898,⁴¹ which was essentially a procedural directive to the head of each executive agency department. The order seeks to achieve environmental justice by two means. First, each agency must identify and address adverse health and environmental effects on minority/low income populations in their current programs, policies, and activities if these effects are proportionately high.⁴² Second, each agency must ensure that its future programs, policies, or actions which substantially affect human health or the environment do not have the effect of subjecting persons or populations to racial discrimination.⁴³ Additionally, the order created an “Interagency Working Group” which must: (1) provide guidance to agencies in identifying populations affected by environmental racism; (2) coordinate and serve as a clearinghouse for strategies that ensure consistency of results; (3) assist in coordinating data collection; (4) examine existing studies relating to environmental justice; (5) hold public meetings; (6) develop model projects that evidence cooperation among federal agencies.⁴⁴

While the order is an admirable attempt at providing a means for investigating disproportionate environmental effects on minority communities, the drafting is not without flaws. It falls short of a succinct remedy for two reasons. First, it does not provide a definition of environmental justice, nor does it attempt to clarify what this means. Second, it does not provide an agency guidance

in pursuing a claim when that agency suspects environmental racism.

Executive Order No. 12898 is applicable to all agencies under the direction and control of the executive branch. The Nuclear Regulatory Commission (NRC), however, stands in an interesting position in relation to this order. As an independent regulatory agency, the NRC was not required to follow the President's directive, but would only be obligated by voluntary compliance. In 1994, the NRC did opt to comply with the order, and it will continue to be fully applicable to the NRC assuming the agency does not revoke its commitment.⁴⁵ As will be discussed below, this fact of voluntary compliance is important because the order was the vehicle used by the Atomic Safety & Licensing Board in rejecting Louisiana Energy Services L.P.'s centrifuge enrichment plant site.⁴⁶

B. Legislative Response: Resource Conservation and Recovery Act

In 1976, Congress passed the Resource Conservation and Recovery Act (RCRA) to regulate improper waste disposal.⁴⁷ This statute tracks hazardous wastes and creates comprehensive guidelines for their management from inception to disposal.⁴⁸ RCRA addresses the siting of hazardous waste facilities, but only in a limited sense because it allows the states to develop their own hazardous waste management programs and have sole control of their siting decisions.⁴⁹ Each state must follow EPA regulations in order to obtain federal approval for its particular program.⁵⁰ Then, once the EPA does authorize the state program, the state has the primary responsibility of enforcement.⁵¹

In developing their siting programs, individual states generally have the following common components: (1) siting criteria; (2) a special siting board; (3) an emphasis on public participation; and (4) state preemption of siting decisions.⁵² The states tend to adopt either a “super-review” approach⁵³ or a site designation approach⁵⁴ in the siting of hazardous waste facilities.

³⁹ *Hazardous Waste News*, *supra*, note 38, reporting, Brett Baden and Don Coursey, *The Locality of Waste Sites Within the City of Chicago: A Demographic, Social, and Economic Analysis* (1997).

⁴⁰ *Id.*

⁴¹ Exec. Order No. 12,898, 3 C.F.R. 859 (1995), *reprinted in* 42 U.S.C. § 4321 (1994).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Matter of Louisiana Energy Services, L.P.*, 45 N.R.C. 367, 369, 1997 WL 458771 (May 1, 1997).

⁴⁶ *Id.* at 370.

⁴⁷ Pub. L. No. 94-580, 90 Stat. 2796 (1976) (codified as amended at 42 U.S.C. §§ 6901-6991 (1988)).

⁴⁸ 42 U.S.C. §§ 6941-6949 (1988).

⁴⁹ RCRA §§ 3001-3012, 42 U.S.C. §§ 6921-6939b (1982 &

Supp. III 1985).

⁵⁰ 42 U.S.C. § 6926 (1988).

⁵¹ See 40 C.F.R. § 272 (1990).

⁵² Bram D.E. Canter, *Hazardous Waste Disposal and the New Siting Programs*, 14 *Nat. Resources Law* 421, 432-37 (1982).

⁵³ This approach requires the regulatory agency to await the filing of permit applications by a developer, then review these against the body of rules for approval or denial before even considering the unsuitability of sites for their intended uses. *Id.* at 438. The Canter study evaluates nine state programs using this approach. *Id.* at 438-43.

⁵⁴ Site designation involves the setting aside in advance of specific proposals for the construction of hazardous waste facilities rather than responding to a developer's suggestion. *Id.* at 443. The Canter study evaluates four state programs using this approach. *Id.* at 444-48.

These state hazardous waste programs fall short in terms of effectiveness because the EPA has failed to identify and list all types of hazardous waste.⁵⁵ Many hazardous substances are not classified as such in the EPA guidelines. Thus, these materials may be transported, stored, and disposed of under the various state regulations.⁵⁶ Commentators have concluded that none of the state siting procedures will ameliorate the inequality in the distribution of hazardous waste facilities.⁵⁷

III. JUDICIAL RESPONSES

A. The Supreme Court's Constitutional Standard

Because Executive Order No. 12898 does not create a new right of enforcement,⁵⁸ plaintiffs that claim environmental racism by suing on constitutional grounds face a considerable uphill battle. The constitutional standard laid down by the United States Supreme Court requires that the claimant prove the public entity intentionally discriminated against the community.

The Court articulated this standard in the landmark case of *Village of Arlington Heights v. Metropolitan Housing Development Corporation*.⁵⁹ In that case, the Supreme Court enunciated six factors which must be considered in determining whether an action is motivated by intentional discrimination. These factors are: (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) departures from normal procedures; (5) departures from normal substantive criteria; and (6) the administrative history of the decision.⁶⁰ Citing the decision in *Washington v. Davis*,⁶¹ the Supreme Court stated clearly that official action will not be held unconstitutional solely because it results in a racially disproportionate impact.⁶² The Court, however, also pointed out that the impact of an official action on different racial groups may be a starting point in deter-

mining whether the official action was motivated by discriminatory intent.⁶³ Some scholars have contended that the practical effect of this decision devastates most civil rights claims because of the difficulty in proving the subjective, motivational intent of the decision-maker.⁶⁴

B. Lower Court Responses to Environmental Racism

Holding to the rationale of the Supreme Court decisions, some lower courts have not been favorable to claims of environmental racism. Parties that attempt to use environmental racism as the basis for their lawsuits have failed because they have not been able to prove discriminatory intent. This is borne out in a series of cases beginning with *Bean v. Southwestern Waste Management*.⁶⁵ In *Bean*, the lower court considered whether racism served as the basis for the siting of a hazardous waste facility. The plaintiffs in *Bean* argued that their community did not have logistically preferable characteristics for a landfill, and that the community was targeted because it had a racial composition which was largely African-American.⁶⁶ The court denied a request for an injunction because the plaintiffs failed to prove that the Texas Department of Health possessed a race-based discriminatory intent.⁶⁷ Additionally, the court discussed disproportionate impact, but found that the reason for proposing the site in a minority area was due to the fact that industries were located there, not because it was populated by minorities.⁶⁸

Two other recent cases illustrate the difficulty encountered when aggrieved parties utilize the courts to constitutionally challenge official action based on claims of environmental racism. In *R.I.S.E., Inc. v. Kay*,⁶⁹ the plaintiff, a bi-racial community organization, filed suit to challenge the King and Queen County Board of Supervisors' acquisition of a purchase option for a site intended to be developed as a regional landfill. The proposed site was located in an area populated primarily by

⁵⁵ Note, *Enhancing the Community's Role in Landfill Siting in Illinois*, 1987 U. Ill. L. Rev. 97, 113.

⁵⁶ *Id.* at 113.

⁵⁷ Godsil, *supra* note 18, at 401.

⁵⁸ Exec. Order No. 12,898, 3 C.F.R. 859 (1995) reprinted in 42 U.S.C. § 4321 (1994). Section 6-609, Judicial Review states:

This order is intended only to improve the internal management of the executive branch and 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. This order shall not be construed to create any right to judicial review involving the compliance or noncompliance of the United States, its agencies, its officers, or any other person with this order. *Id.* at B12.

⁵⁹ 429 U.S. 252 (1977).

⁶⁰ *Id.* at 266-68.

⁶¹ 426 U.S. 229 (1976).

⁶² 429 U.S. at 264-65.

⁶³ *Id.* at 266.

⁶⁴ Theodore Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. Rev. 38, 114-117 (1977). Peter L. Reich, *Greening the Ghetto: A Theory of Environmental Race Discrimination*, 41 *Kan. L. Rev.* 271, 290-297 (1992).

⁶⁵ 482 F.Supp. 673 (S.D. Tex. 1979), *aff'd*, 782 F.2d 1038 (5th Cir. 1986).

⁶⁶ *Id.* at 677-78.

⁶⁷ *Id.* at 677-80.

⁶⁸ *Id.* at 679.

⁶⁹ 768 F.Supp. 1144 (E.D. Va. 1991), *aff'd*, 977 F.2d 573 (4th Cir. 1992).

African-Americans.⁷⁰ At the time of selection, there were three other county-operated landfills which were all located in predominately black areas as well.⁷¹

The plaintiff charged the board with maintaining a pattern and practice of racial discrimination in landfill location and zoning, and thus sued alleging equal protection violations.⁷² The court held that the plaintiff failed to establish that placement of the landfill in a predominately black area resulted from intentional discrimination.⁷³ Instead, it found that in approving the landfill, the Board of Supervisors relied on permissible factors such as relative environmental suitability and compelling financial considerations.⁷⁴ Thus, the court found no violation of the Fourteenth Amendment's equal protection clause because the plaintiffs were unable to prove intentional discrimination.⁷⁵

*East-Bibb Twiggs Neighborhood Association v. Macon Bibb Planning & Zoning Commission*⁷⁶ was a case brought by property owners living near a proposed non-putrescible⁷⁷ landfill site. The census tract that contained the site had a population that was nearly sixty percent (60%) African-American.⁷⁸ The plaintiff alleged constitutional violations of due process, equal protection, and taking without just compensation, but the lower court dismissed these claims.⁷⁹ The plaintiff then appealed to the Eleventh Circuit Court of Appeals where the lower court ruling was upheld.⁸⁰

As for the due process and takings claims, the Eleventh Circuit found that the residents did not seek compensation through the proper procedures provided by the state.⁸¹ In so holding, the court stated that the residents had not exhausted the process for obtaining just compensation because they failed to seek this remedy

through state law procedures.⁸² Ripe due process and takings claims are a requirement under the Supreme Court decision, *Williamson County Regional Planning Commission v. Hamilton Bank*.⁸³

The Eleventh Circuit found that the equal protection claim was also without merit. The court agreed with the district court that the residents did not provide sufficient evidence to prove that the Commission either acted with a discriminatory intent when it approved the landfill application or engaged in a historical pattern of discriminatory conduct.⁸⁴

These cases illustrate the difficulty encountered by parties that pursue their claims of environmental racism through the judicial system. Part of this difficulty stems from the fact that there must be evidence of discriminatory intent. The courts have clearly held that there must be indicia of discriminatory racial motivation in order to succeed. Plaintiffs proceeding on the basis of disproportionate effect alone will also be unsuccessful, as the above decisions demonstrate that this is an insufficient basis for a constitutional claim. Furthermore, the limited economic status of a minority community may be a key factor in its inability to prevent facility sitings. Poverty, however, is not recognized as a suspect class.⁸⁵ Therefore, it plays no part in the analysis of constitutional violations.

C. Judicial Approaches In Non-Siting Cases

While the cases may limit a community's ability to prevent a hazardous facility siting, plaintiffs have not been entirely deterred in pursuing claims of environmental racism. Plaintiffs are using environmental racism

⁷⁰ *Id.* at 1148.

⁷¹ *Id.* at 1148-49.

⁷² *Id.* at 1148. The plaintiff also alleged a violation of both due process and the Virginia Procurement Act. These counts were dismissed by summary judgment in a separate opinion. *R.I.S.E., Inc. v. Kay*, 768 F.Supp. 1141 (E.D. Va. 1991).

⁷³ *Id.* at 1149.

⁷⁴ *Id.* at 1150.

⁷⁵ *Id.* at 1149-50.

⁷⁶ 896 F.2d 1264 (11th Cir. 1989).

⁷⁷ A non-putrescible landfill contains wood, paper, and other items that do not decompose rapidly.

⁷⁸ 896 F.2d at 1264.

⁷⁹ The plaintiffs actually raised four constitutional issues in their complaint: (1) The defendants were alleged to have denied procedural due process rights under applicable zoning regulations, (2) The defendants were alleged to have denied substantive due process because the Commission's decision to grant a conditional use permit did not relate to public health, safety, morality, or general welfare, (3) a taking without just compensation, (4) The defendants were alleged to have denied equal protection because the decision affected more black per-

sons than white persons. 896 F.2d at 1265. The district court ruled that the plaintiffs did not present ripe due process or takings claims and dismissed those claims without prejudice. *East-Bibb Twiggs Neighborhood Ass'n v. Macon Bibb Planning & Zoning Comm'n*, 662 F.Supp 1465 (M.D. Ga. 1987). Then, after a bench trial, the district court ruled against the plaintiffs on the equal protection claim, and entered judgment for the defendant Commission. *East-Bibb Twiggs Neighborhood Ass'n v. Macon Bibb Planning & Zoning Comm'n*, 706 F.Supp 880 (M.D. Ga. 1989).

⁸⁰ 896 F.2d at 1267.

⁸¹ *Id.* at 1266.

⁸² *Id.* at 1266.

⁸³ 473 U.S. 172, 194 (1985). In *Williamson*, the Supreme Court distinguished between exhaustion of judicial or administrative remedies and exhaustion of the administrative process itself, finding the latter must be satisfied before a claim could proceed under a Section 1983 action. 473 U.S. at 192-93.

⁸⁴ 896 F.2d at 1267.

⁸⁵ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

in damage claims for acts of environmental degradation that take place in or near a minority community. For example, in Louisiana, a railroad tank car, owned by CSX Transportation, Inc, caught on fire and injured a number of people in a poor, minority neighborhood.⁸⁶ The plaintiffs charged CSX with environmental racism and reckless handling of toxic substances and were awarded punitive damages of \$3.365 billion dollars.⁸⁷ Although the award was blocked by the Louisiana Court of Appeals,⁸⁸ and the outcome of the total damage award is still in doubt, the case does provide advocates of environmental racism with a glimmer of hope.

In Texas, black residents of the Kennedy Heights subdivision are currently suing for just over \$500 million dollars.⁸⁹ The plaintiffs charged the former owner of the property, Chevron, U.S.A. Inc., with environmental racism for allowing development of the housing subdivision over a former crude oil storage waste pit.⁹⁰ The case is unusual because the plaintiffs claim to possess a Gulf⁹¹ company document which states that the property should be used for "Negro residential and commercial development."⁹² If this is true, then this document may very well provide the discriminatory intent "smoking gun" that is lacking in the other cases dealing with environmental racism.

The prospect of a large damage award, however, has a potential drawback. Any minority community may be encouraged to engage in overreaching or improper use of environmental racism in an attempt to collect damages. The net effect of this scenario would be to tie up the courts in endless and costly litigation, while at the same time, further blur and obscure valid instances of these claims. Nevertheless, the utility of these cases with respect to siting decisions is still debatable because the causes of action are limited to damages rather than the

prevention of facility sitings.

IV. BATTLE LINES DRAWN: THE SITINGS IN LOUISIANA

As discussed above, environmental racism advocates enjoyed their first victory when the NRC's Atomic Safety & Licensing Board (ASLB) denied the application for Louisiana Energy Service L.P.'s (LES) centrifuge enrichment plant in Claiborne Parish, Louisiana.⁹³ This conflict saw the local grassroots organization Citizens Against Nuclear Trash on one side.⁹⁴ LES and the state legislature were on the opposite front, armed with promises of economic enrichment and jobs for the community. The legislature sided with LES because the plant is sited in a "rural enterprise zone."⁹⁵ Rural enterprise zones were established by the state to encourage business development in economically deprived communities, even if such development has a potential, negative environmental impact.⁹⁶

The ASLB based its decision on Executive Order No. 12898. In the opinion, the Board stated that first, LES did not adequately investigate the possibility of racial discrimination in the siting process, and second, that the environmental impact statement prepared by LES did not thoroughly review the plant's potential effect on local property values post-siting.⁹⁷ Although the ASLB admitted that racial discrimination was an area "far afield" from its usual considerations, it recognized a duty to deeply examine possible race-motivated actions by entities seeking to locate their facility in a minority community.⁹⁸

The ASLB's decision is seen as significant by experts because it sets an administrative precedent, giving credence to any future environmental racism claims that may be brought to prevent the siting of an environmentally hazardous facility.⁹⁹ This opinion has attracted con-

⁸⁶ *New Orleans Jury Awards 3.365 Billion, National Law Journal*, Sept. 22, 1997, at B2. The case is *Leonard Adams v. CSX Transportation, Inc.*, Civil District Court, Parish of New Orleans, No. 87-16374.

⁸⁷ *Id.*

⁸⁸ *In re New Orleans Train Car Leakage Fire Litigation*, 97-2547 (La. 10/31/97), 702 So.2d 677, 1997 WL 680943.

⁸⁹ Christopher H. Foreman, Jr., *Down in the Dumps, On Purpose*, *Washington Times*, November 4, 1997, at A21. The case is *Dorothy Adams, et al. v. Chevron, U.S.A., et al.*, Civil No. 96-1462 (S.D. Texas filed 1996).

⁹⁰ *In re Chevron U.S.A., Inc.*, 109 F3d 1016, 1017 (5th Cir. 1997).

⁹¹ Gulf is the original owner of the property, but later merged with Chevron, U.S.A. 109 F3d 1016.

⁹² Sam Howe Verhovek, *Racial Rift Slows Suit for Environmental Justice*, *New York Times*, September 7, 1997, at 32.

⁹³ Wilson Dizzard III, *ASLB Turns Down LES License On Environmental Justice Grounds, Nuclear Fuel*, Vol. 22 No. 10,

May 19, 1997.

⁹⁴ Wilson Dizzard III, *Commission to Review ASLB's Decision on LES, Inside N.R.C.*, Vol. 19 No. 14, July 7, 1997. Citizens Against Nuclear Trash was allegedly supported by 187 activist organizations in 34 states and 20 countries. *Id.*

⁹⁵ Tom Meersman, *Utility Project Stirs Charges of Racial Bias*, *Star-Tribune* (Minneapolis-St. Paul), May 31, 1997, at 1A.

⁹⁶ Marianne Lavelle, *No Uranium Plant Site in Minority Area*, *The National Law Journal*, May 19, 1997, at B1.

⁹⁷ *In the Matter of Louisiana Energy Services, L.P.*, 45 N.R.C. 367, 1997 WL 458771 (N.R.C.) (May 1, 1997) (order denying application for license to build and operate a centrifuge enrichment plant).

⁹⁸ 45 N.R.C. at 377.

⁹⁹ Wilson Dizzard III, *Environmental Justice Decision in LES Case Seen as Key Precedent, Inside N.R.C.*, Vol. 19 No. 10, May 12, 1997 at 3 (reporting an interview with attorney John Kyte where he stressed the significance of the decision by the ASLB and the potential ramifications for future siting decisions).

siderable attention, especially from those that claim the decision is an abuse of discretion by the ASLB.¹⁰⁰ For instance, fearing that the opinion will influence future siting decisions, the Nuclear Energy Institute, a pro-business group, has asked the NRC to officially overturn the ASLB decision.¹⁰¹

The battle lines are also drawn in Convent, Louisiana, which is located in the heavily-industrialized northern portion of the state. A local citizens' group, the St. James Parish Citizens for Jobs and the Environment, supported by the Tulane Environmental Law Clinic and various national groups,¹⁰² sought to block the siting of Shintech, Incorporated's chemical plant.¹⁰³ Both the Governor and Secretary of the Department of Economic Development support the Shintech plant because of the jobs and economic prosperity that it may bring.¹⁰⁴ The battle lines, however, are not that clear. Adding to the confusion is significant local support for the Shintech plant, as well as support of the parish NAACP and the state NAACP,¹⁰⁵ despite allegations of political payoffs in order to gain the endorsement of the latter.¹⁰⁶ In the first round of administrative battles, the Tulane Environmental Law Clinic prevailed because the EPA suspended the facility's air emissions permits.¹⁰⁷ However, the objections to the permits are only technical in nature. Shintech may still operate if it can overcome the objections of disproportionate burden to the local minority community.¹⁰⁸

One reason why the Governor is lending his full support to the plant is the desire of the state to locate indus-

try in economically deprived areas. In order to facilitate this goal, the state offered Shintech \$100 million in tax incentives to locate its plant in the region.¹⁰⁹ This state strategy is philosophically aligned with those commentators who believe improved socio-economic conditions for the communities should be the focus of environmental racism advocates seeking to remedy disproportionate environmental effects.¹¹⁰

Additionally, the Shintech plant siting debate raises the issue of how the EPA will balance economic benefits against environmental burdens when a minority community is affected. A draft EPA document on environmental justice identifies the economic factors that must be considered.¹¹¹ These factors include the reliance of the community on polluting industries for jobs, and the tax incentives that may be available to industries that locate in those communities.¹¹² Unfortunately, the guidelines are missing a suggestion or a proposal for an acceptable method to balance these considerations.¹¹³ The difficulty with such hazy guidelines is that they compound the complexity in articulating a workable solution to resolve the conflict between hazardous sitings and industrial development.

V. POLITICAL MANIPULATION AND MISUSE OF ENVIRONMENTAL RACISM

A number of commentators have expressed a concern about the danger of political misuse in environmental racism claims. In this sense, political misuse is the

¹⁰⁰Pamela Newman-Barnett, *NEI Wades into Environmental Justice Debate*, *The Energy Daily*, August 18, 1997 (reporting that the Nuclear Energy Institute submitted a brief to the NRC arguing for the need for objective criteria in siting decisions, and that the NRC is not the appropriate body to remedy alleged civil rights violations, proven by the ASLB decision despite the lack of hard evidence to support the claim of racism).

¹⁰¹*Id.*

¹⁰²Don Richards, *Environmentalists Seek to Make Shintech Delay More Permanent*, *Chemical Market Reporter*, Vol. 252 No. 12, September 22, 1997, at 5 (The other groups are the Rainbow Coalition, the Southern Christian Leadership Conference, and Greenpeace).

¹⁰³Terry Carter, *EPA Steps in to Clean the Air*, 83 A.B.A.J. 32 (Nov. 1997).

¹⁰⁴Joe Gyan, Jr., *LABI Asking Justices to Rein in Law Clinics*, *The Advocate*, October 2, 1997, at 1A.

¹⁰⁵Stephen C. Jones & Anoop G. Shroff, *Balancing Growth and the Environment: Environmental Justice Concerns Delay Industrial Expansion*, *Envtl. Compliance & Litig. Strategy*, Vol. 13 No. 5 (October 1997) at 1 (reporting that 73% of residents in a poll taken by the local chapter of the NAACP favored the siting of the plant).

¹⁰⁶James Varney, *Nonprofit Group Awarded Grant; Foster Sought Leader's Support*, *The Times-Picayune*, October 13,

1997, at A1. The allegations claim that Governor Foster "bought" the support of state NAACP chairman Ernest Johnson by approving a 2.5 million dollar loan for the group headed by Johnson that assists minority business owners. *Id.* at A1.

¹⁰⁷Jones & Shroff, *Supra*, note 105.

¹⁰⁸Chris Sanders, *U.S. Suspends Permit of Japan Firm to Build Plastics Factory, Incinerator*, *The Daily Yomiuri*, September 19, 1997, at 3.

¹⁰⁹Carl Redman, *Shintech Controversy Will Revisit Legislature*, *Baton Rouge Advocate*, September 23, 1997, at 7B.

¹¹⁰Kent Jeffreys, *Environmental Racism: A Skeptic's View*, 9 *St. John's J.L. Comm.* 677 (1994) (arguing that concern over environmental racism is more properly described as elitism, and that the debate over environmental racism is misplaced in relation to overarching concerns of minority communities, since money spent to battle environmental racism is better used for schools, health care facilities, and jobs for those communities).

¹¹¹Jones & Shroff, *Supra*, note 105, quoting, *EPA Office of Federal Activities, Guidance for Incorporating Environmental Justice Concerns in Environmental Protection Agencies NEPA Compliance Analysis (Review Draft)* July 12, 1996.

¹¹²*Id.*

¹¹³*Id.*

fear that environmental groups and others will use environmental racism claims to further their agenda at the expense of the locally affected community.¹¹⁴ Furthermore, even though public awareness of environmental racism has increased dramatically over the past few years, it may also contribute to potential political misuse. For example, celebrities such as Bonnie Raitt¹¹⁵ and the Indigo Girls¹¹⁶ have helped to make environmental racism a public cause, but their misuse of the concept may actually confuse legitimate claims. Moreover, the concept itself may still be too ill-defined to shape a meaningful solution. Without a firm definition or clear guidelines, the potential for confusion and abuse in environmental racism claims increases dramatically.

In addition, blurring of the issue is exacerbated by the illogical extension of environmental racism to areas where it does not belong. For example, an explosion at a chemical plant in Georgia led to claims of environmental racism, but not due to any polluting qualities of the plant itself. Rather, the claim was based on the racial composition of the staff in that plant.¹¹⁷ The expansion of a convention center in San Diego, California is another example of the illogical extension of environmental racism. Even though it was not being built in a minority neighborhood, a local organizer screamed environmental racism on the basis that the siting decision was similar to the decision-making process used in cases of environmental racism.¹¹⁸ In Houston's "refinery row," local advocates are confusing a nuisance claim with environmental racism due to foul odors emanating from nearby non-

hazardous plants.¹¹⁹ Another commentator reports that companies which pollute low income neighborhoods are being charged with environmental racism as a legal tactic because "big dollar verdicts are in the air."¹²⁰ He claims that attorneys are using environmental racism as a new strategy to litigate dubious claims.¹²¹

An interesting case in New York placed the Natural Resources Defense Council (NRDC), a nationally recognized environmental group, on the receiving end of a charge of environmental racism.¹²² In this case, the NRDC joined with a local business development group to build a paper mill which recycles post-consumer wastepaper and remanufactures it into newsprint.¹²³ When the NRDC found itself on the reverse side of the environmental racism equation, it employed two tactics evidently learned from the entities it usually opposes. First, the NRDC claimed that the project would generate local jobs and revenue while revitalizing an already environmentally contaminated site.¹²⁴ Second, Alan Hershkowitz, a senior scientist for the NRDC, contended that the local environmental group attempting to block the site was trying to scuttle the project for personal gain.¹²⁵ Ironically, there is merit for his contention because an attorney, who is an avid railroad buff, is seeking to preserve the site for a rail yard. By joining forces with the local environmental group in claiming environmental racism, this attorney succeeded in halting the paper mill's construction for a year before being overturned by the state appellate court.¹²⁶ Such is the convoluted world when environmental racism is used improperly.

¹¹⁴Vicki Ferstel, *Sbintech Permits Difficult*, *Baton Rouge Advocate*, September 19, 1997, at 1A (interviewing Nicholls State University Professor James A. Butler Jr. at 7A).

¹¹⁵Paul Kane, *Raitt Leads Musicians' Rally at Capitol Against New England Nuclear Plant*, *Bangor Daily News*, September 25, 1997, at 1 (reporting that Raitt called the siting of the power plant in a non-minority community an example of "environmental racism").

¹¹⁶Curtis Ross, *Indigo Girls Tour for Environmental Cause "Honor the Earth" Outing Raises Awareness of Issues*, *Tampa Tribune*, September 26, 1997 at 18, Friday Extra! (reporting band leader calling the storage of nuclear waste on Indian reservations "environmental racism," even when approved by the community).

¹¹⁷Jim Woods, *Race Fuels Fire in Georgia-Pacific Accident*, *Columbus Dispatch*, November 29, 1997, at 1B.

¹¹⁸Anthony Millican, *Center Expansion Deal Gets Final OK*, *San Diego Union-Tribune*, November 26, 1997 at A1.

¹¹⁹Jim Morris, *Danger's Shadow: Fouled Air Creates Ire*, *Houston Chronicle*, November 10, 1997, at A1 (Reporting that a complaint was drawn up by the Sierra Club in 1994 against the city of Corpus Christi and the Texas Natural Resource Conservation Commission alleging environmental racism because of non-hazardous hydrogen sulfide odors emitted from

nearby plants. The complaint is being investigated by the EPA).

¹²⁰Milo Geyelin, *Legal Beat: Pollution Suits Raise Charges of Racism*, *Wall Street Journal*, October 29, 1997, at B3.

¹²¹*Id.* at B3. The author describes how verdicts for compensation for personal injury and property damages have created a new approach for attorneys to claim environmental racism in an attempt to gain a large award. The article quoted plaintiff's lawyer Hunter Lundy, who in October 1997 signed a \$15 million dollar settlement with Conoco and DuPont Co, as saying "Anytime you have a scenario that affects a low economic or predominately minority community, you have the overtones of an environmental justice claim."

¹²²Greg Gittrich, *Eco-Friendly Mill's In Sight Planners Downplay Pollution Concerns*, *Daily News* (New York), September 21, 1997, at 1, suburban (The mill is sited in the old Harlem River Rail Yard a section of the South Bronx known as "asthma alley").

¹²³*Id.*

¹²⁴*Id.*

¹²⁵Don Van Natta, Jr., *Mill Sought by Bronx Blocked; Railroad Buff Delays a Project in Train Yard*, *New York Times*, August 26, 1997, at 31, sect. 1.

¹²⁶*Id.*

VI. RECOMMENDATIONS AND A PROPOSED ALTERNATIVE SOLUTION

The previous examples demonstrate the frustrations and confusion surrounding the environmental racism debate. While little doubt exists that there is some political motivation behind the actions of both advocates and opponents, the real danger lies in twisting environmental racism in order to benefit the position of a business or environmental entity without due regard for the local community. Lack of concern for those affected is exactly why the movement began. Therefore, this type of political haranguing simply completes the circle instead of positing solutions.

An alternative approach to this problem would consider the debate over the existence of environmental racism misplaced. Concern over whether the studies show a particular degree of mathematical certainty, or that they demonstrate adequate proof of intent, simply confounds the fact that so many minority communities are located near an environmentally hazardous site. These same communities, however, are in an untenable position because they need jobs and economic aid which the industry and facility could provide.

It may be possible to supply economic aid without forcing the community to accept an unwanted facility. The paramount concern should be limiting disproportionate environmental burdens on minority communities, while at the same time offering them economic assistance and protection from hazardous accidents. In order to accomplish this, the siting entity should answer the following questions in the affirmative. First, if jobs are promised, will they go to the local population? Typically, the workers in these communities lack educational or vocational training and the means to obtain the necessary skills. If the facility staffs from outside the area, there is no benefit to the community. Second, is the facility a "fit" in the community? Is it an extension of an existing facility, or is it an added polluter, sited because the location presents the path of least resistance? And are there similar facilities in the immediate area? Third, does the local community want the facility? This factor cannot be measured by the political voice of a small but politically connected minority, claiming to represent the interests of the community as a whole. A local poll of the entire community should be done, or a referendum should be held, in order to determine the overall support for the facility. Fourth, is the business entity willing to invest in the community? Does it have a record of supporting other similarly situated communities? The return to the community must be tangible, not just empty promises. Fifth, is the entity willing to take responsibility for environmental clean up and maintenance?

To accommodate the above considerations, the business entity could engage in a partnership with the community to offset potential hazards by offering a number of benefits. These could include the following sugges-

tions: (1) local employment and skills training with a guarantee of a certain number of jobs for local residents; (2) providing a day-care center, health care facility, park, or community center; (3) investment in local schools; (4) creation of a scholarship program for local residents; (5) offering a low-interest mortgage program or a housing development program to improve the desirability of living in the community; (6) posting a bond or insuring against a potential hazardous spill or leak; (7) assisting in community partnerships to develop retail and other local businesses; and (8) providing incentives for plant management to relocate in the affected community. Of course, the degree to which these suggestions are implemented would depend on the local needs of the community at the time of development.

If these suggestions seem cost prohibitive, compare them to the \$35 million dollars that LES has already spent attempting to obtain license approval for its hazardous facility. Imagine that same \$35 million invested in a local community instead of being spent on legal battles with dedicated interest groups. Also consider that Shintech, Inc. is willing to invest \$855 million dollars in their plant if sited. With such staggering dollar amounts, it would not be unrealistic for the business entity to make a major investment in the local community by utilizing all or some of the suggestions listed above. In fact, provisions for local investment could be considered when the entity develops its facility siting plans. This amount could be included as an additional business cost. After factoring in tax breaks and other tangible benefits the state may be willing to offer as a cost offset, the result may well be a "win-win" solution for those in the "front lines" of the battle over environmental racism.

CONCLUSION

A true advocate of environmental justice should consider the welfare of the local community their paramount concern. In this regard, two notions should be evident. First, neither environmental groups and special interests, nor business entities and local governments, should "use" the minority community as a battleground for their particular agendas. True concern for the community does not mean halting nuclear power altogether, nor does it mean preventing hazardous sitings. On the other hand, empathy for the community does not mean siting a facility in that locale simply because it is economically convenient for the business or government entity. Instead, true concern for the community means improving the socio-economic and physical health of its members without allowing the issue of race to obfuscate these real needs.

Second, hazardous facilities must be sited somewhere. Recent studies have demonstrated that scientific evidence of discriminatory intent is lacking in terms of hazardous facility siting. The studies, instead, indicate that economic factors are pre-eminent. But these economic

factors must be balanced with the welfare of the community where siting is sought. While the studies are inconclusive as to the issue of discriminatory intent, the fact remains that most hazardous facilities are sited in minority communities.

The legal or political misuse of environmental racism serves the opposite purpose than that for which it was created. Responsibility in the use of these claims may be the best solution in preventing unwanted sites from being situated in a community that may relent solely because it lacks the resources and sophistication to adequately defend themselves.