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## If I Had A Hammer: Why Permitting Challenges Do Not Fit in the Fight for Environmental Justice

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## **IF I HAD A HAMMER: WHY PERMITTING CHALLENGES DO NOT FIT IN THE FIGHT FOR ENVIRONMENTAL JUSTICE**

*Elizabeth M. Georges\**

There is an old saying – when the only tool you have is a hammer, everything starts to look like a nail. The point being that often we become so intent on applying a certain solution that we fail to recognize that the solution does not really get at the problem. As every weekend carpenter or do-it-yourself auto mechanic will tell you, if you persist too long in using the wrong tool, you can strip a screw, round off the corners of a lug nut, and turn a fixable problem into an unfixable mess.

Low income, minority communities are disproportionately exposed to the adverse effects of pollution.<sup>1</sup> The

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1. The literature discussing the statistical frequency with which waste facilities are sited in low income or minority communities is extensive. See, e.g., Vicki Been and Francis Gupta, *Coming to the Nuisance or Going to the Barrios: A Longitudinal Analysis of Environmental Justice Claims*, 24 *ECOLOGY L.Q.* 1 (1997); Terrance J. Certner et al., *Environmental Justice and Toxic Release: Establishing Evidence of Discriminatory Effect Based on Race and Not Income*, 3 *WIS. ENVTL L.J.* 119 (1996) (discussing both studies done by the authors and studies reviewed by the authors). While some of

environmental justice movement has determined that too many facilities that emit hazardous substances are being located in neighborhoods that are largely populated by African-Americans or other people of color.<sup>2</sup> However, the environmental justice movement has had little success trying to influence where these sources are located, using the legal system.<sup>3</sup>

Title VI of the Civil Rights Act of 1964 ("Title VI")<sup>4</sup> is a powerful statute in the fight against discrimination.

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these studies debate the accuracy of the methodology used or the legal applicability of the data, the majority of the studies confirm that at present, a disproportionate number of low-income minority communities serve as "hosts" to solid and hazardous waste facilities.

2. In a recent pre-meeting report prepared by Frances A. Dubrowski for the United States Environmental Protection Agency ("USEPA") in anticipation of the November 1999 meeting of the National Environmental Justice Advisory Council ("NEJAC"), ("1999 Pre-Meeting Report") Ms. Dubrowski interviewed a variety of stakeholders regarding the permitting process and environmental justice. The stakeholders interviewed, including industry, acknowledged that the role of environmental justice in the permitting process ranges from important to extremely important. See 1999 Pre-Meeting Report, at 6.

3. Generally, actions in courts alleging racial discrimination on the basis of where a permitted facility is located have met with little success. See, e.g., *Bean v. Southern Waste Management Corp.*, 482 F. Supp. 673 (S.D. Tex. 1977); *East Bibb Twiggs Neighborhood Ass'n. v. Macoa-Bibb County Planning & Zoning Comm.*, 706 F. Supp. 880 (M.D. Ga. 1989). Although court cases have been largely fruitless, community activism, sometimes referred to as "the court of public opinion," has often had an impact. The most publicized victory of this kind is the campaign of the residents of Convent, Louisiana, who succeeded in convincing officials of Japanese vinyl manufacturer Shintech, Inc. to downsize and relocate their proposed facility. See *Company Evades Environmental Racism Test*, N.Y. TIMES, Sept. 20, 1998.

4. 42 U.S.C. §§ 2000d-2000d-7. (1964) [hereinafter "Title VI"].

However, EPA's Title VI Interim Guidance (the "Interim Guidance")<sup>5</sup> is not the correct tool for the job. Indeed, the paralyzation has become so acute that the Title VI Implementation Advisory Committee convened by EPA Administrator Carol Browner (the "Title VI Committee") could do no more in their draft report to EPA than agree to disagree regarding the best means to implement Title VI within the permitting process.<sup>6</sup>

Title VI has two parts. The first part makes it a condition of receiving federal funds that a covered "program or activity" must not engage in intentional discrimination.<sup>7</sup> Section 602 of Title VI allows federal agencies to promulgate rules to terminate funding of programs or activities that engage in discrimination, whether intentional or unintentional.<sup>8</sup> The state agency authorized to administer an environmental permitting statute receives federal funds for its permit program, conditional on the agency's will to comply with Title VI.<sup>9</sup> Thus, while Title

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5. See United States Environmental Protection Agency, *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits* (1998). ("Title VI Interim Guidance").

6. See National Advisory Council for Environmental Policy and Technology, *Report of the Title VI Implementation Advisory Committee: Next Steps for EPA, State, and Local Environmental Justice Programs 1-9* (March 1, 1999).

7. See 42 U.S.C. § 2000(d)(1) (1964). "Program or activity" is defined at 42 U.S.C. § 2000d-4x (1964).

8. See *id.* § 2000(d)(2).

9. The major federal environmental statutes that require operating permits are: Title V of the Clean Air Act ("Clean Air Act" or "CAA"), the National Pollutant Discharge Elimination System program ("NPDES") under the Clean Water Act ("CWA"), and the Resource Conservation & Recovery Act ("RCRA") program. They each offer states the opportunity to obtain "authorization" to administer the statute. See 42 U.S.C. § 7411 (state implementation and enforcement under CAA); 33 U.S.C. § 1316(c) (State enforcement of standards of performance under the CWA); 42 U.S.C. § 6926 (authorization of state hazardous waste programs under RCRA). States

VI cannot expand an agency's decision-making authority, it may constrain the agency from engaging in discrimination with respect to the decisions it is authorized to make.<sup>10</sup>

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must usually apply to obtain the authorization, and as part of the authorization, receive federal grant money. See 40 C.F.R. § 52.21. In nearly every instance where EPA may grant authorization to administer a statute, EPA retains oversight authority over enforcement initiatives and requires that the state program be at least as restrictive as the federal rules. See *id.* States are not required to obtain authorization to administer federal environmental programs. For example, RCRA in the State of Iowa is administered directly by EPA Region 8, because Iowa has not requested authorization to administer RCRA.

10. The operative test used to determine whether a private right of action may be implied from a statute is found in *Cort v. Ash*, 422 U.S. 66 (1975). Among the factors in *Cort* is the requirement that the private right of action must comport with the overall legislative scheme of the statute. *Id.* at 82-84. In the case of environmental permitting statutes, a private right of action under Section 602 of the Civil Rights Act does not comport with the legislative scheme because it inappropriately adds criteria to the permitting statute. The Supreme Court has made it clear that actions under Title VI tailor themselves closely to what it is within the scope of the "program or activity" receiving federal financial assistance. See *United States Department of Transportation v. Paralyzed Veterans of America*, 477 U.S. 597 (1986). It is therefore inappropriate to consider acts that lie outside of the agency's authority to be part of the "program or activity" that engenders Title VI liability.

This is consistent with holdings in appellate courts that have rejected efforts by EPA to require consultation with the Fish and Wildlife Service ("FWS") and the National Marine Fisheries Service ("NMFS") on endangered species issues before granting water discharge permits as a condition of the delegation of the NPDES program under Section 402 of the CWA. 33 U.S.C. § 1342(b)(1)-(9); see also *American Forest and Paper Association v. United States Environmental Protection Agency*, 137 F.3d 291 (5th Cir. 1998). In *American Forest*, EPA threatened to veto any Louisiana state permit

The fundamental problem with the Title VI Interim Guidance is its inconsistency with the way in which environmental permitting statutes usually regulate. In theory, permitting statutes like RCRA, Title V of the Clean Air Act, and the National Pollution Discharge Elimination System ("NPDES") program regulate the operations of facilities to control the discharge of pollutants to the environment.<sup>11</sup> The standards, which are usually promulgated by the EPA, are supposed to protect human health and the environment.<sup>12</sup> In other

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that was not modified to the satisfaction of either FWS or NMFS's satisfaction. The Court held that EPA had no authority to require Louisiana to consult with FWS or NMFS on endangered species protection, nor could it veto a water discharge permit based on the failure to adopt FWS or NMFS's advice, because the protection of endangered species is not an enumerated criteria in CWA Section 402. 33 U.S.C. § 1342. The Court further held that nothing in the Endangered Species Act, 16 U.S.C. § 1536, grants EPA the authority to add criteria to those listed in CWA Section 402(b). *See id.*

11. *See, e.g.*, 33 U.S.C. §1311 (a) (stating that under the CWA any noncompliant discharge is in violation of law); 42 U.S.C. § 6925 (requiring all owners and operators of a facility under RCRA to obtain a permit); 42 U.S.C. §7661(a) (making it unlawful under the CAA to operate a major source without a permit where a Title V permit program is in place).

12. *See, e.g.*, 42 U.S.C. § 6924(a) (granting the Administrator authority to promulgate regulations establishing such performance standards, applicable to owners and operators of facilities for the treatment, storage, or disposal of hazardous waste identified or listed under this subchapter, as may be necessary to protect human health and the environment). *But see* 33 U.S.C. § 1314(b) (stating that in certain instances, the Administrator is confined to "technology-based standards," such as the requirement under the CWA that effluent limitations be set at levels consistent with applications of the best practicable control technology). It is axiomatic in administrative law that federal agencies, which derive their authority from Article II of the Constitution, may only receive the authority delegated to them by the Congress. *See Tank-*

words, they restrict a facility's operations, the types and quantities of material that can be used, where and how long wastes may be stored, and what kinds of control technologies, like scrubbers or treatment plants, must be installed.<sup>13</sup> Whereas the EPA standards regulate the activities at the facility, they do not regulate the decision of where to locate the facility.<sup>14</sup> That decision usually belongs to the permittee, subject to local zoning constraints.

Some programs can influence the location of facilities by adjusting the total amount of permitted discharge based on location.<sup>15</sup> Examples of these types of programs are the Prevention of Significant Deterioration program ("PSD program") under the Clean Air Act,<sup>16</sup> and the Total Maximum Daily Limit program ("TMDL program") under the Clean Water Act.<sup>17</sup> These programs can increase control requirements, usually based on uniform health-based criteria.<sup>18</sup> These standards set a total limit on the amount of a pollutant in an area, and require that all the collective sources within that area

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sley v. Garrelt, 174 B.R. 434 (Bankr. W.D. Va 1994). Moreover, this delegation of authority has specific parameters so that agency decisions may be measured against the agency's authority. It is arguable that an attempt by the EPA to utilize standards for decision-making in the permit context that look beyond general protection of human health and the environment is "arbitrary and capricious" because it exceeds EPA's authority.

13. See generally 10 C.F.R. § 600.116 (2000) (RCRA); see also 18 C.F.R. § 1313.5 (2000) (CAA); 15 C.F.R. § 922.134 (CWA).

14. See *id.*

15. See *infra* notes 16-18.

16. See 40 C.F.R. § 52.21 (1980) (Prevention of Significant Deterioration under the CAA).

17. See 33 U.S.C. § 303d (1981) (Water-quality based TMDL standards as part of NPDES program).

18. See 33 U.S.C. § 1311 (1977) (CWA); see also 42 U.S.C. § 7661 (1990)(CAA).

remain within that total limit.<sup>19</sup> The overall effect, ideally, is to force sources within a control area to collectively limit the amount of pollutants that are exposed to the residents within the control area.<sup>20</sup>

Under the environmental statutes, a state agency does not have the authority to tell a permittee where to locate a facility based on non-health, non-uniform factors.<sup>21</sup> This is the fundamental disconnect between the complaint process outlined in the Interim Guidance and the environmental permit statutes. To make the Title VI Interim Guidance work, the environmental permit statutes and the administering agency must assume authority that the statute has not given them and was not drafted to let them have.<sup>22</sup> If the Interim Guidance has not been effective in achieving environmental justice, and the stakeholders uniformly agree on that point, it is in large part because of this structural inconsistency.<sup>23</sup>

The relatively uneventful success of the National Environmental Policy Act ("NEPA")<sup>24</sup> is further evidence that

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19. See *supra* note 17.

20. Although the control areas in the PSD and TMDL programs are in theory a good start towards addressing the cumulative effects of pollution in minority communities, there are limitations. The control areas in these statutes are usually not small enough to rectify issues of environmental justice. TMDLs are usually based on a body of surface water, such as a specific river or lake. 33 U.S.C. § 1313 (1972). EPA is in fact, moving from setting TMDLs based on a "watershed" system that looks to the interconnected surface waters formed naturally in land basins. See 64 F.R. 46012 (1992).

21. See generally 33 U.S.C.S. § 2001(4).

22. See *supra* note 8.

23. See 1999 Pre-Meeting Report, *supra* note 2, at 4.

24. 42 U.S.C. §§ 4331-4370 (1970). For the NEPA Guidance see *Environmental Protection Agency, Final Guidance for Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analysis* 23 (April 1, 1998)

this "structural disconnect" is what renders the Title VI Interim Guidance ineffective. The NEPA Guidance, finalized in April 1998, requires considerations of environmental justice to be incorporated into every environmental impact statement and environmental assessment performed as part of the NEPA process.<sup>25</sup> Unlike the Title VI Interim Guidance regarding environmental permitting, the NEPA Guidance has passed from proposal to acceptance to implementation with relatively few major disputes.<sup>26</sup> In contrast, the permitting guidance has languished in various stages of drafting.<sup>27</sup>

There is an obvious fit between the concerns of environmental justice and NEPA's mandate. NEPA's mandate is that all major federal actions with significant environmental impact receive a "hard look" in the form of an environmental impact statement.<sup>28</sup> Unlike environmental permitting statutes, NEPA does not regulate activities or operations; it regulates the decision-making process itself.<sup>29</sup>

The irony of the Title VI debate is that EPA did not want to take the same approach as with NEPA to apply environmental justice in its permitting programs. EPA

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<<http://es.epa.gov/ocea/ofa/ejepa.html>>. The NEPA Guidance serves as a guide to incorporate environmental justice goals into the EPA's preparation of environmental impact statements and environmental assessments under NEPA. *See id.*

25. *See id.*

26. *See id.* at 6.

27. EPA's Office of Civil Rights has again distributed a redrafted guidance document to the Regions for comment. EPA has indicated plans to release the Guidance for public comment sometime next year. *See EPA Civil Rights Investigation Guidance Will Likely Remain Unchanged*, *INSIDE EPA*, Vol 20, No. 46 (Nov. 19, 1999).

28. *See* National Environmental Protection Act, 42 U.S.C. § 4332(c) [hereinafter "NEPA"].

29. *See, e.g.,* *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

long ago took the position and defended it successfully in appellate courts that NEPA does not apply to the act of granting an environmental permit.<sup>30</sup> This approach is unfortunate, because where NEPA is applied, it is an ideal vehicle for assuring discrimination plays no part in where pollution sources are located. NEPA is designed to provide the deliberate process that environmental justice concerns require – an in-depth evaluation of the potential impacts of the proposed action and a thorough analysis of alternatives.<sup>31</sup> Unlike permitting statutes, NEPA's structure lends itself readily to environmental justice considerations. That may be why the NEPA Guidance has met with less opposition.

All people should be equally protected from the harmful effects of pollution. If the environmental permitting statutes are ill equipped to fix the problem posed by the environmental justice movement, what is the appropriate solution? Contrary to the belief of activists, permitted facilities do not cause health problems and environmental degradation. Rather, these effects stem from the nature and the amount of discharge the facilities release into the environment. Consequently, the important issue is not the number of facilities in any given neighborhood, but rather the number of pollutants released. This is where the permitting statutes may be able to help. The permitting statutes may not address the location of facilities, but they do control the discharge of pollutants into the environment.<sup>32</sup> Most

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30. See, e.g., *State of Ala. ex rel. Siegelman v. United States Environmental Protection Agency*, 911 F.2d 499 (11th Cir. 1990).

31. See NEPA, *supra* note 28.

32. Each of the permitting statutes set discharge limitations on the permitted substances, where discharge is permitted. See 18 C.F.R. § 1316.5 (CWA); see also 15 C.F.R. § 922.134. Where discharge is not permitted, (in the RCRA program) the permit specifies appropriate treatment, storage

pollution control statutes grant their permits based on health-based standards.<sup>33</sup>

The permitting statutes may reduce some of the resistance from industry stakeholders by insisting on equality in the use of health-based standards. The most substantial issue for permit holders is that in their view, the Interim Guidance as it is currently devised, essentially turns every permit application process into a federally-mandated zoning inquiry that was not contemplated in the environmental statutes.<sup>34</sup> Moreover, because the Interim Guidance currently applies to renewals, the Interim Guidance revisits siting decisions that may have taken place decades ago.<sup>35</sup> The siting decision, whether it was made 40 years ago or 40 days ago, was never part of the permitting process. It is much more difficult for permit holders to argue against permit criteria aimed at protecting the health of the communities in which they operate, since that criteria has always been part of the permit process.<sup>36</sup> Indeed, that is the reason for issuing permits in the first place.

If environmental justice is written into the permit requirements, individuals will not need to protect their rights against unintentional discrimination in federal court through Title VI. Enforcing environmental justice through discharge and emission standards contained in permits neutralizes the availability of a private right of action under Section 602 of Title VI, an idea left open by *Chester Residents*.<sup>37</sup> A private right of action already

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and handling of specific substances. See 10 C.F.R. § 600.116 (RCRA).

33. See *id.*

34. See 1999 Pre-Meeting Report, *supra* note 2, at 6.

35. See *Title VI Interim Guidance*, *supra* note 5.

36. See *supra* note 24.

37. *Chester Residents v. Seif*, 132 F.3d 925 (3rd Cir. 1997) (dismissed on grounds of mootness). The issue in this case was whether or not a private right of action for unintentional discrimination exists under Section 602 of Title VI. There is an explicit private right of action under Section 601

exists to sue a facility that is discharging more pollutants than its permit allows.<sup>38</sup>

Environmental injustice is an old problem, which people have finally become serious about fixing. Environmental justice is in fact a new frontier. Making it happen will require everyone, including the EPA, industry and activists, to rethink the way they do things, and the tools they use to do them. The Title VI Interim Guidance, the way it is crafted right now, is inadequate. It is not the right tool. We can continue to try and use an ill-fitting tool, or we can go back to the toolbox and try to find something better. We can create new tools, we can use old tools in new ways. The only imperative is that whatever tool we use must get the job done.

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of Title VI. 42 U.S.C. § 2000(d)(1). The Supreme Court has not decided the question of whether a private right of action for disparate impact, or unintentional discrimination, exists under Section 602.

38. See, e.g., 42 U.S.C.A. § 6972 (1980)(RCRA); 33 U.S.C.A. § 6972 (1948)(CWA). Moreover, at least in the case of the Clean Air Act, EPA initiatives such as the "credible evidence rule" make it easier than ever for citizens to bring suit against permit violators, because plaintiffs need not utilize the specific data used by EPA to monitor compliance. Plaintiffs may use "any credible evidence" that a violation has occurred. See *Credible Evidence Revisions*, 62 Fed. Reg. 36, 8319 (1987).

