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ENVIRONMENTAL JUSTICE AND TITLE VI CHALLENGES TO PERMIT DECISIONS: THE EPA'S INTERIM GUIDANCE

Maura Lynn Tierney*

“Environmental injustice” refers to the theory that racial minorities and residents of low-income neighborhoods suffer discrimination because they do not receive adequate environmental protection and therefore must bear a disproportionate burden of hazardous facilities and projects. Environmental justice activists argue that the racism and classism of environmental organizations and state and local agencies systematically provide privileged white communities greater environmental protection than poor black communities. In contrast to the present national activism of the civil rights movement, the environmental justice movement is primarily the result of grassroots organization.

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1. See Debra Starkey et al., Environmental Justice: A Matter of Perspective, NAAG NAT'L ENVT'L ENFORCEMENT J., May 1997, at 3. The term “environmental injustice” is often used interchangeably with the terms “environmental racism” and “environmental inequality.” See id. The terms, however, have different meanings and connotations. See id. “Environmental racism” refers to policies and practices that have racially discriminatory environmental effects. See id. “Environmental equity” refers to the belief that all populations should bear proportional environmental pollution and health risks. See id. “Environmental justice” is a broader term that encompasses the meaning of both “environmental racism” and “environmental equality,” and refers to equal protection from environmental burdens and the risks associated with pollution. See id. See generally Major Willie A. Gunn, From the Landfill to the Other Side of the Tracks: Developing Empowerment Strategies to Alleviate Environmental Injustice, 22 OHIO N.U. L. REV. 1227, 1231-36 (1996) (providing a detailed discussion of each of these terms).


4. See Alice Kaswan, Environmental Justice: Bridging the Gap Between Environmental Laws and “Justice,” 47 AM. U. L. REV. 221, 226 (1997) (explaining how most of the participation in the movement stems from community groups engaged in local action). Although regional and national conferences help further the environmental justice movement, the “heart of the movement remains in its grassroots activism.” Id. at 228. For example, in October, 1991, the People of Color Environmental Leadership Summit met in Washington, D.C. and developed Principles of Environmental Justice to guide the grassroots movement. See Douglas A. McWilliams, Environmental Justice and Industrial Redevelopment: Economics and Equality in Urban Revitalization, 21 ECOLOGY L.Q. 705, 765 (1994). These Principles aim for community self-determination to promote protection of
Environmental justice surged onto the civil rights scene in 1982 when citizens in Warren County, North Carolina drew national attention by organizing a protest against efforts to site a polychlorinated biphenyl (PCB) disposal facility outside a predominantly black neighborhood. The citizens brought a complaint against the State of North Carolina and the Regional Administrator of the Environmental Protection Agency (EPA), arguing that the use of county land as a landfill for the disposal of contaminated soil was a public nuisance, and the EPA's approval of the site was defective, arbitrary, and capricious. The Warren County citi-

The grassroots environmental justice movement seeks to bridge traditional civil rights activism with the mainstream environmental movement. See Gunn, supra note 1, at 1227. From the civil rights movement, the environmental justice movement adopted the supposition that basic governmental institutions discriminate on the basis of race. See Gerald Torres, Environmental Justice: The Legal Meaning of a Social Movement, 15 J.L. & COM. 597, 598 (1996). The civil rights movement demonstrated "the extent to which the various institutions of our society are contaminated with the vestiges of de jure and de facto systems of white supremacy" while the environmental justice movement revealed that "environmental policy making seem[s] to exclude the interests of poor, non-white communities." Id. At the grassroots level, environmental justice gained support in minority communities by focusing on the need to combine the issues of environmental activism with the civil rights movement. See id. at 599. An early example of this initiative was the "Urban Environmental Conference," which discussed this approach based on the belief that central city residents were neglected in the environmental protection movement. See id.


6. See Warren County v. North Carolina, 528 F. Supp. 276, 280 (E.D.N.C. 1981). In Warren County, the first case against the state was litigated on public nuisance rather than civil rights grounds. See id. at 280. At the time, Warren County had the highest percentage of African-Americans in North Carolina. See Adam Swartz, Environmental Justice: A Survey of the Ailments of Environmental Racism, 2 HOWARD SCROLL: THE SOCIAL
zens protested against the landfill after the court denied the injunction, and police subsequently arrested more than four hundred African-Americans. This campaign garnered the attention of national civil rights groups and inspired grassroots organizations to challenge the inequitable distribution of environmental hazards and to promote environmental justice.

The plaintiffs also argued that the approval of the site by the EPA was defective because it contained impermissible waivers of regulations and because the state failed to prepare an adequate environmental impact statement (EIS). See Warren County, 528 F. Supp. at 280. Generally, an EIS is a document, mandated by environmental legislation, in which federal agencies set forth the environmental implications of their actions. See STEVEN FERREY, ENVIRONMENTAL LAW: EXAMPLES AND EXPLANATIONS 60-61 (1997). In an amendment to their complaint, the plaintiffs added a claim that the landfill was prohibited by a county ordinance. See Warren County, 528 F. Supp. at 280.

The court denied the plaintiff's request for an injunction. See Warren County, 528 F. Supp. at 282, 296. The court held that: 1) the plaintiffs lacked standing under the North Carolina statute to abate a public nuisance; 2) they lacked standing under the Toxic Substances Control Act; 3) the claim that the state failed to prepare an EIS was moot because the statement was eventually filed; 4) the EPA's decision was not arbitrary and capricious; 5) the Warren County ordinance the plaintiffs based their claim upon was void because it is preempted by the Toxic Substances Control Act; and 6) the filed EIS was not defective. See id. at 282-96.

7. See NAACP v. Gorsuch, No. 82-768-CIV-5, slip op. at 10 (E.D.N.C. Aug. 10, 1982) (on file with the Catholic University Law Review); Fisher, supra note 5, at 296. The citizens were arrested for participating in a civil disobedience campaign organized to keep the landfill out of their predominately black community. See Fisher, supra note 5, at 296. Among those arrested were two influential figures: Walter Fauntroy, the District of Columbia’s delegate to the U.S. House of Representatives and Dr. Benjamin Chavis, the head of the United Church of Christ's Commission on Racial Justice. See id. at 296-97.

The Warren County campaign prompted the local chapter of the NAACP, along with other citizens groups, to sue the state of North Carolina, the Administrator of the State EPA, and the state Department of Crime Control and Public Safety. See Gorsuch, No. 82-768-CIV-5, slip op. at 1; Lazarus, supra note 5, at 832. The NAACP sought a preliminary injunction under the Thirteenth and Fourteenth Amendments, the State constitution, and the Civil Rights Act of 1964. See Gorsuch, No. 82-768-CIV-5, slip op. at 2-3. Denying the injunction, the court held that the decision was not racially motivated, and the plaintiffs would not be irreparably injured because the state had taken steps to minimize harm. See id. at 9-10 n.8; see also Gunn, supra note 1, at 1279 (discussing Gorsuch and the feasibility of using equal protection law to address environmental injustice).

8. See Fisher, supra note 5, at 296 (discussing the involvement of the NAACP and figures such as Walter Fauntroy and Benjamin Chavis). Also involved in the grassroots campaign were groups such as the Sierra Club and the Urban League. See Torres, supra note 4, at 601-02 (discussing the organizations involved and the participation of Benjamin Chavis and Robert Bullard, a sociologist).

9. See McWilliams, supra note 4, at 761-64 (discussing the aftermath of the Warren County protest and the progression of the grassroots movement).
Prompted by the Warren County protest, the United States General Accounting Office (GAO) investigated the composition of southern communities that surrounded the nation’s four largest hazardous waste landfills. The GAO study identified a strong correlation between the racial and socioeconomic make up of communities and the location of landfill sites. For example, in the EPA’s southeast region, the study found that three out of four communities with landfills had populations of 52% to 90% African-Americans, and that all of the communities studied were overwhelmingly poor.

Several years later, a national study published by the United Church of Christ’s Commission on Racial Justice (UCC) found that “[r]ace proved to be the most significant among variables tested in association with the location of commercial hazardous waste facilities.”

10. See Schnell & Davies, supra note 2, at 528. See generally GENERAL ACCT. OFF., GAO/RCED-83-168, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES (1983) [hereinafter GAO STUDY]. In 1975, the United States Commission on Civil Rights declared that the EPA failed to ensure that minority complaints received the EPA’s attention. See Torres, supra note 4, at 599. The EPA responded that this responsibility was beyond its jurisdiction until William Reilly began to take these complaints seriously during his tenure as Administrator. See id.

11. See Schnell & Davies, supra note 2, at 528. One of the issues raised by the GAO Study was whether the discriminatory results were a product of intentional discrimination or instead, caused by other social and market forces. See id. at 528-29. For example, a study done by the University of Chicago concluded that waste disposal sites were located disproportionately in minority communities because of economic reasons, not racism. See Nelson Smith and David Graham, Environmental Justice and Underlying Societal Problems, 27 Envtl. L. Rep. (Envtl. L. Inst.), at 10,568-69 (Nov. 1997) (discussing the Chicago study).

12. See GAO STUDY, supra note 10, at 4; see also Fisher, supra note 5, at 297 (noting the disproportionality reflected in the GAO Study). The study also found that the fourth site was in an area that was only 38% African-American. See id. Within the four-mile radius, however, the population increased to between 69% and 92% African-American. See id.; see also Audrey Wright, Note, Unequal Protection Under the Environmental Laws: Reviewing the Evidence on Environmental Racism and the Inequities of Environmental Legislation, 39 WAYNE L. REV. 1725, 1728-29 (1993) (discussing the GAO Study and the Warren County protest).

13. COMMISSION FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES at xiii (1987) [hereinafter UCC STUDY] (discussing the major findings of the study).

Other studies have challenged evidence that forms the basis of environmental justice arguments. See Vicki Been, Analyzing Evidence of Environmental Justice, 11 J. LAND USE & ENVTL. L. 1, 2 (1995). For example, a national study conducted by the Social and Demographic Research Institute (SADRI) at the University of Massachusetts examined the same facilities as the UCC Study and concluded that “there was no statistically significant difference between the percentages of African-Americans or Hispanics” in areas of locally undesirable land uses (LULUs). Id. at 2-3. Professor Been argues that the different conclusions resulted from the use of different units of analysis. See id. at 3-4 (clarifying...
the demographic makeup of 415 localities that contained known commercial hazardous waste facilities and found that poor people were more likely to live near these facilities than middle or upper class groups. Communities with more than one such facility had three times the number of minorities as those without. The report concluded that these inequities represented institutionalized forms of racism, and that the disproportionate distribution of hazardous waste sites was based on race and other socioeconomic factors in permitting and siting decisions, not chance.

Environmental justice issues are a growing concern among national organizations and civil rights groups. Litigants have begun therefore, to use civil rights laws to address environmental justice issues, including Title VI of the Civil Rights Act of 1964. Title VI prohibits programs and activities receiving federal financial assistance from discriminating on the basis of race. Environmental justice advocates have brought federal civil rights complaints alleging that the disproportionate placement of hazardous facilities within minority communities is the result of discrimination by state permitting programs that receive federal funding. In response to the growing number of environmental justice complaints brought under Title VI, in 1998, the EPA's Office of Civil Rights (OCR) issued the Interim Guidance For Investigating Title VI Administrative

14. See Fisher, supra note 5, at 297 (discussing the methodology of the UCC Study).
15. See id.
16. See UCC STUDY, supra note 13, at 23.
17. See Kaswan, supra note 4, at 228. For example, the Washington Office of Environmental Justice and the Lawyer's Committee for Civil Rights' Environmental Justice Project have become involved. See id. at 228 n.20.
19. See id. § 2000d. The use of civil rights laws seems a natural progression for African-American litigants who have historically used such legislation to combat racial injustice. See Torres, supra note 4, at 601-03 (noting, however, that "the mechanical application of past solutions" may be inappropriate in the context of environmental justice). Federal and state environmental laws and the Constitution are also being used to fight siting decisions. See Cole, supra note 5, at 526 (discussing a litigation strategy that includes utilizing environmental laws that focus on procedures or that mandate public participation, civil rights laws including Title VI and VII of the Civil Rights Act, and Constitutional claims based on the Equal Protection Clause of the Fourteenth Amendment).
20. See Margaret Kriz, The Color of Poison, 28 NAT'L J. 1608, 1609-10 (1998). Minority groups asserting claims under Title VI have filed more than 50 petitions with the EPA. See id. As of June, 1998, the EPA had accepted 15 of the complaints for investigation, dismissed or rejected 30, and was holding seven for consideration. See Vicki Ferstel, Executive Order Draws Attention to New Concern, ADVOCATE (Baton Rouge), June 23, 1998, at 1A (describing a sampling of these cases).
Complaints Challenging Permits (Interim Guidance). The Interim Guidance provides a framework for the investigation and processing of Title VI administrative complaints alleging discriminatory impact resulting from the issuance of permits. Far from settling the controversy that the EPA designed it to address, the Interim Guidance has sparked disagreement among state officials, business and industry groups, and environmental justice advocates.

This Comment first traces the events that led the EPA to issue the Interim Guidance, examining the increasing use of Title VI of the Civil Rights Act by litigants seeking environmental justice. Next, this Comment discusses how the EPA's Interim Guidance addresses the relationship between environmental justice and Title VI. Recognizing the need to balance the interests of environmentalists with the advocates of urban redevelopment, this Comment argues for revisions to the Interim Guidance that would more effectively promote environmental justice while considering other valuable competing interests.

I. THE RISE OF ENVIRONMENTAL JUSTICE LITIGATION AND THE EPA'S INTERIM GUIDANCE

Twelve years after the Warren County protest brought the concerns of environmental justice to the attention of the general public, the Federal Government began to seriously address the issue, and the President issued an Executive order on environmental justice on February 11, 1994.
The EPA subsequently developed an Environmental Justice Strategy. \(^{25}\) Then, using its statutory authority, the EPA promulgated Title VI regulations. \(^{26}\) These three events are important because each signifies the Federal Government's burgeoning commitment to the environmental justice initiative and willingness to enforce firmly Title VI, prompting a rise in Title VI litigation. \(^{27}\)

### A. Federal Action: Executive Order No. 12,898 and the EPA's Environmental Justice Strategy

The number of states passing environmental justice legislation \(^{28}\) and
the proposed legislative initiatives by Congress reflect the movement of environmental justice toward the mainstream.29 This legislative activity, following the GAO and UCC studies, led President Clinton to issue Executive Order No. 12,898, which requires all federal agencies to consider and address issues of environmental justice.30 Executive Order No. 12,898 emerged as a result of the executive branch's commitment to improve the response of federal agencies to environmental justice concerns.31 The order, entitled Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,32 directs federal agencies to identify and address the trend of disproportionate accumulation of adverse environmental and health effects on minority and low-income communities in their programs, policies, and activities.33

29. See Torres, supra note 4, at 613 & n.44. For a collection of the proposed legislation, see Collin & Collin, supra note 28, at 423-24 & nn.85-87.

30. See Torres, supra note 4, at 614. Although subsequent studies have contested whether disproportionate distribution of hazardous waste facilities was a result of discrimination, the finding of the GAO and UCC studies gained sufficient credibility to warrant an Executive order addressing environmental justice. See Schnell & Davies, supra note 2, at 528-29. The order has three important aspects, which are meant to assist agencies in addressing environmental justice. See Torres, supra note 4, at 615-17. First, the order seeks to "naturalize" a concern for environmental justice in agency action by expanding the agency's mandate to address these concerns. See id. at 615-16. Second, the order requires inter-agency cooperation in information gathering and formulation of problems. See id. at 616. Finally, the order requires the development of an inter-agency "working group" that would gather and assemble recommendations and comments from the public. See id. at 617. President Clinton intended these three aspects, combined with the additional creation of the National Environmental Justice Advisory Committee by the EPA, to bring about the requisite changes necessary to further the Administration's environmental justice objectives. See id. at 615-17.

31. See Torres, supra note 4, at 614-15 (noting the order is designed to induce agencies into changing their decision-making structures to accommodate environmental justice issues and to incorporate those issues into their mission statement). The order grew out of the Clinton Administration's concern over the fair enforcement of federal environmental laws. See id. at 614-16.


33. See id. The order calls for increasing public participation in environmental decision-making and for improving data and research collection of the populations affected by environmental decisions. See id. § 860. In addition, the order requires agencies to develop environmental justice strategies that promote enforcement of statutory laws affecting human health and the environment in minority and low-income communities and to identify patterns of consumption of natural resources among these populations. See id. The Executive order also established the Interagency Working Group on Environmental Justice
Abiding by the order's requirements, the EPA issued its Environmental Justice Strategy: Executive Order 12898 (Strategy) in April 1995.\textsuperscript{34} The EPA designed the Strategy to ensure the full integration of environmental justice considerations into all agency activities.\textsuperscript{35}

In addition to the Executive order and the resulting EPA Strategy, a Presidential memorandum accompanying the order identified the importance of using environmental and civil rights statutes to address environmental justice issues.\textsuperscript{36} It also directed federal agencies to comply with Title VI of the Civil Rights Act of 1964 (Civil Rights Act).\textsuperscript{37} The memorandum, Executive order, and Strategy, however, do not elaborate on the application of Title VI. The EPA had implemented regulations explaining the implications of the Civil Rights Act on agency decisions.\textsuperscript{38}

\textbf{B. The EPA's Regulations Under Title VI of the Civil Rights Act of 1964: An Alternative to Equal Protection Claims that Provides a Cause of Action Based on Disparate Impact}

Activists began using Title VI of the Civil Rights Act in environmental justice litigation in light of the difficulty of proving intentional discrimination under the Equal Protection Clause.\textsuperscript{39} Enacted on July 2, 1964,
some commentators describe the Civil Rights Act as the most significant legislation passed in the twentieth century. Title VI of the Act forbids any program or activity receiving federal financial assistance from denying benefits or discriminating on the basis of race, color, or national origin. Although the language of Title VI does not specify whether proof of discriminatory intent or impact is necessary, the Supreme Court held in Guardians Ass'n v. Civil Service Commission of New York that Title VI can be expanded to include disparate impact if agency regulations so provide. Hence, the EPA regulations implementing Title VI expand the original scope of the Act, allowing plaintiffs to bring Title VI claims on the basis of disparate impact in addition to discriminatory intent.

A disparate impact claim asserts that, because of a facially neutral policy, a disproportionate discriminatory effect on a protected group has occurred. In Guardians, African-American and Hispanic members of the New York City Police Department challenged the department's "last-hired, first-fired" policy on Title VI grounds, arguing that it was


42. 463 U.S. 582 (1983). Prior to Guardians, case law suggested that proof of discriminatory intent was required because Title VI was believed to incorporate the same standards as the Fourteenth Amendment's Equal Protection Clause. See Professor William A. Kaplin, Civil Rights Law: Supplementary Cases and Materials 158-59 (1998) (unpublished course materials, on file with the Catholic University Law Review); cf INTERIM GUIDANCE, supra note 21, at 3 (noting that Title VI prohibits intentional discrimination).

43. See Guardians Ass'n, 463 U.S. at 592-93. Prior to Guardians, the Court held that "the validity of a regulation promulgated under a general authorization provision such as § 602 of Tit. VI will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation.'" Lau v. Nichols, 414 U.S. 563, 571 (1974) (quoting Thorpe v. Housing Authority of Durham, 393 U.S. 268, 280-81 (1969)) (footnote omitted). The Guardians court relied on Lau in upholding disparate impact suits brought under Title VI. See Guardians, 465 U.S. at 592 n.12. Disparate impact refers to the first type of basic claim under Title VII. See Kaplin, supra note 42, at 95. Under Title VII, plaintiffs may assert a disparate treatment claim arguing that the defendant intentionally treated him or her in a discriminatory manner because of the plaintiff's race, sex, national origin, or religion. See id.

44. See 40 C.F.R. § 7.35(c) (1994) (stating that a "recipient shall not choose a site or location of a facility that has the purpose or effect of" discriminating on the basis of race, color, national origin, or sex) (emphasis added).

45. See Kaplin, supra note 42, at 95.
discriminatory.\textsuperscript{46} The Court concluded that intentional discrimination is not required under Title VI, and a plaintiff may prevail under a disparate impact standard;\textsuperscript{47} however, only injunctive, non-compensatory relief is permissible for unintentional discrimination.\textsuperscript{48}

The EPA has used the Guardians decision to formulate its Title VI regulations, allowing for a disparate impact standard.\textsuperscript{49} In addition to prohibiting programs and activities that receive EPA assistance from discriminating on the basis of race, color, national origin, or sex, the EPA regulations incorporate the disparate impact standard by stating that a "recipient shall not choose a site or location of a facility that has the purpose or effect"\textsuperscript{50} of discriminating against individuals protected under the Act.\textsuperscript{51} Environmental justice advocates have used these regulations to assert claims of disparate impact under Title VI.\textsuperscript{52}

\textsuperscript{46} See Guardians, 463 U.S. at 585-86. The Civil Service Commission appointed applicants to the police department according to test scores achieved on an entry-level examination, causing African-Americans and Hispanics with lower test scores to be hired later than similarly situated Caucasians. See id. Subsequently, when the department laid off officers on a "last-hired last-fired" basis, those with the lowest scores were laid off first. See id. Consequently, the Commission's appointment process disproportionately affected the petitioners. See id.

\textsuperscript{47} See id. at 584 n.2 (explaining that the five Justices who agreed to reverse the court of appeals decision did so for different reasons, and Justices Blackmun, Stevens, and Brennan agreed that the administrative regulations supplied the disparate impact standard). As evidenced by the disagreement among the Justices, it remains unclear whether a disparate impact standard will be allowed if there are not applicable administrative regulations.

\textsuperscript{48} See id. at 607. Therefore, after Guardians, plaintiffs do not have to prove discriminatory intent under Title VI if agency regulations create an action for disparate impact. See id. If a plaintiff is suing under regulations that prohibit disparate impact, he or she can instead meet this lesser standard. See Fisher, supra note 5, at 319.

\textsuperscript{49} Cf. INTERIM GUIDANCE, supra note 21, at 3 (noting that Supreme Court rulings authorize the EPA "to adopt regulations that prohibit discriminatory effects."); 40 C.F.R. § 7.35(b) (1998) (implementing regulations pertinent to Title VI).

\textsuperscript{50} 40 C.F.R. § 7.35(c) (emphasis added). The regulations also state that:

A recipient shall not use criteria or methods of administering its program which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, national origin, or sex.

\textit{Id.} § 7.35(b).

\textsuperscript{51} See id. § 7.35(b). The regulations prohibit discriminating in the service, benefit, or aid provided in all programs and activities, restricting the enjoyment of any benefits under programs funded by the EPA, and segregating in services or benefits. See id. § 7.35(a)(2)-(4).

\textsuperscript{52} See Ferstel, supra note 20, at 1A (discussing the application of civil rights law and EPA regulations in environmental justice cases). Title VI and the EPA regulations combine to give plaintiffs three legal options. See Colopy, supra note 39, at 156. Plaintiffs may sue the funding agency, sue the discriminating recipient, or take an administrative route by
In response to the growing number of complaints and uncertainty on how to employ a disparate impact claim in the context of environmental justice, the EPA issued the *Interim Guidance*. The *Interim Guidance* assists officials in the EPA's OCR by providing an updated procedural and policy framework for processing Title VI disparate impact complaints in the environmental permitting context.

**C. The Framework of the Interim Guidance and the Disparate Impact Analysis**

The *Interim Guidance* provides the OCR, the entity responsible for processing Title VI administrative complaints, with basic procedural steps for addressing the complaints. First, the OCR determines, within twenty days of acknowledging receipt, whether to reject or accept the complaint. Second, if the complaint is accepted, the OCR conducts a factual investigation to determine whether the issuance of the permit will have a new disparate impact or add to an existing disparate impact on the minority population. Third, upon a conclusion that a significant disparate impact will result, the *Interim Guidance* allows the recipient of EPA funding to rebut the finding, propose a mitigation plan, or justify the impact. If the recipient fails to meet these requirements, the OCR then notifies the recipient in writing that the EPA has made a prelimi-
nary finding of noncompliance that may result in revocation of funding. If the recipient fails to respond to the preliminary finding or otherwise refuses to comply, it receives written notice of a formal determination of noncompliance.

These basic steps raise controversial issues regarding permitting requirements and the legal requirements to bring a claim. In regard to permitting requirements, the Interim Guidance includes a broad framework for establishing a prima facie case for disparate impact, requires permit applicants to consider demographics for their operating permits, and allows permit challenges to be raised for new, modified, and renewal permits after an original permit has already been issued. In regard to legal requirements, the Interim Guidance shifts the ultimate burden of proof in establishing a disparate impact to the permitting agency and creates a private right of action. Plaintiffs may bring Title VI complaints concurrently in federal court and before the administrative agency. Therefore, it is important to examine the procedures employed

60. See id. A copy of the notice is also sent to the grant award official and the Assistant Attorney General for Civil Rights and may also include recommendations for voluntary compliance or information regarding negotiations as part of the fifth step. See id. (citing 40 C.F.R. § 7.115(c)).

61. See id. at 6. The deadline for the recipient’s response is 50 days from the receipt of the preliminary finding. See id. The recipient may supply a written response demonstrating why the OCR decision is incorrect or why voluntary compliance is unachievable. See id. The recipient may comply voluntarily within 10 days after the receipt of the formal determination of noncompliance or the OCR will initiate enforcement action as the seventh step. See id. (citing 40 C.F.R. § 7.115(e)). Copies of the formal determination are sent to the award official and the Assistant Attorney General for Civil Rights. See id. (citing 40 C.F.R. § 7.115(d) (1994)). The Interim Guidance encourages dialogue to occur throughout the process, and urges the OCR to continually pursue informal resolution (the eighth and final step), wherever practical, to achieve a settlement in order to conserve the EPA’s investigatory resources. See id. (citing 40 C.F.R. § 7.120(d)(2)). The Interim Guidance mandates that, if the EPA has determined that discrimination occurred, and the state fails to remedy the violation itself, the EPA must deny, annul, suspend, or terminate the state’s funding. See id. at 4. In addition, the EPA may refer the issue to the United States Department of Justice. See id.

62. See Jeffrey Gracer, Taking Environmental Justice Claims Seriously, 28 Envtl. L. Rep. (Envtl. L. Inst.), at 10,373-75 (July 1998) (discussing controversial issues raised by the Interim Guidance, such as the supplement of a private right of action and the shift of the burden of proof in the prima facie case for disparate impact). This Comment’s use of the term “legal requirements” refers to general requirements within the legal system, while the term “permitting requirements,” although also “legal” because they are based upon statutes, refers to the specific requirements imposed on those seeking permits.

63. See id. (including an impact on the analysis of justification and mitigation measures).

64. See id.

by the federal courts in analyzing environmental justice complaints.

1. Disparate Impact Analysis and the Burden of Proof: The Title VII Analogy

When plaintiffs bring civil rights challenges to permitting decisions in federal court under Title VI, the court applies a disparate impact analysis.\(^6\) Within this analysis, an important issue arises: the burden of proof.\(^6\) When analyzing the burden of proof in Title VI disparate impact cases, courts analogize to Title VII case law because it specifically prohibits disparate impact.\(^8\)

*Griggs v. Duke Power Co.*\(^6\) provides the paradigm for disparate impact cases under Title VII.\(^7\) In *Griggs*, African-American employees brought a class action suit under Title VII against their employer because he required them to either have a high school education or pass a standardized general intelligence test in order to work or transfer to a different job.\(^7\) A large number of African-American employees were conse-

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66. See, e.g., NAACP v. Medical Ctr., Inc., 657 F.2d 1322, 1331 (2d Cir. 1981). In the event that a plaintiff brings an environmental justice complaint before the agency and is not satisfied with the administrative ruling, the existence of a private right of action becomes a significant issue. See Gracer, supra note 62, at 10,374 (discussing Chester Residents Concerned for Quality Living v. Seif, 132 F.3d 925 (3d Cir. 1997)); discussion infra Part I.C.2 (discussing the Chester decision). In addition, whether a plaintiff must first exhaust administrative remedies may also become a significant issue. See Gracer, supra note 62, at 10,374.

67. See Gracer, supra note 62, at 10,375 (criticizing the Interim Guidance because it improperly shifts the ultimate burden of proof to the permitting agency).


70. See Kaplin, supra note 42, at 96.

71. See Griggs, 401 U.S. at 425-26. Neither standard was shown to be significantly related to job performance, and the jobs the applicants sought had formerly been filled exclusively by white employees. See id. at 426.

On July 2, 1965, the very day that Title VII became effective, the employer, Duke Power Company, added a further requirement that employees in all departments other than labor had to achieve a satisfactory score on two professional aptitude tests in addition to possessing a high school education. See id. at 427-28. The employer argued that the intelligence tests were permitted under § 703(h) of the Civil Rights Act, which authorized the use of "professionally developed ability" tests not intended to discriminate on racial grounds. Id. at 433 (internal quotations omitted). The Court, however, gave "great deference" to the Equal Employment Opportunity Commission (EEOC) guidelines interpreting § 703(h). Id. at 434. Consequently, the *Griggs* Court concluded that the EEOC Guidelines expressed the will of Congress to allow testing measures and procedures so long as they were demonstrated to be a reasonable measure of job performance. See id. at 434-36. The EEOC Guidelines on Employment Testing Procedures define a "professionally developed ability test" as one which fairly measures the knowledge or skills required by the particular job or
sequently ineligible because of this requirement. Although the Supreme Court agreed that the employer had no intent to discriminate against the African-American employees, it concluded that those employment procedures that “operate as ‘built-in headwinds’ for minority groups and are unrelated to measuring job capability” are not permissible.

In *Griggs*, the Court constructed a model concerning who bears the burden of proof in disparate impact claims. The Court required the employees to show that a disparate impact resulted from a facially neutral policy. The Court indicated that “[u]nder the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices.” The Court reasoned that Congress did not intend Title VII “to guarantee a job to every person regardless of qualifications.” Therefore, the Court allowed the employer, after the plaintiff established disparate impact, to show that the employment practice was related to job performance, a defense referred to as the “business necessity” exception. In *Griggs*, the Court concluded that the employer did not demonstrate that its employment practices bore a

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72. *See Griggs*, 401 U.S. at 429. In order to be lawful, such requirements must be reasonably related to job performance. *See id.* at 436.

73. *Id.* at 432. The Court noted that “Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.” *Id.*

74. *See id.* (recognizing that the Act is focused on consequences of the employment practices and not just the motivations, if any, of the employers).

75. *See id.* at 430.

76. *Id.* The Court concluded that the record demonstrated that white applicants fared better with the employer’s requirements than African-American applicants, thus directly tracing the disparity to race. *See id.* at 430-31.

77. *Id.* at 430. The Court indicated that tests and other similar criteria may be permissible, but they must meet certain requirements. *See id.* at 430-31.

78. *See id.* at 431. The employer argued that its intelligence tests were permitted under the Act, provided that professionally developed ability tests not intentionally designed to discriminate were permissible. *See id.* at 433. The Court noted, however, that Congress did not intend for these mechanisms to be used when they have a discriminatory impact that cannot be overcome by establishing that they are reasonable measures related to job performance. *See id.* at 436.
relationship to successful job performance. Consequently, because the employees successfully established the presence of a disparate impact and the employer was unable to meet its burden of justification, the Court declared the education requirement discriminatory.

Following Griggs, the Court altered the burden of proof requirements by redefining the business necessity exception. In Wards Cove Packing Co., Inc. v. Atonio, cannery workers brought a Title VII action against their employer, alleging a disparate impact resulting from discriminatory hiring and promotion practices. The Ninth Circuit relied solely on the employees' statistics that showed a disparity in the jobs and pay that white workers held compared with minority workers in finding that the plaintiffs met their prima facie burden of proof. The Supreme Court concluded that, while statistics can satisfy the plaintiff's burden of proof, this evidence alone did not establish a prima facie case of disparate impact. Instead, the Court required that, upon remand, the plaintiff-employees must demonstrate a specific link between statistics and the employer's actual employment practices. As opposed to Griggs, the Wards Cove Court stated that the employer need not show that the employment practice is a business necessity to rebut a prima facie showing of disparate impact. The Wards Cove Court only required the employer to show that the practice was significantly linked to the employer's legitimate goals.

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79. See id. at 431. Instead, the Court referred to the appellate court's indication that the employment practices were adopted "without meaningful study of their relationship to job-performance ability." Id.

80. See id. at 432-33.


82. See Wards Cove, 490 U.S. at 646-48. Specifically, the respondents claimed that minority workers were overrepresented in low-paying cannery jobs, while white employees occupied the non-cannery jobs that paid more and were described as "skilled." See id. at 647-48.

83. See id. at 650.

84. See id. The Court stated that if there are no barriers discouraging minorities from applying, "the percentage of nonwhite workers found in other positions in the employer's labor force is irrelevant to the question of a prima facie statistical case of disparate impact." Id. at 653.

85. See id. at 657. The Court justified this specific causation requirement as reasonable, given that the plaintiffs have access to the employer's records under discovery rules. See id. at 657-58.


87. See Wards Cove, 490 U.S. at 659 (characterizing the business necessity defense as a reasoned review of the justification employers undertake to prove legitimate practices).
remains... with the disparate-impact plaintiff" at all times. Therefore, even if the defendant is unable to establish a (newly defined) business necessity defense, he may still prevail if the plaintiffs are unable to offer alternatives to reduce the disparity.

Congress reacted quickly to the Wards Cove decision. In 1991, Congress enacted the Civil Rights Act of 1991 (1991 Act) which expressly overturned Wards Cove. The 1991 Act states that it is a codification of the business necessity defense and the definition of the term "job related." The 1991 Act provides that the plaintiff may prevail either if the employer fails to demonstrate that the practice is job related and consistent with a business necessity, or if the employer refuses to adopt adequate alternative practices as demonstrated by the plaintiff. The provisions of the 1991 Act adopt the definitions and burdens enunciated in Griggs as statutory requirements.

Courts expanded these burden of proof issues in Title VII to Title VI cases as illustrated by NAACP v. Medical Center, Inc. In this case, the Third Circuit applied a disparate impact "effects" test to a siting decision. The NAACP argued that the relocation of a medical facility from the inner city to an outer suburban location violated Title VI. The court

88. Id. at 659. The Court in Wards Cove indicated that the plaintiff had the burden to prove that alternative employment practices would also serve the employer's interests without a negative effect. See id. at 660-61. The Court relied upon the rules in disparate treatment cases for the burdens of persuasion and production. See id. at 659-60.

89. See id. at 660. The alternatives must be equally effective, however, in achieving the employer's legitimate goals in light of the costs and other burdens associated with the alternatives proposed. See id. at 661.


91. See Civil Rights Act of 1991, Pub. L. No. 102-166, §§ 1-3, 105 Stat. 1071, 1071. Among other changes, the 1991 Act also created the right to a jury trial under Title VII and allows for the recovery of compensatory and punitive damages in intentional discrimination cases. See id. § 102, 105 Stat. at 1072-73; see also Piskorski & Warner, supra note 86, at 9-12 (discussing the purpose and effect of the 1991 Act).


93. See id. § 105(a), 105 Stat. at 1074.

94. See id. § 3(2), 105 Stat. at 1071. The 1991 Act diminishes the protection afforded to employers by the Wards Cove decision, making it more difficult for employers to implement practices which adversely affect minorities. See Piskorski & Warner, supra note 86, at 12.

95. 657 F.2d 1322 (3d Cir. 1981).

96. See id. at 1331-32.

97. See id. at 1324. The plaintiff organizations represented minority, handicapped, and elderly persons. See id. The plaintiffs asserted claims under § 504 of the Rehabilitation Act of 1975, 29 U.S.C. § 794, the Age Discrimination Act, 42 U.S.C. §§ 6101-6107, as well as the Civil Rights Act. See id. Their claims alleged both intentional discriminatory treatment and disparate impact. See id.
explained that a plaintiff establishes a prima facie case under Title VI when he or she produces evidence of a "definite, measurable disparate impact."\textsuperscript{98} Assuming arguendo that the plaintiffs had established a prima facie case, the court in \textit{Medical Center} shifted the burden of production to the defendant to establish a substantial, legitimate justification for the practices that caused the disparate impact.\textsuperscript{99} The court reasoned that the burden on the defendant should remain consistent with that imposed under Title VII for intentional discrimination\textsuperscript{100} and concluded that the defendant had produced "adequate evidence to justify" its relocation.\textsuperscript{101}

 Furthermore, \textit{Medical Center} enunciated that, if the defendant sustains his or her burden, the plaintiff may be allowed "to produce further evidence consistent with the third step of demonstrating pretext that the Supreme Court has mentioned in both intent and impact cases brought under Title VII."\textsuperscript{102} For example, the plaintiff may show that there are alternative measures that serve the employer's legitimate interest with a

\begin{itemize}
  \item \textsuperscript{98} \textit{Id.} at 1332.
  \item \textsuperscript{99} \textit{See id.} at 1332-33. The parties debated whether there should be a difference in the defendant's burden when the claim is one of discriminatory impact rather than intent. \textit{See id.} at 1333. The plaintiffs argued that a defendant rebutting a prima facie case involving discriminatory impact is essentially presenting an affirmative defense, and thus, should shoulder the burden of persuasion. \textit{See id.} The court rejected this approach noting that the same could be true for discriminatory impact cases. \textit{See id.} The plaintiffs based their argument on the theory that "in countering a prima facie case of discriminatory impact, the defendant is presenting something in the nature of an affirmative defense that requires shouldering the burden of persuasion." \textit{Id.} The court, however, rejected this reasoning as contrary to precedent, noting that "[o]ne could just as readily say in an intent case that the necessity to prove a nondiscriminatory reason is an affirmative defense carrying a burden of persuasion." \textit{Id.}
  \item \textsuperscript{100} \textit{See id.} at 1336. The court asserted a number of reasons why there should be a consistent burden on defendants. \textit{See id.} at 1335-36. First, the Third Circuit contended that it is "illogical to impose a heavier burden on a defendant in a case where a neutral policy results in disparate impact than in one where the charge is unlawful animus." \textit{Id.} at 1335. Second, the court could find no important interest that would justify imposing two different burdens on the defendant in such cases. \textit{See id.} Finally, the court found uniformity in procedural aspects of intent and impact cases to be highly desirable. \textit{See id.} at 1336.
  \item \textsuperscript{101} \textit{Id.} at 1324.
  \item \textsuperscript{102} \textit{Id.} at 1336.
\end{itemize}
less discriminatory effect.  

Therefore, the Court’s analysis in Medical Center shows that Title VI does not prohibit disparate impact per se, but rather “forbids only those actions that have an ‘unjustified’ disparate impact[,]” similar to previous Title VII jurisprudence. Whether an environmental justice claim will undergo this legal analysis, however, depends, in part, on whether a plaintiff is able to bring their claim in federal court.

2. Private Right of Action: The Chester Decision

Generally, citizens cannot bring a challenge in federal court unless Congress has manifested its intent to provide for a private right of action by statute. Therefore, although Title VI does not explicitly create a private right of action, under certain circumstances, the courts may nonetheless imply such a right. The Third Circuit, in Chester Residents Concerned for Quality Living v. Seif, recently considered whether Title VI confers a private right of action under the EPA’s regulations even though not expressly stated by Congress.

In Chester, a community group claimed that the Pennsylvania Department of Environmental Protection violated the EPA’s Title VI regulations by granting a waste facility a permit to operate in a predominantly minority neighborhood where four other facilities were already licensed. Although the district court dismissed the suit, ruling that the plaintiffs had no private right of action, the Third Circuit reversed.

103. See id. at 1336 n.17.
104. Fisher, supra note 5, at 321.
105. See Seinfeld v. Austen, 39 F.3d 761, 764 (7th Cir. 1994) (concluding that if Congress provides no federal remedy, a cause of action may only be brought in state court); see also Merrell Dow Pharm. Inc. v. Thompson, 478 U.S. 804, 817 (1986) (concluding that the Federal Food, Drug, and Cosmetic Act does not create or imply a private right of action).
106. See Guardians Ass’n v. Civil Serv. Comm’n of New York, 463 U.S. 582 (1983) (holding that an implied right of action exists under Title VI).
107. 132 F.3d 925 (3d Cir. 1997).
108. See id. at 927.
109. See id. at 927 & n.1.
110. See Chester Residents Concerned for Quality Living v. Seif, 944 F. Supp. 413, 417 (E.D. Pa. 1996). The court reasoned that although there is an implied cause of action under Title VI, there is not one for an allegation of discriminatory effect. See id.
111. See Chester, 132 F.3d at 937. Relying heavily on the Guardians decision, the Third Circuit found support for a private right of action. See id. at 929. The Third Circuit examined the written opinions that resulted from the Guardians decision and found that five Justices agreed that injunctive and declarative relief is available in cases involving discriminatory effects, and thus, concluded that there was implicit approval for a private right of action under the regulations implementing Title VI. See id. at 929-30. The court ap-
The United States Supreme Court granted certiorari, but Pennsylvania revoked the challenged permit, rendering the issue moot and thus, the Court vacated the judgment and remanded the case back to the Third Circuit for dismissal. Prospective litigants, therefore, remain uncertain about their ability to bring private actions.

Placed a three-prong test to determine whether it was “appropriate to imply private rights of action to enforce regulations” because its own precedent did not resolve the issue. _Id._ at 933; _see also infra_ note 140 and accompanying text (discussing the three-pronged test derived from _Angelastro v. Prudential-Bache Securities, Inc._, 764 F.2d 939 (3d Cir. 1985)). In addition, the Third Circuit held that citizens may bring the suit in federal court without first exhausting the administrative remedies set forth in the EPA’s regulations. _See Chester_, 132 F.3d at 934-36.


113. _See Chester_, 119 S. Ct. at 22-23; Milner & Turner, _supra_ note 112, at 482 (noting that “the Supreme Court’s disposition of the case leaves the issue unresolved”). _But see_ INTERIM GUIDANCE, _supra_ note 21, at 4 n.9 (relying on the Third Circuit decision in _Chester_ to conclude that individuals can file a private right of action without exhaustion of administrative remedies). _See generally infra_ Part II.A.2 (discussing the _Chester_ decision).

Allowing judicial review of a private right of action has implications regarding the administrative process and the doctrine requiring exhaustion of administrative remedies. _See John H. Reese, Administrative Law_ 660 (1995). The doctrine delays judicial review based on the assumption that properly authorized remedies exist within the agency thereby providing sufficient relief. _See id._ “The basic premise is that an aggrieved party should be required to pursue his or her remedies within the agency as high as the agency will permit before trying to jump into court.” WILLIAM F. Fox, JR., _Understanding Administrative Law_ 382 (3d ed. 1997). Primarily, the doctrine is important because it prevents premature judicial review and allows an agency to make decisions without interference from the courts. _See id._ at 381.

The agency’s enabling legislation may specifically state an exhaustion requirement or the court may utilize the doctrine in situations where the requirement is not clearly specified, but is necessary pursuant to “sound judicial discretion.” _See Reese, supra_, at 661 (quoting _McCarthy v. Madigan_, 503 U.S. 140, 144 (1992)). The desirability of requiring exhaustion exists due to several factors including the agency’s expertise, the importance of deferring to the autonomy of the agency, preventing judicial review of an incomplete record, and promoting judicial economy. _See Fox, supra_, at 383. These factors were established in _McKart v. United States_, 395 U.S. 185, 193-95 (1969). In addition, _McKart_ illustrates that exhaustion may not be required if special circumstances are present. _See 395 U.S._ at 197. These circumstances include the agency’s inability to grant the remedy sought, the futility of the case before the agency, the potential for irreparable injury, and the presence of a constitutional issue regarding the agency’s structure. _See Fox, supra_, at 383 (listing factors); _see also_ Weinberger v. Salfi, 422 U.S. 749, 760, 765 (1975) (noting that exhaustion is not necessary if the only issue is the constitutionality of the statute); _McKart_, 395 U.S. at 189-90 (discussing the potential burden upon the litigant should exhaustion be required in the criminal context).
II. THE EPA'S INTERIM GUIDANCE

The Presidential Executive order, the EPA's Environmental Justice Strategy, and Title VI regulations foreshadowed the increasing importance of Title VI in environmental justice litigation. It remained unclear, however, just how the Interim Guidance would affect the permitting processes until the EPA issued it.\(^{114}\) When issued, the Interim Guidance revealed the full implications of the environmental justice movement with more clarity and much opposition.\(^{115}\)

The Interim Guidance implicates two specific areas: legal requirements and permitting requirements.\(^{116}\) In terms of legal requirements, the Interim Guidance presents two topics of controversy.\(^{117}\) First, in contrast to traditional Title VII jurisprudence, the Interim Guidance shifts the ultimate burden of proving the necessity of a permit to the administrative agency.\(^{118}\) Second, the Interim Guidance allows individuals to file a private right of action to enforce Title VI.\(^{9}\)

Fueling the controversy regarding permitting requirements, the Interim Guidance provides only a broad framework for establishing a prima facie case for disparate impact, without defining the requirements that a plaintiff must meet.\(^{120}\) Furthermore, the Interim Guidance expands the scope of disparate impact consideration beyond the traditional technical requirements to now include demographics.\(^{121}\) In addition, the proposal

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114. Cf. States Negative on Interim Guidance, 29 Env't Rep. (BNA), at 232 (May 22, 1998) (quoting EPA Administrator Carol M. Browner as acknowledging that, even with the Interim Guidance, the issue of Title VI and environmental permits will not "be easily resolved").

115. See id.


117. See Gracer, supra note 62, at 10,374-75 (referring to provisions for a private right of action and a shift in the ultimate burden of proof in the disparate impact analysis).

118. See INTERIM GUIDANCE, supra note 21, at 11-12; Gracer, supra note 62, at 10,375 (noting that in traditional civil rights jurisprudence the initial and final burden is on the party bringing the claim).

119. See INTERIM GUIDANCE, supra note 21, at 4; Gracer, supra note 62, at 10,374 (predicting that the private right of action provision will be a controversial aspect of the Interim Guidance); see also supra Part I.C.2 (discussing the Chester decision).

120. See Gracer, supra note 62, at 10,375. For example, the Interim Guidance does not indicate what methodology or requirements will be utilized to assess disparity, an element at the heart of a disparate impact analysis. See INTERIM GUIDANCE, supra note 21, at 9.

121. See INTERIM GUIDANCE, supra note 21, at 9-11 (providing a five step disparate impact analysis that, in part, determines the racial and ethnic demographics of the affected population using mapping technologies). Under the typical permitting process, "the permit terms translate generally applicable standards and duties into source-specific emission
allows plaintiffs to raise permit challenges for new, modified, and renewal permits after the EPA has already issued an original permit. Consequently, the Interim Guidance leaves unclear which justification and mitigation measures the EPA will consider acceptable.

Opposition to the Interim Guidance has been widespread among state and local governments, industries, and even among some environmental justice advocates. State and local governments and industry groups have argued that the Interim Guidance will result in additional lawsuits, further clogging the courts. These entities question the EPA's authority to issue and administer the policies of the Interim Guidance. Moreover, state and local governments are urging the EPA to adopt measures that create less conflict with local land-use laws.

122. See INTERIM GUIDANCE, supra note 21, at 8 (discussing EPA's belief that "permit modifications that reduce adverse impacts and improve the environmental operation of the facility should be encouraged" and recognizing the agency's desire to discourage mere administrative modifications).

123. See id. at 11-12. Justification and mitigation issues are a significant step in the process. See id. The Interim Guidance indicated that the OCR will examine the "broader governmental interests" involved in the permit, the seriousness of the disparate impact, whether it is an initial or renewal permit, and whether the affected population can nonetheless benefit from the permit. Id. at 12. Traditionally, the plaintiff must show that other measures without a prejudicial effect exist to serve the defendant's interests. See id. In addition, the defendant must show that it has chosen the least discriminatory alternative. See id.; see also NAACP v. Medical Ctr., Inc., 657 F.2d 1322, 1337 (3d Cir. 1981) (upholding a lower court decision to impose these standards). Justification issues and mitigation measures also continue to be significant to the burden of proof analysis because the defendant will have the opportunity to assert a substantial, legitimate interest to justify its decision. See INTERIM GUIDANCE, supra note 21, at 12 (indicating that mere compliance with environmental regulations will be insufficient).


125. See Environmental Justice, supra note 53, at 10,393.


127. See Mary Greczyn, EPA to Revisit Title VI, WASTE NEWS, Nov. 2, 1998, at 3.
ingly, these groups view the *Interim Guidance* as burdensome and likely to undermine cooperative efforts. On the other hand, some environmental justice and civil rights activists believe that the policy is insufficient and want the EPA to expand it to include other discriminatory practices. A common concern involves the impact of the *Interim Guidance* on the legal requirements traditionally used by federal courts.

### A. The Alteration of Traditional Legal Requirements Regarding Title VI Claims: Burden of Proof Allocation and the Private Right of Action

#### 1. Shifting the Burden of Proof to the Permitting Agency

Through the *Interim Guidance*, the EPA has shifted the ultimate burden of proof away from the plaintiff (the permit challenger) as statutorily adopted by *Griggs*. Instead, the *Interim Guidance* requires the defendant (the permitting agency or permit applicant) to meet the final burden of proof. The defendant must prove that the permit is necessary to advance a substantial and legitimate interest, as well as establish that there are no less discriminatory alternatives. The plaintiff need not prove that a less discriminatory alternative would satisfy a legitimate business

appears the EPA has conceded that perhaps it should have sought more input from state and local government and industry groups before proceeding with the *Interim Guidance*. See id. Timothy Fields, Jr., then acting head of the Office of Solid Waste and Emergency Response, stated that we felt compelled to tell people what our thinking was about those pending Title VI complaints that have come in over the last five years . . . . But at the same time we did not want to delay in an inordinate way an ability to make some decisions about those cases that were pending.

*Id.* But see Hogue, supra note 126, at 234 (observing that there was a public comment period where the EPA received approximately 100 submissions from various commentators criticizing the proposed guidance).

128. *See* Skrzycki, *supra* note 124, at F1 (quoting state sources predicting that a mere postcard could halt a valid permit); *see also* Hazardous Waste Firms Must Address People's Siting Concern, Speaker Says, 20 HAZARDOUS WASTE NEWS 339 (1998) [hereinafter Hazardous Waste Firms] (discussing similar criticism of the *Interim Guidance* by the waste industry).

129. *See* Environmental Justice, *supra* note 53, at 10,393 (noting that in addition to pollutant exposure, the EPA should clarify that discrimination may include "increased health risks, devalution of land, and decreased quality of life").


131. *See* INTERIM GUIDANCE, *supra* note 21, at 11; *supra* Part I.C.1 and accompanying notes (analyzing *Griggs*).


133. *See* INTERIM GUIDANCE, *supra* note 21, at 11-12 (discussing justification and mitigation analysis).
These burden of proof provisions have caused an uproar among state and local permitting agencies, in part because the outcome of such cases are often determined by which party bears the ultimate burden of proof, increasing the likelihood that the permitting agency may end up as the “loser.”

Interim Guidance opponents argue that because the significance of mitigation measures and the justifications sufficient to rebut a finding of disparate impact are unclear, the ability of a defendant to rebut the finding of disparate impact will be more difficult.

2. A Private Right of Action: The Chester Decision as National Policy

Potential defendants to environmental justice challenges are also concerned about the Interim Guidance’s creation of a private right of action. The Interim Guidance, relying on Chester, 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.” In Chester, the Third Circuit determined that the Supreme Court’s opinion in Guardians implicitly approved a private right of action under Title VI discriminatory effect regulations. The Third Circuit used a three-prong test to determine if Title VI has an implied private right of action and, finding that all

134. See Gracer, supra note 62, at 10,375.
135. See id.
136. See Gracer, supra note 62, at 10,375; see also Skrzyczyk, supra note 124, at F4. Michigan’s Director of Environmental Quality suggested that “[y]ou can do a very good permit, but it only takes one person with a postcard to stop the whole thing.” Id.
137. Cf. INTERIM GUIDANCE, supra note 21, at 4 (asserting the existence of a private right of action); Gracer, supra note 62, at 10,374-75 (discussing concerns arising out of the EPA’s assertion that individuals may pursue a private right of action without exhausting administrative remedies).
138. INTERIM GUIDANCE, supra note 21, at 4 (footnote omitted); see supra Part I.C.2 (discussing the private right of action resulting from the Chester decision). A spokeswoman for the EPA has suggested that the recent Supreme Court ruling vacating Chester will not impact the revised guidance. See Cheryl Hogue, Ability to File Legal Challenges to Permits Under Civil Rights Law Remains Untested, 29 Env’t Rep. (BNA), at 892-93 (Aug. 28, 1998).
139. See Chester Residents Concerned for Quality Living v. Seif, 132 F.3d 925, 937 (3d Cir. 1997); Plaintiffs Have Private Right of Action Alleging “Discriminatory Effect”: Chester Residents Concerned for Quality Living et al. v. James M. Seif et al., 13 NAAG NAT’L ENVT. ENF. J., Feb. 1998, at 20, 21 [hereinafter Plaintiffs Have a Private Right of Action]. Although the issue was not addressed specifically by the Supreme Court in Guardians, the Third Circuit inferred from that decision that a private right of action exists under section 601 of Title VI. See id. The Third Circuit also found support for its reasoning in decisions by other circuits. See Chester, 132 F.3d at 936-37.
three prongs were met, held that it did.\textsuperscript{140} Specifically, the court found that an implied right of action exists within the statute when: 1) the permitting agency's rule is within the scope of the enabling statute,\textsuperscript{141} 2) the statute properly permits the implication of a private right of action,\textsuperscript{142} and 3) a private right of action furthers the purpose of the statute.\textsuperscript{143} In effect, the Interim Guidance makes the Chester decision national policy, allowing for a private right of action when plaintiffs allege discriminatory effects.\textsuperscript{144} This policy is controversial, particularly because the Supreme Court vacated the Chester decision\textsuperscript{145} and because in instances of racial discrimination, courts traditionally allow a private right of action only in cases involving discriminatory intent.\textsuperscript{146}

B. The Alterations to the Permitting Process

The Interim Guidance expands upon three crucial issues. First, the Guidance explains the considerations involved in permitting decisions as evidenced by the requirements for meeting a prima facie showing of disparate impact.\textsuperscript{147} In addition to traditional technical requirements, the Interim Guidance requires consideration of demographics for permitting

\textsuperscript{140} See Chester, 132 F.3d at 933-36; see also Plaintiffs Have a Private Right of Action, supra note 139, at 21. This three-prong test is derived from Angelastro v. Prudential-Bache Securities, Inc., 764 F.2d 939, 947 (3d Cir. 1985). See Chester, 132 F.3d at 933 (citing Polaroid Corp. v. Disney, 862 F.2d 987, 994 (3d Cir. 1988) and quoting the test as stated in Angelastro).

\textsuperscript{141} See Chester, 132 F.3d at 933.

\textsuperscript{142} See id. at 933-36 (concluding that an implied cause of action is consistent with the legislative history of the EPA regulations and the legislative scheme of Title VI).

\textsuperscript{143} See id.; see also Plaintiffs Have a Private Right of Action, supra note 139, at 22 (noting that the purpose of Title VI is to fight discrimination against those receiving federal funding and also that a private right of action would further these goals).

\textsuperscript{144} See Gracer, supra note 62, at 10,374.


\textsuperscript{146} See generally Alexander v. Choate, 469 U.S. 287 (1985) (setting forth when a private right of action exists). The Interim Guidance nullifies the requirement that plaintiffs first exhaust administrative remedies. See INTERIM GUIDANCE, supra note 21, at 4. Traditionally, under EPA regulations and because the EPA was seen as the "gatekeeper to enforcement," challengers were first required to exhaust administrative remedies. Chester, 132 F.3d at 934. The ability of individuals filing environmental justice claims to bypass administrative remedies has great practical significance. See Gracer, supra note 62, at 10,374. If siting and permit decisions can be challenged immediately and directly in federal court, then project developers have a greater incentive to seek early community support because they may be threatened by timely lawsuits in addition to traditional agency administrative challenges. See id.

\textsuperscript{147} See INTERIM GUIDANCE, supra note 21, at 9-12; Gracer, supra note 62, at 10,375.
decisions. 148 Second, the Interim Guidance applies these considerations to new permits and modified permits. 149 Finally, the Interim Guidance offers an expanded analysis of justification and mitigation issues. 150

I. Establishing the Prima Facie Case for Disparate Impact Under the Interim Guidance: Determining What Constitutes a Disparate Impact Based Upon the EPA’s Broad Framework

The Interim Guidance establishes a disparate impact analysis as the basic framework for investigating affected communities. 151 The Interim Guidance indicates that the EPA will base its analysis on the facts of each case and the “totality of the circumstances.” 152 Consequently, establishing the prima facie case for disparate impact includes five basic steps. 153 The first step is the identification of the affected population. 154 This “affected population is that which suffers the adverse impacts of the permitted activity.” 155 Second, the demographics of the affected population must be determined. 156 To determine the demographics, the OCR will use demographic mapping technology, generating data estimating race/ethnicity and density near the facility or in the areas impacted adversely by the facility. 157 Third, the OCR determines the universe of existing facilities near the affected population and the total population affected by the permit. 158 This process involves ascertaining the environmental impact of other permitted facilities in the area and their affected populations. 159 The permit or project challenger must be able to show that the facts support the effects of the universe of facilities, and that together they present a disproportionate cumulative burden. 160

148. See INTERIM GUIDANCE, supra note 21, at 10.
149. See id. at 8.
150. See id. at 11-12.
151. See INTERIM GUIDANCE, supra note 21, at 9-12 (listing the five basic steps in the disparate impact analysis).
152. Id. at 9 (asserting that more than one technique may be used for evaluating disparate impact claims).
153. See id. at 9-12.
154. See id. at 9 (referring to the population that triggers the complaint).
155. Id. Considerations will usually be based upon the population’s proximity to the facility. See id.
156. See id. at 10.
157. See id. (discussing the methods and technologies used for conducting demographic analysis).
158. See id. at 10-11 (noting that there may be several universes of facilities affecting the population, but that EPA will consider only those under the recipient’s jurisdiction).
159. See id. at 11.
160. See id.
Fourth, a disparate impact analysis must be conducted that, at a minimum, compares the racial or ethnic characteristics of the affected population to those of the non-affected population. This analysis compares racial and minority groups to find if they are being impacted at a disparate rate. The OCR will make other comparisons on a case-by-case basis. Finally, the Interim Guidance specifies that the OCR will analyze the significance of the disparity as well.

Critics argue that the method for determining whether a disparate impact exists is too vague and that the Interim Guidance provides only a broad framework with little explanation. The Interim Guidance does not indicate how the EPA will define the affected and non-affected populations. The Interim Guidance also does not define the methodology for determining the significance of the statistical disparity.

Acknowledging these concerns, the Science Advisory Board of the EPA has issued a report that analyzes disproportionate impact methodologies for Title VI environmental justice challenges. The report, fo-

161. See id. Paul Kamenar of the Washington Legal Foundation (WLF), warns that the disparate impact standard permits a challenger to demonstrate disparate impact just by proving that a minority community is treated differently from other communities. See Pamela Newman-Barnett, Mayors Join Critics of EPA Environmental Justice Rule, NAT'L J. CONGRESS DAILY A.M., July 7, 1998, at 1. This disparate impact standard replaces “discriminatory effect,” which is thought to be a “tougher standard” for plaintiffs to meet. See id.

162. See INTERIM GUIDANCE, supra note 21, at 11 (noting further that the EPA “would expect the rates of impact for the affected population and comparison populations to be relatively comparable under properly implemented programs”).

163. See id. (stating that there is no single applicable formula or analysis applied).

164. See id. at 11-12 (indicating that justification and mitigation measures will be important focuses in this analysis).

165. See Gracer, supra note 62, at 10,375 (discussing the problems associated with vagueness that give rise to “substantial uncertainty”). See generally Cheryl Hogue, Hansen Suggests 'Template' to Guide States, Localities on Title VI Compliance, 29 Envtl. Rep. (BNA), at 232 (May 22, 1998) (reporting that the legal requirements are not new, but based upon Title VI, which has been in effect since 1964, according to Mark Gross, a complaint adjudication officer for the Justice Department's Civil Rights Division).

166. See Gracer, supra note 62, at 10,375 (noting, however, that the Interim Guidance "refer[s] generally to proximity and contamination pathways").


cusing on the scientific merits, reviewed two methodologies for evaluating the significance of statistical disparities: the Relative Burden Analysis (RBA) and the Cumulative Outdoor Air Toxics Concentration Exposure Methodology (COATCEM). The methodologies are intended to be used by the OCR "to generate information on substantial differences in impact between populations from specific facilities, potential harm due to such differential impacts, and an estimate of overall cumulative levels of risks from multiple emitting sources in the area of concern." Upon review, the SAB Integrated Human Exposure Committee (IHEC) found positives and negatives to using each approach, with the RBA methodology being easier to use and understand, and "the COATCEM methodology [having] significant potential for future use." Although courts and administrative agencies have experience in applying the disparate impact theory, the theory's extension to the environmental justice context is untested.

2. Including Demographic Considerations in Permit Decisions

Under the Interim Guidance, federal, state, and local governments are required to consider racial demographics when granting permits to facilities, or risk being sued based for decisions that result in a disparate impact on minority groups. The Interim Guidance also dramatically affects environmental permitting systems because if any agency (state or local) accepts federal funding, the Interim Guidance will apply to all programs that the agency implements, regardless of whether a specific program receives the federal funds. State and local governments argue that this pressure results in too much EPA control over local government permit-
State and local governments are alarmed by the \textit{Interim Guidance} because it threatens programs aimed at bringing jobs and economic growth to urban areas where poor and minority neighborhoods are located. The United States Conference of Mayors has unanimously indicated strong opposition to the EPA policy as well. They argue that the \textit{Interim Guidance} is becoming too involved in decisions that should be left to state and local officials and quoting the Western States Petroleum Association's warning that "[f]ederal involvement in local land use decisions would be precedent-setting").

175. See Hogue, supra note 126, at 234-35 (citing industry concern that the EPA is becoming too involved in decisions that should be left to state and local officials and quoting the Western States Petroleum Association's warning that "[f]ederal involvement in local land use decisions would be precedent-setting").

176. See State Agency Chiefs Ask EPA to Withdraw New Guidance on Civil Rights Complaints, 28 Env't Rep. (BNA), at 2531 (Apr. 3, 1998) [hereinafter State Agency Chiefs]; David Mastio, \textit{EPA Shock Wave Far From Certain}, DET. NEWS, June 29, 1998, at A1 [hereinafter \textit{EPA Shock Waves Far From Certain}]. The Environmental Council of the States has urged the EPA to withdraw the \textit{Interim Guidance} and develop a policy "that will advance environmental equity concepts in a more workable fashion." State Agency Chiefs, supra, at 2531 (quoting the resolution by the Environmental Council of the States). Members include the top environmental officials from 49 states, the District of Columbia, and two U.S. territories. See id. The Council criticized the \textit{Interim Guidance} for disrupting state management of permitting, and conflicting with land use policies and clean-up and redevelopment efforts of urban areas. See id. The resolution also suggested that the EPA avoid shifting permitting decisions to the Federal Government and allow states to develop and implement programs to satisfy Title VI. See id. at 2532. Regulators in Michigan are concerned that they will face a court challenge of their efforts to comply because their state law does not allow them to reject pollution permits based on environmental justice issues. See \textit{EPA Shock Waves Far From Certain}, supra, at A1.

Russell Harding, Chairman of the ECOS Working Group on Environmental Justice indicated that states will have the additional burdens of refuting EPA findings that a permit decision caused a disparate impact, and that merely demonstrating compliance with environmental laws will not be sufficient to rebut the EPA's finding. See \textit{EPA Seeks Comments on Requiring Civil Rights Test for State Permits}, 29 SOLID WASTE REP. 60 (1998).

177. See Mayors Unanimously Join Archer, Oppose EPA Plan, GRAND RAPIDS PRESS, June 23, 1998, at B4 [hereinafter Mayors Unanimously Join Archer]. The resolution was introduced by Mayor Dennis Archer at an annual meeting in Reno, Nevada. See id. Opposition also included the Washington Legal Foundation (WLF) who filed a petition claiming that all environmental justice complaints should be dismissed due to lack of evidence of racial discrimination and that the \textit{Interim Guidance} is "legally and procedurally flawed." Peyton M. Sturges, \textit{Washington Legal Foundation Asks EPA to Dismiss Pending Civil Rights Complaints}, 29 Env't Rep. (BNA), at 1350 (Nov. 6, 1998) (quoting WLF petition). WLF claims that the Title VI regulations unconstitutionally adopt a disparate impact standard and because environmental justice complaints fail to show intentional discrimination, they should be dismissed. See id. at 1350-51. In addition, the Western Governors Association has voted unanimously to demand withdrawal of the \textit{Interim Guidance}. See David Mastio, \textit{Another Setback for EPA Policy}, DET. NEWS, July 2, 1998, at B1 (citing further opposition including the Environmental Council of the States, the National Association of Black County Officials, the U.S. Chamber of Commerce, 10 state attorneys general, and the U.S. Conference of Mayors); John Chambers, \textit{The Supreme Court Has Agreed to Take Upon Issue That Has Stymied Regulators and Judges: Waste Disposal Facilities Planned for Construction in Minority Communities}, NAT'L L.J., June 22, 1998, at B6 (discussing, in part, criticism that the EPA may not have properly issued the
**Interim Guidance** will cripple economic revival of urban communities and severely reduce job opportunities for minorities.178 Because the Interim Guidance prevents facilities from moving into an urban area based on demographics, these groups are concerned that urban communities will be deprived of valuable, desirable job opportunities due to the potential environmental impact.179

### 3. New and Modified Permits: Finality Concerns

The Interim Guidance requires that the EPA subject all new permits to an environmental justice analysis, and analyzes similarly permit modifications and renewals.180 Specifically, the OCR will analyze permit modifications resulting in a net increase of pollution for adverse impacts.181 The EPA, however, will only consider the effects of the modification, not the facility impact as a whole.182 In contrast, the EPA will treat permit renewals as if they were applications for a new permit; thus, the agency will look at the overall operation of a facility.183 This is particularly controversial because a facility operating for many years in one area may now face an environmental justice challenge based on the demographics

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178. See Mayors Unanimously Join Archer, supra note 177, at B4.

179. See id. Similarly, others worry that the Interim Guidance will prevent redevelopment of brownfields (abandoned industrial sites) or cause delay and additional costs due to the uncertainty about facility permitting. See Hogue, supra note 126, at 236.

180. See INTERIM GUIDANCE, supra note 21, at 6-8. Generally, permitting programs require permits for all new sources of pollution. See id. In addition, a facility must often seek a permit for modified sources of pollutants if they meet the definition provided by statute. See Novello, supra note 121, at 10,091. For example, under the CAA, a modified permit is required for major stationary sources of air pollution. See 42 U.S.C. §§ 7454, 7503 (1990); Novello, supra note 121, at 10,082. In these instances, a permit must be obtained prior to construction or modification. See Novello, supra note 121, at 10,083. In addition, application for renewal permits are often processed as if they were initial permits, meaning that the emissions of the facility will be evaluated as if it were the first permit they were issued. See 40 C.F.R. § 70.7(h) (1998); Novello, supra note 121, at 10,090.

181. See INTERIM GUIDANCE, supra note 21, at 8 (explaining that the OCR will not reject the complaints without examining the circumstances).

182. See id. (providing that the complaint must allege impacts specifically associated with the modification in the permit modification context, as opposed to the permit renewal context).

183. See id. (discussing permit renewals generally). The Environmental Technology Council argues that permit renewals and new permits should be treated differently because """"[t]he courts have long recognized that a company operating for a substantial period of time under a validly issued permit has a vested property right."""" Hogue, supra note 126, at 236.
of a community that might have changed since it first began operations.\footnote{184}{See Gracer, supra note 62, at 10,374-75 (discussing the effect of the Interim Guidance on permitting).} Industries are bothered by this approach because environmental justice concerns are a more significant barrier for new facilities than existing facilities, and the \textit{Interim Guidance}, in effect, treats permit renewals as if they are applications for new facility permits.\footnote{185}{See id. at 10,375; Schnell & Davies, supra note 2, at 530-31. Modifications are generally less controversial among industry advocates because in many cases, they involve new pollution controls that will actually decrease environmental impacts. See Schnell & Davies, supra note 2, at 530. Also, even if the modification allows increased pollution, the net impact will likely be less than that from an entirely new facility. See id. In addition, existing facilities are likely to employ residents from the surrounding community, contributing to its tax base, whereas new facilities hold only the possibility of jobs and tax revenue. See id. Therefore, the community has a stake in the success of the existing facility, and if the facility can demonstrate a reduction in emissions from new modifications that result in no net disparate impact over time, then it will be viewed more favorably by the community. See id.}

Opponents to the \textit{Interim Guidance} argue that it creates a separate administrative process that may take place after the state issues a permit if the state does not consider demographics before issuing the permit.\footnote{186}{See Gracer, supra note 62, at 10,375. Commentators have suggested that if an analysis of the community affected and the interests involved is done early in the permitting process, Title VI concerns can be addressed and potential solutions developed that will serve the community’s needs. See Paul Connolly, \textit{EPA Dismissed Complaint on Proposed Steel Plant in Michigan}, Env’t Rep. (BNA), at 1351 (Nov. 6, 1998) (expressing the advice of the EPA through OCR Director Anne E. Goode).}

Actually, the \textit{Interim Guidance} merely provides a remedy for states that have failed to meet Title VI requirements.\footnote{187}{See generally INTERIM GUIDANCE, supra note 21 (assuming complaints will only be brought when recipients of federal funds fail to meet regulatory requirements under Title VI).} This aspect of the \textit{Interim Guidance} has received criticism because industry groups allege that the permitting process lacks finality and predictability by allowing a challenge to ensue after the state has made a permitting decision.\footnote{188}{See Newman-Barnett, supra note 161, at 1. Industry groups worry that this will pose an economic threat because the challenges will not end after the permitting decision has been made. See id. By allowing intervention at any stage of the permitting process, industrial groups are mostly concerned with the issue of finality and the economic effect that this unpredictability will have on them. See id.} Industries are also concerned that it will pose an economic threat by allowing the EPA (or permitting organization) to demand additional changes or withdrawal of the permit for environmental justice reasons.\footnote{189}{See id. For example, an industry may have already sunk large amounts of money into the operation of a facility based on the issuance of the permit and the public participation process. See Hazardous Waste Firms, supra note 128, at 339.} Critics argue that this additional regulatory layer of permitting is burdensome and
results in delays in the permitting process. Only recently have environmental justice claims become high-profile cases impeding project development and permit renewals. Generally, environmental justice issues had been addressed in task forces and policy formulations that have had little impact on the regulated community.

4. Mitigation and Justification: An Unclear Approach

A facility’s justification for the siting decision and the mitigation measures (or alternatives) that are proposed are also important parts of the Title VI process. According to the Interim Guidance, the recipient will

190. See Ferstel, supra note 20, at 1A. In response to these criticisms, the EPA Administrator, Carol M. Browner and the EPA Director of OCR, Anne E. Goode, have suggested that state agencies can avoid environmental justice challenges by allowing more citizen input in the permitting process. See id.

191. See Gracer, supra note 62, at 10,374-75. The first petition filed utilizing the EPA’s environmental justice Interim Guidance involves Shintech, Inc., a Texas-based subsidiary of a Japanese conglomerate. See Lois Ember, Environmental Justice at Issue, CHEM. & ENG’G NEWS, July 13, 1998, at 39; Kriz, supra note 20, at 1610. Shintech proposed building a polyvinyl chloride plastic factory in St. James Parish, Louisiana, a community composed of mostly poor African-Americans. See Kriz, supra note 20, at 1610. Controversy resulted within the community because some residents argued that the factory should be built because of the jobs it would create, while others opposed the environmental hazards the pollution would cause. See id. at 1611.

The EPA rejected the community’s initial petition that alleged a violation under the CAA. See Ferstel, supra note 20, at 1A. Administrator Browner then suggested that the opponents file a claim under Title VI. See id. Shintech opponents did so, alleging that the Louisiana Department of Environmental Quality violated Title VI by issuing the company an air emission permit for the $700 million project. See id. The citizens claimed that the proposed facility would result in a disproportionate health burden on the community, compounding the industrial pollution problems that already exist there. See id. The complaint alleged that there were already 13 chemical or petrochemical plants in the St. James Parish area. See Ember, supra, at 39. However, the Shintech case became moot because the company abandoned the project, choosing to operate a smaller factory in a predominately white town. See Lynette Clemetson, A Green Bottom Line, NEWSWEEK, Nov. 2, 1998, at 4.

A similar case using the Interim Guidance procedures, yielded the same result for the proposed business venture. Select Steel Corp. had proposed to build a mill in Flint, Michigan under a permit issued by the Michigan Department of Environmental Quality. See Paul Connolly, EPA Panel Upholds Flint Steel Mill Permit; Michigan Seeks Dismissal of Complaint, 29 Env’t Rep. (BNA), at 1119 (Oct. 2, 1998). Despite state approvals, an environmental justice complaint was filed to appeal the permit. See id. Not long after, the company abandoned the $175 million project. See Paul Connolly, Michigan Governor Blames EPA Policy For Company Decision to Scrap Factory Plan, 29 Env’t Rep. (BNA), at 995 (Sept. 18, 1998) [hereinafter Connolly, Michigan Governor].

192. See Ferstel, supra note 20, at 1A (discussing the current trends in environmental justice).

193. See INTERIM GUIDANCE, supra note 21, at 11-12 (noting that “mitigation measures should be considered as less discriminatory alternatives, including additional permit conditions” which would reduce adverse disparate impacts). This step of the EPA’s analy-
have the opportunity to justify the permitting decision based on "substantial, legitimate interests." Determining whether the justification is sufficient will depend on the facts of the case. A mere demonstration that a facility meets the applicable environmental regulation requirements will not be, however, sufficient justification. Among the factors that may be considered are the seriousness of the disparate impact, whether a renewal or a new permit is involved, and whether the articulated benefits will benefit the community subject to the Title VI complaint. In addition, the Interim Guidance states that if a practicable and less discriminatory alternative exists, the EPA will not accept the justification. The Interim Guidance does not indicate, in establishing a prima facie case, which justifications and mitigation measures will suffice to rebut a finding of disparate impact, thus leaving the question open for debate.

The Interim Guidance states that mitigation is an important focus of the process despite the difficulty of justifying an "unmitigated," but disparate, impact. The Interim Guidance indicates that the EPA will consider "supplemental mitigation projects," (SMPs) in combination with other mitigation efforts. Although mitigation is a familiar concept, it is unclear how the EPA or the courts will examine these measures in the

sis involves an arithmetic or statistical disparity calculation, which will be analyzed by experts to make a prima facie disparate impact finding, which the recipient of federal funds has the opportunity to rebut. See id.

194. Id. at 12. This standard is analogous to the "bona fide interest" standard used in Medical Center. See NAACP v. Medical Ctr., Inc., 657 F.2d 1322, 1333 (3d Cir. 1981).

195. See INTERIM GUIDANCE, supra note 21, at 12.

196. See id. The Interim Guidance states that it will also consider "broader governmental interests" because "the interests of a state or local environmental agency are necessarily influenced and informed by the broader interest of the government." Id.

197. See id. Generally, a renewal permit with demonstrated benefits will weigh more favorably than a new permit with more speculative benefits. See id.

198. See id.

199. See generally id.

200. Id. at 11-12. The Interim Guidance states that mitigation measures will be "an important focus in the Title VI process, given the typical interest of recipients in avoiding more draconian outcomes and the difficulty that many recipients will encounter in justifying an 'unmitigated,' but nonetheless disparate, impact." Id. at 11. The Interim Guidance suggests that public health and environmental consideration can be mitigated, and that the EPA will evaluate the sufficiency of such mitigation in consultation with expert advice. See id. at 11-12.

201. See id. at 11 (referring to the method used when "it is not possible or practicable to mitigate sufficiently the public health or environmental impacts of a challenged permit"). These SMPs may involve concerns raised by challengers of the permit that cannot otherwise be addressed under Title VI. See id. at 11-12 (explaining that other considerations may be outside those addressed by the permitting agency).
environmental justice context. Opponents criticize the Interim Guidance for failing to identify categories of mitigation measures that the EPA would find acceptable and indicate how the agency will analyze alternatives. For example, although the Guidance indicates that an offered justification will be unacceptable if a less discriminatory alternative exists, it does not suggest how to determine the adequacy of an alternative. Therefore, it is unclear to developers whether they may reject an alternative based on legitimate business considerations such as cost, access, site suitability, market factors, or availability of infrastructure.

Together, the vagueness concerning what the EPA will consider in examining alternatives, justifications, and mitigation measures results in ambiguity that opponents argue is simply ineffective and inadequate guidance.

C. Additional Opposition and Complaints

Other business groups and civil rights activists have criticisms that are more general and suggestions regarding the Interim Guidance. For example, state and local concerns question the legality of considering racial or economic factors when reviewing permit applications. Additionally, critics argue over whether the EPA has the statutory authority to implement the Interim Guidance at all. Other commentators suggest that the EPA offer guidance on how effectively to prevent Title VI challenges. They suggest that providing a proactive approach would avoid challenges to permitting decisions altogether, allowing state and local agencies to

202. See Gracer, supra note 62, at 10,375 (discussing the lack of analysis of these measures in the environmental justice context). Businesses are concerned that mitigation measures will pose requirements in addition to federal and state regulations. See Hogue, supra note 126, at 235.

203. See Gracer, supra note 62, at 10,375. For example, it is unclear whether job training for residents or benefit payments for communities would be sufficient. See id; Hogue, supra note 126, at 235 (quoting public comments on the Interim Guidance opining that these measures would be insufficient, but that guidance on correcting disparate impacts might be more helpful).

204. See INTERIM GUIDANCE, supra note 21, at 11-12. The Interim Guidance indicates only that "less discriminatory alternatives should be equally effective in meeting the needs addressed by the challenged practice." Id. at 12.

205. See Gracer, supra note 62, at 10,375.

206. See Hogue, supra note 126, at 234-35.

207. See id. at 235. State and local agencies are also concerned about the dual implication of other types of permits when emission permits are also involved. See id. (describing the city of Houston's request to limit the reach of the Interim Guidance to pollution control permits).

208. See id. at 237.

209. See id. at 235.
resolve issues during the permitting process.\textsuperscript{210}

On the other hand, some environmental justice and civil rights activists believe that the \textit{Interim Guidance} is not stringent enough against environmental injustice and want the EPA to expand the number of practices that may indicate discrimination.\textsuperscript{211} For example, activists argue that increased health risks, devaluation of land, and decreased quality of life are additional forms of discrimination that the EPA's \textit{Interim Guidance} should specifically address.\textsuperscript{212} Similarly, the National Environmental Justice Advisory Council (NEJAC) suggests that the EPA strengthen the policy, not rescind it.\textsuperscript{213} NEJAC encourages the EPA to include activities beyond permitting, namely enforcement and cleanup.\textsuperscript{214} Furthermore, commentators called for expansion of the \textit{Interim Guidance} to include an administrative process to review actions taken by the OCR on complaints.\textsuperscript{215} Given the totality of the criticism, the EPA needs to consider ways to address more effectively the competing interests involved before it adopts a final guidance.

### III. THE EPA'S IMPENDING FINAL GUIDANCE: BALANCING ENVIRONMENTAL JUSTICE WITH SUSTAINABLE URBAN REDEVELOPMENT

The EPA's \textit{Interim Guidance} fails to take into account some of the legitimate concerns of industry and minority groups seeking redevelopment of urban areas, as well as the concerns of local and state government regarding autonomy in land use decisions.\textsuperscript{216} Environmental justice and industrial redevelopment advocates are at the forefront of the national environmental policy agenda and therefore, must take this opportunity to collaborate on strategies to improve the urban environment in a manner consistent with environmental justice principles.\textsuperscript{217} It is necessary

\textsuperscript{210} See \textit{id.} (quoting industry sources as saying that "only those who participated in the permit process should be allowed to file complaints").

\textsuperscript{211} See \textit{Environmental Justice, supra} note 53, at 10,393.

\textsuperscript{212} See \textit{id.}

\textsuperscript{213} See \textit{id.}

\textsuperscript{214} See Hogue, \textit{supra} note 126, at 236 (reporting that some commentators believe that the \textit{Interim Guidance} should apply to all of the offices of the EPA, not just the OCR). There is some indication of dissension within the EPA over the \textit{Interim Guidance}. See Newman-Barnett, \textit{supra} note 161, at 1.

\textsuperscript{215} See Hogue, \textit{supra} note 126, at 236 (noting that the Center on Race, Poverty, and the Environment argued that the \textit{Interim Guidance} should be expanded to provide this administrative review so that groups that feel their complaints were erroneously rejected or dismissed will have another avenue of redress).

\textsuperscript{216} See \textit{id.} at 235.

\textsuperscript{217} See McWilliams, \textit{supra} note 4, at 782 (concluding that "[t]his is a critical time for
for the EPA to capture this collaboration in a final guidance that more fairly balances environmental justice concerns with the need for sustainable urban redevelopment.\footnote{218 See generally, J.B. Ruhl, The Seven Degrees of Relevance: Why Should Real-World Environmental Attorneys Care Now About Sustainable Development Policy?, 8 DUKE ENVTL. LAW & POL'Y F. 273 (1998) (providing an interesting discussion on meaningful implementation of sustainable development policies).}

\section{A. Balancing Interests with a Common Goal}

Urban redevelopment advocates are generally public servants including local and state officials, city planners, and local economic development officials.\footnote{219 See McWilliams, supra note 4, at 706 n.1 (describing how these advocates are frustrated with the time and expense involved with environmental cleanup and have persuaded state legislators to create legislation that would facilitate urban redevelopment).} These advocates have focused on reducing cleanup standards, limiting liability, streamlining government review, and increasing government incentives to attract industry to urban areas.\footnote{220 See id. at 738.} It would be unfair to imply, however, that their goals do not include improvement of the urban environment.

Environmental justice advocates have recognized that redevelopment can potentially lead to greater concentrations of adverse environmental impacts in urban areas composed of mostly minority groups.\footnote{221 See Lazarus, supra note 5, at 795.} Environmental justice advocates argue that the burdens of environmental protection are disproportionate to the benefits received.\footnote{222 See McWilliams, supra note 4, at 757 (noting further how the impact of environmental injustice on minority communities has resulted in political empowerment).} Therefore, in order to create a working relationship between these interests, it is important for urban redevelopment advocates to understand a community's resistance to development.\footnote{223 See Smith & Graham, supra note 11, at 10,568-69. Consequences of the loss of large industry include the failure of small businesses relying on the industry, the decrease of the tax base, and deterioration of infrastructure. See id.} Similarly, environmental justice advocates must recognize that loss of industry can have long-term ill effects on a community.\footnote{224 See id. at 10,574.} Both groups need to focus on their common goal: improvement of the quality of urban life.\footnote{225 See id. at 10,574.} The EPA must then incorporate both visions into its final guidance.

The final guidance should recognize the need for equitable permitting standards (which would carry over into siting decisions) and allow for
community involvement. Ideally, this would accommodate the legitimate interests of developers and the economic benefits associated with development. This approach would involve making difficult decisions regarding what environmental risks are acceptable. By allowing for community involvement in the decision-making process, the community affected would shape the decision.

In order for these groups to collaborate effectively, however, there needs to be more effective use of measures such as the public participation process. For example, redevelopment advocates should allow for increased community involvement in the decision-making process at an early stage, as called for in the Interim Guidance, and allow the input to continue through project completion. With community involvement, industrial redevelopment has a better chance of being successful, and will provide an opportunity for a community to define its own identity. The Interim Guidance should reflect the legitimacy of these efforts and not ignore their import.

226. See McWilliams, supra note 4, at 782 (arguing that both groups make compromises in their positions to allow productive collaboration to occur).

227. See id. at 782.

228. See id. This issue of community involvement is demonstrated by the recent events involving Shintech where some community members favor the decision to build the factory in the community because of the resulting economic benefits. See Kriz, supra note 20, at 1610-11. The reality of Shintech is that urban redevelopment cannot be achieved without some degree of environmental harm, but that the economic advantages of development must be weighed with the environmental consequences. See supra note 191 (discussing the Shintech example).

229. See McWilliams, supra note 4, at 782. Within the general permitting process, there are traditionally stages where public participation is mandated. See 40 C.F.R. § 71.11 (1998). The regulations for the federal operating permit programs indicate various stages where public participation is required, including notification of the opportunity to be put on the mailing list for those affected by permitting decisions, in addition to all public notices. See id. at §§ 71.11(d)(3)(i)(E)(3), 71.11(e), 71.11(h), 71.11(j). Generally, notice is given to potentially affected communities early in the permit process so that they may participate more fully and effectively. See PLATER ET AL., supra note 121, at 735. For example, under the CAA, the regulations require public participation for the issuance of an initial permit in addition to notice of a "draft permit." See 40 C.F.R. § 70 (1998); Novello, supra note 121, at 10,089. The EPA has also provided for a 30-day comment period and an opportunity for an informal public hearing. See 40 C.F.R. § 70. However, the preamble to the CAA final rules for the Title V permit program indicates that a state may not have to hold a hearing in all instances. Specifically, a hearing is not required if the petitioner only protests the source's location. See Novello, supra note 121, at 10,089. This may have special relevance for Title VI challenges, which commonly challenge decisions regarding facility location.

230. See McWilliams, supra note 4, at 782-83 (noting that their input may be crucial to the success of industrial redevelopment).

231. See id. (discussing the merits of communication between redevelopment advocates and urban community groups).
The inequities in environmental protection and enforcement have developed over a long time and one agency or program cannot solve this problem alone. Thus, all perspectives must be represented in the debate to improve the Interim Guidance and create a workable solution. Therefore, understanding the concept of sustainable urban development and encompassing the interests of environmental justice activists into that concept will be an important part of devising the final guidance.

B. Sustainable Urban Redevelopment

The concept of sustainable development aims to direct economic efforts toward increasing the quality of life while recognizing that the Earth has a finite capacity to accommodate people and development. The theory recognizes that there is a moral obligation to consider the interests of future generations. The policy objective of sustainable development requires integrating economic and environmental concerns, thereby providing a conceptualization of their common goal. Stereotypically, some people believe that economic development and environmental protection are incompatible. "The economic and social characteristics of [minority] neighborhoods that make them vulnerable to environmental dumping also create an urgent need for economic development[,]" and thus, the principle of sustainable development can bring these concerns together.

Only changes in values, processes, administrative policy, and laws will institutionalize the principle of sustainable development. Moreover, "[p]olitical power must also be structured in ways that are conducive to

232. See supra text accompanying notes 1-16 (discussing the genesis of environmental injustice).


234. See id.

235. See id. at 263.

236. See Godsil & Freeman, supra note 5, at 35. Godsil and Freeman propose an alternative type of economic development called the "community-based economic development" (CED) to overcome this stereotype. Id. CED focuses on the fact that environmental justice principles are often consistent with land use debates over community resources, encompassing both economic and political conflicts. See id.

237. Id.

238. See Smith, supra note 233, at 301. Changes in just one of these four areas will be insufficient because each plays an important role in creating a viable sustainable development policy. See id. at 301-03.
sustainable development.\textsuperscript{239} For example, the law must give decision-making power to the level of government that is best able to make decisions that bring about the goal of sustainable development.\textsuperscript{240} When the EPA issues a final guidance, it should make sustainable development a progressive movement rather than just a rhetorical value. Before the EPA reaches this goal, however, it may first need to address other limitations.

The final guidance must speak to the widespread phenomena that are at the root of environmental inequities: namely, racist attitudes and false stereotypes that result in the lack of political leverage and economic power by racial minority groups.\textsuperscript{241} Those with political influence tend to benefit from the lawmaking process and are more likely to have their problems addressed.\textsuperscript{242} Because minority groups possess significantly less power, particularly on the national level, they are more likely to bear unfavorable societal burdens.\textsuperscript{243} EPA Administrator Carol Browner acknowledged the need for community input when she wrote: "[o]ur agencies want to work with all who can contribute to finding solutions - communities, State, Tribal, and local governments, business, and environmental organizations."\textsuperscript{244} If the EPA is able to follow up this statement by providing all these groups with the opportunity to participate in the formulation of the final guidance, perhaps it can achieve a more equitable and effective approach to environmental justice.

\textsuperscript{239} Id. at 304.

\textsuperscript{240} See id. This may involve allowing land-use decisions to be made at the local level but with accountability under state law. See id. In addition, acquiring critical ecosystem lands may need to be done at the national level with laws creating new institutions and processes to implement sustainable development. See id.

\textsuperscript{241} See Lazarus, supra note 5, at 806-07 (discussing the causes of environmental inequity). The debate over environmental justice also includes the assertion that the community's demographics have changed since the siting, not necessarily with the intent to discriminate. See Starkey et al., supra note 1, at 4. The impacts of siting decisions by industries are often unintentional. See id. at 8. Environmental justice advocates should be aware that "[c]haracterizing the private sector as impersonal and greedy establishes an adversarial attitude that may impede progress in accomplishing environmental justice goals and objectives." Id.; see also Kevin, supra note 167, at 142-43 (discussing factors other than racism).

\textsuperscript{242} See Lazarus, supra note 5, at 810 (concluding that the absence of political leverage is a primary cause of the inequity).

\textsuperscript{243} See id. at 808. These disproportionate burdens are exacerbated by the lack of economic resources that cause minorities to suffer greater economic harm associated with environmental protection. See id.

\textsuperscript{244} Carol M. Browner, Preface to EPA STRATEGY, supra note 25.
C. Strategy and Policy Implications of the Interim Guidance

The Interim Guidance results in strategy and policy implications for both environmental justice activists and industry groups. Environmental justice claims are likely to remain a factor in permitting and siting decisions for some time; and thus, developers will need to be sensitive to citizen's legitimate concerns over disparate impacts. This will require facility owners to recognize when site proposals raise community concerns, and will require community input and assistance of community relations experts.

Industry groups would be wise to engage the public in discussion before locating a facility in their community. By accepting community input and allowing public involvement early in the process, businesses can alleviate some of the tensions that result from lack of information and insufficient communication. Providing for open debate will allow a business to weigh the concerns of a community and avoid lawsuits that result after construction has already begun. Having community participation early on will head off problems before they begin and allow a business to bow out early if the community response generates opposition that might create an economic cost barrier to development. Though it seems obvious that most communities do not want a facility with environmental risks, some may be willing to trade these risks for the resultant economic opportunity.

Although the current movement primarily involves political and economic struggles for which lawsuits may not be the best remedy, challenging environmental equity in the courtroom has significant short-term advantages. Litigation aids in forming a community's identity and lift-
ing morale, raises the profile of environmental and civil rights groups, and consequently builds political momentum by creating a rallying point for public support. While courts have yet to decide a Title VI environmental justice case favorably, as more cases evolve, they have the potential to educate the judiciary, which could result in a winning case. Nonetheless, the symbolic value of filing a lawsuit is substantial in itself.

IV. CONCLUSION

The EPA has justly included the consideration of disparate effects on minority communities through permitting decisions that disproportionately locate hazardous facilities in minority and low-income communities. Environmental justice is a laudable goal that the Interim Guidance seeks to address, and although the Interim Guidance has some shortcomings, it signifies a strong first step in a positive direction, which is needed for the future success of environmental injustice claims.

While the EPA's Interim Guidance regarding environmental justice makes a commendable attempt to address the growing trend of using Title VI to combat disparate environmental impacts, it needs to balance more effectively the interests involved. Both the process for formulating the final guidance and the siting/permitting process itself need to involve adequate public involvement by both industry and the community in order to accommodate all interests involved. Specifically, the final guidance should address the legitimate concerns raised by advocates for urban redevelopment and the complaints made by local and state governments that the EPA is interfering with their land use decisions. In order to achieve a more equitable concept of environmental justice, it is necessary that the final guidance represent all interests without compromising the importance of environmental protection to a community's economic and social health. The EPA can effectively achieve this goal by incorporating the principle of sustainable urban redevelopment into the final guidance.

253. See id. at 541.
254. See id. at 543 (analogizing to civil rights developments in school and facilities desegregation).
255. See Lazarus, supra note 5, at 829 (arguing that the value of a lawsuit extends beyond a favorable decision).