



*Louisiana's demographics
will continue to force the
consideration of environmental
justice issues.*

Leaving Communities Behind: The Evolving World of Environmental Justice

By Robert E. Holden and Tad Bartlett

The Environmental Justice (EJ) movement argues that adverse environmental impacts created by industrial development should be racially balanced. In practice, this means that EJ principles are used to oppose industrial development in areas with large minority populations. Because Louisiana has many areas, particularly rural areas, with high proportions of African-Americans, EJ remains an important consideration for new industrial development in the state.

The accompanying article by Adam Babich (*see page 90*) argues that environmental justice is a problem in Louisiana. He argues further that the color-blind administration of environmental regulations is not enough to prevent these ills. In responding to these positions, I have to keep in mind the main question that my clients ask: "What do we have to do to build a new plant in Louisiana?" My clients are looking for specific answers and are unable to solve historical social problems.

The Environmental Justice Problem in Louisiana

Environmental justice advocates argue that environmental burdens — pollution, proximity to waste disposal facilities, etc. — fall disproportion-

ately on minority communities. Some anecdotes but little empirical data support this view. Christopher Foreman, a prominent scholar and student of environmental justice, has stated:

[O]nce contrary findings and thoughtful criticisms are taken adequately into account, even a reasonably generous reading of the foundational empirical research alleging environmental inequity along racial lines must leave room for profound skepticism Taken as a whole, this research offers, at best, only tenuous support for the hypothesis of racial inequity in siting or exposure . . .¹

On the other hand, there remains a perception, particularly among activists, that environmental justice is a problem in Louisiana.

In 1997, Louisiana lost two planned facilities — involving more than \$1.5 billion in direct new investments — because of EJ concerns. Considering this \$1.5 billion in light of the multiplier effect as money turns over in the economy, the lost facilities have cost the Louisiana economy tens of billions of dollars and thousands of jobs. These costs are neither merely potential nor inconsequen-

tial, but are real burdens for rural communities in this state that must be weighed alongside EJ concerns. As the experiences of these lost facilities demonstrates, ultimately the goal of the EJ movement is not mere dialogue — or the respect, right to participation and institution of pollution controls that are called for in our colleague's article and which are already part of the environmental regulatory regime — but a dramatic choice of whether any industrial and economic development should be allowed in areas with high proportions of racial minorities.

On Sept. 10, 1997, the U.S. Environmental Protection Agency (EPA) ordered the Louisiana Department of Environmental Quality (LDEQ) to reopen air permits for Shintech's proposed St. James facility.² While the order ostensibly turned on technical deficiencies in the permits, EJ concerns had been the drivers of the complaint that led to EPA's order. The fundamental complaint was that 87 percent of the population in the affected census tract was African-American.

In the face of EPA's continuing investigation of a complaint filed under Title VI of the Civil Rights Act of 1964 and EPA's non-discrimination regulations, Shintech withdrew the proposal for the St. James facility. Instead, Shintech has now built a smaller, \$250 million facility in Iberville Parish.³ Iberville Parish has reaped most of the benefits of Shintech's new facility — most of the 49 permanent jobs and most of the \$4 million annual payroll. One Shintech customer has located a 40-employee facility nearby, and Shintech has partnered with Iberville Parish to develop a 100-acre industrial park.⁴

Meanwhile, St. James Parish has lost employment and revenues. After Shintech withdrew its St. James plans, 2,000 anticipated construction jobs, 400 anticipated permanent jobs and \$11.4 million in anticipated sales tax revenue evaporated.⁵ St. James was beset by additional setbacks over the following four years, involving long-term closures of six major facilities.⁶ These events, unrelated to Shintech's withdrawal, have hit the parish's economy hard, a hit that could have been significantly softened by the presence of Shintech's proposed \$700

million facility.⁷

On May 1, 1997, the Nuclear Regulatory Commission (NRC) struck down its Licensing Board's approval of Louisiana Energy Service's (LES) proposed \$855 million facility in Claiborne Parish, and the project was shelved. The facility had promised 400 construction and 100 permanent jobs.⁸ The fundamental complaint was that the facility could be located in an area that was 97.1 percent African-American. Relying on the National Environmental Policy Act (NEPA), the NRC found that the site and a resulting road relocation would disproportionately impact the local residents, who would have to travel 0.38 miles farther to travel between the two communities.⁹

However, LES's siting factors were facially race-neutral: It evaluated potential sites according to topography, seismic susceptibility, flood proneness, number of nearby residents, support of local elected leaders, property availability, shape, size, cost to prepare the site, and access to utilities and transportation routes.¹⁰ The site of the proposed facility had been declared an enterprise zone by the state to encourage companies to locate facilities near poor communities to generate employment and educational opportunities.¹¹

The NRC relied on the testimony of the citizen group's EJ expert, Dr. Robert Bullard, whose testimony illustrates the tension between EJ and economic development, environmental protection and democratic values. The state encouraged industrial development near poor and minority communities for job creation and educational opportunities,¹² but Bullard criticized the disproportionately high African-American population near the LES site. LES valued sites away from schools, hospitals and nursing homes for safety reasons, but Bullard criticized these efforts because minority populations are underserved by these institutions and may be more vulnerable to a facility siting. LES sought the support of local elected officials, but Bullard advocated seeking the support of unidentified and unelected community leaders, contending that incorporated municipalities would support rural sites more likely to have higher African-American populations.¹³

Is Color-Blind Administration of Environmental Laws Enough?

Environmental laws and regulations are intended to protect all citizens, especially those most susceptible to pollution because of age or infirmity, from adverse health effects from pollution. The nation's environmental regulations are demanding and comprehensive — EPA, for example, now administers almost 20,000 pages of regulations in Title 40 of the Code of Federal Regulations. Arguably with too much detail, these regulations control air and water pollution, including hazardous pollutants, and the handling and disposal of wastes. The “gap” in protection mentioned in the accompanying article regarding the absence of *federal* ambient air standards for hazardous air pollutants is remedied in Louisiana by *state* ambient air stan-

dards.¹⁴

Recent Trends Curtail EJ Legal Theories

Rightly or wrongly, the current legal avenues for pursuing EJ have narrowed significantly. Title VI EJ claims, including the Shintech claims, have been pursued as administrative complaints and as private causes of action. Both avenues have been shut off by recent administrative and judicial decisions.

Section 601 of Title VI prohibits discrimination against any person “on the grounds of race, color, or national origin . . . under any program or activity receiving Federal financial assistance.”¹⁵ Section 602 directs federal agencies to promulgate regulations to implement section 601.¹⁶ EPA's Title VI regulations prohibit recipients of EPA financial assistance — such as LDEQ — from discriminating in

the methods or criteria used in administering projects, or in the selection of a facility site.¹⁷

In its 1998 *Select Steel* decision, EPA's Office of Civil Rights (OCR) upheld an air permit that was challenged on Title VI EJ grounds.¹⁸ The air permit was predicated on compliance with the National Ambient Air Quality Standards (NAAQS), and OCR found that the NAAQS were “presumptively sufficient to protect public health with an adequate margin of safety for the population to prevent any ‘adverse’ impacts,” and thus any disparate adverse impacts.¹⁹ OCR concluded that, at a minimum, a permitting or siting decision cannot be found to have a “disparate impact” unless there is some documented adverse impact, such as a violation of the NAAQS or exceedance of acceptable ambient levels of air toxics. Application of the *Select Steel* precedent could curtail Title VI administrative review of Louisiana air permits because where there is no *adverse* impact, there can be no Title VI *disparate* impact.

More recently, the Supreme Court in *Alexander v. Sandoval*, 121 S.Ct. 1511, 1515 (2001), addressed whether regulations promulgated under section 602 of Title VI can create a private cause of action. The court found that Title VI section 602 creates no new rights and does not authorize federal agencies to create new rights via regulation.²⁰

In *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*, 274 F.3d 771 (3 Cir. 2001), the 3rd Circuit addressed the issue whether 42 U.S.C. § 1983 could be used to circumvent the *Sandoval* concern in the EJ context. The court found that the right to nondiscriminatory siting sought to be enforced by the citizen group via section 1983 was not contained in the express terms of Title VI, but only in EPA's regulations. The court held that section 1983 could not be used to enforce a private right of action stemming from regulations promulgated pursuant to section 602 of Title VI rather than from the text of the statute itself.²¹

Nonetheless, EJ continues to be viable under new administrative approaches to Title VI complaints, as well as through

NEPA-based complaints. In 2000, EPA released its *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits* (the Guidance).²² The Guidance establishes a regulatory process for determining adverse and disproportionate impacts and for determining whether such impact is justified.²³ While the Guidance deems compliance with NAAQS in the case of air permits to be presumptively not adverse, and while the Guidance allows for an otherwise disparate adverse impact to be countered by a showing that it is “justified” by its benefits,²⁴ OCR reserves the right to find a Title VI violation if the project is subject to a “less discriminatory alternative.”²⁵

The LES decision shows that NEPA also provides a non-Title-VI basis for EJ.²⁶ One of NEPA’s goals is to “assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings.”²⁷ While ultimately NEPA is not a substantive “go/no-go” statute, a court can always find that inadequate consideration has been given to all environmental factors, including racial demographics. In Louisiana, the public trust doctrine establishes a “mini-NEPA” for major projects. Numerous state court decisions have held that permitting agencies have a mandatory duty to make findings of fact regarding the public trust factors.²⁸ The Louisiana public trust doctrine requires the selection of the environmentally preferable alternative; how racial demographics fit into the Louisiana environmental review process is an open question.²⁹

Conclusion

Although EJ legal theories have been sharply limited by *Sandoval*, *South Camden* and *Select Steel*, Louisiana’s demographics will continue to force the consideration of EJ issues in environmental decisionmaking in this state. EJ will continue to push industry and the administrative agencies into more meaningful dialogue with minority communities about environmental issues, and will continue to push industry to ensure that many of the benefits of new industrial facilities,

such as jobs, are realized among the neighboring communities that bear the burdens of the industrialization.

FOOTNOTES

1. Foreman, Christopher H., Jr., *The Promise and Peril of Environmental Justice*, 27 (1998).

2. In the Matter of Shintech Inc. and its Affiliates’ Polyvinyl Chloride Production Facility, Permit Nos. 2466-VO, 2467-VO, 2468-VO, Order Partially Granting and Partially Denying Petitions for Objection to Permits (Sept. 10, 1997).

3. See In the Matter of Shintech, Inc., 2000-CA-1984 (La. App. 1 Cir. 2/15/02), 814 So.2d 20 (upholding the operating permit granted Shintech’s Iberville Parish facility by LDEQ).

4. Leonard Gray, “Shintech Supplies High-Paying Jobs in Iberville Parish,” *L’Observateur* (LaPlace, La.) (Dec. 19, 2001), at 2A.

5. See *id.* at 1A.

6. John McMillan, “Layoffs, Closings Push Officials Into Tightening Purse Strings,” *The Advocate* (Baton Rouge, La.) (Jan. 26, 2001), at 3B; Associated Press, “Occidental Chemical Suspends Production” (Feb. 22, 2001).

7. See *id.*

8. Alan Clendenning, “Nuclear Plant Opponents Say They Feared Japan-type Leak in North Louisiana,” Associated Press (Oct. 1, 1999).

9. In the Matter of Louisiana Energy Services, L.P. (Claiborne Enrichment Center), Docket No. 70-3070-ML, Final Initial Decision (May 1, 1997), at 97 (LES Decision).

10. LES Decision, at 32-39.

11. Philemon Oyewole, “Social Costs of Environmental Justice Associated with the Practice of Green Marketing,” 29 J. Bus. Ethics 239 (2001).

12. Claiborne Parish’s unemployment rate has been more than 150 percent of the statewide rate. See Clendenning, *supra* note 8.

13. LES Decision, at 42-51.

14. La. Admin. Code 33:III.Table 51.2 (2003).

15. 42 U.S.C. § 2000d (1988).

16. *Id.* at § 2000d-1.

17. 40 C.F.R. § 7.35(b) & (c).

18. See Letter from Ann E. Goode, Director of EPA’s Office of Civil Rights, to Father Phil Schmitter regarding EPA File No. 5R-98-R5 (Oct. 3, 1998).

19. *Id.* at 3. OCR also rejected a number of procedural challenges. *Id.* at 5-6.

20. 121 S.Ct. at 1521.

21. 274 F.3d at 780-89. The U.S. Supreme Court denied writ of certiorari, allowing the 3rd Circuit’s decision to stand. 122 S.Ct. 2621 (2002).

22. 65 Fed. Reg. 39650 (June 27, 2000).

23. *Id.* at 39670 (footnotes omitted).

24. *Id.* at 39680, 39683.

25. *Id.*

26. Other statutes may also contain non-Title-VI bases for EJ. For example, included in the legal maneuvering regarding Shintech’s St. James facility were Fair Housing Act complaints filed with HUD pursuant to Title VIII of the Civil Rights Act, alleging that pollution would result in unfair rental patterns. See generally Richard J. Lazarus, “Pursuing ‘Environmental Justice’: The Distributional Effects of Environmental Protection,” 87 N.W. U. L. Rev. 787, 839-41 (1992); Terenia Urban Guill, “Environmental Justice Suits Under the Fair Housing Act,” 12 Tul. Envtl. L.J. 189 (1998).

27. 42 U.S.C. § 4331(b)(2) (emphasis added).

28. See, e.g., Coalition for Good Gov’t v. LDEQ, 99-2843 (La. App. 1 Cir. 10/18/00), 772 So.2d 715; In re Rubicon, Inc., 95-0108 (La. App. 1 Cir. 2/14/96), 670 So.2d 475 (en banc); In re American Waste & Pollution Control Co., 633 So.2d 188 (La. App. 1 Cir. 1993).

29. See, e.g., N. Baton Rouge Env’tl Ass’n v. LDEQ, 2000-1878 (La. App. 1 Cir. 11/14/01); 805 So.2d 255.

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