

ENVIRONMENTAL RACISM: THE CAUSES, CONSEQUENCES, AND COMMENDATIONS

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I. INTRODUCTION

In 1940, American companies produced one billion pounds of hazardous and toxic chemicals.¹ By 1987, this figure had multiplied to over 220 billion pounds.² People regularly encounter these poisonous chemicals in the environment, the workplace, and in the products they consume. In fact, "[i]t is likely that every single individual in the United States today has been exposed to a chemical that poses some predictable risk to well-being."³

As long as consumers continue to demand products containing "a wide array of environmentally destructive chemicals,"⁴ and industry continues to use these toxic chemicals, with no incentive to do otherwise, facilities that regularly use toxic materials and produce hazardous wastes will continue to be constructed.⁵ Consequently, deciding where to site facilities that treat, store, and dispose of these hazardous wastes poses a grave dilemma to the nation.

Because these facilities present dangers to health and have a detrimental impact on the quality of life, they are shunned by most communities. Louis Gibbs, the leader of the struggle at Love Canal in New York and the present director of the Citizens Clearinghouse for Hazardous Wastes "once characterized the nation's attitude toward hazardous wastes as 'out of sight, out of mind.'"⁶ According to Charles Lee, the Director of Research

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1. Gary Cohen, *It's Too Easy Being Green: The Gains and Losses of Earth Day*, SOC. POL'Y, Summer 1990, at 21, 23.

2. *Id.*

3. CHEMICAL CONTAMINATION AND ITS VICTIMS: MEDICAL REMEDIES, LEGAL REMEDIES, AND PUBLIC POLICY 3 (David W. Schnare & Martin T. Kutzman eds., 1989) [hereinafter CHEMICAL CONTAMINATION AND ITS VICTIMS].

4. Cohen, *supra* note 1, at 23.

5. *Id.*

6. Charles Lee, *The Integrity of Justice: Evidence of Environmental Racism*, SOJOURNERS, Feb.-Mar. 1990, at 22, 24.

for the United Church of Christ Commission for Racial Justice in New York City, however, "out of sight and out of mind" is where the poor and powerless live and work."⁷

Society prefers to believe that as long as these facilities are isolated from the general public, the problems they create will not have to be addressed. However, the dangers and hazards these facilities impose can no longer be ignored. Environmental pollutants are destroying human lives, as well as the natural resources upon which society depends. Indeed, "the vast accumulation of toxic, radioactive, and other hazardous contaminants in our air, water, and soil now threaten the very survival of our planet's ecology."⁸

The struggle for environmental protection has become a persistent and vigorous battle against all polluters. In the 1960s and 1970s, the cry for a better environment, shrilled throughout the nation. Yet, as the environmental movement gained strength, its participants were relatively few and racially homogeneous. Members of the environmental movement generally did not include those with more pressing needs. Instead, African-Americans and other minorities were struggling for social, economic, and political justice through the civil rights movement. African-Americans and other minorities such as Native Americans, Hispanic-Americans, and Asians, did not embark on a struggle against the environmental problems adversely affecting their own communities until the early 1980s.

Minority groups are now fighting for environmental protection much in the same way they fought for equal protection in education, employment, and housing. The struggle for environmental protection and social justice has become interwoven with the civil rights movement. This struggle is premised upon the claim that the right to live in an unpolluted environment belongs to all citizens.⁹

If hazardous wastes are not properly treated, stored, and disposed of, the health effects are devastating. These deadly effects have been meticulously documented in the aftermath of the unfortunate Love Canal incident. Because of the unknown

7. *Id.*

8. *Id.*

9. Robert Bullard, *Ecological Inequities and the New South: Black Communities Under Siege*, 17 J. ETHNIC STUD. 101, 101-05 (1990); Thomas Atkins, *UTNE READER*, May-June 1990, at 19 ("We must make environmental pollution a priority on our social justice agenda, along with housing, jobs, the military buildup, drugs and illiteracy.").

health risks and other dangers involved in the treatment, storage, and disposal of hazardous wastes, residents of communities located near existing or proposed sites have a strong and rational fear of the facilities' construction or continued operation. State legislatures have responded to this fear by enacting statutes to regulate the location of hazardous waste sites.¹⁰ Some of these statutes, however, have been overturned by the courts.¹¹ The serious questions posed by concerned citizens regarding proper disposal, treatment, and storage of wastes continue to persist without any foreseeable resolutions.

Despite the many risks involved, the hazardous waste disposal business is highly profitable. The industry continues to thrive on an abundance of waste generation despite increasing federal and state regulation and enforcement action. In fact, although the 1991 economy has declined and the gross national product staggers along at three to four percent a year, the waste management business is booming.¹²

According to a study conducted by Management Information Services, Inc., the waste disposal industry grossed more than seventy billion dollars in 1985 and more than one hundred billion dollars in 1989.¹³ Moreover, the hazardous waste disposal industry, in particular, demonstrated the most remarkable growth. Although this industry barely existed fifteen years ago, it grossed ten billion dollars in 1989, and its revenues are expected to double in the next three to five years.¹⁴ Further, this growth trend is expected to escalate due to this country's need to clean up "[l]eaching landfills, ruptured oil tankers, leaking wastepipes, contaminated soil, tainted groundwater, buildings full of asbestos, [and] lagoons full of toxins."¹⁵ Indeed, in today's modern society, every new toxic hazard discovered, "every new controlling regulation, every new legal tangle, has the makings of a market niche."¹⁶

10. Denise Provost, *The Massachusetts Hazardous Waste Facility Siting Act: What Impact On Municipal Power to Exclude and Regulate?* 10 B.C. ENVTL. AFF. L. REV. 715, 718-19 (1982).

11. *Id.* at 768.

12. Environmental goods and services steadily grew at 12% per year and environmental engineering and consulting has been growing at a rate of 20-30% a year. *Id.* See also, Bruce Stutz, *Cleaning Up*, The Atlantic, Oct. 1990, at 46.

13. Stutz, *supra* note 12, at 46.

14. *Id.*

15. *Id.*

16. *Id.*

Besides being a growing and profitable business, the hazardous waste disposal industry is also critical to the success of cleaning up and protecting the environment. Each year, the United States generates over 250 million metric tons of hazardous waste.¹⁷ The annual output of waste in this country is enough to fill the New Orleans Superdome more than 1,500 times. This amounts to each person in the United States generating over a ton of waste each year.¹⁸ Although approximately ten percent of that waste is "properly" disposed of, the remaining ninety percent is dumped illegally at municipal landfills, on back roads, or in sewer systems.¹⁹

Undoubtedly, hazardous waste disposal facilities are essential to protect both human health and the environment. However, the burden of housing hazardous waste facilities is not shared equally among the states. Large commercial hazardous waste sites tend to be constructed in rural communities of the southern Blackbelt.²⁰ For example, many of the large paper, chemical, and waste disposal industries, constructed in the 1970s, are located in Texas, Louisiana, South Carolina, North Carolina, and Alabama.²¹

These sites are often located in communities composed of high percentages of poor minorities.²² Many of the "uncontrolled" toxic waste sites are located in African-American and Hispanic-American communities. As a result, the minority communities surrounding hazardous waste facilities bear the brunt of most of the nation's generated hazardous waste. No concrete answers exist to explain why hazardous waste sites are disproportionately located in minority communities. Perhaps some answers can be discovered by examining the hazardous waste siting process and its political, economic, and social implications.

II. THE WARREN COUNTY SITING DECISION

Why are hazardous waste sites disproportionately located

17. Bullard, *supra* note 9, at 103.

18. *Id.*

19. *Id.*

20. U.S. GEN. ACCOUNTING OFFICE, PUB. NO. B-211461, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES 2 (1983).

21. *Id.*

22. Richard F. Anderson & Michael R. Greenberg, *Hazardous Waste Facility Siting: A Role of Planners*, 48 J. AM. PLANNING ASSOC. 204, 204-18 (1982).

in minority communities? After the United States Environmental Protection Agency (EPA) and North Carolina state officials decided to locate a hazardous waste facility in Warren County, North Carolina, national attention focused on the questions of where hazardous waste sites were located and how these sites had been selected.

In 1982, North Carolina state officials decided to bury more than 32,000 cubic yards of soil contaminated with highly toxic polychlorinated biphenyls (PCBs) in Afton, North Carolina, a small town in Warren County.²³ More than eighty-four percent of Afton's population is African-American.²⁴ According to the 1980 census, African-Americans composed 24.2 percent of the North Carolina population.²⁵ By contrast, African-Americans composed 63.7 percent²⁶ of the total population of Warren County. In 1982, Warren County ranked ninety-second out of one hundred counties in the state for median family income. Its residents earned an average per capita income of 6,984 dollars compared to 9,283 dollars for the rest of the state.²⁷ In addition, the unemployment rate for Warren County was reported to be 13.3 percent during 1982 and 1983.²⁸

The decision to locate the tremendously dangerous PCB landfill in Warren County triggered the first national African-American protest against the location of a hazardous waste facility.²⁹ The residents of Warren County, as well as civil rights and political leaders united in their opposition to the construction of this highly toxic landfill.³⁰ The protestors were outraged by the obvious inappropriateness of the proposed site:

The site at Afton was not even the most scientifically suitable. The water table of Afton, North Carolina . . . is only five to ten feet below the surface, and the residents of the community derive all of their drinking water from local wells. Only the most optimistic could believe that the Afton landfill will not eventually leach into the groundwater. Unless a more permanent solution is found, the PCBs will eventually end up in these

23. ROBERT D. BULLARD, *DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY* 35 (1990).

24. *Id.* at 36.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 35-36.

30. *Id.*

people's wells.³¹

During this protest, civil rights activists noted that, with respect to hazardous waste sites, African-American and poor neighborhoods in other states have also had to "bear a heavier burden than other communities."³² Indeed, the Warren County siting decision raised the question of "how many other racial and ethnic communities were similarly affected by hazardous wastes."³³

Demonstrations in opposition to the Warren County hazardous waste site resulted in the arrests of more than five hundred people, including national civil rights leaders, African-American elected officials, environmental activists, and labor leaders.³⁴ Among those arrested were Dr. Benjamin F. Chavis, Jr., the executive director of the United Church of Christ Commission for Racial Justice; Dr. Joseph Lowery, of the Southern Christian Leadership Conference; and Walter Fauntroy, the Congressional Delegate of the District of Columbia.³⁵

III. THE GAO AND CRJ STUDIES OF THE DISPROPORTIONATE IMPACT ON POOR RACIAL MINORITY COMMUNITIES

Following the intense debate regarding the PCB landfill in Warren County, Congressional Delegate Fauntroy requested that the General Accounting Office (GAO) determine the correlation between the location of hazardous waste landfills and the racial and economic status of the surrounding communities.³⁶ In its study, GAO focused on off-site landfills, or those landfills that are neither part of nor contiguous to an industrial landfill.³⁷ GAO also limited its study to those landfills located in the eight southeastern states comprising EPA's Region IV.³⁸ GAO found four off-site hazardous waste landfills in these eight states.³⁹ GAO also discovered that African-Americans compose the

31. *Id.* at 36-37 (quoting Ken Geiser & Gerry Waneck, *PCBs and Warren County*, SCIENCE FOR THE PEOPLE, July-Aug. 1983, at 17).

32. *Id.* at 37.

33. COMM'N FOR RACIAL JUSTICE UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES 2 (1987) [hereinafter TOXIC WASTES AND RACE].

34. *Id.*

35. *Id.*

36. U.S. GEN. ACCOUNTING OFFICE, *supra* note 20, at 1.

37. *Id.*

38. *Id.*

39. *Id.*

majority of the population in three of the four communities surrounding these sites.⁴⁰

Chemical Waste Management owns and operates one of the four off-site hazardous waste landfills examined by GAO.⁴¹ The Chemical Waste Management landfill⁴² is located in Emelle, Alabama, a town where African-Americans compose ninety percent of the population.⁴³ The GAO study further revealed that at least twenty-six percent of the population in the four communities have an income below the national poverty level.⁴⁴ In Emelle, African-Americans represent one hundred percent of the population living below the poverty level.⁴⁵

Although the GAO study confirmed the fears of the Warren County protestors, the study's own terms limited its scope to off-site hazardous waste landfills in the southeastern area of the United States. In response to the clear limitations of the GAO study, the United Church of Christ Commission for Racial Justice (CRJ) directed the first comprehensive national study on the demographic patterns associated with the location of hazardous waste sites.⁴⁶

The investigators for the CRJ national study conducted two cross-sectional examinations of the areas surrounding "commercial hazardous waste facilities"⁴⁷ and the location of "uncontrolled toxic waste sites."⁴⁸ The first study examined the significance of race and socio-economic status in association with the location of commercial hazardous waste treatment, storage, and disposal facilities.⁴⁹ The second study examined the presence of uncontrolled toxic waste sites in ethnic and racial

40. *Id.*

41. *Id.* at 3.

42. Chemical Waste Management is the largest commercial hazardous waste treatment, storage, and disposal facility in the nation. It is a subsidiary of Waste Management, Inc., a global conglomerate that had gross receipts of \$2 billion in 1986. BULLARD, *supra* note 23, at 70.

43. U.S. GEN. ACCOUNTING OFFICE, *supra* note 20, at app. I.

44. *Id.* at 1.

45. *Id.* at app. I.

46. TOXIC WASTES AND RACE, *supra* note 33, at 3.

47. Throughout this study, the researchers defined "commercial facility" as "any facility (public or private) which accepts hazardous wastes from a third party for a fee or other remuneration." *Id.* at xii.

48. "Uncontrolled toxic waste sites refer to closed and abandoned sites on the EPA's list of sites which pose a present and potential threat to human health and the environment [i.e., Superfund sites]." *Id.* at xii, 9.

49. *Id.* at 9.

minority communities.⁵⁰

Five major variables⁵¹ deemed relevant to the location of hazardous waste facilities were compared in the first study.⁵² Five different statistical tests⁵³ were then applied to these variables "to determine the relationship between racial characteristics of populations and the location of commercial hazardous waste facilities in the United States."⁵⁴ Using EPA's Hazardous Waste Data Management System, the researchers extracted information on 415 operating commercial hazardous waste facilities.⁵⁵ These facilities included all of the identified commercial hazardous waste facilities⁵⁶ in the United States as of May 1986.⁵⁷

The findings under the discriminant analysis tests revealed that, among all other variables, the racial composition of the surrounding community proved to be the greatest predictor relevant to the location of a commercial hazardous waste facility.⁵⁸ Indeed, "the percentage of community residents that belong to a racial and ethnic group was a stronger predictor of the level of commercial hazardous waste activity than was household income, the value of homes, the number of uncontrolled waste sites, or the estimated amount of hazardous wastes generated by industry."⁵⁹

This comprehensive national study discovered the following:

In communities with one operating commercial hazardous

50. *Id.* at 12.

51. These variables include "minority percentage of the population," "mean household income," "mean value of owner-occupied homes," "number of uncontrolled toxic waste sites per 1,000 persons," and "pounds of hazardous waste generated per person." *Id.* at 10.

52. *Id.*

53. The five statistical tests used were: "discriminant analysis, difference-of-means test, matched-pairs test, and non-parametric versions of the difference-of-means and matched-pairs test." *Id.* at 11.

54. The researchers focused their attention on "operating commercial or 'off-site' rather than 'on-site' facilities, which are by definition located at the site of production." The investigators reasoned that the "location of 'off-site' facilities is more likely to be influenced by factors other than proximity to industrial activity, such as land values or degree of local opposition." *Id.* at 9-10.

55. *Id.* at 10.

56. "Such facilities may include landfills, surface impoundments or incinerators." *Id.* at xii.

57. *Id.* at 10.

58. *Id.* at 13.

59. *Id.*

waste facility, the mean minority percentage of the population was approximately twice that of communities without facilities (twenty-four percent vs. twelve percent). In communities with two or more operating commercial hazardous waste facilities or one of the five largest landfills, the mean minority percentage of the population was more than three times that of communities without facilities (thirty-eight percent vs. twelve percent).⁶⁰

In addition to examining the relationship between the racial composition of the surrounding community and the location of the commercial waste facilities, CRJ investigated the existence of "uncontrolled toxic waste sites" in ethnic and racial minority communities.⁶¹ The information on these sites was obtained from the EPA's Comprehensive Environmental Response, Compensation, and Liability Act Information System (CERCLIS).⁶²

The second study documented the widespread presence of uncontrolled toxic waste sites in ethnic and racial minority communities throughout the United States.⁶³ In fact, the results demonstrated that "three out of every five [African-] and Hispanic-Americans lived in communities with uncontrolled toxic waste sites."⁶⁴ Therefore, more than fifteen million African-Americans and more than eight million Hispanic-Americans live in communities near one or more uncontrolled toxic waste sites.⁶⁵

The alarming figures of this nationwide study document the "disproportionate numbers of racial and ethnic persons residing in communities with commercial hazardous waste facilities."⁶⁶ Both CRJ studies discovered a "substantially larger number⁶⁷ of racial and ethnic persons living in communities with some form of hazardous waste activity."⁶⁸

60. *Id.* at 13.

61. *Id.* at xii.

62. *Id.* at 12.

63. *Id.* at xiii.

64. *Id.* at 13.

65. *Id.*

66. *Id.* at 15.

67. "For example, the average number of racial and ethnic persons who live in communities with commercial hazardous waste facilities was five times greater than in communities without such facilities (6,707 vs. 1,240). The same holds true for racial and ethnic populations in areas with uncontrolled toxic wastes sites, where the average population is four times greater (3,244 vs. 723)." *Id.* at 16.

68. *Id.*

Regarding the findings of the CRJ studies, Charles Lee noted:

Although African-Americans comprise only 11.7 percent of the total population of the United States, they make up 43.3 percent of Memphis, Tennessee, which has 173 sites; 27.5 percent of St. Louis, Missouri, which has 160 sites; 23.6 percent of Houston, Texas, which has 152 sites; 23.7 percent of Cleveland, Ohio, which has 106 sites; 37.2 percent of Chicago, Illinois, which has 103 sites; and 46.1 percent of Atlanta, Georgia, which has 94 sites.⁶⁹

According to the researchers of the CRJ study, "[t]he probability that this association occurred purely by chance is less than 1 in 10,000."⁷⁰ Consequently, "[i]t is clear from these studies that as the number of a community's racial and ethnic residents increases, the probability that some form of hazardous waste activity will occur also increases."⁷¹

Dr. Benjamin F. Chavis, Jr. attributes these findings to racism:

Racism is racial prejudice plus power. Racism is the intentional or unintentional use of power to isolate, separate, and exploit others. This use of power is based on a belief in superior racial origin, identity, or supposed racial characteristics. Racism confers certain privileges on and defends the dominant group, which in turn sustains and perpetuates racism. Both consciously and unconsciously, racism is enforced and maintained by the legal, cultural, religious, educational, economic, political, environmental, and military institutions of societies. Racism is more than just a personal attitude; it is the institutionalized form of the attitude.⁷²

Racism applied in the context of environmental concerns, decisions, and issues is aptly described as "environmental racism."⁷³

IV. THE ROLE OF LOCAL OPPOSITION IN THE SITING PROCESS

The construction and operation of a hazardous waste facility requires a safe and viable location. Ideally, the facility should be relatively isolated from residential areas in order to

69. Lee, *supra* note 6, at 25.

70. TOXIC WASTES AND RACE, *supra* note 33, at 15.

71. *Id.* at 17.

72. *Id.* at ix-x (citation omitted).

73. *Id.* at ix; see also Dick Russell, *Environmental Racism* 11 AMICUS J. 22, 24 (1989).

diminish adverse impact on the host community. Even if the hazardous waste facility will have a limited adverse impact on the host community, any developer in the industrial waste industry should expect some degree of local opposition.⁷⁴

A number of players are involved in the siting scheme. The composition and strength of these players differ from community to community based upon the educational, social, economic, and political backgrounds of the residents. The players in the siting process exist at national, state, regional, and local levels. Some of these players belong to institutional groups, which possess the strongest political influence; others are members of unorganized groups, which possess the weakest political influence.

Some examples of politically influential players on the national level are the facility developers, the facility contractors, the labor leaders, the state politicians and agencies, and the state environmental and public interest groups. At the local level, the strongest actors are the local officials and the environmental and public interest groups. Some scattered local support groups may encourage the construction of these facilities. These groups are made up of those interested in increased employment, tax revenue, and social services. These support groups, however, are politically weak and basically non-structural. The "abutters or the takees" are local actors opposed to the operation of these facilities because they will be adversely affected. These actors have the potential to oppose and block the proposed siting of the facilities, especially when they work together with environmental and other organized public interest groups.⁷⁵

"The public, although often dealt with in public participation efforts as a unified group, actually is composed of separate groups, each affected differently" by proposals for hazardous waste siting.⁷⁶ The siting process is inherently political because of these differences. During the siting process, political conflicts

74. Typically, concerned individuals crying "Not In My Backyard" unite to oppose the presence of a hazardous waste site in their community. The solidarity and ultimate effectiveness of these groups often depends on the underlying social and economic cohesiveness of the community. See generally DAVID MORELL & CHRISTOPHER MAGORIAN, *SITING HAZARDOUS WASTE FACILITIES: LOCAL OPPOSITION AND THE MYTH OF PREEMPTION* (1982).

75. *Id.* at 89.

76. Gail Bingham, *Prospects for Negotiation of Hazardous Waste Siting Disputes*, ENVTL. L. (Standing Committee on Env'tl. Law, American Bar Ass'n, Washington, D.C.) Winter 1984-1985, at 2.

tend to arise between the "majority" residents of the entire state or nation and the "minority" members of the host community. Members of the majority would generally approve of these sites because they would not be constructed and operated in their "backyard." Minority members of the host community, however, would oppose these sites because they believe they would become immediately vulnerable to some risk.⁷⁷ According to a study conducted by the Keystone Center, this belief is not an irrational one. This study found that "[e]ven with the best standards, technology, management, and enforcement, each hazardous waste management site will have some residual risk."⁷⁸

Some of the risks associated with the siting of a hazardous waste facility are unknown, but past experience with such facilities, particularly with landfills, justifies a view that "serious risks to the public" exist.⁷⁹ Unless sufficient evidence can be presented to a host community showing that they are "safe" from any potential harmful effects of a hazardous waste site, perceptions of risks, whether rational or not, will continue to be the most crucial barrier to a successful siting.⁸⁰

Studies have been conducted based on what appears to be an "acceptable risk." These studies indicate that acceptance of risk generally "increases when the benefits to be derived from an activity also increase."⁸¹ These studies have also shown that "individuals will accept voluntary risks roughly 1,000 times

77. MORRELL & MAGORIAN, *supra* note 74, at 66.

78. *Id.* at 62 (quoting KEYSTONE CENTER, *SITING NON-RADIOACTIVE HAZARDOUS WASTE MANAGEMENT FACILITIES: AN OVERVIEW* 6 (Sept. 1980)).

79. MORRELL & MAGORIAN, *supra* note 74, at 67. Before the Love Canal disaster, "the public trusted the government." Peter M. Sandman, *Getting to Maybe: Some Communications Aspects of Siting Hazardous Waste Facilities*, 9 SETON HALL LEGIS. J. 437, 439 (1986). But with the exposure to serious health problems as a result of toxic disasters, "[t]hey lost confidence, developed a good deal of cynicism and distrust, and realized that they now had to play a major role in the decision-making process for future waste disposal facilities." *Id.*

80. The legitimacy of a community's persistent fear is not only premised upon past occurrences, but on recent events as well. For example, the plaintiffs in *Warner v. Waste Management*, 521 N.E.2d 1091 (Ohio 1988), sought a class action certification claiming that Waste Management's and Chemical Waste Management's alleged activities in and around the Ohio Liquid Disposal site in Vickery, Ohio, involved "the transportation, receipt, storage, and disposal of toxic, poisonous, hazardous, and disease-causing chemical substances," *Id.* at 1091, which adversely restricted the use of their properties surrounding the facility to indoor use only and caused them to suffer from offensive odors, difficulty in breathing, the inability or disruption of their sleep, headaches, coughing, nausea and vomiting, significantly decreased real estate values, and fear, fright, stress, worry, and anxiety. *Id.* at 1094.

81. MORRELL & MAGORIAN, *supra* note 74, at 63.

[more often] than involuntary exposure risks [R]isks are assumed voluntarily when corresponding benefits can be consciously considered to be worth the risk. Involuntary risk, in contrast, offers no such apparent compensatory benefits to the individual involved."⁸²

Since some risks are inherent in the operation of these sites — either in the transportation of the hazardous waste to the facility or in the disposal, treatment, and storage of the waste — the local government must work together with the state legislature and industry to determine the standards for "safety." Yet, the question arises as to what is "safe." Whether a project is "safe" is not necessarily determined by its design and operation. Such a determination is more often based on an individual's values and judgments:

Much of the widespread confusion about the nature of safety decisions would be dispelled if the meaning of the term *safety* were clarified. For a concept so deeply rooted in both technical and popular usage, safety has remained dismayingly ill-defined.

We will define safety as a judgment of the acceptability of risk, and risk, in turn, as a measure of the probability and severity of harm to human health.

A thing is safe if its risks are judged to be acceptable.⁸³

Since the hazardous waste siting process is inherently political at the local, state, and federal levels, the politician's responsibility is to "persuade people that while the risks of hazardous waste disposal are real, they are not of the unthinkable or immoral category of risk, but in the thinkable, livable category of life's risks."⁸⁴ Yet, successfully convincing or persuading members of a host community that their fears and perceptions of risks are exaggerated is a difficult task, dependent upon a community's sociopolitical values. As a result of conflicting sociopolitical values, the conflicts over goals, values, and power are intertwined in the tensions between majority rule and minority rights. This "inherent conflict between the majority's need for sites and facilities and the minority's right to resist being exploited in this manner lies at the heart of the politics of the siting dilemma."⁸⁵

82. *Id.* (citation omitted).

83. WILLIAM LOWRANCE, OF ACCEPTABLE RISK: SCIENCE AND DETERMINATION OF SAFETY 8 (1976).

84. *Id.*

85. *Id.* at 85.

According to Gail Bingham, a Senior Associate of the Conservation Foundation, a community's decision to oppose a hazardous waste facility to be located in their community "is a rational decision, based on the balance of costs and benefits to the potential host community."⁸⁶ While politicians tend to argue that the operation of these facilities would benefit the community by generating tax revenues and increasing employment, the costs generally tend to outweigh the benefits.⁸⁷ Michael Baram advises that the costs resulting from the construction and operation of a hazardous waste facility result in "quantifiable and unquantifiable impacts" on the following areas:

- (1) *Ecology*: includes erosion, landscape, and air and water pollution.
- (2) *Economy*: includes private property values, taxes, and local and regional jobs.
- (3) *Regional and community quality of life*: includes human health (both physical and psychological), aesthetics, congestion, odors, and traffic.
- (4) *Social and political factors*: includes changes in residences and lifestyles, changes in social opportunities, and changes in municipal systems.⁸⁸

Of the four impact areas, the adverse impact a facility may have on the "regional and community quality of life" concerns host communities the most because an unsafe facility would inevitably affect their public health.⁸⁹ Therefore, when balancing the costs and benefits of these facilities, both the local community and the society outside the community must determine whether or not the risks are worth it.

When determining what risks are worth the benefits to a potential host community, the state must address the community's needs and fears directly to preserve the democratic notion

86. Bingham, *supra* note 76 at 1; LOWRANCE, *supra* note 83, at 8 ("Nothing can be absolutely free of risk. One can't think of anything that isn't under some circumstances able to cause harm. Because nothing can be absolutely free of risk, nothing can be said to be absolutely safe. There are degrees of risk and consequently, there are degrees of safety.").

87. Lawrence A. Bacon & James R. Milley, *Overcoming Local Opposition to Hazardous Waste Facilities: The Massachusetts Approach*, 6 HARV. ENVTL. L. REV. 265, 268-69 (1982) ("The local benefits of "increased tax revenues and new jobs rarely outweigh the local cost resulting from potential health and environmental risks, the noise and congestion caused by increased traffic, and the stigma attached to being a site for hazardous waste disposal.").

88. MORRELL & MAGORIAN, *supra* note 74, at 62.

89. *Id.*

of public participation at the local level. Once a state permit is issued to operate a hazardous waste facility, society as a whole benefits; however, this siting decision could lead to the alienation of the state's local citizens. Although the nation requires an adequate number of environmentally protective facilities to meet the nation's treatment and disposal needs for today and the future, local public participation is required for the preservation of basic democracy:

There should be no question that society must simultaneously seek to preserve local autonomy over specific land use and siting decisions, both because this autonomy is basic to the effective operation of our federalist democracy and because the federal government does not have the resources to intercede effectively on these matters.⁹⁰

Public participation is an integral part of the nation's democratic system. This participation at a local level is important simply because the residents of any host or proposed host community are the voters. Therefore, the first step in dealing with the public is to acknowledge and address conflicting interests, fears, and perceived risks. This process must include all interested individuals. Members of minority communities have often been forgotten in the siting process because they lacked organization and political influence.

V. THE ROLE OF POLITICAL AND ECONOMIC INFLUENCE IN SITING DECISIONS

Groups of local opposition in some communities possess the basic components of structural organization. Many of those groups have succeeded in stopping the construction of a hazardous waste facility by mastering the "techniques of exclusion, the art . . . of using public participation and organized grassroots opposition to keep out what they want to keep out."⁹¹ When employing "the art of exclusion," these groups raise a variety of legitimate concerns: (1) the need for the facility, (2) where the waste will come from, (3) the potential effects on public health, (4) the transportation routes to and from the facility, (5) the impact on real estate values near and adjacent to the facility, (6) whether the community will have access to the facility and its

90. Rena Steinzor & Velma Smith, *The Toxic Combat Zone: Is A Ceasefire Possible?*, ENVTL. F., July-Aug. 1988, at 5, 6.

91. Orlando E. Delogu, "NIMBY" Is a National Environmental Problem, 35 S.D. L. REV. 198, 198 (1990).

operation and monitoring records, and (7) whether compensation will be available to members of the host community for any adverse impacts the facility may have on the community.⁹²

These groups use a "more subtle strategy of delay" by questioning the need for such a facility, requesting additional hearings, calling for new technical data or more studies on possible health impacts, and raising the "'what if' worst case scenarios designed to heighten latent fears and anxieties."⁹³

Using such a technique successfully may prohibit and at the least delay the construction of the unwanted facility. This, in turn, crystallizes into a victory for the members of "not in my backyard" (NIMBY) organizations who seek a vindication of participatory democracy: the justifiable warding off an activity that posed real, or imagined, threats to local sensibilities, property values, and community character."⁹⁴

Implementing these techniques, however, requires vast amounts of time, money, political influence, and access to a variety of resources, including meeting places, publications, public and private records, funding for technical assistance, and the ability to research possible health impacts. Not all members of our society have access to these "fighting back" tools; only "[p]eople who participate actively in political processes tend to have sufficient resources to allow them this luxury."⁹⁵ Thus, those with greater access to the resources necessary to stage a successful protest against a hazardous waste facility developer and the local siting board or city council generally have a stronger economic, educational, and political background.⁹⁶

Members of a community with the least structural power

92. John A. S. McGlennon, *A Model Siting Process and the Role of Lawyers*, 17 NAT. RESOURCES LAW. 463, 465 (1984).

93. Delogu, *supra* note 91, at 199. But the utilization of such delaying techniques is not always accepted by the courts; see, e.g., *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 534 (1977) (criticizing the tactics and strategic delays utilized by two citizen intervenor groups, the Saginaw and the Mapleton, for their "total disregard of even those minimal procedural formalities necessary to give the Board some idea of exactly what was at issue.").

94. Delogu, *supra* note 91, at 199. However, is it really a victory for society's benefit? Ultimately, the site will have to be constructed elsewhere: "Citizens of municipalities seeking to protect themselves from hazardous waste problems must realize that . . . [l]ocating a waste dump in the next town, or the one down the river or in the next state is not a 'solution'." Provost, *supra* note 10, at 793.

95. MORELL & MAGORIAN, *supra* note 74, at 116.

96. According to Robert Bullard and Beverly Wright, environmental activism was embraced by the middle to upper classes because they have greater access to the resources involved in the political arena and they possess a greater sense of personal efficacy. Robert

tend to be missing as players in the hazardous waste siting process. Thus, political participation is characterized by the exclusion of lower socio-economic groups. People "who are unorganized are not likely to be represented, since the unorganized are often those persons not endowed with the economic and political resources necessary to become organized; regulatory politics thus generally exclude the poor."⁹⁷ This exclusion from the siting process may explain why poor minority communities are so frequently the target of hazardous waste siting and currently host a disproportionate share of these facilities.

If siting policies are to adequately represent full public participation, the state legislatures responsible for the promulgation of hazardous waste siting procedures must take members of lower socio-economic communities into consideration. If this approach is not implemented, state politicians, in conjunction with facility developers, will continue to site in vulnerable minority communities and will continue to perpetuate society's general attitude of imposing undue burdens on politically and economically disadvantaged groups. Congress enacted the Resource Conservation and Recovery Act (RCRA),⁹⁸ the Comprehensive Environmental Response Compensation and Recovery Act (CERCLA),⁹⁹ and the Superfund Amendments and Reauthorization Act (SARA)¹⁰⁰ to encourage all states to share the burden of treating, storing, and disposing of the nation's generated hazardous waste. Yet, because many resourceful communities have kept unwanted facilities out of their backyards, the following consequences have occurred:

- (1) Town A's actions are frequently replicated in towns B and C making it impossible for some activities to find any situs in whole states.
- (2) The need for the unwanted activity or facility does not go away and consequently, land needs for such facilities grow more acute as the supply of spaces for these undertakings dwindles in the face of steady (or more likely, increasing) demand.
- (3) The NIMBY rejection of land-using activities and facilities that responsibly handle unwanted but essential societal

D. Bullard & Beverly H. Wright, *Hazardous Waste Siting Process and Environmental Racism*, 14 HUMBOLDT J. SOC. REL., 165, 167 (1986-1987).

97. *Id.*

98. 42 U.S.C. §§ 6901-6992 (1988).

99. *Id.* §§ 9601-9675.

100. Pub. L. No. 99-499, 100 Stat. 1613 (1986) (42 U.S.C. § 9601-9675).

needs forces these needs to be met in a variety of irresponsible ways that almost always pose greater dangers to the environment and . . . society than the dangers or risks associated with the proposed, but rejected, activity or facility.¹⁰¹

Therefore, if each state is to fairly share in the responsibility of hosting some type of treatment, storage, or disposal facility, then siting boards and committees must cease their consideration of demographic and social elements. Whether the residents of a state live in a rural, semidepressed, or high unemployment regions or whether the residents are middle to upper class and possess great political clout should not matter.

Thus, what should take precedence is whether the potential land site is viable and safe. However, poor minority communities disproportionately host hazardous waste facilities. The question, then, is whether this disproportionate impact is a mere coincidence or whether the siting boards and industry intentionally consider demographic and social factors in choosing sites. As the CRJ study demonstrated, the probability that this is a mere coincidence is less than one in ten thousand.¹⁰² If the disparate impact is not a coincidence, then the entire approach to hazardous waste siting decisions is unjust, and only results in the distribution of "risk by class and race rather than based on the science of the safest locations."¹⁰³

VI. BALANCING THE NEED FOR HAZARDOUS WASTE SITING AND PUBLIC PARTICIPATION: THE STATES' RESPONSES

In an attempt to overcome the barrier of local opposition, some states have resorted to techniques such as preemption and zoning for industrial land uses. These siting techniques, however, tend to strip away democratic participation at the local level and may have severe political ramifications for those already holding elected political positions.

Other states have attempted to address the needs and fears of all members of the socio-economic spectrum. These states have passed legislation establishing hazardous waste siting procedures that incorporate "[n]egotiation[s] with offers of appro-

101. Delagu, *supra* note 91, at 201.

102. TOXIC WASTES AND RACE, *supra* note 33, at 15.

103. Delogu, *supra* note 91, at 201.

priate compensation for actual and potential losses suffered by the host community [The negotiation approach] appears to offer a more direct and equitable response to the causes and dynamics of public opposition than do other approaches alone."¹⁰⁴ Three states, Massachusetts, Rhode Island, and Wisconsin, are currently using this statutory scheme of negotiation and compensation.

The purpose behind the negotiation and compensation approach is to encourage two-way communication in order to sufficiently address the needs of the host community. These incentives could take many forms:

job commitments and job training; on-site and off-site infrastructural improvements; direct monetary payments to abutting property owners to compensate for [their] inconvenience, perceived risks, and the possibility of diminished property values . . . and direct monetary payments to the host municipality to compensate for larger societal costs [including project review and monitoring programs].¹⁰⁵

Massachusetts, for example, has enacted a statutory scheme for hazardous waste siting that attempts to balance state, regional, and local interests. The Massachusetts scheme requires the hazardous waste developer to negotiate an approved siting agreement with the host community prior to any construction and further, to compensate the community to offset any adverse impacts.¹⁰⁶ After the developer files a letter of intent with the Hazardous Waste Facilities Site Safety Council and the letter is accepted, a Local Assessment Committee (LAC) is formed to represent the interests of the host community.¹⁰⁷ Each LAC is to be comprised of a variety of chair people from the local board

104. Bingham, *supra* note 76, at 1. Another form of negotiation is mediation. Mediation is "a voluntary process in which parties negotiate face-to-face", but it is facilitated by a unbiased third party in order to assist the parties in jointly developing a solution. James E. McGuire, *The Dilemma of Public Participation in Facility Siting Decisions and the Mediation Alternative*, 9 SETON HALL LEGIS. J. 467, 470 (1986).

105. Delogu, *supra* note 91, at 205.

106. MASS. GEN. LAWS ANN. ch. 21D, § 12 (West 1988). The legislature recognized that while some local autonomy was politically necessary to preserve the state's tradition of home rule, local opposition to hazardous waste facility siting in the form of zoning ordinances and administrative or judicial delays must be eliminated. Abstract, *The Hazardous Waste Facility Controversy: The Massachusetts Experience*, 12 AM. J. L. & MED. 131, 137 (1986) [hereinafter *The Massachusetts Experience*]. The right to home rule in the Massachusetts Constitution "grants and confirm[s] to the people of every city and town the right of self-government in local matters." *Id.* at 137, n.43.

107. MASS. GEN. LAWS ANN. ch. 21D, § 12.

of health, the planning board, and the fire department.¹⁰⁸ Up to eight citizens can sit on a LAC, and if desired, up to four members from the opposing side may sit on a LAC as well.¹⁰⁹

Negotiations commence after the developer files a preliminary Project Impact Report, which is similar to an Environmental Impact Statement. During the negotiation process, a siting agreement, which must include terms pertaining to the construction and maintenance of the facility, monitoring procedures, and compensation for any adverse impacts the community may suffer, is developed.¹¹⁰ Once the council approves the agreement, it becomes a nonassignable binding contract between the developer and the host community. If the parties are in disagreement over particular terms, the council declares an impasse and requests binding arbitration.¹¹¹

The statute does not give the LACs the ability to veto any permit; the local board of health, however, may deny a siting proposal permit if it "finds that the facility would impose a significantly greater danger to public health."¹¹² The statute also makes available state assistance grants to the host community to obtain any technical studies and any other material it needs to negotiate effectively.¹¹³ The enactment of this statute, however, has failed to overcome strong local opposition to siting proposals; at least five attempts to establish a waste facility have failed.¹¹⁴

Rhode Island has also passed a similar hazardous waste siting process statute.¹¹⁵ The two fundamental differences between the states' programs are that negotiations commence after the issuance of a permit, and only two members of the public can sit on the LAC, one of whom must be knowledgeable in environmental matters.¹¹⁶ Unlike Massachusetts, Rhode Island has

108. *Id.* ch. 21D, § 5.

109. *Id.*

110. *Id.* ch. 21D, § 10.

111. *Id.* ch. 21D, § 15.

112. *Id.* ch. 111, § 15B.

113. *Id.* ch. 21D, § 11.

114. Denis J. Brion, *An Essay on LULU, NIMBY, and the Problem of Distributive Justice*, 15 B.C. ENVTL. AFF. L. REV. 437, 448 (1988); see also *The Massachusetts Experience*, *supra* note 106, at 133 (discussing the Act's inability to control local opposition because of its failure to "provide for a substantive review of facility proposals and [its vulnerability to allowing] a locality to legally oppose a siting in its backyard").

115. Hazardous Waste Management Facilities Act of 1982, R.I. GEN. LAWS § 23-19.7-15 (1989).

116. *Id.* § 23-19.7-6.

issued at least one permit. In 1982 the Antonelli Corporation, an electroplating company, applied for a permit to construct a treatment and storage facility. The designated parties negotiated and agreed to a variety of terms. The parties were not able to agree on concerns about property values. Members of the community then formed an opposition group and filed suit against the Department of Environmental Management, claiming that the Department did not provide sufficient notice of the hearing on the construction permit. The Supreme Court of Rhode Island denied the allegation, however, holding that the notice and public hearing provisions in the statute were not mandatory.¹¹⁷

The Wisconsin approach also includes a negotiation and arbitration approach to siting hazardous waste facilities. The negotiation process begins prior to the state permitting process. Therefore, the public may get involved early and the developer will have the opportunity to "gauge the proposal's political acceptability before spending large amounts of time and money to obtain state permits."¹¹⁸ Yet, if the host municipality passes a siting resolution on its own accord, "the developer is not required to negotiate, and the facility is not subject to local approval."¹¹⁹ Otherwise, the negotiated agreement must be approved by "the governing body of each town, city, or village where all or part of the facility is to be located, or it is void."¹²⁰ Since the promulgation of this statute, at least twenty-nine solid waste facilities have been requested, only one case has been settled, and one has been withdrawn.¹²¹

In order to adequately represent the legitimate concerns of members of minority communities, states must take special care to ensure their participation. Minority groups must be educated about the facility and any conceivable consequential impacts. Furthermore, the state should enable residents of minority communities to have access to the same resources to which their counterparts in the middle to upper-class communities have access.

The compensation approach should not be used by the state

117. *Gryguc v. Department of Env'tl. Management*, 510 A.2d 937, 941 (R.I. 1986).

118. Gail Bingham & Daniel A. Miller, *Prospects for Resolving Hazardous Waste Siting Disputes Through Negotiation*, 17 NAT. RESOURCES LAW 473, 483 (1984).

119. *Id.* at 482 (citation omitted).

120. *Id.* at 483 (citation omitted).

121. *Id.*

politicians, the federal government, or industry as a way to attract minority approval by flashing dollar signs. Short-term monetary gain should not displace potential long-term health and environmental impacts. Compensation provisions must be drafted carefully as "[t]hey must not suggest that the relative poverty or wealth of individual property owners or municipalities are in any way a part of the site selection process."¹²²

If the poverty of the property owners or of the municipality is taken into consideration by those steering the siting process, hazardous waste facility developers, who are statutorily obligated to compensate property owners for a foreseeable decline of their property value, may be politically encouraged to search for a site in depressed real estate areas in order to cut expenses. If this were the case, the desire to reduce costs to create a greater profit might take precedence over safety and viability concerns in a siting decision. Thus, minority communities would continue to bear the burden of hosting a disproportionate number of hazardous waste sites simply because many minority residents live in the economically depressed areas. Minority residents, often in dire need of extra money, may be prone to either sell their land to hazardous waste site developers or to accept monetary compensation for a decline in land value, despite the negative impacts the operation of the site may have on their health and the surrounding environment.

An advantage of the negotiation and compensation approach is that it provides a forum for members of any community to voice their distrust, fear, and recommendations. Further, the forum serves as a vehicle to educate the members of a host community about the facility. The negotiation approach gives the developer and participants at the local level the ability to communicate and take part in the actual siting; this approach preserves the mechanics of democratization at the grassroots level.

Unfortunately, not all states recognize the importance of giving members of a proposed host community the opportunity to participate in the siting process. Some states simply bypass local opposition. Although this approach angers the effected residents, their anger can only have an effect on their elected representatives if the residents possess political influence. If those community members are not strong politically, then they

122. Delogu, *supra* note 91, at 216.

are unduly vulnerable to the racist decision-making of a biased siting council. The following discussion contains a case study on an example of this "environmental racism."

VII. ENVIRONMENTAL RACISM IN WALLACE, LOUISIANA

In 1980, the population of Reserve, Louisiana, was 7,288 people.¹²³ Of this population, 3,654 individuals were white, and 3,609 individuals were African-American.¹²⁴ In the small neighboring residential area of Wallace, however, at least ninety-five percent of the population was African-American.¹²⁵

Wallace is located on the west bank of the Mississippi River near Reserve and Vacherie, Louisiana. As an unincorporated community in St. John the Baptist Parish, Wallace has no governing body of its own and relies upon the St. John the Baptist Parish Council to protect its health, welfare, and environment.

The conditions in Wallace provide a stark contrast to the conditions in the nearby town of Vacherie, Louisiana, which is also within St. John the Baptist Parish. In Vacherie, most of the residents are white. Like Wallace, Vacherie is located on the west bank of the Mississippi River. Unlike Wallace, Vacherie is a more prosperous community and has its own local government.

According to Wilfred Green,¹²⁶ most of the African-Americans in the Wallace community own the property on which they live. Like his neighbors, Mr. Green lives on property he inherited from his father, who had inherited it from his father. Mr. Green hoped to leave his home to his own children. For as long as Mr. Green can remember, Wallace has been zoned as a residential area. Consequently, African-Americans have built their homes, raised their families, and established their community in

123. U.S. BUREAU OF THE CENSUS, GENERAL POPULATION CHARACTERISTICS OF LOUISIANA 1980 tbl. 15 (1982).

124. *Id.*

125. Telephone interview with Wilfred Green, a native of the Wallace Community (Oct. 1990) (all information and data regarding the demographics of the Wallace Community has been obtained from Mr. Green).

126. Mr. Green is 68 years old and he has lived in Wallace all his life. In 1958, Mr. Green earned his Bachelor of Science from Xavier University in New Orleans, Louisiana; in 1970, he earned his Masters of Arts in Administration and Supervision, also from Xavier University. For 29 years, Mr. Green worked in the Wallace school system as a teacher and a principal. The authors found Mr. Green to be a knowledgeable source regarding the history of the Wallace Community. Further, his sensitivity and concern for his family, his fellow neighbors, and himself were evident when he discussed his life experiences.

reliance upon the protection of the residential zoning restrictions set by the Parish Council.

In 1990, however, Formosa Plastics Corporation (Formosa)¹²⁷ asked the St. John the Baptist Parish Council to rezone eighteen hundred acres of land from residential property to industrial property.¹²⁸ The Parish Council voted to adopt the proposed zoning change. This tract of land included the residential area of Wallace.

Like the rezoning decision in Warren County, the rezoning decision in St. John the Baptist Parish is highly suspect for three reasons. First, residential property usually receives the utmost protection from parish zoning commissions. However, when rezoning Wallace, the Parish Council caused the residents of Wallace to be exposed to highly toxic chemicals. Second, because other industrially zoned properties already existed on the west bank, the Parish Council could have allowed Formosa to use the industrial land already available. Although dangers from Formosa would still remain, the residential communities would not be impacted in such a dangerous manner. Rather than requiring Formosa to locate in this industrial area, however, the Parish Council chose to disregard longstanding residential zoning laws and placed the residents of Wallace in fear of adverse health effects and the destruction of their quality of life. Third, and most offensive, it is widely known that "Formosa has a well-earned reputation as a world class environmental outlaw."¹²⁹ Formosa has been a major source of pollution at each of its plants in Louisiana, Texas, Delaware, and Taiwan.¹³⁰

Formosa has a plant in Baton Rouge, Louisiana,¹³¹ which is one of the "largest sources of toxic chemicals in the Baton Rouge area."¹³² The "worst aspect of Formosa's violation of Louisiana's environment may be the company's contamination of groundwater, which threatens Baton Rouge's water sup-

127. Although Formosa Plastics, Inc. is a manufacturing company and not a hazardous waste treatment or disposal facility, it is a prime example of the potential threats imposed on African-American communities by the siting of industrial facilities that emit toxic pollutants. The proposed facility threatens the health, safety, welfare, quality of life, and property of Wallace community residents.

128. DANIEL MANDELL & SANFORD J. LEWIS, NATIONAL TOXICS CAMPAIGN FUND, *THE FORMOSA PLASTICS STORY: A REPORT TO THE PEOPLE OF ST. JOHN THE BAPTIST PARISH 1* (1990).

129. *Id.* at 17.

130. *Id.* at 8.

131. *Id.* at 10.

132. *Id.*

ply."¹³³ As a result, Formosa was repeatedly cited for dangerous discharge permit violations.¹³⁴

The Formosa plant in Point Comfort, Texas, is also a consistent environmental offender. Since "the Point Comfort plant opened in 1982, it has accumulated an extensive record of environmental violations."¹³⁵ Like the Baton Rouge plant, the Point Comfort plant threatens the city's water supply. In 1983 Formosa's "wastewater discharge showed extremely high levels of ethylene dichloride, up to 242 ppm [parts per million]. Although Formosa officials admitted that these dangerous levels were the result of a spill, Formosa violated state law by not reporting this spill to the state."¹³⁶

As well, Formosa's facility in Delaware City, Delaware, has highly contaminated its surrounding environment and has "contributed huge amounts of toxic chemicals to the state's pollution problem."¹³⁷ In October 1985, the Delaware Department of Natural Resources (DNR) discovered that the Delaware City facility had committed a number of egregious violations.¹³⁸

133. *Id.* at 12.

134. For example:

In December 1988, Formosa paid a \$28,000 fine for violating its air pollution permit by releasing high levels of vinyl chloride. In 1987, Louisiana fined Formosa \$44,500 for illegal releases of vinyl chloride. On June 25, 1986, a ruptured line spilled 7,848 pounds of vinyl chloride, spotted as "a large cloud of chemicals moving toward the eastern base of the Old Mississippi Bridge". A "line failure" on May 30, 1986 released 1,446 pounds of vinyl chloride, 902 pounds of hydrochloric acid, and 337 pounds of ethylene dichloride. In April 1984, the Sierra Club filed suit against Formosa and five other corporations for "consistently" exceeding their NPDES discharge limits. EPA sued Formosa in January 1984 over chronic vinyl chloride violations (the case was put on hold in 1985 and, as of September 1989, was still unresolved).

Id. at 11 (citations omitted).

135. For example in December 1984, Texas officials:

found out about a large release of toxic ethylene dichloride only after the local newspaper ran a story about the incident, despite legal requirements for the company to immediately notify the state. On June 25, 1989, the day before a state inspection of the plant, Formosa intentionally breached an illegal dike holding a large pool of highly acidic water (Ph 2.16) allowing the toxic liquid to flow directly into state waters, and then reconstructed the dike. During the 1989 inspection, state officials found twenty barrels of hazardous waste, most unmarked and undated. Three barrels even lacked lids. The officials also found that 'spillage was intensive.'

Id. at 8 (citations omitted).

136. *Id.*

137. For example "in 1984, Delaware filed a lawsuit against Formosa for 30 illegal air releases of vinyl chloride between 1981 and 1984." *Id.* at 12.

138. The DNR found 40 separate illegal releases of vinyl chloride gas, including 10 after the state had issued a cease-and-desist order; chronic breakdowns in the plant's

Finding an "almost complete disregard by Formosa of the State's environmental regulations," the DNR issued an emergency order to revoke all of Formosa's permits and shut down the plant.¹³⁹ One of the most appalling violations committed by Formosa's Delaware plant occurred on October 15, 1985, when vinyl chloride leaked from the plant but was not reported for more than seven hours.¹⁴⁰ Two days later, vinyl chloride leaked from the plant again.¹⁴¹ Formosa never reported this second violation; the DNR learned about it from an anonymous source.¹⁴²

Moreover, Formosa has failed to demonstrate environmental responsibility in its home country of Taiwan.¹⁴³ In 1986, Taiwan's Council for Economic Planning and Development "publicly accused Formosa of causing serious pollution problems" that are contributing to the severe health problems of the country.¹⁴⁴

Formosa's demonstrations of blatant disregard for environmental regulations are particularly alarming since the facilities owned and operated by Formosa use and generate extremely toxic chemicals.¹⁴⁵ The plant Formosa plans to build in Wallace would create pulp for rayon production.¹⁴⁶ The processes employed at this type of plant use bleach to separate lignin from cellulose,¹⁴⁷ and reduce the cellulose to a useable form that can be treated with chemicals to create rayon.¹⁴⁸ During the process of separating the lignin from the cellulose, the bleaches that are used enter the wastewater from the plant.¹⁴⁹ The wood and

emissions monitoring system, including a missing part that rendered the system inoperable; violations of polyvinyl chloride (PVC) process wastewater discharge permits in 16 out of preceding 24 months; and violations of sanitary wastewater discharge permits in 44 out of 45 months from 1982 to 1985. *Id.* at 13.

139. *Id.*

140. *Id.* at 15.

141. This leak was so serious that it activated the plant's sprinkler system, and the employees were forced to rely on emergency breathing apparatuses. *Id.*

142. *Id.*

143. *Id.* at 15-17.

144. *Id.* at 16. "Cancer is the leading cause of death in Taiwan, and the number of birth defects and [cases of] lung disease in the country are rising steadily. Many school children are forced to rely on surgical masks to reduce their exposure to pollution." *Id.* at 15-16 (citation omitted).

145. *Id.* at 4.

146. *Id.* at 3.

147. *Id.* at 5. Lignin, a glue-like substance, and cellulose are two components of wood chips. *Id.*

148. *Id.*

149. *Id.*

bleach contained in the wastewaters will ultimately reduce the oxygen levels of receiving waters.¹⁵⁰ The pollution created by these chemicals include dioxin, which is "among the deadliest pollutants known to man," as well as other chlorinated compounds¹⁵¹ and is accompanied by strong odors.¹⁵²

If Formosa goes beyond the mere production of the raw materials for rayon and adds a rayon finishing plant, it will require the use of other highly toxic chemicals.¹⁵³ Carbon disulfide¹⁵⁴ and sulfuric acid¹⁵⁵ are two very toxic chemicals that remain after the rayon finishing process is complete.¹⁵⁶ In addition, Formosa has speculated about building a polyvinyl chloride (PVC) plant at the Wallace facility.¹⁵⁷ PVC manufacturing produces highly toxic materials such as ethylene dichloride¹⁵⁸ (EDC), vinyl chloride¹⁵⁹ (VCM), and chloroform.¹⁶⁰

If these highly hazardous materials must be used, then they must be handled and used with the highest degree of caution and

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. EPA rates carbon disulfide as "extremely hazardous." *Id.* (citation omitted). The lethal dose for a human is "between one ounce and one pint (or pound) for a 150-pound person. In lower doses, the chemical affects the central nervous system, cardiovascular system, eyes, kidneys, liver, and skin. Chronic exposures damage the central nervous system and causes liver degeneration and jaundice." *Id.* at 6 (citations omitted).

155. *Id.* at 5. Sulfuric acid is also extremely hazardous to human health. This chemical is highly corrosive to all body tissues. Serious lung damage can result from inhalation, eye contact causes blindness, and a dose of as little as one teaspoon or one ounce will result in death. *Id.* at 6.

156. *Id.*

157. *Id.* at 1.

158. *Id.* at 7. EDC is highly toxic and is capable of causing cancer and mutations, of damaging embryos, and of creating physical malformations. *Id.* This highly toxic chemical causes damage to the liver, kidneys, and other organs. *Id.* EDC can also cause internal hemorrhaging and blood clots. *Id.* As a highly flammable substance, the vapor of EDC can explode and generate "extremely toxic gases that could result in a Bhopal-style accident." *Id.* In 1984, the leakage of poison gas at the Union Carbide plant in Bhopal, India, caused the death of more than 3,400 people and maimed another 10,000 people. BULLARD, *supra* note 23, at 62.

159. VCM, another extremely hazardous chemical, causes liver, stomach, and brain cancer. MANDELL & LEWIS, *supra* note 128, at 8. Reportedly, "an abnormally high number of spontaneous abortions" occur among the spouses of workers exposed to this toxic chemical. *Id.* An increased number of birth defects have also been reported near locations of facilities using and producing VCM. *Id.*

160. Chloroform is suspected of causing cancer and is known to cause mutations and damage to embryos. *Id.* Chloroform presents a particular threat to those who eat exposed fish and shellfish, because its concentrations characteristically increase in as it moves up the food chain. *Id.*

care. As well, if facilities that use these chemicals must exist, then they must be located away from population centers to ensure citizens' safety. The proposed Formosa facility in Wallace will meet neither of these requirements. Formosa Plastics Corporation has failed to demonstrate that it "deserves permission to build another plant in Louisiana" because it has not demonstrated that it can operate a chemical plant safely.¹⁶¹ By its own actions and policies, Formosa has only demonstrated to society that it has no intention of using chemicals responsibly.

Rezoning the primarily African-American residential community of Wallace into an industrial area is clearly contrary to duties of the St. John the Baptist Parish Council. The powers of the Parish Council are defined in Article III Section A(7) of the St. John the Baptist Home Rule Charter. This charter provides that "the Parish Council may enact any ordinance necessary, requisite, or proper to promote, *protect*, and preserve the general welfare, *safety*, *health*, peace, and good order of St. John the Baptist Parish"¹⁶² Rather than acting to protect the health and safety of their parishioners, the members of the Parish Council have actually endangered the welfare of every citizen in the Wallace Community. Wallace residents are now more likely to develop disorders in their central nervous system, blindness, and cancer of the liver, stomach, and brain.¹⁶³ The residents are also more likely to see a higher number of spontaneous abortions and birth defects.

The Parish Council's uncanny ability to disregard the egregious environmental violations repeatedly committed by Formosa reflects the environmental racism about which Dr. Benjamin Chavis has spoken.¹⁶⁴ Whether intentional or not, the St. John the Baptist Parish Council exercised its political power to isolate, separate, and exploit the African-American community of Wallace.

VIII. AMERICAN INDIANS AND ENVIRONMENTAL RACISM

In 1985, EPA commissioned the Council of Energy Resource Tribes (CERT) to survey the potential hazardous

161. *Id.* at 17.

162. ST. JOHN THE BAPTIST PARISH HOME RULE CHARTER art. III, § A(7)(b) (1980) (emphasis added).

163. MANDELL & LEWIS, *supra* note 128, at 7.

164. TOXIC WASTES AND RACE, *supra* note 33, at ix-x.

wastes located or generated on or near Indian lands.¹⁶⁵ The survey revealed that "as many as 1,200 hazardous waste generators or other hazardous waste activities sites were located on or near the twenty-five Indian reservations selected for the survey."¹⁶⁶

But, according to Martin Topper¹⁶⁷ and Donald Sutherland¹⁶⁸ of the U.S. Bureau of Indian Affairs, six hazardous waste facilities on or adjacent to Indian reservations are listed or proposed to be listed on EPA's National Priorities List, and seventeen known hazardous waste sites on or near Indian reservations have not yet been placed on EPA's National Priorities List.¹⁶⁹ The implications of these numbers are startling. Like African- and Hispanic-Americans, American Indians are severely and disproportionately affected by hazardous waste activities.

Supposedly, Indian lands are attractive for hazardous waste facility sites¹⁷⁰ because "they are far removed from populated areas."¹⁷¹ Indian lands include "approximately sixty million acres, or over three percent of the land mass of the United States — an area larger than New Jersey, Maryland, Delaware, Massachusetts, Connecticut, Maine, New Hampshire, Rhode Island, and Vermont combined."¹⁷² However, these sixty million acres do not compose one large mass in one large area. There are 280 reservations and 220 Indian villages scattered throughout the United States.¹⁷³

165. Richard A. Dubey et al., *Protection of the Reservation Environment: Hazardous Waste Management on Indian Lands*, 18 ENVTL. L. 449, 459 n.35 (1988).

166. *Id.*

167. Telephone interview with Martin Topper, Coordinator of Indian Matters, EPA (Oct. 1990).

168. Telephone interview with Donald Sutherland, Acting Chief of Environmental Services, U.S. Bureau of Indian Affairs (Oct. 1990).

169. Both Mr. Topper and Mr. Sutherland note that few of the hazardous waste sites located on Indian lands are known because EPA has no systematic surveying process on the Indian reservations. According to Mr. Topper, EPA is presently developing such a system. He notes that this system will be unlike that of CERT in that it will be comprehensive, rather than partial.

170. There is strong concern that these hazardous facilities are locating to Indian reservations, not only because the reservations are isolated from large populations, but also because they bypass stringent state regulation. See generally Ziva Branstetter, *Incinerator Firm Under Fire: Kaws Approve Location*, TULSA TRIBUNE, Nov. 20, 1990, at 1; *Watchdogs Battling Hazardous Waste: Cherokee Land Site of Incinerator*, GREEN COUNTY NEIGHBORS, Nov. 11, 1990, at 1; Robert Tomsho, *Dumping Grounds: Indian Tribes Contend With Some of Worst of America's Pollution*, WALL ST. J., Nov. 29, 1990, at A6.

171. Dubey, et al. *supra* note 165, at 454.

172. *Id.* at 453-54 (citation omitted).

173. Telephone interview with Martin Topper, *supra* note 167.

Long before Columbus discovered America, the water, the land, and the living things that make up the environment were an integral part of the Indian culture.¹⁷⁴ Today, the once abundant water sources of the Indian reservations are being depleted by coal mining activities.¹⁷⁵ In addition to the depletion of their natural water sources, the Indian lands are heavily burdened with the mining, milling, and smelting of the nation's minerals and ores.¹⁷⁶

Approximately one-third of the nation's low sulfur coal is found in Native American lands, as is one-half the uranium, and about six percent of the oil and gas. In addition, oil shale, tar sands, phosphate, and other minerals and ores are located on tribal lands Many of these activities use or produce materials classified as hazardous or toxic under the EPA's regulations.¹⁷⁷

These hazardous activities are destroying the food sources, the water supplies, the culture, and the lives of the American Indians.

A recent front page article of the Wall Street Journal describes the disturbing ordeal that the Mohawk tribe has been suffering through for more than thirty years.¹⁷⁸ The St. Regis Indian Reservation, called Akwesasne by the Mohawks, is located on the St. Lawrence River near Massena, New York. Factories, such as General Motors, Reynolds Metals Co., Aluminum Co., and a number of Canadian manufacturers are also located on the St. Lawrence River.¹⁷⁹ According to the article,

[i]n the 1960s, Mohawk ranchers started complaining that cattle grazing upwind from the Reynolds stacks were developing loose teeth, brittle bones, and other problems. Farmer Earnes Benedict's Herefords began dying while giving birth. Mohawk hunters discovered strange markings on the hides of small game. Others reeled in bass and muskellunge that had skin

174. Dubey, et al. *supra* note 165, at 450.

175. Bill Lambrecht, *Water Rights: Hopis Challenge Peabody Coal*, ST. LOUIS POST DISPATCH, July 9, 1990, at 1. (Peabody Coal Co. of St. Louis "pumps 120,000 gallons of water per hour into the 18-inch-wide pipeline that carries the coal slurry on its 273 mile journey to the Mohave Generating Station in Laughlin, Nevada. The plant burns about five million tons of coal each year to provide power in Southern California and Nevada."). *Id.* at 7.

176. Dubey, et al. *supra* note 165, at 454.

177. *Id.*

178. Tomsho, *supra* note 170, at 1.

179. *Id.*

ulcers and deformed spines.¹⁸⁰

In 1978, studies by scientists from Cornell and other universities indicated that the sickly cattle were suffering from fluoride poisoning. The scientists also found high levels of PCBs and other toxins in the flora and fauna.¹⁸¹

Today, the nine thousand residents of Akwesasne can no longer eat the perch or pike from its waters, and fluoride poisoning has annihilated their cattle herds.¹⁸² The nearby factories have fouled the land and water of the Akwesasne to such an extent that the health, culture, food supply, and income source of these Indian people have been devastated.¹⁸³

IX. THE DISPROPORTIONATE IMPACT OF ADVERSE PSYCHOLOGICAL EFFECTS

The health of those residents who live in ethnic and racial minority communities near hazardous waste activities is greatly jeopardized by their close proximity to toxic chemicals.¹⁸⁴ These communities are struck hardest by transportation spills, explosions, toxic emissions, and groundwater contamination.¹⁸⁵ Because of the increased probability of exposure to toxic chemicals, these residents have a higher probability of contracting cancer, or experiencing "birth defects, genetic damage, neurological damage, liver disease, and/or numerous other health problems" caused by chemical exposure.¹⁸⁶ Thus, placing a hazardous waste facility near any type of socioeconomic community has adverse psychological effects on its residents.

In 1983, a community survey was conducted¹⁸⁷ to assess the

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *CHEMICAL CONTAMINATION AND ITS VICTIMS*, *supra* note 3, at 53-54. The problem with the health effects associated with chemical exposure is that some are not manifested until long after the initial exposure. Consequently,

[t]he greatest danger of pollution may well be that we shall tolerate levels of it so low as to have no acute nuisance value, but sufficiently high, nevertheless, to cause delayed pathological effects and despoil the quality of life.

Id. at 54 (citation omitted). However, "[t]he data available on chemical effects is sufficient to support additional diagnostic evaluation of exposed patients" *Id.* at 19.

185. *TOXIC WASTES AND RACE*, *supra* note 33, at 17.

186. *PSYCHOLOGICAL EFFECTS OF HAZARDOUS TOXIC WASTE DISPOSAL ON COMMUNITIES* 81 (Dennis Peck ed., 1989).

187. Originally, the survey was to be conducted with Arizona Department of Health Services (ADHS); however, one week before the survey was to begin, ADHS withdrew its participation and resources from the survey. The Director of ADHS explained that if

psychological impact of a proposed hazardous waste facility on the residents of Rainbow Valley, Arizona, host community to the proposed site.¹⁸⁸ The researchers noted that because the media has "sensitized the public to the problems associated with hazardous and toxic substances, people do not want these potentially health-threatening substances located near them."¹⁸⁹ The residents of Rainbow Valley were no exception, when they learned that the Arizona Legislature had decided to locate the proposed hazardous waste facility in their community, they were outraged.¹⁹⁰ The residents expressed their anger at a meeting sponsored by EPA.¹⁹¹ During this meeting, the residents voiced their resentment toward the decision-making process¹⁹² as well as concerns for their future health and safety in Rainbow Valley.¹⁹³

Through the survey, the researchers learned that eighty-five percent of the participants perceived the facility as a threat.¹⁹⁴ Despite their efforts to prevent construction of the facility in Rainbow Valley, two-thirds of the participating residents believed that the facility would be built at the whim of the political officials.¹⁹⁵ Rainbow Valley residents "viewed the facility as a threat to their well-being and expected few community benefits."¹⁹⁶ The residents' anxieties ranged from fear of potential

ADHS participated in the survey, it would have to present the findings to the legislature. He was worried that the data from the survey might be used to force a delay in the construction of the hazardous waste facility. *Id.* at 77.

188. Kenneth M. Bachrach & Alex J. Zavtra, *Assessing the Impact of Hazardous Waste Facilities: Psychology, Politics, and Environmental Impact Statements*, in 6 *ADVANCES IN ENVIRONMENTAL PSYCHOLOGY—EXPOSURE TO HAZARDOUS SUBSTANCES: PSYCHOLOGICAL PARAMETERS* 71, 74-77 (Allen H. Lebovits et al. eds., 1986).

189. *Id.* at 71.

190. *Id.* at 75.

191. *Id.*

192. *Id.* The Arizona State Legislature received an in-depth report on one highly ranked site for the hazardous waste facility and two alternative sites. Rainbow Valley was one of the alternative sites. The residents believed that the legislators did not select the highly ranked site, which was in fact better suited for the facility, because it was located in the district of the Republican Senate Majority Leader. The other alternative was not selected because it was located in the district of the Democratic Senate Minority Leader whose support was often needed. Consequently, the Democratic State Senator of Rainbow Valley, who had the least political clout, could not prevent the location of the facility in his district. *Id.* at 74-75.

193. *Id.* at 75.

194. *Id.* at 80.

195. *Id.*

196. *Id.* at 84.

accidents,¹⁹⁷ to fear of surface water contamination,¹⁹⁸ to fear of an increased risk of becoming sick.¹⁹⁹ Not only did the Rainbow residents distrust the political process that placed the hazardous waste facility near their home, but the residents were also distrustful of the people who would eventually manage the facility.²⁰⁰ The residents did not think that public complaints regarding the operations of the facility would be investigated promptly.²⁰¹ In addition, the residents did not believe that the general public nor the local community would be apprised of any changes regarding the facility.²⁰² According to the researchers, "if the community does not feel it can trust the State or the facility operator, distress among local residents may be increased once the building of the hazardous waste facility begins."²⁰³

Despite the opportunity to voice their concerns regarding the hazardous waste facility, Rainbow Valley residents still experienced high levels of anxiety. These levels of anxiety will undoubtedly intensify when local residents have no opportunity to participate in the siting process but instead are led into accepting the potentially life threatening facility.

In 1978, the political leaders of Emelle, Alabama,²⁰⁴ (a predominantly African-American community) brought Chemical Waste Management²⁰⁵ (Chemwaste) into their community without any input from the local residents.²⁰⁶ Emelle residents were taken unaware:

Few residents knew they were about to become the host community of the nation's largest hazardous waste dump. Rumors circulated throughout the community about a "new industry" coming to town [A] local newspaper, touted the economic benefits of the industry

Over two years after the site had opened, the residents learned that Alabama Governor George Wallace's son-in-law acquired the 2,400 acres of land, obtained the necessary permits with surprising ease, and immediately sold the package to

197. Seventy-three percent of the residents had this fear. *Id.* at 83.

198. Eighty-one percent of the residents had this fear. *Id.*

199. Sixty-nine percent of the residents had this fear. *Id.* (The study does not identify or discuss the toxic chemicals to which the residents may possibly be exposed).

200. *Id.* at 85.

201. Sixty-five percent of the residents had this opinion. *Id.* at 83.

202. Seventy-eight percent of the residents had this opinion. *Id.* at 83.

203. *Id.* at 85.

204. See discussion of the U.S. GEN. ACCOUNTING OFFICE study *supra* part III.A.

205. U.S. GEN. ACCOUNTING OFFICE, *supra* note 20, at app. I, 1.

206. BULLARD, *supra* note 23, at 70.

Chemwaste.²⁰⁷

The Chemwaste facility is now receiving most of the nation's heavy metals, industrial solvents, and PCBs and is the largest hazardous waste facility in the country.²⁰⁸

Like the residents of Rainbow Valley and Emelle, the emotions and anxieties of ethnic and racial minority communities where the hazardous waste sites are disproportionately located must not be overlooked.²⁰⁹ Feelings of helplessness and desperation plague the ethnic and racial minority communities faced with the injustice in the decision-making process and the lack of any recourse.

X. THE DISPROPORTIONATE IMPACT OF PROPERTY VALUE LOSSES

For the same reasons that residents so diligently protest the siting of hazardous waste facilities in their neighborhoods, prospective homeowners prefer to buy as far from the hazardous waste facilities as possible. According to Dr. Stephen Farber,²¹⁰ "consumer products with higher risks bear lower prices."²¹¹ Thus, "land near noxious facilities in unpleasant environments will sell for less than other land."²¹²

In fact, studies have shown that prior to the discovery of the dangers inherent in hazardous waste sites "[p]roperty values did not significantly increase with distance from the site." However, "after 'discovery,' property values increased by 1.3 percent — 1.9 percent more for every mile of distance from a site before discovery."²¹³ Similar studies have concluded:

Households would be willing to pay between 300 and 495 [dollars] (1984) annually for each mile increase in distance between the residence and a hazardous waste landfill. When capitalized at 10 percent, this implies increases in property values of

207. *Id.* at 71.

208. *Id.* at 71-72.

209. Unfortunately, for racial and ethnic communities who experience various forms of racism every day the fears of chemical exposure only compound an already troublesome situation.

210. Telephone interview with Dr. Stephen C. Farber, Professor of Economics at Louisiana State University in Baton Rouge, Louisiana (Oct. 1990).

211. Stephen C. Farber, *Loss in Property Values*, in LA. COMP. RISK PROJECT FINAL REP. 1 (1990).

212. *Id.*

213. *Id.* at 3 (citing R. Gregory Michaels & V. Kerry Smith, *Market Segmentation and Valuing Amenities with Hedonic Models: The Case of Hazardous Waste Sites* (Oct. 1988) (unpublished manuscript on file with the *Tulane Environmental Law Journal*)).

between 3,300 and 4,950 [dollars] (1984) for each additional mile from the site.²¹⁴

These studies demonstrate that homeowners located near hazardous waste facilities lose substantial economic value in their homes. Prospective homeowners are willing to pay more money to avoid the perceived risks associated with hazardous waste sites.²¹⁵ As a result of these dynamics, a home located near a hazardous waste site will be worth less on the market than a comparable home located some distance from the site. Many homeowners in this position,²¹⁶ have no other means of obtaining the additional money they need to move to a cleaner and safer environment.²¹⁷ Consequently, even if these homeowners could find a willing buyer, they would still have difficulty finding an affordable home outside of the area.

XI. THE FIGHT FOR ENVIRONMENTAL PROTECTION AND JUSTICE

Since the Warren County protests, ethnic and racial minority communities throughout the nation have organized against the location of these dangerous facilities in their neighborhoods. Minority involvement in environmental activism is increasing rapidly across the country.²¹⁸ One commentator observed that local opposition groups are "emerging from neighborhood living rooms, voting minority representatives into local office, and reaching out to the established environmental organizations" to aid in their campaign for environmental protection and social justice.²¹⁹ Indeed, there has been a remarkable increase in minority participation, at least at the grassroots level, in environmental activism. With the help of organized environmental

214. *Id.* (citing V. Kerry Smith & William H. Desvousges, *The Value of Avoiding a LULU: Hazardous Waste Disposal Sites*, 68 REV. OF ECON. AND STAT. 293, 293-99 (1986)).

215. *Id.* at 4.

216. The U.S. General Accounting Office study found that at least 26% of population in all four predominantly African-American communities have an income below that of the national poverty level, U.S. GEN. ACCOUNTING OFFICE, *supra* note 20, at 4; 93% of the African-American population in Sumter County, Alabama are below poverty level, *Id.* at app. I, 1; and 80% of the African-American population in Warren County, North Carolina are below the poverty level. *Id.* at app. I, 7.

217. Like the residents of Wallace County, the land that has been handed down for generations may be the only financial asset the residents possess. Interview with Wilfred Green, *supra* note 125.

218. Russell, *supra* note 73, at 22-32.

219. *Id.* at 23.

coalitions and other interest groups, minority groups are utilizing more action-oriented techniques including protesting, demonstrating, picketing, applying political pressure, and initiating litigation.²²⁰

As noted above, the nation's largest hazardous waste facility is located in Emelle, Alabama, in Sumter County. The operation of this facility contributes more than two million dollars annually to Sumter county. Despite the pesticides and other volatile solvents which have arisen in monitoring wells outside the site in less than ten years of the plant's operation,²²¹ the state continues to accept hazardous waste for treatment, storage, and disposal from forty-eight states.²²² Many of the Emelle residents characterize their community as the "industrial pay toilet of the nation."²²³

As of 1990, 78.9 percent of Emelle's population was African-American,²²⁴ at least ninety-three percent of whom had an income below the poverty level.²²⁵ According to Charles E. Cobb, the executive director-emeritus of the United Church of Christ Commission for Racial Justice, the siting of the largest hazardous waste dump in "one of the poorest counties in the country [is] 'a moral outrage and a national disgrace.'"²²⁶ In a constructive effort to stimulate and organize local opposition on a grassroots level, the CRJ, through its Special Project on Action Against Toxic Pollution in Poor Communities, assisted the citizens at Emelle in their protest against Chemwaste.²²⁷ CRJ's assistance included a leadership training conference and educational efforts.²²⁸ Lois Gibbs, leader of the Citizens' Clearinghouse for Hazardous Waste (CCHW), contributed to CRJ's efforts as well. As an integral part of the process, the

220. *Id.*

221. Robert Bullard & Beverly H. Wright, *Environmentalism and the Politics of Equity*, 12 MID-AM. REV. OF SOC. 21, 31 (Winter 1989). Any contamination to the ground water could adversely affect not only the health of Emelle's residents, but it could also impact their economic mainstay: cattle raising.

222. *National Solid Wastes Management v. Alabama Dept. of Env'tl. Quality*, 910 F.2d 713, 715 (11th Cir. 1990) ("[E]ighty-five percent of the wastes disposed of at Emelle were generated outside Alabama.").

223. Charles Lee, *From Montgomery to Emelle: The Continuing Struggle Over the Disposal of Toxic Wastes*, E/SA, Oct. 19, 1984, at 28, 30.

224. Bullard & Wright, *supra* note 221, at 31.

225. Lee, *supra* note 223, at 28.

226. *Id.* at 30.

227. *Id.*

228. *Id.*

groups attempted to first characterize the site as a violation of the Emelle citizens' civil rights, and second, to facilitate the election of more African-American representatives.²²⁹

Another misguided siting occurred in a poor minority community in Houston, Texas. Houston has a no-zoning policy. In light of this policy, it is no mere coincidence that five out of eight Houston sanitary landfills are located in predominately African-American neighborhoods and twelve of the thirteen municipal waste disposal sites are located in Houston's "poverty pockets."²³⁰

In 1979 African-Americans from North Forest, a predominately African-American neighborhood in Houston, filed a lawsuit against Browning-Ferris Industry to stop construction of another sanitary landfill in their community.²³¹ This community was one of the poorest in Houston and already hosted two sanitary landfills. Although, the residents' alleged that the siting decision was based on racial discrimination, they lost the suit and construction of the third landfill went ahead as planned. The site was ultimately constructed only 1,400 feet from a high school, a stadium, and the school district's administration building. Seven other North Forest schools are within a two mile radius of the landfill site. Eighty-five percent of the students attending school within the North Forest School District are African-American. Despite the North Forest residents' failure to stop the construction of this landfill in their community, the Houston City Council passed a resolution in 1980 restricting city-owned solid waste trucks from dumping waste at this site. The Texas Department of Health (TDH) also recently updated its permit application procedure to require developers of waste disposal sites to include demographic information regarding the socio-economic condition of the area surrounding the proposed site.²³² Since the North Forest protests, TDH has issued only two Type I sanitary landfill permits in areas where there are only a minority of African-Americans.²³³

229. *Id.* Since the early 1980s, African-Americans have been elected to positions such as state representative, state senator, mayor of Emelle, and have composed all of the seats on the county commission and board of education. *Id.*

230. Bullard & Wright, *supra* note 221, at 33.

231. *Id.*

232. TEXAS DEPARTMENT OF HEALTH, DEPARTMENT'S POLICY ON LAND USE § A - 5, § E - 3.3e (on file with authors).

233. Also, the court of appeals upheld a Texas Department of Health decision denying Browning-Ferris Industry a permit for a Type I solid waste disposal facility in

In the struggle against "environmental racism," there have been a few success stories. In Triana, Alabama, where the population is entirely African-American, the citizens won a twenty-five million dollar out-of-court settlement against Olin Chemical Company (Olin) for its contamination of the town's water supply in 1983.²³⁴ In the accompanying settlement agreement, Olin agreed to clean up residual DDT and PCBs, to allocate an additional five million dollars for long-term health care costs, and to pay cash settlements to each Triana resident.²³⁵ Also, in 1985 the minority residents of West Dallas, Texas, led protests and demonstrations, applied political pressure, and engaged in litigation against the RSR Corporation.²³⁶ The residents were ultimately awarded twenty million dollars after a number of residents suffered irreversible brain damage caused by the hazardous activities of RSR.²³⁷

Yet many communities with established grassroots opposition movements continue to suffer from environmental racism. For example, in Richmond, California, the Citizens For A Better Environment (CBE) released a report in February 1989 stating that Richmond is home to more than 350 industrial facilities handling hazardous chemicals, and to 210 different toxics that are emitted into the air, dumped into the water, and found in the form of solid waste.²³⁸ The report also indicated that one-half of Richmond's population is African-American. The report stated, "[A]ll of the lower income, minority neighborhoods [including many Hispanic-Americans] are in the western and southern parts of Richmond where the highest location of petrochemical facilities are also located."²³⁹ Richmond residents have organized the West County Toxics Coalition in order to clean up their environment.²⁴⁰ Currently, these residents are pressuring Chevron to engage in negotiations concerning health and toxic reduction issues.²⁴¹ According to coalition member Ernie Witt, "We

southwest Houston noting that it constituted improper land use of the property because the construction and operation of the site would harm the health and welfare of its residents and the property surrounding the proposed site. *Browning-Ferris v. Texas Dept. of Health*, 625 S.W.2d 764, 768-69 (Tex. Ct. App. 1981).

234. BULLARD, *supra* note 23, at 20.

235. *Id.* at 20-21.

236. *Id.* at 54-61.

237. *Id.* at 60.

238. Cohen, *supra* note 1, at 29.

239. Russell, *supra* note 73, at 25.

240. Cohen, *supra* note 1, at 28.

241. *Id.*

may be black, we may be poor, but we should have the basic human rights of clean air, clean water, and a non-toxic neighborhood."²⁴²

Hispanic-Americans have also joined the fight against environmental racism. In November 1989, nearly one thousand Hispanic-Americans gathered in East Los Angeles to protest the construction of a twenty-nine million dollar incinerator that would burn 125,000 pounds of toxic wastes per day.²⁴³ The proposed incinerator would be located only three and a half miles from downtown Los Angeles.²⁴⁴ A citizens' group called Mothers of East Los Angeles (MELA) organized the protest. MELA has joined forces with the African-American group Concerned Citizens of South-Central Los Angeles (CCSCLA) as well as the Chinese residents of Lincoln Heights to stop the construction of the Vernon waste incinerator. In 1989, CCSCLA successfully stopped the construction of a garbage incinerator in a predominately African-American community in Los Angeles.²⁴⁵

Given the fact that minority communities host a disproportionate share of hazardous waste facilities, one can only imagine what motivates the decisions behind each siting project. Charles Lee suggests that "[t]he unwritten law governing corporate [and political] decision-making about toxics seems to have been, 'Do what you can get away with,' . . . mean[ing] that those communities which are poorer, less informed, less organized, and less politically influential become more likely targets for abuse from toxic polluters."²⁴⁶ Another commentator points out that "[t]here is a functional link between racism, poverty, and powerlessness, and the chemical industry's assault on the environment."²⁴⁷

This attitude is illustrated by a 1984 report prepared for the California Management Board, which "carefully delineated the demographics of where opposition to such [siting] projects was likely to come from (liberal, college educated, young, or middle-aged, middle and high-income groups in large urban areas)."²⁴⁸

242. *Id.*

243. Russell, *supra* note 73, at 22.

244. *Id.*

245. *Id.*

246. *Id.* at 25.

247. *Id.*

248. *Id.*

The report then recommended that "ideally . . . officials and companies should look for 'lower socioeconomic neighborhoods' that are also in a 'heavy industrial area with little, if any, commercial activity.'"²⁴⁹ Ideally, recommendations such as these will become obsolete as minorities begin to play a larger role in the environmental movement. With increased organized minority opposition, federal, state, and industrial entities may no longer question the residents' ability to understand the magnitude of the environmental and health risks associated with a hazardous waste facility. These entities may no longer be able to rely on the residents' inability to successfully resist the siting of a facility. Minority communities should no longer have to be "somebody else's backyard."

XII. HOW STATES ARE CONTROLLING LOCAL OPPOSITION: THE ISSUE OF PREEMPTION

In 1970, EPA estimated that the United States generated approximately nine million tons of hazardous waste.²⁵⁰ In 1974, the generated hazardous waste had increased to twenty-nine million tons. By 1981, this waste had skyrocketed to 250 million metric tons.²⁵¹ In response to growing suspicions that industry might be mishandling wastes, Congress passed the Toxic Substances Control Act of 1976 (TSCA)²⁵² and the Resources Conservation and Recovery Act of 1976 (RCRA).²⁵³ These regulations set minimum standards for the generation, treatment, storage, and disposal of hazardous wastes.²⁵⁴ In 1984, Congress amended RCRA to prohibit "the disposal of certain highly toxic and mobile hazardous wastes in landfills unless those wastes are first treated to reduce toxicity and mobility using the best available demonstrated technology" to prevent serious and deadly threats to public health and the environment.²⁵⁵ The passage of TSCA and RCRA did not, however,

249. *Id.* at 26 (quoting a 1984 report prepared for the California Waste Management Board by the Cerrell Associates Consulting Firm).

250. Stutz, *supra* note 12, at 46.

251. *Id.*

252. Toxic Substances Control Act, Pub. L. 94-469, 90 Stat. 2003 (1976) (codified as amended at 15 U.S.C. § 2601-2629 (1988)).

253. Resources Conservation and Recovery Act of 1976, Pub. L. 94-580, 90 Stat. 2795 (codified as amended at 42 U.S.C. § 6986 (1988)).

254. 15 U.S.C. § 2601-2671 and 42 U.S.C. § 6901-6992(k).

255. National Solid Wastes Management Ass'n. v. Alabama Dep't. of Env'tl. Management, 910 F.2d 713, 722 (11th Cir. 1990) (citing 42 U.S.C. § 6924(d)-(m)).

address the orphaned wastes that have persisted after more than one hundred years of unregulated industrial activity. Congress subsequently promulgated the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), commonly known as Superfund.²⁵⁶ Superfund allotted 1.6 billion dollars to finance investigations and cleanups of unsafe sites. Congress then passed the Superfund Amendments and Reauthorization Act of 1986, reauthorizing the operation of Superfund until 1991, and increasing the Superfund to 8.5 billion dollars.²⁵⁷

RCRA, CERCLA, and SARA made the states responsible for the hazardous waste siting process and standards of treatment, storage, and disposal of hazardous waste. Although the states have the power to establish stricter standards, each state is required to follow the minimum standards established by statute. The purpose of these statutes is "to protect health and environment and conserve valuable material and energy resources," which is accomplished in part "by establishing a viable federal-state partnership."²⁵⁸ This "partnership" is hardly equal; the Supreme Court has held that neither RCRA, CERCLA, nor SARA preempts state and local siting controls, unless the site selection process discriminates against interstate commerce or frustrates congressional goals.²⁵⁹ A persistent problem EPA has encountered is that, by designating the siting responsibility to the states and their localities, the construction and operation of essential hazardous waste facilities has been successfully blocked by intense local opposition.

At the federal level, "Congress was concerned that certain states, because of political pressures and public opposition, were not able to create and permit sufficient facilities within their borders to treat and securely dispose of (and/or manage) the amounts of wastes produced in those states."²⁶⁰ Therefore,

256. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. 9601-9657 (1988)).

257. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (codified as amended in scattered sections of 10, 26, & 42 U.S.C. (1988)).

258. H.R. REP. NO. 1491, 94th Cong., 2d Sess. 33 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6271.

259. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 620-21 n.4 (1978). *But cf. Hillsborough County v. Automated Med. Labs.*, 471 U.S. 707, 713 (1985) ("[s]tate and local enactments are nullified to the extent they actually conflict with federal law").

260. *National Solid Waste Management v. Alabama Dept. of Env'tl. Management*, 910 F.2d 713, 716 (11th Cir. 1990) (quoting OFFICE OF SOLID WASTE AND EMERGENCY

when Congress amended CERCLA in 1986, the amendments required the states to present a proposal to EPA showing:

They will "have adequate capacity available to dispose of the hazardous wastes generated within the state for the next twenty years [I]f the state does not provide such capacity assurances deemed adequate by the EPA, . . . the state is prohibited from receiving Superfund money for remedial clean-up actions taken within the state."²⁶¹

The Eleventh Circuit noted that when Congress enacted SARA, it also recognized that,

[p]ressures from local citizens place the political system in an extremely vulnerable position The broader social need for safe hazardous waste management facilities has not been strongly represented in the . . . process [of creating new facilities]. A common result has been . . . no significant increase in hazardous waste capacity over the past several years.²⁶²

Preemption is one technique used to prevent local opposition from frustrating the national goal of establishing the development of facilities to safely handle the nation's hazardous wastes.²⁶³ The success of this technique is guaranteed "[i]n nonhome rule states [where], there is no question of the state's power to preempt because local units of government lack any inherent powers of sovereignty and are subject to complete controls by state legislatures."²⁶⁴ In home rule states, however, local opponents of state preemption will claim that preemption conflicts with the constitutional grants of home rule.²⁶⁵

States have developed six basic approaches to preempt local authority:

RESPONSE, EPA, ASSURANCE OF HAZARDOUS WASTE CAPACITY: GUIDANCE TO STATE OFFICIALS 2 (Dec. 1988)).

261. *Id.* at 716-17 (citations omitted). According to § 104(c)(9) of SARA, if the exporting state cannot safely dispose of its wastes within its borders, the state can meet its capacity requirements by reaching an agreement with other states to use their publicly and privately owned disposal facilities. *Id.*

262. *Id.* at 716 (quoting S. REP. NO. 11, 99th Cong., 1st Sess. 22 (1985)).

263. *Swift & Co. v. Wickham*, 382 U.S. 111, 125 (1965) ("The [preemption] doctrine arises from the supremacy clause of the Constitution, which states that the Constitution shall be the supreme law of the land. U.S. CONST. art. VI, cl.2." Moreover, "the invalidation of a state statute because it conflicts with a federal statute represents an application of the preemption doctrine that is grounded on this constitutional foundation.").

264. A. DAN TARLOCK, *Siting New or Expanded Treatment, Storage, or Disposal Facilities: The Pigs in the Parlors of the 1980s*, 17 NAT. RES. LAW. 429, 438 (1984).

265. *Id.*

(1) straight state preemption; (2) straight preservation of local veto authority; (3) partial preemption; (4) state preemption of local vetoes upon state review and an extraordinary majority of the state siting authority; (5) state preemption after extensive local involvement and enhanced public participation; and (6) a requirement that the operator and the local community negotiate an agreement that offers [incentives] to the community.²⁶⁶

The use of preemption as a tool to silence local opposition has been recently applied by the federal courts. These courts are willing to preempt if the state legislatures or local authorities pass a statute or zoning ordinance that frustrates the government's goal in facilitating the storage, treatment, and disposal of hazardous wastes. In *Warren County v. State of North Carolina*,²⁶⁷ for example, the district court held that a county ordinance banning disposal of PCBs in the county was void because it conflicted with the purposes and objectives of Congress under the TSCA.²⁶⁸ The Eighth Circuit in *Ensco v. Dumas*²⁶⁹ held that a county ordinance prohibiting the storage, treatment, or disposal of "acute hazardous waste" within its boundaries was preempted by RCRA.²⁷⁰

The Eleventh Circuit in *National Solid Wastes Management v. Alabama Department of Environmental Management*,²⁷¹ declared Alabama's "Holley Bill"²⁷² unconstitutional on two grounds. First, the bill frustrated congressional environmental objectives, and, thus, was preempted by RCRA, CERCLA, and SARA. Second, the bill violated the Commerce Clause of the United States Constitution. The court held that because "hazardous waste is an object of commerce" it is subject to congressional power in regulating the interstate movement of hazardous

266. *Id.* at 439-40. For a discussion on the advantages and disadvantages of Tarlock's six approaches to preemption see *id.* at 439-46.

267. 528 F. Supp. 276 (E.D.N.C. 1981).

268. According to the court in *Warren*, "Congress intended to give states and localities some leeway to impose more stringent disposal requirements than those provided for by federal regulation. However . . . [if the preemption doctrine under Article VI of the United States Constitution] means anything it must mean that a county may not pass an ordinance if the effect of which is to totally frustrate an entire statutory plan enacted by Congress for the protection of the citizens in all fifty states." *Id.* at 289-90.

269. 807 F.2d 743 (8th Cir. 1986).

270. *Id.* at 745.

271. 910 F.2d 713 (11th Cir. 1990).

272. ALA. CODE § 22-30-11 (1988), requires that states wanting to export their generated waste into the Emelle site must first obtain Alabama's preapproval and second must pretreat the waste before it is exported.

waste.²⁷³ The court claimed that "the dangers associated with hazardous waste movement do not outweigh the value of moving hazardous waste across state lines."²⁷⁴ The court further held that "Alabama did not ban the shipment of hazardous wastes into the state, but only shipments from certain states, . . . Alabama's law is a protectionist measure ban based inadequately on a legitimate local concern."²⁷⁵

The Eleventh Circuit failed to address at least one important issue. Although the court pointed out that Alabama had the responsibility of sharing the national burden of treating, storing, and disposing of hazardous wastes, it failed to request that every state participate in the national burden as well. Until such a decision is rendered, forty-eight states will continue to export their generated portions of hazardous waste to the largest hazardous waste site facility located in the minority community of Emelle, Alabama. Thus, the *National Solids* decision not only strips away local control over a community's desired land use, but fails to encourage other communities from participating in the fair distribution of the treatment, storage, and disposal of hazardous wastes.

XIII. CHALLENGING A SITING DECISION: THE ROLE OF NUISANCE ACTIONS, DUE PROCESS ACTIONS, § 1982 ACTIONS AND EQUAL PROTECTION ACTIONS

A. *The Nuisance Action*

Even though some siting statutes can be preempted either by federal or state legislation, private parties and local units of government with standing can still challenge hazardous waste siting as a nuisance. Parties will not usually be able to enjoin the construction of a hazardous waste facility in advance "because the plaintiffs will be unable to show that the proposed use will cause imminent irreparable injury," and the operators of the facility must first be given the chance to operate the facility reasonably.²⁷⁶ In recent years, however, the courts have begun to accept a showing of risk rather than the proof of cause in fact

273. 910 F.2d at 718-19.

274. *Id.* at 719.

275. *Id.* at 720.

276. TARLOCK, *supra* note 264, at 445 (citation omitted). However, if the facility is publicly owned, it may be immunized from any preconstruction injunction suits. *Id.*

typically required to satisfy the doctrine of imminent irreparable injury.²⁷⁷

Despite the relaxation in the causation element of nuisance claims, a nuisance action is still difficult to win. In *Twitty v. State*,²⁷⁸ the plaintiffs brought a public nuisance action and a private nuisance action *per accidens*²⁷⁹ against the state-operated PCB facility in Warren County, North Carolina. The trial court found for the plaintiffs, holding that the state's location and operation of the PCB disposal facility had "resulted in a 'substantial non-trespassory invasion of plaintiffs' interest in the private use and enjoyment of their property in that it . . . resulted in a material diminution in the value of plaintiffs' lands . . . [and] constitute[d] a public nuisance permanent in nature resulting in a diminution in value of plaintiffs' lands."²⁸⁰ Accordingly, the trial court awarded plaintiffs just compensation.

The North Carolina Court of Appeals reversed the trial court's decision, holding that the facility did not constitute a public nuisance because its operation did not affect the local community generally since its "acts or conditions [were] not subversive of public order, decency, or morals, [nor did they] constitute an obstruction of public rights."²⁸¹ The court also found that the state's operation of the PCB disposal site did not constitute a private nuisance *per accidens* because the state was operating and maintaining the facility reasonably, and was properly exercising its police authority to promote the health, safety, and welfare of North Carolina's residents.²⁸²

B. The Due Process Action Under the Fourteenth Amendment

The *Twitty* court also addressed plaintiffs' due process claims against the state's operation of the PCB disposal facility in Warren County, North Carolina. The plaintiffs contended that the state's placement of the facility in close proximity to their land constituted a "governmental taking for which they [were] entitled to just compensation under the Fourteenth

277. *Id.* at 447.

278. 354 S.E.2d 296 (N.C. App. 1987).

279. *Id.* at 301. According to *Twitty*, "[a]n intentional private nuisance *per accidens* is one which constitutes a nuisance by reason of its location or the manner in which it is constructed, maintained, or operated." *Id.* at 301 (citation omitted).

280. *Id.* at 300.

281. *Id.* at 301 (quoting *State v. Everhardt*, 166 S.E. 738, 741-42 (N.C. 1932)).

282. 354 S.E.2d at 301.

Amendment of the United States Constitution.”²⁸³ The court stated that “for a ‘taking’ to occur ‘there need only be a substantial interference with elemental rights growing out of their ownership of the property.’”²⁸⁴ The court gave examples of these “takings,” which included the existence of odors, smoke, ashes, and rats linked to the operation of sewage and waste disposal sites.²⁸⁵ The court held, however, that “[a] reduction in market value, standing alone, does not constitute an ‘actual interference with or disturbance of’ plaintiffs’ use and enjoyment of their property, [which] requires an actual interference (the cause) substantial enough to reduce the market value of plaintiffs’ property (the effect).”²⁸⁶ The *Twitty* plaintiffs managed to prove only the effect, the diminution in land value, but not the cause.

C. *An Action Pursuant to 42 U.S.C. § 1982*

A minority community hosting a hazardous waste site may be able to enjoin the construction or operation of a site pursuant to a civil rights action brought under 42 U.S.C. § 1982.²⁸⁷

This law applies to cases in which private or state decisions have adversely impacted the property value of black residents when their white counterparts were not suffering the same adverse effect. A similar cause of action under this statute could be applied to state or private interests that discriminatorily site a hazardous waste facility in a minority community.

The Supreme Court in *Jones v. Alfred H. Mayer Co.*,²⁸⁸ held that a claim pursuant to 42 U.S.C. § 1982 bars all racial discrimination, private and public, in the sale or rental of property. However, according to *City of Memphis v. Greene*,²⁸⁹ 42 U.S.C. § 1982 has been broadly construed “to protect not merely the enforceability of property interests acquired by black citizens, but also their right to acquire and use property on an equal basis with white citizens.”²⁹⁰ The Supreme Court further indicated that 42 U.S.C. § 1982 could be violated if the construction of a

283. *Id.* at 302.

284. *Id.* (quoting *Long v. City of Charlotte*, 293 S.E.2d 101, 109 (N.C. 1982)).

285. *Id.* at 303.

286. *Id.* at 304.

287. 42 U.S.C. § 1982 states: “All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.”

288. 392 U.S. 409 (1968).

289. 451 U.S. 100, 120 (1981).

290. *Id.* at 123.

hazardous waste facility "severely restricted access to black homes, because blacks would then be hampered in the use of their property."²⁹¹ Yet, the Supreme Court did not find a civil rights violation because plaintiffs failed to introduce evidence that property values had actually decreased.²⁹²

D. An Action Pursuant to the Equal Protection Clause

A central purpose of the Equal Protection Clause of the Fourteenth Amendment is to prevent official conduct that discriminates on the basis of race.²⁹³ In proving an Equal Protection case under the Fourteenth Amendment, a person must first prove a discriminatory purpose or intent by the official decisionmaker and must then show the racially disproportionate impact.²⁹⁴ In showing discriminatory intent, a person must establish a clear pattern, unexplainable on grounds other than race.²⁹⁵ In *Village of Arlington Heights*, the Supreme Court set out five factors to consider in determining whether "invidious discriminatory purpose or intent is present in official actions":

- (1) The impact of the official action whether it bears more heavily on one race than another;
- (2) The historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes;
- (3) The specific sequence of events leading to the challenged decision;
- (4) The substantive departures from normal procedures, particularly if factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached;
- (5) The legislative or administrative history of the statute.²⁹⁶

A claimant does not have to prove that a racial purpose was the sole, dominant, or even primary purpose for a challenged action, but only that it has been a motivating factor in the decision.²⁹⁷ Showing a discriminatory purpose, however, "implies more than intent as a volition or intent as awareness of its conse-

291. *Id.*

292. *Id.*

293. *Washington v. Davis*, 426 U.S. 229, 239 (1976).

294. *Neighborhood Ass'n v. Planning and Zoning Com'n*, 896 F.2d 1264, 1266 (11th Cir. 1989).

295. *Village of Arlington Heights v. Metro Hous. Dev.*, 429 U.S. 252, 266 (1977).

296. *Id.* at 266-68.

297. *Id.* at 265-66.

quences It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."²⁹⁸ Proof of intentional discrimination can be developed through circumstantial rather than direct evidence and inferred from the totality of relevant facts.²⁹⁹ The Supreme Court in *Personnel Administrator of Massachusetts v. Feeney* noted that "[t]his is not to say that the inevitability or foreseeability of consequences of a neutral rule has bearing upon the existence of discriminatory intent. Certainly, when the adverse consequences of a law upon an identifiable group are . . . inevitable . . . a strong inference that the adverse effects were desired can be reasonably drawn."³⁰⁰

Analogous to cases where minority communities are burdened with disproportionate numbers of hazardous waste facilities are a series of Eleventh Circuit cases where municipalities violated the Equal Protection Clause by denying African-American communities certain services bestowed upon the white communities.³⁰¹ A reasonable argument could be made that state or local governments violate the Equal Protection Clause when they disproportionately burden minority communities with hazardous waste facilities, while systemically allowing their white or more affluent neighbors to live free of polluting industries and the concomitant risks associated with living in close proximity to hazardous waste sites.

XIV. THE ROLE OF RACIAL DISCRIMINATION CLAIMS

Minority communities have become tired of bearing the brunt of the nation's generation of hazardous waste and have begun turning to the legal system to halt this form of environmental racism. Two minority communities have filed civil rights actions challenging the selection of waste facility sites as racially discriminatory.

In *Bean v. Southwestern Waste Management Corp.*,³⁰² the plaintiffs challenged the Texas Department of Health's decision

298. *Personnel Adm'r. of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

299. *Washington v. Davis*, 426 U.S. 229, 242 (1976).

300. 442 U.S. 256, 279 n.25 (1979).

301. *Ammons v. Dade City*, 783 F.2d 982, 987 (11th Cir. 1986); *Dowdell v. City of Apopka*, 698 F.2d 1181, 1185 (11th Cir. 1983); *Baker v. City of Kissimmee*, 645 F. Supp. 571, 588 (M.D. Fla. 1986).

302. 482 F. Supp. 673 (S.D. Tex. 1979).

to grant a permit to Southwestern Waste Management Corporation to operate a Type I solid waste facility in Houston.³⁰³ The plaintiffs testified that they were told a shopping mall or a steel mill was being constructed, not a solid waste facility.³⁰⁴ Once the plaintiffs became aware that a solid waste facility was being built, they signed petitions and raised funds to oppose the facility.³⁰⁵ The plaintiffs contended that the siting decision was partially motivated by racial discrimination in violation of 42 U.S.C. § 1983 and sought a motion for a preliminary injunction.³⁰⁶ The court found the necessary substantial threat of irreparable injury because the plaintiffs alleged "that they [were] being deprived of their constitutional rights. That, in itself, may constitute irreparable injury."³⁰⁷

Yet, the court denied the motion because the plaintiffs were unable to establish a substantial likelihood of proving TDH's discriminatory purpose in its siting decisions for solid waste facilities under the *Washington v. Davis* standard.³⁰⁸ The plaintiffs in *Bean* claimed that TDH had followed a pattern of racial discrimination in the siting of solid waste facilities.³⁰⁹ After examining data on the site locations, the court disagreed with the plaintiffs and held that the "available statistical data, both city-wide and in the target area, fail[ed] to establish a pattern or practice of discrimination by TDH."³¹⁰ The court stated that the plaintiffs had failed to show a pattern of racial discrimination in TDH's siting process because, "[o]f all the solid waste sites opened in the target area, 46.2% to 50% were located in census

303. *Id.* at 674-75. "The entrance to this facility is located in the City of Houston, but the major portion of the facility is outside the city limits at Houston, located in Harris County." *Id.* at 675 n.3.

304. *Id.*

305. 482 F. Supp. 673, 674-76 (S.D. Tex. 1979). The defendants named in the complaint were Southwestern Waste Management Corp., Browning-Ferris, Inc., and the Texas Department of Health. Southwestern Waste Management Corp. and Browning-Ferris asked that the case be dismissed based upon the absence of state action. The court stated that the granting of the permit by TDH constituted state action, claiming that "[i]f TDH either discriminated on its own or endorsed or ratified discriminatory acts of the other defendants, the plaintiffs are entitled to relief . . . [unless their actions were] not so intertwined with the state that their actions should be considered actions of the state. *Id.* at 676.

306. *Id.* at 677.

307. *Id.* (citing *Henry v. Greenville Airport Comm'n*, 284 F.2d 631, 633 (4th Cir. 1960)).

308. 482 F. Supp. at 677.

309. *Id.*

310. *Id.*

tracts with less than 25% minority population *at the time they were opened.*"³¹¹ The court did state, however, that the outcome may have been different if the statistical data had shown that "even those sites approved in predominately Anglo census tracts were actually located in minority neighborhoods."³¹²

In order to prove purposeful discrimination, the plaintiffs offered evidence revealing that the same site proposal had been denied by the county commissioners in 1971. Since 1971, the Smiley High School had changed from an Anglo-American student body to one that is predominately African-American. The commissioners did not approve the site proposal until after this change in the student racial distribution. The court recognized that land use considerations should have deterred the granting of the site permit in that location:

If this Court were TDH, it might very well have denied this permit. It simply does not make sense to put a solid waste site so close to a high school Nor does it make sense to put the land site so close to a residential neighborhood. But I am not TDH and for all I know, TDH may regularly approve of solid waste sites located near schools and residential areas, as illogical as that may seem.³¹³

Despite the court's wisdom in recognizing TDH's illogical decision, the court did nothing to remedy the decision and denied the injunction. The court suggested, however, that the plaintiffs introduce evidence pertaining to the following unanswered questions:

- (1) Where are the solid waste sites located in each census tract? Even though the sites may be placed in a predominately Anglo tract, the sites themselves may be situated in or near an African-American or other minority community.
- (2) How large an area does a solid waste site affect? If it affects an area larger than that of a census tract, then a target area analysis becomes much more persuasive.
- (3) How are solid waste site locations selected?
- (4) What factors entered into TDH's decision to grant the permit? The racial compositions of the neighborhood and the racial distribution of solid waste sites in Houston were primary concerns of the plaintiffs. The degree to which TDH

311. *Id.* (emphasis added).

312. *Id.*

313. *Id.* at 679-80.

was informed of these concerns remains unclear.³¹⁴

In any given case, the success of gathering the extrinsic evidence, including reasons why a developer or a siting board makes a siting decision, is extremely difficult. The *Bean* court did state, however, that sufficient statistical data could establish the foundation for a racially discriminatory motive, particularly if it is supplemented by other nonstatistical evidence.

The issues raised in *Bean* have been dormant for the past eleven years. However, the plaintiffs in *Bordeaux Action Comm. v. Metro. Gov't of Nashville*³¹⁵ have revived the issue of racial discrimination in the hazardous waste facility siting process. The plaintiffs in *Bordeaux* filed a class action suit against the City of Nashville for a declaratory judgment and injunctive relief. The plaintiffs alleged that the sanitary landfill located in Nashville, Tennessee, was being operated in violation of the Tennessee Solid Waste Disposal Act³¹⁶ and the Federal Solid Waste Disposal Act.³¹⁷ Plaintiffs alleged violations against the landfill for

unsatisfactory daily cover, for pooling of water in garbage, for allowing leachate to escape into the Cumberland River, for the allowance of leachate to collect in impermissible amounts within the dump itself, for dumping waste into the Cumberland River, and for improper handling of special wastes that include asbestos and incinerator ash, constituting more than forty . . . separate violations.³¹⁸

The failures of the Commissioner for the Tennessee Department of Health and Environment along with the Metropolitan Government of Nashville to operate the sanitary landfill in a safe and lawful manner had allegedly caused the "diminution of [the plaintiffs'] property value, reduction in their general quality of life, and an increase in their exposure to airborne and waterborne health hazards, particularly hazardous to the health of the

314. *Id.* at 680.

315. *Bordeaux Action Comm. v. Metro. Gov't of Nashville*, No. 3-90-0214 (M.D. Tenn. filed Mar. 12, 1990). The plaintiffs are the citizens of Bordeaux and the Bordeaux Action Committee, a corporation chartered in 1989 and organized in 1973 for the purpose of blocking the development of the sanitary landfill in the Bordeaux area of Metropolitan Nashville. The defendants include the Commissioner of the Tennessee Department of Health and Environment.

316. TENN. CODE ANN. §§ 68-31-101 to 501 (1987).

317. 42 U.S.C. § 6901.

318. Complaint at 6, *Bordeaux Action Comm.* (No. 3-90-0214).

elderly and the children in said community."³¹⁹

The plaintiffs also alleged that the defendants' motive for continuing to improperly and unlawfully maintain the sanitary landfill was

predicated upon an inappropriate and unlawful racially discriminatory animus . . . [which was] manifest in statements such as those made by Metro Council persons who suggested that the residents in the proximity of the subject sanitary landfill were there by choice and because they in some way benefited from the presence of the landfill.³²⁰

Because six hundred African-Americans live in Bordeaux, the plaintiffs argued that "the placement of the subject sanitary landfill was . . . consistent with a national racially discriminatory trend that has resulted in more than seventy percent of all such landfills existing in Afro-American communities."³²¹ The plaintiffs also claimed that the continued unlawful operation of the landfill site violated their right to equal protection and violated 42 U.S.C. § 1982. The plaintiffs alleged that they had been denied the same rights enjoyed by white citizens to inherit, purchase, lease, sell, hold, and convey real property.

According to Walter Searcy, attorney for the plaintiffs, the residents of Bordeaux were not informed when they purchased their homes seventeen years ago that a sanitary landfill would subsequently be built in that location. Searcy noted, the area was predominately white seventeen years ago. Once African-Americans began to purchase property in the area, the white residents left. The realtors who sold the homes to the African-Americans supposedly knew about the construction of the sanitary landfill but failed to tell African-American homebuyers. Once the majority of the homes were sold, the construction of the site commenced. Immediately, the property value of the homes dropped and the African-Americans were unable to sell their homes for their purchase prices.³²²

The plaintiffs recently lost their motion for a declaratory judgment and injunctive relief. Searcy said that the plaintiffs only addressed the issue of unlawful operation of the site. He

319. *Id.* at 7.

320. *Id.* at 8.

321. Telephone interview with Walter Searcy, attorney for Bordeaux Action Committee (Nov. 1990) (all information used in this paper regarding the *Bordeaux* case was obtained from Mr. Searcy).

322. *Id.*

plans to take the case to trial to address the other issues, including the claim that the siting and continued operation of the facility was motivated, at least in part, by racial discrimination. The plaintiffs will ask for compensatory and punitive damages.³²³

The residents of Noxubee, Mississippi, are now confronting a very similar situation but are still in the preliminary stages of protest.³²⁴ Recently, the siting board approved the location of a hazardous waste facility in the all African-American community. The developers claim that the construction and operation of the site will stimulate employment and bring in more income for the economically depressed community. Even with these assurances, most members of the Noxubee community have begun to oppose the siting, claiming racial discrimination. Environmental and other public interest groups have gone to Noxubee to help organize opposition against the siting.³²⁵ The minority opposition will likely use a variety of action-oriented tactics, including filing civil rights suits claiming that the siting decision was racially motivated.

XV. THE PROCESS BY WHICH HAZARDOUS WASTE FACILITIES ARE LOCATED MUST BE REEVALUATED

To eliminate environmental racism from the hazardous waste facility siting process, the process itself must be reformed. To start, the permitting stage should require the immediate notification of local residents of the possible siting of a hazardous waste facility.

In most states, the general public and local residents do not receive notice of a company's permit application until a draft permit is prepared for public comment.³²⁶ By this time, the requesting company has submitted the application and the agency has drafted an initial draft permit,³²⁷ a fact sheet delineating the basis for the initial draft permit,³²⁸ and an administrative record.³²⁹ In reality, the time period between the initial

323. *Id.*

324. *Toxic Waste Plant Approved in Mississippi*, TIMES-PICAYUNE, Dec. 13, 1990, at B5.

325. *Id.*

326. National Primacy Drinking Water Regulations Implementation, 40 C.F.R. § 124.6 (1989).

327. *Id.*

328. *Id.* §§ 124.7, 124.8.

329. *Id.* § 124.9.

application and public notice may consist of a year or more. Consequently, the public is not notified about the proposed facility in their neighborhood until long after the applicant has had ample opportunity to persuade the agency of its good intentions. The present process does not lend itself to agency flexibility once the application reaches the public comment stage. The public comment stage of the siting and permitting process too often represents the final decision of the agency. After a year or more of work and deliberation, the agency officials want to stand behind their product and often have little motivation to return to the initial stage of the process. Consequently, the current process often leaves the affected residents and the general public frustrated. Once the residents enter the current process, they do not believe that their efforts and concerns will be truly considered. Like the Rainbow Valley situation, this belief only leads to further distrust and anxiety.

States that have not already done so should amend their current permitting process to require public notice at the same time that the applicant submits the application for the permit. The public notification will allow the local residents and concerned citizens to join in the decision-making process and reduce the problem of agency inflexibility.

By allowing the residents to voice their concerns early in the process, residents will retain a sense of control over their future well-being. The residents no longer have to rely solely on a political process that involves the bargaining of votes or an agency process that has little political accountability. Rather, the residents can advance their concerns and needs in a forum that is more likely to lead to change.³³⁰

XVI. CONCLUSION

The evidence of environmental racism is astounding. The GAO, the CRJ, and the CERT studies demonstrate that the vast majority of hazardous waste facilities are surrounded by people who live below the poverty level and who are members of minority races. The national CRJ study discovered that race was the

330. The CRJ study includes a number of noteworthy recommendations to address the problem of the disparate impact of hazardous waste facilities on racial and ethnic communities. The CRJ has addressed recommendations to each level of government as to how to confront the many issues of this problem. *TOXIC WASTES AND RACE*, *supra* note 33, at 23-27. The authors of this paper adopt these recommendations, but will not discuss them herein.

most significant predictor in detecting hazardous waste activity levels. This evidence supports the many allegations that governmental officials and agencies have exercised their power to exploit the less politically influential, the less informed, and the poorer members of society. Rather than receiving protection from a democratic system designed to protect the minority voice, the ethnic and racial minority communities became a convenient scapegoat for difficult political decisions.³³¹

Environmental protection and social justice are compatible goals. Every citizen of the United States should have the right to a pollution-free environment. If some citizens already enjoy this right, then all of the people in the nation should be able to enjoy it as well. Members of the majority should not expect others to host the waste that the nation generates. Attractive techniques such as monetary compensation for depreciated land values and job incentives cannot justify the siting of hazardous waste facilities in economically depressed communities. Social justice cannot be purchased. Whether willing or not, these communities have assumed health risks and sacrificed the enjoyment and full value of their property. They have been stripped of their right to a pollution- and risk-free environment — rights that other communities continue to enjoy. The burden of treating, storing, and disposing of hazardous wastes needs to be equitably and fairly distributed among all members of society.

As the public becomes more aware of the siting process and the risks involved in hosting a site, minority opposition will continue to grow and groups will organize to fight decisions to site hazardous waste facilities in their communities. Minority communities will continue their struggle against "environmental racism" until their homes are no longer looked upon as "someone else's backyard."

331. Indeed, in the administrative process, if the minority voice is heard, it is not until the agency and the industrial applicant have reached a final agreement.

