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I. INTRODUCTION

A new battle is underway to drastically expand the traditional goals of environmental protection and the weapons are various federal claims, statutes, regulations and governmental agencies. Historically, environmental protection goals have been concerned primarily with two basic objectives: 1) defining acceptable levels of emissions, and 2) establishing regulations to maintain emissions within those levels.[1] Today, a third objective is being advocated by groups to achieve an "equitable distribution" of environmental risks across societal lines. This new issue is commonly referred to as "environmental equity," and the movement to attain "environmental equity" is called the "environmental justice movement."

The "environmental justice movement" has also been characterized as an effort to combat "environmental racism." The term "environmental racism" was coined in 1982 by Dr. Benjamin Chavis, Executive Director, United Church of Christ Commission for Racial Justice as:

> . . . the deliberate targeting of people of color communities for toxic waste facilities and the official sanctioning of a life threatening presence of poisons and pollutants in people of color communities.[2]

Thus, "environmental racism," by definition, refers to intentional environmental discrimination.

The environmental justice movement was originally fueled by studies by the General Accounting Office, the United Church of Christ Commission for Racial Justice, and the United States Civil Rights Commission's advisory groups have been released which suggested that minorities bear a larger burden of environmental risks than whites[3] and at least two of these studies cite environmental racism as the cause.[4] The studies suggested that minority neighborhoods were "disproportionately impacted" by industrial and hazardous waste facilities and/or by government systems which permit and regulate these facilities.

While in certain cases the racial composition of residential neighborhoods surrounding industrial and hazardous waste facilities may be comprised of minority groups, the existence of such facilities near minority neighborhoods does not in itself establish the existence of intentional environmental discrimination. The proximity of industrial facilities is usually attributed to the availability of large tracts of land and transportation facilities. Testimony before a subcommittee of the U.S. House of Representatives noted:

> Some argue that race alone determines these outcomes, not income. This oversimplifies a much more complex issue, nor is it clear that race as opposed to income levels or political power is the most relevant factor. It must be obvious to us all that in this country race and income are too often closely related. It is difficult to disaggregate these factors when determining causes . . . I disagree . . . with the largely self-defeating attempt to pin the causes on race to the exclusion of other factors.[5]

It is important that industry be aware of developments in the environmental justice movement, anticipate potential political and legal ramifications, and adopt strategies available to counter, prevent, and resolve environmental racism claims.

II. KEY EVENTS AND STUDIES

A. The Warren County Siting Decision

The environmental justice movement was triggered in 1982 after the U.S. Environmental Protection Agency ("EPA") and North Carolina state officials decided to allow a landfill for polychlorinated biphenyls (PCBs) in Warren County, North Carolina. More than 63% of the population of Warren County was minority, the residents earned an average per capital annual income of less than $7,000, and the unemployment rate for the county exceeded 13%. Residents of Warren County joined with civil rights and political leaders in protest regarding the site selection process for a hazardous waste facility. The protest raised the question of "how such decisions are made and how many other racial and ethnic communities were similarly affected by hazardous wastes."[6] Over 500 people were arrested in the demonstrations that occurred, including a number of

national civil rights leaders and a Congressman. Following the events in Warren County, Congressman Fauntroy of the District of Columbia, requested that the U.S. General Accounting Office ("GAO") investigate the correlation between the location of hazardous wastes landfills and the racial and economic status of surrounding communities.[7]

B. The GAO Study

In 1983, the GAO surveyed four off-site hazardous waste landfills located in EPA Region III, the southeastern United States. The study found that minorities constituted the majority of the population in communities surrounding three of the four landfills, and that at least 26% of the residents of all four communities had income below the poverty level. The GAO findings were considered significant because it was the first official recognition by the U.S. government of a possible relationship between race, income, and the siting of hazardous waste facilities. However, the impact of the study was limited by its regional scope.[8]

C. The UCC Report

The findings of the GAO report and the earlier events in Warren County prompted the United Church of Christ Commission for Racial Justice ("UCC") to conduct a national study of the distribution of hazardous waste sites in relation to minority communities. The UCC study was released in 1987, and reported that: 1) communities with commercial hazardous waste facilities were found to have twice the percentage of racial minorities as communities without such facilities, 2) communities with more than one facility or with the largest toxic waste dumps have three times as many people of color, 3) three of the five largest landfills with toxic waste in the country are in black and hispanic communities, and 4) race was the most significant predictor of where commercial toxic waste treatment, storage, and disposal occur nationwide.[9] According to the UCC, socioeconomic status appeared to be an important factor, but was less significant than race. Also, the UCC expressed that the results of the study suggested that disproportionate numbers of racial and ethnic persons residing near hazardous waste facilities was a consistent national pattern, not a random occurrence.[10]

D. The University of Michigan Conference

The GAO and UCC studies generated considerable controversy and academic inquiry. In January, 1990, academic and government officials from across the country met at a conference at the University of Michigan to present and discuss papers on a variety of environmental justice issues. Following the conference, participants met with EPA Administrator William K. Reilly, who agreed to create an "Environment and Equity" work group at the agency. This group was assigned to audit EPA policies from an equity perspective, taking into account both income and race.

E. The EPA Report

The work of the "Environment and Equity" group resulted in a 1992 report by EPA entitled "Environmental Equity, Reducing Risk for all Communities."[11] Overall, the report suggested that minorities experienced a greater than average exposure to some environmental pollution; but, race was not as significant as poverty in determining which communities face the highest risk. Specific findings by EPA included: 1) there are differences between racial groups in terms of disease and death rates, but there is limited data to link environmental exposures to these differences and there is limited data on environmental health effects by race and income; 2) racial minority and low income populations experience higher than average exposures to selected air pollutants, hazardous waste facilities, contaminated fish, and agricultural pesticides in the workplace; 3) environmental and health data are not routinely collected and analyzed by income and race; and 4) although risk assessment and management procedures are not in themselves biased against certain income or racial groups, these procedures can be improved to better take into account equity considerations.[12]

F. The NLJ Investigation

In 1992, the National Law Journal ("NLJ") conducted a special investigation and study of the connection between race and EPA enforcement of environmental laws. After reportedly analyzing all U.S. environmental lawsuits concluded between 1985 and 1992, the NLJ concluded that, "penalties against pollution law violators in minority areas are lower than those imposed for violations in largely white areas."[13] Further, after reportedly analyzing all residential

toxic waste sites in the Superfund program, the NLJ concluded that, "government takes longer to address hazards in minority communities and accepts solutions less stringent than recommended by the scientific community."[14] Specific findings by the NLJ included: 1) penalties under hazardous waste laws in areas having the greatest white populations averaged 500% higher than in areas with the greatest black populations; 2) the disparity in penalties occurs by race alone, not income, as average penalties were essentially the same in the lowest and highest median income areas; 3) hazardous waste sites in minority areas took 20% longer to be placed on the Superfund national priority list; 4) clean-up actions at sites in minority areas begin from 12% to 42% later in more than half of the EPA's ten regions; and 5) at minority area sites, EPA chooses "containment" remediation procedures 7% more frequently than "permanent" treatment. At white sites, EPA orders "permanent" treatment 22% more often than "containment."[15]

Notably, at least one writer questioned the NLJ's statistical methodology and stated:

> I doubt the results of your study . . . because you are clearly selecting from a larger data base the bits of data that support your theory . . . I am not a fan of entities that pollute . . . I just do not like having information reported selectively to support a theory.[16]

G. The LAC Study

In response to issues raised by the environmental justice movement, the United States Civil Rights Commission formed state advisory groups. The Louisiana Advisory Committee to the U.S. Commission on Civil Rights ("LAC") released a report in September, 1993, that evaluated the state's environmental policies and procedures from an equity perspective and included results of a fact finding study on environmental issues in black communities in the state.[17] The study is significant from a national perspective because Louisiana is one of the largest producers of oil and natural gas in the United States and home of an enormous petrochemical industry.[18]

Although, not specifically stated in the report, the LAC found no indication of environmental racism in Louisiana, as a separate opinion of one LAC members noted:

Absent from the report is the one finding most clearly supported by the evidence: Environmental racism has not been shown to exist in Louisiana . . . None of the extensive findings contains anything about, nor could they support a finding of "deliberate targeting" [of people of color communities for toxic waste facilities], and the "official sanctioning" [of a life threatening presence of poisons and pollutants in people of color communities].[19]

The LAC did conclude that seven black communities in Louisiana were "disproportionately impacted" by state and local systems for permitting and expansion of hazardous waste and chemical facilities. However, five of the seven communities were located in the midst of a heavily industrialized corridor along the Mississippi River between Baton Rouge and New Orleans.

III. FEDERAL RESPONSE

The federal environmental justice mandate requires federal agencies to identify and address "disproportionately high and adverse human health or environmental effects of [their] programs, policies, and activities on minority populations and low-income populations."[20] Executive Order No. 12,898, § 1-101. The Executive Order also directs federal agencies to develop an "environmental justice strategy" to help achieve the goals of the environmental justice mandate through public participation, the promotion of enforcement of all health and environmental statutes in areas with minority populations and low-income populations, and the improvement of research and data collection in those areas.[21] Executive Order No. 12,898, § 1-103.

(1) Significant EPA Environmental Appeals Board Decisions Addressing Environmental Justice Claims.

A review of key decisions of the EPA Environmental Appeals Board and administrative action evidence an increasing importance on addressing claims of "environmental equity." Based on these actions and EPA's current environmental justice strategy, permitting will likely be subjected to increased government scrutiny and industry will be subjected to stricter permitting requirements for sites in minority areas.

(a) In re Chemical Waste Management of Indiana, Inc., RCRA Appeal Nos. 95-2 and 95-3, 1995 WL 395962 (EAB, June 29, 1995).

In re Chemical Waste Management of Indiana, Inc., RCRA Appeal Nos. 95-2 and 9503, 1995 WL 395962 (June 29, 1995) involved a petition to the EPA Environmental Appeals Board seeking review of an EPA Region V decision to issue a permit pursuant to the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 et seq., to Chemical Waste Management of Indiana, Inc. ("CWM") for a hazardous waste landfill facility. EPA issued a Hazardous and Solid Waste Amendment ("HSWA") permit to CWM; Indiana issued the RCRA portion of the permit.

Several citizens groups appealed the HSWA permit, alleging that the facility's operation had a disproportionately adverse impact on the health, environment, or economic well-being of minority or low-income populations in the surrounding area. Included in Petitioners' challenge to the Region's permit decision was a claim that EPA failed to promulgate a national environmental justice strategy as it is required to do under Executive Order No. 12,898 and a claim that EPA's demographic study, the scope of which was limited to one-mile radius around the facility, was clearly erroneous and ignored evidence presented during the comment period.Id. at 1.

During its discussion of these claims, the Environmental Appeals Boarddefined the scope of "environmental justice" as utilized in Executive Order No. 12,898:

"Environmental Justice," at least as that term is used in the Executive Order, involves "identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of [Agency] programs, policies, and activities on minority populations and low-income populations * * *." 59 Fed. Reg. at 7629. Some of the commenters also believe that environmental justice is concerned with adverse effects on the economic well- being of such populations. Thus, when Petitioners couch their arguments in terms of environmental justice, they assert that the issuance of the permit and the concomitant operation of the facility will have a disproportionately adverse

impact not only on the health and environment of minority or low-income people living near the facility but also on economic growth and property values.

Id. at 4 (emphasis added). After defining "environmental justice" and delineating the groups in society protected by "environmental justice," the Environmental Appeals Board thusclarified the effect that Executive Order No. 12,898 would have on the RCRA permitting process. The Executive Order expressly pronounces that "federal agencies shall implement this order consistent with, and to the extent permitted by, existing law."Id. at 5. However, under federal law, public support or opposition to thepermitting of a facility can affect a permitting decision if such support or opposition is based on issues relating to compliance with the requirements of RCRA or RCRA regulations or such support or opposition otherwise relate to protection of human health or the environment.Id. at 5.

Further, the Environmental Appeals Board found that Executive Order No. 12,898 did not purport to, nor has the effect of, changing the substantive requirements for reviewing a permit under RCRA. The Board described the effect of Executive Order No. 12,898 on the permitting process as follows:

The Region correctly observes that under RCRA and its implementing regulations, "there is no legal basis for rejecting a RCRA permit application based solely upon alleged social or economic impacts upon the community." Region's Response to Petition at 11. Accordingly, if a permit applicant meets the requirements of RCRA and its implementing regulations, the Agency must issue the permit, regardless of the racial or socio-economic composition of the surrounding community and regardless of the economic effect of the facility on the surrounding community.

Id. at 5 (emphasis added). However, the Environmental Appeals Board noted that there are two areas in the RCRA permitting scheme in which EPA has significant discretion to implement the mandates of the Executive Order: (1) public participation, and (2) the omnibus clause under Section 3005(c)(3) of RCRA. Both provisions are discretionary.

Under this analysis, Executive Order No. 12,898 must be implemented in the permitting process when environmental justice issues are applicable to the implementing regulations. Environmental justice issues are applicable to a permitting scheme "when the Region has a basis to believe that operation of the facility may have a disproportionate impact on minority or low-income segment of the affected community . . ."Id. at 5 (emphasis added). In these instances, EPA should, as a matter of policy, exercise its discretion to assure early and ongoing opportunities for public involvement in the permitting process.Id. at 5.

Thus, the Board found that environmental justice concerns must be implemented in the permitting process when EPA makes a properly supported finding that (1) environmental justice issues exist, and (2) that exercise of its omnibus authority is necessary to protect human health and the environment. The Environmental Appeals Board stated that "[under the omnibus clause, if the operation of the facility would have an adverse impact on the health or the environment of the surrounding community, the Agency would be required to include permit terms or conditions that would ensure that such impacts do not occur."Id. at 6.

Under the omnibus clause, the agency can take a "more refined look at its health and environmental impacts assessment."Id. at 6. However, according to the Environmental Appeals Board, RCRA's omnibus clause is limited in its application:

> [I]n response to an environmental justice claim, the Region would be limited to ensuring the protection of the health or environment of the minority or low- income populations. The Region would not have discretion to redress impacts that are unrelated or only tenuously related to human health and the environment, such as disproportionate impacts on the economic well-being of a minority or low-income community.

Id. at 6.

Finally, the Petitioners inChemical Waste Management challenged EPA's efforts to determine whether operation of the facility would have a disproportionate impact on minority or low-income populations. During the permitting process EPA performed a demographic study, based on census figures, of the racial and

socio-economic composition of the community surrounding the facility. EPA chose a one-mile radius for the demographic evaluation based upon a CERCLA guidance document developed for CERCLA sites without groundwater contamination.[22] The Environmental Appeals Board denied the challenge to the one-mile radius but stated that the "proper scope of a demographic study to consider [environmental justice] impacts is an issue calling for a highly technical judgment."Id. at 9. According to the Board, such a determination should be made by the agency.

On the merits, the Board denied the request to review EPA's decision to issue the permit. The decision was based on a finding that the Petitioners failed to demonstrate how the absence of a national environmental justice strategy led to an erroneous permit decision or that the Region clearly erred in restricting the scope of its demographic study to a one-mile radius. Petitioners also failed to show that the Region clearly erred in concluding that there would be no disproportionate adverse impact on low-income or minority populations within a one-mile radius.

(b) In re Puerto Rico Electric Power Authority, PSD Appeal No. 95-2, 1995 WL 794466 (EAB, December 11, 1995).

In re Puerto Rico Electric Power Authority, PSD Appeal No. 95-2, 1995 WL 794466 (December 11, 1995) involved review of the issuance of a final PSD permit issued by EPA Region II to the Puerto Rico Electric Power Authority ("PREPA") for construction of a 248-megawatt combustion turbine simple-cycle electric generating station to be constructed on a 52-acre site in Cambalanche, in the municipality of Arecibo, Puerto Rico. A citizens' action group petitioned the Board to review EPA's decision to issue the final PSD permit contending that failure to conduct an epidemiology study around the proposed facility violated President Clinton's Executive Order on environmental justice.

The Environmental Appeals Board rejected the environmental justice claim, finding the petition lacking in specificity, thereby preventing review.[23] The Board also stated that "[t]he petition does not even facially demonstrate that the Region's methods or conclusions were wrong."Id. at 3. Finally, the Board held that the Region satisfactorily responded to environmental justice issues raised during the comment period by (1) ensuring public participation in the

permitting process, and (2) performing a comprehensive environmental justice analysis.

EPA responded to environmental justice issues raised during the comment period by ensuring public participation in the permitting process and by performing a comprehensive demographic analysis.[24]Id. at 3. Based on this analysis, the Region concluded that the proposed project would not cause a disproportionate adverse health impact to lower-income populations. Accordingly, review on the basis of environmental justice was denied.

(c) In re Envotech, L.P., UIC Appeal Nos. 95-2 through 95-37, 1996 WL 66307 (EAB, February 15, 1996).

In re Envotech, L.P., UIC Appeal Nos. 95-2 through 95-37, 1996 WL 66307 (February 15, 1996), involved an appeal of two Class I Underground Injection Control ("UIC") permits issued by EPA Region V to Envotech Limited Partnership ("Envotech") pursuant to Sections 1421(b) and 1422(c) of the Safe Drinking Water Act ("SDWA"). The permits authorized Envotech to construct and operate two hazardous waste injection wells in Washtenaw County, Michigan.

Various citizens appealed the permit on numerous grounds, including the contention that considerations of "environmental justice," and in particular the President's Executive Order on Environmental Justice dictated that the permits should be denied because the areas surrounding the site were already host to numerous burdensome land uses.Id. at 1. Included in the petition was an assertion that the permit should have been denied because of Envotech's allegedly poor environmental compliance history. However, the Board rejected this argument stating that a permittee's environmental compliance history is not uniquely an issue of environmental justice.Id. at 12.

In regard to issuance or denial of a permit, the Board concluded as follows:

[T]he Agency has no authority to deny or condition a permit where the permittee has demonstrated full compliance with the statutory and regulatory requirements. . . . Accordingly, if a UIC permit applicant meets the requirements of the SDWA and UIC regulations, the "Agency must issue the permit regardless of the racial or socio-

economic composition of the surrounding community and regardless of the economic effect of the facility on the surrounding community."

Id. at 13, citingChemical Waste Management at 10.

The Environmental Appeals Board inEnvotech referenced theChemical Waste Management decision in adjudicating petitioners' issues on environmental justice. Although theChemical Waste Management decision involved a RCRA permit, the Board stated that the principles articulated therein were instructive for similar permitting processes such as UIC permits. Thus, the Board inEnvotech listed the same two areas in the UIC permitting scheme where the Region has the necessary discretion to implement the mandates of the Executive Order on environmental justice: (1) public participation, and (2) the omnibus clause contained in the UIC regulations. Again, the Board held that environmental justice concerns should be addressed in the permitting process and that Executive Order No. 12,898 does not have the effect of changing the substantive requirements for issuance of a permit.

In Envotech, the Environmental Appeals Board held that the public participation procedures listed in 40 C.F.R. § 124 may be expanded to include environmental justice.Id. at 12. Under this expanded view, if a Region has a basis to believe that operation of a facility may have a disproportionate impact on a minority or low-income segment of the affected the community, the Region should, as amatter of policy, exercise its discretion to assure early and ongoing opportunities for public involvement in the permitting process. Second, under the omnibus clause listed in 40 C.F.R. § 144.52(a)(9), the Agency has broad authority to impose, on a case-by-case basis, permit conditions necessary to prevent migration of fluids into underground sources of drinking water.Id. at 14. The UIC omnibus clause applies even where no disparate impact has been alleged.

However, under the omnibus clause, and in response to an environmental justice claim, "the Region is limited to ensuring the protection of the [underground sources of drinking water] upon which the minority or low-income community may rely." . . . "The Region would not have the authority to redress impacts unrelated to the protection of underground sources of drinking water, such as

alleged negative impacts on the community, diminution in property values, or alleged proliferation of local undesirable land uses."Id. at 14.

As part of the permitting process for Envotech, EPA conducted a demographic analysis for a two-mile radius surrounding the sites. Based on the demographic analysis, EPA concluded that the impact of Envotech UIC permit decisions on minority or low income populations, if any, was minimal. The petitioners countered that EPA's response was inadequate because the area analyzed was too small to allow for proper evaluation of the sociological, health, and financial impacts.[25] In rejecting petitioners' assertion that the two-mile area used in the demographic analysis was too small, the Environmental Appeals Board cited theChemical Waste Management decision:

> The proper scope of a demographic study to consider such impacts is an issue calling for a highly technical judgment as to the probable dispersion of pollutants through various media into the surrounding community. This is precisely the kind of issue that the Region, with its technical expertise and experience, is best suited to decide.

Id. at 15, citingChemical Waste Management at 17 (citations omitted).

The Board concluded that, based on the record before it, the Region took adequate steps to implement the Executive Order by ensuring the participation of the community in the permitting process, and by conducting an analysis of any impact of the proposed wells on the minority and low-income segments of the community in which the wells were located.Id. at 14. With the exception of one issue (waste minimization certification), the petitioners failed to meet the stringent standards necessary to invoke Board review of the Region's decision. Thus, in all other respects (including the environmental justice claim), the petitions for review were denied.

(d) In re EcoElectrica, L.P., PSD Appeal Nos. 96-8 and 96-13, 1997 WL 160751 (EAB, April 8, 1997).

In re EcoElectrica, L.P., PSD Appeal Nos. 96-8 and 96-13, 1997 WL 160751 (April 8, 1997) involved an appeal of a prevention of

significant deterioration ("PSD") permit issued by EPA Region II to EcoElectrica Limited Partnership ("EcoElectrica") pursuant to 42 U.S.C. § 7475. The permit authorized EcoElectrica to install and operate a 461-megawatt cogeneration plant in Penuelas, Puerto Rico, and to construct a liquefied natural gas marine terminal to receive deliveries of the plant's primary fuel.

Various citizens appealed the permit on numerous grounds, including the contention that the Region's failure to require additional data-gathering by EcoElectrica "is an example of environmental injustice."Id. at 9. Although petitioner's reference to environmental justice was "entirely unexplained," the Environmental Appeals Board examined the Region's application of and compliance with Executive Order 12,898:

[I]n response to a commenter's observation that "Guayanilla and Penuelas are poor towns," the Region explained that it had performed an analysis specifically designed to identify any disproportionate impact of the EcoElectrica PSD permitting decision upon a low-income community. The Region explained in that in the course of that analysis it had assembled per capita income data from the 1990 Census, and source location data derived from the 1990 Toxic Release Inventory and from the Region's own Permit Compliance System database.

These data were subsequently geographically plotted for the Ponce, Guayanilla, and Penuelas Municipalities and for the Commonwealth of Puerto Rico as a whole. The location of the proposed facility, maximum emission impact data and monitored meteorological data were then plotted on maps to determine: (1) if the proposed facility was located in a lower income area; and (2) if the maximum emission impacts occurred in areas that were either lower than the Island's or the Guayanilla/Penuelas's per capita income average.

Id. at 9 (emphasis added).[26]

Based on this analysis, the Region determined that the location of the proposed facility was characterized by a median household income that was lower than the Commonwealth of Puerto Rico but higher than the median household income in nearby towns. In addition, the Region determined that the maximum emission impacts from the proposed facility would occur primarily in areas of

higher median household income than the surrounding areas. For these reasons, the Region concluded that "the proposed EcoElectrica facility does not have any disproportionately high impact to lower income communities."Id. at 9.

Since the petitioner in this case could not make a showing of clear error in connection with the Region's analysis of any environmental justice issues associated with the permit, the Environmental Appeals Board declined to review the Region's permit decision on grounds of environmental justice.[27]

(e) Environmental Justice Concerns Raised in the Shintech Permitting Process.

A far-reaching federal response to an environmental justice claim is illustrated by the "Shintech Decision." On September 10, 1997, EPA announced a major decision regarding "environmental justice concerns" raised by various public interest groups in opposition to Shintech, Inc.'s ("Shintech") applications for permits to construct and operate a facility in St. James Parish, Louisiana.SeeIn the Matter of Shintech Inc. and Its Affiliates' Polyvinyl Chloride Production Facility Permit 2466,67,68-V0, U.S. EPA.

On February 18, 1997, the Louisiana Department of Environmental Quality ("DEQ") issued proposed PSD and Title V operating permits for a facility in Convent Louisiana.[28] In issuing the permits to Shintech, DEQ acted pursuant to federal approval.[29] However, under Section 505(b) of the Clean Air Act, the EPA Administrator is authorized to review state operating permits issued pursuant to Title V and to object to permits that fail to comply with the applicable requirements of the Act.

"Citizen groups," represented by the Tulane University Environmental Law Clinic, petitioned the Administrator to object to the permits on technical grounds. In addition, the citizen groups raised "environmental justice concerns" and requested that the Administrator object to the permits under the authority of Executive Order 12,898.[30] In the "Order Responding to Petitioners' Requests that the Administrator Object to Issuance of State Operating Permits," the EPA Administrator observed:

> Petitioners assert that issuance of the Shintech Permits would disproportionately burden the surrounding predominantly African-American and low-income populations with increased levels of pollution, and increased health and environmental risks. Petitioners argue that permitting the Shintech facility in Convent would add too much additional air pollution to an area that Petitioners stress already bears a disproportionately high level of industrial pollution from existing facilities . . . . Petitioners further claim that environmental justice concerns mandate that Shintech go beyond the requirements of the Act in controlling HAP emissions from the PVC plant. Finally, Petitioners maintain that in assessing the possible impacts of the Shintech complex on the surrounding African-American and low-income communities, EPA should take into consideration what Petitioners characterize as LDEQ's ineffective enforcement record.

Id. at 6 (citations omitted, emphasis added). Thus, the petitioners urged the Administrator to go beyond what was required by the Clean Air Act and air quality regulations to remedy environmental justice concerns. Without directly addressing petitioners' claim to increase hazardous air pollutant emissions standards beyond the recognized standards, the EPA qualified its authority under Executive Order 12,898:

> While Executive Order 12898 was intended for internal management of the executive branch and not to create legal rights, federal agencies are required to implement its provisions "consistent with, and to the extent permitted by, existing law." Sections 6-608 and 6-609, 59 Fed. Reg. at 7632-33.

Id. at 7 n.5. Since the petitioners inShintech could not demonstrate how their "environmental justice concerns" resulted in a violation of the Clean Air Act by the permittee, EPA denied the petition, stating:

> Petitioners argue in their petitions that Executive Order 12898 requires EPA to object under the Clean Air Act to the proposed Shintech Permits on environmental justice grounds. Under section 505(b)(2) of the Act, however, a petitioner must demonstrate that a permit is not in compliance with applicable requirements of the Act. While there may be authority under the Clean Air Act to consider environmental justice issues in some circumstances, Petitioners have not shown how their particular Permits do not comply with

applicable requirements of the Act. In light of the foregoing, in response to Petitioners' request that EPA object to the Shintech Permits on this basis, their petitions are hereby denied.

Id. at 8 (emphasis added).

Although the Administrator found that the petitioners failed to demonstrate that the permits were not in compliance with the Clean Air Act, she nevertheless pronounced the following:

The Agency believes that the environmental justice claims raised by Petitioners in their Title VI complaint deserve serious attention. Consistent with the purpose of Executive Order 12898 and the use of Title VI as a tool for achieving the goal of environmental justice, EPA has accepted for investigation the Title VI complaint filed by Petitioners. Under EPA's Title VI regulations, the EPA Office of Civil Rights is conducting the investigation, which is ongoing. In addition, the State of Louisiana has agreed to address the environmental justice issues raised by Petitioners, and EPA has committed to work with the State to address the issues and find an appropriate resolution.

Id. at 8 (emphasis added). Administrator Browner closed her transmittal letter to the LDEQ stating:

EPA's Office of Civil Rights has accepted the Title VI complaints for further investigation. However, in addition to EPA's review, we believe that it is important for the state to establish a process for resolving these issues with the full and meaningful involvement of the surrounding community. We acknowledge, as an important first step, the state's pledge to initiate a broad- based process for involving all stakeholders to address these concerns and to develop a mutually acceptable resolution. And we support the state's plans to examine environmental justice issues in the heavily industrialized corridor around the Convent site, as the issues that are presented at Shintech may reoccur at other nearby facilities and elsewhere in the state.

EPA is committed to continuing its work with the state and the community to resolve the Title VI complaint. However, if there is no resolution of this matter, we will expedite our ongoing Title VI

review in order to ensure that the concerns of local residents are fully addressed.

In closing, our review of the issues arising from the proposed Shintech facility have highlighted the need for EPA to continue our work with communities, industry, state governments and other stakeholders regarding the resolution of environmental justice issues. In the near future, we anticipate working with stakeholders to address and resolve Title VI concerns, using forums provided by the Environmental Council of States, EPA's National Environmental Justice advisory Council and other appropriate entities.

Even though petitioners "environmental justice concerns" were denied by EPA in its Order, the Shintech decision nevertheless set a confusing tone. For instance, even though the petitioners inShintech did not show how their particular environmental justice concerns resulted in a violation of an air quality standard, the EPA stated that those claims "deserve serious attention."

(f) Interim Guidance for Investigative Title VI Complaints and Challenging Permits.

On February 4, 1998, the EDA issued this guidance to provide a framework for processing Office of Civil Rights complaints. The guidance provides for a factual investigation to determine, "whether the permit(s) at issue will create a disparate impact, or add to an existing disparate impact, on a racial or ethnic population." It also provides the mechanism the Agency uses in evaluating the results of the investigation. The general framework of determining whether a disparate impact exists involves the following steps:

Identifying the Affected Population;

Determining the Demographics of the Affected Population; 2. Determining the Universe(s) of Facilities and Total Affected Population(s); 3. Conducting a Disparate Impact Analysis; and, 4. Determining the Significance of Disparity.

"Mitigation" and "Justification" can also be considered by the Agency in arriving at a decision.

(g) Select Steel Corporation.

On October 30, 1998, the EPAdismissed an administrative complaint filed as the result of the Michigan Department of Environmental Quality issuing a clean Air Act permit to Select Steel Corporation. In doing so, the Agency noted that the facility wouldnot pose an "adverse impact on the community. The Agency did, however, opine:

Title VI prohibits discrimination based on race, color, or national origin under programs or activities of recipients of federal financial assistance. EPA has adopted Title VI implementing regulations that prohibit unjustified discriminatory effects which occur under federally-assisted programs or activities. 40 C.F.R. .Part 7. Discrimination can result from policies and practices that are neutral on their face, but have the effect of discriminating. Facially neutral policies or practices that result in discriminatory effects violate EPA's Title VI regulations unless they are justified and there are no less discriminatory alternatives.

MDEQ is a recipient of EPA financial assistance; therefore, MDEQ is subject to the requirements of Title VI and EPA's implementing regulations. Section 7.35(b) prohibits recipients from administering their programs in a manner that would have the effect of subjecting individuals to discrimination because of their race, color, or national origin. Section 7.3 of EPA's Title VI regulations provides that no person may be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving EPA assistance on the basis of race, color, or national origin.

* * *

As outlined in EPA's Interim Guidance, EPA follows five based steps in its analysis of allegations of discriminatory effects from a permit decision. "The first step is to identify the population affected by the permit that triggered complaint. The affected population is that which suffers the adverse impacts of the permitted activity." Interim Guidance at 8. If there is no adverse effect from the permitted activity, there can be no finding of a discriminatory effect which would violate Title VI and EPA's implementing regulations.

* * *

It is import ant to note that EPA believes that the evaluation of adverse, disparate impact allegations should be based upon the facts and totality of circumstances each case presents.

* * *

Although EPA has dismissed this complaint, we believe that the Complainants raised serious and important issues that merited a careful review. To the extent the Complainants have identified general concerns about pollution in their community, including existing elevated blood lead levels in children, EPA encourages the State to continue activities to address these concerns. EPA is available to provide technical assistance in these efforts. EPA also encourages the State to continue working with this community to improve understanding of regulated activities in their local environment and the Agency is available to facilitate these efforts should the parties so desire.

More broadly, EPA believes that many of the issues raised in the context of Title VI administrative complaints could be better addressed through early involvement of affected communities in the permitting process. Such consultations will better ensure that communities are fairly and equitably treated with respect to the quality of their environment and public health, while providing State and local decision makers and businesses the certainty they deserve.

In conclusion, please be aware that Title VI provides all persons the right to file complaints against recipients of federal financial assistance. No one may intimidate, threaten, coerce, or engage in other discriminatory conduct against anyone because he or she has either taken action or participated in an action to secure rights protected under Title VI. 40 C.F.R. § 7.120(a). The Agency would seriously consider and investigate such a complaint if warranted by the situation."

(h) In re Knauf Fiber Glass, 1998 WL 830742 (EPA).

This was a PSD permit review. There was a remand because therecord did not fully discuss the environmental justice concerns that were raised:

Unfortunately, there are no details regarding Region IX's determination in the administrative record. As such, we cannot judge the adequacy of the Region's analysis. See In re EcoElectrica, L.P., PSD Appeal Nos. 96-8 and 96-18, slip op. at 16-17 (EAB, Apr. 8, 1997), 7 E.A.D. __ (describing environmental justice analysis performed by Region in light of claim of low-income communities proximate to proposed facility). At a minimum, the petitioner's comment invoking the Executive Order deserves a more complete response than the cursory denial that is currently in the record. If an environmental justice issue is unlikely in the context of this proposed project, we need to know the basis for that conclusion. Therefore, we are including this issue as part of our remand order. AQMD should obtain the Region's environmental justice determination and make it available during the remand process. See alsoIn re Knaul Fiber Glass, 1999 WL 64235 (EPA).

(i) In re Environmental Disposal Systems, Inc., 1998 WL 723912 (EPA).

In re Environmental Disposal Systems, Inc., 1998 WL 723912 (EPA), addressed the scope of the necessary demographic analysis:

The proper scope of a demographic study to consider such impacts is an issue calling for a highly technical judgment as to the probable dispersion of pollutants through various media into the surrounding community. This is precisely the kind of issue that the Region, with its technical expertise and experience, is best suited to decide. Envotech, 6 E.A.D. at 283 (quotingIn re Chemical Waste Management of Indiana, Inc., 6 E.A.D. 66, 80 (EAB 1995)). Accordingly, we reject Mr. Basham's assertion that the two-mile area in which the Region conducted its demographic analysis was too small. Id. (rejecting challenge to two-mile demographic analysis).

(j) Report of the Title VI Implementation Advisory Committee, March 1, 1999.

This committee was established by the EPA Administrator and charged with reviewing "existing techniques" used by state and local agencies that receive federal funding for programs covered by Title VI, 42 U.S.C. § 2000 d-d7. The draft report notes that the committee members arrived at "conflicting interpretations" of the significance of theSelect Steel decision. The "Eight Consensus Principles" discussed in the report are:

6. The Committee unanimously endorses the concept of environmental justice.

7. The Committee is united in the belief that discrimination on the basis of race, color, or national origin is illegal and unjust.

8. Members of the Committee are unanimous in the conviction that early, proactive intervention is necessary if one is to deter Title VI violations and complaints. Whether preventive steps are implemented under the auspices of state and local governments, in the context of voluntary initiatives by industry, or at the initiative of community advocates, opportunities for potential protagonists to sit down and discuss their true needs before positions harden are invaluable. (Materials on the chemical industry's Responsible Care program are included with this report as Appendix I.)

9. The Committee unanimously agrees that the affected community, as an actual or potential victim of the discrimination Title VI seeks to prohibit, should not be treated by EPA and other regulatory agencies as merely another stakeholder group. Therefore, for state and local environmental justice programs to be truly proactive, they must purposefully promote and ensure meaningful participation by these communities.

10. The Committee believes that EPA must develop transparent and comprehensive standards and decision-making processes accessible to the community that it will use to evaluate Title VI complaints so that communities, industry members, and state and local officials will understand their prospects if a negotiated solution is impossible and EPA must decide the merits of a formal complaint. Although Committee members strongly disagree about the substance of those standards, they agree that such standards

are necessary, and recognize that uncertainty harms everyone by wasting limited resources that could be far better spent.

11. The Committee recognizes that community concerns about cumulative impacts are at the heart of many Title VI disputes. As described in the discussion of Track I, below, to address the communities' fundamental concerns effectively, appropriate authorities and other responsible parties should recognize the cumulative nature of such impacts and to attempt to take action to reduce and ultimately, eliminate the impacts.

12. The Committee recognizes that cumulative exposure to pollution and synergistic effects are important concerns raised in the Title VI context. The Committee is convinced that a dearth of reliable scientific research, as well as monitoring and modeling date, frequently makes it difficult to address such concerns. The Committee urges EPA and the states to make concerted, well-supported efforts to research the nature and existence of cumulative exposures and synergistic effects and the risks they pose. The Agency has already begun this crucial work, and the Committee recommends that it significantly expand those efforts.

13. Finally, the Committee urges EPA to conduct meaningful consultations with all affected stakeholders, including community groups and local governments, as it revises the Interim Guidance and moves on to consider other equally pressing applications of Title VI. The Committee has discovered during its deliberations that preconceptions about the positions various stakeholders will take are often erroneous and that it is always possible for people of good faith to gain a deeper understanding of the issues from each other. EPA's perception that stakeholders are in a state of irreconcilable difference, or that the Agency must respond immediately to reports or crisis in the field, should not deflect its attention from the very constructive efforts it has already made to encourage this ongoing dialogue.

CONCLUSION

"Environmental Justice" is a reality that Industry must recognize and address. The "movement" will impact industry in two primary areas — increased regulation and public relations. These issues are highly

significant to the future of industry. Therefore, it is submitted that Industry must be proactive in meeting the challenges presented by the environmental justice movement.

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1. Lazarus,Pursuing Environmental Justice: The Distributional Effects of Environmental Protection, 87 NW Univ. L.Rev. 787 (1993). [back to text]
2. Benjamin F. Chavis, Jr., Executive Director, United Church of Christ Commission for Racial Justice, testimony before the U.S. House of Representatives, Judiciary Committee, Subcommittee on Civil and Constitutional Rights, "Environmental Racism," Washington, D.C., March 3, 1993. [back to text]
3. U.S. General Accounting Office, "Siting of Hazardous Waste Landfills and Their Correlation with Racial and Economic Status of Surrounding Communities," 1983 (hereinafter cited as GAO Report"); United Church of Christ, Commission for Racial Justice,Toxic Wastes and Race in the United States: A National Report on the Racial and Socioeconomic Characteristics with Hazardous Waste Sites (1987) (hereinafter cited as UCC Report"); U.S. Environmental Protection Agency,Environmental Equity, Reducing Risks For All Communities (1992) (hereinafter cited as EPA Report"); National Law Journal,Unequal Protection, The Racial Divide in Environmental Law, A Special Investigation (1992) (hereinafter cited as NLJ Report"); Louisiana Advisory Committee to the U.S. Commission on Civil Rights,The Battle for Environmental Justice in Louisiana . . . Government, Industry, and the People (1993) (hereinafter cited as LAC Report").

[back to text]
4. UCC Report andNLJ Report,supra. [back to text]
5. Kyle McSlarrow, environmental attorney, testimony before the Subcommittee on Civil and Constitutional Rights, U.S. House of Representatives, March 4, 1993. [back to text]
6. LAC Report,supra, citing Colquette and Robertson,Environmental Racism: The Causes, Consequences, Commendations, 5 Tulane Environmental Law Journal 153 (1991). [back to text]
7. UCC Report,supra. [back to text]
8. LAC Report,supra. [back to text]

9. UCC Report,supra. [back to text]
10. Id. [back to text]
11. EPA Report,supra. [back to text]
12. Id. [back to text]
13. NLJ Report,supra. [back to text]
14. Id. [back to text]
15. Id. [back to text]
16. Ballenger,Methods Questioned in Unequal Protection, National Law Journal, Vol. 15, No. 10 (1992). [back to text]
17. LAC Report,supra. [back to text]
18. Id. [back to text]
19. LAC Report,supra, dissent by John S. Baker, Jr., Professor of Law, Louisiana State University Law Center. [back to text]
20. President Clinton's Executive Order addressing environmental justice was published in the Federal Register on February 16, 1994. See "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," Executive Order No. 12,898, 59 Fed. Reg. 7,629. [back to text]
21. EPA's Environmental Justice Strategy was issued on April 3, 1995.See EPA/200-R-95-002. [back to text]
22. The CERCLA guidance document ("Hazard Ranking System Guidance Manual") was published in November, 1992.See EPA 9345.1- 07. [back to text]
23. The Board held that the petition was so lacking in specificity that it did not meet the standards necessary to invoke Board review of the Region's decision promulgated in 40 C.F.R. § 124.19.Id. at 3. [back to text]
24. In this case, per capita income data, emission inventory data, and source location data were geographically plotted for the Arecibo Municipality, and for the island of Puerto Rico as a whole. The location of the proposed facility, maximum emission impact data and monitored meteorological data were then plotted on maps to determine: (1) if the proposed facility was located in a lower income area, and (2) if the maximum emission impacts occurred in areas that were either lower than the Island's or the Arecibo Municipality's per capita income average. [back to text]
25. Petitioners argued that a 10-mile radius should have been used and that impacts should have been analyzed by census tracts, rather than for the area as a whole.Id. at 11. [back to text]
26. TheEcoElectrica decision did not specifically state the geographic radius used in the demographic analysis. [back to text]

27. However, the Board stated in a footnote that it has "previously encouraged EPA Regional offices to examine any ‘superficially pausible' claim that a minority or low-income population may be disproportionately affected by a particular facility."Id. at 10 n.17 (citingChemical Waste Management andEnvotech decisions). [back to text]
28. Shintech submitted three applications to DEQ on July 23, 1996 for Part 70 operating permits in order to operate a chlor-alkali production facility, a PVC production facility, and a VCM production facility in Convent, Louisiana, St. James Parish. [back to text]
29. In September, 1995, EPA granted full approval of the Louisiana Title V operating permits program, which became effective in October, 1995. [back to text]
30. In a footnote, the Administrator examined the scope of petitioner's "environmental justice concerns:"

Petitioners do not define their use of the term "environmental justice concerns," but it is apparent that their petitions use the term, in part, to refer to alleged disproportionate impacts and burdens from pollution levels, and health and environmental risks on minority and low- income populations.

Id. at 6 n.4.