ENVIRONMENTAL RACISM: RACE AS A PRIMARY FACTOR IN THE SELECTION OF HAZARDOUS WASTE SITES

Carolyn M. Mitchell

I. INTRODUCTION

People of color continue to struggle against racial discrimination in education, housing, and employment. Recently, the fight against racism has reached the environmental arena. More grass-roots organizations are developing in racially integrated, poorer, and less politically influential communities to prevent waste-treatment facilities, hazardous waste incinerators, hazardous waste landfills, steel mills and landfills from being placed in their neighborhoods.

This paper will address the topic of environmental racism, which is the practice of placing toxic waste and other environmental hazards at sites in neighborhoods primarily populated by people of color— African Americans, Hispanics, Asian Americans and Native Americans. Environmental racism also refers to the various strategies employed by the dominant environmental organizations and those utilized in communities inhabited by people of color.[1] More specifically, the following will be discussed: (1) the victims of environmental racism and their campaigns against it; (2) industrial polluters' contributions to the destruction of the environment in urban, racially integrated areas; and (3) legal and social remedies to environmental racism.

II. THE VICTIMS OF ENVIRONMENTAL RACISM

The victims of environmental racism— African Americans, Hispanics, Native Americans and Asian Americans— tend to bear the burden of industrial pollution and receive the least attention from the Environmental Protection Agency.[2] In April 1987, the United Church of Christ's Commission on Racial Justice released a report, "Toxic Wastes and Race in the United States." The study, which was the first to document the relationship between hazardous waste sitings and racial demographics,[3] indicated that more than 15 million of the nation's 26 million African Americans, and more than 8 million of the 15 million Hispanics reside in communities with one or more uncontrolled toxic-waste sites.[4] A brief discussion of the report is necessary to demonstrate the magnitude of the environmental hazards that people of color face. The report focuses on (1) the relationship between demographic patterns

1. *Panos Institute Releases Publication on Social Justice*, Race and Environment, Business Wire, Dec. 4, 1990.

2. Schneider, *Minorities Join to Fight Polluting Neighborhoods*, The New York Times, Oct. 25, 1991, at Section A, p. 20, col. 1.

3. Godsil, *Remedying Environmental Racism*, 90 MICH.L.REV. 394,397 (1991).

4. Russell, *Environmental Racism: Minority Communities and Their Battle Against Toxics*, The Amicus Journal, Spring 1989, at p. 24.

and commercial hazardous waste facilities[5] and (2) the connection between demographic patterns and uncontrolled toxic waste sites.[6] The commission's report determined that race is the most significant determinant of the location of hazardous waste facilities.[7] Although a community's social and economic class were contributing factors in the selection of the location of hazardous waste facilities, race was the most significant factor. The report also concluded that: communities with the highest composition of minority residents had the greatest number of commercial hazardous waste facilities; and 40 percent of the country's commercial hazardous waste capacity is located in landfills in predominantly African American or Hispanic communities.[8]

The second phase of the United Church of Christ's Commission on Racial Justice report focuses on the presence of uncontrolled toxic waste sites in the United States. The report indicates that 50 percent of all Americans live in communities with uncontrolled sites.[9] However, racial communities are greatly affected by the presence of uncontrolled toxic waste sites because three of every five African Americans and Hispanics live in communities with uncontrolled toxic waste sites.[10]

Recent environmental hazards which have occurred in minority communities give credence to the pervasiveness of environmental racism. For example:

- In Baton Rouge, Louisiana, an Exxon refinery exploded on Christmas Eve in 1989. The explosion caused propane, ethane and diesel fuel to burn for nearly 15 hours and more than 50,000 people suffered injuries, property damage or business loss. Forty percent of the population in Baton Rouge is comprised of people of color. Not only do the residents contend with pollution from the Exxon refinery, but on a daily basis they fight the toxic chemicals released from two halogen manufacturers, seven major petrochemical plants, 10 hazardous waste facilities, and a major Superfund site called "Devil's Swamp." Samples of Baton Rouge mothers' milk, tested in 1982, contained chloroform, dichlorobenzene, methylene chloride, perchloroethylene, trichloroethylene, benzene, styrene and 27 other synthetic chemicals. Louisiana has the most reported toxic releases of the 50 states— 741.2 million pounds a year.[11]

- In June 1989, the California Department of Health Services submitted its report, "Childhood Lead Poisoning in California: Causes and Prevention," to the state legislature. The report concluded that some 3,200 children under the age of six in California had elevated blood lead levels. The number of children at such risk over time could increase because (1) lead does not break down in the environment; (2) lead-based paint and lead-contaminated soil remain an exposure source for new families with children. The study also found

5. A "commercial hazardous waste facility" accepts hazardous wastes from a third party for a fee or other remuneration. Godsil at 397 (quoting Commission for Racial Justice, United Church of Christ, Toxic Wastes and Race in the United States (1987) [hereinafter Toxic Wastes and Race].

6. *Id.* "Uncontrolled toxic waste sites" are those close and abandoned sites on the EPA's list of sites which pose a threat to human health and the environment.

7. *Id.* at 398.

8. *Id.* at 398 (quoting Toxic Wastes and Race at xiv).

9. Godsil at 398 (quoting Toxic Wastes and Race at xiv).

10. *Id.*

11. *Home Street, USA: Living With Pollution*, Greenpeace, Oct., Nov., Dec. 1991 at p. 12.

that people of color and poor people were most likely to be affected by lead poisoning, and that children in these groups had the least access to medical care. Latinos are at greatest risk in the two cities surveyed: in Oakland, 54 percent of the children studied were Hispanic, 26.3 percent were Asian and 12.9 percent were African American, while in Los Angeles, 90 percent of the subjects were Hispanics.[12] African Americans have a higher incidence of lead poisoning because many reside near sources of toxic metal.[13] In communities located near highways, the contamination of leaded gasoline seeps throughout the soil of playgrounds and fields.[14]

• In February 1991, residents of Kettleman City, California filed the first civil rights lawsuit to block the construction of a commercial toxic waste incinerator at the largest toxic waste landfill facility west of the Mississippi River. Kettleman City, located in the hills of the San Joaquin Valley, is a community of mostly poor, migrant workers from Mexico. The suit, filed on behalf of a community group, People for Clean Air and Water, states that Chemical Waste Management Inc. (ChemWaste) and the Kings County incinerator-permit process violated California environmental law and the civil rights of the Spanish-speaking residents because meetings, public hearings, and most technical information pertaining to the project were in English.[15]At the very least, the lawsuit could delay construction of the facility. It is estimated that upon completion, the incinerator would burn 100,000 tons of toxic waste annually and add $25 million to Chem Waste's $1.1 billion in annual revenues.[16]

• The trade-off between environmental protection and bringing jobs to an impoverished community has often been labeled "environmental blackmail." Industrial polluters and municipalities often join forces to offer minority, low-income communities the prospects of jobs if they agree to accept potentially harmful wastes. Evidence of this trade-off is apparent in the Mescalero Apaches' decision to consider the prospect of housing a storage site for nuclear wastes on their reservation in south central New Mexico. The Waste Isolation Pilot plant is being developed to store 800,000 barrels of plutonium-contaminated military waste that has been accumulating for 46 years.[17] Since Mescaleros suffer from a high unemployment rate of 35 percent, the commercial nuclear waste site could reduce their unemployment rate to 25 percent.[18]

Similarly, California's Campo tribe of Mission Indians, whose reservation is located 68 miles east of San Diego, are contracting with a waste-disposal company to build a landfill and recycling plant that would dispose of 3,000 tons of garbage a day from San Diego County.[19] The project is slated to pro-

12. Monroe, *Lead Poisoning Still Strikes Inner City Youth*, Race, Poverty and the Environment, Oct. 1990 at p. 1.

13. Weisskopf, *Minorities' Pollution Risk Is Debated; Some Activists Link Exposure to Racism*, The Washington Post, Jan. 16, 1992, First Section, p. A25.

14. *Id.*

15. Ratcliffe, *Fusing Civil, Environmental Rights*, The Christian Science Monitor, May 24, 1991 at p. 12.

16. Siler, *Environmental Racism: It Could Be A Messy Fight*, Business Week, May 20, 1991 at p. 116.

17. Benanti, *Tribe's Nuke Waste Interest Worries Minority Leaders*, Gannett News Services, Oct. 25, 1991.

18. *Id.*

19. Elson, *Dumping on the Poor*, Time, Aug. 13, 1990 at p. 46.

vide jobs and millions of dollars in income, and it would permit Campo tribe members to write its own health and safety codes that would be symmetrical to those required by California's environmental agencies.[20]

The Penobscot Nation in Indian Island, Maine, fishes the Penobscot River for its livelihood and commercial sale. However, paper mills located upstream pollute the fish with dioxin.[21]

- Located on the far south side of Chicago, the Altgeld Gardens is a housing project built on top of a former landfill. More than 70 percent of the residents are African Americans, 11 percent are Hispanics, and all suffer from elevated levels of cancer and infant mortality.[22] The 2,000 families who reside in the Altgeld Gardens call it "the toxic donut" because they are inundated with pollutants from a nearby sludge plant, a steel mill, a paint company, a huge incinerator, and an 80-ft.-high landfill.[23] Located a few miles away from the toxic housing project is a dump filled with 4-ft.-high piles of trash, broken glass, rusty nails and construction rubbish.[24] In May 1991, a Chicago-based, grass-roots organization, Citizens for a Better Environment, lost a four-year battle to prevent a 1,600-ton-per-day municipal incinerator from being constructed in southeast Chicago. The incinerator will release two tons of mercury and a half-ton of lead into the air each year.[25]
- In Emelle, Alabama, the Emelle landfill opened in 1978 and is the largest hazardous waste dump in the United States. The landfill is owned by Chemical Waste Management and receives toxics from 45 states.[26] African Americans comprise more than 90 percent of Emelle, which is an impoverished community.
- Alsen, Louisiana is the site of the nation's fourth largest hazardous waste dump, operated by Rollins Corporation. Alsen is a community which is 98.9 percent Black and lies at the gateway to the 85-mile corridor known as "Cancer Alley," where one-quarter of the nation's petrochemicals are produced. Between 1980 and 1985, the Rollins landfill was cited for more than 100 state and federal toxic emission violations, but escaped paying penalties.[27]
- In November 1988, the EPA and California state health officials approved the construction of the state's first toxic waste incinerator, which was scheduled to be built in the predominantly Latino community of Vernon. The $29-million incinerator was expected to burn nearly 22,500 tons per year of solvents, pesticides, alcohols, oil and paint sludges, heavy metal residues and other hazardous waste.[28] The incinerator was one of two hazardous waste disposal facilities planned for Vernon. Federal and state officials were considering permits for a hazardous waste chemical treatment plant, which would neutralize cyanide, hexavalent chromium and other toxic chemicals about a

20. *Id.*
21. Tyson, *Target of Toxins*, USA Today, Oct. 24, 1991 at p. 1A.
22. *People Living With Pollution*, Greenpeace, Oct., Nov., Dec., 1991, at p. 13.
23. Elson, *Dumping on the Poor*, Time, Aug. 13, 1990 at p. 46.
24. *Id.*
25. *People Living with Pollution*, Greenpeace, Oct., Nov., Dec., 1991 at p. 13.
26. Russell, *Environmental Racism*, The Amicus Journal, Spring 1989, at p. 24.
27. Bullard and Wright, *The Quest for Environmental Equity: Mobilizing the Black Community for Social Change*, Race, Poverty & the Environment, July 1990, at p. 14.
28. Gomez, *Vernon Toxic Incinerator Gets EPA Approval*, Los Angeles Times, Nov. 17, 1988, Part 1, Page 1, Column 3, Metro Desk.

mile south of the incinerator site.[29] For six years, community activists mounted a campaign against the construction of the incinerator because they feared the incinerator would contaminate the air with escaping toxic residue. More significantly, the grass-roots organizations opposing the incinerator demanded that an environmental impact report be prepared to detail the potentially dangerous side effects of the incinerator. Groups led by the Mothers of East Los Angeles organized protests marches and petition drives to inform residents of the emissions of deadly dioxins and furans from the incinerator.[30]

• Grass-roots activism also killed plans for a trash-to-energy incineration plant that was set to be constructed at a vacant lot at 41st Street and Long Beach Avenue in South Central Los Angeles. The Los Angeles City Energy Recovery project (LANCER) was a $170-million plant that would use advance technology to burn tons of household trash to make electric power. City officials believed the project would provide electricity and jobs to the predominantly African American community, which had a 78 percent unemployment rate and an average income ($8,158) less than half that of the general population of Los Angeles, and a residential density more than twice that of the entire city.[31] However, residents of the South Central Los Angeles area, particularly the Concerned Citizens of South Central Los Angeles, launched a successful two-year battle to fend off construction of the incinerator. The community had already been ravaged by the after-effects of industrial development: refuse, abandoned factories and warehouses, discarded chemicals and debris. Asking the community to house a thirteen-acre solid waste incinerator seemed unconscionable.

III. The Burdens and Benefits of Environmental Racism

Although the victims of environmental racism tend to be residents of minority communities, the victimizers are industrial polluters and state and/or municipal leaders who want to generate revenues in their towns.[32] Not only do the poor and minority communities have to contend with unemployment, crime, poverty, drugs, and the lack of access to proper medical care, they also have to fend off unwanted hazardous waste sites. Far too often, minority communities are selected to house hazardous waste sites because they lack the financial resources and political clout to combat a waste management firm. Many waste managers deny the prevalence of environmental racism. Instead, they attribute their selection of minority communities for landfills or incinerators to sound economic decision-making— they choose the impoverished communities as sites for landfills or incinerators because the communities were

29. *Id.*

30. Of all pollutants emitted by incinerators, polychlorinated dioxins and furans, formed during garbage incineration, may pose the greatest long-term threat to public health and the environment. They have been identified in incinerator ashes, gaseous emissions and even in the soils near incinerators. Dioxins carry a high level of toxicity and a safe level of exposure cannot be ascertained. Upon their emission into the environment, polychlorinated dioxins and furans remain for years, selectively concentrating in the tissues of living creatures— fish, other animals and humans. The accumulation of dioxins and furans in the flesh and breast milk of humans is a matter of global concern because these toxic chemicals have been linked to higher cancer rates, miscarriages, birth defects, liver disease, neurological damage and immune system disorders. Greenpeace Action, Toxics 1990, at p. 3.

31. Hamilton, *Women, Home and Community: The Struggle in an Urban Environment*, Race, Poverty & the Environment, April 1990, at p. 3.

32. Elson, *Dumping on the Poor*, Time, Aug. 13, 1990, at p. 46.

already industrial wastelands where old factories and other facilities were built and abandoned long before anyone was concerned about pollution.[33] Furthermore, many waste managers contend that the placement of landfills, hazardous industries and toxic waste dumps provides an economic boon to the minority communities which suffer from high rates of unemployment.[34]

IV. REMEDIES FOR ENVIRONMENTAL RACISM

Several theories have been proposed as potential remedies for environmental racism. This section will address the viability of several remedies which include: Section 1983 of the Civil Rights Act of 1866; the Equal Protection Clause of the Fourteenth Amendment; state tort remedies such as negligence, trespass, nuisance, strict liability, and fraud; and social remedies which would require those in the public and private sectors of the environmental movement to recruit, train and educate people of color so that they will actively participate in the decision-making process regarding environmental regulations.

A. *42 U.S.C. 1983: The Civil Rights Statute*

The text of section 1983 provides in part that, "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in action at law, suit in

33. *Id.*

34. Russell, *Environmental Racism*, The Amicus Journal, Spring 1989 at p. 26. A recent example which depicted the environment v. jobs trade-off was evidenced in 1986, when the Los Angeles Board of Sanitation approached Gilbert W. Lindsay, an African American city councilman, with a proposal for a Los Angeles City Energy Recovery Project (LANCER) in the predominantly Black South Central Los Angeles. LANCER was a $235-million trash-to-energy incinerator designated for the residential neighborhood at 41st and Alameda streets. The first stage of the LANCER project required building a trash incinerator on a 13-acre site one mile east of the Los Angeles Memorial Coliseum in South Los Angeles. The incinerator would burn 1,600 tons of trash a day and convert it to electricity. The second and third LANCER plants were slated for West Los Angeles and the San Fernando Valley. Lindsay was the most forceful proponent on the city council for the LANCER project. He was offered a $10-million "Community Betterment Fund" which would be used to fund improvements in a local community center and other projects. But the LANCER proposal met with strong community opposition. Under the terms of the LANCER agreement, proposed dioxin emissions from the incinerator were 170 times greater than permitted in Sweden, which had invented the incinerator systems. The LANCER contract also failed to address emissions of heavy metals or vinyl chloride and concentrated flu ash from the incinerator's pollution control system. It was estimated that 224 diesel trucks operating seven days a week would be carrying trash to the LANCER site. The traffic congestion would contribute to the dreadful smog problems in the Los Angeles basin. Los Angeles Mayor Tom Bradley was contacted by a local law firm which indicated that (1) the South Central Los Angeles area was selected long before an environmental impact report was conducted; and (2) the city had disregarded the advice of a physician on its peer review committee who had warned about carcinogens in the incinerator. The lawyers wrote that the area was "apparently chosen on the erroneous assumption that the residents either were insufficiently sophisticated to recognize and understand the magnitude of the environmental and health risks associated . . . or were insufficiently 'politically' powerful to successfully resist the siting." Bowing to political pressure, Bradley announced that the LANCER project would be shelved because it would create "a significant health risk." The cancellation of the LANCER project ended a five-year campaign for approval and cost the city of Los Angeles $12 million. *Id.*

equity, or other proper proceeding for redress."[35] The federal statute, 42 U.S.C. 1983, is the foundation for most suits in federal courts against local governments and state and local government officers to redress federal law violations.[36] In order to litigate a section 1983 claim, a plaintiff must show that (1) the conduct complained of was committed by a person acting under the color of state law;[37] and (2) this conduct deprived a person of rights, privileges, and immunities secured by the Constitution or the laws of the United States.[38] The issue of a municipality's liability under section 1983 was resolved in Monell v. Department of Social Services.[39] Previously in Monroe, the Court held that municipal governments may not be sued under section 1983.[40] However, in the landmark Monell case, the Court overruled Monroe's preclusion of municipal liability. Thus, the standard for a section 1983 claim against a municipality was established: "a local government may not be sued under section 1983 for an injury inflicted solely by its employees or agents. Instead it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under section 1983."[41]

In order to prove the existence of an official municipal policy, a plaintiff litigating a section 1983 claim must show one of the following:[42] (1) actions by the municipal legislative body constitute official policies; (2) official policy exists when there are actions by municipal agencies or boards that exercise authority delegated by the municipal legislative body; (3) actions by those with final authority for making a decision in the municipality constitute official policy for purposes of section 1983. A deliberate choice to follow a course of action is made from various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question; (4) establishing a government policy of inaction; (5) establishing the existence of custom. Although there is no uniform definition of custom, some courts have found customs to exist based on well-settled practice within the city,[43] while other courts have ruled that customs exist only where "actual or constructive knowledge of such custom was attributable to the governing body or an official

35. 42 U.S.C. 1983.

36. ERWIN CHEMERINSKY, FEDERAL JURISDICTION, (Little, Brown and Company, 1989) at p. 369.

37. "Under color of law" is defined in Monroe v. Pape, 365 U.S. 167, 184 (1961) as the "misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." A government officer acts under color of law for all actions taken as an officials that violate the Constitution and laws of the United States. The Court in Monroe also ruled that actions taken by an officer in his or her official capacity are deemed to have occurred "under color of law" even if they are not in pursuance of any official state policy and even if they violate state law.

38. 365 U.S. at 184. In Monroe, the Supreme Court held that municipalities were not persons for the purposes of section 1983. This aspect of the Monroe ruling was overruled in Monell v. Department of Social Services, 436 U.S. 657 (1978).

39. 436 U.S. 658 (1978).

40. 365 U.S. 167 (1961).

41. 436 U.S. 658, 694 (1978).

42. Chemerinsky at pp. 392-397.

43. See Anela v. City of Wildwood, 790 F.2d 1063, 1069 (3d Cir. 1986), cert. denied, 107 S.Ct. 434 (1986) ("long-standing practice that had become an acceptable standard and practice for the city").

to whom that body had delegated policy-making authority."[44]

A plaintiff alleging an environmental racism claim under section 1983 would have a difficult burden of proof. In a suit against a municipality acting in conjunction with a private industrial waste manager,[45] a plaintiff would have to demonstrate that the municipality's siting of the toxic waste facility in a minority community derived from an unconstitutional illegal policy.[46]

B. *The Equal Protection Clause of the Fourteenth Amendment*

The Equal Protection Clause of the Fourteenth Amendment provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[47] In order to challenge a state's decision to locate a hazardous waste facility, minority residents making an Equal Protection claim must demonstrate that the state action was motivated by a discriminatory purpose.[48] 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.[49] The Supreme Court has delineated five relevant factors to use as circumstantial evidentiary sources of a state's discriminatory purpose:[50] (1) the impact of the official action and whether it bears more heavily on one race than another; (2) the historical background of the decision, especially if it "reveals a series of official actions taken for invidious purposes;" (3) the sequence of events preceding the decision; (4) any departures, substantive or procedural, from the normal decision-making process; and (5) the legislative or administrative history, specifically contemporary statements, minutes of meetings, or reports.[51]

As a prerequisite of racial discrimination, the element of intent places an undue burden of proof on plaintiffs who sue under the Equal Protection Clause. To show racial discrimination, plaintiffs must prove that a governmental action was motivated by racial acrimony. This burden is difficult because plaintiffs often have the least access to evidence of racial bias.[52]

There are two recent cases that have applied the Equal Protection Clause to solid waste landfill sitings. In both of the cases, the courts held that the plaintiffs' evidence was insufficient to show that racial discrimination moti-

44. *See* Bennett v. City of Slidell, 728 F.2d 762, 768 (5th Cir. 1984), cert. denied, 472 U.S. 1016 (1985).

45. In Dennis v. Sparks, 449 U.S. 24, 27 (1980), the Court held that a private person is deemed to act under color of state law if he or she is a willful participant in joint action with the state or its agents.

46. Municipalities may not be sued for the acts of their employees— thus, the doctrine of respondeat superior does not apply to section 1983 actions.

47. U.S. CONST. amend. XIV 1.

48. Godsil, *Remedying Environmental Racism*, 90 MICH. L.REV. 394, 409 (1991) (citing Washington V. Davis, 426 U.S. 229, 242 (1976) (holding that invidious purpose was necessary to trigger strict scrutiny of a facially neutral government action).

49. United States v. Yonkers Board of Education, 837 F.2d 1181, 1216 (2nd Cir. 1987), cert. denied, 468 U.S. 1055 (1988); see Washington v. Davis, 426 U.S. 229 (1976); E&T Realty v. Strickland, 830 F.2d 1107 (11th Cir. 1987), cert. denied, 485 U.S. 961 (1988).

50. Village of Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252 (1977).

51. 429 U.S. at 266-68.

52. Godsil, *Remedying Environmental Racism*, 90 MICH.L.REV. 394, 410 (1991).

vated the municipalities' decisions to locate the landfills in minority communities. The cases are East Bibb Twiggs Neighborhood Association v. Macon-Bibb County Planning & Zoning Commission,[53] and Bean v. Southwestern Management Corporation.[54] In February, 1991, Hispanic farm workers in Kettleman City, California filed the first civil rights lawsuit to block the construction of a toxic waste incinerator.[55]

In East Bibb Twiggs, the plaintiffs, residents of Macon-Bibb County, brought a lawsuit challenging a Planning and Zoning commission decision to permit the creation of a private landfill in an area where 60 percent of the residents were African Americans. Although the court admitted that the landfill would affect to a "somewhat larger degree" the predominantly Black census tract,[56] the court noted that the only other commission-approved landfill was located in a predominantly White census tract and determined that this landfill placement undermined "the development of a 'clean pattern, unexplainable on grounds other than race.' "[57] The court disregarded the plaintiffs' evidence which showed that both census tracts were located within a County Commission District which had a 70 percent Black population.[58]The plaintiffs argued that the court should review the Commission's landfill decision against a historical background of locating undesirable land uses in Black neighborhoods. But the court determined that the Commission's decision to place a landfill in a White census tract refuted this argument. The court also held that the plaintiffs failed to show sufficient historical evidence of racially-biased decision-making in the Commission. Rather, the court contended that the plaintiffs' historical evidence focused on decisions made by agencies other than the Commission, "evidence which sheds little if any light upon the alleged discriminatory intent of the Commission."[59]

East Bibb Twiggs demonstrates the extreme burden that plaintiffs have in finding a remedy for landfill siting decisions which adversely affect minority communities. Instead of measuring the percentage of minorities in census tracts, the court in East Bibb Twiggs should have determined the population of the area physically affected by the landfill siting: the area in which the minority residents suffer the smell, the traffic, the sight, the decreased property values, and the potentially contaminated ground-water resulting from the

53. 706 F. Supp. 880 (M.D. Ga. 1989), aff'd., 896 F.2d 1264 (11th Cir. 1989).

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

55. El Pueblo Para El Aire y Agua Limpio (People For Clean Air and Water) v. County of Kings, Board of Supervisors of the County of Kings and Waste Management, Inc., Chemical Waste Management, Inc., Docket No. 366045, Oct. 1, 1991, at p. 10.

56. 706 F.Supp. at 885.

57. 706 F.Supp. at 884 (quoting Village of Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252, 266 (1977)).

58. 706 F. Supp. at 885.

59. Godsil, *Remedying Environmental Racism*, 90 MICH. L.REV. 394, 411 (1991) (quoting 706 F. Supp. at 885). The plaintiffs in East Bibb Twiggs produced a statement in a study conducted by the Commission that "racial and low-income discrimination still exist[ed] in the community." But the court concluded that racial discrimination existed without attributing it to its existence in the Commissions' decision-making process. The plaintiffs argued that the Commission did not adhere to its normal procedures in several ways: the Commission encouraged participation from the city and county; it granted a rehearing after the petition for a landfill was denied; and it made certain findings of fact. However, the court ruled that the Commission's deviation from normal procedures was not substantial to be consider the Commissions' decision-making procedurally flawed.

landfill.[60] Furthermore, it becomes problematic for plaintiffs to show a systematic pattern of discrimination committed by a particular government agency. In reference to hazardous waste siting, the agencies are often newly formed, and thus lack a history of discrimination. The state or city government might have an historical pattern of racism, but a court adhering to East Bibb Twiggs would not consider the state or city government's racism upon review of a specific agency's racial intent.[61]

In Bean v. Southwestern Waste Management Corporation,[62] the plaintiffs moved for a preliminary injunction of the Texas Department of Health's decision to grant a permit to Southwestern Waste Management to construct a solid was facility near a predominantly Black high school and residential neighborhood. The plaintiffs argued that (1) the Texas Department of Health's decision to construct a solid waste facility in a minority residential neighborhood was a pattern or practice of discrimination in the placement of solid waste sites;[63] and (2) the Texas Department of Health's approval of the permit, in the context of the historical placement of solid waste sites and the events surrounding the application, constituted discrimination.[64] To support their first theory of a pattern of discrimination by the Texas Department of Health, plaintiffs produced statistical data for 17 solid waste sites operating with permits since 1978. Throughout the city, 82.4 percent of the sites were located in areas in which the minority population was 50 percent or less.[65] Fifty-nine percent of the sites were located in census tracts with minority populations of 25 percent or less.[66] But the court held that plaintiffs' data did not indicate a clear pattern or practice of discrimination because 50 percent of the solid waste sites were located in census tracts with less than 25 percent minority population.[67]Even though the plaintiffs submitted three sets of data to buttress their second argument that the Texas Department of Health's approval of the permit and the specific circumstances surrounding the application constituted racial discrimination, the court deemed that the agency's decision was illogical but not racially motivated.[68] The solid waste site was being placed within 1700 feet of a predominantly Black high school and only a little farther from a residential neighborhood. The court even admitted that if it were the Texas Department of Health, "it might very well have denied this permit. It simply does not make sense to put a solid waste site so close to a high school. . . . Nor does it make sense to put the land site so near to a

60. *Id.* at 412 (quoting Bean v. Southwestern Waste Management Corporation, 482 F.Supp. 673 (S.D. Tex. 1979).

61. *Id.* at 412.

62. 482. F. Supp. 673 (1979).

63. *Id.* at 677.

64. *Id.* at 678.

65. 482 F. Supp. at 677.

66. *Id.*

67. *Id.*

68. 482 F.Supp. at 678-681. The first set of data showed that the city of Houston planned to use two waste sites but that the area being challenged contained 100 percent of the landfills that Houston used, although it contained only 6.9 percent of the entire population of Houston; the second set of data showed that the target area contained 15 percent of the solid waste sites located in Houston and only 6.9 percent of its population; the third set of date focused on the citywide location of solid waste sites and the fact that the eastern half of Houston (which was primarily composed of minority residents) had many more solid waste sites than the western half.

residential neighborhood."[69] The plaintiffs' statistical data did not establish a clear pattern or practice of discrimination, nor did the state agency's decision reflect a racial bias. However, the court did not grant the defendant's motion to dismiss because in the event of a full trial, the court wanted explanations for the following issues that would establish a state agency's discriminatory intent: the proximity of solid waste sites to minority communities within each census tract; the site selection process and how many alternative sites are adequate; and whether the Texas Department of Health was informed of the racial composition of the community and the racial distribution of waste sites in Houston.[70] East Bibb Twiggs and Bean demonstrate the difficulty that plaintiffs have in proving a state agency's discriminatory intent in siting decisions.

Recently, Hispanic farm workers in Kettleman City challenged a decision of the Kings County Board of Supervisors granting a conditional use permit for the construction and operation of a hazardous waste incinerator by Chemical Waste Management, Inc. (CWM) at CWM's existing hazardous waste treatment, storage and disposal facility in the Kettleman Hills area of southwest Kings County. The board's decision affirmed determinations by the Kings County Planning Commission that (1) the environmental impact report prepared on the incinerator project adequately complied with the requirements of the California Environmental Quality Act and (2) the incinerator project was consistent with the Kings County General Plan and Zoning Ordinance. The petitioners argued that these determinations, and the board's grant of a conditional use permit based on the determinations, were invalid.

The superior court in Sacramento ruled that the Final Subsequent Environmental Impact Report (FSEIR) on CWM's proposed incinerator project was inadequate as an informational document under CEQA for the following reasons: (1) the FSEIR was misleading and inaccurate regarding the emissions from the operation of the incinerator project which would contribute to air pollution in the San Joaquin air basin; (2) the FSEIR improperly concluded that air pollutants emitted during operation of the incinerator would have an insignificant effect on agriculture and livestock grazing in the vicinity of the incinerator; (3) the FSEIR indicated that nitrogen oxide, PM-10 and other criteria pollutants emitted during incinerator operations would contribute cumulatively to similar pollutants emitted in the San Joaquin air basin by existing and anticipated future stationary sources. The FSEIR incorrectly concluded the incinerator's cumulative impact would be insignificant because the incinerator's emissions would constitute so small a proportion of the emissions in the air basin— approximately 0.25 percent of the total basin emissions in 1985— that the incinerator's emissions would not significantly worsen the air quality problems in the basin; (4) the FSEIR's analysis of project alternatives was inadequate under CEQA because the FSEIR analysis rejected all alternatives to the incinerator project at Kettleman Hills, concluding that incineration as a method of hazardous wastes disposal would be required as a result of federal and state laws banning land disposal and that none of the site alternatives were practical or superior environmentally; (5) the absence of Spanish translation of the FSEIR precluded the residents of Kettleman City from actively participating in the CEQA review process. However, the court

69. 482 F.Supp. at 680.
70. 482 F.Supp. at 680.

also ruled that the report was not "written in a manner incomprehensible to interested laypersons among the public. The text of the FSEIR contained a significant amount of technical matter which could have been better placed in appendices, but the text was readable;"[71] (6) because the FSEIR analysis and conclusions have been determined to be inadequate, a substantial portion of the reasoning and information underlying the consistency determinations have been invalidated.

The crux of the Equal Protection violation in the hazardous waste context is that people of color bear disproportionate burdens of hazardous waste disposal. One solution for correcting this dilemma is to spread the burden of the disposal of hazardous waste among greater numbers and greater varieties of communities.[72] Although this solution requires state agencies and waste management firms to concentrate on long-term economic considerations, the result would lift the environmental burdens of minority, rural, poor and politically powerless communities and force all communities to share the burdens in the placement of hazardous waste.

C. *CEQA as a Remedy for Environmental Racism*

The California Environmental Quality Act (Pub. Resources Code, section 21000 et seq.) was enacted by the California Legislature in 1970 to ensure long-term preservation of a high quality environment for the citizens of California. CEQA was designed to: (1) compel redevelopment decisionmakers to thoroughly evaluate any adverse impacts of a redevelopment project and to take all possible steps to mitigate those environmental costs; and (2) to compel the government at all levels to make decisions with environmental consequences in mind. Patterned after the National Environmental Policy Act (NEPA, which is codified at 42 U.S.C.S. sections 4321 et seq.), CEQA declares: (1) the maintenance of a quality environment for the people of the state of California and in the future is a matter of statewide concern; (2) the necessity of providing a high-quality environment that at all times is healthful and pleasing to the senses and intellect of man; (3) the need to understand the relationship between the maintenance of high-quality ecological systems and the general welfare of the people of the state, including their enjoyment of the natural resources of the state; (4) the capacity of the environment is limited, and it is the intent of the Legislature that the government of the state take immediate steps to identify any critical thresholds for the health and safety of the people of the state and take all coordinated actions necessary to prevent such thresholds being reached; (5) every citizen has a responsibility to contribute to the preservation and enhancement of the environment; (6) the interrelationship of policies and practices in the management of natural resources and waste disposal requires systematic and concerted efforts by public and private interests to enhance environmental quality and to control environmental pollution; (7) it is the intent of the Legislature that all agencies of the state gov-

71. El Pueblo Para El Aire y Agua Limpio v. County of Kings, Docket No. 366045, Oct. 1, 1991 at p. 10. The plaintiffs were disputing the Kings County incinerator-permit process as violative of California environmental law and the civil rights of the Hispanic residents because 40 percent of the community spoke only Spanish, but the meetings, public hearings and written information pertaining to the incinerator project were in English.

72. Wright, *Hazardous Waste Disposal and the Problems of Stigmatic and Racial Injury*, 23 Arizona State Law Journal 777, 790 (1991).

ernment which regulate activities of private individuals, corporations, and public agencies which are found to affect the quality of the environment, shall regulate such activities so that major consideration is given to preventing environmental damage, while providing a decent home and satisfying living environment for every Californian.

As a cure for environmental racism, CEQA mandates that public agencies comply with information disclosure provisions and inform members of the public who will be affected by their environmental decisionmaking. In the Kettleman City case, plaintiffs, who are Hispanic farm workers, accused ChemWaste of failure to provide access to participate in public meeting notices, a summary of the FSEIR, and public hearing testimony. Perhaps the lack of a Spanish translation of an extended summary of the Final Subsequent Environmental Impact Report violated the plaintiffs' procedural due process rights, and this would afford plaintiffs a constitutional cause of action under the Fourteenth Amendment and the state constitution of California.

D. *Social Remedies for Environmental Racism*

Many grass-roots organizations combat environmental racism by increasing the participation of people of color in the decision-making processes in the environmental movement. Many community groups that are fighting environmental racism share the common goals of:[73] (1) Congressional support for legislation to ban dumping of toxic or nuclear wastes on Indian reservations or in African American or Latino communities, and to ban the export of such wastes to other countries; (2) force the hiring of people of color by environmental organizations that are dominated by Whites; (3) encourage the federal government to provide funds to Indian tribes to set up their own environmental regulatory agencies independent of the EPA and the Bureau of Indian Affairs; (4) create a fund which will compensate victims of environmental injustice. Other recommendations that will bring people of color into the environmental protection movement include:[74] (1) recruiting minority professionals; (2) ensuring that all environmental legislation includes provisions for retraining and/or relocating workers who may lose their jobs due to new regulations; (3) offering paid internships or fellowships to low-income students; (4) creating more race-based environmental organizations.

V. CONCLUSION

The prevalence of environmental racism continues to threaten communities which are inhabited by people of color. A sufficient judicial remedy must be established so that plaintiffs in these communities can successfully litigate viable claims against waste management firms that continue to place hazardous waste facilities in minority neighborhoods. It simply unfair to place the burdens of environmental waste on the shoulders of certain groups because of their race or ethnicity.

73. Benanti, *Tucson Activist Details Community's Hardship*, Gannett News Service, Oct. 25, 1991.

74. Ruffins, *Blacks and Greens*, Race, Poverty & the Environment, July 1990, at p. 5.