



The unintended consequences of environmental justice

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Abstract

The article commences with a discussion of the Title VI issues that arise when a member of industry contemplates locating a facility in a community. Since the early 1990's there has been an increase in the claims that poor minority communities bear a disproportionate amount of the negative health and environmental risks (referred to as environmental racism) of the siting of hazardous facilities in their part of town. The authors discuss the effects on the population, the President's Executive Order 12898, "Federal Actions to Address Environmental Justice", the EPA's "Interim Guidance For Investigating Title VI Administrative Complaints Challenging Permits", the Chester case, and the EPA's administrative actions in the Louisiana Shintech case. They examine allegations that the EPA's application of its interim guidance may do real economic harm to the very low income, minority population that it is intended to benefit. They conclude by suggesting several ways for any industry to manage for the "environmental justice" risks of facility location by prior planning, educating all stakeholders, and evaluating the potential risks. © 1999 Elsevier Science Ireland Ltd. All rights reserved.

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1. Background

Two recent significant actions, a court of appeals decision and interim permitting

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guidance issued by the EPA, have created dangerous waves in the turbulent waters of environmental permitting for plant sites. Unless reversed, they forecast a regulatory nightmare for American industry that will result in a dramatic increase in the legal and economic risks associated with siting of industrial facilities. One important question is whether individuals or environmental groups have an implied private right of action in federal court to challenge the permitting and permit renewal process without exhausting available remedies before state or federal permitting agencies. As we shall soon see, the answer is probably yes. The fact that, when Title VI of the Civil Rights Act is considered, all three branches of government are involved, gives considerable impetus toward future unfettered filings of private causes of action in environmental justice cases. Prior to these unexpected regulatory actions it was generally accepted that the federal or state permitting agencies served as gatekeepers to which private individuals or groups must administratively submit their opposition. These agencies could then exercise discretion about how to deal with the challenge. Astute management accountants, auditors, engineers, controllers, lawyers, and company executives involved in the selection of plant sites must be prepared to adopt management approaches suggested in this article to deal with the new permitting developments.

Another question, even more basic is, what is environmental justice and how does it impact plant siting vis a vis rich and poor neighborhoods, white and black ones. This essay will address both these narrow and broad issues, the former first.

2. Increasing the risks of plant siting

President Clinton set the stage for this increased risk when he forcefully stated that one of the national priorities should be to establish environmental justice for minority and low-income communities by issuing Executive Order 12 898 (Feb. 11, 1994). The Order broadly provides that all communities and persons across this nation should live in a safe and healthful environment. Then on December 30, 1997, the 3rd Circuit Court of Appeals entered the arena when it discovered that a *private cause of action* exists to challenge the plant permitting process. And in February 1998, the Environmental Protection Agency (EPA), seized the initiative when it, citing the President's Executive Order, issued interim guidance that clearly recognizes a private cause of action in both the site permitting and renewal process.

Both the court decision and EPA interim guidance are rooted in a strained interpretation of a well-known Civil Rights statute.¹ Title VI that says that no person in the United States shall, on the grounds 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 any financial assistance. Whether those words can be

¹ According to some commentators this law has a 'noble purpose' behind it: an end to discrimination. For an alternative view, one which maintains that people have a right to interact with whomever they please on a mutually voluntary basis, that is, they have a right to discriminate (e.g., the right of free association), see [7,17,21,22,30].

strained to infer a private right of action in an environmental siting case is subject to considerable conjecture.

3. The case

In *Chester Residents Concerned For Quality Living v. Seif*, Secretary of the Pennsylvania Department of Environmental Protection, No. 97-1125 (3rd Cir., Dec. 30, 1997), the appellate court dealt with the issue of whether a private cause of action exists under Title VI to challenge the permitting process. The city of Chester is located in Delaware County, Pennsylvania, and has a population of approximately 42 000, of which 65% is black and 32% is white. Delaware County, excluding Chester, has a population of about 502 000, 6.2% black and 91% white. The environmental group, Chester Residents Concerned for Quality Living, contended that state and environmental authorities had granted five waste facility permits for sites for the City of Chester since 1987, while granting only two in the rest of Delaware County. It further charged that Chester facilities have a total permit capacity of 2.1 million tons of waste per year, while the non-Chester counterpart is only 1400 tons.

The court was faced with the question of whether a private right of action exists under the Discriminatory Effect Regulations promulgated by a federal administrative agency (EPA) under Title VI of the Civil Rights Act of 1964. The trial court found that no right of action exists which would allow a private individual to enforce the EPA civil rights regulations. The lower court believed that the permitting agency acted as a gatekeeper for these complaints. Title VI and the EPA's civil rights regulations implementing Title VI condition a state Department of Environmental Policy's receipt of federal funding on its assurance that it complies with Title VI and the regulations [40 CFR §7.80(a) (1997)]. These regulations prohibit recipients of federal funding, like state permitting boards, from using criteria or methods which have the effect of subjecting individuals to discrimination because of race, color, national origin, or sex.

The 3rd Circuit Court of Appeals decided that, in the absence of a statutory authorization, there is a three-pronged test to determine when it is appropriate to trigger a private right-of-action to enforce government regulations. The test requires the court to determine:

- Whether the issue is properly within the scope of the enabling statute;
- Whether the statute under which the rule is promulgated properly permits the implication of a private right-of-action; and,
- Whether implying a private right-of-action will further the purpose of the enabling statute.

The appellate court held there was no question that the EPA's discriminatory effect regulation satisfies the first prong. The court said it is clear that actions having an unjustifiable disparate impact on minorities can be redressed through agency regulations designed to implement the purpose of Title VI. Announcing that the second and third

prongs determined whether a private right of action existed, the court maintained it had to consider the relevant factors of:

- Whether there is any indication of legislative intent, explicit and implicit, either to create such a remedy or to deny one; and
- Whether it is consistent with the underlying purpose of the legislative scheme to find such a remedy for the plaintiff.

The court reviewed the law and regulations and agreed that there is some weight to the argument that the EPA, or a state permitting agency, are only a gatekeeper to enforcement, with private parties submitting their objections to the agency to act at its discretion. The court failed to enlighten the litigants by citing any explicit examples of a legislative intent to confer a private cause of action. The court, however, decided that private lawsuits are consistent with the underlying legislative scheme of Title VI, and as a result, the purposes of Title VI would best be served by allowing a private right-of-action. In sum, the activist court inferred an implicit indication in the legislative history of an intent to create a private right-of-action. It also found a private right-of-action as desirable since this will further the purposes of the statute. This is because it will “deputize private attorneys general who will enforce Title VI and its implementing regulation.”²

Certainly, the foregoing decision should serve to warn those who are involved in risk management and plant siting to carefully consider the discrimination issues raised in the Chester case. The case, however, leaves unresolved several important questions. Is there a cause of action, for example, in the renewal of a site license? Shortly after decision in the Chester case the Environmental Protection Agency released interim guidance that seems to deal with that question.

4. EPA interim guidance

Citing the President’s Executive Order 12 898, Federal Actions To Address Environmental Justice In Minority and Low-Income Populations, the Environmental Protection Agency issued Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits, on February 5, 1998. The EPA cites the Chester case and flatly states that individuals may file a private right-of-action in court to enforce the nondiscrimination requirements in Title VI or the EPA’s implementing regulations without exhausting administrative remedies. This means that the EPA and state permitting agencies are no longer considered by the agency as gatekeepers and allows private individuals direct access to the federal courts. This approach will obviously lead to increased environmental permitting litigation. The statement of agency policy will

² Chester V. Seif. No. 97-1125 (3rd Cir., Dec. 30, 1997).

also likely have considerable influence on courts in other circuits which are, or soon will be, considering the same question.

Another section of the interim guidance should be frightening to all the individuals involved in plant siting. In the section Investigations of Alleged Discriminatory Permit Renewals, the interim guidance provides:

Generally, permit renewals should be treated and analyzed as if they were facility permits, since permit renewal is, by definition, an occasion to review the overall operations of a permitted facility and make any necessary changes. Generally permit renewals are not issued without public notice and an opportunity for the public to challenge the propriety of granting a renewal under the relevant environmental laws and regulations.³

The potential legal and management impact of that interim guidance is enormous because it is clearly relevant to renewals. Under the interim guidance claims could be brought directly in federal court long after permits have been issued. This will give retroactive reach to environmental justice claims to jeopardize existing permits. It clearly will cause considerable reluctance to invest capital in and preclude otherwise beneficial development in the very minority and low-income communities that Title VI was intended to benefit.

5. Dealing with the regulations

Taken together, the action of the 3rd Circuit Court of Appeals in recognizing a private cause-of-action and the EPA interim guidance for investigating Title VI administrative complaints challenging permits, foretell an explosion of regulatory and judicial activity in site permitting and renewals. Management accountants, auditors, controllers, engineers, facility owners, and executives must be alert to plan new construction and expansion carefully. Management of plant site selection and petitions for permit renewal should, at a minimum, involve the following:

- An evaluation of the population of the city and county surrounding the proposed plant location;
- A survey and evaluation of other plant sites and facility permits in the city and county;
- An evaluation of how those facilities and permits impact on the protected classes of race, color, national origin, or low-income populations; and,
- A carefully balancing of the advantages of the plant site against the potential liability under the holding of the Chester case and the Environmental Protection Agency Interim Guidance.

³ US Environmental Protection Agency, Interim Guidance for Investigating Title V Administrative Complaints Challenging Permits, February 5, 1998.

There is only one quick and sure way to reverse this trend toward enlisting private attorney's general and bring economic sanity to the siting process. It is for Congress to adopt legislation clearly indicating that a private cause of action is not appropriate. Sadly, given the present congressional leadership's demonstrated timidity to act when faced with the administration's considerable ability to demonetize those who disagree in the area of minority and environmental rights, such action is not likely.

6. The philosophy of 'environmental justice'

There is, however, another way to deal with this issue. It is neither quick nor sure, but it may be deeper and longer lasting. It is to call into question the very philosophical base upon which all such programs are predicted, the notion of 'environmental justice'.

We place quotation marks around this phrase to indicate that it is ideologically charged. As defined by its advocates, it depicts a world where poor and black neighborhoods are as environmentally pleasant as rich and white ones.

Before indicating why and in what sense such a state of the world would actually be *unjust*, a few distinctions must first be drawn.

One is between a lack of environmental amenities which constitute rights violations and those which do not. For example, living in a medium sized city, the main industries of which are computers, universities, hospitals and other such 'clean' endeavors will undoubtedly be more ecologically desirable than in a large city which produces steel, automobiles and leather tanning—even if strict environmental regulations are imposed on both. This is because of de minimus considerations: be the firms ever so careful, there will inevitably be some small amount of deleterious seepage in the latter case which does not apply to the former. As long as this falls safely under the threshold of what constitutes, invasive behavior ([31]) there is no rights violation.

The second distinction is between a person 'coming to the nuisance' and the nuisance coming to the victim. For example, suppose A has been living a quiet bucolic existence out in the country, where his land, except for a few crickets, is utterly silent. All of a sudden an airport opens up next door and inundates A at all hours with noise pollution. This would be a clear violation of his rights, since he had in affect homesteaded acoustical amenities. When these were torn from Mr. A, it was as if a possession of his was stolen.⁴ In contrast, if B builds a house on an empty lot near an airport, then it was this facility which had homesteaded the rights to make noise, not him to a quiet environment. Were Mr. B to then turn around and sue the airport, it would be the latter who would be in the right.

The third distinction is between being victimized by pollution by permission and against one's will. Mr. C wants to open up a pig raising and mushroom farming emporium. Both of these activities give off foul odors. If Mr. C blithely opens up shop, without a by-your-leave from any of his neighbors, he is clearly violating their rights.

⁴ For [12,16,27,26], this would be an impossibility. In their view whether I should have the right to silence the airport the right to make noise depends upon who values it more. For a critique of this position, see [3,8,5,15,13,14,20,24,25].

They had homesteaded the relevant olfactory amenities which are now illicitly being seized. However, suppose C *purchases* the right to waft foul odors over the property of the only persons negatively impacted. That is, these neighbors *voluntarily* agree to accept on his lands what would otherwise be deemed an improper odoriferous trespass. Would C *then* be guilty of untoward behavior? Of course not. But what of the *tenant* of D, Mr. E, who vociferously objects? Is not C guilty of ruining the environment if not for D, then for E? Again, we must answer in the negative. For the tenant has no direct rights to ecological values; his ownership cannot stretch any further than those of his landlord, D. But D has for a fee given up his right to a smell-free environment. As such he cannot also rent it to E. So E has no such rights. Of course, presumably, the rent E will have to pay D under the new regime will tend to be lowered, or not raised as fast as would otherwise occur. But this is entirely another matter.

With these preliminary distinctions in mind, we are now ready to consider permits for plant siting⁵ in poor or black areas. (The two words shall be used interchangeably, given that blacks are on average poorer than whites).

One conclusion follows right off the bat. No permits should be granted for any factory, whether in rich or poor areas, where the pollution created thereby surpasses the level deemed compatible with the private property rights of other people. To allow this would be rights violative, a bringing of the nuisance to the victim, not the other way around, and must therefore be rejected. What, then, of industrial equipment which does not exceed such thresholds, but does render the surrounding areas less desirable? This, by definition, should be legal. However in a free market, they will tend to be confined to poorer, (e.g. blacker) areas. This holds, except, of course, in cases where the surrounding property owners are willing to accept such facilities, in return for financial compensation.

Many commentators look in horror at such a phenomenon.⁶ After all, they will ask, why should people, just because they are poor, have to put up with less than fully desirable surroundings?⁷ Our critics are asserting in effect that the poor have as much right to a home overlooking the city as the rich, and we are maintaining that this claim is without merit. The point is, once we abstract from rights violations, we are left only with that which is more or less pleasant. Our contention is that unless additional funds can be used to purchase those things which make life more enjoyable (e.g. better views, safer neighborhood, more acreage of plot, more square feet of housing space, limosines, etc.) there is little reason to work harder or smarter to earn extra money. And without such incentives, civilization tends to fall apart, and with it general economic wellbeing.

Then, of course, there is the sheer justice of the matter. Why *shouldn't* a Bill Gates or

⁵ We are assuming, but only for the sake of argument, that there is a case for plant siting; e.g., a system whereby firms must first obtain the permission of the state to erect buildings. For the view that this is in effect prior restraint, that factories should be able to locate wherever their owners wish, subject only to a lawsuit if they violate the rights of others (e.g. pollute), see [31,10,11].

⁶ Dr. Benjamin Chavis, Testimony before the US House of Representatives Committee on the Judiciary, Subcommittee on Civil and Constitutional Rights, Oversight Hearing: Environmental Justice, March 3, 1993.

⁷ Remember, we are now talking about environments which although they may be less desirable, are not rights violative. This is the difference, for example, between a house in a valley, with no view, and one on top of a hill, looking down upon a spectacular panorama.

a Michael Jordan be able to afford better environments than those of us with less money? It is *their* wealth, and to deny them the right to spend it on any legitimate goods and services they may wish such as a better environment is in effect to steal from them. Why should the rest of us, who have made fewer contributions to the wellbeing of our fellow citizens, enjoy equally desirable neighborhoods as a Gates or a Jordan?

Let us now consider some specific cases. If it is unfair for blacks to have the short end of the stick environmentally speaking,⁸ it must also be improper that they, on average, drive older automobiles, do not eat as 'high off the hog,' have fewer computers, take fewer luxurious cruises, and are less well represented in high-end private schools. If we as a society are required to right the wrongs of 'environmental racism,' we must also alter these other perhaps more subtle instances of 'economic racism.'

A moment's thought, however, will disabuse us of this notion. There is a good, sufficient and *just* reason why whites should be better housed, fed, educated, transported, etc., than blacks. They are richer, on average. This has little or nothing to do with race,⁹ and much to do with wealth. Michael Jordan, Mike Tyson, Spike Lee, Oprah Winfrey, Jimmy Brown, Richard Roundtree, Michael Johnson, Evander Holyfield, Roy Jones, Dr. Dre, John Singleton, Ice Cube, Vernon Jordan, Naomi Campbell, Iman, Shaquille O'Neil, Carl Lewis, Robin Givens, Johnny Cochran, Eddy Murphy, Will Smith, Denzel Washington, Halle Berry, can all have if they wish Rolls Royces, lobster every night, Choate and Harvard, private jets, and trips to Europe. The can also, if they choose, live in upscale neighborhoods with every environmental amenity known to man. In contrast, poor whites for the most part just like poor blacks must do without such benefits. They must also live in more environmentally challenged neighborhoods, because they lack the requisite funds to do better for themselves.¹⁰

Let us attack this issue from another perspective: consider the issue of who initiates 'environmental racism.' The presumption of the critics is and must be that 'environmental racism' is initiated by whites, or by the power structure, or 'society,' or some such.¹¹ After all, murder, rape and theft are begun not by the victims, but by the perpetrators. Were this not the case, these acts would not be crimes at all but something very different. For example, murder would be converted into assisted suicide, rape into seduction, and theft into gift giving.¹² That is, if A asks B to kill him, and perhaps even

⁸ Again, it is not that their rights are violated, only that their surroundings are not as desirable as richer, on the average, whites.

⁹ For an economic analysis in support of this contention, see [2,7,17,21,22,28,38,37,36,35,34,33,32,39,40].

¹⁰ Of course, using international comparisons, poor people in the US, white and black, live immeasurably better than their counterparts in many areas of the world. Virtually everyone in America now has air conditioning, color TV, refrigeration, a telephone, an automobile, etc. The same, unfortunately, cannot be said for even the middle class in most countries on the globe.

¹¹ "EPA's Environmental Racism rule blamed for job losses in poor areas", The Washington Times, Oct. 14, 1998.

¹² Here is a parallel to the blackmail literature. An act can be considered blackmail no matter who initiates the threat (usually to release secret and embarrassing information) coupled with the demand (usually for money, or perhaps sexual services). This to say the least, is an anomaly, at least compared to the way we treat murder, rape and robbery. It is part of the case for the legalization of this activity. On this see [9,6,4,23,30,29].

pays him to do so, this may be a crime in some jurisdiction,¹³ but it is certainly not first-degree murder; rather, it is assisted suicide. If a woman asks a man to have sex with her, however this is characterized, it cannot be considered rape. And if C *requests* that D ‘rob’ him, it is not theft. C and D may be trying to steal from a third party, such as an insurance company, but that is another matter; D is no longer initiating a real holdup of C.

To put this into other words, if it is the blacks who are initiating ‘environmental racism,’ then this not only cannot be considered a crime, it cannot even be considered an injury to them.

How, then, and in what ways do the poor bring upon themselves ‘environmental racism’? It is simple. When offered a choice between a cheap dwelling with few environmental amenities, and an expensive one with many, they tend to choose the former. When moving into Manhattan, for example, a poor or black person will locate in Harlem, or in the lower East Side, rather than on Fifth Avenue in the 60s. The latter offers a very nice environment, with access to Central Park, but at a very high price. The best that can be said for the former areas, environmentally speaking, is that rents are relatively cheap there. Not only does this phenomenon apply to neighborhoods, it applies to towns as well. Very few poor people can be found in Scarsdale, NY, or Indian Wells, California, towns with many environmental amenities, where a small house sells for a half million dollars or more. Rather, they locate in poor towns, such as College Station, Arkansas, or Lake Charles, Louisiana, where housing is far cheaper and environmental benefits far fewer.

So, if the poor, of their own volition, move to less attractive areas so as to take advantage of the cheaper real estate prices available there, how can ‘environmental racism’ be considered an attack on them? It cannot. As it happens, matters are very much to the contrary. For suppose that the self-styled green anti-racists have their way, and succeed in rendering all neighborhoods, areas, towns, etc., *equal*, environmentally speaking. This would mean that real estate prices, too, would tend toward a rough similarity. But this would prevent blacks from stretching their dollars further, by occupying environmentally deprived areas. The green self-proclaimed anti-racists, then, are no friends of the black or poor communities.

Advocates of ‘environmental racism,’ were they to be logically consistent, would have to favor spreading rich and poor people, blacks and whites, homogeneously throughout the environment. Bill Gates and Michael Jordan will have to live cheek-by-jowl with the homeless, and denizens of the Bowery, no matter their desires in this regard. This is justice?

One way to promote ‘environmental racism,’ is, as we have seen, for the poverty stricken to seek out cheap real estate with few environmental amenities. But the direction of causation can also take place in the opposite direction. That is, sometimes a factory, plant or mill initiates matters, by locating in a poor area.

On superficial examination, this would appear to be more like the murder, rape or

¹³ Not libertarian ones. On this see [19,18,30].

theft cases discussed above. Here, the presumed ‘bad guy’ is at least initiating the harm. But this too should be legally unobjectionable, despite surface appearances.

First of all, the incursion of the commercial endeavor must be with the permission of the *owners* of the property in question. Only they can sell to a newcomer, and they would only do so if in their own minds, they benefitted more from the sale price than they lost from the alienation of their holdings. The tenants occupying the areas surrounding the new enterprise will of course lose out, given our assumption that these new structures are not environmentally attractive. But if so, their rent levels will fall, and we are in effect back at our first case, where poor racial minorities *voluntarily* trade environmental amenities for cold hard cash.

Secondly, various self-styled spokesmen for blacks and poor people (e.g. [41]) have long and bitterly complained about the fact that factories are *deserting* inner city areas. They characterize *this* as a form of racism. It would thus appear that the verdict is already in, all that needs to be done is to specify the particular charge: capitalism is guilty of racism no matter what it does. If factories *leave* black areas, they are racist in that they are not providing enough jobs; if they stay there, or enter for the first time, then they are *environmental* racists.¹⁴

What we may take from this discussion is the fact that plant location is a double-edged sword for the poor. Yes, it reduces environmental amenities, but, other things equal, it increases job availability. It is only under a free enterprise system that poor blacks (and everyone else for that matter) are allowed to make such tradeoffs for themselves. Plant location regulation, whether based on the fallacious notion of ‘environmental racism’ or racism due to factory desertion, deny this. If the cause of the environmental disparity is economics rather than racism, the tactic of prohibiting industrial development in minority and poor areas will harm the very communities that proponents of the ‘environmental racism’ theory propose to aid.

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¹⁴ [41] is entirely mistaken in thinking that firms would leave the inner city out of a racist desire to exacerbate black unemployment. They relocate out of these areas, on the contrary, because union-inspired minimum wage laws render such operations unprofitable ([1]). Often, they relocate to the South or to Third World countries which are relatively free of such obstructions to enterprise. A high incidence of crime in these areas provides another disincentive.

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