

# ENVIRONMENTAL JUSTICE RISKS IN THE PETROLEUM INDUSTRY

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## I. THE HAZARD

In practically all of its various forms, petroleum is potentially hazardous to the environment. As a result, virtually every activity engaged in by the petroleum industry can have profound environmental implications. For many years, environmental considerations have played a role in decisions regarding the siting of petroleum production, refining, or storage facilities. Recent case law and regulatory developments in “environmental justice,” however, assure that environmental considerations that affect minority communities will play an increasingly critical economic role in both the permitting process and, perhaps most importantly, the permit renewal process. This article discusses the recent developments, suggests preventive management techniques to deal with the new challenges, and proposes a better process of environmental justice in order to benefit minority populations living near the sites. The article will accomplish this by addressing the legal and regulatory environmental barriers to the petroleum site permitting and renewal process, reviewing the Environmental Protection Agency’s “environmental justice” compliance guidance, and suggesting pre-permit management techniques to educate citizens of the affected community so as to minimize the hidden contingent costs of “environmental justice” complaints.

## II. BACKGROUND

To incorporate environmental considerations into capital budgeting, a company must constantly monitor changes in environmental

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law. Astute petroleum executives, attorneys, controllers, auditors, investors and management accountants must be able to identify potential hidden environmental costs resulting from compliance with environmental regulations. The Institute of Management Accountants has recognized this need by issuing two helpful statements, No. 4W, "Implementing Corporate Environmental Strategies," and No. 4Z, "Tools and Techniques of Environmental Accounting for Business Decisions."

Few contemporary issues are more emotionally charged than environmentalism and its underlying values. Legitimate policy controversies are generally portrayed as battles between victimized citizens and corporate polluters. In this context, it is difficult not to side with the environmentalists.<sup>1</sup>

This context, however, often represents a misleading and false dichotomy, which may actually operate to direct beneficial social and economic resources away from the poor, minority communities that the regulations were intended to benefit.<sup>2</sup> It is reasonable to assume that the type of community most likely to accept a new factory would be a town where more jobs are needed and increased tax revenue from the facility would benefit the area. There is scant evidence that the Environmental Protection Agency (EPA) takes into account the wishes or needs of the affected minority community in the decision making process.<sup>3</sup> Decision makers must be aware that their good faith motives and community support for a facility may not be determinative with government regulators and the courts.

### III. STUDIES

Throughout the 1970s and 1980s, a variety of empirical studies purported to find evidence of environmental injustice. One of the first studies examined population data for Houston, Texas area communities where landfills and incinerators were located.<sup>4</sup> The study concluded that minority neighborhoods supported a disproportionate number of waste

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<sup>1</sup> See Frank B. Cross, *The Subtle Vices Behind Environmental Values*, 8 DUKE ENVTL. L. & POL'Y F. 151 (1997).

<sup>2</sup> See *id.* at 151.

<sup>3</sup> For example, in the Louisiana *Shintech* matter (*see infra* note Section IX) 73% of the black residents and 100% of the black public officials favored the plant. See Robyn Blumner, *Standing in the Way of Jobs*, WASH. TIMES, Oct. 3, 1998, at C7.

<sup>4</sup> See Robert D. Bullard, *Solid Waste Sites and the Black Houston Community*, 53 SOC. INQUIRY 273 (1983).

facilities.<sup>5</sup> A second study, conducted by the U.S. General Accounting Office in 1983, analyzed population demographics in communities adjacent to waste facilities in the Southeast.<sup>6</sup> This study also reported that a disproportionate number of such facilities were located in minority and/or poor communities.<sup>7</sup> Another frequently cited study was published by the Commission for Racial Justice of the United Church of Christ in 1987.<sup>8</sup> It too reported evidence of environmental racism.<sup>9</sup>

Although many of these studies have been frequently cited in order to bolster the position taken by advocates of the environmental justice cause, some experts have questioned the results of the studies on the basis of methodological flaws.<sup>10</sup> One such problem has to do with the studies' definition for "minority communities" which classifies any community as a minority community if it has a higher proportion of nonwhite residents than that reflected in national statistics.<sup>11</sup> As a result, the studies categorize some communities as "minority" even if they have a large majority of non-minority residents. A related problem is that the studies focus on the minority proportion of the population in high pollution areas, rather than population densities. As a result, the studies ignore the actual number of minority or low-income residents exposed to hazardous waste.<sup>12</sup> Still another potential flaw of these studies is the potential for significant aggregation error resulting from defining geographic areas too broadly.<sup>13</sup>

These studies have also failed to consider the timing of hazardous material sitings relative to shifts in the population.<sup>14</sup> In other words, due to the dynamic nature of the housing market, population shifts toward a

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<sup>5</sup> See *id.* at 285.

<sup>6</sup> See U.S. Gen. Accounting Office, GAO Rept. No.: RCED-83-168, *Siting of Hazardous Waste Landfills and Their Correlation with Racial and Economic Status of Surrounding Communities Report* (1983).

<sup>7</sup> See *id.*

<sup>8</sup> THE UNITED CHURCH OF CHRIST COMM'N FOR RACIAL JUSTICE, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES (Public Data Access, Inc., New York 1987).

<sup>9</sup> See *id.*

<sup>10</sup> See Laura Pulido, *A Critical Review of the Methodology of Environmental Racism Research*, 28(2) *ANTIPODE* 142 (1996).

<sup>11</sup> See *id.*

<sup>12</sup> See *id.*

<sup>13</sup> See *id.*

<sup>14</sup> See Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 *YALE L.J.* 1383 (1994).

higher proportion of minority and/or poor residents may have occurred after the siting of hazardous material facilities in some locations.<sup>15</sup> In fact, one study suggests that economic factors, not environmental racism, are the real cause of the observed population differences surrounding hazardous materials facilities.<sup>16</sup> Another problem with much of the environmental justice research is that the studies focus exclusively on the number of facilities located in minority/poor neighborhoods, failing to consider the amount and type of pollution actually involved.<sup>17</sup>

#### IV. A DEFINITION

The Environmental Protection Agency defines environmental justice as fair treatment for people of all races, cultures, and incomes, regarding the development of environmental laws, regulations, and policies.<sup>18</sup> Since the early 1990s, there has been a steady increase in the incidence of claims that minority and low income populations bear a disproportionate amount of negative health and environmental effects from pollution, often as a result of environmental racism — the intentional siting of hazardous waste facilities in predominately minority and low-income areas.<sup>19</sup> Now the President, the EPA, and the courts have acted to expand greatly the definition of “environmental justice” to include not only the evils of intentional discrimination, but also unintended “disparate impact” discrimination.<sup>20</sup>

Disparate impact discrimination flows from practices that are not intended to discriminate, but for some reason have an unintended, but discriminatory, disparate effect on a protected class.<sup>21</sup> For example, an employer may have a policy that it only hires the relatives of current employees. Well-intentioned reasons may exist for this policy, such as increasing employees’ loyalty to and knowledge of the company. However, if all the current employees are white, the policy will have a discriminatory disparate impact on qualified blacks, who will never be

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<sup>15</sup> See *id.* at 1388.

<sup>16</sup> See Thomas Lambert & Christopher Boerner, *Environmental Inequity: Economic Causes, Economic Solutions*, 14 YALE J. ON REG. 195 (1997).

<sup>17</sup> Andrew Holmes & Larry B. Cowart, *Environmental Racism: The New Liability for Industrial Site Selection*, REAL ESTATE ISSUES, Apr. 1996, at 1.

<sup>18</sup> See generally 40 C.F.R. 7.30 (1999) (prohibiting discrimination under any EPA program or activity).

<sup>19</sup> See Robyn Blumner, *Standing in the Way of Jobs*, WASH. TIMES, Oct. 3, 1998, at C7.

<sup>20</sup> See *id.*

<sup>21</sup> See *id.*

employed at this company. The Clinton Administration and the EPA seem to believe that there is a vast conspiracy between state environmental regulators and regulated industries to impose a disparate impact by locating industrial facilities in low-income and minority neighborhoods.<sup>22</sup>

## V. SETTING THE STAGE

Whether or not claims of environmental racism are adequately supported by sound scientific research, President Clinton moved environmental justice to the forefront of the national agenda when he issued Executive Order 12898 on February 11, 1994.<sup>23</sup> This Order broadly provides that “disproportionately high and adverse human health or environmental effects... on minority populations and low-income populations”<sup>24</sup> shall be identified and addressed. The Order further requires each cabinet of the government to make environmental justice a part of its mission.<sup>25</sup>

In the past, it was generally accepted that federal or state permitting agencies served as gatekeepers to which private individuals or groups must submit their opposition to siting permits. These agencies could then exercise discretion in dealing with such challenges. However, several recent significant developments, in the form of a court of appeals decision,<sup>26</sup> an EPA policy statement,<sup>27</sup> and a controversial EPA decision in the Louisiana *Shintech* case<sup>28</sup> have the potential to open the floodgates for additional private actions in environmental permitting for plant sites. The obvious result would be a dramatic increase in the legal and contingent economic costs associated with siting of industrial facilities.

## VI. NEW DEVELOPMENTS

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<sup>22</sup> See *id.*

<sup>23</sup> Exec. Order No. 12,898, 3 C.F.R. 859 (1995).

<sup>24</sup> *Id.* at 859.

<sup>25</sup> See *id.* at 859.

<sup>26</sup> See *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925 (3d Cir. 1997).

<sup>27</sup> See OFFICE OF ENVIRONMENTAL JUSTICE, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, INTERIM GUIDANCE FOR INVESTIGATING TITLE VI ADMINISTRATIVE COMPLAINTS CHALLENGING PERMITS (1998), available at <<http://www.epa.gov/oeca/oej/titlevi/html>> [hereinafter INTERIM GUIDANCE].

<sup>28</sup> See *In re Shintech*, 746 So. 2d 601 (La. Ct. App. 1999).

The first critical question is whether private individuals or environmental activists have an implied private cause of action in federal court to challenge the permitting and permit renewal process without first exhausting available remedies with state or federal permitting agencies. The Third Circuit Court of Appeals provided an affirmative answer to this question when it discovered that a private cause of action does exist to challenge the plant permitting process.<sup>29</sup> In February 1998, the Environmental Protection Agency seized the initiative when, citing the President's Executive Order,<sup>30</sup> it issued a policy statement in the form of an interim guidance that clearly recognizes a private cause of action in both initial site permitting, and more surprisingly, the permit renewal processes.<sup>31</sup>

Both the court decision and the EPA interim guidance are rooted in an interpretation of The Civil Rights Act of 1964 (the "Act").<sup>32</sup> Title VI of the Act says that "no person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."<sup>33</sup> Whether the Act infers a private right of action in an environmental siting case has been the subject of considerable conjecture.<sup>34</sup>

## VII. THE *CHESTER* CASE AND PRIVATE PERMIT CHALLENGES

When decided, *Chester Residents Concerned for Quality Living v. Seif*<sup>35</sup> was widely regarded as having the same effect on environmental law as the *Brown v. Board of Education* desegregation case did on education law. Although the appeal of the *Chester* decision was recently vacated by the U.S. Supreme Court as moot because the contested facility

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<sup>29</sup> See *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925 (3d Cir. 1997).

<sup>30</sup> Exec. Order No. 12,898, 3 C.F.R. 859 (1995).

<sup>31</sup> See INTERIM GUIDANCE, *supra* note 27.

<sup>32</sup> 42 U.S.C. §§ 2000d – 2000d-7 (1994).

<sup>33</sup> *Id.*

<sup>34</sup> See generally *Chowdhury v. Reading Hosp. and Med. Ctr.*, 677 F.2d 317 (3d Cir. 1982) (alleging racial discrimination in denial of staff privileges at federal-assisted hospital); *Guardians Ass'n v. Civil Serv. Comm'n of New York*, 463 U.S. 582 (1983) (asserting discriminatory impact of police appointments made based on written examination scores); *Alexander v. Choate*, 469 U.S. 287 (1985) (claiming that limitation on number of allowed hospital days funded under Medicaid has a disproportionate and discriminatory effect on the handicapped).

<sup>35</sup> 132 F.3d 925 (3d Cir. 1997).

decided to surrender the challenged permit in question,<sup>36</sup> the initial decision provides a valuable roadmap to follow for courts evaluating private causes of action. It is beneficial to understand the case because the theory espoused by the court is recognized by other federal circuits, is cited in EPA permitting regulations, and cases like it will surely arise again.

In *Chester*, the appellate court dealt with the issue of whether a private cause of action exists under Title VI to challenge the permitting process.<sup>37</sup> “The City of Chester is located in Delaware County, Pennsylvania, and has a population of approximately 42,000, of which 65% is black and 32% is white. Delaware County, excluding Chester, has a population of about 502,000 of which 6.2% is black and 91% is white.”<sup>38</sup> The environmental group, Chester Residents Concerned for Quality Living, contended that state and environmental authorities had

granted five waste facility permits for sites in the City of Chester since 1987, while only granting two permits for sites in the rest of Delaware County. It further alleges that the Chester facilities have a total permit capacity of 2.1 million tons of waste per year, while the non-Chester facilities have a total permit capacity of only 1,400 tons of waste per year.<sup>39</sup>

The court was faced with the question of whether a private right of action exists under the Discriminatory Effect Regulations promulgated by a federal administrative agency (EPA) under Title VI of the Civil Rights Act of 1964.<sup>40</sup> The original trial court found that no private right of action exists that would allow a private individual to enforce the EPA civil rights regulations,<sup>41</sup> thus affirming that the state permitting agency acts as a gatekeeper for such complaints. Title VI and the EPA’s civil rights implementing regulations condition the receipt of federal funding by a state’s permitting agency on its assurance that it complies with Title VI

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<sup>36</sup> See *Seif v. Chester*, 524 U.S. 974 (1998) (citing *United States v. Munsingwear*, 340 U.S. 36 (1950) for the proposition that the withdrawal of the permit application rendered the case moot).

<sup>37</sup> See *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925, 927 (3d Cir. 1997).

<sup>38</sup> See *id.* at 927, n.1.

<sup>39</sup> See *id.*

<sup>40</sup> See *id.* (referring to 42 U.S.C. § 2000d).

<sup>41</sup> See *Chester Residents Concerned for Quality Living v. Seif*, 944 F.Supp. 413, 417 (E.D. Pa. 1996).

and the regulations.<sup>42</sup> “[T]hese regulations prohibit recipients of federal funding from using ‘criteria or methods ... which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex....’”<sup>43</sup>

On appeal, the Third Circuit decided that in the absence of a specific statutory authorization, there is a three-pronged test to determine when it is appropriate to imply a private right of action to enforce government regulations.<sup>44</sup> The test requires the court to determine “(1) ‘whether the issue is properly within the scope of the enabling statute’; (2) ‘whether the statute under which the rule was promulgated properly permits the implication of a private right of action’; and (3) ‘whether implying a private right of action will further the purpose of the enabling statute.’”<sup>45</sup>

The appellate court said that “[t]here [was] no question that the EPA’s discriminatory effect regulation satisfies the first prong.”<sup>46</sup> The court also said it is clear that “‘actions having an unjustifiable disparate impact on minorities [can] be redressed through agency regulations designed to implement the purpose of Title VI.’”<sup>47</sup> Announcing that the second and third prongs determined whether a private right of action existed,<sup>48</sup> the court found that it had to consider the relevant factors of “(1) whether there is ‘any indication of legislative intent, explicit and implicit, either to create such a remedy or to deny one’; and (2) whether it is ‘consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff.’”<sup>49</sup>

The court reviewed the law and regulations and agreed that there was some weight to the argument that the EPA, or a state permitting agency, acts only “as a gatekeeper to enforcement, with private parties submitting their allegations to the agency and its discretion.”<sup>50</sup> The court failed to enlighten the litigants by citing any explicit examples of a legislative intent to confer a private cause of action.<sup>51</sup> It decided that private lawsuits are consistent with the underlying legislative scheme of

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<sup>42</sup> See 40 C.F.R. § 7.80 (a) (1999).

<sup>43</sup> *Chester*, 132 F.3d at 928 (referring to 40 C.F.R. § 7.35(b) (1997)).

<sup>44</sup> See *id.* at 933.

<sup>45</sup> *Id.* (quoting *Polaroid Corp. v. Disney*, 862 F.2d 987, 994 (3d Cir. 1988)).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* (quoting *Alexander v. Choate*, 469 U.S. 287, 293 (1985)).

<sup>48</sup> See *id.*

<sup>49</sup> *Chester*, 132 F.3d at 933 (quoting *Cort v. Ash*, 422 U.S. 66, 78 (1975)).

<sup>50</sup> *Id.* at 935.

<sup>51</sup> See *id.* at 936.

Title VI.<sup>52</sup> The court also said that a private right of action is desirable “because it will deputize private attorneys general who will enforce section 602 and its implementing regulations”<sup>53</sup> and will further the purposes of Title VI.<sup>54</sup>

The foregoing decision should serve as a signal to those involved in risk management and siting decisions to consider carefully the discrimination issues involving disparate impact raised in the *Chester* case. The case, however, leaves unresolved several important questions. Is there a cause of action, for example, in the renewal of a site license? The interim guidance released by the EPA shortly after the *Chester* decision deals with that question.<sup>55</sup>

#### VIII. EPA INTERIM GUIDANCE FOLLOWS *CHESTER*

On February 5, 1998, in connection with the President’s Executive Order 12898, “Federal Actions To Address Environmental Justice In Minority Populations and Low Income Populations,”<sup>56</sup> the EPA issued its “Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits” (the “Guidance”).<sup>57</sup> The EPA cites the *Chester* case with approval and flatly states that “individuals may file a private right of action in court to enforce the nondiscrimination requirements in Title VI or EPA’s implementing regulations without exhausting administrative remedies.”<sup>58</sup> With the interim guidance, this means that the EPA and state permitting agencies are no longer considered by the agency as gatekeepers; private individuals now gain direct access to the federal courts.

The Agency announced a five-step framework for determining whether a disparate impact exists that is subject to this private cause of action.<sup>59</sup> The steps are:

- (1) To identify the population affected by the permit that triggered the complaint. The affected population is that which suffers the adverse impacts of the permitted activity;
- (2) To determine the racial and/or ethnic composition of the affected population;

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<sup>52</sup> *See id.*

<sup>53</sup> *Id.*

<sup>54</sup> *See id.*

<sup>55</sup> *See* INTERIM GUIDANCE, *supra* note 27.

<sup>56</sup> Exec. Order No. 12,898, 3 C.F.R. 859 (1995).

<sup>57</sup> *See* INTERIM GUIDANCE, *supra* note 27.

<sup>58</sup> *Id.* at 4.

<sup>59</sup> *See id.* at 9-11.

- (3) To identify which other permitted facilities, if any, are to be included in the analysis and the racial and/or ethnic composition of the population already affected by those permits. This is referred to as the universe of facilities;
- (4) To conduct a disparate impact analysis to determine whether persons protected under Title VI are being impacted by the facility at a disparate rate. The EPA expects the rates of impact for the protected population and comparison populations to be relatively comparable; and
- (5) To use arithmetic or statistical analysis to determine whether the disparity is significant under Title VI. After calculations, the EPA may make a prima facie disparate impact finding, subject to the recipient's opportunity to rebut.<sup>60</sup>

The recipient will have an opportunity to "justify" the decision to issue a permit, based on legitimate, substantial interests of the recipient, notwithstanding the resulting disparate impact.<sup>61</sup> Demonstrating that the permit complies with applicable environmental regulations will *not* ordinarily be considered a legitimate justification.<sup>62</sup> Rather, an articulable value to the recipient must be found.<sup>63</sup>

The types of factors that will be considered in determining the sufficiency of the justification can include the seriousness of the disparate impact, whether the permit is a renewal (with demonstrated benefits) or for a new facility (with more speculative benefits), and whether any of the articulated benefits associated with the permit can be expected to assist the affected minority community that is a subject of the complaint.<sup>64</sup> An offered justification will not be considered acceptable if there is a less discriminatory alternative that lessens the adverse disparate impact.<sup>65</sup> This approach obviously will lead to increased environmental permitting litigation. The statement of agency policy will likely have considerable influence on courts who are, or soon will be, considering the same question as in *Chester*.

Another section of the Guidance should be of even greater concern to all managers involved in decisions to seek permit renewals. In the

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<sup>60</sup> *See id.*

<sup>61</sup> *See id.* at 12.

<sup>62</sup> *See id.*

<sup>63</sup> *See* INTERIM GUIDANCE, *supra* note 27, at 12.

<sup>64</sup> *See id.*

<sup>65</sup> *See id.*

section “Investigations of Allegedly Discriminatory Permit Renewals,” the Guidance provides:

Generally, permit renewals should be treated and analyzed as if they were facility permits, since permit renewal is, by definition, an occasion to review the overall operations of a permitted facility and make any necessary changes. Generally, permit renewals are not issued without public notice and an opportunity for the public to challenge the propriety of granting a renewal under the relevant environmental laws and regulations.<sup>66</sup>

The potential legal and management impact of the Guidance is enormous because it is clearly relevant to permit renewals. Consequently, under the Guidance, disparate impact claims may be brought directly in federal court long after permits have been issued. Jeopardizing existing permits by giving retroactive reach to environmental justice claims is likely to cause considerable reluctance in related capital investment decisions. Although unfortunate, a likely result is the abandonment of otherwise beneficial economic development in the same minority and low-income communities that Title VI was intended to benefit.<sup>67</sup> In fact, Detroit Mayor Dennis Archer is pushing to scale back federal involvement in environmental justice cases because he wants to attract industry to minority neighborhoods.<sup>68</sup> Press reports indicate that some manufacturers are avoiding black areas because of the interim guidance.<sup>69</sup>

#### IX. THE EPA GUIDANCE IN ACTION: THE *SHINTECH* AND *SELECT STEEL* DECISIONS

The “minority community economic development be damned” approach is illustrated by the EPA’s *Shintech* decision in February 1998.<sup>70</sup>

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<sup>66</sup> *Id.* at 8.

<sup>67</sup> See Henry Payne, ‘Environmental Justice,’ Kills Jobs for the Poor, WALL ST. J., Sept. 16, 1997, at A22.

<sup>68</sup> See Lynette Clemetson, *A Green Bottom Line*, NEWSWEEK, Nov. 2, 1998, at 53.

<sup>69</sup> See Blumner, *supra* note 19.

<sup>70</sup> See United States Environmental Protection Agency, In re: Shintech Inc., Order Responding to Petitioners’ Requests That the Administrator Object to Issuance of State Operating Permits, Permit Nos. 2466-VO, 2467-VO, 2468-VO available at <<http://www.epa.gov/rgytgrnj/programs/artd/air/title5/t5memos/shin1997.pdf>> [hereinafter *Shintech*].

This case illustrated that a permit already granted by Louisiana's Department of Environmental Quality could be delayed.<sup>71</sup> The stated reason was that polluting industries locate in minority areas because their residents are powerless to stop them. The action was taken despite local NAACP polls that showed that seventy-three percent of the black residents of Convent favored the plant location.<sup>72</sup> According to a lawyer representing town residents, the EPA and opposing nonresident activists also ignored the favorable opinions of all the locally elected black officials.<sup>73</sup> The community residents were excited because the average wage paid by Shintech was \$12.00 to \$15.00 per hour compared to the prevailing community wages of \$6.00 per hour.<sup>74</sup> Shortly after the EPA's decision, Shintech abandoned the project and moved to another location.<sup>75</sup>

The *Shintech* decision has generated considerable criticism from governors, mayors, and chambers of commerce because it is viewed as failing to follow the interim guidance by taking into account the demonstrated economic benefits of the facility for the community.<sup>76</sup> Sadly "when government actions are driven by public perception and pressure groups, those actions generally are responding to middle class concerns and ignoring the problems of the poor."<sup>77</sup>

A result favorable to industry was handed down in an October 30, 1998, decision concerning Select Steel Corporation.<sup>78</sup> In *Select Steel*, the EPA's Office of Civil Rights carefully followed the five-step framework previously discussed.<sup>79</sup> The private complaint charged that the Michigan Department of Environment Quality's permit for a steel recycling mill would lead to a discriminatory, disparate impact on minority residents in Genesee County.<sup>80</sup> The EPA followed the interim guidance's framework

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<sup>71</sup> See *id.* at 21.

<sup>72</sup> See Payne, *supra* note 67.

<sup>73</sup> See *id.*

<sup>74</sup> See *id.*

<sup>75</sup> See Vicki Ferstel, *Environmental Justice Under Scrutiny*, BATON ROUGE ADV., Feb. 7, 2000, at 1B.

<sup>76</sup> See John H. Cushman Jr., *Pollution Policy is Unfair Burden, States Tell E.P.A.*, N.Y. TIMES, May 10, 1998, at Sect. 1, Page 1, Col. 6.

<sup>77</sup> Cross, *supra* note 1 at 157.

<sup>78</sup> See Office of Civil Rights, United States Environmental Protection Agency, *Investigative Report for Title VI Administrative Complaint File No. 5R-98-R5 (Select Steel Complaint)*, available at <<http://www.epa.gov/reg5oopa/pdf/selsteel.pdf>> [hereinafter *Select Steel*].

<sup>79</sup> See *supra* text accompanying note 60.

<sup>80</sup> See *Select Steel*, *supra* note 78 at 1.

by determining the affected population,<sup>81</sup> determining the demographics of the affected population,<sup>82</sup> determining the universe of the facilities and the total affected population, and conducting a disparate impact analysis.<sup>83</sup> The EPA found that there was no affected population that suffered “adverse” impacts within the meaning of Title VI.<sup>84</sup> The EPA dismissed the private complaint.<sup>85</sup> The decision was obviously influenced by the Michigan Department of Environmental Quality’s careful investigation of the permit application that generally followed the EPA’s guidance. The decision signals that a permit applicant that initially applies the interim guidance’s five-step approach in preparing the application will likely receive a reasoned response from the EPA.

#### X. MANAGING ENVIRONMENTAL JUSTICE ISSUES

Taken together, the president’s executive order, the philosophy of the *Chester* case recognizing a private cause of action, the EPA’s interim guidance for investigating Title VI private administrative complaints challenging permits, and the EPA’s application of the Guidance foretell an explosion of regulatory and judicial activity in site permitting and renewals. All parties involved, including managers, controllers, investors, creditors, and auditors would be wise to consider the impact of these developments. These developing concerns must be carefully managed. First, the five-step framework established by the interim guidance and the EPA decisions in *Shintech* and *Select Steel* provide helpful guidance. Recall that the EPA decision in *Select Steel* complimented the Michigan state agency for essentially following the interim guidance. So the following, at a minimum, should be accomplished prior to requesting a permit:

- An evaluation of the population of the city and county surrounding the property in question to determine the racial and ethnic composition that will be affected by the permit.
- A survey and evaluation of other plant sites and facility permits in the city and county.

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<sup>81</sup> See *id.* at 12.

<sup>82</sup> See *id.*

<sup>83</sup> See *id.*

<sup>84</sup> See *id.* at 25-27.

<sup>85</sup> See *id.* at 40.

- An evaluation of the impact of those facilities and permits on the protected classes of race, color, national origin, or low-income populations; and,
- A disparate impact analysis to determine whether protected persons affected by the new facility will suffer a disparate impact and whether the impact is significant.

Even if disparate impact is found, bear in mind that the permit may still be “justified” based on a legitimate, substantial interest of the recipient.<sup>86</sup> Factors that may be considered are the seriousness of the disparate impact, whether the permit is a renewal (with demonstrated benefits), or, perhaps most importantly, whether the articulated benefits can be expected to assist the minority community.<sup>87</sup> Surely, as Mayor Dennis Archer advocates, jobs and tax revenues can be considered a substantial benefit.<sup>88</sup>

One other very practical concern that is not often addressed is how to educate the affected community about the facility and its impact on them.<sup>89</sup> Many applicants for permits allow activists with no connection to the community to capture the issue and dominate the discussion.<sup>90</sup> “Environmental activists tend to be white, middle-aged, middle-class professionals - not young, blue collar workers or blacks.”<sup>91</sup> They often do not reflect the concerns of the poor minority residents. How then do you beat the activists to the hearts and minds of citizens of the affected community? One often overlooked way is to utilize Section 101 of the National Environmental Policy Act of 1969 (“NEPA”).<sup>92</sup> The section focuses on “productive harmony” as the goal of federal actions, including “social, economic, and other requirements of present and future generations of Americans.”<sup>93</sup> The section advocates the importance of citizen participation and perspective through an interactive, integrated process to improve final decisions, and discovering the “widest range of beneficial uses of the environment.”<sup>94</sup> A way to preempt and manage intrusion has been developed by the environmental consulting firm of

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<sup>86</sup> See INTERIM GUIDANCE, *supra* note 27 at 12.

<sup>87</sup> See *id.*

<sup>88</sup> See Clemetson, *supra* note 68.

<sup>89</sup> See Cross, *supra* note 1 at 155.

<sup>90</sup> See *id.*

<sup>91</sup> See *id.*

<sup>92</sup> 42 U.S.C. §4321 (1994).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

James Kent and Associates of Aspen, Colorado.<sup>95</sup> By going into the community and informally identifying the leaders and disruptive issues prior to the permitting process, the firm helps its clients avoid the kind of activist interference that evolved in the *Shintech* case.<sup>96</sup>

Pre-permit application contact with community members provides opportunities to integrate the project successfully with local leaders and networks.<sup>97</sup> The community contacts allow the permit applicant to institute “issue tracking” mechanisms so citizens can understand how their interests are being addressed, thereby building public support for the project and focusing decision making on the informed interests of the community.<sup>98</sup> Recognizing the values of the local community allows for the social and physical environment to be linked together into a plan that will accommodate their interests and achieve the “productive harmony” contemplated by section 101 of the Act.<sup>99</sup> Such action will signal to the regulators that the permit applicant is accommodating the “community interests” and, as in the *Select Steel* case, is likely to receive a favorable response from the regulators.<sup>100</sup>

Some might express concern about the costs associated with initially following the five-step framework of the interim guidance<sup>101</sup> or the section 101 citizen participation advocated by the Kent firm.<sup>102</sup> The alternative, however, of a contested permit surely is much more costly in terms of money, personnel, and resources. The funds expended on pre-permit management is money well-spent. In addition, business decision makers will find that community support makes for a smoother transition in other, non-environmental facets of siting a facility in a new town. It is in a business’ best interest to get the community involved, and the diminution of a threat of a suit is just one of many reasons for better community involvement.

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<sup>95</sup> See Interview with James Kent and Associates of Aspen, Colorado (transcript on file with authors).

<sup>96</sup> See *id.*

<sup>97</sup> See *id.*

<sup>98</sup> See *id.*

<sup>99</sup> See *id.*

<sup>105</sup> A prominent theme in a review of the National Environmental Policy Act's effectiveness is “issue stacking.” The term refers to issues identified at the professional or community level that are catalogued, saved, and analyzed in the Environmental Impact Statement process, thereby providing many opportunities for early resolution and building community support. See Lynton Caldwell, *Beyond NEPA: Future Significance of the National Environmental Policy Act*, 22 HARVARD ENVTL. L. REV. 203, 203-209 (1998).

<sup>101</sup> See *supra* text accompanying note 60.

<sup>102</sup> See Interview, *supra* note 95.

## XI. PHILOSOPHICAL DIFFICULTIES

Another way to manage the problem might be to encourage petroleum companies to reward or compensate communities for hosting a facility such as an oil refinery. A compensation system ensures that all who benefit from the facility pay the full cost that the facility imposes on society.<sup>103</sup> However, there are philosophical difficulties with “encouraging” companies to pay communities for foisting oil refining facilities on them. First of all, such “encouragement” often translates into the legal obligation for firms to make pay-offs at some point in time for such purposes. After all, if it is sound public policy to “encourage” the petroleum industry to compensate host communities, it will reasonably be asked why this should not be formalized in law. Moreover, suppose an oil refiner refuses to do that which it is “encouraged” to do. This would promote uneven results, and the calls to require that firms live up to their compensatory duty will be overwhelming.

Secondly, and more basically, the direction of compensation is by no means clear. There is indeed a case for forcing (or “encouraging”) an oil company to make a payment to the locality. After all, operating in that vicinity will help the firm, or it would not have chosen to locate there. On the other hand, the town gains as well, or it would not welcome the company with open arms. More to the point, the people in the area benefit from this commercial immigrant. With regard to paying this “compensation,” there are three options open to the new petroleum firm: it can offer wages below, equal to, or in excess of, those already prevailing. If the oil company proffers less salary than presently being earned by the local workers, they will spurn this opportunity. Even a roughly comparable salary (with due consideration given to the non-monetary aspects of the job) will likely be insufficient to woo them away from their present employment; why leave your job for something that is not preferable in any way? Only if the wage and working conditions package is better than those already prevailing will the new corporation be able to attract a labor force. Typically, the improvement must be substantial to overcome the status quo.<sup>104</sup> Thus, if there is any compensating to be done, there is at least as good a case that the local community should be

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<sup>103</sup> See Stephen Huebner, *Are Storm Clouds Brewing On The Environmental Justice Horizon?*, CTR. FOR THE STUDY OF AMERICAN BUSINESS, Apr. 1998, at 21-22.

<sup>104</sup> As we have seen, the pay offered by Shintech was about \$15.00 per hour compared to the prevailing \$6.00 community wage.

compensating the petroleum firm; the direction of compensation should actually be reversed.

But all talk of compensation, in *either* direction stems from economic illiteracy. *All* commercial interaction, whether in the goods or labor market, is mutually beneficial in the *ex ante* sense. Both parties to a trade expect to gain from it in some form, and this is their motivation for entering into a transaction. Suppose, for example, that a housewife purchases a fish for \$4. She would not have done so if she places a value on this item of less than this amount. Assume that she values it at \$5. Then she earns a profit of \$1 on the deal. But the identical reasoning applies on the other side of the equation. The retailer would never have sold the fish at this price unless he valued it at *less* than this amount. Let us suppose that he assigned a value to it of \$3. Then he earns a profit of \$1 on the exchange. So, who should compensate whom for this sale? The entire question is ludicrous. Both gain from it.<sup>105</sup> It is the same with the location of the oil industry in the town; there is no warrant for compensation in either direction, for the market is a *mutually* beneficial institution.

Suppose, however, that there is a winner and a loser. While this cannot occur *ex ante*, it certainly could take place *ex post*. For example, suppose the seller, but not the housewife, later comes to regret his decision. That is, the price of fish rises to \$50 right after the sale at \$5 takes place, and the fish monger comes running after the housewife, demanding compensation (or a rescission of the sale). What are we to make of such a claim? It is abject nonsense, since the commercial interaction was “for keepsies” in the terminology of the playground, and not unilaterally revocable.<sup>106</sup> The bottom line here, is that it is a misunderstanding of the market to think that compensation should be “encouraged” or legally mandated just because gains from trade are made.

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<sup>105</sup> In the *ex ante* sense, that is. In the *ex post* sense, the housewife may later learn that her family had fish for lunch, and doesn't want to eat it for dinner as well. Had she known that, she would not have made the purchase for any positive price. Thus, she loses her entire expenditure. Similarly, a fish shortage might suddenly ensue, driving the market price of fish up to \$50. The seller, then, would greatly regret his precipitate sale. The *ex ante* gains from trade are always positive, necessarily so. *Ex post*, they are only usually positive, depending on the skills of the market participants.

<sup>106</sup> Similarly, it would be just as wrong to “encourage” or force, the fishmonger to return the housewife's money to her if she later came to regret her purchase, say, because her family was tired of fish. Now it might be that the seller will do this in any case, in order to keep a loyal customer, *e.g.*, for the good will involved. But it should be no part of public policy to “encourage” him to do so, and certainly not to require any such act on his part.

Gains from trade are *always* made in the free market, and by *both* sides. If compensation had to be made under such conditions, the death knell of free enterprise would begin to toll.

## XII. VOTE WITH FEET

We have seen above that, according to an NAACP poll in Louisiana, seventy-three percent of the black residents favored a new oil industry plant in their town.<sup>107</sup> Some people may object and argue that there are falsehoods in polls. Similarly, the views of black politicians welcoming Shintech may also be disparaged by left wing environmentalists<sup>108</sup> within the EPA noting that elected officials are chosen on the basis of many criteria. Therefore, their views on any one issue such as siting a plant may not be representative of those of their constituents.<sup>109</sup> But there is one indication of black acceptance of the “environmental racism” of plant location in their areas which cannot so easily be dismissed: “voting with one’s feet.”

Consider again the fact that black response to hazardous material sittings has been to move *toward* these locations *after* they have been set up.<sup>110</sup> This shows, perhaps in a way that no other evidence can, the true

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<sup>107</sup> See Payne, *supra* note 67.

<sup>108</sup> “Left wing environmentalist” is by no means a tautology, nor, by the same token, is “free market environmentalist” an oxymoron. For instances of the latter, see Terry L. Anderson & Peter J. Hill, *Property Rights as a Common Pool Resource, in BUREAUCRACY VS. ENVIRONMENT: THE ENVIRONMENTAL COSTS OF BUREAUCRATIC GOVERNANCE* (John Baden and Richard L. Stroup, eds., Ann Arbor: University of Michigan Press 1981); TERRY L. ANDERSON & DONALD R. LEAL, *FREE MARKET ENVIRONMENTALISM* (San Francisco: Pacific Research Institute 1991).

<sup>109</sup> It is interesting to compare the dollar vote of the marketplace with the ballot box vote of the political system in this regard. In the latter, “consumers” are allowed to express themselves only once every two or four years; in the former, every day. In the political system, the choice is limited to a “package deal.” One must vote for Clinton or Bush overall, for example, and cannot pick Clinton on monetary, trade and farm policy, and Bush on labor, taxes and “ethics.” In very sharp contrast, in the economic market it is possible to focus one’s vote. This may be done so narrowly as to distinguish between colors and brands of cars and ties, for example. For the case that voters are not at all akin to consumers, examine the claim of the Public Choice School. See JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (Ann Arbor: University of Michigan 1971); WALTER BLOCK & THOMAS DILORENZO, *A CRITIQUE OF THE PUBLIC CHOICE THEORY OF THE STATE* (forthcoming).

<sup>110</sup> See Thomas Lambert & Christopher Boerner, *Environmental Inequity: Economic Causes, Economic Solutions*, 14 YALE J. REG. 195 (Winter 1997).

evaluation on the part of poor blacks of these plant locations; it is one of enthusiastic approbation.

It was no coincidence that there was only one-way Jewish traffic with regard to Nazi Germany in the late 1930s; no Jews wanted to enter, all wanted to leave. Similarly, immigration in the 1950s was to the U.S. and from Cuba, not the other way around. Likewise, the movement across the Berlin Wall was from East to West, not from West to East.<sup>111</sup> Another indication of where life was better concerned blacks in the U.S. south during the Jim Crow decades. Very few moved from Detroit, Chicago, New York and Philadelphia to Alabama, Mississippi and Arkansas; the overwhelming majority moved in the opposite direction. The point is, when people are free to migrate, can telephone or write encouraging messages to their friends and family still “back home,” and the migration continues, this is some of the strongest evidence we have as social scientists that geographical relocation is an improvement.<sup>112</sup>

The fact that poor and black people are attracted to the higher paying jobs in the petroleum industry is very strong evidence that they regard the package of slightly dirtier air and higher wages as preferable to the slightly cleaner air and lower wages back where they came from. Nothing could more dramatically indicate that in the eyes of ostensible “victims” of environmental racism, this was a good thing. In effect the blacks are saying, “if this is environmental racism, we want more of it.”

### XIII. PATERNALISM

However, these arguments are not good enough for the EPA and others who complain about “environmental racism.” For not only are they

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<sup>111</sup> On the importance of voluntary migration patterns as an indication of the underlying social welfare involved, see THOMAS SOWELL, *MIGRATIONS AND CULTURES: A WORLD VIEW* (New York: Basic Books, 1996).

<sup>112</sup> Very few people will question the fact the Jews were better off away from the Nazis, Cubans escaping Castro, Germans out from under the yoke of the Communists, and blacks free of Jim Crow restrictions. But the same analysis can be applied to several other much more controversial cases. For example, black migration patterns were *toward* the Republic of South Africa in pre-Mandela days. This suggests that as bad as the white apartheid regime was for these peoples, it was an improvement over the neighboring black run countries. Similarly, the migration from the countryside to the cities during the Industrial Revolution indicates that these changes constituted an *improvement* in the lives of the poor, not a retrogression. On this latter case, see *CAPITALISM AND THE HISTORIANS* (F. A. Hayek, ed., Chicago: The University of Chicago Press 1954) (includes essays by T. S. Ashton, L. M. Hacker, W. H. Hutt, B. de Jouvenel).

left wing environmentalists, they are paternalists as well — a poisonous combination.

What is paternalism? It is the view that the elites<sup>113</sup> know better what benefits the people (particularly the poor and blacks) than do they themselves. Since the elites know better, they also adopt the right to impose their vision on these people “for their own good.” Nowhere is this mind set more clearly articulated than in the debate now raging over social security.<sup>114</sup> The underlying premise of this program is that the people have too high a rate of time preference (or are too stupid) to be able to save for their old age. Therefore, the government is justified in forcing them to do “in their own interest” what they (perversely) do not now believe to be in their own interest.<sup>115</sup>

For example, “...there is some justification for the government to mandate, as the Chilean government does in its private system, sufficient saving during working years so that most people will have a privately provided old age income that exceeds the designated income floor.”<sup>116</sup> The minor objection to Barro is that it is somewhat misleading to call the Chilean system “private” in that it stems from the barrel of the government’s gun.<sup>117</sup> A more serious one is that it implies that unless savings “exceeds the designated income floor,” the government will step in with a welfare program (e.g., rob the parsimonious Peter to pay the spendthrift Paul). But why should the government engage in massive theft from the more thrifty? Another difficulty has to do with the rate of time preference. Why do the paternalists of the world assume that one time preference is better than another, and that the government can unerringly hit upon the “correct” one. Certainly, no reasons are given in support of this curious contention.

Perhaps the most serious objection of all to paternalism, at least from the point of view of its adherents, is that this doctrine is logically incompatible with our democratic institutions. And this applies to all paternalism, whether concerned with child labor, minimum wages,

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<sup>113</sup> See THOMAS SOWELL, *THE VISION OF THE ANOINTED* (New York: Basic Books 1995) (calling the elites “the anointed”).

<sup>114</sup> See Robert J. Barro, *Don’t Tinker with Social Security. Reinvent It*, 4 *HOOVER DIGEST* 11 (1998).

<sup>115</sup> See *id.*

<sup>116</sup> *Id.*

<sup>117</sup> Try not saving as much as this government thinks is good for you and see what happens. To be sure, it is reasonable to distinguish between a program imposed by the government and one run by it, but the former is not private and the latter public. Both are within the purview of the government.

maximum hours, savings or, in the present case, “environmental racism.” If there are people so stupid, so childlike, so unsophisticated, so unworldly, so simple-minded, so credulous, so unwary, that their savings or geographical locational decisions cannot be relied upon, then why and how can they be entrusted with the vote? Why should we not, according to this very mischievous argument, take away the suffrage from all blacks, all poor people, and all those whose savings rate is not to the liking of our rulers? Needless to say, down this path lies totalitarianism and fascism. All men of good will, of necessity, would have to pull back from this logical abyss with horror. But then the same may be said of the “environmental racism” which is an integral part of this perspective.

#### XIV. CONCLUSION

But we have not yet plumbed the depths of this philosophy. So far we have only scratched the surface, showing how “environmental racism” law is a legal and administrative nightmare, will harm its supposed beneficiaries, constitutes a “taking” against the petroleum industry,<sup>118</sup> attacks private property rights, and is paternalistic. It is now time to take off the gloves and challenge the underpinnings of the EPA’s version of “environmental justice” by taking a people friendly, economically responsible, and environmentally concerned approach to the siting of facilities.

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<sup>118</sup> See generally Epstein, Richard A., Takings: Private Property and the Power of Eminent Domain, Harvard University Press, Cambridge, Massachusetts and London, England, 1985.