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Environmental Justice: Avoiding the Difficulty of Proving Discriminatory Intent in Hazardous Waste Siting Decisions

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ENVIRONMENTAL JUSTICE: AVOIDING THE DIFFICULTY OF PROVING DISCRIMINATORY INTENT IN HAZARDOUS WASTE SITING DECISIONS

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All views, interpretations, recommendations, and conclusions expressed in this paper are those of the author and not necessarily those of the supporting or cooperating institutions.

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ENVIRONMENTAL JUSTICE: AVOIDING THE DIFFICULTY OF PROVING DISCRIMINATORY INTENT IN HAZARDOUS WASTE SITING DECISIONS

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INTRODUCTION

The health risks and resource hazards created by pollution in the United States fall most heavily on lower-income and minority groups.[1] Contrary to general public perception that environmental hazards are borne equally, the risks and accompanying burdens of exposure to environmental contaminants are distributed disproportionately along racial and class lines.[2] The concept of environmental justice emerged as a reaction to growing concern about the inequitable distribution of environmental hazards along racial lines. The environmental justice movement has received much recent attention as being an extension of the civil rights movement, where advocates have demanded fair distribution of environmental benefits and burdens.[3]

This paper will focus on the difficulty that plaintiffs wishing to challenge hazardous waste siting in their communities have in proving that the siting decision was based on racial factors. Part 1 will examine a North Carolina case that illustrates the potential that substantive and procedural requirements have in protecting communities from environmental injustice. Part 2 will focus on the emergence of the concept of environmental racism and early research studies that examined the phenomenon. Part 3 will discuss the distinction between environmental racism and environmental justice. Part 4 will examine the difficulties that surround the use of the Equal Protection Clause by plaintiffs who challenge hazardous waste siting in their communities. Part 5 will examine Title VI of the Civil Rights Act of 1964 as it has been used in environmental justice cases. Part 6 will discuss *Chester Concerned for Quality Living* v. *Seif*, a Third Circuit Court environmental justice case in which plaintiffs challenged the siting of a hazardous waste facility in their community under Title VI. Part 7 will focus on post-Chester environmental justice developments. Finally, Part 8 will explore substantive and procedural requirements designed to encourage community involvement in siting decisions.

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[1] See Jill E. Evans, *Challenging the Racism in Environmental Racism: Redefining the Concept of Intent*, 40 AZ. L. REV. 1219, 1225 (1998).

[2] *See id.*

[3] *See* Alice Kaswan, *Environmental Laws: Grist for the Equal Protection Mill*, 70 U. COLO. L. REV. 397 (1999).

1. HOLLY SPRINGS, NORTH CAROLINA

In the early 1990s, Wake County, North Carolina, decided that it needed to obtain additional space for a solid-waste sanitary landfill in order to accommodate the county's increasing waste disposal needs.[4] On April 6, 1992, the Wake County Board of Commissioners directed county staff to pursue plans to laterally expand the boundaries of a solid waste landfill located on the outskirts of Holly Springs.[5] The landfill had been in existence since the 1970s, and the county planned to laterally expand the landfill by approximately 480 acres, 310 of which were located within the jurisdictional limits of Holly Springs.[6] Holly Springs gave its approval for the *expansion* in September 1992.[7] In December 1994, however, the county submitted to the Department of Environmental and Natural Resources (DENR) a site plan application for a *new* facility.[8] Two years later, Wake County submitted to DENR an application for a permit to construct.[9] But on May 19, 1998, Holly Springs withdrew its 1992 approval for expansion.[10] Reasons cited for the withdrawal were that Holly Springs did not give approval for a new facility and that the town had experienced rapid population growth.[11] In 1992, the town's population was about 1,000, but at the time the town withdrew its permission for expansion the population was close to 10,000.[12]

North Carolina law distinguishes "lateral expansion" from a "new" facility. A lateral expansion is defined as a "horizontal expansion of the waste boundaries of an existing Municipal Solid Waste Landfill Facility (MSWLF)".[13] A new facility, however, is any municipal solid-waste landfill unit that has not received waste prior to October 9, 1993.[14] The administrative law judge concluded that the landfill which was the subject of the permit at issue was not a lateral expansion, but rather a new facility completely separate from the old one, which was required by regulation to be closed in 1998.[15] The judge analogized that "a permit to construct an addition to a home is not the same thing as a permit to construct a whole new home."[16] Thus, the permit was set aside because the county never secured proper approval from Holly Springs for permission to build a new facility.

The judge had further support for the decision to grant the plaintiffs' summary judgment motion. Holly Springs had never enacted a franchise allowing Wake County to operate a landfill inside the town. In North Carolina, in order to operate a public utility within the

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[4] *See Franks et al.* v. *North Carolina Department of Environment & Natural Resources*, 99 HER 0344, 380 (1999) (Administrative order granting summary judgment).

[5] *See id.*

[6] *See* id.

[7] *See id.*

[8] *See id.*

[9] *See id.*

[10] *See id.*

[11] *See id.*

[12] *See id.*

[13] *See* 15A N.C.A.C. 13B.602(14).

[14] *See* 15A N.C.A.C. 13B.602(18).

[15] *See Franks*, *supra* note 178.

[16] *See id.*

corporate limits of a municipality, the operator must obtain a franchise from the municipality.[17] The North Carolina General Statutes define the operation of a solid waste landfill as a public utility.[18] Furthermore, in order to operate a public utility within a city's limits, the city must grant a franchise to the operator.[19] A franchise cannot be granted unless it has been passed at two regularly scheduled meetings of the governing board.[20] The judge concluded that Wake County did not obtain a franchise to operate a landfill from Holly Springs.[21] The town's approval was at most a license, which could be revoked at any time. Therefore, the revocation was effective, and the permit was set aside.[22]

Local government approval is required before a landfill can be located within the jurisdictional limits of a town or county.[23] Additionally, prior to the issuance of approval there must be public notice and a public hearing regarding the landfill site.[24] The judge concluded that the residents of Holly Springs or Wake County had never received the required notice or opportunity to be heard.[25]

The regulations that require local government approval to site a landfill in a community and the operator of a landfill to obtain a franchise from the municipality are procedures that implement N.C.G.S. § 130A-294. This statute requires a franchise granted for a sanitary landfill to include a description of the geographic area and population to be served, a description of the volume of the waste stream, and a projection of the useful life of the landfill.[26] Furthermore, the statute requires certain actions to be taken if there has been a "substantial amendment" to a permit application.[27] A "substantial amendment" is defined as an increase of 10 percent or more in: (1) the population of the geographic area to be served by the landfill, (2) the quantity of solid waste to be disposed of in the landfill, or (3) the geographic area to be served by the landfill.[28] Once there has been a substantial amendment to the permit application, the mandatory requirements of § 130A-294(a)(b1)(2-3) (adoption of a franchise and holding of a public hearing) are triggered.[29]

The administrative law judge found that the permit application for the Holly Springs landfill had been "substantially amended."[30] From the time of the initial site approval of expansion in 1992 to DENR's submission of a permit to construct a new facility in 1996,

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[17] *See* N.C.G.S. § 160A-311.

[18] *See* N.C.G.S. § 160A-311(6).

[19] *See* N.C.G.S. § 160A-76.

[20] *See id.*

[21] *See Franks*, *supra* note 178.

[22] *See id.*

[23] *See* 15A N.C.A.C. 13B.1618.

[24] See 15A N.C.A.C. 13B.1618(c)(5)(A)(i-iv)

[25] *See Franks*, *supra* note 178.

[26] *See* N.C.G.S. § 130A-294(b1)(3).

[27] *See* N.C.G.S. § 130A-294(a)(b1)(1)(a)(1-3).

[28] *See id.*

[29] *See Franks*, *supra* note 178.

[30] *See id.*

Holly Springs had undergone significant population growth.[31] When Wake County submitted its site plan application in 1992, it based the annual population growth rate at 3 percent.[32] The actual growth rate for Wake County, however, has been 6 percent.[33] By the time the landfill would have opened in 2003, the population of Wake County would have increased by more than 10 percent over the initial population projections based on a 3 percent growth rate.[34] Accordingly, the permit application had been "substantially amended," thus requiring the applicant to conduct public hearings and obtain a franchise.[35]

Holly Springs plaintiffs relied on one other statute to support their argument that the town did not give the county permission to construct a new landfill within the town's jurisdiction. The statute mandated that "the board of commissioners of a county shall consider alternative sites and socioeconomic and demographic data and shall hold a public hearing prior to selecting or approving a site for a new sanitary landfill…that is located within one mile of an existing sanitary landfill…."[36] The landfill that was the subject of the controversy in the Holly Springs case was within one mile of the old landfill.[37] The judge found that Wake County did not comply with the requirements of N.C.G.S. § 513A-136(c) because it did not conduct public hearings, did not consider alternative sites, and did not consider socioeconomic data.[38]

As the above discussion indicates, a prospective landfill operator in North Carolina is required by law to follow various substantive and procedural requirements in order to construct a landfill. A potential operator must obtain a franchise to operate a public utility[39] and receive local government approval.[40] Furthermore, county decision makers must consider alternative sites and socioeconomic and demographic data prior to approving a site.[41] These requirements serve to inform and protect the people who may have to live with a hazardous waste facility in their community.

The requirements ensure that both the residents of the community and the operator of the facility have an opportunity to participate throughout the decision-making process. This participation in the decision-making process allows community members to learn about the burdens and benefits that come with hazardous waste facilities and allows them to voice their concerns. The facility operator in turn has incentive to work with the community to ensure that the benefits are maximized and the burdens are minimized. Failure to cooperate in the process can lead, as it did in Holly Springs, to the denial of a permit to operate a facility.

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[31] *See id.*

[32] *See id.*

[33] *See id.*

[34] *See id.*

[35] *See id.*

[36] *See* N.C.G.S. § 153A-136(c)(1).

[37] *See Franks*, *supra* note 178.

[38] *See id.*

[39] *See* N.C.G.S. § 160A-311.

[40] *See* N.C.G.S. § 513A-136.

[41] *See id.*

Another advantage that substantive and procedural requirements offer communities at risk for hazardous waste siting is allowing environmental justice plaintiffs to avoid the difficulties posed by the Equal Protection Clause and Title VI claims. Plaintiffs do not have to show discriminatory intent or provide evidence of disparate impact. Of course, prospective operators of hazardous waste facilities will learn to carefully follow substantive and procedural requirements so that they can receive permits to construct and operate facilities. The requirement of local approval, therefore, is important. Communities trying to attract jobs to the area can also express concern about minimizing residents' exposure to pollutants. If the benefits of having hazardous waste facilities are outweighed by the burdens, communities have the ability to deny permits. Eventually facility operators will be forced to create adequate benefits in order to receive local approval for permits.

It is inevitable that Wake County will construct a new landfill somewhere. Evidence presented in the Holly Springs case indicates that the county has experienced significant population growth in the last decade. Obviously an increase of people in an area leads to an increase in trash and pollutants. The issue for the environmental justice plaintiffs in Holly Springs, however, was not whether the county needed a new landfill, but rather who should bear the burden of a new facility. As a community with an existing landfill, was Holly Springs the best choice for the siting of a new one? The residents of Holly Springs not only had a common-sense notion of fairness on their side, but they also found support in laws that were designed to protect communities such as theirs from injustices that result in environmental decision making.

2. EMERGENCE OF THE CONCEPT OF ENVIRONMENTAL RACISM

In the early 1970s, the proliferation of toxic waste sites and groundwater contamination converged with the emergence of other pollution problems to shift public perception of pollution from that of a singular, localized problem to a pervasive, national issue.[42] The development of environmental activism by way of mainstream environmental groups was predominantly male, middle- to upper-middle class, and white.[43] Despite indications that minorities and low-income groups were bearing the brunt of pollution hazards, few minority members served on environmental organizational staffs or boards of directors.[44] One explanation for the lack of minority participation in early environmental activism is that the goal of mainstream environmentalists was to redistribute environmental threats rather than eliminate them.[45] Thus, environmentalists, lawmakers, and agencies could influence outcomes based on whatever prioritization these leaders deemed politically and economically appropriate.[46] Given the "whiteness" of those in positions of power, minority interests were not adequately represented.[47]

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[42] *See id.* at 1227.

[43] *See id.* at 1229

[44] *See id.* at 1230.

[45] *See* Evans, *supra* note 1, at 1228.

[46] *See id.*

[47] *See id.*

Absent a minority presence, mainstream environmental groups took little notice of issues relating to race, class, and discrimination in the provision of environmental services or the imposition of environmental burdens.[48] Environmentalists were seen as ignoring both the "urban environment" and the needs of the poor in favor of seeking "governmental assistance to avoid the unpleasant externalities of the very system from which they themselves have already benefited so extensively."[49]

While the interests of people of color were not given due consideration in early environmental improvement efforts, distributive inequities were not going unnoticed. In 1982, African-American residents of Warren County, North Carolina, engaged in a widespread campaign of nonviolent civil disobedience to protest the state's plan to dump over 6,000 truckloads of polychlorinated biphenyl (PCB) contaminated soil in their community.[50] Although the state enacted its plan in spite of the protests, which resulted in over 500 arrests, Warren County residents succeeded in generating national awareness about the problem of environmental racism.[51]

In 1983, the publicity of these protests led to a study by the General Accounting Office (GAO).[52] The GAO Report focused on racial and socioeconomic characteristics of communities surrounding hazardous landfills.[53] The Report concluded that within the eight southeastern states studied, despite the fact that African-Americans comprised only 20 percent of the population, three of the four commercial hazardous-waste landfills were located in predominantly African-American communities.[54] The GAO Report also identified a strong correlation between race, poverty, and location of hazardous waste facilities.[55]

In response to the GAO Report, the Commission for Racial Justice of the United Church of Christ (UCC) undertook a comprehensive, nationwide study culminating in the 1987 issuance of "Toxic Wastes and Race in the United States: A National Report on the Racial and Socioeconomic Characteristics of Communities with Hazardous Waste Sites" (UCC Report).[56] Going further than the GAO study, the UCC Report concluded not just that race was correlated with hazardous waste-site location, but that race was the single best predictor of where hazardous waste facilities were located.[57] According to the UCC Report, race is a

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[48] *See id.* at 1232.

[49] *See* Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 N.W. U. L. REV. 787 (1992) (*quoting* Peter Marcuse, *Conservation for Whom?*, in James N. Smith, *The Coming of Age of Environmentalism in American Society*, in ENVIRONMENTAL QUALITY AND SOCIAL JUSTICE IN URBAN AMERICA (1974)).

[50] *See* Amanda C.L. Vig, *Using Title VI to Salvage Civil Rights from Waste: Chester Concerned for Quality Living* v. *Seif*, 67 U.C. IN. L. Rev. 907, 911 (1999).

[51] *See id.*

[52] *See* Evans, *supra* note 1, at 1247.

[53] *See id.*

[54] *See id.*

[55] *See id.*

[56] *See id.*

[57] *See id.* at 1248.

better predictor than poverty, property values, home ownership, presence of uncontrolled toxic waste sites, or amounts of hazardous waste generated by industry.[58]

In 1990, the UCC Report was followed by an investigation by the *National Law Journal* that focused on the regulatory response to hazardous waste contamination and specifically considered whether there was any correlation between agency action and community demographics.[59] Among its most significant findings, the study reported that the penalties imposed by the Environmental Protection Agency (EPA) as well as the scope of remedial or cleanup actions at hazardous waste sites differed between sites located in white versus minority communities.[60] At sites located in white communities, agency action was faster, cleanup remedies were superior, and penalties imposed on waste generators were stiffer than at sites located in minority communities.[61] As in the GAO Report and the UCC Report, the *National Law Journal* study also found that this racial imbalance occurred more often than not regardless of the economic status of the community.[62]

Critics of the evidence of race-based inequities in the distribution of toxic waste facilities argue that rather than intentionally placing polluting facilities in poor and minority neighborhoods, industrial or governmental actors are simply making an economic decision.[63] The cheapest land is often located near the most undesirable land uses, and poorer individuals buy the cheaper land.[64] Furthermore, industry may situate facilities near the property of low-income or minority groups not because those groups reside in the area, but because the land is cheaper and already has mixed uses (residential, vacant, industrial, and commercial)—and thus does not present the same expense and land-use compatibility problems that exist in other areas.[65]

A frequently used pro-siting argument emphasizes the economic opportunity offered by a proposed facility.[66] Siting advocates argue that the proposed facility will provide local residents with economic opportunities not currently available to them.[67] Furthermore, siting advocates point to the irony of the environmental justice position by noting that environmental justice advocates protest the development of economic opportunities in minority communities by arguing that hazardous waste facilities would pose too great a burden on a community with a high rate of poverty and disempowerment.[68]

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[58] *See id.*

[59] *See id.* at 1249.

[60] *See id.*

[61] *See id.*

[62] *See id.*

[63] *See* Michael Wynne, *Environmental Racism: Is a Nascent Social Science Concept a Sound Basis for Legal Relief?*, HOUSTON LAWYER, March/April 1998, at 34.

[64] *See id.*

[65] *See id.* at 35.

[66] See Lisa A. Binder, *Religion, Race, and Rights: A Rhetorical Overview of Environmental Justice Disputes*, 6 WIS. L.J. 1, 28 (1999).

[67] *See id.*

[68] *See id.*

These economic explanations, however, fail to recognize that race plays a significant role in siting decisions.[69] With obstacles such as limited financial resources, exclusionary and expulsive zoning practices, and discrimination in employment and housing, minorities find their mobility limited.[70] Furthermore, facilities are more apt to be located not only in communities with cheaper land values, but also in communities lacking political power or social status as well.[71] Minority communities, especially low-income minority communities, tend to be unorganized and less involved in political processes, to lack resources, and to be underrepresented on governing bodies—and thereby deprived of both information about and ability to influence siting decisions.[72]

The data provided by the studies discussed above prompted the EPA to create an Environmental Equity Workgroup charged with the task of assessing evidence that racial minority and low-income communities bear a higher environmental risk burden than the general population and to consider what the EPA might do about it.[73] In 1992, the Workgroup submitted a report that indicated that low-income and minority populations experience disproportionate hazardous environmental exposures to certain pollutants compared to other population groups.[74] The report concluded that environmental inequities are "deeply rooted in historical patterns of commerce, geography, state and local land use decisions, and other socioeconomic factors that affect where people live and work."[75]

3. ENVIRONMENTAL RACISM OR ENVIRONMENTAL JUSTICE?

Evans distinguishes the concepts of environmental racism, environmental equity, and environmental justice.[76] She notes that environmental racism includes the charge of racism as an integral component of documented, disparate treatment in the distribution of environmental risks and burdens across communities.[77] The prevalence of hazardous pollutants in minority communities serves as support for this charge.[78] Environmental racism has more specifically been defined as "[r]acial discrimination in environmental policymaking, in the enforcement of regulations and laws, and the targeting of communities of color for toxic waste disposal and siting of polluting industries."[79]

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[69] *See* Evans, *supra* note 1, at 1256.

[70] *See id.* at 1257.

[71] *See id.*

[72] *See id.*

[73] See Jimmy White, *Environmental Justice: Is Disparate Impact Enough?*, 50 MERCER L. REV. 1155, 1158 (1999).

[74] *See* Evans, *supra* note 1, at 1250.

[75] *See id.* (*quoting* ENVIRONMENTAL PROTECTION AGENCY, PUB. NO. 230-R-92-008, ENVIRONMENTAL EQUITY: REDUCING RISK FOR ALL COMMUNITIES, 6–7 (1992)).

[76] *See* Evans, *supra* note 1, at 1266.

[77] *See id.* at 1267.

[78] *See* Lazarus, *supra* note 11, at 790.

[79] *See* Barry E. Hill, *Chester, Pennsylvania—Was It a Classic Example of Environmental Injustice?*, 23 VT. L. REV. 479, 486 (1999) (*quoting* Robert D. Bullard, *Grassroots Flowering*, THE AMICUS J., Spring 1994, at 32.)

Environmental equity, however, encompasses the notion of fairness and involves the balancing of the siting of potentially environmentally hazardous facilities among communities of all backgrounds.[80] Rather than focusing on the underlying racial component to environmental action, environmental equity focuses on fairness.[81] The premise here is that fairness in environmental decision making would result in an even distribution of environmental risks and burdens.[82] According to the EPA, environmental equity means "[e]qual protection from environmental hazards for individual groups, or communities regardless of race, ethnicity, or economic status."[83]

Finally, environmental justice seeks to relieve communities of the burden of waste generation by forcing legislation designed to change modern industrial processes.[84] Environmental justice is based on the following premises: (1) all Americans have a basic right to live and work in a healthy environment; (2) it is forward-looking and goal-oriented; (3) it is a public health issue in addition to being an environmental issue; and (4) it is based on the concept of fundamental fairness, which includes the concepts of economic and racial prejudice.[85] Environmental justice has emerged as the more politically attractive expression, presumably because it invokes a more positive and less divisive connotation.[86]

Environmental racism and environmental equity appear to be incorporated into the broader concept of environmental justice.[87] Environmental racism, however, looks to more than just equitable distribution of risks and hazards.[88] As discussed above, environmental racism entails the charge that racism is an integral component of decisions regarding the distribution of environmental burdens. For the sake of convenience, this paper will use the terms "environmental racism" and "environmental justice" interchangeably since the former is encompassed within the latter.

Swanston emphasizes that environmental justice is about land: public and private landownership, land use, access to land, and land management and policy.[89] Landownership has historically played a significant role in economic status and quality of life; hence discrimination in land use and ownership has contributed to environmental inequities faced by minority communities.[90] In fact, even after legal barriers to property ownership were

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[80] *See* Evans, *supra* note 1, at 1267.

[81] *See id.*

[82] *See id.*

[83] *See* Hill, *supra* note 38, at 487 (*quoting* U.S. EPA, PUB. NO. 520/B-94-001 GUIDE TO ENVIRONMENTAL ISSUES—EARTH DAY 25 edition 53 (1995).

[84] *See id.* at 1268.

[85] *See* Hill, *supra* note 38, at 487-88.

[86] *See* Lazarus, *supra* note 11, at 790.

[87] *See* Evans, *supra* note 1, at 1268.

[88] *See id.* at 1271.

[89] *See* Samara F. Swanston, *Environmental Justice and Environmental Quality Benefits: The Oldest, Most Pernicious Struggle and Hope for Burdened Communities*, 23 VT. L. REV. 545, 546 (1999).

[90] *See id.* at 350.

overcome, discrimination continued to limit the ability of people of color, particularly African-Americans, to own property.[91]

Issues of environmental justice are a growing concern among civil rights groups.[92] Litigants have therefore used civil rights laws to address problems of environmental justice.[93] However, plaintiffs have in general been unsuccessful in proving claims of environmental racism at trial.[94]

4. THE PROBLEM WITH THE EQUAL PROTECTION CLAUSE

The Equal Protection Clause of the Fourteenth Amendment provides in part that "no State shall…deny to any person within its jurisdiction the equal protection of the laws."[95] The promise of the Equal Protection Clause, however, has faded as the Supreme Court has steadily increased the evidentiary hurdles that must be surmounted before finding a violation of the clause.[96] Facially discriminatory laws and actions have become rare in today's race-conscious society.[97] Therefore, equal protection claims in the environmental justice context are likely to allege that a governmental decision which is facially neutral is nonetheless discriminatory.[98]

The current understanding of when a facially neutral decision or action can be considered discriminatory was established with two cases in the 1970s. In *Washington* v. *Davis*[99]and *Arlington Heights* v. *Metropolitan Housing Development Corporation*[100] the Supreme Court held that plaintiffs claiming a violation of the Equal Protection Clause must demonstrate that government officials intentionally discriminated against them.[101] The Court interpreted the intent requirement to demand that claimants demonstrate that race "has been a motivating factor in the decision," and that the decision was made not merely in spite of, but in part "because of," its adverse effect on the class.[102]

In *Arlington Heights*, the Court acknowledged that governmental decision making rarely involves a single motivating purpose, but rather involves multiple actors and thereby requires examination of circumstantial evidence to prove discriminatory intent.[103] The Court identified five factors as potentially probative of intentional discrimination: (1) disparate impact, (2)

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[91] *See id.*

[92] *See* Maura Lynn Tierney, *Environmental Justice and Title VI Challenges to Permit Decisions: The EPA's Interim Guidance*, 48 CATH. U. L. REV. 1277, 1281 (1999).

[93] *See id.*

[94] *See* Vig, *supra* note 12, at 912.

[95] U.S. CONSTITUTION, AMENDMENT XIV, 1.

[96] See Kaswan, *supra* note 3, at 407.

[97] *See id.* at 408.

[98] *See id.*

[99] 426 U.S. 229 (1976)

[100] 429 U.S. 252 (1977)

[101] *See* Bradford C. Mank, *Is There a Private Cause of Action under EPA's Title VI Regulations?: The Need to Empower Environmental Justice Plaintiffs*, 24 COLUM. J. ENVTL. L. 1, 10 (1999).

[102] *See Arlington Heights*, 429 U.S. at 266.

[103] *See id.*

historical background to the decision, (3) history of the decision-making process, (4) departures from normal substantive factors or procedures, and (5) legislative or administrative history.[104]

Kaswan argues that this test provides the framework that is likely to be invoked in an equal protection challenge to the siting of an undesirable land use.[105] Plaintiffs challenging a siting decision bear the burden of proving that the decision maker was motivated by a discriminatory purpose.[106] At that point, the burden of proof shifts to the decision maker to show "that the same decision would have resulted even had the impermissible purpose not been considered."[107]

In environmental racism cases, courts have failed to find evidence of intentional discrimination because siting boards and developers can almost always offer at least some race-neutral justification for a site.[108] For example, in *Bean* v. *Southwestern Waste Management Corporation*,[109] plaintiffs sought a preliminary injunction, alleging racial discrimination in the Texas Department of Health's decision to grant a permit for the operation of a solid waste facility in a predominantly minority area of Harris County, Texas.[110] The plaintiffs used the *Arlington Heights* factors to prove their case by circumstantial evidence of discriminatory purpose.[111] Specifically, the plaintiffs argued that the "Texas Department of Health's approval of the permit was part of a pattern or practice…of discriminating in the placement of solid waste sites" and that its approval was discriminatory "in the context of the historical placement of solid waste sites and the events surrounding the application."[112] The court concluded that plaintiffs failed to demonstrate that the siting was within a minority "census tract" and hence there was no evident pattern of discriminatory practice.[113] The court also found that the historical evidence presented was insufficient to infer purposeful racial discrimination.[114]

Seven years after the Bean decision, in *East Bibb Twiggs Neighborhood Ass'n* v. *Macon-Bibb County Planning & Zoning Commission*,[115] on equal protection grounds plaintiffs challenged a decision to grant a permit authorizing the siting of a landfill in a community that was 70 percent African-American.[116] The court analyzed plaintiffs' evidence using the five-factor *Arlington Heights* test.[117] For the first factor, the court dismissed the plaintiffs'

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[104] *See id.* at 268. *See also* Kaswan, *supra* note 3, at 411.

[105] *See* Kaswan, *supra* note 43.

[106] *See id.* at 413.

[107] *See Arlington Heights*, 429 U.S. at 271. *See also* Kaswan, *supra* note 3, at 414.

[108] *See* Mank, *supra* note 63, at 11.

[109] 482 F. Supp. 673 (S.D. Tex. 1979), aff'd without op., 782 F.2d 1038 (5th Cir. 1986).

[110] *See* White, *supra* note 35, at 1163.

[111] *See* Kaswan, *supra* note 3, at 434.

[112] *See id.*

[113] *See* Kaswan, *supra* note 3, at 450.

[114] *See id.*

[115] 706 F. Supp. 880 (M.D. Ga. 1989), aff'd, 896 F.2d 1264 (11th Cir. 1989).

[116] *See* Kaswan, *supra* note 3, at 440.

[117] *See id.*

assertion of discriminatory impact by noting that the only other landfill approved by the Commission was located in a white census tract.[118] Although the court acknowledged that both of these census tracts and their landfills fell within the same county district and that the district was primarily African-American, it found that this evidence was insufficient "to establish a clear pattern of racially motivated decisions."[119]

In applying the second *Arlington Heights* factor, the court looked to the history of the Commission's prior decisions.[120] In rejecting the claim of a long history of siting undesirable land uses in black neighborhoods, the court noted that many of the siting decisions were made by agencies other than the Commission and concluded that such evidence "shed little if any light upon the alleged discriminatory intent of the Commission."[121]

Looking at the third *Arlington Heights* factor, the court found no persuasive evidence that the sequence of events associated with the Commission's approval of the landfill application revealed a discriminatory purpose.[122] Turning to the fourth *Arlington Heights* factor, the court found no evidence that the Commission had violated any procedural or substantive requirements.[123] Finally, with respect to the fifth factor, the legislative history of the decision, the court concluded that the individual commissioners' justification for reversing the earlier denial of an application for a landfill at the site were not motivated by discriminatory purposes.[124]

In another equal protection challenge to a landfill, a community organization in *R.I.S.E., Inc.* v. *Kay*[125] alleged that it was denied equal protection when the County Board of Supervisors approved the siting of a regional landfill in a predominantly African-American section of the county.[126] The court examined all but the fifth *Arlington Heights* factor in rejecting the plaintiffs' claim.[127] Despite finding that from 1969 to 1991 the placement of landfills in the area had had a disproportionate impact on African-American residents, the court rejected the plaintiffs' claim because "the Equal Protection Clause did not impose an affirmative duty to equalize the impact of official decisions on different racial groups."[128] This conclusion was reached notwithstanding the evidence suggesting that some decision makers held discriminatory views, or the fifth factor of *Arlington Heights*, legislative history.[129]

The fact that government agencies may be able to escape responsibility for siting decisions by arguing that key location decisions are made by private, not state, actors presents

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[118] *See id.*

[119] 706 F.Supp. at 885.

[120] *See* Kaswan, *supra* note3, at 55.

[121] 706 F.Supp. at 885.

[122] *See* Kaswan, *supra* note 3, at 441.

[123] *See id.*

[124] *See id.*

[125] 768 F. Supp. 1144 (E.D. Va. 1991).

[126] *See id.* at 1164.

[127] *See* Kaswan, *supra* note 3, at 443.

[128] *See id.*

[129] *See id.* at 444.

a significant hurdle for using the Equal Protection Clause in the environmental racism context.[130] However, to the extent that state actors retain the authority to approve or disapprove private applications, their decisions are subject to the requirements of the Equal Protection Clause.[131] Kaswan argues, for example, that in *East Bibb Twiggs*, the court should have analyzed whether the Commission's past approval and denial of applications could have been correlated with race.[132]

As the above discussion indicates, demonstrating discriminatory purpose is a difficult task for plaintiffs challenging a siting decision on environmental grounds. However, the cases show that environmental justice plaintiffs should be aware of certain essential components to an equal protection claim. These include facts about disparate impacts, about historical circumstances, about decision-making processes, about the rules and procedures guiding the decision, and about what decision makers have said and done in making their decisions.[133]

5. EPA'S REGULATIONS UNDER TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

Lazarus noted that much of environmental protection lawmaking has been highly centralized, with lawmakers at the federal level creating most of the legislation aimed at ameliorating environmental problems.[134] Environmental legislation has been produced through intense and lengthy "horse-trading" among interest groups.[135] This process has often depended upon the forging of alliances between diverse interests both within the environmental public interest community and within the government bureaucracy.[136] These unions have included what has been called "unholy alliances" between environmentalists and commercial and industrial interests, where the latter have perceived an economic advantage to be gained (or disadvantage minimized) by supporting an environmental protection law which allocates the benefits and burdens of environmental protection in a particular fashion.[137] Therefore, it is not surprising that the environmental laws enacted by the U.S. Congress typically address some, but not all, environmental pollution problems.[138]

Federal and state environmental agencies began expressing concern for the distributional implications of environmental laws in general and of their own actions in particular.[139] In 1990, the EPA formed the Environmental Equity Workgroup to study environmental justice.[140] In 1992, the Workgroup published a report assessing the evidence for

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[130] *See id.* at 440.

[131] *See id.*

[132] *See id.* at 441.

[133] *See id.* at 456.

[134] *See* Lazarus, *supra* note 11, at 812.

[135] *See id.* at 813.

[136] *See id.*

[137] *See id.*

[138] *See id.* at 814.

[139] *See* Kaswan, *supra* note 3, at 395.

[140] *See id.* at 397.

disproportionate distribution of environmental risks.[141] The EPA also established the national Office of Environmental Justice to coordinate the agency's environmental justice efforts.[142]

In 1994, in response to the EPA's failure to enforce its own regulations, President William J. Clinton published Executive Order No. 12,898, which acknowledged the existence of environmental inequity and directed employees of the Executive Branch—environmental regulators; those responsible for rule making, permitting, and enforcement; agency lawyers; and others—to include environmental equity in their decision-making calculus.[143] Specifically, the Order required all federal agencies to promote environmental justice "[t]o the greatest extent practicable and permitted by law."[144]

In a presidential directive issued simultaneously with the Executive Order, federal agencies providing funding to programs affecting human health or the environment were required to ensure that their grant recipients comply with the anti-discrimination provisions in Title VI of the Civil Rights Act of 1964.[145] The directive, however, is not judicially enforceable and does not expand existing Title VI rights.[146]

Where disproportionate burden has been identified, the environmental justice movement has focused on using or creating remedies that are triggered by evidence of disparate impact.[147] Existing authority includes EPA regulations implementing Title VI of the Civil Rights Act.[148] Title VI forbids any program or activity receiving federal financial assistance from denying benefits or discriminating on the basis of race, color, or national origin.[149]

Title VI contains two separate sections that provide enforcement mechanisms.[150] Under section 601, private citizens may file a private lawsuit challenging the discriminatory actions of any recipient of federal funds; however, the plaintiff must demonstrate that the recipient has consciously discriminated against the minority group.[151] Under section 602, agencies may promulgate regulations that prohibit practices creating unjustified discriminatory effects.[152] The EPA, for example, has promulgated regulations that prohibit recipients from engaging in practices that cause disparate impacts.[153]

Although the language of Title VI does not specify whether proof of discriminatory intent or impact is necessary, the Supreme Court held in *Guardians Ass'n* v. *Civil Service*

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[141] *See id.*

[142] *See id.*

[143] *See* Wynne, *supra* note 35, at 25.

[144] *See* Mank, *supra* note 63, at 1 (*quoting* Executive Order 12,898, 42 U.S.C. § 4321 (1994)).

[145] *See id.* at 3.

[146] *See id.*

[147] *See* Kaswan, *supra* note 3, at 400.

[148] *See id.*

[149] *See* Tierney, *supra* note 54, at 1285.

[150] *See id.*

[151] *See* Mank, *supra* note 63, at 4.

[152] *See id.*

[153] *See id.*

Commission of New York[154] that it can be expanded to include disparate impact if agency regulations so provide.[155] The Court concluded that proof of intentional discrimination under section 601 of Title VI was necessary, but that an agency implementing regulations under section 602 may prohibit disparate impact discrimination.[156] Hence, the EPA regulations implementing Title VI expand the original scope of the Civil Rights Act, allowing plaintiffs to bring Title VI claims on the basis of disparate impact in addition to discriminatory intent.[157]

Under EPA regulations, recipients of EPA financial assistance are required to agree annually in writing to comply with Title VI and the EPA civil rights regulations.[158] As of 1995, however, the EPA had not completed a single investigation of any civil rights complaint and had never investigated whether a recipient of EPA financial assistance was fulfilling its obligations to comply with the requirements of the civil rights regulations.[159]

6. *CHESTER CONCERNED FOR QUALITY LIVING* V. *SEIF*: AN ENVIRONMENTAL RACISM SUCCESS UNDER TITLE VI OF THE CIVIL RIGHTS ACT OF 1964?

Chester, Pennsylvania, a small city near Philadelphia, is inhabited primarily by African-Americans.[160] One-quarter of the city's residents live below the poverty line.[161] Chester is plagued with problems such as inadequate public housing and high rates of truancy, crime, teen-age pregnancy, infant mortality, homelessness, AIDS, and drug abuse.[162] In the early 1970s, a Chester resident began leasing land to a hazardous waste disposal company, which stored the hazardous waste in drums or emptied it directly onto the soil.[163] In February 1978, one of the largest chemical waste fires in this country's history erupted on the property.[164]

Today Chester is a city of 42,000 people, has no McDonald's or Burger King—or a public swimming pool—yet by 1993 had five different waste facilities.[165] All of the solid waste in the county and 85 percent of its raw sewage are treated in Chester.[166] Furthermore, Chester has the highest infant mortality rate and the highest death rate resulting from certain

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[154] *See* 463 U.S. 582 (1983).

[155] *See* Tierney, supra note 54, at 72.

[156] *See* Mank, *supra* note 63, at 14.

[157] *See* Tierney, *supra* note 54, at 78.

[158] *See* Jerome Balter, *The EPA Needs a Workable Environmental Justice Protocol*, 12 TUL. ENVTL. L. J. 357, 360 (1999).

[159] *See id.*

[160] *See* Jeffrey R. Cluett, *Two Sides of the Same Coin: Hazardous Waste Siting on Indian Reservations and in Minority Communities*, 5 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 191, 202 (1999).

[161] *See id.*

[162] *See id.*

[163] *See id.*

[164] *See id.*

[165] *See id.*

[166] *See* Vig, *supra* note 12, at 907.

malignant tumors of any city in Pennsylvania.[167] These facilities, however, brought money and jobs to a community where most of the industrial base has departed and the property taxes are among the highest in the county.[168]

Some residents, however, were concerned about the effects that the facilities were having on their communities. Opposition to any new hazardous waste facilities led some residents to organize into a group called the Chester Residents Concerned for Quality Living (CRCQL), a nonprofit organization.[169] In 1996, CRCQL brought suit against the Pennsylvania Department of Environmental Protection (PADEP), alleging that, by burdening Chester with a disparate impact of the county's pollution, PADEP was violating both section 601 of Title VI of the Civil Rights Act of 1964 and the EPA regulations made pursuant to section 602 of the Civil Rights Act.[170]

The District Court for the Eastern District of Pennsylvania dismissed the plaintiffs' allegations of discrimination because an implied cause of action under section 601 was limited to cases of intentional discrimination.[171] The court also refused to recognize a private right of action under Title VI's section 602 regulations.[172] The Third Circuit Court, however, reversed that decision and held that a private right of action may exist under these regulations.[173] By finding a cause of action in section 602, Chester established that a Title VI plaintiff may succeed on a showing of disparate impact.[174]

The potential of Chester's impact is grounded in the differing burdens carried by the defendant under section 601 and section 602.[175] Equal Protection Clause precedents define the parameters of section 601.[176] Therefore, under the *Arlington Heights* standard, defendants facing a section 601 claim are able to rebut claims of disparate impact under the Equal Protection Clause with a nondiscriminatory reason for the discriminatory effect.[177] In contrast, under section 602, a defendant can rebut a claim of disparate impact only with showing that the disparate impact has a "manifest relation" to the specific agency action in question, thus creating a more demanding burden on the defendant.[178]

On June 8, 1998, the Supreme Court granted the PADEP's petition for a writ of certiorari to review the Third Circuit's determination that a plaintiff may bring a private right of action under section 602.[179] On April 30, 1998, before the Supreme Court granted the petitioner's petition for a writ of certiorari, PADEP revoked the underlying permit in the case after it had

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[167] *See id.* at 908.

[168] *See id.* at 203.

[169] *See id.*

[170] *See id.* at 908.

[171] *See id.* at 922.

[172] *See* Mank, *supra* note 63, at 5.

[173] *See id.*

[174] *See* Vig, *supra* note 12, at 929.

[175] *See id.* at 930.

[176] *See id.*

[177] *See id.*

[178] *See id.*

[179] *See* Mank, *supra* note 63, at 50.

expired and the permit applicant had indicated that it no longer planned to site a facility in Chester.[180] CRCQL filed a motion to dismiss the case as moot on July 29, 1998.[181] The Commonwealth of Pennsylvania in turn filed a brief in opposition, arguing that the case remained justiciable despite the revocation of the permit to vacate the Third Circuit's decision to prevent the case from being cited as precedent in the future if the court dismissed the case as moot.[182] On August 17, 1998, the Supreme Court granted both the CRCQL's petition to dismiss the case as moot and Pennsylvania's request to vacate the Third Circuit's decision.[183] As a result, environmental justice plaintiffs may not cite the Third Circuit decision as precedent in their attempts to prevail on environmental justice claims.

7. POST-CHESTER ENVIRONMENTAL JUSTICE DEVELOPMENTS

In February 1998, the EPA's Office of Civil Rights (OCR) issued an "Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits" (Interim Guidance).[184] The Interim Guidance provides a framework for the investigation and processing of Title VI administrative complaints alleging discriminatory impact resulting from the issuance of permits.[185] First, within twenty days of acknowledging receipt, the OCR determines whether to reject or accept the complaint.[186] Second, if the complaint is accepted, the OCR conducts a factual investigation to determine whether the issuance of the permit will have a new disparate impact or add to an existing disparate impact on the minority population.[187] Third, upon a conclusion that a significant disparate impact will result, the Interim Guidance allows the recipient of EPA funding to rebut the finding, propose a mitigation plan, or justify the impact.[188] If the recipient fails to meet these requirements, the OCR then notifies the recipient in writing that the EPA has made a preliminary finding of noncompliance, which may result in revocation of funding.[189]

Regarding permitting requirements, the Interim Guidance includes a broad framework for establishing a prima facie case for disparate impact, requires permit applicants to consider demographics for their operating permits, and allows permit challenges to be raised for new, modified, and renewal permits after an original permit has already been issued.[190] In terms of legal requirements, the Interim Guidance shifts the ultimate burden of proof in establishing a disparate impact to the permitting agency and creates a private right of action.[191]

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[180] *See id.*

[181] *See id.*

[182] *See id.* at 51.

[183] *See id.*

[184] *See* Tierney, *supra* note 54, at 1281.

[185] *See id.*

[186] *See id.* at 1288.

[187] *See id.*

[188] *See id.*

[189] *See id.*

[190] *See id.* at 1289.

[191] *See id.*

State and local governments, industries, and even some environmental justice advocates have opposed the Interim Guidance.[192] Governments and industries view the Interim Guidance as burdensome, while environmental justice advocates believe it is insufficient.[193] During October 1998, President Clinton signed an appropriations bill that included a rider that placed a moratorium on the EPA's accepting new Title VI complaints until the agency issues a final guidance on Title VI.[194] Tierney suggests that the final guidance should balance the interests of economic development with those of environmental justice,[195] allow for community involvement in the decision-making process,[196] and consider sustainable urban redevelopment as an important policy objective.[197]

8. SUBSTANTIVE AND PROCEDURAL REQUIREMENTS IN ENVIRONMENTAL LAWS CAN FACILITATE ENVIRONMENTAL JUSTICE

Environmental laws may establish substantive and/or procedural requirements for the siting of particular types of land use.[198] An example of a substantive standard might be a state environmental law that governs the siting of solid waste facilities by establishing location standards specifying that the facility must be a certain distance away from sources of water, parks, or residences.[199] To illustrate an example of a procedural requirement, the National Environmental Policy Act (NEPA) requires the preparation of an Environmental Impact Statement (EIS) in connection with any major federal action having significant effects on the environment.[200]

Although the NEPA requirements apply only to action involving the federal government, many states have adopted similar environmental review statutes applicable to state projects.[201] These state environmental policy acts (SEPAs) require state governments to consider a wide range of health, economic, social, and cultural impacts before taking action that affects the environment.[202] SEPAs can therefore be valuable tools for achieving environmental justice.[203]

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[192] *See id.* at 1298.

[193] *See id.* Specifically, state and local governments object to the shifting of the burden of proof since justifications sufficient to rebut a finding of disparate impact are unclear. *See id.* at 1299–1300. Additionally, the Interim Guidance threatens programs aimed at bringing jobs and economic growth to urban areas where poor and minority neighborhoods are located. *See id.* at 1305.

[194] *See* Mank, *supra* note 63, at 20. As of summer 1999, the final guidance had not been issued. *See* Tierney, *supra* note 54, at 1312.

[195] *See* Tierney, *supra* note 54, at 1312.

[196] See id.

[197] *See id.* at 1314.

[198] *See* Kaswan, *supra* note 3, at 457.

[199] *See id.*

[200] *See id.*

[201] *See* Stephen M. Johnson, *NEPA and SEPAs in the Quest for Environmental Justice*, 30 LOY. L.A. L. REV. 565, 567 (1997).

[202] *See id.*

For example, Minnesota's environmental review law provides that

> [n]o state action significantly affecting the quality of the environment shall be allowed, nor shall any permit for natural resources management and development be granted, where such action or permit has caused or is likely to cause pollution, impairment, or destruction of the air, water, land or other natural resources located within the state, so long as there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare.[204]

Procedural requirements help to generate a great deal of information about the site under consideration.[205] The NEPA, for example, requires the EIS to discuss the purpose and need for the proposed action, the environment to be affected, and the consequences of the proposed project to that environment such as ecological, aesthetic, historic, cultural, economic, social, or health effects.[206] Other sources of information other than the EIS that result from NEPA's review process include comments from the public and other agencies having jurisdiction over or an interest in the proposed project as well as information about alternatives to the selected site.[207]

Public participation provisions, which require public input in siting decisions, empower communities, providing them with a voice in the decision-making process.[208] In addition, the government decision-making process is benefited as well.[209] For example, community residents are "experts" in their knowledge of where they live in that they know more about their community than the government agency making the siting decisions that would affect that area.[210] Information that these experts provide regarding opposition to siting in their community might enable the decision-making agency to identify alternatives to the proposed action.[211]

Kaswan argues that substantive and procedural requirements within environmental laws could provide factual information relevant to the five *Arlington Heights* factors discussed above.[212] She notes that in cases involving environmental-justice equal-protection challenges, courts have often found that substantive and procedural requirements were in fact followed.[213] If, however, more detailed substantive and procedural requirements were within the laws, deviations from those requirements could support an inference of discriminatory intent.[214] Although information gathered to satisfy substantive and procedural requirements may not reveal any evidence of a discriminatory purpose in the siting decision, it has a potential to

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[203] *See id.*

[204] *See id.* at 598–599 (*quoting* Minn. Stat. Ann. § 116 D.04(6) (West 1987)).

[205] *See* Kaswan, *supra* note 3, at 459.

[206] *See id.*

[207] *See id.* at 460–61.

[208] *See* Johnson, *supra* note 157, at 572.

[209] *See id.*

[210] *See id.*

[211] *See id.*

[212] *See* Kaswan, *supra* note 3, at 464.

[213] *See id.* at 475.

[214] *See id.*

play a role in a community's effort to show that a siting decision violated the Equal Protection Clause.[215]

The Holly Springs case discussed in part 1 illustrates how substantive and procedural requirements within environmental laws can protect communities from lax or even biased decision making in siting hazardous waste facilities. There is a strong argument that the Holly Springs plaintiffs would not have been successful if they had had to rely solely on the Equal Protection Clause and/or Title VI to support their argument that environmental injustice had occurred. The substantive and procedural requirements in North Carolina's environmental laws were crucial to the Holly Springs plaintiffs' success in combating an unjust environmental decision.

CONCLUSION

As environmental justice advocates push for increased and improved legislation designed to more fairly distribute environmental benefits and burdens, substantive and procedural laws regulating the siting of hazardous waste facilities will become more important to ensuring environmental justice. Community involvement is a critical component that should be included in the process of siting of hazardous waste facilities. Specific substantive and procedural regulations combined with local approval requirements will provide plaintiffs challenging siting decisions with legal arguments that avoid the obstacles of the Equal Protection Clause and Title VI of the Civil Rights Act.

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[215] *See id.*