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ENVIRONMENTAL JUSTICE AT THE CROSSROADS

KARY L. MOSS*

Our fundamental criticism is that the news media have failed to analyze and report adequately on racial problems in the United States. . . . The media write and report from the standpoint of a white man's world. . . . This may be understandable, but it is not excusable in an institution that has the mission to inform and educate the whole of our society.

—Kerner Commission Report, 1968

On August 30, 1998, *The Detroit News* ran an editorial entitled *Return of the Job Killer*. Its subject was the Environmental Protection Agency's ("EPA") top administrator Carol Browner and recent efforts to consider problems of the disproportionate siting of waste facilities in minority neighborhoods.¹ The editorial focused on a decision by the EPA in 1998 to investigate a complaint, filed by residents of Flint, Michigan, that the siting of a new steel mini-mill (Select Steel) would pose an unfair burden of pollution on minorities living in the area. According to the complaint, the siting was in violation of Title VI of the 1964 Civil Rights Act and its implementing regulations, which prohibit recipients of federal funds from

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¹ See Editorial, *Return of the Job Killer*, DET. NEWS, Aug. 30, 1998, at B6.

engaging in race discrimination.²

The editorial also criticized the EPA's decision to consider the administrative complaint, referring to a threat made by the owners of the steel mill to site the plant in Toledo unless the EPA closed its investigation within forty-five days. The editorial lambasted EPA Administrator Browner as using "hardball tactics against companies that refuse to kow-tow to its dubious ideology," referred to what it called its "questionable reading" of the 1964 Civil Rights Act, and alleged that the EPA "will cheerfully sacrifice economic development to promote its own agenda." Shortly after, Michigan Governor John Engler convened a press conference in Flint where he demanded that the residents withdraw their Title VI complaint.³ This then led to several articles in *The Flint Journal* and the *News* specifically attacking by name the two complainants, members of the St. Francis Prayer Center, an inter-denominational prayer and retreat center located in the community.⁴

At issue was an Interim Guidance released by the EPA in February 1998.⁵ Since then, the *News* has had continuous coverage opposing it and indeed all efforts by the EPA to investigate complaints of environmental racism. The consequence has been severe for those who advocate greater enforcement of civil rights laws in the environmental context.

This article discusses the role of the media in the environmental justice context, specifically *The Detroit News* in its recent coverage of the issue, with a particular focus on two cases at the center of the attack. The article focuses on *The Detroit News* because that paper has devoted substantial resources to attacking the Guidance and the environmental justice movement generally. One reporter in particular has written over forty news stories on this subject. Of those, twenty-three were given front page status

² 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." 42 U.S.C. §§ 2000(d) (1994).

³ See David Mastio, *Governor Will Use Flint Press Conference to Denounce Environmental Justice Rules*, DET. NEWS, Sept. 2, 1998, at B1.

⁴ See Tom Wickham, *'Environmental Justice' Dispute Harmful—Engler*, FLINT J., Nov. 11, 1998, at A5; Editorial, *Our Views: Round 2 Over Steel Mill Could Be Disastrous*, FLINT J., Nov. 3, 1998, at A6; David Mastio, *EPA Aids Activist Groups: Agency Gives \$10 Million to Organizations Pushing its Environmental Justice Campaign*, DET. NEWS, June 5, 1998, at A6.

⁵ See OFFICE OF ENVIRONMENTAL JUSTICE, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, INTERIM GUIDANCE FOR INVESTIGATING TITLE VI ADMINISTRATIVE COMPLAINTS CHALLENGING PERMITS (1998), available at <<http://es.epa.gov/oeca/oej/titlevi.html>> [hereinafter INTERIM GUIDANCE].

and supplemented by numerous editorials with noteworthy titles such as *EPA: Rogue Agency*, and *Environmental Deception Agency*.⁶ Moreover, the paper's location in Detroit, a city plagued by corporate flight, unemployment, and urban sprawl, has given the issue special play with elected officials, who are vulnerable to the charge that greater equity in the environmental decision-making process will hamper economic development.⁷

This article also looks at the extent to which *The Detroit News* has exaggerated the threat posed by enforcement of Title VI. This exaggeration plays upon fears of industry, who legitimately seek to avoid endless delays in permitting, and on the fears of residents of depressed urban communities, who legitimately seek prosperity. It examines the way in which the question of whether minorities bear a disproportionate burden of pollution has been underplayed and the threat to economic development overplayed by charges that greater equity will destroy efforts at brownfield development. Coined not long ago by the environmental justice movement, brownfield redevelopment has been championed as essential to the health of urban communities involved in the redevelopment of abandoned polluted sites. Turning the notion on its head, *The Detroit News* and opponents of Title VI have used efforts to clean up and develop these sites as an opportunity to undermine the very principles upon which brownfield redevelopment rests.

I. BACKGROUND

A. *Title VI of the 1964 Civil Rights Act*

In 1994 President Clinton issued Executive Order No. 12,898,⁸ *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, which directed federal agencies to comply with Title VI of the 1964 Civil Rights Act.⁹ The Executive Order requires federal agencies to assure that federal actions substantially affecting human health or the environment do not have discriminatory effects based on race,

⁶ See Editorial, *Return of the Job Killer*, DET. NEWS, Aug. 30, 1998, at B6; Editorial, *EPA: Rogue Agency*, DET. NEWS, Sept. 24, 1998, at A8; Editorial, *Environmental Deception Agency*, DET. NEWS, Nov. 1, 1998, at D10.

⁷ See David Mastio, *Mostly Whites Live Near Proposed Mill Site*, DET. NEWS, Aug. 27, 1998, at A1; Editorial, *Disparate Nonsense*, DET. NEWS, May 5, 1998, at A10.

⁸ 3 C.F.R. 859 (1995), reprinted as amended in 42 U.S.C. § 4321 (1994 & Supp. IV 1998).

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

color or national origin.¹⁰ The EPA has defined environmental justice as the "fair treatment for people of all races, cultures, and incomes, regarding the development of environmental laws, regulations and policies."¹¹ The Executive Order places no additional legal obligations on state governments.

Although Title VI and its implementing regulations have been law since the 1960s, it had rarely been used in court to challenge discriminatory siting practices in the environmental context. Historically, residents unhappy with a decision to site a polluting facility in their neighborhood either challenged the decision within the permitting agency itself, the Environmental Appeals Board, and/or in state or federal court arguing that the permit violated relevant environmental regulations and statutes.¹²

Beginning in the early 1980s, however, civil rights advocates took a different approach: they looked more closely at the population demographics of a particular proposed site and obtained data demonstrating that minorities bore a disproportionate burden of pollution.¹³ There emerged a rights-based critique that explicitly recognized on an institutional level that environmental laws, as traditionally applied, fail to account for different communities' abilities to influence environmental decisions.¹⁴

¹⁰ See 3 C.F.R. at 861.

¹¹ Office of Solid Waste and Emergency Response, United States Environmental Protection Agency, *Environmental Justice Homepage* (visited April 11, 2000) <<http://www.epa.gov/swerosps/ej/index.html>>.

¹² The Environmental Appeals Board has a website (<http://www.epa.gov/eab>) that features an archive of all EAB decision, although the decisions are stored in a graphical format that does not permit users to search them for specific text. EAB decisions are available in text-searchable format, however, on LEXIS and Westlaw and are also published in West's *Environmental Reporter*.

¹³ The author makes the assumption that the communities of color and low-income communities experience both disproportionate exposures to pollution as well as disproportionate siting of polluting facilities. The methodological issues inherent in determining the degree of impact is complex and has engendered significant debate. Compare generally UNITED CHURCH OF CHRIST COMMISSION FOR RACIAL JUSTICE, *TOXIC WASTES AND RACE IN THE UNITED STATES* (1987) (analyzing location of commercial hazardous waste facilities using zip codes) and Paul Mohai & Bunyan Bryant, *Environmental Injustice: Weighing Race and Class as Factors in the Distribution of Environmental Hazards*, 63 U. COLO. L. REV. 921 (1992) (arguing the disproportionate environmental burden borne by the poor and minorities) with Douglas Anderson, et al., *Environmental Equity: The Demographics of Dumping*, 31 DEMOGRAPHY 229 (1994) (finding that there were no statistically significant differences between the percentages of people of color in host census tracts and non-host tracts for commercial hazardous waste facilities).

¹⁴ See generally ROBERT D. BULLARD, *DUMPING IN DIXIE: RACE, CLASS AND ENVIRONMENTAL QUALITY* 97-98 (1990). See also Neil Popovic, *Pursuing Environmental*

The influence of the environmental justice movement¹⁵ has been substantial. The call for more privileged communities to assume their fair share¹⁶ of the burdens of industrialization has permeated the Executive Branch of government,¹⁷ federal agencies,¹⁸ federal¹⁹ and state legislatures,²⁰

Justice with International Human Rights and State Constitutions, 15 STAN. ENVTL. L.J. 338 (1996) (discussing state law approaches to environmental justice).

The environmental justice movement is at heart a grassroots movement. See Charles Lee, *Beyond Toxic Wastes and Race*, in CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS 41, 51-52 (Robert D. Bullard ed., 1993). Non-profit organizations, attorneys, and others have championed the cause, but the movement is dependent for its moral force upon the voices of those historically the least financially and institutionally empowered. See generally Luke Cole, *Environmental Justice Litigation, Another Stone in David's Sling*, 21 FORDHAM URB. L.J. 523 (1994).

¹⁵ Cesar Chavez and the farm workers' movement to challenge the use of pesticides is perhaps one of the best-known and powerful examples, although not usually acknowledged in environmental justice literature. Some would credit the Native American rights movement as the grandparent. See *A Place at the Table, A Sierra Roundtable on Race, Justice and the Environment*, SIERRA BULLETIN, May-June 1993, at 51, 55.

¹⁶ Use of the term "fair share" in the context of environmental planning may be found in state land use planning laws that impose a requirement that areas distribute lower income housing. See, e.g., *Southern Burlington NAACP v. Township of Mt. Laurel*, 336 A.2d 713, cert. denied, 423 U.S. 808 (1975).

¹⁷ See generally Exec. Order No. 12,898, 3 C.F.R. 859 (1995), reprinted as amended in 42 U.S.C. § 4321 (1994 & Supp. IV 1998); Willie G. Hernandez, *Environmental Justice: Looking Beyond Executive Order No. 12,898*, 14 U.C.L.A. J. ENVTL. L. & POL'Y 181 (1995-1996); Melissa Healy, *Environmental Justice for US Minorities is Ordered*, L.A. TIMES, Feb. 12, 1994 at A15; Melissa Healy, *Administration Joins Fight for Environmental Justice*, L.A. TIMES, Dec. 7, 1993, at A1.

¹⁸ See *In the Matter of Louisiana Energy Services, L.P.*, Docket No. 70-3070-ML, ASLBP No. 91-641-02-ML (May 1, 1997) (denying applicant's requested authorization for a combined construction permit and operating license to possess and use byproduct, source and special nuclear material in order to enrich uranium using a gas centrifuge process in a rural black community under the National Environmental Policy Act, and requiring the staff to address insufficiencies in the federal environmental impact statement including the impacts on property values and the negative economic and sociological impacts on two minority communities of the relocation of a road); Conference, *US EPA Office of Environmental Justice In The Matter Of The Fifth Meeting of the National Environmental Justice Advisory Counsel*, 9 ADMIN. L.J. AM. U. 623 (1995); ENVIRONMENTAL PROTECTION AGENCY, ENVIRONMENTAL EQUITY: REDUCING RISK FOR ALL COMMUNITIES (vol. 1, 1992); U.S. GENERAL ACCOUNTING OFFICE, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES (1983).

¹⁹ See Claire L. Hasler, Comment, *The Proposed Environmental Justice Act, "I Have a (Green) Dream,"* 17 U. PUGET SOUND L. REV. 417 (1994).

²⁰ See, e.g., Ark. Code Ann. § 8-6-1501 (LEXIS 2000) (explaining that the legislative intent of a particular subsection is to address tendency to concentrate high impact solid waste

and the courts,²¹ which are attempting to address the problem of environmental equity through a marriage of environmental protection and civil rights norms. However, the efforts of civil rights advocates and environmentalists to use traditional theories of equal protection to challenge siting decisions were largely unsuccessful.²²

For example, environmental advocates have raised, on several occasions, equal protection arguments within the Environmental Appeals Board. However, the decision to grant review is wholly discretionary with that body. Persuading the board to grant a petition for review, let alone overturn a permit decision, is difficult. Ordinarily the EAB grants review only where it finds a "clearly erroneous finding of fact or conclusion of law, or [if the permit] involves an important matter or policy or exercise of discretion that warrants review."²³ The Board's review power is to be only "sparingly exercised," leaving most permit conditions to be finally

disposal facilities in lower-income and minority communities); Ga. Code Ann. § 12-8-25.4 (1996) (preventing the concentration of solid waste facilities in any one area); N.C. Gen. Stat. § 160A-325(a) (1999) (requiring cities to consider "socioeconomic and demographic data" in siting sanitary landfills).

²¹ The case credited by many as spearheading environmental justice litigation was *Bean v. Southwestern Waste Management Corp.*, 482 F. Supp. 673 (S.D. Tex. 1979), which was brought under the federal equal protection clause. See also *RISE, Inc. v. Kay*, 768 F. Supp. 1144, 1149 (E.D. Va. 1991) (rejecting challenge to siting of a regional landfill in a predominantly African-American community).

For a discussion of the difficulty in establishing discriminatory intent, see Theodore Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U.L. REV. 36, 114-17 (1977). In recent years environmental and civil rights lawyers have turned to Title VI of the 1964 Civil Rights Act and its implementing regulations, which forbid discrimination on the basis of race by recipients of federal funds. See *Chester Residents v. Seif*, Civil Action No. 96-CV-3960 (E.D. Pa. 1996) (dismissing Title VI complaint challenging granting of a waste facility permit to Soil Remediation Services, Inc. on the grounds that there is no private right of action under the regulations); *Tolbert v. Ohio Dept. of Transp.*, 3:97CV7592 (N.D. Ohio 1997) (filed August 26, 1997) (alleging that defendants refusal to propose sound mitigation measures or other design features that would lessen noise impact of new highway project immediately adjacent to predominantly African-American neighborhood violates Title VI, Title VIII of the 1964 Civil Rights Act, 42 U.S.C. §§ 3601-3619, and 42 U.S.C. §§ 1981, 1983 and the Fourteenth Amendment of the U.S. Constitution).

²² See *East Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb County Planning & Zoning Comm'n*, 896 F.2d 1264 (11th Cir. 1989) (rejecting challenge to a local zoning board decision to permit the location of a privately-owned landfill in a predominantly African-American community).

²³ *In re Chemical Waste Management of Ind.*, RCRA Appeals No. 95-2 & 95-3 at 3.

determined at the regional level.²⁴ Moreover, even when considering claims of environmental racism within the EAB, the requirement that intent be established as a condition of making a successful equal protection claim is extremely difficult to establish.²⁵ In the Genesee Power Station case,²⁶ for example, the EAB rejected an equal protection claim for failing to set forth facts sufficient to support the intent requirement.

With the advent of Executive Order 12,898²⁷ and an express commitment by President Clinton and EPA Administrator Carol Browner to the principles of environmental justice, community organizations and civil rights lawyers turned to Title VI as a potential vehicle of redress.²⁸ There were two significant advantages to using Title VI and its regulations. First, the regulations clearly articulated that a case of discrimination could be proven using a disparate impact theory.²⁹ This significantly decreased the burden of proof for civil rights complainants who had been unsuccessful using traditional equal protection theories.³⁰ Second, residents could have their choice of suit either in federal court or in an administrative agency—the EPA and its Office of Civil Rights (OCR).³¹ This latter forum provided the benefit of allowing communities to proceed *pro se* more easily and at less cost.

The chief disadvantage for proponents of environmental justice using the administrative process was the remedy. Title VI regulations make explicitly clear that relief is limited to EPA withdrawal of federal funding from the violating agency.³² The agency itself has no power to revoke a permit issued by a state agency or to prevent construction of the waste facility permitted by a state agency. At best, after a long negotiating process with the offending agency, as required by the Title VI regulations,³³ the EPA may refer the case to the Department of Justice for additional enforcement

²⁴ See 40 C.F.R. § 124.19 (1999).

²⁵ See *id.*

²⁶ Discussed *infra* notes 55-57 and accompanying text.

²⁷ See generally Executive Order No. 12,898, 3 C.F.R. 859 (1995), *reprinted as amended in* 42 U.S.C. § 4321 (1994 & Supp. IV 1998).

²⁸ See Office of Environmental Justice, United States Environmental Protection Agency, *The EPA's Environmental Justice Strategy* (visited Apr. 4, 2000) <<http://www.epa.gov/docs/oejpubs/strategy/strategy.txt.html>>.

²⁹ See INTERIM GUIDANCE, *supra* note 5.

³⁰ See *id.*

³¹ See generally 3 C.F.R. at 862-63.

³² See 40 C.F.R. §§ 7.115(e), 7.130(b) (2000). See also 40 C.F.R. § 7110(c) (1995).

³³ See Civil Rights Act of 1964, 42 U.S.C. § 2000d-1 (1994); 40 CFR 7.130(a) (1999).

efforts.³⁴ To date, the relatively limited power of revoking federal funds, or even referral of a Title VI complaint to the DOJ, has never occurred.

Undeterred, residents and civil rights lawyers began filing complaints in the OCR in 1993.³⁵ By 1998 over sixty complaints had been filed, but none decided.³⁶ Few of the complaints had even been accepted by the EPA for investigation within the 180-day time limit required by Title VI regulations.³⁷ Only seventeen had been accepted for substantive review, and over half were rejected on procedural grounds.³⁸ At the same time, the EPA reported that more than 270,000 permits had been issued around the country in the last five years.³⁹

According to Anne Goode, Director of the EPA's OCR, "it wasn't until February [1998] that the EPA [even] set up a process for investigating and deciding cases. The cases it had accepted sat in a file cabinet."⁴⁰ While Title VI regulations include specific requirements about what the complaint process requires for racial discrimination in an employment context,⁴¹ the agency seemed stymied about how to analyze claims of racial discrimination in an environmental context.

The process that was eventually developed in February 1998 was called *An Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits*.⁴² The Interim Guidance was intended to tackle some of the more difficult legal questions involving Title VI regulations. For example, it required the OCR to identify the population affected, determine its demographics and decide whether the additional pollution would disproportionately affect minorities.⁴³ The Interim Guidance, however, did not have the force and effect of law, create any additional legal claims, nor provide additional remedies to civil rights complainants.⁴⁴ The Interim Guidance stated: "The statements in this document are intended solely as guidance. This document is not intended, nor can it be relied upon, to create any rights enforceable by any party in litigation with the United

³⁴ See 42 U.S.C. § 2000d-1; 40 CFR 7.130(a).

³⁵ See Mike Magner, *EPA to Try Clearing Air Over Environmental Justice*, FLINT J., Dec. 20, 1998, at A15.

³⁶ See *id.*

³⁷ See *id.*

³⁸ See *id.*

³⁹ See *id.*

⁴⁰ *Id.*

⁴¹ See Civil Rights Act of 1964 § 601, 42 U.S.C. § 2000d (1994).

⁴² See United States Environmental Protection Agency, *supra* note 5.

⁴³ See *id.*

⁴⁴ See *id.*

States.”⁴⁵

Nonetheless, it met a torrent of opposition from state government and the business community, with the charge led by the Michigan Department of Environmental Quality (MDEQ) and the National Association of Manufacturers, which formed an industry coalition called the Business Network for Environmental Justice.⁴⁶ In particular, the opposition charged that “examining civil rights issues raised by pollution in industrialized cities . . . would cause endless delays” and hurt economic development.⁴⁷ The U.S. Conference of Mayors issued a resolution condemning the Guidance,⁴⁸ as did the Western Governor’s Association and the Environmental Commissioners of States.⁴⁹ The furor grew so great that in October 1998 Congress banned the EPA from accepting any new civil rights complaints for the following year.⁵⁰ In addition, Congressional leaders used an EPA investigation into a civil rights complaint involving a proposed steel mill in Flint to launch a wider attack on the EPA itself.⁵¹

B. *Genesee Power Plant, Flint, Michigan*

Before the ruckus at the national level began, events taking shape in

⁴⁵ *Id.*

⁴⁶ The Business Network includes the American Petroleum Institute, the Chemical Manufacturers Association, and the National Mining Association.

⁴⁷ See David Mastio, *EPA Plan Risks Metro Growth*, DET. NEWS, Apr. 19, 1998, at A1; David Mastio, *Regulator Under Fire For EPA Commentary*, DET. NEWS, May 12, 1998, at B1; Daniel Howes, *Archer Opposes EPA Plan*, DET. NEWS, June 1, 1998, at A2; Editorial, *Return of the Job Killer*, DET. NEWS, August 30, 1998, at B6; Editorial, *EPA: Rogue Agency*, DET. NEWS, Sept. 24, 1998, at A8.

⁴⁸ See Daniel Howes, *Archer Opposes EPA Plan*, DET. NEWS, June 1, 1998, at A1; David Mastio, *EPA Takes Heat Over New Policy That Equates Pollution With Rights Violation*, DET. NEWS, May 29, 1998, at B1.

⁴⁹ See Russell Harding, *EPA Torpedoes Brownfield Initiatives*, DET. NEWS, May 8, 1998, at A15.

⁵⁰ See Mike Magner, *EPA To Try Clearing Air Over Environmental Justice*, FLINT J., Dec. 20, 1998, at A15. See also Editorial, *Environmental Deception Agency*, DET. NEWS, Nov. 1, 1998, at D10 (“Congress is conducting investigations to determine if the agency deliberately misled it about the economic repercussions of environmental justice rules.”); David Mastio, *Lawmakers Want Answers: House Panel Digs at Feds to Explain Pollution Policy*, DET. NEWS, May 20, 1998, at A1.

⁵¹ See David Mastio, *Lawmakers Urge EPA to Drop Mill Fight*, DET. NEWS, Sept. 24, 1998, at B1 (Rep. James Barcia stating that the financial ties are part of an EPA pattern, noting the agency has been fingered in the recent past for supplying “erroneous” information to Congress on clean water issues and using EPA staff to push constituent groups to bring pressure on federal officials).

Flint, Michigan would set the stage for the debate that would take place around the Interim Guidance.⁵² In particular, a community challenge to a decision by the Michigan Department of Environmental Quality to grant a permit to the Genesee Power Station in 1992 served to mobilize opposition to the Interim Guidance by the Director of the MDEQ and Michigan's Governor John Engler.⁵³

Community opposition began quietly with the filing of one of the first Title VI cases ever filed with the OCR, *In re Genesee Power*⁵⁴. While that complaint sat dormant in the agency, Flint residents, led by the NAACP and St. Francis Prayer Center, filed a lawsuit in state court alleging that the decision to grant the permit violated the state human rights law.⁵⁵

1. Environmental Health Profile

At issue was a permit granted by the MDEQ to the Genesee Power Station to build and operate in Flint the first wood-fired boiler in the state that would use construction and demolition wood for a significant amount of its fuel.⁵⁶ Of primary concern to the plaintiffs were the lead emissions from the plant, as well as the State's failure to consider multiple environmental burdens already facing the community.⁵⁷ According to a 1995 report released by the Governor's Science Board Lead Panel, approximately fifty percent of all children living in Flint between the ages of six months and five years experienced elevated blood lead levels.⁵⁸ Supplementing this report were

⁵² See Engler Administration Unhappy with Air Pollution Ruling, THE DET. NEWS, May 31, 1997, at MET4.

⁵³ See David Mastio, *Michigan in Forefront of Fight Over EPA Rules: 'Environmental Racism' Debate Rages On*, THE DET. NEWS, June 28, 1998, at A1.

⁵⁴ See *In re Genesee Power*, IR 94-R5 (1992).

⁵⁵ See NAACP v. Michigan Dept. of Env'tl. Quality, 573 N.W.2d 617 (Mich. 1997) (No. 95-38228-CV).

⁵⁶ See Trial Transcript, NAACP v. Michigan Dept. of Env'tl. Quality, 573 N.W.2d 617 (Mich. 1997) (No. 95-38228-CV) at 68-9 [hereinafter *Trial Transcript*]. Construction and demolition wood contains lead based paint and the permit granted by the state allowed the facility to emit lead in the amount of 2.2 tons per year or 65 tons over the life span of the power plant. See *id.*

⁵⁷ See *id.* at 617.

⁵⁸ See Michigan Environmental Science Board (MESB), *The Impacts of Lead in Michigan*, (Mar. 1995) (on file with author). These figures represent an underestimation because, as the report notes, "the diagnosis of elevated blood lead levels is difficult without blood screening since most children are asymptomatic." *Id.* at 3. The report also notes that comprehensive blood-lead data at ten micrograms per deciliter is not presently available in Michigan but that "limited" data is available for children at or above fifteen micrograms per

data collected by the Genesee County Health Department, which reviewed reported cases of elevated blood lead levels from referrals by physicians and laboratories and health care systems in Flint. Numerous cases of children with blood lead levels in excess of ten micrograms per deciliter—the threshold identified by the Centers for Disease Control as a benchmark for concern—were identified.⁵⁹ The majority of reported cases were found in the northern section of Flint, where the Genesee Power Station was to be located, and in predominantly African-American neighborhoods.⁶⁰ Lead poisoning can result in mental retardation, a drop in IQ levels, learning disabilities and other serious health problems,⁶¹ and is an ailment that disproportionately affects African-Americans.⁶²

The site chosen was located in a residential community⁶³ across the street from an elementary school, with a population of approximately 60,000

deciliter. *See id.* at 4. These figures may also represent an overestimation because they rely upon blood sample data collected in the 1970s, which relied on sampling and analysis techniques no long in use. *See id.* at 5-6; Dr. Batterman, *supra* note 56, at 21-22.

The Report, which ranked twelve cities, placed Flint third in terms of childhood lead exposure. *See id.* at 6. The top two cities, Detroit and Battle Creek, had percentages that were greater by only a small amount (56.5 and 50.6, respectively). *See id.* Flint ranks third in population of children in this age group in the state (39,017). Detroit's population of children in this age range is 330,694 and Grand Rapids' population is 58,978. *See id.* at 6.

The Centers for Disease Control has determined that the threshold amount of blood lead that indicates dangerous levels is now ten micrograms per deciliter. *See Trial Transcript, supra* note 56, at 12, 83. This determination reflects scientific advances in the study of the health effects of lead exposure. In 1978, when the federal government promulgated regulations governing lead exposure under the Clean Air Act, it based its standards on the assumption that the level of danger occurs at a level of 30 micrograms per deciliter. *See id.* at 21-4, 56-61, 63-6. *See also generally* Wendy Wagner, *The Science Charade in Toxic Risk Regulation*, 95 COLUM. L. REV. 1613 (1995) (discussing regulators' difficulty in basing environmental policy in sound scientific justifications).

⁵⁹ *See Trial Transcript, supra* note 56, at 17. In 1992 and 1993, the agency recorded sixty-nine referrals for children for levels above fifteen micrograms per deciliter and fifty-three referrals from the six month period from October 1994 through April 1, 1995. *Id.* at 11.

⁶⁰ *See id.* at 17.

⁶¹ *See Trial Transcript, supra* note 56, at 16-17, 19-26, 61-62, 66, 67.

⁶² Numerous studies document the correlation between health risk and variables such as ethnicity, race, age, and sex. *See generally* Richard Rios et al., *Susceptibility to Environmental Pollutants Among Minorities*, 9 TOXICOLOGY & INDUS. HEALTH 797 (1993); Samara Swanston, *Race, Gender, Age and Disproportionate Impact: What Can We Do About The Failure To Protect the Most Vulnerable?*, 21 FORDHAM URB. L. J. 577 (1994); Erin Marcus, *Asthma's Grip: Millions Gasp for Breath as Serious Attacks Soar and Deaths Nearly Double*, WASH. POST, Aug. 4, 1992, at A10; *Toxic Lead from the Ancients*, N.Y. TIMES, Apr. 19, 1994 at C6.

⁶³ *See Trial Transcript, supra* note 56, at 9.

people living within three miles.⁶⁴ There were over 227 sites of known or potential risk within that same area.⁶⁵ These included sites for hazardous waste generation, solid waste disposal, hazardous treatment, storage and disposal facilities; and other sources of known and potential environmental contamination.⁶⁶ Additionally, soil sample tests obtained within one mile of the Genesee Power Station revealed levels of lead significantly higher than natural background levels (twenty-one parts per million), with at least one site reaching 240 parts per million. Lead soil samples in the City of Flint indicated that the mean average of lead in soil was higher near the Genesee Power Plant site than in Flint parks.⁶⁷

African-Americans constituted the majority (55.8%) of the population living within one mile, although comprising only 19.6% of the population in

⁶⁴ See *id.* at 489-99. The three mile radius was determined by this expert to be a relevant geographical measurement. For example, the United States Environmental Protection Agency utilizes a Hazard Rank System ("HRS") risk assessment model to assess the relative risk of federal Superfund sites. This model utilizes a total zone of influence of distance radii of environmental risk from sites of environmental contamination of 4 miles. The distance used to assess human exposure risk for various affected or potentially affected media and exposure pathways included is graduated according to population density within 1/4, 1/2, 1, 2, 3, and 4 miles. Distance radii used are the largest for air and ground water contamination plumes of undocumented nature and extent. For example, residential direct contact to contaminated soils is evaluated separately for on-site (workers, and residents within 200 feet) and nearby residents (within 1 mile of a known source). Similar to the State of Michigan's Site Assessment Model ("SAM") described above, the HRS also considers and weights the documented presence of off-site soil contamination from a source from airborne deposition.

⁶⁵ See *Trial Transcript*, *supra* note 56, at 21, 41. This evidence was provided by Plaintiffs' expert witness Mr. Grobbel, a former employee of the Michigan Department of Environmental Quality in the enforcement division, who was qualified as an expert without objection by Defendant in the areas of environmental health, environmental remediation, and brownfield redevelopment. He was also qualified as an expert in environmental policy over the state's objection. *Id.* at 32-3. He commissioned a study from the Environmental Data Resources ("EDS"), a business that evaluates sources of environmental contamination for corporations seeking to locate in a particular area. EDS identified the sites of known and potential risk. Some of these sites are "double counted" because they present more than one source of risk. When this double-counting is eliminated, Mr. Grobbel testified that the number of sites of known or potential risk is 141. See *id.* at 32. However, he also determined that this count is an underestimation based upon a personal review of one category of pollution sources—Part 201 sites—which he undertook to form an opinion about whether the survey may have missed any sites. This involved a review of files at the district office. There he identified an additional six Part 201 sites missed, which suggests that the total magnitude of sites is greater than originally determined.

⁶⁶ See *id.*

⁶⁷ See *id.* at 33-34, 37, 40, 52-53.

Genesee County, and 13.9% in Michigan.⁶⁸ The top fifteen polluters in Genesee County, which included the Genesee Power Station (which ranks as number eleven), were located in areas which, on average, are 39.1% African-American.⁶⁹

2. Genesee Power Station Permit Approval

The Genesee Power Station promised few jobs; in fact, fewer than 20 were anticipated. Nonetheless, as a first step in the permit approval process, the Township of Genesee approved through its zoning powers the siting of the Genesee Power Station on the border between the Township and the City of Flint. Flint is a city which has suffered in recent years from a radical decline in economic stability, due primarily to a decision by General Motors (the city's major employer) to lay off approximately 30,000 workers during the 1980s.⁷⁰ A shell of its former self, Flint has become an international symbol of urban decline. The location of the power plant on the border of Flint and Genesee Township meant that the majority African-American, overwhelmingly low-income residents of Flint living to the south were unable to participate in the decision to approve the site location.⁷¹

The second stage of the process was approval of the permit application by the State of Michigan. The MDEQ took the position that the only relevant information it would consider would be comments related to the technical question of whether specific permit conditions would violate air regulations. The MDEQ Director maintained that

we would have to adjudicate those comments based on the rules and regulations that . . . we have established. If a comment regarding environmental justice could be shown to pertain to a regulation or in fact shown that in some way there was a technical or legal or a program basis for making a change in the permit than we certainly would consider that.

⁶⁸ See Plaintiff's Exhibit 41(A-D), *Trial Transcript*, *supra* note 56.

⁶⁹ See Plaintiff's Exhibit 78(A), *Trial Transcript*, *supra* note 56.

⁷⁰ The film *Roger and Me*, produced and directed by Michael Moore, chronicles the impact of the layoff on the City of Flint.

⁷¹ See *Trial Transcript*, *supra* note 56, at 28-9. See also Rae Zimmerman, *Issues of Classification in Environmental Equity: How We Manage is How We Measure*, 21 FORDHAM URB. L.J. 633, 650 (1994) (analyzing NPL sites in two northeastern states showed that a number of sites were within a few miles of counties other than the one ascribed to the site location).

We would have to link that back to the regulations.⁷²

This position meant that most public comments in opposition, even from scientists, physicians, and experts in air pollution, were considered irrelevant during the public hearings.⁷³ For example, MDEQ staff refused to consider testimony that the siting in this neighborhood was part of a larger process targeting poor and minority communities as hosts for such undesirable land uses.⁷⁴ It also refused to consider a petition presented by citizens containing over 1,000 signatures in opposition to granting the permit as outside the scope of review.⁷⁵ The agency further refused to consider the existence of multiple sources of pollution in a particular area. Finally, it denied the consideration of information pertaining to the residential nature of the community, whether the proposed facility would result in any economic benefit to the community,⁷⁶ or information related to noise or traffic congestion.⁷⁷ Most significantly, the MDEQ refused to consider evidence about elevated blood lead levels among the area's children, who seemed especially at risk because the power station was sited across the street from their elementary school.⁷⁸

The permit was granted, and subsequent appeals to the Environmental Appeals Board ("EAB") were largely unsuccessful.⁷⁹

3. State Court Litigation

Following final issuance of the permit, plaintiffs sought a preliminary injunction in state court. The lawsuit charged that the MDEQ and Genesee Power Station violated the state constitutional mandate that the MDEQ act

⁷² *Trial Transcript*, *supra* note 56, at 16, 61-62, 79.

⁷³ For example, the state included in the permit no provision for an enforceable mechanism to clean the construction and demolition wood. *See id.* at 59. The only requirement was that such waste be visually inspected, a method challenged as insufficient to remove lead by the Genesee County Medical Society, American Lung Association, and an expert in wood processing. All of these comments in opposition were considered to be irrelevant by the state. *See id.* at 28-9.

⁷⁴ *See id.* at 6-7.

⁷⁵ *See id.* at 5.

⁷⁶ *See id.* at 10, 13.

⁷⁷ *See id.* at 13.

⁷⁸ *See Trial Transcript*, *supra* note 56, at 5-6, 9, 19-20, 31, 39, 57-58.

⁷⁹ Plaintiffs and others filed an appeal before the Environmental Appeals Board, which found that the state had not adequately addressed the issue of fuel cleaning, and remanded the permit for further action. *See id.* at 26-29.

to protect the public health,⁸⁰ a state air quality regulation,⁸¹ the state constitution's equal protection clause, and a public accommodations law.⁸²

⁸⁰ The Michigan constitution provides: "The *public health and general welfare* of the people of the state are hereby declared to be matters of of primary public concern. The legislature shall pass suitable laws for the protection and promotion of the public health." MICH CONST. art. IV § 51 (emphasis added). Art. IV § 52 of the Michigan constitution provides: "The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the *health, safety and general welfare of the people*. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction." *Id.* at art. IV § 52 (emphasis added).

⁸¹ "[T]he Department may . . . deny or revoke a permit issued under this part if [i]nstallation, construction, reconstruction, relocation, alteration, or operation to the source presents or may present an *imminent and substantial endangerment to human health, safety, or welfare, or the environment*." M.C.L. § 324.5510 (West 1999) (emphasis added). Plaintiffs also included a claim under the Michigan Environmental Protection Act, M.C.L. § 691.1203 (West 1990), but voluntarily withdrew that claim during the litigation. MEPA specifically "authorizes the courts to determine the validity, applicability, and reasonableness of any standards for pollution or pollution control equipment set by a state agency and to specify a new or different pollution control standard if the agency's standard falls short of the substantive requirements of MEPA." *Her Majesty the Queen v. City of Detroit*, 874 F.2d 332, 337 (6th Cir. 1989).

⁸² Until 1996 courts in Michigan applied a disparate impact analysis to cases brought under the anti-discrimination component of the state's equal protection clause, however, in *Harville v State Plumbing and Heating Inc.*, 553 N.W.2d 377, 380 (1996), the state Court of Appeals required plaintiffs to establish discriminatory intent to prevail under the equal protection clause in its entirety. A number of state courts have interpreted similar state constitutional equal protection provisions to provide greater protection than that available under the Fourteenth Amendment. *See generally* *Camarena v. Texas*, 754 S.W.2d 149 (Tex. 1988) (upholding lower court's determination that exemption of agricultural workers from Texas Unemployment Compensation Act was a violation of the Texas Equal Rights Amendment); *In re McLean*, 725 S.W.2d 696 (Tex. 1987) (holding that gender-based distinction contained in Family Code statutory scheme relative to fathers' legitimation of illegitimate children constitutes discrimination violative of the Texas Equal Rights Amendment); *Rand v. Rand*, 374 A.2d 900 (1977) (holding that, following the adoption of the Maryland Equal Rights Amendment, parental obligation for child support is to be shared by both parents and the sex of the parent cannot be a factor in allocating responsibility for support); *Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988) (striking down medical malpractice caps under state equal protection clause); *Long Beach City Employees Ass'n v. City of Long Beach*, 719 P.2d 660 (Cal. 1986) (holding that equal protection does not allow for a statutory scheme that protects private employees but not public employees from involuntary polygraph examinations).

The public accommodations law, the Elliot-Larsen Act, provides that: Except where permitted by law, a person shall not:

- (a) Deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place

After plaintiffs closed their case, the judge urged the parties into settlement discussions. Plaintiffs and the Genesee Power Station were able to arrive at an agreement that the facility would use no more than twenty percent of construction and demolition wood and be subject to the supervision of a Special Master.⁸³ Plaintiffs and the MDEQ were unable to reach an agreement, and the case proceeded to trial in the spring of 1997.

The MDEQ's principal defense was that it had no discretion to deny permits based upon demographic factors or degree of environmental risk so long as an applicant's emissions would not exceed the National Ambient Air Quality Standards,⁸⁴ and that this policy "benefits" everyone equally.⁸⁵ The state pointed in support to actual ambient air concentrations of lead measured in Genesee County of .01 ug/m³ or one hundred and fifty times below the national standard of 1.5 ug/m³.⁸⁶

of public accommodation or public service because of religion, race, color, national origin, age, sex, or marital status.

M.C.L. § 37.2302 (West 1999).

⁸³ Since it began operation, the Genesee Power Station has been cited for permit violations and placed on the EPA's Significant Violators List. See R. Sills, *NAACP v. Michigan Dept. of Env'tl. Quality*, 573 N.W.2d 617 (No. 95-38228-CV at 42) (Mich. 1997).

⁸⁴ See L. Fiedler, *id.* at 47.

⁸⁵ See *id.*; T. Adams, Defense Witness at 20, 27; R. Harding at 19, 54. Under cross-examination, one witness for the state did concede, however, that its policy does not treat everyone the same. See Fiedler at 55, 62.

⁸⁶ Brief for Appellant, *id.* at 5.

The EPA has developed a NAAQS for lead to protect human health with some margin of safety. Pollutant concentrations above these standards may cause adverse health effects. The Michigan Air Sampling Network is designed to measure air quality throughout the state and consists of more than 130 monitoring sites, entailing over 230 monitoring sensors in 28 counties. There are 54 lead monitors located in the state, 20 of which are operated by the Air Quality Division or local air agencies. There is one monitor in Genesee County to measure the Flint urban area. This monitor is located in Whaley Park, within two miles from the proposed facility, and well represents the locale. The data from this location has been useful in accurately identifying the ambient level of lead emissions in this area. The data from this site has consistently been over 35 times under the NAAQS for lead. Further, a dispersion modeling analysis of lead emissions from the proposed facility, using the allowed lead emission limit, demonstrated that the maximum impact from the facility would be over 100 times under the NAAQS. Therefore, the NAAQs for lead will continue to be met.

Letter From Russell J. Harding, Deputy Director of Michigan Dept. of Env'tl. Quality, to Valdas Adamkus, Regional Administrator, U.S. Environmental Protection Agency 1 (Aug. 15, 1994) (on file with author).

During the trial, plaintiffs' experts, Dr. Stewart Batterman,⁸⁷ a tenured professor at the University of Michigan, and Dr. Rebecca Bascom, a tenured professor at the University of Maryland School of Medicine,⁸⁸ both qualified without objection, challenged this approach to environmental protection. Each stated that the lead standard promulgated under the federal Clean Air Act in 1978 does not guarantee that the public health is adequately protected even where a facility is operating within that twenty-year-old federal guideline.⁸⁹ There is an impressive literature directed generally at the scientific uncertainty in toxics regulation.⁹⁰ This uncertainty is especially apparent with respect to the determination of the lead standard. When it was enacted, it relied upon a threshold of thirty micrograms per deciliter, well above the level of ten now considered as a benchmark.⁹¹ Most toxins remain unregulated.⁹² Criticism of the standards also include their reliance upon animal research,⁹³ delays in science-based regulations,⁹⁴ excessive emissions levels,⁹⁵ the shifting of pollution from one medium to another,⁹⁶ and the weighing of risks that require compromises to the public health.⁹⁷ Moreover,

⁸⁷ Dr. Stuart Batterman was qualified as an expert by the court in the areas of exposure assessment, risk assessment and epidemiological studies, which includes pollution control technology, and statistics. See *Trial Transcript*, *supra* note 56, at 45.

⁸⁸ Dr. Rebecca Bascom was qualified by the court as an expert in toxicology, the health effects of air pollution, and the Clean Air Act. See *id.* at 53-54.

⁸⁹ See *id.* at 66.

⁹⁰ See Alyson C. Flournoy, *Legislating Inaction: Asking the Wrong Questions in Protective Environmental Decisionmaking*, 15 HARV. ENVTL. L. REV. 327, 327 n.1 (1991); Troyen A. Brennan, *Causal Chains and Statistical Links: The Role of Scientific Uncertainty in Hazardous-Substance Litigation*, 73 CORNELL L. REV. 469, 507 (1988).

⁹¹ See *Trial Transcript*, *supra* note 56, at 24, 64.

⁹² See Wagner, *supra* note 58, at 1677.

⁹³ See Thomas O. McGarity, *Substantive and Procedural Discretion in Administrative Resolution of Science Policy Questions: Regulating Carcinogens in EPA and OSHA*, 67 GEO. L. J. 729, 744-45 (1979); Robert Kuehn, *The Environmental Justice Implications of Quantitative Risk Assessment*, 1996 U. ILL. L. REV. 103, 129 n.102 (1996).

⁹⁴ See Wagner, *supra* note 58, at 1681.

⁹⁵ See *Resource Conservation and Recovery Act Amendments of 1991 and Hearings on S. 976 Before the Subcomm. on Environmental Protection of the Senate Committee on Environment and Public Works*, 102nd Cong., 597 (1991).

⁹⁶ See PROPOSED POLLUTION PREVENTION POLICY STATEMENT, 54 Fed. Reg. 3845, 3846 (1989); 56 Fed. Reg. 7853, 7855 (1991).

⁹⁷ See National Primary and Secondary Ambient Air Quality Standards for Lead, 43 Fed. Reg. 46,246, 46,255 (1978) (codified at 407 C.F.R. 50) [hereinafter National Lead Standards]. An additional criticism of environmental laws is that they are difficult to implement. See Howard Latin, *Regulatory Failure, Administrative Inconvenience and the Clean Air Act*, 21 ENVTL. L. 1648, 1649 (1991); Paul R. Portney, *Overall Assessment and*

this approach to pollution control avoids the problem of toxic hot spots in any one particular area.⁹⁸

Thus, both testified that the NAAQS standards alone do not provide an adequate threshold to assess risk. Based upon this conclusion, the problems with the permit, testimony that emissions would result in a five percent increase in the amount of lead in soil, and that there was no "wobble room" for children whose IQ is already been affected by existing sources of lead exposure,⁹⁹ Dr. Bascom stated:

[T]he argument that's important is that in Flint there are children—there are a lot of children who already have lead toxicity, and in that setting you cannot say that any additional increment is insignificant, that the only appropriate direction is a reduction, and that there are . . . calculations showing that there are increments, one into the soil and one into the air. *It is a small increment into the air, but it is an increment into the air, and it's an increment in the setting of a group of—a group of children who are already more than maxed out on their lead concentration, so they don't stand a chance of getting rid of that increment. It will only add to the problem.*¹⁰⁰

Even the state's own toxicologist, upon cross-examination, testified that "there would appear to be little or no margin of safety for any additional incremental exposure in a household from peeling and deteriorating lead based paint or lead contaminated drinking water supply distribution systems."¹⁰¹ The most appropriate public policy, therefore, plaintiffs' experts agreed, was one of a *net reduction* in lead exposure, even where there has been a general downward trend in lead content in the air.¹⁰² Dr. Bascom

Future Directions, in PUBLIC POLICIES FOR ENVIRONMENTAL PROTECTION 276 (Paul Portnoy ed., 1990).

⁹⁸ See *Trial Transcript*, *supra* note 56, at 66-7.

⁹⁹ See *id.* at 80-82.

¹⁰⁰ *Id.* at 71 (emphasis added).

¹⁰¹ *Id.* at 49.

¹⁰² *Id.* at 76, 79-80. The notion that pollution prevention is an important public policy can be found in federal initiatives like the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6902(b) (West 1988) ("It is to be the national policy that wherever feasible, the generation of hazardous waste is to be reduced or eliminated as expeditiously as possible.") *Id.*

testified:

I think that the EPA standard makes sense in a place where you do not have substantial portion of children that already have toxic levels. *But in Flint where the governor's report estimated 17 percent of the kids had levels above 15 micrograms per deciliter . . . I think the only—only approach for airborne lead is to have a decrease and to have—no new source introduction. . . . A new source should be introduced only if there is a net reduction if other offsets are found.*¹⁰³

The state's toxicologist conceded that lead is a "serious public health problem in Michigan, particularly in urban areas," that there are substantial numbers of children with high levels of lead in Michigan. He also indicated that the scientific community really "doesn't know if there is a safe level of lead exposure or, in other words, a level below which there would not be any effect." He testified that there are some studies that suggest the possibility that there could be adverse effects even below ten micrograms per deciliter.¹⁰⁴ Finally, he admitted that the 1978 lead standards are outdated and not consistent with advances in scientific research.¹⁰⁵ In spite of his testimony, however, he steadfastly maintained that the NAAQS standards were adequate to protect the public health.

The court rejected this defense and on May 29, 1997 found that the MDEQ policy failed to protect the health, safety, and welfare of Michigan citizens. Sitting as a court of equity, the court granted plaintiffs' motion for a permanent injunction,¹⁰⁶ issuing a thorough, fifty-page decision and finding:

The Michigan Department of Environmental Quality's failure to take into consideration the *multiple pathways of lead exposure* in analyzing the risk to the community is violative . . . of its *duty under the Constitution to protect the health, safety and welfare of the citizens of this State.*¹⁰⁷

The Michigan Department of Environmental Quality's failure

¹⁰³ *Id.* at 40, 48, 76-77.

¹⁰⁴ *See Trial Transcript, supra* note 56, at 10, 18-20.

¹⁰⁵ *See id.* at 16-17, 27.

¹⁰⁶ *See id.* at 45, 53-56.

¹⁰⁷ *See id.* at 17 (emphasis added).

to take into consideration *the urban environment and the existing sources of pollution* therein is violative of its duty under the Constitution to protect the health, safety and welfare of the citizens of this state.¹⁰⁸

The Court also held that the Defendant violated the Michigan Air Act by failing to perform a Risk Assessment Analysis in this case. Unless the MDEQ performs a Risk Assessment to determine the impact within a five mile radius, it cannot conclude that the plant does not violate this provision and must therefore refuse to grant a permit.¹⁰⁹

The Court believes that the facts of this case and the law of the land require that as part of the permit review process the M.D.E.Q. *should be required to perform Risk Assessment Analysis* at the cost of the proposed facility and not the public. . . . *Based on the evidence presented in this case*, this Court has concluded that the policies of the MDEQ do not protect the health, safety and welfare of all citizens in Michigan in circumstances such as are before this Court. . . . Given that this Court has concluded that the State has violated its constitutional duty to protect the health, safety and welfare of its citizens by failing to enact policies that protect cities like Flint and its residents and given them a fair opportunity to be heard in a meaningful way, this Court concludes that *there is no remedy at law and therefore it is appropriate to exercise its equitable power* and to grant an injunction against the Michigan Department of Environmental Quality preventing it from granting permits to major pollution sources—until a Risk Assessment is performed and those interested parties and governmental units that will be impacted based upon the Risk Assessment Study are notified and given an opportunity to be heard before the Michigan Department of Environmental Quality.¹¹⁰

At the same time, the trial court dismissed plaintiffs' claim that the MDEQ's permit review process had a disproportionate impact on the basis

¹⁰⁸ *Id.* (emphasis added).

¹⁰⁹ *See id.* at 43 (emphasis added).

¹¹⁰ *Trial Transcript, supra* note 56, at 33-45 (emphasis added).

of race because it was not the "sole" cause of the problem. Nonetheless, the trial court made a number of findings of fact which confirmed that African-American communities would "suffer disproportionately."¹¹¹ The court found that a racial imbalance exists in Genesee County, stating, *inter alia*, that although "African-Americans comprise approximately 19.6 percent of the population of Genesee County and 13.9 percent of the population of the State of Michigan, . . . [t]he population living within three miles of any of the top 15 polluters in Genesee County, in terms of pounds of pollutants per year per person, is 39.1 percent African-American."¹¹²

For the court, the MDEQ's decision to allow Genesee Power Station to locate in an area which was already unquestionably predominantly African-American added significantly to racial inequity in Genesee County. The trial court found that "[a]ctual and potential environmental hazards, including hazardous waste generation facilities, solid waste generation facilities, solid waste disposal facilities, hazardous treatment and storage and disposal facilities are concentrated in the area near the Genesee Power Station," that residents were already exposed to significant health risk from elevated soil lead levels, and that approximately ninety percent of people referred to the Genesee County Health Department for lead poisoning reside in northern Flint.¹¹³ The trial court further acknowledged a direct correlation between lead poisoning and the African-American population living in Genesee County.¹¹⁴ However, the trial court excused this finding of a disparity in site location of polluting facilities because of "racial segregation that has been historically practiced by White America, poor educational and employment opportunities for minorities, political disenfranchisement, the numerous social and political forces at work every day to insure that minorities are kept 'in their place' and away from mainstream society."¹¹⁵ Rather than treat what the court explicitly acknowledged as the influence of racism on the disproportionate siting of waste facilities in Flint as a cause of the problem, and then to view the state's policy as exacerbating that problem, the court allowed the phenomenon of historical racism to exempt the state from any responsibility for its aggravation. Thus the court dismissed the civil rights claim, finding that the plaintiffs had failed to demonstrate that the siting concentration was solely caused by the state's permit review process.¹¹⁶

¹¹¹ *Id.* at 14, 22.

¹¹² *Id.* at 14.

¹¹³ *Id.* at 13-14.

¹¹⁴ *Id.* at 14, 16, 24, 25.

¹¹⁵ *Id.* at 35.

¹¹⁶ See *Trial Transcript*, *supra* note 56, at 35-37.

Nonetheless, based on its finding that the permit review process was unconstitutional, the court required the state to assess both the cumulative impact of proposed facilities in and the pollution existing in an area through all exposure pathways. It also ordered the state to provide a meaningful opportunity for public participation.¹¹⁷

In the meantime, the Title VI complaint filed by the St. Francis Prayer Center in the OCR remained undecided.

C. *Select Steel Mill, Michigan*

Immediately after the trial court's decision, the MDEQ obtained a stay of the injunction and, with an appeal pending, granted a permit to the Dunn Industrial Group to site a mini-steel mill in Flint. Following in the wake of the *NAACP* decision,¹¹⁸ community members were concerned because the mini-mill would process 560 million pounds of scrap steel into 280,000 tons of high-grade industrial steel annually. Unlike the Genesee Power Station, however, this facility promised jobs—an estimated 200.¹¹⁹ The site for the facility was identified as falling within the same geographic area as the Genesee Power Station.

Following issuance of the permit to Select Steel, the St. Francis Prayer Center, which had also filed the Title VI complaint in the OCR over the *Genesee Power* case, filed a one page, *pro se* complaint in the OCR alleging a violation of Title VI. The complainants were quickly attacked by the *News*, the *Journal*, Michigan's Governor John Engler,¹²⁰ and many others.¹²¹ The principal reporter at the *News* was David Mastio, a one-time client of the Washington Legal Foundation in a case challenging the use of affirmative action guidelines in college admissions.¹²²

¹¹⁷ See Order Granting Plaintiffs' Motion for a Permanent Injunction, *NAACP v. Michigan Dept. of Env'tl. Quality*, 573 N.W.2d 617 (No. 95-38228-CV at 2) (Mich. 1997).

¹¹⁸ See *NAACP v. Michigan Dept. of Env'tl. Quality*, 573 N.W.2d 617 (No. 95-38228-CV) (Mich. 1997).

¹¹⁹ See Nick Chiappetta, *Officials Up Ante For Mill*, FLINT J., Nov. 27, 1998, at C1.

¹²⁰ The *Journal* reported that Governor Engler said, "additional prying by the U.S. Environmental Protection Agency into civil rights complaints could have a chilling effect on development in Genesee County." Tom Wickham, *Environmental Justice Dispute Harmful—Engler*, FLINT J., Nov. 11, 1998, at A1.

¹²¹ See David Mastio, *Lawmakers Urge EPA to Drop Mill Fight*, DET. NEWS, Sept. 24, 1998 at B1; David Mastio, *Research Backs Pollution Bias: New Study of Proposed Steel Mill Shows Affected Population is Mostly Black*, DET. NEWS, Oct. 21, 1998, at B3; David Mastio, *Mostly Whites Live Near Proposed Mill Site*, DET. NEWS, Aug. 27, 1998 at A1.

¹²² See *In Suit, White Students Seek Ban on Minority Scholarships*, N.Y. TIMES, Mar. 22,

Moving at lightning speed, on October 30, 1998, the OCR issued its first written opinion in a Title VI action, dismissing the civil rights charges 74 days after it accepted the complaint for investigation. The seventeen other complaints, including those involving the Genesee Power Station, were "sitting in the file cabinet" and remained unresolved. In response to the rapid and apparent bias of the review, the NLG/Sugar Law Center, a Detroit based, non-profit national civil rights organization with a special expertise in environmental justice, along with fourteen other complainants with cases pending in the OCR, filed a petition to reopen the *Select Steel* investigation or set aside the investigative and analytical methods. That petition is pending.

II. NEWS COVERAGE

As *de jure* segregation has receded, the issue of race and racism has left in its wake more subtle and indirect effects. The problem of disproportionate siting of waste facilities in minority neighborhoods—whether intentional or not—in the author's opinion, is one of the most obvious and profound ways in which racism operates in this country.

The experience of *Select Steel* has demonstrated the power of the media's coverage of this issue, which has had a profound impact on the formulation of public policy and the law. In November 1998 for example, the *News* attacked the EPA for its "hard-line political agenda" and called upon Congress to "slash the [EPA's] budget before Americans are forced to sacrifice their jobs and standard of living to its dubious crusades."¹²³ The *News* admitted that Michigan's Governor John Engler would call upon the National Governors Association to get "on the offensive" against the EPA's "environmental justice policy" and reported that Detroit Mayor Dennis Archer was taking a lead "in pushing the U.S. Conference of Mayors to oppose the policy."¹²⁴ Within a month the *News* reported that the Agency

1991, at B6. The Washington Legal Foundation opposed the Interim Guidance itself, filing a *Petition to Intervene in the Proceedings and Memorandum Supporting Dismissal of the Title VI Complaint* in all the pending Title VI administrative complaints pending in the EPA's OCR. See *id.*

¹²³ Editorial, *Environmental Deception Agency*, DET. NEWS, Nov. 1, 1998, at D10.

¹²⁴ David Mastio, *Governor Will Use Flint Press Conference to Denounce Environmental Justice Rules*, DET. NEWS, Sept. 2, 1998, at B1. See also David Mastio, *Flint Divided, Dismayed as EPA Crusade Falters*, DET. NEWS, December 28, 1998, at A1 (MDEQ Director Harding bases his declaration on a conference call he and several other top state regulators had with EPA Administrator Carol Browner in which she affirmed the agency would follow

would back away from the environmental justice program,¹²⁵ referring to the EPA's environmental justice work as a "crusade,"¹²⁶ with the MDEQ Director "declaring victory" in the effort to end EPA investigations.¹²⁷ In the meantime, the *News* issued a report that the *Select Steel* appeal had scared off the proponents of the mill, a charge that the Vice-President of the Dunn Industrial group immediately denied.¹²⁸

Two problems in particular have characterized the media coverage of this issue. The first has been to overplay the threat of this economic loss to a community by creating a phantom threat that considerations of equity in the decision-making process will cause endless delays in permitting. The second has been to sacrifice objectivity and treat advocates of environmental justice as being equally or more politically powerful than large multi-national corporations and industrial associations like the Chemical Manufacturer's Association.

This apparent bias has served those opposed to the Guidance and environmental justice by fanning the flames and derailing the OCR investigatory process.

A. *Playing the Card: Economic Development and Brownfields*

Since the St. Francis Prayer Center filed its complaint against the Select Steel corporation, *News* reports were replete with charges that implementation of civil rights laws would have serious economic consequences for urban areas and, in particular, would destroy brownfield redevelopment. Articles titled *Feds Put Car Plants at Risk: EJ Proposal Hurts Automakers* and *Pollution Rules Stink For Urban Cities, Minorities Who Need Jobs*, lit a spark that was fanned by an estimated fifteen *News* articles on this subject published between April and June of 1998.

The invocation of the threat to the auto industry struck a resonant note in Detroit residents, who are especially vulnerable to visions of doom. According to a recent article by *Nation's Business*, published by the Chamber of Commerce, the auto industry in Detroit has decreased from 16 companies

the precedents set in the *Select Steel* decision).

¹²⁵ See David Mastio, *Flint Divided, Dismayed as EPA Crusade Falters*, DET. NEWS, Dec. 28, 1998, at A1.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ See *Area Loses Steel Mill, Report Says: State Officials Can't Confirm Project Going to Lansing Area*, FLINT J., Mar. 2, 1999, at A1; Jeff Karoub & Nick Chiappetta, *Genesee Twp. Still Might Get Steel Mill*, FLINT J., Mar. 3, 1999, at C1.

to three since 1960.¹²⁹ Charges launched by MDEQ Director Harding, for example, and featured prominently on the editorial page of the *News*,¹³⁰ have the ability to implode in a place like Detroit.

The assertion that EPA investigation of civil rights complaints would destroy the auto industry or efforts at brownfield redevelopment is based on several false premises. The first is that these industries would be the subject of Title VI complaints. In fact, based on existing data, this has not been true.

The 50 or so cases filed in the OCR have not involved either the auto industry or a brownfield site. And, according to the EPA, communities are unlikely ever to challenge a permit in a brownfield area. This conclusion was drawn by the EPA, following the attack in *The Detroit News*, when it conducted a series of case studies to determine whether the redevelopment of brownfields has been impeded by Title VI environmental justice complaints. The study, "The Brownfields Title VI Case Studies,"¹³¹ showed that community residents were not likely to file Title VI complaints in brownfields redevelopment cases. This was because they were actively involved in the redevelopment process and could identify and address their concerns. Secondly, residents were more interested in the economic benefits of the possibility of redevelopment.

Another faulty assumption is that the EPA has the power to create "endless delays." This is false. The Interim Guidance, as pointed out earlier, does not have the force and effect of law and creates no additional remedies.

Successful complainants in the OCR would not have any direct remedy themselves. EPA is, at best, authorized to withdraw federal funds, a remedy yet to be utilized by that agency and unlikely to be used except in the most egregious circumstances. The charge that OCR investigations would cause "endless delays" is clearly overstated.

A final false assumption is that but for civil rights complaints, brownfield redevelopment would be proceeding apace. The fact is that there

¹²⁹ See David Warner & James Worsham, *The EPA's New Reach*, NATION'S BUSINESS, Oct. 1998, at 12.

¹³⁰ See Russell Harding, *EPA Torpedoes Brownfield Initiatives*, DET. NEWS, May 8, 1998, at A15.

¹³¹ The areas studied were Miami, Florida; Chicago, Illinois; Lawrence, Massachusetts; Detroit, Michigan; Camden, New Jersey; and Charlotte, North Carolina. The selected cities had to meet the following criteria: 1) be an EPA Brownfields Assessment pilot; 2) have a minority population greater than 10 percent; 3) list a proposed redevelopment activity that seemed likely to require an environmental permit; 4) identify at least two sites for redevelopment in its application, and 5) have provided quarterly reports on its Assessment Pilot to the EPA. Copies of the case studies can be accessed at <http://www.epa.gov/brownfields> or by calling the hotline at 1-800-424-9346.

are numerous barriers already to brownfield redevelopment, none of which has to do with civil rights prosecutions. For example, the *News* reported that Detroit environmental officials don't know the number, size or location of hundreds of polluted sites.¹³² Cleaning these sites is costly and investors often fear potential liability. According to an environmental scientist from the city, "Detroit has just as many brownfields now as it had three years ago."¹³³ To suggest, therefore, that the creation of this Guidance has the power to derail economic development is fantasy. There exist many impediments to brownfield redevelopment that remain unresolved and unaddressed and are beyond the scope of this paper.

The truth is that opponents of environmental justice have used the Guidance as an excuse to launch a wider attack on the EPA and proponents of fair regulation. In *Return of the Job Killer*, for example, the *News* editorial progresses from an attack on the Interim Guidance to a vilification of the specific enforcement effort by the EPA to clean up a polluter called the Michigan Peat Co.¹³⁴ In *EPA: Rogue Agency*, the *News* editorial progresses from an attack on the Guidance to an explicit indictment of the EPA:

The EPA, it appears, has become the purveyor of a radical environmental agenda that cares little about the economic havoc it leaves in its wake. Congress moved to rein in the Legal Services Corp. When it became clear that the organization had become a job factory for activist lawyers intent on promoting "social justice" instead of providing legal services to the poor. The EPA should share the same fate.¹³⁵

In *EPA Aids Activist Groups: Agency Gives \$10 Million to Organizations Pushing its Environmental Justice Campaign*, the *News* proceeds from a discussion about an alleged misuse of \$5,000 by a small non-profit agency to a quote from Christopher Foreman of the Brookings Institution who charges that "[w]hat you have here is an agency stirring up interest in environmental justice with federal money, then using that interest as an excuse to regulate."¹³⁶

¹³² See Jeremy Pearce, *Renewal Hindered Because City Hasn't Kept Track of Hundreds of Polluted Urban Sites*, DET. NEWS, Mar. 9, 1999, at A1.

¹³³ *Id.*

¹³⁴ See Editorial, *Return of the Job Killer*, DET. NEWS, Aug. 30, 1998, at B6.

¹³⁵ Editorial, *EPA Rogue Agency*, DET. NEWS, Sept. 24, 1998, at A8.

¹³⁶ David Mastio, *EPA Aids Activist Groups: Agency Gives \$10 Million to Organizations Pushing its Environmental Justice Campaign*, DET. NEWS, June 5, 1998, at A10.

Retreat from enforcement of environmental laws is the real issue here. One need only look at MDEQ's own record of enforcement of environmental laws over the last several years to confirm the notion. A 1998 survey of MDEQ employees is revealing. The 1998 survey was sent to 1462 employees with 609 responses (41.6% participation).¹³⁷ Survey data indicated that 86% of the employees believed that management views the primary "customer" of DEQ as individuals and businesses who seek permits rather than natural resources and the general public;¹³⁸ 70% believed that the regulated community "excessively" influences permitting decisions at the DEQ;¹³⁹ and 63% believed that permit applicants received preferential review after they or interested elected officials had visited with DEQ management regarding a proposed project.¹⁴⁰ Ordinary citizens were perceived by almost half of the employees (43%) to not have as much access and influence with decision-makers as representatives of the business community.¹⁴¹ Employees believed that "under the 'guise' of 'regulatory reform', the Director had ordered [them] to take actions that have resulted in less environmental protection" (61%); and that a majority (52%) feared job-related retaliation for advocating enforcement of environmental rules and regulations.¹⁴²

B. *Fox in Charge of the Henhouse*

One of the principal tactics used by the *News* in the attack on the EPA has been to underplay the relationship between the regulators and the regulated, and to overstate the power of the affected communities.

One strong example can be found in the coverage by the *The Detroit News* in an Op/Ed piece written by the MDEQ Director entitled *EPA Torpedoes Brownfield Initiatives*.¹⁴³ The MDEQ Director attacked the EPA

¹³⁷ See 1998 PEER Survey of Michigan DEQ Employees (hereinafter Survey) (on file with author). Survey respondents were comprised of non-supervisory personnel (82%); management (12%), and clerical (6%). See *id.*

¹³⁸ The figures includes both those who indicated that the "strongly agree" and "agree." For this question, 63% strongly agreed and 34% agreed. See *id.* at question 3. Interestingly, approximately the same proportion believe that this attitude toward constituency is inappropriate—82% indicated that they believed that the primary "customer" should be the natural resources and the public rather than the regulated community. See *id.* at question 4.

¹³⁹ See *id.* at question 6.

¹⁴⁰ See *id.* at question 7.

¹⁴¹ See *id.* at question 16.

¹⁴² See *id.* at questions 13, 14.

¹⁴³ Russell Harding, *EPA Torpedoes Brownfield Initiatives*, DET. NEWS, May 8, 1998, at A15.

for issuing the Guidance as “proposing nothing less than the creation of a national system for the issuance of an environmental justice permit.”¹⁴⁴ It warns: “[u]nder the guidance, a single Title VI complaint could significantly delay or prevent development of a site. It sets up a troubling presumption of a civil rights violation whenever an industrial facility and a low-income or minority community meet. These delays potentially would devastate Michigan.”¹⁴⁵ The article continues by warning against its impact on brownfields. “By delaying redevelopment of brownfields, the EPA not only slams the door on economic opportunity, it also neglects its primary mission of cleaning up the environment.”¹⁴⁶

Several days later, however, the *News* revealed that the MDEQ Director's article had “included whole paragraphs from materials prepared for the Chemical Manufacturers Association.”¹⁴⁷ While giving front page status to so many other articles attacking the Interim Guidance and Select Steel mill, this article appeared towards the back of the paper. The CMA, it turned out, used ten paragraphs from another article, authored by Bonner Cohen for the Michigan Chemical Council, who had apparently never given his approval for use of the material.¹⁴⁸ In fact, Cohen indicated that it was his understanding that the paper would be rewritten before it was ever used, since the trade group felt his work was too hard on the EPA.¹⁴⁹

The next day, the paper followed the article with an editorial describing “this [as] an episode that would seem to require more than an apology” but also launched a defense stating that the Director “and his colleagues in other states are on solid ground when they argue that ‘environmental justice’ may do more harm than good. And, in fairness, Mr. Harding was sounding the alarm well before the chemical industry joined the fray.”¹⁵⁰ It also used the opportunity to once again attack environmental justice proponents stating, “As we also noted in a recent editorial, environmental activists are not above planting ghost-written articles in prominent publications.”¹⁵¹

Compare this with *The Detroit News* coverage of an issue that got

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ David Mastio, *Regulator Under Fire For EPA Commentary*, DET. NEWS, May 12, 1998, at B1.

¹⁴⁸ *See id.*

¹⁴⁹ *See id.*

¹⁵⁰ Editorial, *Disparate Nonsense*, DET. NEWS, May 13, 1998, at A10.

¹⁵¹ *Id.*

both front page and editorial attention during the time of the *Select Steel* investigation—a grant of \$5,000 to a complainant supposedly to prosecute a Title VI action in the EPA. In September of 1998, Mastio accused the EPA of “funnel[ing] money to groups threatening a proposed Flint steel mill.”¹⁵² He continued:

The agency’s financial ties to a religious group that complained about the plant are revealed as top EPA officials have made the Flint case their highest priority in a push to use civil rights laws to attack pollution in minority neighborhoods. Opponents of the policy . . . argue the EPA push will stifle redevelopment and cost inner-city jobs.¹⁵³

In the front page story, Mastio reports: “In one of the documents, an attorney for the St. Francis Prayer Center wrote in August 1995 that the group was acting on behalf of another related organization that had received nearly \$5,000 in EPA grants in 1994 and 1995.”¹⁵⁴ The implication is clearly that the St. Francis Prayer Center used the money to prosecute the *Select Steel* complaint in 1999. The article continues with a separate section entitled “It Sounds Like Setup” with a quote from the chair of the board of Select Steel who states: “It sounds like a setup. . . I can’t believe EPA would be so involved. It looks like it was their money and their advice that set this in motion.” It is followed with a report that Senator Carl Levin entered the fray, meeting privately with EPA civil rights chief Ann Goode “to discuss his concerns”¹⁵⁵ and closes with an unattributed quote from “national urban leaders” that “the EPA’s environmental justice policy will backfire by driving jobs and investment from neighborhoods that need them most.”¹⁵⁶

In case there was any doubt about the implication of the article, it was followed the next day by a *News* editorial entitled *EPA: Rogue Agency*. The editorial begins by saying that

¹⁵² David Mastio, *EPA Aided Mill Fighters: Flint Prayer Center Affiliate Gets \$5,000 From Agency to Lobby Local Officials*, DET. NEWS, Sept. 23, 1998, at A1; David Mastio, *EPA Aids Activist Groups: Agency Gives \$10 Million to Organizations Pushing its Environmental Justice Campaign*, DET. NEWS, June 5, 1998, at A10.

¹⁵³ David Mastio, *EPA Aided Mill Fighters: Flint Prayer Center Affiliate gets \$5,000 From to Lobby Local Officials*, DET. NEWS, Sept. 23, 1998, at A1.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

[T]he Detroit News' David Mastio reported yesterday that the Environmental Protection Agency (EPA) effectively paid a local group to lodge a complaint against a proposed steel mill in Flint. This revelation, coming on the heels of many others of a similar nature, confirms that the EPA will resort to anything in an effort to implement its widely loathed policy of 'environmental justice,' which could kill millions of jobs in America's urban areas.¹⁵⁷

The reporter had no evidence that any funds obtained by United for Action, which had one board member in common with the St. Francis Prayer Center, were used in any way by the Prayer Center. Moreover, the one-page complaint was filed *pro se* and would never have cost \$5,000. Additionally, EPA grants to community organizations have focused on pollution prevention as the primary solution to environmental justice problems. An EPA Regional Administrator told the *News* in a subsequent letter: "The EPA awarded an Environmental Justice Small Grant (\$4,180) to the group Flint-Genesee United For Action to carry out an educational project, including development of a community demographic and pollution profile and strategies to prevent and reduce community pollution."¹⁵⁸ All of the funding programs prohibit recipients from lobbying Congress or EPA with federal money.¹⁵⁹

Finally, the article conflates the time, suggesting that the EPA grant to United for Action, although occurring in 1994 and 1995, and long before any plans had even been made to site the Select Steel mill in Flint, actually paid for the prosecution of the St. Francis Prayer Center complaint against the steel mill in 1998.¹⁶⁰ Thus, the *News* made stark allegations of improper and illegal acts by residents of a low-income community involving a \$5,000 grant, turning it into a wholesale attack on the EPA. At the same time, the *News* left virtually untouched the MDEQ Director's highly improper relationship with the Chemical Manufacturer's Association and Michigan Chemical Council, members of the industry he is responsible for regulating.¹⁶¹

¹⁵⁷ Editorial; *EPA: Rogue Agency*, DET. NEWS, Sept. 24, 1998, at A8.

¹⁵⁸ Letters: David Ullrich, Acting Administrator, EPA Region V, *EPA Denies Bankrolling Flint Complaint*, DET. NEWS, Nov. 8, 1998, at D8.

¹⁵⁹ See Office of Enforcement and Compliance Assurance, United States Environmental Protection Agency, Environmental Justice (visited Apr. 4, 2000) <<http://es.epa.gov/oeca/main/ej/index.html>>.

¹⁶⁰ See David Mastio, *EPA Aided Mill Fighters*, THE DET. NEWS, Sept. 23, 1998, at A1.

¹⁶¹ See David Mastio, *Regulator Under Fire for EPA Commentary*, DET. NEWS, May 12,

As one Michigan resident, a former adjunct journalism school instructor and mass media librarian, observed in a letter to the editor following the *News* article, *EPA Plan Risks Metro Growth*:¹⁶²

It is the role of the press to provide a representation of voices on issues that reflect the range of interests and stakeholders involved. The *News* clearly didn't care to give voice to any reasons why 'environmental justice' is even an issue. Instead, it quotes the powerful, the folks who already stuff their pockets and who don't have to live in a heavily polluted environment.¹⁶³

III. CONCLUSION

This story is David and Goliath in modern form. The one question that lingers after the story is told is why was it necessary to launch a whole-scale assault on the environmental justice movement? There can be no question that those who oppose the Title VI Guidance and the environmental justice movement have a great deal more political and economic power than any of the other players in this drama. The opponents of the movement knew full well the limits to Title VI and its regulations, as well as the limited capacity of community groups to sustain prolonged legal action. Was the attack on the Guidance simply a flexing of muscle?

This article submits that at stake here was something far more significant than the question of whether the EPA could or should evaluate claims of environmental racism under Title VI. The real issue turns on whether community interests' influence on public policy is sustainable in an age where environmental regulation can have real economic impacts.

The manipulation of the media was demonstrative of the power of those corporate interests. This article described how very little evidence was offered by the media and other opponents of the lawsuit to substantiate the charges that enforcement of Title VI would stop economic growth. The power of the EPA to stop permits in progress and the legal enforceability of the Title VI Guidance were grossly exaggerated. The public was led to believe that the Guidance would halt brownfield redevelopment, although not

1998, at B1.

¹⁶² David Mastio, *EPA Plan Risks Metro Growth*, DET. NEWS, Apr. 19, 1998, at A1.

¹⁶³ Letters: Terry Link, *Detroit Needs Environmental Justice Rules*, DET. NEWS, Apr. 26, 1998, at B6.

one civil rights charge filed with the OCR even involved brownfields. There is enormous superficial appeal to the claim that what is good for a corporation is good for the community. The formation of public policy on this issue took place at the level of high stakes politics, far beyond the capacity of community organizations and members to play as equal members.

The extent to which the media was a pawn in this game should really be of no surprise in this age of slingshot journalism and Jerry Springer.

That the EPA rolled over so quickly suggests that there is not much hope for finding remedies at the federal level. Unfortunately, this idea is really nothing new for community activists. They long ago learned that battles are won at the community level, often long before a permit application is even filed. The use of environmental regulations and civil rights laws provide a hook to exert some political pressure, to educate the public, and to provide a focus for community efforts. Meaningful change in the decision-making about who will bear the costs of pollution, however, will not be decided in the courts, legislatures, or agencies. These venues have rarely been successful except in the most extreme situations. Perhaps those behind the corporate assault on the Guidance realized this on some level. They knew that the muscle must be flexed every once in a while. The need is recognized because the real power is with the people—once they have had enough.