

The EPA Needs a Workable Environmental Justice Protocol*

Jerome Balter†

I. INTRODUCTION	357
II. EPA AND PADEP ACTIVITIES	359
III. THE LAW OF ENVIRONMENTAL JUSTICE	359
IV. CHESTER RESIDENTS' CIVIL RIGHTS STRATEGY.....	361
V. PRESIDENTIAL EXECUTIVE ORDER 12,898	363
VI. CRITIQUE OF THE EPA'S INTERIM GUIDANCE.....	364
VII. THE EPA WAFFLES ON TITLE VI.....	366
VIII. A SUBSTITUTE: THE ENVIRONMENTAL JUSTICE PROTOCOL	367
IX. CONCLUSION	368
APPENDIX. ENVIRONMENTAL JUSTICE PROTOCOL	370

I. INTRODUCTION

The City of Chester, Pennsylvania, is a victim of environmental injustice. It has been a victim for at least ten years and the environmental injustice continues. The United States Environmental Protection Agency (EPA) has the legal responsibility to provide the means for overcoming this injustice.

The City of Chester has a population of 42,000.¹ Sixty-five percent of the residents are African-American and most are in low income families.² Delaware County, Pennsylvania, outside of Chester, has 500,000 residents, most in middle to high income families, and ninety-four percent are white.³

During the ten-year period from 1987 to 1996, the Pennsylvania Department of Environmental Protection (PaDEP) granted five waste facility permits for sites in Chester and two waste facility permits for

* Submitted by the Public Interest Law Center of Philadelphia.

† Director of the Environmental Law Project.

1. See Morgan Kelley, *The History of Chester* (visited May 10, 1999) <<http://www.penweb.org/chester/history/html>>; U.S. Census Bureau, *1990 U.S. Census Data, Chester City, Pa.* (visited May 10, 1999) <<http://www.census.gov>>.

2. See Chester Residents Concerned for Quality Living (CRCQL) & Campus Coalition Concerning Chester (C-4), *Environmental Racism in Chester* (visited May 10, 1999) <<http://www.penweb.org/chester>> [hereinafter *Environmental Racism*]; U.S. Census Bureau, *1990 U.S. Census Data, Chester City, Pa.* (visited May 10, 1999) <<http://www.census.gov>>.

3. See sources cited *supra* note 2.

sites in the rest of Delaware County.⁴ The five permits in Chester were for facilities processing over 2,000,000 tons of waste per year.⁵ These included one permit for the largest infectious waste processor in the United States⁶ and one for the fourth largest municipal waste incinerator in the United States.⁷ In contrast, the two permits for sites in Delaware County outside Chester were for facilities which processed a total of 1400 tons per year.⁸

In 1993, when the PaDEP issued the permit for an infectious waste facility to be sited in Chester, local residents organized the Chester Residents Concerned for Quality Living (CRCQL) to struggle against existing environmental pollution and to prevent the permitting of any more pollution generating facilities.⁹ Chester community opposition included picket lines, marches, sit-ins, meetings and various other forms of protest.¹⁰ Opposition also included the use of legal action to stop violations of environmental emission limitations by existing facilities and legal action to enforce civil rights laws.¹¹

4. See *Environmental Racism*, *supra* note 2; Pennsylvania Dep't of Env'tl. Protection (PaDEP), *Municipal and Residual Waste* (visited May 10, 1999) <<http://www.dep.state.pa.us/>>.

5. See *Environmental Racism*, *supra* note 2. The five waste facility permits issued by PaDEP are as follows:

LCA Transfer	(1987)	500,000 tons/year
Westinghouse, Inc.	(1988)	840,000 tons/year
Abbonizio Recycle	(1988)	375,000 tons/year
Thermal Pure Systems	(1993)	148,000 tons/year
Soil Remediation System	(1995)	280,000 tons/year
Total		2,143,000 tons/year

See id.

6. Thermal Pure Systems' Infectious Waste Processing by Autoclave process, permitted for 148,000 tons/year. *See id.*

7. Westinghouse's Incinerator, permitted for 840,000 tons/year. *See id.*

8. *See id.* The two waste facilities permits issued by PaDEP in the Delaware County outside the City of Chester are as follows:

Riddle Memorial Hospital (incinerator)	(1989)	700 tons/year
Taylor Hospital (incinerator)	(1990)	700 tons/year
Total		1,400 tons/year

See id.; PaDEP, *supra* note 4.

9. The Bylaws of Chester Residents Concerned for Quality of Living (CRCQL) (on file with author) declares that the organization's purpose is:

To safeguard the right to live in an environmentally safe community, to educate the community on the risks associated with being exposed to environmentally unsound industries. To educate and organize the community on environmental equity and to establish a way to environmental justice.

10. See Heather Kurtz, *Environmental Injustice in Chester, PA* (visited May 10, 1999) <http://penweb.org/chester/kurtz_article.html>.

11. See *Chester Residents Concerned for Quality of Living v. Pennsylvania Dep't of Env'tl. Protection*, 668 A.2d 110, 111. (Pa. 1995).

The Environmental Law Project of the Public Interest Law Center of Philadelphia has represented CRCQL in these activities since 1993.

II. EPA AND PADEP ACTIVITIES

EPA's Region III headquarters, located in Philadelphia, twenty miles north of Chester, was induced to participate in CRCQL's struggle for environmental justice. The EPA Regional Director ordered a study of the environmental risks being suffered by Chester's population.¹² In December 1994, the EPA's report of the study declared:

Though we may be uncertain about the exact level of risk posed by the air pollution in Chester, we believe that our calculated risk numbers paint a clear picture. That is, Chester residents probably run a higher-than-average chance of developing cancer and non-cancer health effects due to environmental risk factors. Therefore, we would like to do all we can to reduce current air emissions and caution against any new sources of air emissions in Chester.¹³

Despite the EPA's recommendations, the opposition of the Chester residents, the broad support which CRCQL had received from environmental and civil rights organizations, and the editorial support of Chester and Philadelphia newspapers, the PaDEP in June 1995 granted another waste processing facility permit for a site in Chester.¹⁴ The permit was issued to Soil Remediation System (SRS).¹⁵ The permit allowed for the processing of 250,000 tons per year of petroleum contaminated soil.¹⁶ The issuance of the SRS permit provided clear evidence that PaDEP would not revise its permit application review program to prevent further environmental injustice. CRCQL had to devise a new strategy.

III. THE LAW OF ENVIRONMENTAL JUSTICE

Though the issue of environmental justice had been the subject of innumerable studies and law review articles, by the mid-1990s

12. See U.S. EPA, CUMULATIVE RISK STUDY FOR THE CITY OF CHESTER, PA. (1994); Kelvyn Anderson, *Chester's on the Agenda*, DELAWARE COUNTY DAILY TIMES, June 8, 1994, at 4. In May 1994, EPA Region III, under Administrator Peter Kostmayer, announced that it was undertaking a Cumulative Risk Study for the City of Chester, Pa. See *id.*

13. U.S. EPA, CHESTER ENVIRONMENTAL RISK STUDY FINDINGS AND RECOMMENDATIONS (1994).

14. See Kurtz, *supra* note 10. The Permit was issued to Soil Remediation Services (SRS), Pa. DEP Waste Permit No. 301243 (June 25, 1995), Air Permit No. 23-330-103 (June 28, 1995), Revoked DEP letter (Apr. 30, 1998).

15. See Kurtz, *supra* note 10.

16. See *Environmental Racism*, *supra* note 2.

there had not been a single successful challenge of environmental injustice in the United States. The few court challenges to environmental injustice all failed because the victims were not able to prove to the court's satisfaction that the discriminatory effects they suffered were the result of intentional discriminatory actions on the part of the state or local environmental protection agencies.¹⁷

The EPA, in 1984, promulgated civil rights regulations¹⁸ to enforce Title VI of the Civil Rights Act of 1964. Title VI provides that any entity, including a state entity, which receives federal financial assistance is required to operate its programs in a manner that does not result in a discriminatory effect against minorities.¹⁹ The EPA's civil rights regulations pursuant to Title VI established an elaborate administrative procedure by which alleged victims of environmental discrimination could file civil rights complaints with the Office of Civil Rights of the EPA against any recipient of EPA financial assistance, including complaints against a state environmental protection agency such as the PaDEP.²⁰

According to EPA regulations, recipients of EPA financial assistance are required to annually agree in writing to comply with Title VI and the EPA civil rights regulations.²¹ But, as of 1995, when the PaDEP granted the SRS permit, the EPA had never completed a single investigation of any civil rights complaint, and the EPA had never investigated whether a recipient of EPA financial assistance was fulfilling its obligations to comply with the requirements of the EPA's civil rights regulations.²²

The failure of the EPA to enforce its own civil rights regulations was a clear message to state agencies that they could continue to grant permits for facilities in minority communities such as Chester and across the United States. The illegal discrimination in siting unwanted facilities became so rampant and so obvious that in

17. See, e.g., *R.I.S.E., Inc. v. Kay*, 768 F. Supp. 1144 (E.D. Va. 1991) (holding that plaintiff failed to prove that placement of a landfill in a black community was racially motivated); *East Bibb Twiggs-Neighborhood Ass'n v. Macon-Bibb County Planning & Zoning Comm'n*, 706 F. Supp. 880 (M.D. Ga. 1989) (holding there was insufficient evidence that landfill site was racially motivated); *Bean v. Southwestern Waste Management Corp.*, 482 F. Supp. 673 (S.D. Tex. 1979) (dismissing civil rights claim that selection of a site for a solid waste facility was racially motivated).

18. 40 C.F.R. §§ 7.10-7.135 (1998).

19. See Civil Rights Act of 1964, Title VI, 42 U.S.C. § 2000d (1997).

20. See 40 CFR §§ 7.10-7.135.

21. See *id.* § 7.85.

22. See Letter from Ann E. Goode, Director, Office of Civil Rights, U.S. EPA, to Jerome Balter, Director, Environmental Project, Public Interest Law Center of Philadelphia (Jan. 19, 1999) (on file with author) [hereinafter Goode Letter 1].

February, 1994, the President found it necessary to publish Executive Order 12,898, which mandated federal agencies to take action to stop the environmental injustice against minorities and low-income communities.²³ The EPA, which should have been the federal government's principal agency in developing programs to overcome environmental injustice, was poorly prepared for the task. The EPA's Title VI civil rights regulations, promulgated in 1984, were merely procedural in nature and failed to provide guidance to the EPA, or to the states, on how to determine the merits of a permit application with respect to civil rights.²⁴ The EPA's failure to establish a civil rights guidance protocol may explain why the EPA had never adjudicated an environmental justice complaint.

IV. CHESTER RESIDENTS' CIVIL RIGHTS STRATEGY

When the PaDEP, in 1995, issued the waste permit to SRS, CRCQL debated the legal strategy to oppose the permit. First, they considered filing an administrative civil rights complaint with the EPA but rejected that approach when they realized that the EPA had not decided the merits of a single civil rights complaint in its entire history.²⁵ Moreover, CRCQL learned that the EPA had never attempted to enforce its own civil rights regulations against recipients of EPA funds, such as the PaDEP.²⁶

These considerations convinced CRCQL that it would be preferable to bring its own civil rights action against the PaDEP to determine whether victims of environmental discrimination had a right to enforce administrative regulations pursuant to Title VI. Subsequently, in June, 1996, CRCQL filed its Civil Rights Title VI complaint against the PaDEP, the first such action in the country.²⁷

CRCQL's legal strategy was to focus its case on the PaDEP's violation of the EPA civil rights regulations.²⁸ While previous cases were based on the same claims, it was the inability of earlier environmental justice plaintiffs to prove discriminatory intent that

23. Exec. Order No. 12,898, 59 Fed. Reg. 7,629 (1994).

24. See 40 C.F.R. §§ 7.10-7.135 (1998).

25. See *id.* § 7.85.

26. See *id.*; Goode Letter 1, *supra* note 22.

27. See *Chester Residents Concerned for Quality Living (CRCQL) v. Seif*, 944 F. Supp. 413 (E.D. Pa. 1996), *rev'd*, 132 F.3d 925 (3d Cir. 1997), *cert. granted*, 118 S. Ct. 2296 (1998), *vacated* 119 S. Ct. 22 (1998).

28. 40 CFR § 7.35(b) provides in relevant part as follows: "recipient [of federal financial assistance] shall not use criteria or methods of administering its program which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex."

resulted in defeat.²⁹ In its complaint, CRCQL provided extensive evidence of the concentration of waste facilities in Chester in relation to the waste facilities in the rest of Delaware County.³⁰ The complaint, using Pennsylvania Health Department statistics, compared the poor public health of the people of Chester to the better than average public health of the residents of Delaware County outside Chester.³¹ Chester's age-adjusted mortality rate was forty percent higher and its infant mortality rate was 100% higher.³²

Despite these considerations, the Federal District Court dismissed CRCQL's lawsuit on the ground that the victims of discrimination had no standing to enforce the EPA's civil rights regulations.³³ CRCQL appealed the decision and the EPA filed a brief in support of the CRCQL position.³⁴ The court of appeals unanimously reversed the district court's holding and granted the victims of environmental discrimination, for the first time, the right to enforce the EPA's civil rights regulations, which did not require proof of discriminatory intent.³⁵ It appeared that a new era of judicial activity against environmental injustice had begun.

The elation, however, was short-lived. In June 1998, the Supreme Court granted the PaDEP's petition for a writ of certiorari, and in August, 1998, before briefs were submitted, the Supreme Court vacated the case.³⁶

The revocation of the SRS permit application denied CRCQL the opportunity to determine the nature of proof that federal courts would require to prove discriminatory effect in actions to enforce the EPA's civil rights regulations.³⁷ This was particularly important because, at the time CRCQL had filed its complaint, the EPA had not established any guidance for adjudicating administrative complaints in respect to the EPA's civil rights regulations.

29. See cases cited *supra* note 17.

30. See *CRCQL*, 944 F. Supp. at 416.

31. See Kelley, *supra* note 1.

32. See *id.*

33. See *CRCQL*, 944 F. Supp. at 414.

34. *CRCQL v. Seif*, 132 F.3d. 925, 927 (3d. Cir. 1997), *cert. granted*, 118 S. Ct. 2296 (1998), *vacated*, 119 S. Ct. 22 (1998).

35. See *id.*

36. *Seif v. CRCQL*, 119 S. Ct. 22 (1998) (memorandum opinion).

37. See *id.* The Supreme Court, on August 18, 1998 entered an order in *Seif v. CRCQL* which declared the judgment of the U.S. Court of Appeals for the Third Circuit "vacated, and the case is remanded to the United States court of Appeals for the Third Circuit with instructions to dismiss." See *id.* Subsequently, on October 14, 1998, the Third Circuit issued an order dismissing the appeal in *CRCQL v Seif*, #97-1125 (3d Cir., Oct. 14, 1998).

V. PRESIDENTIAL EXECUTIVE ORDER 12,898

The EPA's benign neglect of the problem of environmental injustice, and its failure to enforce its own civil rights regulations, was finally challenged by the President's Executive Order of February 1994.³⁸ The first manifestation of changes at the EPA occurred in April 1997, when the EPA filed an amicus brief with the United States Court of Appeals for the Third Circuit in support of CRCQL's appeal; it appears that EPA was anxious to find a non-government means for vindicating Title VI environmental rights.

A few months later, in July 1997, the EPA was confronted by an administrative civil rights complaint alleging that the Louisiana Department of Environmental Quality (LaDEQ) had violated the EPA Title VI civil rights regulations.³⁹ The LaDEQ granted a permit to Shintech, Inc. for the construction of a polyvinyl chloride manufacturing facility to be sited in an African-American community in St. James Parish, Louisiana (population 20,000).⁴⁰ The struggle for EPA approval of the Shintech permit was intense because the proposed facility was estimated to represent an investment of \$700 million.⁴¹ As a result, Governor Mike Foster of Louisiana had taken a personal interest in helping Shintech maintain its permit.⁴²

Though the EPA had not yet resolved a single civil rights complaint, and though the EPA had not yet published a draft of its guidance for determining when a state permit for a facility would violate the EPA's civil rights regulations, the EPA nevertheless undertook an investigation of the Shintech permit civil rights complaint.⁴³

38. See Exec. Order No. 12,898, 59 Fed. Reg. 7,629 (1994). The Presidential Executive Order No. 12,898, published February 11, 1994, directed federal agencies to make the achievement of environmental justice for minority populations and low-income populations part of each agency's mission. See *id.*

39. See Civil Rights Administrative Complaint to EPA, filed by St. James Citizens for Jobs & the Env't et. al., (No. 4R-97-R6) (July 16, 1997) (on file with journal) [hereinafter Administrative Complaint].

40. See *id.*; U.S. Census Bureau, 1990 U.S. Census Data, St. James Parish, La. (This data can be downloaded from <<http://www.census.gov>> (visited May 10, 1999)). The complaint alleged violations of Civil Rights Title VI regulations by the LaDEQ based on an LaDEQ grant of a permit to Shintech, Inc. for the construction of a polyvinyl chloride manufacturing facility in the minority area of St. James Parish, La. See Administrative Complaint, *supra* note 39.

41. Mike Dunne, *DEQ Ok'd to Decide Permits for Proposed Shintech Plant*, BATON ROUGE ADVOCATE, Apr. 2, 1999, at 2B.

42. Frank Esposito, *Bias Hearing Further Stalls Shintech Plant*, PLASTICS NEWS, Sept. 7, 1998, at 4.

43. See U.S. EPA, INTERIM GUIDANCE FOR INVESTIGATING TITLE VI ADMINISTRATIVE COMPLAINTS CHALLENGING PERMITS (Feb. 4, 1998) (on file with author) [hereinafter INTERIM GUIDANCE].

The EPA's investigation attempted to determine the cumulative health risk due to the proposed facility in conjunction with the health risks from existing facilities in the area of the proposed Shintech site.⁴⁴ During its investigation, in January 1998, the EPA published a Draft Demographics Information Report of its Shintech investigation which was more than seventy-five pages of text, attachments, figures, tables and distribution charts.⁴⁵ The EPA also requested interested individuals to submit comments as to the nature and adequacy of EPA's investigation.⁴⁶

In February 1998, while the EPA's investigation of the Shintech permit was still in progress, the EPA published its *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Interim Guidance)*.⁴⁷ The *Interim Guidance* appeared to be very similar to the methodology that the EPA had been employing in its investigation of the *Shintech* permit.⁴⁸ The EPA requested public comments on the *Interim Guidance* and convened a meeting of its newly organized Implementation Advisory Committee (IAC) in May 1998 in Arlington, Virginia.⁴⁹ The IAC consisted of twenty-three stakeholders from industry, state governments, federal government, environmental activists and community leaders who were assembled to assist the EPA to develop a final guidance for evaluating complaints of civil rights violations.⁵⁰

VI. CRITIQUE OF THE EPA'S INTERIM GUIDANCE

The Public Interest Law Center of Philadelphia (Law Center) attended the IAC meeting.⁵¹ Prior to the IAC meeting, the Law Center had submitted its comments with respect to the *Interim*

44. See U.S. EPA, DRAFT DEMOGRAPHICS INFORMATION REPORT (Jan. 1998) (regarding the Shintech Permit) (on file with author) [hereinafter DEMOGRAPHICS INFORMATION].

45. See *id.*

46. See *id.*

47. See INTERIM GUIDANCE, *supra* note 43.

48. Compare INTERIM GUIDANCE, *supra* note 43, with DEMOGRAPHICS INFORMATION, *supra* note 44.

49. See INTERIM GUIDANCE, *supra* note 43. Comments on the Interim Guidance were to be submitted to the EPA by May 6, 1998. See *id.*

50. See U.S. EPA, Office of Civil Rights, Announcement of the First Meeting of the Nat'l Advisory Council for Env'tl. Policy & Tech., Title VI Implementation Advisory Comm. (May 18-19, 1998) (on file with author). On May 18-19, 1998, the Title VI IAC held its first meeting. See *id.* The original IAC had a total of twenty-three stakeholders representing state agencies, local government agencies, industry, academia and non-governmental grass roots organizations. Elliot Laws, Esquire has been chairperson of the IAC since it came into existence. See *id.*

51. See *id.*

Guidance.⁵² Those comments noted that the *Interim Guidance* was extremely complex and included many factors about which experts could disagree endlessly.⁵³ The Law Center noted that the EPA's inability to resolve any civil rights complaint was evidence of the impracticability of the *Interim Guidance* methodology.⁵⁴ The Law Center suggested that the *Interim Guidance* could become a successor to Superfund litigation, with resources flowing to experts and lawyers, but failing to provide meaningful resolution of civil rights or environmental justice complaints.⁵⁵

In its comments to EPA's *Interim Guidance* and in its comments at the May 1998 meeting of the IAC, the Law Center noted that the *Interim Guidance* had failed to assign any role or responsibility to state environmental protection agencies with respect to civil rights laws and regulations.⁵⁶ Though states are required to comply with Title VI when they accept EPA federal financial assistance, the EPA has never attempted to enforce these federal/state civil rights contracts.⁵⁷ The Law Center, therefore, suggested that every state environmental protection agency be required to include in its permit application review program a protocol for determining compliance with Title VI, just as state agencies now include in their permit application review a protocol for determining compliance with federal and state environmental protection laws and regulations.⁵⁸

The Law Center's predictions about the EPA's *Interim Guidance* have been borne out by experience. The EPA devoted fourteen months to its investigation of the Shintech permit, but never resolved the problem.⁵⁹ In September 1998, Shintech decided to give up the struggle for the St. James site and made arrangements for the production of polyvinyl chloride at a site outside St. James Parish.⁶⁰ That victory for the people of St. James Parish was, unfortunately, dimmed by a decision of the Louisiana Supreme Court, which issued an Order at the urging of Governor Mike Foster that severely limited the range of organizations that can be served by law clinics in

52. See Letter from Jerome Balter, Director, Environmental Project, Public Interest Law Center of Philadelphia, to Ann E. Goode, Director, Office of Civil Rights, U.S. EPA (Apr. 23, 1998) (on file with author) [hereinafter Balter Letter].

53. See *id.*

54. See *id.*

55. See *id.*

56. See *id.*

57. See Goode Letter 1, *supra* note 22.

58. See Balter Letter, *supra* note 52, at 2.

59. See Mark Schleitstein, *Shintech Taking its Plant Upriver*, NEW ORLEANS TIMES-PICAYUNE, Sept. 18, 1998, at A1.

60. See *id.*

Louisiana.⁶¹ The Order affects the Tulane Environmental Law Clinic, which had provided legal aid to the St. James Parish community in respect to the Shintech permit.⁶²

VII. THE EPA WAFFLES ON TITLE VI

In contrast to Shintech, which the EPA could not resolve in more than fourteen months, the EPA later in 1998 did resolve a civil rights complaint in under four months. It was the first and only Title VI Civil Rights complaint ever fully adjudicated by the EPA. This was the EPA's decision in the *Select Steel* case, which the EPA announced in October 1998.⁶³

The *Select Steel* case concerned an African-American community in Flint, Michigan.⁶⁴ The community filed a civil rights complaint with the EPA in June 1998 alleging that the Michigan Department of Environmental Quality (MDEQ) had violated the EPA's Title VI civil rights regulations by granting a permit to Select Steel Corporation of America to build a steel manufacturing plant near their minority community.⁶⁵ The EPA was under pressure from Select Steel and Michigan Governor John Engler to resolve the complaint rapidly and to resolve it in favor of MDEQ and Select Steel.⁶⁶

The EPA, disappointed by its inconclusive investigation of Shintech, was determined to do better. Within less than three months, the EPA issued a final ruling to the effect that the Select Steel permit did not violate the EPA's civil rights regulation.⁶⁷ To achieve its speedy result, the EPA abandoned all the methodology of the *Interim Guidance*. Instead of attempting a comparative cumulative risk analysis, the EPA declared there could be no racial discrimination because the permit required Select Steel to meet all air emission regulations and all ambient air quality standards.⁶⁸ Thus, it was argued, there could be no adverse health effects from the facility emissions and without adverse health effects there could be no

61. Susan Finch, *New Law Clinic Rules Hot Topic at Forum*, NEW ORLEANS TIMES-PICAYUNE, Sept. 17, 1998, at A6.

62. *See id.*

63. *See* Letter from Ann E. Goode, Director, Office of Civil Rights, U.S. EPA, to Father Schmitter, St. Francis Prayer Center (Flint, Mich.) & Russell Harding, Director, Mich. Dept. of Env'tl. Quality (Oct. 30, 1998) (on file with author) [hereinafter Goode Letter 2]. This letter can also be found at <<http://www.epa.gov/region5/steelcvr.htm>> (visited May 10, 1999).

64. *See id.*

65. *See id.*

66. *See Environmental Justice: Michigan Governor Blames EPA Policy for Company Decision to Scrap Factory Plan*, 29 ENV'T REP. (BNA) at 995-96 (Sept. 18, 1998).

67. *See* Goode Letter 2, *supra* note 63.

68. *See id.*

discrimination.⁶⁹ Indeed, the EPA resolved the civil rights complaint by equating compliance with environmental laws to compliance with Title VI of the Civil Rights Act.⁷⁰ Based on the EPA's decision in *Select Steel*, it would not matter how disparate the concentration of facilities was in minority areas; if there was no violation of environmental laws, there would not be any violation of civil rights laws. This logic was unlikely to convince the people of Flint, Michigan, the people of St. James Parish, Louisiana, or the people of Chester, Pennsylvania.

VIII. A SUBSTITUTE: THE ENVIRONMENTAL JUSTICE PROTOCOL

The EPA's *Interim Guidance* proved too complex to solve the *Shintech* case, and the EPA's abandonment of Title VI in the *Select Steel* case proved that the EPA had not yet found the means to satisfy the mandate of the President's Executive Order. A different approach is required.

At the IAC meeting in May 1998, the Law Center not only offered its criticism of the *Interim Guidance*, it also presented a substitute to the EPA's *Interim Guidance* which it has designated as an Environmental Justice Protocol (EJP).⁷¹ In distinction from the *Interim Guidance*, which is based on complex multiple risk analysis, the EJP is based on a comparative public health analysis. The EJP is based on the view that communities with substandard public health need protection from local sources of environmental pollution regardless of the cause of the substandard public health. Therefore, the EJP does not require the use of cumulative risk analysis. Moreover, since most substandard health communities are minority and low income communities, the EJP would fulfill the goals of the

69. *See id.*

70. *See* Letter from Jerome Balter, Director, Environmental Project, Public Interest Law Center of Philadelphia, to Ann E. Goode, Director, Office of Civil Rights, U.S. EPA (Nov. 12, 1998) (on file with author). Paragraph 4 of the Public Interest Law Center of Philadelphia's November 12, 1998 letter to Ann E. Goode, Director, Office of Civil Rights, EPA, reads as follows:

Apparently, EPA believes the way to determine whether polluting facilities are disproportionately sited in minority communities is to say that it doesn't matter as long as the facility meets emission and ambient standards. In effect, the EPA reads Title VI out of the analysis.

See id. at 2.

71. The Law Center's Environmental Justice Protocol was first submitted to EPA in a letter to Ann E. Goode (May 5, 1998) (on file with author). The Law Center has revised its Protocol several times since in response to comments submitted. The latest version of the Protocol is reprinted in the Appendix of this Article.

environmental health protection laws, the civil rights laws and the President's Environmental Justice Executive Order.

The EJP would require state agencies to promulgate laws, regulations or protocols that would make public health protection an explicit part, and civil rights an implicit part, of the permit application review process. Such a requirement would also reduce the need for civil rights complaints to the EPA subsequent to the issuance of permits by the states.

The EJP would use state and local health department statistics to provide stakeholders with a practical means for determining which communities are to be protected against facilities that release environmental pollutants. This approach is easier and more direct than the ultra sophisticated and costly multiple risk analysis required by the EPA's *Interim Guidance*.

The EJP would also provide residents of substandard health communities the flexibility to override a permit prohibition through the use of a referendum financed by the permit applicant.⁷² This provision recognizes that communities have a variety of short term and long term interests and protected communities should have the right to impose their views in the light of information about the status of the community's public health.

IX. CONCLUSION

Populations in minority or low-income communities generally have substandard public health and live closer to pollution releasing facilities than middle class and wealthy white communities. These populations are the victims of environmental injustice. They have a right to be protected against a "disproportionate burden of the negative human health or environmental impact of pollution."⁷³

The EPA's *Interim Guidance*, using cumulative impact risk analysis is too complex and too unpredictable to serve as a practical or fair method for advancing environmental justice.

The Environmental Justice Protocol, proposed as a substitute for the *Interim Guidance*, would provide a predictable, fair and reasonable basis for determining the populations entitled to protection from environmental hazards based on their existing substandard public health. Since the EJP is based on health data available from state health agencies it can be readily administered by a State's own

72. See *infra* Appendix, paras. 1, 7.

73. Civil Rights Act of 1964, Title VI, 42 U.S.C. § 2000d-d7 (1997); Exec. Order No. 12,898, 59 Fed. Reg. 7629 (1994).

environmental protection agency. And very importantly, the EJP has the virtue that it can be instituted without the endless research that it will take to develop a workable guidance based on cumulative impact analysis. In short, the EJP is a practical methodology that can meet the requirements of Title VI and the President's Environmental Justice Executive Order.

APPENDIX. ENVIRONMENTAL JUSTICE PROTOCOL

Public Interest Law Center of Philadelphia

INTRODUCTION

The Public Interest Law Center of Philadelphia (Law Center) herein presents a Draft of an Environmental Justice Protocol for use by the EPA and by state environmental protection agencies to determine whether proposed permit applications are in compliance with the Civil Rights Act of 1964, Title VI and with the goals of Environmental Justice.

This is a Draft. It is recognized that adjustments will be needed in response to comments and suggestions, all of which are welcome.

1. No state or local environmental protection agency which receives federal financial assistance shall grant a pollution control permit to construct or operate a new facility or to enlarge an existing facility in any Affected Area where the Public Health of the residents is determined to be Substandard; except that such prohibition may be overridden by a referendum of the residents of the Affected Area (see paragraph 7).

2. The Affected Area of a proposed new facility or of a proposed enlargement of an existing facility shall be the area within a circle of radius (____ Distance) except that the radius shall be increased so that the Affected Area contains a minimum of (____) residents. The center of the circle shall be the centroid of the property owned or leased by the permit applicant for the operation of the proposed facility.

3. The Public Health of residents of a geographical area shall be determined from the records of state or local health departments for the five (5) year period preceding the time of the permit application and the most recent records published by the U.S. Census Bureau.

4. The following factors shall be used to determine the Public Health of residents of any geographical area:

- a. Age adjusted mortality rates per 100,000 population;
- b. Age adjusted cancer mortality rates per 100,000 population
- c. Infant mortality rates per 1000 live births
- d. Low baby birth weight rate (under 2500 grams) per 1000 live births

5. Standard Public Health shall be the median of the health factors for the population of the entire State or County in which the Affected area exists.

6. The Affected Area shall be deemed to have Substandard Public Health when there is a disparity of at least (____ %) in (each, all) of the health factors in the Affected Area as compared to the Standard Public Health.

7. Residents of an Affected Area determined to be a Substandard Public Health area shall have the right to override a permit prohibition by a referendum, paid for by the permit applicant.