REPRINT

NORTHWESTERN UNIVERSITY LAW REVIEW

Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection

Richard J. Lazarus

Volume 87 Spring 1993 Number 3

polluted urban areas place greater priority on the urban and industrial environment than do those in the environmental community who have tended to influence statutory priorities.[157] These urban residents and workers tend to identify "environmental" progress with improvements in housing, transportation, and air quality.[158] As one minority environmentalist put it, "[i]f you're only concerned with clean streams and dolphins and whales, then that limited view of environmentalism smacks people of color in the face. . . . We've been working on issues that affect our environment—health care, lead in public housing, gang violence."[159]

IV. Pursuing Environmental Justice

The pursuit of "environmental justice" within the context of environmental law is necessarily problematic because to define the issue exclusively in those terms misapprehends the nature of the problem in the first instance. The distributional inequities that appear to exist in environmental protection are undoubtedly the product of broader social forces. To be sure, features endemic to the ways in which environmental protection laws have historically been fashioned may have exacerbated the problem in the environmental context. But the origins of the resulting distributional disparities do not begin, nor will they end, with reforming either the structure of environmental protection decisionmaking or the substance of environmental law itself.

Hence, while a series of measures within the environmental law arena have the potential for redressing or, at least reducing, the existing distributional inequities, their undertaking cannot be to the exclusion of more broadly directed actions. Distributional inequities are very likely rooted in past and present racial hostility, racial stereotypes, and other forms of race discrimination. The vestiges of past discrimination may be the greatest factor contributing to such disparities because of the self-perpetuating impact of such discrimination on racial minority economic

157 Reportedly, a survey in 1989 of 248 CEOs and their equivalent in mainstream environmental groups showed that their interests lay primarily in the areas of conservation and preservation, with the greatest amount of their resources being devoted to fish and wildlife and public land management. *See* Dorceta Taylor, *Can the Environmental Movement Attract and Maintain the Support of Minorities?*, *in* Michigan Conference Proceedings, *supra* note 37, at 41.

158 Robert Gottlieb & Helen Ingram, *The New Environmentalists*, Progressive, Aug. 1988, at 14.

159 Safir Ahmed, *Building A Rainbow Coalition*, Riverfront Times, Nov. 6-12, 1991, at 11 (quoting delegate at First National People of Color Environmental Leadership Summit); Safir Ahmed, *Seeing Red Over the Green Movement*, Riverfront Times, Nov. 6-12, 1991, at 10 (quoting Dana Alston, Director, Panos Institute) ("We refuse the narrow definition of environmentalism. . . . It's not just ancient, old-growth forests. It is not just the spotted owl and other endangered species. Our communities and our people are an endangered species, too."); Paul Ruffins, *Environmental Commitment as if People Didn't Matter*, *in* Environmental Racism, *supra* note 9, at 51, (because " 'environment' is seldom defined as the places where people live and work[, there are] large holes in the way we deal with environmental regulation, the way we allocate money, and the way we establish environmental priorities.").

and political power. These vestiges effectively deny minorities the autonomy to choose, either by purchase or through the ballot, the level of environmental quality that they will enjoy or the amount of pollution that they will tolerate.

With that significant, threshold caveat, important reforms can nevertheless be implemented within the existing environmental law framework. These reforms could both ameliorate the inequities currently resulting from those laws and, more importantly, provide a much-needed impetus to those seeking broader social reforms. These reforms include: (1) providing environmental policymakers with a better understanding of the nature and scope of the problem; (2) litigating the associated civil rights issues as civil rights issues; (3) rethinking the substance of environmental law to take better account of distributional concerns; (4) reforming the structure of environmental policymaking to promote minority involvement and interests; and (5) reclaiming the common ground of environmentalism and civil rights. Each reform is discussed below.

A. Providing A Better Understanding

Both those who believe that distributional inequities exist in environmental protection, and those who remain skeptical, should be able to join in one common recommendation: the need for better empirical investigation. To date, there have been relatively few technically rigorous studies addressing the distributional issue.[160] Moreover, those that purport to be, such as the UCC study, advance significant conclusions but not with especially high levels of statistical confidence.[161] Furthermore, a separate study casts some doubt on the UCC's central finding concerning the role that race plays in the distribution of environmental benefits and burdens. This study concludes that it is the ability of a community to engage in collective action, rather than either race or income, that is the statistically significant factor affecting facility decisions to expand existing hazardous waste processing capacity.[162]

EPA currently collects massive amounts of information relating to environmental pollution and quality. The agency needs to correlate this data with information already available on race, ethnicity, and socioeconomic status. One obvious source of such data is the toxic release inventory, collected pursuant to the Emergency Planning and Community

---

[160] Ken Sexton, *Cause for Immediate Concern: Minorities and the Poor Clearly are More Exposed*, EPA J., Mar./Apr. 1992, at 38, 39 (author is Director of EPA's Office of Health Research) ("[T]here is a paucity of data relating class and race to specific environmental pollutants and associated health effects.").

[161] The UCC findings were based on statistics with only a 90% confidence level. *See supra* note 56.

[162] *See* Hamilton, *supra* note 56. Of course, race is not unrelated to collective action potential.

Right-to-Know Act.[163] This inventory provides an authoritative accounting of all toxic releases throughout the country.[164] By joining this data with existing census information, a nationwide correlation between toxic releases and race, ethnicity, and socioeconomic status should not be difficult to derive.[165] One pending congressional proposal that would help in this regard would require that the National Academy of Sciences study the extent to which "minority and low-income populations in the United States are disproportionately impacted by environmental health hazards" and identify the extent to which existing Federal environmental programs "adequately address the priority environmental needs of such minority and low-income populations . . . ."[166]

To be sure, distinguishing the effects of socioeconomic status from race will not be easy. Those two variables are themselves closely intertwined for the simple reason that the socioeconomic status of minorities is plainly tied to their racial identity. And, as previously discussed, there are a host of secondary factors ranging from diet, job-related stress, and cultural practices that are likely to affect the degree of environmental health-related risk.[167]

The need for "better understanding" should not, however, be confined to formal empirical investigation. It must also include efforts aimed at increasing awareness among both the general public and policymakers about the potential for, and impact of, distributional inequities. As described by one minority environmentalist, who warned against addressing the problem by simply including more minority representation, "[t]here is a need for diversity not only in the makeup of the organizations, but also in how these [environmental] issues are looked at. . . . For environmental groups to consider issues like wetlands, global warming, and wilderness protection as being the only environmental issues flies in the face of reality."[168]

B. Litigating The Civil Rights Issue

Litigation provides another medium for addressing the distributional issue. Two basic litigation strategies are available. First, an administrative or judicial complaint could be filed on behalf of a minority group for the purpose of preventing the siting of an unwanted facility in

163 42 U.S.C. §§ 11001-11050 (1988); *see supra* note 63.

164 Cynthia H. Harris & Robert C. Williams, *Research Directions: The Public Health Service Looks at Hazards to Minorities*, EPA J., Mar./Apr. 1992, at 40.

165 A third-year law student at Washington University in St. Louis recently undertook such an analysis in focusing on the relative amounts of toxics released in predominantly black and predominantly white neighborhoods in St. Louis. He found that substantially higher amounts of toxics were released per capita in the black neighborhoods. *See supra* note 63.

166 H.R. REP. No. 428, 101st Cong., 2d Sess. 17 (1990) (quoting H.R. 3847).

167 Sexton, *supra* note 160, at 38-39.

168 David Hahn-Baker, *The Need for Cultural Diversity and Environmental Equity*, *in* ENVIRONMENTAL RACISM, *supra* note 9, at 5, 6, 8.

its community, and the basis of the lawsuit could be the facility's noncompliance with an applicable environmental statute. The possibility of distributional inequities would not be directly relevant to the substantive merits of the administrative challenge or lawsuit. It would simply be the reason why the lawsuit was necessary and why, for example, a minority community should be entitled to a greater share of enforcement resources. Alternatively, the distributional inequities could provide the substantive basis for the lawsuit by supporting a civil rights cause of action. In other words, the cause of action would itself derive from the fact that a distributional inequity exists.

To date, minority plaintiffs appear to have favored the civil rights approach. However, virtually none of those suits has been successful. This is largely because existing equal protection doctrine, which has been the focal point of most lawsuits, has not proved hospitable to the kinds of arguments upon which environmental justice claims have depended. For this reason, federal and state environmental laws may offer the best opportunity for minority plaintiffs to ameliorate environmental inequities. Many of these statutes impose a panoply of procedural and substantive limitations on those wishing to site polluting facilities, and many confer private attorney general status on citizens aggrieved by actions that violate applicable statutory limitations. Plaintiff organizations with the necessary resources have consequently been quite successful in resisting environmentally undesirable facilities under these environmental statutes.[169] To the extent that such legal and technical resources are made available to minority communities, those statutes could likewise provide a basis for considerable relief from distributional inequities.[170]

---

169 *See e.g.*, Marianne Lavelle, *Plant Foes Light Legal Fires*, NAT'L L.J., Feb. 8, 1993 at 1; Gerrard, *supra* note 119, at 57-88.

170 For instance, minority plaintiffs represented by the California Rural Legal Assistance Foundation successfully invoked the California Environmental Quality Act (CEQA) to persuade a state trial court to set aside a county board decision to permit the construction and operation of a hazardous waste incinerator in a predominantly minority community. *See* El Pueblo para el Aire y Agua Limpio v. County of Kings, [1991] 22 Envtl. L. Rep. (Envtl. L. Inst.) 20,357 (Cal. App. Dep't Super. Ct. 1991). The court ruled that the county's "Final Subsequent Environmental Impact Report" did not satisfy CEQA's requirements because its analysis of air quality impacts and mitigation, agricultural impacts, cumulative air quality impacts, and project alternatives were all inadequate. *Id.*, slip op. at 2-10. Although most of the court's ruling was thus based on technical deficiencies unrelated to environmental inequity per se, the court's further ruling that the county's failure to provide a spanish translation of its formal environmental analysis violated CEQA's public participation requirement is directly related to equity concerns. *Id.*, slip op. at 10. Because almost 40% of the residents of the city in which the proposed incinerator was to be located are monolingual in spanish, the court reasoned, the absence of such a translation deprived these residents of an opportunity for "meaningful involvement" in the decisionmaking process. *Id.* Another successful environmental case brought on behalf of minority residents was Houston v. City of Cocoa, No. 89-92-CIV-ORL-19 (M.D. Fla. Dec. 22, 1989), in which residents of a historically black neighborhood invoked provisions of the National Environmental Policy Act, 42 U.S.C. § 4331 (1988), and the National Historic Preservation Act, 16 U.S.C. § 470 (1988), to protect the community from unwanted commercial development. *See* Karl S. Coplan, *Protecting Minority Communities with Environmental, Civil*

There is nonetheless substantial reason for continued emphasis on civil rights litigation aimed at redressing distributional inequities in environmental protection. Burdens of proof are difficult to overcome under existing doctrine, but if litigation efforts were to receive additional resources, some isolated successes might be achievable. In addition, the cases brought so far have relied on only a few legal theories. Several promising theories have not yet been fully explored and warrant greater attention.

Perhaps more importantly, the real value of these lawsuits extends beyond their ability to obtain a favorable decision in a given case. Indeed, the symbolic value of filing the lawsuit is itself substantial. The mere filing of a formal complaint provides a very powerful and visible statement by minorities regarding their belief that distributional inequities exist in environmental protection. The publicity that frequently surrounds the complaint's filing enhances public awareness of these concerns and thereby serves an important educational function. Should, moreover, a victory on the merits be achieved, the benefits could be tremendous. For many within the minority community it is extremely important that a formal judicial decision be obtained confirming their belief that environmental protection presents its own unique civil rights issues.

1. Equal Protection and the Problem of Discriminatory Intent.— Equal protection claims have been the principal focus of most environmental justice lawsuits brought to date.[171] One of the earliest cases raising an environmental justice claim in the siting context, *Harrisburg Coalition Against Ruining the Environment v. Volpe*,[172] was a lawsuit seeking to enjoin construction of two major highways through a public park. Brought by minority residents of a neighborhood in Harrisburg, Pennsylvania, the plaintiffs argued that the proposed highways denied "black residents of equal opportunities to housing and recreation in violation of the Fourteenth Amendment."[173] More particularly, the plaintiffs alleged that the siting of the highways through a park "was partly motivated by an awareness that the predominant use of the [p]ark was by

Rights Claims, N.Y. L.J., Aug. 20, 1991, at 1. Another case currently pending in federal district court in Tennessee provides an example of a challenge to a municipal siting decision grounded, inter alia, on alleged violations of federal and state hazardous waste laws. *See* Complaint at 8, 11-12, Bordeaux Action Comm. v. Metropolitan Gov't of Nashville, No. 90-0214 (M.D. Tenn. filed Mar. 12, 1990). Finally, a group of black residents in Wallace, Louisiana, recently stopped the siting of a $700 million wood, paper, and rayon plant in their community. *See* Suro, *supra* note 12.

171 *See generally* Godsil, *supra* note 14, at 410-16 (describing two cases raising equal protection challenges against municipalities for discriminatory solid waste landfill sitings in which the courts held the evidence insufficient to establish that racial discrimination motivated the challenged official decisions).

172 Harrisburg Coalition Against Ruining the Env't v. Volpe, 330 F. Supp. 918 (M.D. Pa. 1971).

173 *Id.* at 921. The plaintiffs also claimed violations of the "Civil Rights Acts of 1871 and 1964." *Id.*

the black citizens of the City."[174] The court rejected the constitutional claim, finding insufficient evidence of either discriminatory motivation or results.[175]

Courts have since rejected similar minority plaintiffs' equal protection claims, but have done so *notwithstanding* showings of "discriminatory results" rather than because no such showing was made. In 1976, the U.S. Supreme Court made it considerably more difficult for civil rights plaintiffs to prevail on equal protection grounds by requiring that such litigants establish a "discriminatory intent" or "purpose" underlying the challenged action.[176] This means that plaintiffs must show that race "has been a motivating factor in the decision," and that the decisionmaker chose or reaffirmed a given course of action "because of" its adverse effect on the group.[177] While some courts have diminished the harshness of this requirement by allowing for a burden shifting once disparate treatment is shown, the defendant can overcome such a showing by articulating a legitimate, nondiscriminatory motive for its behavior, which the plaintiff can in turn overcome only by a showing of mere pretext.[178]

As commentators have long contended, the practical effect of the required "discriminatory intent" element is devastating to most civil rights claims because of the inordinate difficulty of proving the subjective, motivating intent of a decisionmaker.[179] In addition, where many of the existing distributional inequities are more proximately traceable to the self-perpetuating vestiges of past discrimination, the equal protection

---

174 *Id.* at 926.

175 *Id.* at 926-27.

176 Washington v. Davis, 426 U.S. 229, 238-48 (1976).

177 Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264-66 (1977); *see* Godsil, *supra* note 14, at 409-10.

178 Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 861-63 (1991). On the other hand, it is not a legitimate nondiscriminatory motive to rely on a stereotypical judgment about a racial class, even if such an inference might be supported by rational statistics. For instance, government officials or industrial owners cannot claim that their neutral motive was the desire to site the facility in a location where people were less likely to complain or less likely to mount political opposition, if their judgment that such was the case in a particular area was based on the race of the residents. It is no defense that such an inference might be supported by a rational statistical inference. Such a judgment is an impermissible racial classification. *See id.* at 862 (citing Village of Bellwood v. Dwivedi, 895 F.2d 1521, 1531 (7th Cir. 1990)).

179 Theodore Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 38, 114-17 (1977); Kenneth L. Karst, *The Costs of Motive-Centered Inquiry*, 15 SAN DIEGO L. REV. 1163 (1978); Randall L. Kennedy, *Competing Conceptions of "Racial Discrimination": A Response to Cooper and Graglia*, 14 HARV. J.L. & PUB. POL'Y 93, 98 (1991); Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105 (1989); *cf.* Elizabeth Bartholet, *Proof of Discriminatory Intent Under Title VII:* United States Board of Governors v. Aikens, 70 CAL. L. REV. 1201 (1982). There are, of course, exceptional cases where the evidence is somehow fortuitously available to make the required showing. *See* Dowdell v. Apopka, 511 F. Supp. 1375 (M.D. Fla. 1981) (disparities in water, stormwater drainage in black/white neighborhoods motivated by discriminatory intent).

test simply cannot be met. For instance, 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 that siting.

A case decided just a few years after the Supreme Court's imposition of the "discriminatory intent" requirement illustrates the pitfalls of reliance on equal protection litigation theories. In *Bean v. Southwestern Waste Management Corp.*,[180] minority plaintiffs sought to enjoin the siting of a solid waste disposal facility within their community in Houston, Texas. The claim was brought, pursuant to 42 U.S.C. 1983, against the state agency that issued a permit for the facility and against the operators of the facility itself, and alleged an equal protection violation. The approved solid waste site was within 1700 feet of a predominantly black high school with no air conditioning and was also close to a predominantly black residential neighborhood. Plaintiffs' claim rested on two theories: (1) that the state agency's "approval of the permit was part of a pattern or practice by it of discriminating in the placement of solid waste sites,"[181] and (2) that the state agency's "approval of the permit, in the context of the historical placement of solid waste sites and the events surrounding the application, constituted discrimination."[182]

The district court denied the plaintiff's motion for a preliminary injunction,[183] and the complaint was ultimately dismissed[184] on the ground that the plaintiffs had failed to prove that the decision to grant the permit was attributable to an intent to discriminate on the basis of race.[185] While the court commented that some of the statistical data "at first blush, looks compelling,"[186] it ultimately concluded that the data was not sufficient to establish discriminatory intent. The size of the census tracts made it difficult to show that the approved sites were located in minority neighborhoods. Notably, while the census tracts encompassed predominantly white populations (thus undermining the discrimination charge), the approved sites were specifically located in minority neighborhoods within those larger census tracts.[187] However, the small

180 482 F. Supp. 673 (S.D. Tex. 1979), *aff'd without op.*, 782 F.2d 1038 (5th Cir. 1986).

181 *Id.* at 677.

182 *Id.* at 678.

183 The judge who first denied plaintiff's motion for a preliminary injunction went out her way, however, to comment on the potential strength of plaintiff's claim of disparate impact and to suggest how plaintiffs might establish their entitlement to relief in the subsequent permanent injunction hearing. That same judge, who is a minority, was not the judge who later presided over the permanent injunction hearing. According to the lawyer who represented the plaintiffs in *Bean*, the transfer occurred shortly before the hearing. Linda McKeever Bullard, Remarks at the Proceedings of the First National People of Color Environmental Leadership Summit (Oct. 1991) (notes available from author).

184 The court initially denied the defendants' motion to dismiss, providing the plaintiffs with an opportunity to proceed with discovery. 482 F. Supp. at 680.

185 *Id.* at 677-80.

186 *Id.* at 678.

187 *Id.* at 677.

number of prior solid waste sites made it difficult to draw statistical inferences,[188] and the location of the sites could be linked to the location of industry.[189]

Not long after *Bean*, the United States District Court for the Eastern District of North Carolina, in *NAACP v. Gorsuch*,[190] rejected on similar grounds a constitutional challenge to the proposed siting of a PCB disposal facility. The plaintiffs in this class action alleged that the fact that the county in which the facility would be located "has the highest percentage (at least 63.7%) of minority residents of any county in North Carolina was at least one factor in deciding to place the PCB dump there."[191] The district court denied the plaintiffs' request for preliminary injunctive relief, concluding that there was "little likelihood that plaintiffs will prevail on the merits."[192] According to the court, "[t]here is not one shred of evidence that race has at any time been a motivating factor for any decision taken by any official—state, federal or local—in this long saga."[193]

Minority plaintiffs' claims in Georgia met a similar fate in 1989. In *East Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb County Planning & Zoning Commission*,[194] the United States District Court for the Middle District of Georgia rejected an equal protection challenge to a local zoning board decision to permit the location of a privately owned landfill in a predominately black community. The court concluded that the plaintiffs' evidence of disparate impact was inadequate because it relied heavily on decisions made by local authorities other than the zoning board, and because there was no evidence of "improper racial animus."[195] The Eleventh Circuit affirmed.[196]

Finally, and even more recently, the United States District Court for the Eastern District of Virginia, in *R.I.S.E. v. Kay*, rejected an equal protection challenge to the siting of a regional landfill in an area populated primarily by blacks.[197] The court agreed that the county's siting of landfills over the past twenty years had had a disproportionate impact on racial minority communities[198] but, relying on *Arlington Heights v. Met-*

[188] *Id.* at 678 ("[T]here are only two sites involved here. That is not a statistically significant number.").

[189] *Id.* at 679 ("But those sites, the Assistant Attorney General argues persuasively, are located in the eastern half of the city because that is where Houston's industry is, not because that is where Houston's minority population is.").

[190] No. 82-768-CIV-5 (E.D.N.C. Aug. 10, 1982).

[191] *Id.*, complaint at 2. The plaintiffs also raised a Title VI claim based on the allegedly adverse effects of the PCB facility on minority property values. *Id.* at 12.

[192] *Id.*, slip op. at 9.

[193] *Id.* at 9-10 n.8.

[194] 706 F. Supp. 880 (M.D. Ga.), *aff'd*, 896 F.2d 1264 (11th Cir. 1989).

[195] *Id.* at 885-87.

[196] 896 F.2d 1264 (11th Cir. 1989).

[197] R.I.S.E., Inc. v. Kay, 768 F. Supp. 1144 (E.D. Va. 1991), *aff'd*, 977 F.2d 573 (4th Cir. 1992).

[198] The court examined the racial composition of both the locations of the proposed, and three

ropolitan Housing Development[199] and *Washington v. Davis*,[200] ruled that a showing of disproportionate impact is not enough; to prevail the plaintiff must go further and show discriminatory intent.[201] The Fourth Circuit affirmed.[202]

The existing case law, therefore, does not give minority plaintiffs much reason to be optimistic about their likelihood for successfully challenging particular actions or decisions based on an equal protection theory. What is even more striking about the uniformity of these rulings, however, is that they contrast quite sharply with decisions in a closely analogous area where courts have been far more receptive to equal protection claims. Specifically, these other cases have involved the disparate provision of municipal services. In that context, some federal courts have more readily inferred discriminatory intent based on the government's knowledge of disparate impacts stemming from the provision of governmental services.[203] Theoretically, there is no obvious reason why those two types of cases should be treated differently by the courts. What is necessary to establish discriminatory intent should be the same whether the stakes are the benefits of municipal services or the burdens of undesirable environmental cleanup facilities such as landfills. One likely reason for this disparity in the case law may be that the judiciary perceives significant differences in the harm-shifting implications that arise with the type of relief sought in each kind of case.

When municipal services are at stake, the problem can seemingly be remedied by providing better or more services to those bringing the action. Significantly, there is not an immediate perception that the parties are involved in a zero-sum game where winners and losers must necessarily offset each others' gains and losses. Raising services for one group does not, in all likelihood, mean that the services of others will be compromised.[204] However, where the question is how environmental risks

previously sited, landfills in the county, which has a population of approximately 50% black and 50% white. The court found that 100%, 95%, and 100% of the residents living in the immediate vicinity of the three previous sites were black, and that 64% of the residents within a half-mile radius of the proposed site were black. *Id.* at 1148.

199 429 U.S. 252 (1977).

200 426 U.S. 229 (1976).

201 768 F. Supp. at 1149. The court also concluded that, notwithstanding the disproportionate impact on black communities, a "[c]areful examination of the administrative steps taken by the Board of Supervisors . . . reveals nothing unusual or suspicious. To the contrary, the Board appears to have balanced the economic, environmental, and cultural needs of the County in a responsible and conscientious manner." *Id.* at 1149-50.

202 977 F.2d 573 (4th Cir. 1992).

203 *See* Ammons v. Dade City, 783 F.2d 982 (11th Cir. 1986); Dowdell v. City of Apopka, 698 F.2d 1181 (11th Cir. 1983); Baker v. City of Kissimmee, 645 F. Supp. 571 (M.D. Fla. 1986). All three of these cases, and how the courts inferred the requisite element of discriminatory intent based on government official knowledge of existing disparities in municipal services, are discussed in Godsil, *supra* note 14, at 416-20.

204 Of course, to the extent that government revenues are fixed, this may not be true. But it is the

are to be distributed or redistributed, a court is more likely to perceive the necessary tradeoffs. In short, the risks must go somewhere. Under these circumstances, courts seem far less willing to invoke the equal protection clause to dictate to local government how harms such as environmental risks must be redistributed in a community, perhaps because the redistribution would so directly implicate the quality of the environment enjoyed by those in the community wielding great political and economic influence.[205] Hence, the success of civil rights litigation for the pursuit of environmental justice will likely turn not just on whether attempted theories avoid the doctrinal burdens posed by equal protection, but also on whether the courts are less troubled by (or at least less focused on) the harm-shifting implications of the judicial relief being sought.

2. Title VI of the Civil Rights Act: The Search for Federal Funds to Avoid the Intent Limitation.—One option not yet well explored by civil rights plaintiffs in the environmental context is Title VI of the Civil Rights Act of 1964. Title VI provides that: "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."[206]

The principal advantage of Title VI over equal protection is that courts have not required a showing of discriminatory intent in the Title VI context; disparate impact has been enough. Hence, in *Lau* v. *Nichols*,[207] where non-English-speaking Chinese students had allegedly been deprived of equal educational opportunities, the Supreme Court concluded that Title VI had been violated because of the discriminatory effect of the challenged school policies "even though no purposeful design is present."[208] Although the Court's subsequent ruling in *Regents of University of California v. Bakke*[209] casts some doubt on the continuing validity of this aspect of *Lau*,[210] the Court later reaffirmed, in *Guardians*

judicial perception of the practical consequences, rather than the actual consequences, that likely explain the differences in judicial approach.

205 *Cf.* Derrick A. Bell, Jr., *Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4, 10 (1985) ("effective remedies for harm attributable to discrimination in society in general will not be granted to blacks if that relief involves a significant cost to whites.").

206 42 U.S.C. § 2000d (1988); *see generally* Charles F. Abernathy, *Title VI and the Constitution: A Regulatory Model for Defining "Discrimination"*, 70 GEO. L.J. 1 (1981) (discussing interpretations of Title VI and the role of regulatory agencies in effecting its purposes).

207 414 U.S. 563 (1974).

208 *Id.* at 568.

209 438 U.S. 265 (1978).

210 *See id.* at 318-19 (opinion of Justice Powell), 351-52 (opinion of Justice Brennan, joined by Justices White, Marshall, and Blackmun, concurring in part and dissenting in part); *see generally* CHARLES F. ABERNATHY, CIVIL RIGHTS CONSTITUTIONAL LITIGATION—CASES AND MATERIALS 516-19 (2d ed. 1992) (discussing the opinions in *Bakke* and analyzing their treatment of the discriminatory effects test set out in *Lau*).

Ass'n v. Civil Service Commission,[211] that discriminatory intent is not required under Title VI where that had been the view historically endorsed by applicable federal agency regulations implementing the statutory mandate. Notably, EPA's Title VI regulations embrace a discriminatory *effects* test.[212] It is also well settled that Title VI provides an implied private right of action on behalf of individuals who have suffered discrimination deemed unlawful by Title VI.[213]

There are, however, two limitations to Title VI. Although each is significant, Title VI's reach in the environmental protection arena remains potentially great. The first limitation is that Title VI's nondiscrimination mandate applies only to "any program or activity receiving Federal financial assistance."[214] Thus, while covering all federal agency activities, nonfederal actions are within Title VI's mandate only when a sufficient federal financial nexus can be established. Federal financial assistance for environmental protection is extensive, however, particularly assistance to state governments. Virtually all federal environmental laws, including those dealing with hazardous waste,[215] toxic substances,[216] water pollution control,[217] and clean air[218] provide funding to state programs. These state programs make many of the decisions that, when not initiated by the federal government, effectively determine the distribution of benefits and burdens from environmental protection at the state and local level. In 1986, for example, federal grants to state governments made up forty-six, thirty-three, and forty percent of the state budgets for air, water, and hazardous waste programs, respectively.[219]

211 463 U.S. 582, 584 & n.2 (1983), *cert. denied*, 463 U.S. 1228 (1983).

212 40 C.F.R. § 7.35 (1991).

213 463 U.S. at 593-95.

214 42 U.S.C. § 2000d (1988).

215 Both the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 (1988 & Supp. II 1990), and the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6992k (1988 & Supp. II 1990) offer large amounts of federal monies. CERCLA authorizes expenditures for the cleanup of inactive and abandoned hazardous waste sites. *See* 42 U.S.C. §§ 9604, 9611 (1988 & Supp. II 1990). RCRA provides substantial financial assistance to states. *See* 42 U.S.C. §§ 6931 (assistance for "the development and implementation of authorized State hazardous waste programs"), 6947-6948 (assistance for development and implementation of federally approved state solid waste management plans), 6949 (assistance to rural communities for solid waste management facilities) (1988 & Supp. II 1990).

216 Toxic Substances Control Act, 15 U.S.C. § 2627 (1988) (authorizing "grants to States for the establishment and operation of programs to prevent or eliminate unreasonable risks within the States to health or the environment which are associated with a chemical substance or mixture and with respect to which the Administrator is unable or is not likely to take action under this chapter").

217 Clean Water Act, 33 U.S.C. §§ 1252(c) (comprehensive programs), 1254(b)(3), (g)(1) & (g)(3) (research, investigation, training, and information), 1255 (research and development), 1256 (for pollution control programs), 1259 (training grants and contracts), 1281(g) (publicly owned treatment works), 1281(h) (privately owned treatment works), 1282 (treatment works) (1988).

218 Clean Air Act, 42 U.S.C. §§ 7405, 7505, 7544 (1988).

219 U.S. EPA, A PRELIMINARY ANALYSIS OF THE PUBLIC COSTS OF ENVIRONMENTAL PROTECTION: 1981-2000, at 9 (1988).

Given this significant federal financial assistance to state environmental programs, the potential reach of Title VI is correspondingly great.

The second Title VI limitation is remedial in nature. Until recently, it appeared fairly well settled that in the absence of a showing of discriminatory intent, equitable relief was the only remedy available to redress a Title VI violation.[220] Just this past Term, however, the U.S. Supreme Court unanimously ruled, in *Franklin v. Gwinnett County Public Schools*,[221] that a damages remedy is available in implied private rights of actions brought under Title IX of the Education Act Amendments of 1972.[222] Because the language of Title IX was expressly modeled after Title VI of the Civil Rights Act, and because the Court has frequently relied on constructions of one in interpreting the other,[223] it would seem fair to assume that a damages remedy is now generally available for Title VI violations, even absent a showing of discriminatory intent.

To date, however, there has been very little reliance on Title VI in any of the litigated cases.[224] EPA has likewise not exploited its Title VI responsibilities as it could to redress distributional inequities. There are a host of ways that EPA could implement Title VI's nondiscrimination mandate in the agency's disbursement of federal pollution control funds. A relatively modest measure would be for EPA to require the recipient of the funds to make a showing that the funds are being disbursed according to racially neutral criteria. A more aggressive approach would be to require a further showing that racial minority groups are proportionately represented among the ultimate beneficiaries of the federal funds. Such a showing could include proof that the "neutral" distribution of federal funds in no manner perpetuated the vestiges of past racial discrimination within the relevant community. For instance, in the case of a federally funded wastewater treatment facility, EPA would need to be satisfied that the community's sewage treatment program provides service to minority communities (e.g., connections to sewage treatment plants) equal to that provided to nonminority communities in the affected area.

EPA's decision to play a reduced role under Title VI seems to have

220 In *Guardians*, four justices embraced the view that Title VI, as affected by administrative regulations, forbids both intentional discrimination and "effects" discrimination, and provides a damages remedy for each type of transgression. 463 U.S. 582, 615-34 (Marshall, J., dissenting), 635-45 (Stevens, Brennan & Blackmun, JJ., dissenting) (1983). Justice White provided the fifth vote in favor of the former proposition, but concluded that the damage remedy was available only upon a showing of discriminatory intent. *Id.* at 593.

221 112 S. Ct. 1028 (1992).

222 20 U.S.C. §§ 1681-1688 (1988).

223 *E.g.*, Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. at 594 (opinion of White, J.); Cannon v. University of Chicago, 441 U.S. 677, 694-703 (1979).

224 In those isolated instances when a Title VI claim has been raised in the complaint, such as in Harrisburg Coalition Against Ruining the Env't v. Volpe, 330 F. Supp. 918 (M.D. Pa. 1971), and NAACP v. Gorsuch, No. 82-768-CIV-5 (E.D.N.C. Aug. 10, 1982), the plaintiffs do not appear to have pressed the issue very far. In *Gorsuch*, for example, plaintiffs raised a Title VI claim in their complaint but did not argue the issue in their memorandum in support of an injunction.

been made very early on in the agency's history. During hearings before the United States Commission on Civil Rights in 1971, just a few months after EPA's creation, EPA officials acknowledged that the agency was taking a narrow view of Title VI's relevance to its work.[225] Specifically, EPA Administrator William Ruckelshaus testified that there were "limitations" on what a "regulatory agency" such as EPA could do consistent with its statutory mandate to achieve pollution control.[226] In particular, Ruckelshaus explained that any denial or termination of pollution control funding to a community would cause that community to violate pollution control standards, but without necessarily prompting the community to change its racially discriminatory practices:

> [I]t 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.[227]

Administrator Ruckelshaus acknowledged that EPA could couple its denial of federal funding, pursuant to Title VI, with a lawsuit against the community to compel its compliance with water quality standards, but contended that such an approach was problematic because it would necessarily cause further delay in the accomplishment of national pollution control objectives pending resolution of the litigation.[228] For this reason, Ruckelshaus concluded, absent a "clear violation" of Title VI, "the needs of the community" would have to be taken into account "in the determination of what mandate receives priority" in a particular case.[229]

In a 1975 report on federal civil rights enforcement, the United States Commission on Civil Rights faulted EPA for its lack of effort under Title VI. The Commission found that EPA

> had not yet fully recognized . . . [its] . . . responsibility to ensure that conditions such as the lack of fair housing laws, absence of a fair housing agency, or the existence of exclusionary zoning ordinances do not contribute to the effective exclusion of minorities from EPA assistance by aiding their exclusion from a community which has applied for or receives EPA assistance.[230]

In response to EPA's defense of its Title VI efforts, the Commission

---

225 U.S. COMMISSION ON CIVIL RIGHTS, HEARING HELD IN WASHINGTON, D.C. 146-56 (June 14-17, 1971) (testimony of William Ruckelshaus, Administrator of the United States Environmental Protection Agency).

226 *Id.* at 147.

227 *Id.*

228 *Id.* at 151 ("there are circumstances that can arise where it would seem that our ability to achieve the purposes of the Civil Rights Act flies in the face of our mandate by Congress to insure that water quality standards are complied with.").

229 *Id.* at 1007 (Draft Statement of William D. Ruckelshaus before U.S. Civil Rights Commission, June 15, 1971).

230 6 U.S. COMMISSION ON CIVIL RIGHTS, THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT—1974, 598-99 (1975) (footnote omitted).

stated more categorically that "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."[231] The Commission further concluded that "unless EPA takes positive steps to insure an end to the systemic discrimination which has resulted in inadequate sewer services in many minority communities, EPA will be responsible for perpetuating that discrimination."[232]

Whatever the merits of EPA's decision in 1971 to deemphasize its civil rights responsibilities, it now seems appropriate for both EPA and those parties litigating environmental justice claims to take the steps necessary to ensure a fuller realization of Title VI's environmental protection mandate. Indeed, Title VI has been an effective means of redressing distributional inequities in other related areas. For instance, minority plaintiffs have successfully utilized Title VI in administrative and judicial actions to challenge the siting of federally financed highways, prisons, hospitals, and other facilities that would tend to have a substantial adverse or beneficial impact on their communities.[233] The gist of these Title VI legal complaints has been the disproportionate impact that the facility, or its absence, would have on a minority community. Such a showing, while not sufficient by itself to prove a Title VI violation, shifts to the recipient of federal funds the burden of articulating a legitimate, nondiscriminatory reason for the siting decision. In many instances, the recipient of the federal financial assistance meets this challenge.[234] Quite often, however, the practical effect of this burden-shifting is to prompt the recipients of federal financial assistance to settle a Title VI claim. There is no apparent reason why similar Title VI claims might not be raised against federally financed facilities that impose disproportionate environmental risks on minority communities or, conversely, fail to provide such communities with a commensurate level of environmental benefits.

---

231 *Id.* at 591.

232 *Id.* at 595. EPA responded to the Commission report by stating that "the report should give more recognition to the fact that EPA is essentially a pollution abatement agency and, as such, is to be distinguished from an agency principally concerned with community development." *Id.* at 586 (Letter from Carol M. Thomas, Director, EPA Office of Civil Rights, to John A. Buggs, Staff Director, U.S. Commission on Civil Rights (July 8, 1975)). EPA further asserted that "[w]e do not consider it as our major responsibility to see to the sewering of minority communities nationwide irrespective of pollution abatement considerations." *Id.* at 589. In reply, the Commission characterized EPA's position "as tantamount to saying that, in the face of environmental considerations, EPA may see fit to weaken or even abandon civil rights standards." *Id.* at 591 (U.S. Commission on Civil Rights' reply to Carol M. Thomas' letter of July 8, 1975).

233 *See, e.g.*, North Carolina Dep't of Transp. v. Crest Street Comm. Council, 479 U.S. 6 (1986) (highway); NAACP v. Wilmington Medical Ctr., 689 F.2d 1161 (3d Cir. 1982), *cert. denied*, 460 U.S. 1052 (1983) (hospital).

234 *E.g.*, Coalition of Concerned Citizens Against I-670 v. Damian, 608 F. Supp. 110 (S.D. Ohio 1984) (defendants rebut plaintiffs' showing of disparate impact in siting of highway by articulating legitimate, nondiscriminatory reasons for the siting determination).

Indeed, there is Title VI precedent virtually on point that has largely been ignored by those bringing environmental justice claims. These are cases where minority plaintiffs have invoked Title VI to redress distributional inequities associated with the availability of environmental amenities or quality resources, such as public parks and water quality treatment facilities. Courts have upheld Title VI challenges to these federally financed programs based on their racially disparate effects.[235]

In sum, Title VI provides a possible basis for civil rights litigation to redress environmental inequities and is an approach that warrants greater emphasis and attention. Most importantly, by using Title VI as a vehicle for these suits, the bugaboo of proving discriminatory intent can be avoided. And, while Title VI's federal financial assistance requirement is not insignificant, the fact that states receive so much of their environmental budgets from the federal government suggests that that limitation may not be much more practically significant than equal protection's threshold requirement that there be "state action." Finally, courts may be more willing to grant relief under Title VI than under equal protection because the focus of the lawsuit is, at least superficially, the provision of governmental benefits as opposed to the redistribution of environmental risks. To that extent, a Title VI lawsuit is more analogous to equal protection challenges concerning provision of municipal services (which have fared substantially better in the federal courts) than to those suits which more overtly seek a judicial redistribution of "harmful" environmental risks.

3. Title VIII of the Civil Rights Act and 42 U.S.C. § 1982: The Need to Bridge Housing and the Environment.—Two other potentially useful, but even less explored, civil rights causes of action are Title VIII of the Civil Rights Act of 1968[236] and 42 U.S.C. § 1982. Title VIII makes it unlawful "[t]o discriminate against any person in the . . . sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status or national origin."[237] Section 1982 provides that all United States citizens "shall have the same right . . . to inherit, purchase, lease, sell, hold, and convey real and personal property."[238]

There are several threshold advantages to Title VIII's nondiscrimination mandate. Like a claim under Title VI of the Civil Rights Act of 1964, and unlike a constitutional equal protection claim, no showing of

235 *See, e.g.*, Johnson v. City of Arcadia, 450 F. Supp. 1363 (M.D. Fla. 1978) (black neighborhoods not being provided with same level of municipal services as white neighborhoods). As described above, similarly based equal protection claims have been successfully advanced. *See supra* note 207 and accompanying text.

236 42 U.S.C. §§ 3601-3619, 3631 (1988).

237 42 U.S.C. § 3604(b) (1988).

238 42 U.S.C. § 1982 (1988).

EAST BIBB TWIGGS NEIGHBORHOOD ASSOCIATION, et al., Plaintiffs,

v.

MACON-BIBB COUNTY PLANNING & ZONING COMMISSION, et al., Defendants.

Civ. A. No. 87-87-3-MAC (WDO).

United States District Court, M.D. Georgia, Macon Division.

Feb. 16, 1989.

Area residents brought action challenging county planning and zoning commission's decision to allow creation of private landfill. The District Court, Owens, Chief Judge, held that evidence was insufficient to establish that county planning and zoning commission's decision to allow creation of private landfill in census tract in which majority of residents were black was motivated by race discrimination.

Judgment for defendants.

See also 674 F.Supp. 1475.

1. Civil Rights ⇐3

Considerations in determining whether official actions were motivated by race discrimination include the following: impact of official action—whether it bears more heavily on one race than upon another; historical background of decision; specific sequence of events leading up to challenged decision; any departures, substantive or procedural, from normal decision-making process; and legislative or administrative history of challenged decision. U.S. C.A. Const.Amend. 14.

2. Civil Rights ⇐13.13(3)

Evidence was insufficient to establish that county planning and zoning commission's decision to allow creation of private landfill in census tract in which majority of residents were black was motivated by race discrimination; only other commission-approved landfill was located within census tract containing majority white population, and historical background of commission's decisions established that commission's decisions were not racially motivated. U.S. C.A. Const.Amend. 14.

Lonzy F. Edwards, Macon, Ga., for plaintiffs.

O. Hale Almand, Jr., William P. Adams, Macon, Ga., for defendants.

ORDER

OWENS, Chief Judge.

This case involves allegations that plaintiffs have been deprived of equal protection of the law by the Macon-Bibb County Planning & Zoning Commission ("Commission"). Specifically, plaintiffs allege that the Commission's decision to allow the creation of a private landfill in census tract No. 133.02 was motivated at least in part by considerations of race. Defendants vigorously contest that allegation. Following extensive discovery by the parties, this court conducted a non-jury trial on October 4-5, 1988. The parties were permitted to supplement the record following the conclusion of the trial. Based upon a thorough examination of the file and careful consideration of both the evidence submitted and arguments offered during the trial, the court now issues the following ruling.

Facts

On or about May 14, 1986, defendants Mullis Tree Service, Inc. and Robert Mullis ("petitioners") applied to the Commission for a conditional use to operate a non-putrescible [1] waste landfill at a site bounded at least in part by Davis and Donnan Davis Roads. The property in question is located in census tract No. 133.02, a tract containing five thousand five hundred twenty-seven (5,527) people, three thousand three hundred sixty-seven (3,367) of whom are black persons and two thousand one hundred forty-nine (2,149) of whom are white persons.[2] The only other private landfill approved by the Commission is situated in the adjacent census tract No. 133.01, a tract having a population of one thousand three hundred sixty-nine (1,369) people, one thousand forty-five (1,045) of whom are white persons and three hundred twenty (320) of whom are black persons.[3] That site was approved as a landfill in 1978. The proposed site for the landfill in census tract No. 133.02 is zoned A-Agricultural, and the parties are in agreement that property so zoned is eligible for the construction of and subsequent operation as a landfill of this type.

On May 27, 1986, the Commission conducted a hearing on petitioners' application for a conditional use. Evidence was presented by petitioners, and certain individuals expressed various concerns about the location of the landfill in this area. The Commission deferred the decision on petitioners' application pending input from the City of Macon and the County of Bibb regarding the location of a landfill on the proposed site.

By letters dated June 5, 1986, and June 10, 1986, respectively, the County and the City responded to invitations from the Commission to participate in the evaluation of the instant application and to participate in the development of a procedure by which the City and the County actively participate in the evaluation of future applications for landfills. The Bibb County Board of Commissioners, through its Chairman, Mr. Emory Green, while expressing its appreciation for and accepting the Commission's offer to participate, stated that the Com-

1. Putrescible waste was described as waste such as household garbage which decomposes rapidly, thus requiring immediate cover. Non-putrescible waste was described as non-garbage waste, such as wood, wood by-products, paper products, corrugated products, packaging materials, metal goods, tires and refrigerators.

2. See Plaintiff's Exhibit 54. Figures are based upon 1980 census. The court notes the numerical discrepancy (3,367 + 2,199 = 5,516), but it finds such discrepancy without significance.

3. See Plaintiff's Exhibit 54.

mission had full authority to act on any such application and that any suggestion or recommendation offered by the County Commission would be for "informational" purposes only. The City, through Mayor George Israel, applauded the Commission's suggestion that a procedure be developed, but it had "no comment" regarding the specific project in question in that the project was located outside the Macon city limits. During this exchange of letters, the Environmental Protection Division ("EPD") of the Georgia Department of Natural Resources informed Mr. Mullis by letter dated May 30, 1986, that the proposed site was acceptable for disposal of non-putrescible waste.

The Commission reconvened on June 23, 1986, to consider petitioners' application. Petitioners were present and were represented by Mr. Charles Adams. Approximately one hundred fifty (150) individuals opposed to the landfill attended the Commission meeting. Numerous statements were made, and various opinions were offered. Included among those reasons offered in opposition to the landfill were the following: (1) threat to the residential character of the neighborhood; (2) devaluation of the residents' property; (3) danger to the ecological balance of the area; (4) concern regarding the possible expansion of the landfill into a public dump; (5) hazards to residents and children from increased truck traffic; and (6) dissatisfaction with the perceived inequitable burden borne by the East Bibb Area in terms of "unpleasant" and "undesirable" land uses.

Mr. Mullis and his representative, Mr. Adams, emphasized the need for an additional landfill and championed the free enterprise system as the appropriate developer and manager of such sites. They relied upon the reports supplied by Tribble & Richardson, Inc., an engineering concern with vast experience in examining proposed landfill sites, and upon the EPD's approval of the site. Petitioners further emphasized that the landfill would be managed pursuant to the existing regulations and under close supervision of the EPD.

After hearing the views of numerous individuals, the Commission voted to deny the application. The stated reasons were as follows: (1) the proposed landfill would be located adjacent to a predominantly residential area; (2) the increase in heavy truck traffic would increase noise in the area; and (3) the additional truck traffic was undesirable in a residential area. See Commission Letter dated June 30, 1986.

Pursuant to a request from petitioners through both Tribble & Richardson and Mr. Charles Adams, the Commission voted on July 14, 1986, to rehear petitioners' application. The rehearing was conducted on July 28, 1986. Applicant Robert Mullis and his representatives addressed numerous concerns which had been previously raised by citizens opposed to the landfill and by members of the Commission. Specifically, Mr. Mullis informed those present that he had met all of the existing state, city, county and planning and zoning commission requirements for the approval of a permit to operate a landfill. He also reiterated that the site had been tested by engineers and that it had been found geologically suitable for a landfill. He explained that burning, scavaging, open dumping and disposal of hazardous wastes would be strictly prohibited, and he advised that this landfill would be regulated and inspected by the EPD. Mr. Mullis and Mr. Hodges of Tribble & Richardson pointed out that the site entrance would be selected by the EPD and that such selection would be subject to approval by the Commission. Mr. Mullis assured those present that the site would be supervised at all times. Finally, Mr. Mullis informed the Commission and the other participants that the buffer zone would be increased an additional fifty (50) feet, from one hundred (100) feet to one hundred fifty (150) feet, in those areas where the landfill site adjoined residences. Also included in the record was a letter dated July 15, 1986, in which Mr. Mullis stated that there existed only five residences continguous to the proposed landfill site and only twenty-five houses within a one mile radius of the site.

The citizens opposing the landfill voiced doubts about the adequacy of the buffer zone and the potential health threats from vermin and insects. Concerns were expressed regarding the impact the landfill might have upon the water in the area in that many of the residents relied upon wells for their household water. Certain of the participants questioned whether the residents of this area were subject to the same considerations afforded residents in other areas of the city and county when decisions of this nature were made.

When the above-mentioned allegations of unfairness were raised by opponents to the landfill, Commission Chairperson Dr. Cullinan expressed concern regarding that perception. He stated as follows:

> I'm interested in your comments about manipulations and information may have been passed subrosa in some way. I'm interested in that because I think government and ultimately democracy functions on the legitimacy of its purpose and if people don't have faith in their institutions, the system won't work. They may not like all of the decisions that government institutions make, but I would feel badly if they thought that there was some sort of conspiracy a foot and I can tell you that I received a number of calls before and after my own meanderings through that land and I received no calls from big corporate people asking me to vote a particular way. Although, I did receive numerous calls from people in the area. Although, I can't speak for the other commissioners feeling is that their experiences are similar to mine. I think that the record should show to the best of this chairman's knowledge there is not manipulations or conspiracies a foot and if you have such information I would be interested in having it entered into the record.

Defendant's Exhibit D–P & Z–3, Transcript of July 28, 1986, Hearing. Dr. Cullinan further stated that "anything that I have any knowledge of will be in the record. We're not going to let vague charges of conspiracy go unchallenged here. We want this Board to be a legitimate Board and speak to the will of all of the people...." *Id.*

At the conclusion of the discussion, the Commission deliberated and voted.[4] The Commission approved the application subject to the following conditions: (1) approval by the county engineer; (2) approval or permits from all applicable state and federal agencies; (3) restriction on dumping of all but non-putrescible materials; and (4) review and approval by the Commission of the final site plan. See Commission Letter dated August 1, 1986.

On November 10, 1986, the Commission approved the final site plan for the landfill. On November 20, 1986, the EPD issued a permit to Mullis Tree Service conditioned upon the permitee complying with the following conditions of operation:

1. No hazardous or putrescible waste shall be deposited at the landfill.

2. Materials placed in the landfill shall be spread in layers and compacted to the least practical volume.

3. A uniform compacted layer of clean earth cover not less than one (1) foot in depth shall be placed over all exposed waste material at least monthly or more frequently as may be determined by the division.

4. The disposal site shall be graded and drained to minimize runoff onto the landfill

4. Each Commissioner articulated his or her position on the record. Each Commissioner noted the difficulty of the decision. Mr. Pippinger emphasized the forthright approach taken by petitioner and the approval given by the Environmental Protection Division for the proposed landfill. He stated that his decision to vote in favor of the application was based upon "all of the details [,] the use of the land and the facts and conclusions that I have gleamed (sic) out of this." Commissioner Ingram voted "no" on petitioners' application, citing the need for a comprehensive approach to the waste problem and the impropriety of reconsidering petitioners' application after initially denying same. Chairperson Cullinan voted in favor of petitioners' application, and he stated as follows: "We can't rule on sites until they are brought to use. This site was brought to us.... If others are brought to us in North Macon, South Macon, West Macon, we have to be as deliberative and as thoughtful and make an independent assessment there to see whether in fact the land use is adequate." The motion to approve petitioners' application carried three votes to one vote.

surface, to prevent erosion and to drain water from the surface of the landfill.

5. The landfill shall be operated in such manner as to prevent air, land, or water pollution, public health hazards or nuisances.

6. Access to the landfill shall be limited to authorized entrances which shall be closed when the site is not in operation.

7. Suitable means shall be provided to prevent and control fires. Stockpiled soil is considered to be the most satisfactory fire fighting material.

8. The Design and Operational Plan submitted by the permittee and approved by the Division for this landfill is hereby made a part of this permit and the landfill shall be operated in accordance with the plan.

9. This permit shall become null and void one year from the effective date if the permitted disposal operation has not commenced within one year from the effective date.

Discussion

[1] "To prove a claim of discrimination in violation of the Equal Protection Clause a plaintiff must show not only that the state action complained of had a disproportionate or discriminatory impact but also that the defendant acted with the intent to discriminate." *United States v. Yonkers Board of Education*, 837 F.2d 1181, 1216 (2nd Cir.1987), *cert. denied*, — U.S. —, 108 S.Ct. 2821, 100 L.Ed.2d 922 (1988); *see Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976); *E & T Realty v. Strickland*, 830 F.2d 1107 (11th Cir.1987), *cert. denied*, — U.S. —, 108 S.Ct. 1225, 99 L.Ed.2d 425 (1988). A plaintiff need not establish that "the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one." *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265, 97 S.Ct. 555, 563, 50 L.Ed.2d 450, 464–65 (1977). "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Id.* at 266, 97 S.Ct. at 564, 50 L.Ed.2d at 465. Considerations include the following: (1) the impact of the official action—whether it bears more heavily on one race than upon another; (2) the historical background of the decision; (3) the specific sequence of events leading up to the challenged decision; (4) any departures, substantive or procedural, from the normal decision-making process; and (5) the legislative or administrative history of the challenged decision. *Id.* at 266–68, 97 S.Ct. at 564–65, 50 L.Ed.2d at 465–66.

[2] Having considered all of the evidence in light of the above-identified factors, this court is convinced that the Commission's decision to approve the conditional use in question was not motivated by the intent to discriminate against black persons. Regarding the discriminatory impact of the Commission's decision, the court observes the obvious—a decision to approve a landfill in any particular census tract impacts more heavily upon that census tract than upon any other. Since census tract No. 133.02 contains a majority black population equalling roughly sixty percent (60%) of the total population, the decision to approve the landfill in census tract No. 133.02 of necessity impacts greater upon that majority population.

However, the court notes that the only other Commission approved landfill is located within census tract No. 133.01, a census tract containing a majority white population of roughly seventy-six percent (76%) of the total population. This decision by the Commission and the existence of the landfill in a predominantly white census tract tend to undermine the development of a "clean pattern, unexplainable on grounds other than race...." *Village of Arlington Heights*, 429 U.S. at 266, 97 S.Ct. at 564, 50 L.Ed.2d at 465.

Plaintiffs hasten to point out that both census tracts, Nos. 133.01 and 133.02, are located within County Commission District No. 1, a district whose black residents compose roughly seventy percent (70%) of the total population. Based upon the above facts, the court finds that while the Commission's decision to approve the landfill for location in census tract No. 133.02 does of necessity impact to a somewhat larger degree upon the majority population therein, that decision fails to establish a clear pattern of racially motivated decisions.[5]

Plaintiffs contend that the Commission's decision to locate the landfill in census tract No. 133.02 must be viewed against an historical background of locating undesirable land uses in black neighborhoods. First, the above discussion regarding the two Commission approved landfills rebuts any contention that such activities are always located in direct proximity to majority black areas. Further, the court notes that the Commission did not and indeed may not actively solicit this or any other landfill application. The Commission reacts to applications from private landowners for permission to use their property in a particular manner. The Commissioners observed during the course of these proceedings the necessity for a comprehensive scheme for the management of waste and for the location of landfills. In that such a scheme has yet to be introduced, the Commission is left to consider each request on its individual merits. In such a situation, this court finds it difficult to understand plaintiffs' contentions that this Commission's decision to approve a landowner's application for a private landfill is part of any pattern to place "undesirable uses" in black neighborhoods. Second, a considerable portion of plaintiffs' evidence focused upon governmental decisions made by agencies other than the planning and zoning commission, evidence which sheds little if any light upon the alleged discriminatory intent of the Commission.

Finally, regarding the historical background of the Commission's decision, plaintiffs have submitted numerous exhibits consisting of newspaper articles reflecting various zoning decisions made by the Commission. The court has read each article, and it is unable to discern a series of official actions taken by the Commission for invidious purposes. *See Village of Arlington Heights*, 429 U.S. at 267, 97 S.Ct. at 564, 50 L.Ed.2d at 465. Of the more recent articles,[6] the court notes that in many instances matters under consideration by the Commission attracted widespread attention and vocal opposition. The Commission oft times was responsive to the opposition and refused to permit the particular development under consideration, while on other occasions the Commission permitted the development to proceed in the face of opposition. Neither the articles nor the evidence presented during trial provides factual support for a determination of the underlying motivations, if any, of the Commission in making the decisions. In short, plaintiffs' evidence does not establish a background of discrimination in the Commission's decisions.

"The specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purpose." *Village of Arlington Heights*, 429 U.S. at 267, 97 S.Ct. at 564, 50 L.Ed.2d at 466. Plaintiff identifies as the key piece of evidence in this regard a statement contained in "Action Plan for Housing,"[7] a study of the status of housing in the Macon area conducted by the Macon-Bibb County Planning and Zoning Commission. The study states that "[r]acial and low income discrimination still exist in the communi-

5. The court further finds it clear that the Commissioner's decision to approve petitioners' application is not a "single invidiously discriminatory act" which makes the establishment of a clear pattern unnecessary. *See Village of Arlington Heights*, 429 U.S. at 266 n. 14, 97 S.Ct. at 564 n. 14, 50 L.Ed.2d at 465 n. 14.

6. Several of the articles date from the late 1950's and the early 1960's. At least one article dates from 1940, and another dates from 1950. Those articles printed in the past fifteen years or so received primary consideration by the court as more representative of the Commission's activity. However, the court read each article.

7. See Plaintiffs' Exhibit 52, p. 33.

ty."[8] The study was issued in March of 1974, and it constitutes a recognition *by* the Commission that racial discrimination still existed in the Macon community in 1974. That recognition in no way implies that racial discrimination affected the decision-making process of the Commission itself. Rather, the statement indicates the Commission's awareness that certain individuals and/or groups in society had yet to come to grips with the concept of equality before the law. The Commission's recognition of the situation does not constitute its adoption. Indeed, such recognition probably encourages that Commission to exercise vigilance in guarding against such unprincipled influence. The statements of the various Commissioners during their deliberations indicates a real concern about both the desires of the opposing citizens and the needs of the community in general.

In terms of other specific antecedant events, plaintiffs have not produced evidence of any such events nor has the court discerned any such events from its thorough review of the record. No sudden changes in the zoning classifications have been brought to the court's attention. Plaintiffs have not produced evidence showing a relaxation or other change in the standards applicable to the granting of a conditional use. Thus, this court finds no specific antecedant events which support a determination that race was a motivating factor in the Commission's decision.

Plaintiffs contend that the Commission deviated from its "normal procedures" in several ways. First, plaintiffs point to the Commission's efforts to encourage input from the County and the City. These efforts do not constitute evidence that "improper purposes are playing a role"[9] in the Commission's decision. The statements of the Commissioners make clear that such efforts had their genesis in the Commission's concerns about accountability to the public for certain controversial governmental decisions and about centralized planning for the area's present and future waste disposal problems.

Plaintiffs' contentions regarding other alleged procedural irregularities, including the requirement that the Commission make certain findings of fact and that a rehearing was improperly granted, are without merit. The court has examined the Comprehensive Land Development Resolution in light of the actions taken and has been unable to identify any procedural flaws.[10]

The final factor identified in *Village of Arlington Heights* involves the legislative or administrative history, particularly the contemporary statements made by members of the Commission. Plaintiffs focus on the reasons offered by the Commission for the initial denial of petitioners' application, *i.e.*, that the landfill was adjacent to a residential area and that the approval of the landfill in that area would result in increased traffic and noise, and they insist that those reasons are still valid. Thus, plaintiffs reason, some invidious racial purpose must have motivated the Commission to reconsider its decision and to approve that use which was at first denied. This court, having read the comments of the individual commissioners, cannot agree with plaintiffs' arguments.

Mr. Pippinger, who first opposed the approval of the conditional use, changed his position after examining the area in question and reviewing the data. He relied upon the EPD's approval of the site and upon his determination that the impact of the landfill on the area had been exaggerated. Mrs. Kearnes, who also inspected the site, agreed with Mr. Pippinger.

Dr. Cullinan also inspected the site. After such inspection and after hearing all of the evidence, he stated that, based "on the overriding need for us to meet our at large responsibilities to Bibb County I feel that [the site in question] is an adequate site and in my most difficult decision to date I will vote to support the resolution." Transcript of July 28, 1986, Commission Meeting.

Both Dr. Cullinan and Mr. Pippinger were concerned with the problems of providing adequate buffers protecting the residential area from the landfill site and of developing an appropriate access to the site for the dumping vehicles. These concerns were in fact addressed by both the Commission and the EPD.

The voluminous transcript of the hearings before and the deliberations by the Commission portray the Commissioners as concerned citizens and effective public servants. At no time does it appear to this court that the Commission abdicated its responsibility either to the public at large, to the particular concerned citizens or to the petitioners. Rather, it appears to this court that the Commission carefully and thoughtfully addressed a serious problem and that it made a decision based upon the merits and not upon any improper racial animus.

For all the foregoing reasons, this court determines that plaintiffs have not been deprived of equal protection of the law. Judgement, therefore, shall be entered for defendants.

SO ORDERED.

8. The court believes this evidence is more probative of the "historical background of discrimination" than it is indicative of the specific sequence of events leading up to the challenged decision. Even considered in the historical context, the statement neither admits nor indicates that such discrimination existed in the Commission itself.

9. *See Village of Arlington Heights*, 429 U.S. at 267, 97 S.Ct. at 564, 50 L.Ed.2d at 466.

10. See Plaintiffs' Exhibit 4, particularly §§ 6.03, 23.14, 27.07, 27.12, 27.13, 27.14 and 27.15.

R.I.S.E., INC., et al., Plaintiffs,

v.

Robert A. KAY, Jr., et al., Defendants.

Civ. A. No. 3:90CV000680.

United States District Court,
E.D. Virginia,
Richmond Division.

June 21, 1991.

Community organization formed to oppose development of proposed regional landfill in predominately black area of county brought action against county board of supervisors, alleging equal protection violation, conspiracy to deny equal protection, due process violation, and violation of Virginia Procurement Act. The District Court, Richard L. Williams, J., held that organization failed to establish that placement of landfill in predominately black area of county resulted from intentional discrimination in violation of equal protection clause.

Judgment for defendants.

See also, 768 F.Supp. 1141.

1. Constitutional Law ⇐215

Official action will not be held unconstitutional under Fourteenth Amendment's equal protection clause solely because it results in racially disproportionate impact; official action will violate equal protection clause only if it is intentionally discriminatory. U.S.C.A. Const.Amend. 14.

2. Constitutional Law ⇐215.4

Community organization formed to oppose development of proposed regional landfill failed to provide sufficient evidence to show that placement of landfill in predominately black area was intentionally discriminatory in violation of equal protection clause; administrative steps taken by county board of supervisors to negotiate purchase of land and authorize its use as landfill site revealed nothing unusual or suspicious, board's opposition to another landfill in predominately white area and its approval of proposed landfill in black area were based on relative environmental suitability of sites, and board responded to concerns and suggestions of citizens by establishing advisory group and evaluating suitability of alternative site. U.S.C.A. Const.Amend. 14.

3. Constitutional Law ⇐215

Equal protection clause does not impose affirmative duty to equalize impact of official decisions on different racial groups. U.S.C.A. Const.Amend. 14.

Sa'ad El-Amin, Richmond, Va., for plaintiffs.

John Granville Douglass, Jonathan Steven Geldzahler, Wright, Robinson, McCammon, Osthimer & Tatum, Richmond, Va., for defendants Robert A. Kay, Jr., Robert H. Bourne, Jr., Raymond F. Alsop, Wilbur L. Hickman, and James R. Walton.

Dennis Patrick Lacy, Jr., William Jeffrey Dinkin, Clayton Lewis Walton, Timothy George Hayes, Samuel Miles Dumville, Hazel, Thomas, Fiske, Beckhorn & Hanes, Richmond, Va., for defendant Browning-Ferris Industries of South Atlantic.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

RICHARD L. WILLIAMS, District Judge.

This case is before the Court for resolution following a bench trial on June 10 and 12, 1991 of the plaintiffs' claim of deprivation of equal protection of the laws under the Fourteenth Amendment of the United States Constitution. Pursuant to Rule 52 of the Federal Rules of Civil Procedure, and on the basis of all the evidence admitted at trial, stipulations and the parties' exhibits, the Court makes the following findings of fact and conclusions of law. The parties' stipulations are incorporated by reference.

Findings of Fact

A. PARTIES AND JURISDICTION

1. The Court has jurisdiction of this case pursuant to 28 U.S.C. § 1343 and § 1331.

2. Plaintiff R.I.S.E., Inc. (Residents Involved in Saving the Environment) is a biracial community organization formed for the purpose of opposing the development of the proposed regional landfill that is the subject of this case. R.I.S.E. is a not-for-profit corporation organized under the laws of the state of Virginia and is made up primarily of King & Queen County residents who own property in the geographical area of the proposed landfill.

3. Defendant King and Queen County Board of Supervisors consists of five members: R.A. Kay, Jr., R.H. Bourne, J.R. Walton, R.F. Alsop, and W.L. Hickman. Kay, Bourne, and Walton are white and Alsop and Hickman are black. Supervisors Alsop and Hickman were elected in a special election in 1988, following a federally-ordered redistricting which resulted in an increase from three to five supervisors.

B. LANDFILL SITING PROCESS

1. In 1987, the state of Virginia issued new regulations for solid waste disposal in landfills. The new regulations posed a significant financial problem for King and Queen County. Closing the three existing county landfills, which did not meet the new environmental standards, would cost 1.7 million dollars. The County could not afford to close the existing landfills and develop a new landfill that would comply with the new regulations. Trial testimony of R. Alsop; Plaintiff's Exh. 25.

2. In an effort to solve its increasingly troublesome waste disposal problems, the County initiated negotiations with the Chesapeake Corporation for a joint venture landfill. According to the preliminary plan, Chesapeake would build the landfill and use it for its own waste disposal, and the County would operate the landfill in exchange for free waste disposal.

3. Chesapeake Corp. identified 420 acres of the Piedmont Tract, as a potential landfill site. Trial testimony of R. Kay, Jr.

4. Chesapeake Corp. retained Law Engineering Company of Charlotte, North Carolina to conduct soil studies of the Piedmont Tract to determine its suitability for a landfill. Defendants' Exh. 41.

5. Law Engineering's findings were reported to Chesapeake in a draft Landfill Permit Application dated April 8, 1988. The tests established the site's suitability for landfill development. Defendants' Exh. 41.

6. During the summer of 1988 Chesapeake abandoned the preliminary negotiations for a joint venture and expanded the already existing Prince William landfill for its own waste disposal. Trial testimony of R. Kay, Jr.

7. On January 25, 1989, Supervisors Alsop and Kay met with Chesapeake representatives to negotiate the purchase of property from Chesapeake for use as a landfill site.

8. On February 3, 1989 and February 17, 1989 County Administrator Charles Smith joined Alsop and Kay in further negotiations with Chesapeake.

9. Chesapeake Corp. identified at least two sites for possible landfill development: the Piedmont Tract and the Norman–Saunders Tract. The Supervisors preferred the Piedmont Tract because it had already been tested and, while it was centrally located, it was also remote. Plaintiff's Exh. 25.

10. Contemporaneously, James Cluverius initiated discussions with Jeffrey Southard of BFI Engineering about the County's waste disposal problems. The two met several times in January, February and March 1989.

11. Kay, Alsop, and Cluverius continued discussions with Chesapeake and arrived at an agreement in principle to obtain an option to purchase 420 acres of the Piedmont tract at a price of $1,000 per acre.

12. At a regular Board of Supervisors meeting on October 10, 1989, in public session, Board members officially appointed Alsop and Kay as a "liaison committee" to explore alternatives for the County's future waste disposal needs. Supervisor Walton briefed the participants on the cost of closing the existing landfills to meet state regulations. The Board also passed two resolutions to amend its zoning ordinance as it pertained to landfills. Plaintiffs' Exh. 16.

13. In early October 1989, Supervisor Bourne visited Mr. Carlton, an owner of land bordering the Piedmont tract and a customer of Chesapeake Corp, to solicit his approval for the proposed landfill. Although Mr. Carlton's approval was not made a condition of the contract, Chesapeake representatives made it clear that they would not proceed with the proposal without Mr. Carlton's approval. Trial testimony of R. Bourne.

14. At a public hearing on November 8, 1989, the Planning Commission recommended amendments to the zoning ordinance regarding landfills. The Board voted to accept the Planning Commission recommendations. Plaintiffs' Exh. 16.

15. At a Board meeting on November 13, 1989, in public session, Supervisor Kay identified the 420 acre Piedmont site under consideration. The Board voted to advertise a public hearing to consider whether the County should acquire an option to purchase the Piedmont tract. Trial testimony of R. Bourne; Plaintiffs' Exh. 17.

16. At the December 11, 1989 public hearing, Kay reported that the County could not afford to operate a landfill on its own. Alsop moved to adopt a resolution authorizing the Board to execute a purchase option agreement with Chesapeake for the 420 acre Piedmont site and that the supervisors sign the option. Hickman seconded the resolution and Kay, Alsop and Hickman voted in favor. Walton and Bourne abstained from voting because they were employees of Chesapeake. Plaintiffs' Exh. 18.

17. The Board executed a purchase option agreement with Chesapeake on December 11, 1989, in accordance with its resolution. Plaintiffs' Exh. 4.

18. Although the Board's public notices did not specifically refer to a "regional" landfill, letters and petitions expressing opposition to the landfill demonstrate that citizens were well aware of the regional nature of the proposed landfill. The regional nature of the landfill was well-publicized in local newspapers. Plaintiffs' Exh. 4, 26–29; Defendants' Exh. 4–7.

19. Board members were responsive to the concerns of area residents and took measures to insure minimal interference with Second Mt. Olive Baptist Church. Board members obtained assurances from BFI that it would pave Rt. 609 and leave a large vegetative buffer between the graveyard and the landfill grounds. Board members also discussed the issue of road improvement with Dept. of Transportation officials, as a result of which Rt. 614 was moved up on the DOT's six-year priority list. Trial testimony of R. Alsop, R. Kay, Jr., W. Hickman and S. Yob.

C. COMMUNITY OPPOSITION

1. On January 25, 1990, citizens concerned about the proposed landfill met in Second Mt. Olive Baptist Church. Reverend Taylor, the church's pastor invited the Board of Supervisors to attend the meeting. Supervisors Bourne, Hickman, and Alsop and City Administrator Charles Smith attended the meeting. Plaintiffs' Exh. 3; Trial testimony of Rev. Parham and Rev. Taylor.

2. The citizens expressed concerns that the proposed landfill 1) would reduce the quality of life of area residents by increasing noise, dust and odor; 2) result in a decline in property values; 3) interfere with worship and social activities in Second Mt. Olive Church and grave sites on church grounds; 4) require major improvements in access roads; and 5) result in blighting an historic church and community. The Second Mt. Olive Baptist Church was founded in 1869 by recently freed slaves and subsidized an inadequately funded black school across the road for many years. Trial testimony of Rev. Parham. Plaintiffs' Exh. 3, 27.

3. On February 12, 1990, the Board held a public hearing and invited BFI to make a presentation about the operation of a regional landfill. Two hundred and twenty-five citizens attended the hearing and fifteen citizens spoke in opposition to the proposal. In addition, the Board was presented with a petition signed by 947 individuals opposing the regional landfill. Trial testimony of Rev. Parham. Plaintiffs' Exh. 29, 31.

4. Following public comment, the Board voted unanimously to authorize the development of a landfill and to continue negotiations with BFI and other private contractors.

5. By letter to Supervisor Bourne dated March 23, 1990, James (Donnie) Sears, Chairman of the Concerned Citizen's Steer-

ing Committee, the apparent precursor of R.I.S.E., requested that the Board establish a Regional Landfill Citizen's Advisory Committee before signing a contract. He also submitted a list of four proposed alternative sites for the landfill. Plaintiffs' Exh. 43. Trial testimony of J. Sears.

6. By letter dated April 4, 1990, and upon the request of the Board, Mr. Sears narrowed the list of alternative sites to one site; specifically, the Mantapike Tract. Plaintiffs' Exh. 44.

7. BFI representative Jeffrey Southard and Steven Yob, together with County Administrator Smith, inspected the Mantapike site. Southard and Yob concluded that the site was environmentally unsuitable because of the slope of the land and the existence of a stream running through its center. They reported their conclusions to the Board. The racial composition of the area surrounding the Mantapike Tract was 85% black. Trial testimony of Steven Yob, C. Culley; Defendants' Exh. 20.

8. R.I.S.E. was incorporated in May 1990 by James Sears and Keith Parham. Defendants' Exh. 37.

9. R.I.S.E. was a bi-racial group initially concerned with environmental problems. Race discrimination did not become a significant public issue until it appeared that the initial thrust was failing.

10. In July 1990, the Board adopted a resolution approving the Planning Commission's recommendation that the Piedmont Tract be rezoned from an agricultural to an industrial area. Alsop, Kay, and Hickman voted in favor of the resolution, Bourne voted against it, and Walton abstained. The Board also approved a proposal to hold a public hearing on August 13, 1990 to consider a lease agreement for the Piedmont Tract and went into executive session to consider the terms and provisions of a lease agreement between the Board and BFI for the operation of a landfill. Plaintiffs' Exh. 36.

11. At an August 13, 1990 public hearing the Board passed a resolution to enter into a lease of the Piedmont site to BFI to operate a landfill. Alsop, Kay, and Hickman voted in favor of the resolution, Bourne voted against it, and Walton abstained. Plaintiffs' Exh. 37.

D. DEMOGRAPHIC ANALYSIS OF COUNTY LANDFILL SITES

1. The population of King and Queen County is approximately fifty percent black and fifty percent white.

2. Thirty-nine blacks (64% of total) and twenty-two whites (36% of total) live within a half-mile radius of the proposed regional landfill site. Most of the landfill-bound traffic will travel along a 3.2 mile stretch of Rt. 614, between Rt. 14 and Rt. 609. Twenty-one of the twenty-six families living along the 3.2 mile stretch are black and 5 are white. Trial testimony of Doris Morris, C. Culley; Defendants' Exh. 18.

3. The Mascot landfill was sited in 1969. None of the present Board members were serving on the Board at that time. At the time the landfill was developed, the estimated racial composition of the population living within a one mile radius of the site was 100% black. The Escobrook Baptist Church, a black church, was located within two miles of the landfill. Trial testimony of C. Culley. Defendants' Exh. 22.

4. The Dahlgren landfill was sited in 1971. None of the current Board members were on the Board at that time. An estimated 95% of the population living in the immediate area at the time the landfill was built were black. Presently, an estimated 90–95% of the residents living within a two-mile radius are black. Trial testimony of A. Powers and C. Culley.

5. The Owenton landfill was sited in 1977. Supervisors Kay and Bourne were serving on the Board when the landfill was developed. In 1977, an estimated 100% of the residents living within a half-mile radius of the landfill were black. The area population is still predominantly black. The First Mount Olive Baptist Church, a black church, is located one mile from the landfill. Trial testimony of F. Holmes, Jr.

E. THE KING LAND CONTROVERSY

1. In 1986, King Land Corporation set up and began to operate a private landfill on a 120 acre site located in King and Queen County and owned by the Corporation. The County did not have a zoning ordinance in effect at that time; it was therefore unnecessary for King Land to obtain County approval of the landfill. Defendants' Exh. 1.

2. The Board of Supervisors hired attorney James Cluverius to challenge the King Land operation. Mr. Cluverius advised the Board to implement a zoning ordinance.

3. From its inception, the King Land landfill was an environmental disaster. King Land began dumping without performing the necessary geotechnical tests. Tests results later revealed incinerator ash buried in the ground water and the absence of clay soil to prevent ground water pollution. Trial testimony of Robert Kay, Jr. Defendants' Exh. 1.

4. The County implemented a zoning ordinance, effective August 12, 1986. On January 27, 1986, the County obtained an injunction in Circuit Court to prevent King Land Corp. from operating its landfill under a state-issued permit. Defendants' Exh. 1.

5. Following the issuance of the injunction, King Land Corp. sought permission to operate its landfill under the County zoning ordinance. In January 1987 the County Zoning Administrator determined that the King Land operation was not a "nonconforming use" as defined in the zoning ordinance, thereby prohibiting landfill operation on the site. Defendants' Exh. 1.

6. King Land Corp. appealed the Administrator's decision to the Board of Zoning Appeals, which heard the appeal on March 16, 1987. The Board of Appeals upheld the determination of the Zoning Administrator. The Board later denied King Land's application for a variance to use the property as a sanitary landfill. The Board found that the landfill operation would result in a significant decline in the property values of the adjacent properties and that King Land had ignored environmental, health, safety, and welfare concerns. Defendants' Exh. 1.

7. The racial composition of the residential area surrounding the King Land landfill is predominantly white. Plaintiffs Exh. 41.

Conclusions of Law

1. In *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, the U.S. Supreme Court identified the following factors to be considered in determining whether an action was motivated by intentional race discrimination: 1) the effect of the official action; 2) the historical background of the decision; 3) the specific sequence of events leading up to the challenged decision; 4) departures from normal procedures; 5) departures from normal substantive criteria; and 6) the administrative history of the decision. 429 U.S. 252, 266–68, 97 S.Ct. 555, 563–65, 50 L.Ed.2d 450 (1977).

2. The placement of landfills in King and Queen County from 1969 to the present has had a disproportionate impact on black residents.

[1, 2] 3. However, official action will not be held unconstitutional solely because it results in a racially disproportionate impact. Such action violates the Fourteenth Amendment's Equal Protection Clause only if it is *intentionally* discriminatory. *Id.* at 264–65, 97 S.Ct. at 563, citing *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). See also *East-Bibb Twiggs Neighborhood Association v. Macon Bibb Planning & Zoning Commission*, 896 F.2d 1264, 1266 (11th Cir.1990).

4. The impact of an official action—in this case, the historical placement of landfills in predominantly black communities—provides "an important starting point" for the determination of whether official action was motivated by discriminatory intent. *Arlington Heights*, 429 U.S. at 266, 97 S.Ct. at 564.

5. However, the plaintiffs have not provided any evidence that satisfies the remainder of the discriminatory purpose equation set forth in *Arlington Heights*. Careful examination of the administrative steps taken by the Board of Supervisors to negotiate the purchase of the Piedmont Tract and authorize its use as a landfill site

reveals nothing unusual or suspicious. To the contrary, the Board appears to have balanced the economic, environmental, and cultural needs of the County in a responsible and conscientious manner.

6. The Board's decision to undertake private negotiations with the Chesapeake Corporation in the hope of reaching an agreement to operate a joint venture landfill was perfectly reasonable in light of the County's financial constraints.

7. Once this deal fell through, the Board was understandably drawn to the Piedmont Tract because the site had already been tested and found environmentally suitable for the purpose of landfill development.

8. The Board responded to the concerns and suggestions of citizens opposed to the proposed regional landfill by establishing a citizens' advisory group, evaluating the suitability of the alternative site recommended by the Concerned Citizens' Steering Committee, and discussing with landfill contractor BFI such means of minimizing the impact of the landfill on the Second Mt. Olive Church as vegetative buffers and improving access roads.

9. Both the King Land landfill and the proposed landfill spawned "Not In My Backyard" movements. The Board's opposition to the King Land landfill and its approval of the proposed landfill was based not on the racial composition of the respective neighborhoods in which the landfills are located but on the relative environmental suitability of the sites.

[3] 10. At worst, the Supervisors appear to have been more concerned about the economic and legal plight of the County as a whole than the sentiments of residents who opposed the placement of the landfill in their neighborhood. However, the Equal Protection Clause does not impose an affirmative duty to equalize the impact of official decisions on different racial groups. Rather, it merely prohibits government officials from intentionally discriminating on the basis of race. The plaintiffs have not provided sufficient evidence to meet this legal standard. Judgment is therefore entered for the defendants.

It is so ORDERED.