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COMMENT

Environmental Justice: Is Disparate Impact Enough?

I. INTRODUCTION

"Not in my backyard!" This simple statement and the vigorous efforts to enforce it have resulted over the last sixteen years in a growing movement in minority communities in search of what has been termed "environmental justice." It is claimed by activists, and proven in numerous studies, that minorities are more likely to be affected by the siting of hazardous waste facilities and the permitting of other hazardous waste producers than are whites.¹ The causes of these inequities are neither uniform nor easily identifiable.² Unfortunately, remedies may be equally elusive. Lack of resources, political power, and practical knowledge have proven all too often to be insurmountable obstacles to

1. Vicki Been & Francis Gupta, *Coming to the Nuisance or Going to the Barrios? A Longitudinal Analysis of Environmental Justice Claims*, 24 *ECOLOGY L.Q.* 1, 4 (1997). See also Charles J. McDermott, *Testimony submitted to the House Judiciary Committee, Subcommittee on Civil and Constitutional Rights* (March 3, 1993) (stating that, although hazardous waste treated in off-site facilities does pose some risk, it should be remembered that "the entire commercial hazardous waste industry handles only 3% of the hazardous waste in this country," with the rest being handled by the generator on-site).

2. Been & Gupta, *supra* note 1, at 6.

the resolution of conflicts over the siting of hazardous waste producers or handlers.³

Civil rights claims based on the Equal Protection Clause of the Constitution have proven particularly ineffective because discriminatory intent is so difficult to establish. Title VI of the Civil Rights Act of 1964⁴ and the Environmental Protection Agency's ("EPA's") implementing regulations⁵ have recently been utilized as a potential alternative to equal protection claims. During the 1998 term, however, the United States Supreme Court vacated the Third Circuit's decision in *Chester Residents Concerned For Quality Living v. Seif*,⁶ the first decision recognizing an implied private right of action under the EPA's regulations.⁷ Private citizens' groups are now faced with uncertainty on their ability to file private environmental justice actions without evidence of discriminatory intent.

This comment examines the environmental justice issue with an eye toward establishing the viability of Title VI as a tool for achieving some measure of protection for minority communities. Specifically, Part II provides a brief overview of the environmental justice problem, discussing both its chronological development and its substantive elements. Part III examines the traditional methods of recourse in environmental justice: claims brought under environmental laws and claims brought pursuant to the Equal Protection Clause and 42 U.S.C. § 1983. Part IV introduces Title VI and the EPA's implementing regulations as an alternative to equal protection challenges. Part V introduces the reader to Chester, Pennsylvania, and provides initial procedural history for *Chester Residents Concerned for Quality Living v. Seif*. Part VI then provides an analysis of the Third Circuit's reasoning in *Seif*, identifying the rationale for an implied private right of action within the EPA's regulations. Next, Part VII examines subsequent litigation addressing the private right of action. This Comment then concludes by recognizing the growing trend in courts across the country allowing disparate impact claims under Title VI and associated implementing regulations, and urging the utilization of these provisions in addition to tools already in place for addressing environmental justice concerns.

3. See Alice Kaswan, *Environmental Justice: Bridging the Gap Between Environmental Laws and "Justice,"* 47 AM. U. L. REV. 221, 272 (1997).

4. 42 U.S.C. §§ 2000d to 2000d-7 (1994).

5. 40 C.F.R. § 7.10 et seq. (1998).

6. 132 F.3d 925 (3d Cir. 1997).

7. 119 S. Ct. 22 (1998).

II. ENVIRONMENTAL JUSTICE OVERVIEW

Environmental justice advocates generally trace the movement's origin back to 1982, when state officials in North Carolina approved the siting of a poly-chlorinated biphenyl ("PCB") plant near a predominantly African-American community in Warren County.⁸ The protests that accompanied the controversy were comparable to those of the civil rights movement of the 1960s.⁹ The controversy over the PCB plant siting prompted Congressman Walter E. Fauntroy, who participated in the demonstrations, to request that the U.S. General Accounting Office ("GAO") conduct a study "of the socioeconomic and racial composition of the communities surrounding the four major hazardous waste landfills in the South."¹⁰ The study, entitled *Siting of Hazardous Waste Landfills and their Correlation with Racial and Economic Status of Surrounding Communities*, completed in 1983, found that "[b]lack make up the majority of the population in three of the four communities where the landfills are located," and that "[a]t least 26 percent of the population in all four communities have income below the poverty level and most of this population is Black."¹¹ Furthermore, the study found that three out of every five African-American and Latino residents lived in communities with uncontrolled toxic waste sites.¹²

A broader study conducted by the United Church of Christ Commission for Racial Justice ("UCC") and reported in 1987, concluded that race proved to be a more significant factor in the siting of hazardous waste facilities than did socioeconomic status, even after the study controlled for urbanization and regional differences.¹³ In particular, the study found that "[i]n communities with two or more operating hazardous waste facilities or one of the five largest landfills, the mean minority percentage of the population was more than three times that of

8. See Richard J. Lazarus, *The Meaning and Promotion of Environmental Justice*, 5 MD. J. CONTEMP. LEGAL ISSUES 1 (1994).

9. Paul Mohai, Ph.D., *Testimony presented to the House Judiciary Committee, Subcommittee on Civil and Constitutional Rights* (Mar. 4, 1993).

10. *Id.* (Congressman Fauntroy was also one of over 500 persons arrested during the demonstrations).

11. Been & Gupta, *supra* note 1, at 801 (citing U.S. GEN. ACCOUNTING OFFICE, *SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES* at 2 (1983)).

12. *Id.* at 802.

13. *Id.* The UCC study investigated controlled and uncontrolled hazardous waste treatment facilities across the country. *Id.* at 801.

communities without facilities (38 percent versus 12 percent).¹⁴ The study also concluded that in communities with one hazardous waste facility in operation, the minority percentage of the population was double that of communities without facilities.¹⁵ The GAO study and the UCC study represent the first detailed investigations into whether race plays a role in the selection of sites for hazardous waste facilities.¹⁶

The data provided by these studies prompted EPA Administrator William K. Reilly, in 1990, to appoint an "Environment and Equity" working group.¹⁷ The group was charged with the task of assessing evidence that racial minority and low-income communities bear a higher environmental risk burden than the general population, and considering what, if anything, the EPA might do about it.¹⁸ The report, distinguishing between exposure to pollutants and consequent health effects, found that exposure did vary by race and by socioeconomic factors, and that "clear evidence [exists] that there are differences by race for disease and death rates."¹⁹ Among the reasons cited by the EPA report for the disparity between races were (1) the physical proximity to hazardous waste sites,²⁰ (2) minority consumption of contaminated food,²¹ and (3)

14. *Id.* at 802. See also Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787, 802 n.56 (1993) (identifying possible methodological and statistical confidence problems).

15. Been & Gupta, *supra* note 1, at 802. The study also concluded that of every five Black and Hispanic Americans, three lived in communities with "uncontrolled toxic waste sites." *Id.* A follow-up study conducted in 1994 found that the average percentage of minority residents living near hazardous waste sites had increased since the 1987 study. See DR. BENJAMIN A. GOLDMAN & LAURA FITTON, *TOXIC WASTES AND RACE REVISITED 2-5* (Center for Policy Alternatives 1994).

16. Lazarus, *supra* note 14, at 801. Subsequent studies have attempted to determine whether the disproportionate distribution of waste treatment facilities among minorities is a result of race-based siting policies and procedures, or is, rather, a result of minorities "coming to" the hazard due to lower property values. While less than conclusive on the causation question, several of these studies do indicate that waste facilities tend to be placed in minority communities more often than in white communities. See Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics*, 103 YALE U.L. REV. 1383, 1405 (1994) (concluding that there is significant evidence to suggest that waste treatment facilities are disproportionately located in minority neighborhoods). *But see* John E. Milner & John Turner, *Environmental Justice*, 13 NAT. RESOURCES & ENV'T. 478, 478-79 (1999) (arguing that many studies have concluded that there is no actual disparity in the siting of hazardous waste facilities).

17. See ENVIRONMENTAL EQUITY WORKGROUP, OFFICE OF POLICY, PLANNING, AND EVALUATION, U.S. EPA, *ENVIRONMENTAL EQUITY: REDUCING RISK FOR ALL COMMUNITIES*, WORKGROUP REPORT TO THE ADMINISTRATOR (June 1992).

18. *Id.* at 2.

19. *Id.* at 11, 13.

20. *Id.* at 14-15.

minority farmworker exposure to pesticides.²² Finally, the Report suggested that some minorities may suffer disproportionately from environmental pollution, both because of the greater incidence of exposure and because members of minority groups may be more vulnerable to the effects of the pollution.²³

Many commentators believe the current distributional inequity can be attributed to the lack of political clout in minority communities.²⁴ This premise is supported by recorded efforts of private industry to minimize resistance to siting of their facilities. In 1984 Cerrell Associates conducted a study to determine the feasibility of siting a hazardous waste treatment facility in a particular area. The study noted that "all socioeconomic groupings tend to resent the nearby siting of major facilities, but middle and upper socioeconomic strata possess better resources to effectuate their opposition. Middle and higher socioeconomic strata neighborhoods should not fall within the one-mile and five-mile radius of the proposed site."²⁵ The obvious message to facility developers is to locate waste facilities in lower socioeconomic strata

21. *Id.* at 15-16.

22. *Id.* at 16.

23. *Id.* at 22. The report stated the conclusion may be reached that some population groups identified as sensitive to the health effects of air pollution (asthmatics, persons with certain cardiovascular diseases or anemia, and women at risk of delivering low-birth-weight fetuses) appear to be "disproportionately composed of low-income or racial minority individuals compared to the general population." See also Lazarus, *supra* note 14, at 806 (discussing the increased sensitivity of certain population subgroups to most contaminants); and Dominique R. Shelton, *The Prevalent Exposure of Low Income and Minority Communities to Hazardous Materials: The Problem and How to Fix It*, 5 BEVERLY HILLS B.A.J. 1, 3 (Summer/Fall 1997) (noting that exposure to hazardous materials can cause increased risk of cancer, birth defects, lung diseases, kidney disorders, liver problems, bone marrow diseases, and damage to the immune and nervous systems).

24. See Sheila Foster, *Justice From the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement*, 86 CAL. L. REV. 775, 799 (1998) ("Conventional industry wisdom counsels private companies to target sites that are in neighborhoods 'least likely to express opposition'—poorly educated and lower socioeconomic neighborhoods with little if any commercial activity"). See also Rachel D. Godsil, *Remedying Environmental Racism*, 90 MICH. L. REV. 394, 400 (1991) (noting that, although civil rights groups have occasionally been successful in opposing the siting of hazardous waste facilities in their communities, "minority communities often do not have the political influence or resources to compete with their affluent white counterparts, nor the level of representation in the state legislatures to compete even with poor whites. Therefore, because hazardous waste sites must go *somewhere*, they are frequently placed in poor, minority communities").

25. Robert Bullard, *Dumping in Black and White*, in *WE SPEAK FOR OURSELVES: SOCIAL JUSTICE, RACE, AND ENVIRONMENT* 4, 18 (Dana Alston, ed. 1990) (citing the Cerrell Associates report).

communities, the population of which are disproportionately minority in make-up.

In addition to political powerlessness, segregated housing patterns in minority communities, low home and property values in and around selected communities, and lack of sufficient resources and practical knowledge of the process required to oppose hazardous waste facilities may all contribute to a developer's choice of sites.²⁶ It is even possible that part of the responsibility for the disproportionate siting of waste treatment facilities in minority communities may be attributed to community leaders in search of jobs and tax support.²⁷ Unfortunately, any economic benefits accruing to the host community via hazardous waste facilities probably will not adequately offset the serious health risks and the economic depression associated with the potential reluctance of new businesses to relocate in communities hosting waste facilities.²⁸

Furthermore, once a facility is located in a minority community, and hazardous waste is released into the environment, evidence indicates differential treatment of "white" and "minority" sites.²⁹ Federal and state agencies do not possess adequate funds to respond to every violation, and enforcement agencies have much discretion in deciding on enforcement priorities.³⁰ The *National Law Journal*, in a study conducted in 1992, found that agencies are slower to begin the clean-up of hazardous waste sites located near minority or low-income communities,³¹ and when agencies do take remedial action, the response chosen for minority communities is often inferior to that selected for white

26. See Godsil, *supra* note 24, at 399-400.

27. McDermott, *supra* note 1, at 11-12 (McDermott pointed out in his testimony that "[i]t is often overlooked that siting is . . . a local land use issue . . ." and that revenue generated by waste facilities often improves schools and health care delivery systems, provides employment, and contributes to other civic projects). *But see* Foster, *supra* note 24, at 786.

28. It is important to note at this point that opposition to the siting of hazardous waste treatment facilities in minority communities is rarely unanimous. See *Environmentalists Seek To Make Shintech Delay More Permanent*, in THE CHEMICAL MARKET REPORTER, Monday, September 22, 1997, located at 1997 WL 8497940 (quoting Ernest Johnson, president of the Louisiana Conference of NAACP, noting that in a door-to-door community survey by the St. James NAACP branch, seventy-three percent of African Americans favored the placement of the chemical plant, twenty-four percent were against it, and three percent had no opinion).

29. Marianne Lavelle & Marcia Coyle, *Unequal Protection. The Racial Divide In Environmental Law. A Special Investigation*, 15 NAT'L L.J. s2, col.1 (Sept. 21, 1992).

30. Kaswan, *supra* note 3, at 238.

31. Lavelle & Coyle, *supra* note 29, at 2 ("In more than half of the 10 autonomous regions that administer EPA programs around the country, action on cleanup at Superfund sites begins from 12 percent to 42 percent later at minority sites than at white sites").

communities.³² In addition, penalties assessed for violations of environmental laws are lower than in white communities.³³ It appears that minority communities do not receive equal consideration or treatment before or after hazardous waste facilities are sited.

In 1994 President Clinton got involved in the environmental justice issue when he published Executive Order 12,898, entitled *Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations*. The Order instructed federal agencies to make achieving environmental justice part of their mission by "identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of [their] programs, policies, and activities on minority populations and low-income populations in the United States"³⁴ The Order also created an Interagency Working Group on Environmental Justice, to be formed within three months by the EPA.³⁵ The group would provide guidance to, and coordinate research efforts with, federal agencies.³⁶ Finally, section 2-2 of the Order requires each agency to conduct all of its programs, policies, and activities substantially affecting health or the environment in a manner that ensures minorities are not denied participation based on race, color, or national origin.³⁷

In the memorandum accompanying the Executive Order, the President directed federal agencies to ensure compliance with the nondiscrimination requirements of Title VI.³⁸ In response, the EPA published the *Interim Guidance For Investigating Title VI Administrative Complaints Challenging Permits*, which was intended to prepare the agency to handle an anticipated increase in the number of Title VI complaints

32. *Id.* ("At minority sites, the EPA chooses 'containment,' the capping or walling off of a hazardous dump site, 7 percent more frequently than the cleanup method preferred under the law, permanent 'treatment,' to eliminate the waste or rid it of its toxins. At white sites, the EPA orders treatment 22 percent more often than containment").

33. *Id.* ("For all federal environmental laws aimed at protecting citizens from air, water, and waste pollution [for example] penalties in white communities were 46 percent higher than in minority communities").

34. Exec. Order No. 12,898, 59 Fed. Reg. 7629 (1994).

35. *Id.*

36. *Id.*

37. *Id.*

38. *Interim Guidance For Investigating Title VI Administrative Complaints Challenging Permits* (1994). Title VI provides, in relevant part: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (1994).

alleging discrimination in the environmental permitting context.³⁹ While laying out the appropriate procedures for processing complaints made to the EPA pursuant to Title VI, the Guidance also notes that "individuals may file a private right of action in court to enforce the nondiscrimination requirements in Title VI or EPA's implementing regulations without exhausting administrative remedies."⁴⁰ Unfortunately, as the basis for this statement, the EPA cites to *Chester Residents Concerned for Quality Living v. Seif*,⁴¹ a Third Circuit decision which has recently been vacated by the United States Supreme Court.⁴² Does the private right of action still exist?

III. EQUAL PROTECTION UNDER THE CONSTITUTION: PROVING DISCRIMINATORY INTENT

Formal opposition to the discriminatory siting of a hazardous waste treatment facility may take the form of an administrative or judicial complaint filed against a facility that is, or will be in noncompliance with an applicable environmental statute.⁴³ Filing under an environmental law is an effective approach when there is a violation of an environmental statute.⁴⁴ Most environmental laws, however, provide little in the way of protection from discrimination. When the problem is a disproportionate burden on a minority community, citizens have preferred to litigate the siting based on alleged civil rights violations.⁴⁵

Unfortunately, until very recently civil rights actions based on discrimination in the environmental context have been overwhelmingly unsuccessful.⁴⁶ Lack of success may be attributed to the requirement that claimants under the Equal Protection Clause of the Constitution prove that a discriminatory intent motivated the policy maker to site the

39. *Interim Guidance For Investigating Title VI Administrative Complaints Challenging Permits*, at 2. Title VI complaints filed with the EPA prior to the passage of the Executive Order and the Interim Guidance, "typically alleged discrimination in access to public water and sewerage systems or in employment practices." *Id.* at 2.

40. *Id.* at 4.

41. *Id.*

42. *Seif*, 119 S. Ct. at 22.

43. Lazarus, *supra* note 14, at 827-28.

44. Most environmental statutes do provide citizen suit provisions designed to allow individuals to challenge the actions of potential or actual violators of the statute. *See, e.g.*, 33 U.S.C. § 1365 (1994) (citizen suit provision for the Clean Water Act); 42 U.S.C. § 6972 (1994) (citizen suit provision for the Resource Conservation and Recovery Act); 42 U.S.C. § 9659 (1994) (citizen suit provision for Comprehensive Environmental Response, Compensation and Liability Act).

45. Lazarus, *supra* note 14, at 828.

46. *Id.*

facility at a certain location.⁴⁷ Proving the subjective intent of a decision maker has become nearly impossible, particularly when low property values offer an alternate explanation for the siting decision.⁴⁸

As discussed above, the environmental justice movement is usually traced back to 1982. In *NAACP v. Gorsuch*,⁴⁹ state officials had approved the proposed siting of a PCB landfill in predominantly black Warren County, North Carolina. Plaintiffs sought injunctions to prevent the siting, arguing that the siting was racially motivated.⁵⁰ As evidence of discriminatory intent, plaintiffs pointed to eight other counties in the state where the soil was more suitable for the facility.⁵¹ The court, holding that there was no proof of intent to discriminate and that no irreparable injury would occur, dismissed the suit.⁵²

In *Bean v. Southwestern Waste Management Corp.*,⁵³ plaintiffs sought a preliminary injunction, alleging racial discrimination in the Texas Department of Health's decision to grant a permit for the operation of a solid waste facility in a predominantly minority area of Harris County, Texas.⁵⁴ The court found that because plaintiffs had failed to demonstrate the siting was within a minority "census tract," there was no evident pattern of discriminatory practice.⁵⁵ The court, relying on *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, found that, although "unfortunate and insensitive," the decision to grant the permit was not motivated by purposeful racial discrimination in violation of 42 U.S.C. § 1983.⁵⁶

47. See *Washington v. Davis*, 426 U.S. 229, 238-48 (1976). The intent requirement has been interpreted by the Court to demand claimants demonstrate that race "has been a motivating factor in the decision," and that the decision was made, not merely in spite of, but in part "because of" its adverse effect on the class. *Village of Arlington Heights v. Metropolitan Hous. Corp.*, 429 U.S. 252, 266 (1977).

48. See *Lazarus*, *supra* note 14, at 830. *Lazarus* also points out that, among the problems associated with proving discriminatory intent is the fact that "a community may become a 'minority community' only after a hazardous waste facility is located there, because of the decrease in property values caused by the siting." *Id.* at 831.

49. No. 82-768-5 (E.D.N.C. Aug. 10, 1982).

50. Warren County has the highest percentage of minority population of any county in North Carolina. See Valerie J. Phillips, *Have Low Income, Minorities Been Left Out Of The Environmental Cleanup?* 38-Oct *ADVOCATE* (Idaho) 16 n.17 (1995).

51. *Id.*

52. *Id.*

53. 482 F. Supp. 673 (S.D. Tex. 1979), *aff'd without op.*, 782 F.2d 1038 (5th Cir. 1986).

54. 482 F. Supp. at 674-75.

55. *Id.* at 677. See also Phillips, *supra* note 50, at 18 (noting that reliance on a "census tract" analysis allows courts "to rationalize by pointing to the sites located in majority white census tracts which are actually located within larger minority communities").

56. 482 F. Supp. at 680.

Little had changed when, ten years later, in *East Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb County Planning & Zoning Commission*,⁵⁷ plaintiffs challenged the decision of the local planning and zoning commission to allow creation of a private landfill in a predominantly black community.⁵⁸ The challenge was brought under the Equal Protection Clause of the Fourteenth Amendment, alleging that the Commission was partially motivated by race in violation of the Constitution.⁵⁹ Local residents had consistently opposed the landfill siting. The court interpreted their opposition as adequate participation in the siting process to ensure that a nondiscriminatory siting process had been followed by the Commission.⁶⁰

Likewise, in *R.I.S.E., Inc. v. Kay*,⁶¹ a community organization alleged that they were denied equal protection when the County Board of Supervisors approved the siting of a regional landfill in a predominantly black section of the county.⁶² Among its findings of fact, the court noted that: (1) the population of the county was approximately fifty percent black and fifty percent white; (2) thirty-nine blacks and twenty-two whites lived within a half-mile of the proposed regional landfill site; (3) the racial make-up of the community when a landfill was sited there in 1969 was one hundred percent black; (4) the racial make-up of the community when a second landfill was situated there in 1971 was approximately ninety-five percent black; and (5) when a third landfill was sited there in 1977, an estimated one hundred percent of the residents living within a half-mile radius were black.⁶³ Despite finding that the placement of the landfills from 1969 to 1991 had had a disproportionate impact on black residents, the court rejected plaintiffs' claim.⁶⁴ In concluding, the court stated, "the Equal Protection Clause does not impose an affirmative duty to equalize the impact of official decisions on different racial groups."⁶⁵

Such has been the position of equal protection challenges to the siting of hazardous waste facilities in minority communities under 42 U.S.C. § 1983 and under the Equal Protection Clause of the United States Constitution. By far, the greatest obstacle to success in such suits has⁵

57. 706 F. Supp. 880 (M.D. Ga. 1989).

58. *Id.* at 881.

59. *Id.* at 884.

60. *Id.* at 885.

61. 768 F. Supp. 1144 (E.D. Va. 1991).

62. *Id.* at 1150.

63. *Id.* at 1148.

64. *Id.* at 1149.

65. *Id.* at 1150.

been the lack of direct evidence of discriminatory intent.⁶⁶ Attorney Dominique Shelton has pointed out that in the environmental context, unlike traditional civil rights cases, "courts have refused to admit statistical evidence of disparate siting patterns to prove intentional discrimination."⁶⁷ This refusal, according to some commentators, defeats most equal protection challenges.⁶⁸

Courts have been more receptive to a finding of discriminatory intent when provision of municipal services are at issue. In *Ammons v. Dade City*,⁶⁹ black residents brought an action under Title VI against the city and several officials seeking to restrain defendants from providing municipal services in a racially discriminatory manner. The court, noting it was apparent that there existed a significant disparity in the provision of street paving, street resurfacing and maintenance, and storm water drainage facilities between black and white communities, held there was sufficient evidence from which to infer discriminatory intent.⁷⁰ When the issue involves the allocation of risk, such that one community's gain will be another's loss, however, courts have been less willing to find discriminatory intent. Another tool is needed.

IV. TITLE VI AS A POTENTIAL SOLUTION TO THE DISCRIMINATORY INTENT REQUIREMENT

Title VI of the Civil Rights Act of 1964, as amended, prohibits programs or activities receiving federal financial assistance from discriminating based on race, color, or national origin.⁷¹ Authority for promulgating regulations for the enforcement of Title VI are found in 42 U.S.C. § 2000d-1, which provides that agencies, such as the EPA, that provide financial assistance, may effectuate Title VI "by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute"⁷² Pursuant to that authority, the EPA promulgated regulations designed to limit federal funds to organizations which did not comply with the protections afforded by Title VI.⁷³ In short, if the EPA finds that a recipient of

66. See Shelton, *supra* note 23, at 12.

67. *Id.*

68. *Id.*

69. 783 F.2d 982 (11th Cir. 1986).

70. *Id.* at 987-88. See also *Dowdell v. City of Apopka*, 698 F.2d 1181 (11th Cir. 1983) and *Baker v. City of Kissimmee*, 645 F. Supp. 571 (M.D. Fla. 1986). In each case the court inferred discriminatory intent from the government's knowledge of existing disparities in municipal services.

71. 42 U.S.C. § 2000d (1994).

72. 42 U.S.C. § 2000d-1 (1994).

73. 40 C.F.R. § 7.35 (1994).

federal funds is in violation of Title VI or the implementing regulations, the EPA can move to suspend funding.⁷⁴

Rather than mirroring the statutory language and requiring proof of discriminatory intent, the EPA's regulations expressly provide for a disparate impact analysis. Under 40 C.F.R. section 7.35(b),

[a] recipient [of federal funds] shall not use criteria or methods of administering its program which have *the effect* of subjecting individuals to discrimination because of their race, color, national origin, or sex, or have *the effect* of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, national origin, or sex.⁷⁵

The standard the EPA applies when a complaint is submitted pursuant to these enforcement regulations is one of effect, not intent.⁷⁶ Effect can be objectively measured and demonstrated through statistical data—a form of evidence which courts have been particularly unwilling to review in equal protection suits.

While Title VI and the EPA's regulations have been in place for several years, prior to 1993 they were not utilized in the environmental justice context. In other areas of the civil rights movement, however, Title VI has consistently been successful. In *North Carolina Department of Transportation v. Crest Street Committee Council*,⁷⁷ for instance, citizens filed an administrative complaint with the United States Department of Transportation, challenging the North Carolina Department of Transportation's proposed extension of a largely federally funded expressway through an established, predominantly black neighborhood in Durham, North Carolina, as a violation of Title VI.⁷⁸ Subsequent negotiations resulted, after five years, in a Final Mitigation Plan executed by petitioners, respondents, and the city that resolved the controversy.⁷⁹

74. *Id.*

75. 40 C.F.R. § 7.35(b) (1994) (emphasis added). Furthermore, the EPA specifically identified the siting of facilities as a potential source of discrimination.

A recipient [of federal funds] shall not choose a site or location of a facility that has the purpose or effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination under any program to which this Part applies on the grounds of race, color, or national origin or sex; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of this subpart.

Id. at § 7.35(c) (1994) (emphasis added).

76. *Id.*

77. 479 U.S. 6 (1986).

78. *Id.* at 6.

79. *Id.*

In the meantime, construction of the highway extension had been enjoined by the federal district court in an unrelated action alleging violations of certain federal statutes that did not include any civil rights laws.⁸⁰ The citizens' group moved to intervene in that action and filed a proposed complaint asserting Title VI violations.⁸¹ The district court subsequently entered a consent judgment dissolving the injunction and dismissing the action, along with the citizens' groups' Title VI claims, *on the condition that petitioners implement the Final Mitigation Plan*.⁸² The Title VI claims, although dismissed, were instrumental in achieving the ends sought by the citizens group.

In *NAACP v. Wilmington Medical Center, Inc.*,⁸³ a group of African-Americans, Hispanics, and handicapped individuals brought an action under Title VI against a local hospital and certain government officials to prevent the relocation of the hospital ("WMC") to a new suburban area.⁸⁴ The suit resulted in a court order that the Department of Health Education and Welfare ("HEW") investigate WMC's planned relocation to determine if Title VI rights were being violated.⁸⁵ Finding that the planned relocation would violate plaintiffs' rights, HEW entered into negotiations with WMC, which ultimately amended its plan in order to satisfy the concerns of the citizens' group.⁸⁶ While the ultimate decision by the trial court denied plaintiffs' the relief they sought, the Title VI claims did force WMC to meet needs of minority citizens which otherwise might have been ignored.⁸⁷

Likewise, in *Johnson v. City of Arcadia*,⁸⁸ black citizens of Arcadia brought an action against the city and various city officials alleging deprivation of equal municipal services violative of Title VI.⁸⁹ The court held that inequality in services and facilities provided to black residents of the city with respect to street paving, parks, and recreation and in provision of a water supply system were the results of systematic racial discrimination in violation of plaintiffs' rights.⁹⁰ It is apparent

80. *Id.*

81. *Id.* at 10.

82. *Id.*

83. 530 F. Supp. 1018 (D. Del. 1981).

84. *Id.* at 1020.

85. *Id.* at 1021.

86. *Id.*

87. *Id.* at 1022.

88. 450 F. Supp. 1363 (M.D. Fla. 1978).

89. *Id.* at 1367.

90. *Id.* at 1368. See also *Young v. Pierce*, 685 F. Supp. 975 (E.D. Tex. 1988) (finding Title VI violations in housing programs); and *Marable v. Alabama Mental Health Bd.*, 297 F. Supp. 291, 293 (M.D. Ala. 1969) (addressing Alabama's violation of the Equal Protection

that Title VI provides a successful framework for addressing discriminatory policies and decisions, even when those policies are not based on an intent to discriminate.

Unfortunately, the EPA has historically taken a very narrow view of its responsibilities and opportunities under Title VI. In 1971, soon after the EPA's creation, EPA Administrator William Ruckelshaus testified before the United States Commission on Civil Rights, that there were "limitations' on what a 'regulatory agency' such as EPA could do consistent with its statutory mandate to achieve pollution control."⁹¹ In explaining the Agency's rationale, the administrator noted that denying or terminating funding would cause communities to violate environmental laws, which would be counter-productive to the Agency's purpose, without ensuring a change in racially discriminatory practices.⁹²

It would not be a penalty against that community at all and it would be no incentive for them to go ahead and do what we were asking them to do, because in fact they might consider it a benefit not to have to spend that additional money for the construction of a sewage treatment plant which our matching fund would force them to spend.⁹³

Responding to the suggestion that the EPA couple the denial of federal funds with lawsuits against the Title VI violator, Administrator Ruckelshaus expressed concern that such action would simply cause further delay in meeting national pollution control objectives while the suit was being litigated.⁹⁴

The EPA's failure to be proactive in enforcing Title VI did not go unnoticed. The U.S. Commission on Civil Rights noted in 1975 that the EPA was responsible for ensuring that violations of fair housing laws, the absence of a fair housing agency, and the existence of exclusionary zoning laws did not contribute to the exclusion of minorities from EPA assistance.⁹⁵ The Commission further noted that the EPA had not

Clause in the operation of mental health facilities in the state, and the subsequent steps taken by HEW to terminate federal funding under Title VI and agency enforcement regulations).

91. Lazarus, *supra* note 14, at 837 (citing *U.S. Commission On Civil Rights, Hearing Held In Washington, D.C.* 147 (June 14-17, 1971) (testimony of William Ruckelshaus, Administrator of the United States Environmental Protection Agency).

92. *Id.*

93. *Id.*

94. *Id.* (citing *U.S. Commission On Civil Rights, Hearing Held In Washington, D.C.*, *supra* note 91, at 151).

95. *Id.* (citing 6 *U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort—1974*, 598-99 (1975)).

satisfied that responsibility.⁹⁶ "EPA provides funds to municipalities without taking adequate steps to ensure that they are in compliance with Title VI, and . . . EPA has been lax in executing its Title VI mandate."⁹⁷ In recent years, however, the EPA has begun to realize more of its potential under the Civil Rights legislation.

In September and November, 1993, the first Title VI complaints based on environmental justice issues were filed with the EPA.⁹⁸ The Louisiana complaint alleged that the Louisiana Department of Environmental Quality ("DEQ") was violating Title VI by considering for permit a hazardous waste storage facility in an area already saturated with chemical plants.⁹⁹ The area, just west of New Orleans, is predominantly African-American and was, at the time, already home to ten major chemical plants.¹⁰⁰ The complaint asked the Federal EPA to intervene with the Louisiana DEQ to "force those agencies to look at environmental justice concerns."¹⁰¹

The EPA accepted the Louisiana complaint and a similar complaint filed against the Mississippi DEQ, marking the first time any citizens' group had complained to the EPA using Title VI.¹⁰² In response to the prospect of losing federal funding, and without admitting to any form of discrimination, the Louisiana DEQ denied the permit application. The Agency found that the applicant, Supplemental Fuels, Inc. ("SFI") had failed to analyze alternative sites.¹⁰³ The EPA's investigation into the

96. *Id.*

97. *Id.* at 838.

98. The procedure for filing a Title VI complaint with EPA consists of filing a letter, preferably with the EPA's Office of Civil Rights, alleging a discriminatory action or effect by someone receiving federal funds. It is not even necessary to designate the action as a violation of Title VI. The complaint should, at a minimum, allege discrimination on the basis of race, color, or national origin, including a description of the discriminatory acts and the program or activity receiving federal aid. EPA will then proceed, if it determines that a valid complaint exists, to notify the alleged violator and to investigate the allegations. See Luke W. Cole, *Civil Rights, Environmental Justice and the EPA: The Brief History of Administrative Complaints Under Title VI of the Civil Rights Act of 1964*, 9 J. ENVTL. L. & LITIG. 309, 314-15 (1994).

99. Cole, *supra* note 98, at 327-28 (noting that the affected area, known affectionately as "cancer alley" is home to 175 chemical plants. "The annual per capita toxics load in the area, 352 pounds, is significantly higher than the state average of 105 pounds and the Parish average of 168 pounds. Cancer death rates in the area have been found to be among the highest in the United States").

100. *Id.* (citing Scott Bronstein, *Around the South, Environmental Racism? U.S. Opens Probe of Toxic Dump Sites in South*, SUN-SENTINEL (Fort Lauderdale, Fla.), Mar. 20, 1994, at 1F.

101. *Id.* at 331.

102. *Id.* at 334.

103. *Id.* at 334-35.

alleged discriminatory siting practice was suspended when SFI brought suit against the Louisiana DEQ.¹⁰⁴

Since those first complaints were filed with the EPA in 1993, the number of Title VI-type grievances submitted to the EPA have increased.¹⁰⁵ Administrative complaints are not, however, without a few disadvantages. First, time limits are rarely met. While the EPA is required by statute to make preliminary findings on a complaint within 180 days, that just has not happened.¹⁰⁶ A second disadvantage is that complainants are largely left out of the investigation.¹⁰⁷ A third disadvantage is tied to litigation, as is a fourth.¹⁰⁸ Remedies through appeal to the EPA are indirect, offering complainants only promised compliance by the violator or termination of funding.¹⁰⁹ This does little to compensate citizens for harm already suffered. Nor does filing a complaint with the EPA toll the statute of limitations.¹¹⁰ If a citizen or group of citizens does not get adequate relief through appeal to the EPA, it may be too late to file a legitimate lawsuit. But can environmental justice advocates file civil suits for Title VI violations?

In areas other than environmental justice, private actions have been brought under Title VI to redress discriminatory practices. In *Lau v. Nichols*,¹¹¹ for instance, non-English speaking students brought a Title VI action, alleging that they had been deprived of educational opportunities inasmuch as courses were taught only in English, and were, therefore, completely inaccessible.¹¹² The Supreme Court held that Title VI had been violated by the challenged policies, even though there had been no discriminatory intent.¹¹³ Likewise, in *Guardians Ass'n v. Civil Service Commission*,¹¹⁴ the Court reaffirmed the fact that discriminatory intent is not required under Title VI, the view historically endorsed by applicable federal agency regulations implementing the

104. See *In re Supplemental Fuels, Inc.*, 656 So. 2d 29 (1st Cir. 1995), *cert. denied*, 656 So. 2d 41 (1st Cir. 1995) (holding that Supplemental Fuels, Inc. was not entitled to a de novo review of the Louisiana DEQ's denial of applicant's permit).

105. Cole, *supra* note 98, at 346. The author identifies seventeen complaints filed between September 13, 1993 and September 13, 1994 which EPA deemed to implicate Title VI. *Id.* at 324.

106. *Id.* at 321 (noting that, as of March 1995, EPA had never met this statutory deadline in environmental justice cases, with the current backlog at eighteen months).

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. 414 U.S. 563 (1974).

112. *Id.* at 565-65.

113. *Id.* at 568-69.

114. 463 U.S. 582, *cert. denied*, 463 U.S. 1228 (1983).

statutory mandate.¹¹⁵ The Court also pointed out that there is an implied private right of action under Title VI.¹¹⁶ The Court did not, however, decide whether such an implied private right of action extended to agency regulations implementing Title VI. Does the private right of action extend to complaints based on discriminatory effect alone?

V. CITIZENS OF CHESTER, PENNSYLVANIA FILE SUIT BASED ON DISPARATE IMPACT

A. *Factual Background*

Chester, Pennsylvania, is a small urban city of about 39,000 residents, situated in Delaware County along-side the Delaware River.¹¹⁷ While Delaware County is predominantly white (ninety-one percent), African-Americans make up over sixty-five percent of Chester's residents.¹¹⁸ Chester has the highest crime rates in the state, among the poorest schools in the state, and dramatically lower median incomes than the remainder of Delaware County.¹¹⁹ Such conditions led city government officials, according to one commentator, to encourage anyone and everyone to bring jobs to Chester.¹²⁰

Once an industrial "boom-town,"¹²¹ Chester is now a home for numerous hazardous waste treatment facilities and hazardous waste producers.¹²² Facilities in Chester include the DELCORA sewage waste treatment facility,¹²³ the Westinghouse Resource Recovery Facility ("the Westinghouse incinerator"),¹²⁴ and the Abbonizio Recy-

115. 463 U.S. at 584 n.2.

116. *Id.* at 593.

117. *See Foster, supra* note 24, at 779.

118. *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925, 927 n.1 (3d Cir. 1997).

119. *Foster, supra* note 24, at 779 (citing Craig Offerman, *Trouble Comes To Toxic Town USA*, GEORGE, Mar. 1998, at 94; and Brent Staples, *Life in the Toxic Zone*, N.Y. TIMES, Sept. 15, 1996, at A14) (The author points out that Chester also has the highest child mortality rate in Pennsylvania).

120. *Id.* at 783.

121. Amicus Brief to United States Supreme Court by the Chamber of Commerce of the United States, et al., 1998 WL 457676 (citing Council of the City of Chester, *Chester City Vision 2000, Comprehensive Plan & Economic Development Strategy* at 8 (1994)).

122. *Foster, supra* note 24, at 781.

123. *Chester Residents Concerned For Quality Living v. Seif*, 944 F. Supp. 413, 415 (E.D. Penn. 1996) (noting that the DELCORA has a permit allowing it to "treat 44,000,000 gallons of sewage a day and an air quality permit to incinerate 17,500 tons per year of sewage sludge").

124. *Id.* The Westinghouse incinerator is one of the largest in the country, and is permitted to burn over 2,000 tons of trash per day, which includes waste from states as far

cling Corporation,¹²⁵ as well as numerous older industries, such as WITCO Chemicals, Scot Paper, British Petroleum, and Sunoco Oil.¹²⁶ Between 1986 and 1996, the Pennsylvania Department of Environmental Protection ("DEP") issued seven permits for commercial waste facilities in Delaware County, five of which would be located in Chester.¹²⁷ Unfortunately, once hazardous waste facilities begin locating in an area, other businesses typically avoid the area, leading to the eventual reputation of the area as a "toxic wasteland" fit only for continued use by other waste treatment and disposal facilities.¹²⁸

The clustering of waste facilities and the associated potential health risks led the EPA, pursuant to President Clinton's Executive Order on Environmental Justice, to conduct a six-month cumulative risk assessment in Chester.¹²⁹ The study concluded that residents of Chester were subject to increased risks of kidney and liver disease, increased respiratory problems from the pollution in the community, increased health risks stemming from the children's increased levels of lead in their blood, and increased risks of cancer associated with air emissions from facilities in and around Chester.¹³⁰ While causation is difficult to prove, the common perception is that "the community's poor health status is linked to the surrounding waste processing facilities."¹³¹

As a result of what one community member has referred to as "condescending behavior" by government and private industry representatives in response to community concerns, residents formed Chester Residents Concerned About Quality of Life ("CRCQL").¹³² CRCQL has conducted protests (the first, blocking the highway utilized to deliver waste to the Westinghouse incinerator); presented organized opposition at town council hearings over potential sitings; met with government and industry officials to discuss pollution problems in the community; and appealed permits issued by the Pennsylvania DEP.¹³³ In 1996 CRCQL broke new ground when it filed a civil action against the Pennsylvania DEP, under Title VI and the EPA's implementing

away as Ohio. See Foster, *supra* note 24, at 781.

125. Foster, *supra* note 24, at 781. Abbonizio is a demolition debris recycling company responsible for enormous amounts of dust in Chester. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 786.

129. *Id.* at 782.

130. *Id.* at 781-82.

131. *Id.* at 782.

132. *Id.*

133. *Id.* at 812-16.

regulations, challenging DEP's unequal distribution of waste facilities in Delaware County.¹³⁴

B. Procedural History and Trial Court Rationale

The residents of Chester, in their suit against, inter alia, DEP Secretary James Seif, complained that the process utilized by DEP to determine whether to grant permits for potential waste treatment facilities discriminated against the minority community by "concentrating the burden of pollution and the negative health effects it causes, within the African-American community in Chester while leaving the white residents of Delaware County essentially free of the pollution their waste caused."¹³⁵ More specifically, CRCQL asserted that DEP's grant of a permit to Soil Remediation Services, Inc. for the operation of a soil incineration facility violated the civil rights of CRCQL's members. The citizens' group accused DEP of violating: (1) section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq.; (2) the EPA's civil rights regulations, 40 C.F.R. section 7.10 et seq., promulgated pursuant to section 602 of Title VI; and (3) DEP's assurance pursuant to the EPA regulations that it would not violate the regulations.¹³⁶

Defendants moved for dismissal on the grounds that CRCQL had failed to allege discriminatory intent consistent with Title VI, and that there was no private right of action under the EPA's implementing regulations.¹³⁷ Noting the Supreme Court had already identified an implied cause of action under Title VI, the trial court examined whether disparate impact alone could suffice as a valid claim under Title VI.¹³⁸ Citing an opinion by Justice Marshall, the court held that Title VI reached only discriminatory intent violations, and that allegations of discriminatory effect must be handled through agency regulations.¹³⁹ Defendants' motion to dismiss Claim I was, therefore, granted without prejudice.¹⁴⁰

Acknowledging that the Supreme Court had never decided whether an implied private right of action existed under the EPA's regulations, the court turned to Third Circuit precedent for guidance.¹⁴¹ In *Chowdhury*

134. *Chester Residents*, 944 F. Supp. at 415.

135. *Id.* (citing the Complaint at pgs. 31, 44).

136. *Chester Residents*, 132 F.3d at 927-28.

137. *Id.* at 928. In fact, CRCQL did not allege discriminatory intent in their original complaint, and their attempts to amend through their Brief in Opposition to Defendants' Motion to Dismiss were rejected. *Chester Residents*, 944 F. Supp. at 416.

138. *Id.*

139. *Id.* at 416-17 (citing *Alexander v. Choate*, 469 U.S. 287, 292-93 (1985)).

140. *Id.* at 417.

141. *Id.* at 417 n.5.

v. Reading Hospital & Medical Center,¹⁴² the Third Circuit examined the question of whether a private plaintiff must first exhaust administrative remedies under section 602 of Title VI and its implementing regulations before bringing suit directly under section 601.¹⁴³ The Third Circuit's decision in *Chowdhury*, according to the court, limited remedies under EPA regulations to the cessation of federal funding and voluntary compliance, and no role or remedy was provided for the individual citizen.¹⁴⁴ Accordingly, defendants' motions for dismissal of Claims II and III were also granted, with prejudice.¹⁴⁵ Determined that EPA's regulations did provide for an implied private cause of action for discriminatory impact claims, CRCQL filed its appeal with the Third Circuit.¹⁴⁶

VI. THIRD CIRCUIT REVERSES, FINDING IMPLIED PRIVATE RIGHT OF ACTION

The Third Circuit began its analysis of the question presented by looking to relevant Supreme Court authority in the form of *Guardians Ass'n v. Civil Service Commission*.¹⁴⁷ *Guardians Ass'n* related to a suit by black and hispanic police officers alleging that lay-offs by their department violated Title VI.¹⁴⁸ The case resulted in a fragmented decision by the Court, with five separate opinions being filed.¹⁴⁹ The Third Circuit acknowledged that two propositions were apparent from *Guardians*: "(1) a private right of action exists under section 601 of Title VI that requires plaintiffs to show intentional discrimination; and (2) discriminatory effect regulations promulgated by agencies pursuant to section 602 are valid exercises of their authority under that section."¹⁵⁰ Whether a private right of action existed under the regulations was not, however, explicitly addressed in *Guardians Ass'n*. The Third Circuit did agree with plaintiffs, however, that a close reading of the opinions in *Guardians* demonstrated an implicit approval by five Justices of the existence of a private right of action under discriminatory effect

142. 677 F.2d 317 (3d Cir. 1982), *cert. denied*, 463 U.S. 1229 (1983).

143. *Chester Residents*, 132 F.3d at 929.

144. *Chester Residents*, 944 F. Supp. at 417 (citing *Chowdhury v. Reading Hosp. & Med. Ctr.*, 677 F.2d at 319-20).

145. *Id.* at 418.

146. *Chester Residents*, 132 F.3d at 925.

147. 463 U.S. 582 (1983).

148. *Chester Residents*, 132 F.3d at 929.

149. *Id.*

150. *Id.* See *Alexander v. Choate*, 469 U.S. 287, 292-94 (1985).

regulations.¹⁵¹ The court of appeals declined to base its decision solely on extrapolations from the *Guardians Ass'n* opinion, however, holding that Supreme Court precedent was not dispositive.¹⁵²

The court next examined the precedent that the trial court relied on. The district court, the Third Circuit stated, had misinterpreted and misapplied *Chowdhury*.¹⁵³ "*Chowdhury* does not hold that no private right of action exists under section 602 It merely indicates that the regulations themselves do not expressly provide for a significant role for private parties"¹⁵⁴ Because Third Circuit precedent was also insufficient to settle the question presented, the Third Circuit next looked at whether a private right of action should be implied.¹⁵⁵

In *Angelastro v. Prudential Bache Security, Inc.*,¹⁵⁶ the Third Circuit established a three-prong test for determining when to imply a private right of action to enforce regulations. The test requires that courts inquire: "(1) 'whether the agency rule is properly within the scope of the enabling statute'; (2) 'whether the statute under which the rule was promulgated properly permits the implication of a private right of action'; and (3) 'whether implying a private right of action will further the purpose of the enabling statute.'"¹⁵⁷ Finding that EPA's regulations easily satisfied the first prong of this test, the court of appeals turned to number two.¹⁵⁸

The key factors in examining the second prong, set out by the Supreme Court in *Cort v. Ash*,¹⁵⁹ are investigation of whether there is "any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one," and whether it is "consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff."¹⁶⁰ In its amicus brief, the United States contended that an implied private right of action was consistent with legislative intent

151. *Chester Residents*, 132 F.3d at 930. This opinion by the Third Circuit was based in part on the willingness of Justice White to allow private plaintiffs to proceed under section 601 in cases of discriminatory effect; on similar statements by Justice Marshall in his dissenting opinion; and on the opinion by Justice Stevens, joined by Justices Brennan and Blackmun, that plaintiffs would only be required to show discriminatory effects in order to prove violations of the regulations. *Id.*

152. *Id.* at 931.

153. *Id.* at 932.

154. *Id.*

155. *Id.* at 933.

156. 764 F.2d 939, 947 (3d Cir. 1985).

157. *Chester Residents*, 132 F.3d at 933 (citing *Polaroid Corp. v. Disney*, 862 F.2d 987, 994 (3d Cir. 1988) (quoting *Angelastro v. Prudential-Bache Sec. Inc.*, 764 F.2d at 947)).

158. *Id.*

159. 422 U.S. 66 (1975).

160. *Chester Residents*, 132 F.3d at 933 (citing *Cort v. Ash*, 422 U.S. at 78 (1975)).

"because Congress acknowledged the existence of the right when it amended Title VI . . . to broaden [its] scope . . ." ¹⁶¹ In addition, the United States submitted, as evidence of legislative intent, a House Report on an earlier version of the bill, ¹⁶² several legislators' comments in the Congressional Record, ¹⁶³ and various congressional hearing testimonies. ¹⁶⁴ The Third Circuit accepted the evidence offered by the United States as an indication that there was legislative intent to create a private right of action sufficient to satisfy the first element of the *Cort* test. ¹⁶⁵

The court of appeals also found that the implication of a private right of action would be consistent with the legislative scheme of Title VI. ¹⁶⁶ The primary purpose of section 602's procedural requirements is to provide notice to the federal funding recipient of alleged violations and of the potential consequences. ¹⁶⁷ The court found that a private cause of action would provide similar notice. ¹⁶⁸ Additionally, the court pointed out that the procedural requirements of section 602 were in place to prevent fund recipients from being surprised by the enormous impact of the cessation of federal funds, an impact which private plaintiffs could not impose. ¹⁶⁹ Consequently, the court determined that the statute under which EPA's rules were promulgated "properly permit[ed] the implication of a private right of action [cites omitted] and that the second prong of the test [was] satisfied." ¹⁷⁰

Finally, the Third Circuit held that implying a private right of action would further the purposes of the enabling statute, which were to: "(1) combat discrimination by entities who receive federal funds; and (2) provide citizens with effective protection against discrimination." ¹⁷¹ The court found that permitting a private right of action would further

161. *Id.*

162. *Id.* at 934 (citing H.R. REP. NO. 963 (1986), which provides that the "private right of action which allows a private individual or entity to sue to enforce Title IX would continue to provide the vehicle to test certain regulations in Title IX and their expanded meaning to their outermost limits.") Later in the opinion the Third Circuit points out that "Courts have regarded Title IX and Title VI jurisprudence as, more or less, interchangeable." *Id.* at 934 n.12.

163. *Id.* at 934 (noting that the legislators comments "appear to recognize the existence of a private right of action").

164. *Id.*

165. *Id.*

166. *Id.* at 936.

167. *Id.* at 935-36.

168. *Id.* at 936.

169. *Id.*

170. *Id.*

171. *Id.*

these purposes by "deputiz[ing] private attorneys general" to enforce section 602 and its implementing regulations, and would compensate for the EPA's lack of enforcement resources.¹⁷² The third prong, the court held, was satisfied.¹⁷³

The court finished its opinion with a brief review of other court of appeals decisions which, although not precisely on point, did offer support for allowing the private cause of action.¹⁷⁴ All permitted plaintiffs to bring suits based on discriminatory impact grounds rather than requiring discriminatory intent, and all permitted the suit to be brought under the regulations, rather than under the statute. Holding that "private plaintiffs may maintain an action under discriminatory effect regulations promulgated by federal administrative agencies pursuant to section 602 of Title VI of the Civil Rights Act of 1964," the Third Circuit reversed and remanded *Chester Residents* for reconsideration.¹⁷⁵ The citizens of Chester had won a major battle.

The victory was short lived, however, as the Supreme Court granted certiorari¹⁷⁶ and, subsequently, vacated the Third Circuit's decision and remanded to that court with instructions to dismiss.¹⁷⁷ While the Court's decision to vacate the Third Circuit's decision was not accompanied by an opinion, briefs filed by the parties to the action provide some insight. According to CRCQL's Brief, the SRS permit at issue in the original action was revoked before the Court granted certiorari.¹⁷⁸ Petitioners had simply failed to notify the Court. Therefore, there was currently no case or controversy existing and the case should have been considered moot.¹⁷⁹ The motion to find the case moot, and, therefore, to refrain from hearing and deciding the case, may have been motivated

172. *Id.*

173. *Id.*

174. *Id.* at 936-37. See, e.g., *Latinos Unidos De Chelsea v. Secretary of Hous. & Urban Dev.*, 799 F.2d 774, 785 n.20 (1st Cir. 1986); *New York Urban League, Inc. v. New York*, 71 F.3d 1031, 1036 (2d Cir. 1995); *Casteneda by Casteneda v. Pickard*, 781 F.2d 456, 465 n.11 (5th Cir. 1986); *Buchanan v. City of Bolivar*, 99 F.3d 1352, 1356 n.5 (6th Cir. 1996); *David K. v. Lane*, 839 F.2d 1265, 1274 (7th Cir. 1988); *Gomez v. Illinois State Bd. of Educ.*, 811 F.2d 1030, 1044-45 (7th Cir. 1987); *Larry P. by Lucille P. v. Riles*, 793 F.2d 969, 981-82 (9th Cir. 1984); *Villanueva v. Carere*, 85 F.3d 481, 486 (10th Cir. 1996); *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1406 (11th Cir. 1993); and *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1417 (11th Cir. 1985).

175. 132 F.3d at 937.

176. *Seif v. Chester Residents Concerned for Quality Living*, 118 S. Ct. 2296 (Mem) (1998).

177. *Seif*, 119 S. Ct. at 22.

178. Respondent's Brief to United States Supreme Court, 1998 WL 435980 at *3 (July 29, 1998).

179. *Id.* at *7.

by apprehension on the part of environmental justice advocates. Although the reasoning of the Third Circuit appeared sound, there was always the potential that the Supreme Court would disagree.

Petitioners, while opposing the suggestion of mootness by respondents, suggested in the alternative that the Court vacate the Third Circuit's decision consistent with Court precedent.¹⁸⁰ Petitioners argued in their Brief that "the purpose of vacating a judgment that becomes moot pending review is to return the legal relationships of the parties to the status that existed prior to the suit."¹⁸¹ Petitioners cited *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*¹⁸² for the proposition that a "party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment."¹⁸³ Exactly two weeks after Petitioner's Brief was filed, the Third Circuit's decision was vacated and the case was remanded with orders to dismiss.¹⁸⁴ A cloud of doubt loomed over private citizens' right to bring discrimination charges against recipients of federal funds absent proof of discriminatory intent.¹⁸⁵

VII. SUBSEQUENT TREATMENT OF THE PRIVATE RIGHT ISSUE

Subsequent to the Third Circuit's decision in *Chester Residents*, but prior to the Supreme Court's vacature of that decision, the Middle District of Alabama had an opportunity to address the same issue.¹⁸⁶ In *Sandoval v. Hagan*, non-English speaking residents brought an action alleging that the Alabama Department of Public Safety's policy of administering driver's exams only in English violated rights protected by enforcement regulations promulgated under section 602 of Title VI.¹⁸⁷ As was the case in *Chester Residents*, defendants in *Sandoval*

180. Petitioner's Brief to United States Supreme Court, 1998 WL 470120 (Aug. 3, 1998).

181. *Id.* at *13.

182. 513 U.S. 18 (1994).

183. Petitioner's Brief to United States Supreme Court, 1998 WL at *15-16 (citing *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. at 25).

184. *Seif*, 119 S. Ct. at 22.

185. See *The South Bronx Coalition For Clean Air, Inc. v. Conroy*, 20 F. Supp. 2d 565, 572 (S.D.N.Y. 1998) (based on the Supreme Court's vacature of *Chester Residents*, the New York court questioned whether there even exists a right to a "disparate impact' private cause of action under federal regulations promulgated pursuant to Section 602 of Title VI").

186. *Sandoval v. Hagan*, 7 F. Supp. 2d 1234 (M.D. Ala. 1998).

187. *Id.* at 1244. Prior to 1991, Alabama had administered its driver's exams in at least fourteen languages. Pursuant to a law passed in the Alabama legislature in 1990, however, mandating that English be utilized as the official language of state government, all driver's exams became English-only exams, with no available assistance from translators or other interpretive aids. *Id.* at 1243.

argued that there existed no private right of action under the implementing regulations to Title VI.¹⁸⁸ The court disagreed, finding that an implied private right of action existed within the regulations, consistent with the intent of Congress, as well as with other court decisions.¹⁸⁹

The court began its analysis by recognizing that neither Title VI nor the regulations implemented pursuant to section 2000d-1 expressly authorized a private right of action, but that a private right of action was clearly implied within Title VI itself.¹⁹⁰ The court then referred to two Eleventh Circuit cases, *Georgia State Conference of Branches of NAACP v. Georgia*¹⁹¹ and *Elston v. Talladega County Board of Education*,¹⁹² both of which related to private litigants bringing suit pursuant to § 2000d-1 regulations. In both cases, the courts by-passed the issue of whether a private cause of action existed, and proceeded instead to address the merits. Because both cases allowed suit to proceed based on disparate impact, rather than requiring a showing of discriminatory intent, the Alabama District Court found they had implicitly supported the existence of an implied private right under section 2000d-1.¹⁹³

Additionally, the court relied on two Eleventh Circuit cases which recently held that federal rights may be created by valid regulations that merely further define or flesh out the content of the statutory right.¹⁹⁴ Noting the purpose of Title VI was obviously to prohibit discrimination in programs receiving federal funds, the court stated that there was “no principled reason to deny an implied private right of action under regulations effectuating the provisions of a statute containing an implied right of action.”¹⁹⁵

188. *Id.* at 1251-52 n.14.

189. *Id.* at 1264.

190. *Id.* at 1253 (citing *Canon v. University of Chicago*, 441 U.S. 677, 703 (1979) (stating “we have no doubt that Congress . . . understood Title VI as authorizing an implied private cause of action for victims of the prohibited discrimination”); and *Cone Corp. C.H. v. Florida Dep’t of Transp.*, 921 F.2d 1190, 1201 n.37 (11th Cir. 1991) (“finding that Title VI (§ 2000d) authorized private cause of action against the Florida Department of Transportation and its Secretary”).

191. 775 F.2d 1403, 1407 (11th Cir. 1985) (involving a suit by black schoolchildren challenging policies and practices of Georgia State Board of Education and several local school districts).

192. 997 F.2d 1394, 1400 (11th Cir. 1993) (involving a suit brought by black schoolchildren and their parents in opposition to restructuring plans made by the Talladega County school system).

193. *Sandoval*, 7 F. Supp. 2d at 1253.

194. *Id.* at 1253-54 (citing *Harris v. James*, 127 F.3d 993, 1008-09 (11th Cir. 1997) and *Doe v. Chiles*, 136 F.3d 709, 717 (11th Cir. 1998)).

195. *Id.* at 1254.

Finally, the court concluded that, even if *Elston* and *Georgia State Conference* did not lead to the conclusion that section 2000d-1 regulations provided a private right of action, and even if *Doe* and *Harris* did not lead to the conclusion that the statute itself, in conjunction with the regulations implementing the statute, created an enforceable federal right, a private right existed just the same.¹⁹⁶ The court's decision was based on the same analysis as that applied by *Chester Residents* for finding a private cause of action: (1) text; (2) legislative intent; and (3) the purpose of Title VI.¹⁹⁷ In fact, noting that the Third Circuit's analysis was completely consistent with the Supreme Court's test for determining whether a private right should be implied,¹⁹⁸ the court in *Sandoval* adopted the entire line of reasoning of the Third Circuit.¹⁹⁹

In *Bryant v. New Jersey Department of Transportation*,²⁰⁰ decided after the Supreme Court's vacature of *Chester Residents*, the New Jersey District Court addressed a Title VI complaint by citizens whose homes were being condemned pursuant to the construction of a highway and a tunnel.²⁰¹ Plaintiffs alleged that the imminent action by the state Department of Transportation ("D.O.T.") would have negative effects which would fall disproportionately on the "last stable, middle-class African-American neighborhoods" in Atlantic City.²⁰² Among the concerns listed by plaintiffs were air quality, traffic, water quality, wetlands and community character impacts, and the destruction of at least nine homes in one of the affected communities.²⁰³

On reconsideration of the standing issue, the District Court addressed the right to a private cause of action under the United States Department of Transportation regulations enforcing Title VI. The regulations state:

196. *Id.* at 1255.

197. *Id.*

198. *See Cort*, 422 U.S. at 78. The four factors identified by the Supreme Court as pivotal in determining whether a private right of action exists within a statute are (1) "whether the plaintiff is a member of the class for whose 'especial benefit' the statute was enacted; (2) whether there is any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one; (3) whether it is consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff; and (4) whether the cause of action is one traditionally relegated to state law, so that it would be inappropriate to infer a cause of action based on federal law." *Id.*

199. *Sandoval*, 7 F. Supp. 2d at 1256.

200. 998 F. Supp. 438 (D.N.J. 1998).

201. *Id.* at 440-41.

202. *Id.* at 440.

203. *Id.*

In determining the site or location of facilities, a recipient or applicant may not make selections with the purpose or effect of excluding persons from, denying them the benefits of, or subjecting them to discrimination under any program to which this regulation applies, on the grounds of race, color, or national origin; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the Act or this part.²⁰⁴

The regulation is remarkably similar to the EPA regulation at issue in *Chester Residents*. The court, in fact, noting that the regulation was not "arbitrary, capricious or manifestly contrary to Section 601 [of Title VI]," cited *Chester Residents* for the proposition that regulations of this nature do provide a private right of action for disparate impact claims.²⁰⁵ The court held, therefore, that because such an interpretation of Section 601 would prohibit the New Jersey D.O.T. from locating a federally funded highway project in a location which produces a disparate racial impact, plaintiffs had standing to bring their action.²⁰⁶

Likewise, in *Powell v. Ridge*,²⁰⁷ plaintiffs brought an action based on disparate impact. Plaintiffs charged the Governor of Pennsylvania, the Chairman of the Board of Education, and others with "violating Title VI of the Civil Rights Act of 1964 . . . and certain regulations promulgated by the United States Department of Education's Title VI implementing requirements."²⁰⁸ Plaintiffs alleged that the Commonwealth's statutory public school funding formula had a disparate impact on the school children of Philadelphia, "the majority of whom are poor and non-white, in violation of Title VI"²⁰⁹ Citing *Chester Residents* and *Elston v. Talledega County Board of Education* as support for an implied right of action under an agency's implementing regulations, and noting that the United States Department of Education's regulations applied a disparate impact standard, the court held that plaintiffs' claim of discrimination by disparate impact under section 602 of Title VI would not be dismissed under the theory that Title VI does not create a private cause of action.²¹⁰

Finally, upon the vacature of *Chester Residents* by the Supreme Court, defendant in *Cureton v. National Collegiate Athletic Association*²¹¹ submitted a Motion to Amend Order to Certify Question for Immediate

204. 49 C.F.R. § 21.5(b)(3) (1998) (emphasis added).

205. *Bryant v. New Jersey Dep't of Transp.*, 998 F. Supp. at 446.

206. *Id.*

207. 1998 WL 804727 (E.D. Pa. Nov. 19, 1998).

208. *Id.* at *1.

209. *Id.* at *2.

210. *Id.* at *12.

211. 1998 WL 726653 (E.D. Pa. Oct. 16, 1998).

Appeal, claiming that there was substantial ground now for a difference of opinion on whether or not a private right of action existed under implementing regulations to Title VI.²¹² Judge Buckwalter cited the Third Circuit's statement from *Chester Residents* that "the decisions of other courts of appeals indicate support of our reasoning [that there is a private right of action]."²¹³ He then stated:

In summary, in light of overwhelming circuit law to the contrary, I do not believe I can fairly imply from the grant of certiorari in *Chester Residents* that a substantial ground for difference of opinion exists regarding the issue of whether Title VI implementing regulations create an implied right of action based upon unintentional discrimination.²¹⁴

The motion was denied.²¹⁵

In summary, while the vacature of *Chester Residents* may have cast some doubt on a private plaintiff's ability to bring an action for violations based on discriminatory impact alone, most courts have, to this point, acted consistent with the reasoning of the Third Circuit.

VIII. CONCLUSION

In the wake of the Supreme Court's vacature of the Third Circuit's decision, citizens' groups are faced with some degree of uncertainty. Can communities who encounter circumstances similar to those endured by the residents of Chester, file a private action without proof of discriminatory intent? As the Third Circuit pointed out, *Guardians Ass'n* decided that a private right of action was implied under section 601 of Title VI. Such a private right, however, being tied directly to Title VI, would require proof of discriminatory intent. *Guardians Ass'n* also provided that federal agencies acted within their authority under section 602 of Title VI when they promulgated regulations implementing a disparate impact standard. Without an implied private right within the regulations themselves, however, the disparate impact standard would be applied only by the federal agencies distributing the funds. *Guardians Ass'n* did not decide whether an implied private right of action existed under agency regulations. Was the Third Circuit's analysis correct?

The three-part test applied by the court in *Chester Residents* was, as the *Sandoval* court pointed out, completely consistent with Supreme Court precedent. The primary factor in determining whether a private

212. *Id.* at *1.

213. *Id.*

214. *Id.*

215. *Id.*

right of action may be implied is the intent of the legislature. It was the apparent intent of the legislature that citizens be protected from the impact of discrimination, particularly when that impact was a result of the actions of a recipient of federal funds. While the statute itself may only reach to the limits of the Fourteenth Amendment, there was no restriction placed on Federal agencies in implementing the legislative mandate. The Department of Education, the Department of Transportation, and the Environmental Protection Agency have all enacted regulations which set in place a disparate impact standard. Each of these sets of regulations have now been tested to see if they permit use by private citizens, and each court analyzing the regulations has confirmed the reasoning from *Chester Residents* that an implied private right does exist.

Because discriminatory intent is so difficult to prove, the implementing regulations to Title VI may be the most accessible, most effective tool in the environmental justice tool chest. Title VI is not without its own set of limitations, however. To begin with, Title VI protects residents from discrimination, but only from discrimination by "any program or activity receiving Federal financial assistance."²¹⁶ For environmental justice advocates, this may not be a significant obstacle because most state environmental programs receive funds from the Federal Government. The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"),²¹⁷ for instance, contributes large amounts of money to clean up inactive and abandoned hazardous waste sites.²¹⁸ The Resource Conservation and Recovery Act ("RCRA")²¹⁹ offers considerable funds to states to assist with development and implementation of authorized state hazardous waste programs,²²⁰ to assist with development and implementation of federally approved state solid waste programs,²²¹ and to assist rural communities with waste management facilities.²²² Air, water, and hazardous waste programs are regular recipients of federal funds.

The second limitation may be of little concern as well. Until recently, it appeared that the only remedy to be had under Title VI was equitable in nature. In 1992, however, in *Franklin v. Gwinnett County Public*

216. 42 U.S.C. § 2000d (1994).

217. 42 U.S.C. §§ 9601-9675 (1988 & Supp. II 1990).

218. *Id.* §§ 9604, 9611.

219. 42 U.S.C. §§ 6901-6992k (1994).

220. *Id.* § 6931.

221. *Id.* §§ 6947-48.

222. *Id.* § 6949.

Schools,²²³ the Supreme Court held that a damages remedy is available in implied private rights actions brought under Title IX.²²⁴ Title IX was expressly modeled after Title VI of the Civil Rights Act.²²⁵ Therefore, there is a strong likelihood that courts would rule the same remedy is available under Title VI. If Title VI actions are limited to equitable remedies, such limitations may be secondary for private citizens in the environmental justice context when the plaintiffs are simply trying to get the recipient of federal funds to refrain from issuing a permit or rezoning land to support hazardous waste treatment facilities. When, however, the recipient has already taken actions that had a disparate impact and led to actual damages, such as injuring the health of the residents or lowering property values, it should be expected that damages would be an important component of any remedy sought.

Administrative remedies under Title VI and the implementing regulations still exist as well, and should be utilized to the fullest extent possible. After all, it costs very little to put a complaint in the mail to the EPA outlining the discriminatory policy and the disparate impact, and the federal funds recipient allegedly violating the regulations. Administrative actions alone will rarely be enough to motivate the federal fund recipient to reconsider their actions.²²⁶ When the disproportionate siting of hazardous waste treatment facilities may result in increased health risks, especially in children, not to mention the effect on surrounding property values and the depressing effect on incoming business, communities cannot afford to rely on a single avenue of redress. Rather, they should rely on both administrative and legal actions if resources permit.

Finally, the efforts of the Chester community serve as an excellent example of successful grassroots opposition to environmental injustice. CRCQL's efforts included physical protests, attendance at hearings and community meetings, discussions with government and industry officials, administrative appeal to the EPA, and legal action under Title VI. None of the efforts standing alone was sufficient to successfully oppose the local recipients of federal funds, the state courts, and private industry.²²⁷ It certainly appears for now, though, that private actions under

223. 112 S. Ct. 1028 (1992).

224. *Id.* at 1038.

225. *Id.* at 1032.

226. See Steven Keeva, *Pursuing the Right to Breathe Easy*, 85 A.B.A. J. 48, 49 (1999) (quoting Zulene Mayfield, founder of CRCQL: "There's a lot that goes into fighting environmental racism[.] There's no recipe. You just keep at it until you find what works. But we've definitely found that we need the extra armament of having legal counsel").

227. For an excellent detailed discussion of the history of Chester, Pennsylvania, the formation of CRCQL, and the efforts of CRCQL to remedy the environmental injustice

Title VI and the EPA's implementing regulations provide citizens' groups with a powerful lever for moving federal fund recipients toward environmental justice.

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associated with the clustering of hazardous waste treatment facilities in the community, see Sheila Foster, *Justice From the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement*, 86 CAL. L. REV. 775 (1998).

