WHO PAYS AND WHO IS COMPENSATED? ENVIRONMENTAL JUSTICE, SOCIAL POLICY, AND SUSTAINABLE DEVELOPMENT

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The preamble to Agenda 21, the product of the Rio Earth Summit, begins as follows:

Humanity stands at a defining moment in history. We are confronted with a perpetuation of disparities between and within nations, a worsening of poverty, hunger, ill health and illiteracy, and the continuing deterioration of the ecosystems on which we depend for our well-being. However, integration of environment and development concerns and greater attention to them will lead to the fulfillment of basic needs, improved living standards for all, better protected and managed ecosystems and a safer, more prosperous future. No nation can achieve this on its own, but together we can -- in a global partnership for sustainable development.

In this short paragraph more than 175 governments agreed to a statement of a great challenge and to an approach to its solution -- sustainable development. But it is clear that there are significant issues of equity in this commitment. Principle 7 of the Rio Declaration adds: "In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities." The World Commission on Environment and Development, better known as the Brundtland Commission, added: "Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs." This presents a different kind of equity issue, equity across generations. Finally, 117 heads of government in Copenhagen underscored the Brundtland Commission's core argument that "economic development, social development and environmental protection are interdependent and mutually reinforcing components of sustainable development." Central to these interwoven foundations for change is a recognition that there are serious social issues as well as critical problems of environmental protection and economic development that must be addressed if the global community is to enter the new century on a sustainable path. And at the core of many of these issues in all three realms are extreme and worsening crises of inequity. The problem of equity must be addressed if the goal of sustainable development to which virtually all of the world's nations have committed themselves is to be achieved.

However, the evidence to date suggests that for all of its rhetoric the global community has not adequately committed itself to the development of the balance among the economic, social, and environmental elements of sustainable development. In fact, the evidence is that while some progress has been made, "the overall trends for sustainable development are worse today than they were in 1992." The United Nations Environmental Programme's Global Environmental Outlook report (GEO-1) concluded in 1997 that "Progress towards a global sustainable future is just too slow. A sense of urgency is lacking. Internationally and nationally, the funds and political will are insufficient to halt further global environmental degradation and to address the most pressing environmental issues -- even though technology and knowledge are available to do so." The evidence is strong that economic growth predominates over concern with the environment in most places around the globe. Financial support has not been produced in the manner or in the amounts committed at Rio or Copenhagen. While the signatories to the Rio Declaration and Agenda 21 accepted their special responsibility to provide financial support for the sustainable development effort and to
focus on assisting the most desperate people immediately, the Rio+5 report found that: "Regrettably, on average ODA [official development assistance] as a percentage of GNP of developed counties has drastically declined in the post-UNCED period, from 0.34 per cent in 1992 to 0.27 per cent in 1995." In fact, official development assistance actually fell in both constant dollar and even in absolute dollar terms. Despite the continued focus on growth and the lack of investment in sustainable development, the global economy has been and remains volatile and fragile, with serious dangers on the horizon and significant impacts already present in Latin American and Asia. And if the economic and environmental situation is volatile and troubled, the social development situation is far worse. The Rio+5 report found that: "Too many countries have seen economic conditions worsen and public services deteriorate; the total number of people in the world living in poverty has increased." The 1997 UNDP Human Development Report put it bluntly.

Although poverty has been dramatically reduced in many parts of the world, a quarter of the world's people remain in severe poverty. In a global economy of $25 trillion, this is a scandal -- reflecting shameful inequalities and inexcusable failures of national and international policy.

More specifically, the Human Development Report states that: (1) some 1.3 billion people "live on incomes of less than $1 a day;" (2) current estimates indicate that by 2000 "half the people in Sub-Saharan Africa will be in income poverty;" (3) in Latin America some 110 million people are currently estimated to be poor by standard income measures and the figures continue to grow despite some progress during the early 1990s; (4) "some 160 million children are moderately or severely malnourished;" and in fact the Human Development Index (HDI) has actually declined in 30 countries (3 of those in Latin America) during the past year.

It is time to go back to the core concern and consider how to reestablish the commitment to the critical relationships among economic development, social development, and environmental protection. The question is where to look for critical points of intersection that address both the broad values of sustainable development embodied in the international commitments while simultaneously attending to very real pragmatic problems. The thesis explored here is that a careful reconsideration of equity in its intragenerational as well as intergenerational dimensions provides such a focus and that the emerging issue of environmental justice provides a context for analysis and action. This essay will consider first why it is important to develop the concept of equity in sustainable development beyond its current usage. It will then consider this expanded conception as it is manifest in the debate over environmental justice. It will then use the case of the United States to provide lessons concerning the complexities of the environmental justice concept and conclude with a new framework for addressing issues of environmental equity in cases raising environmental equity concerns.

THE PROBLEM OF EQUITY IN SUSTAINABLE DEVELOPMENT

What made the global move toward sustainable development different from the environmental efforts that preceded it was a recognition of the interrelationship among the critical elements of economic development, social policy, and environmental protection. It was a growing recognition that in a world with a rapidly expanding population, a history of excessive and wasteful use of resources in developed countries, and a huge population in developing, often very poor nations, something had to change. There were and are very large
issues about who had benefited from the use and abuse of the world's resources and who had paid. It was clear that the developed countries had built their high standard of living on the extraction of resources not only from their own lands but from less developed nations at bargain basement prices, if they were not simply taken at the point of a gun, and in ways that left devastating impacts not only on their natural resources but also on their people and their cultures. At the same time, these nations were not prepared to give up their own dreams for a better life and the enjoyment of the advantages that come with economic development just because environmentalists in rich western capitals called for conservation. That development, in turn, entailed the use of yet more resources. There were serious issues of both inequality and equity to be addressed if sustainable development was to be achieved. To meet that challenge, it is necessary to understand the relationship between equality and equity, to better understand the nature and uses of the concept of equity, and to relate the intergenerational and intragenerational aspects of equity in sustainable development.

Equality and Equity in Sustainable Development

The several agreements and sets of commitments reached during the 1990's, from Rio through Istanbul, establish a set of principles that provide the framework against which the discussion of equality and equity in sustainable development takes place. The beginning of the discussion at the Rio Earth Summit concerned the environmental protection principle, the commitment that protection of the global commons is required for the preservation of life itself and is essential to both social and economic development. The commitments associated with this principle consider both what is commonly referred to as the green agenda, which is primarily associated with conservation and with the management of natural resources, and the brown agenda, which emphasizes issues of pollution control with respect to current activities and cleanup of environmental damage already done. However, there is also the principle of integration and balance which emphasizes the fact that, despite the obvious tensions among environmental activists, neoliberal economists, and social policy advocates, the only hope for humankind is an effective working balance among these elements. Gro Harlem Brundtland put the matter bluntly in her foreword to the report of the World Commission on Environment and Development.

When the terms of reference of our Commission were originally being discussed in 1982, there were those who wanted its considerations to be limited to "environmental issues" only. This would have been a grave mistake. The environment does not exist as a sphere separate from human actions, ambitions, and needs, and attempts to defend it in isolation from human concerns have given the very word "environment" a connotation of naivety in some political circles. The word "development" has also been narrowed by some into a very limited focus, along the lines of `what poor nations should do to become richer,' and thus again is automatically dismissed by many in the international arena as being a concern of specialists, of those involved in questions of "development assistance."

Against this backdrop the common commitments recognize a right to development, but with an obligation of mutual respect. The international conferences have consistently accepted the basic right of sovereign nations "to exploit their own resources pursuant to their own environmental and developmental policies" since the 1972 Stockholm Conference. However, that same principle also calls upon the states to accept "responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment or other States or of areas beyond the limits of national jurisdiction." This concern for transboundary
issues extends not only to deliberate actions, as in the transboundary shipment of hazardous waste, but also to responsibility for what appear to be domestic actions that nevertheless plainly have transboundary effects.

There is an equality principle and an equity principle. The equality principle starts from the premise that all people are valuable, regardless of their race, gender, religion, cultural heritage, physical condition, or age. There are two subordinate principles embodied in the equality commitment. First, there is a nondiscrimination principle that bars deliberate discriminatory treatment. Second, there is a participation principle that calls upon regimes to empower all persons within the society, and particularly women, to participate fully in the economy, the public policy process, and social action as they affect all aspects of life, including environmental issues.

The equity principle has two dimensions. The intergenerational principle begins from the commitment to "meet the needs of the present without compromising the ability of future generations to meet their own needs." However, beyond those general admonitions that emphasize the environmental dimensions of sustainable development, there are numerous other elements to the intergenerational equity commitment that speak specifically to children. These began with the recognition of the importance of the involvement of youth in the Rio Declaration and reached a much wider scope in the Copenhagen Declaration and Commitments. Beyond these factors, there are numerous commitments with respect to intragenerational equity. These commitments stress the need to address the special concerns of women, indigenous persons, the elderly, and persons with disabilities, all groups that have historically been excluded from key decisions that have had significant environmental, social, and economic consequences on their lives, and to include them in decisionmaking. The intragenerational equity dimension also has numerous specific recognitions that developing nations have been specifically disadvantaged by the actions of developed countries and international institutions which now have an obligations not only to accord them the dignity that they deserve as sovereign states with proud cultural traditions but also to undertake differential burdens in sustainable development efforts to assist these countries.

The Nature of Uses of Equity

Of course, what these principles indicate is that equality and equity are not the same. It is important to consider what equity is, how it differs from equality, and why it matters in terms of its inter- and intragenerational dimensions. This effort to take equity seriously is all the more important because the concept is used so loosely and inappropriately in the general discourse on sustainable development and specifically with respect to the term environmental equity.

The concept of equity goes back to Aristotle. It arises from the fact that while decisions of those who govern should be just, justice is not served by treating everyone in the same way. This seemingly contradictory idea stems from two different problems. First, laws and other official decisions are meant to apply to a broad range of persons and situations. It is clear that laws and policies will be made that have unintended harsh effects on unintended targets. Thus, it would be considered unjust to treat the poor mother who steals to feed her starving child with the same degree of harshness as we would the professional criminal. She would be guilty of the same crime but equity would be invoked to conclude that she should be treated differently in the interest of justice. Second, there is a corrective sense of equity in
which we conclude that it is necessary to provide special consideration for someone who suffered because of the inappropriate behavior of another. In either case, equity is about a deliberately unequal treatment in the interest of justice.

The legal community has spent centuries developing the concept of equity. At first, when lands that became nations were governed by kings, or for that matter tribal chieftains, the issue of equity was addressed by an appeal to the ruler. Since the ruler was ordained by God (or in some societies by the Gods) he or she was anointed under divine authority with the power to exercise perfect truth and perfect justice. However, when the ruler's subordinates issued decisions, they were not so endowed. They could make mistakes and do injustices. Thus, in many countries, the ruler appointed a particular person to hear appeals from these other officials and to do justice to parties who may have been injured. In Britain, for example, the King (or Queen) appointed the Lord High Chancellor (known as My Lord Keeper for his role as keeper of the King's conscience) to hear cases in equity.

In the modern manifestation, courts are often given jurisdiction to decide cases in law and equity. For example, when courts are told to issue remedial orders to correct an injustice in the past, they are instructed to take into account the special circumstances of the case and provide a remedy designed to make the victim of past conduct whole where a simple award of damages will not be sufficient. Thus, judges issue injunctions which require government to cease illegal behavior and take remedial steps. In countries that have traditionally functioned on a civil code system with distinct limits on the discretion of courts, there has nevertheless been a move toward according a wider scope. It is not clear just now how this trend will evolve.

The discussion and development of the meaning and uses of equity in international law continues to date. Edith Brown Weiss has been a leading voice in this conversation. She notes that:

Today we regard equity as serving several functions: filling gaps in the law (praeter legem), providing the basis for the most just interpretation (infra legem), providing a moral basis for making an exception to the normal application of a rule of international law (contra legem), and as providing a basis for deciding a case in a way that disregards existing law (ex aequo et bono).

Thus, this more appropriate use of equity as a deliberate departure from standard or equal treatment in the interest of justice is well established both within many nations and among nations.

This use of the concept was also well understood by the drafters of Agenda 21 and other sets of critical commitments. However, it has become very common, particularly in the realm of social policy, to treat the term equity as if it meant equality and inequity as if it meant inequality. That is in some sense understandable, since something that is inequitable is unjust and that which is unequal would seem to be unjust and therefore wrong. However, an action at equity is a deliberate decision to single out some people or even some nations for special treatment because they have been or may be subject to injustices. Hence, while unequal treatment may sometimes be unjust, that is not always true. Indeed, the special commitments of Agenda 21 and the Copenhagen accords recognize that special solicitude is required for the least developed nations and for groups of people such as women, indigenous persons,
ethnic or religious minorities, the disabled, and children because they have been so
disadvantaged by past behavior by the developed countries, sometimes by those in power
within the developing world, and often within their own nations.

This is not to say that equity is only a legal concept. It is and should be a social,
political, and economic concept as well. However, it would be a serious misuse of the term
and jeopardize the effort to do justice for developing nations and people who have suffered in
the past and continue to be at a disadvantage today, if equity were not properly understood.
In this perspective, equity in sustainable development is a specific response to issues
presented by the marketplace, either because it can be used to address problems the market
is not designed to consider or because of market failures that produce injuries to the weak
and the poor. It is political as well in that it is a justification for relief for groups that have been
either intentionally or unintentionally harmed by past political decisions. In both the social and
juridical uses, equity calls for a process of careful consideration of context and the unique
facts of the specific problem presented for remediation and recognizes that blunt instruments
will not suffice to redress injustice.

Intergenerational and Intragenerational Equity Issues

There is one other aspect of equity in which there is need for an effort to bring together
the different perspectives that form the basis for sustainable development. It is important to
recognize the critical syntheses called for in the common commitments and articulated most
clearly in the Brundtland report. First, of course, is the foundation principle of sustainable
development which holds that only by bringing together the social, economic, and
environmental perspectives can there be a sustainable future. Notwithstanding the
fundamental character of this commitment, it remains one of the most difficult tasks both
within nations and in the international arena to keep advocates in each of these fields from
seeking to pull policymaking off in one dimension. Policy entrepreneurs who enjoy dominance
in their particular field are loathe to engage with those who seem to speak a different
language and who have goals that seem to be in competition with, if not in opposition to, their
own priorities. Moreover, in certain countries or regions, one or more of these groups tend to
enjoy substantial political support. Hence, there is no serious doubt that economic
development forces are dominant in Asia whereas environmental interests are much stronger
at least in relative terms in North American and Western Europe. In much of Latin America, by
contrast, there is a good deal of support for social development as evidenced in recent CLAD
conferences. Interestingly, part of the support may come precisely because the group is seen
as defending its interests against the other. Hence, it is quite clear that support for social
policy development has grown in Latin America, Africa, and Eastern Europe in reaction to the
local and regional impacts of economic development policies. A similar dynamic exists in the
North American and Western Europe between environmentalists and economic development
advocates.

Second, the Brundtland Commission pressed the argument that the global community
must continually address issues of both intergenerational and intragenerational equity. As
noted above, the Social Summit and Habitat II, in particular, have emphasized that
intergenerational equity means not merely generations in the distant future, but also just
relationships in terms of who benefits and who pays within the groups of children, adults, and
older persons who are seeking "a healthy and productive life in harmony with the
environment" as called for in Principle 8 of the Copenhagen Declaration. Indeed, the very
young and the elderly live at the intersection between inter- and intragenerational equity concerns. Thus, the concern is not merely with who pays and benefits, or with whose range of choices for satisfying needs shall be dominant but also about the treatment of the aged, children, and other groups who are either vulnerable or who have traditionally suffered most from social, economic, or environmental problems. Beyond that, intragenerational equity issues may be presented in sustainable development literature in the language of capacity building, providing the essential capabilities for groups or nations to meet their own sustainable development needs by ensuring that they have the tools and resources despite issues of inequality or worse.

Many of these issues and forces have given rise to what is a rapidly growing environmental justice movement. Indeed, environmental justice provides a vehicle for thinking about how we might better bring the three dimensions of sustainable development closer together and also a context for considering more carefully how to use the concept of equity in the sustainable development effort. However, there are also potentially problematic elements to the environmental justice debate as it is currently evolving both domestically and internationally. In that regard, it is useful to use the rise of environmental justice in the United States as a case study with particular attention to lessons about the problems that have arisen on all sides in the debate.

ENVIRONMENTAL JUSTICE IN THE UNITED STATES: A DEMONSTRATION OF PROBLEMS

The environmental justice movement arose out of the efforts of civil rights leaders during the 1980's and 1990's, though its roots can be traced even further back. It proceeds from the premise that some people in the society and their communities have been called upon to pay a disproportionate cost for the economic gains of the wider society. It has become a matter of considerable interest and activity in the past five years, but has unfortunately turned into a battleground that has produced little for the people in whose name the battle has been fought. Indeed, it has seen many of those people turn against each other as well as against the advocates on all sides of the effort. Its story can be understood in four parts. First, there was the rise of environmental justice as environmental racism. Second, there evolved an inadequate policy developed essentially around, rather than through, the normal policy process. Third, as conflict emerged over that policy, the level of anger grew with members of the minority communities pitted against each other and organizations that needed to be part of a joint effort locked in battle. Finally, in the wake of these battles, efforts to save the policy have still failed to understand the real problem and address it.

Environmental Justice as Environmental Racism: The Rise of a Political Movement In the U.S.

The early 1980's were clearly years of tremendous dynamism, and that was certainly true in the United States. On the environmental front, the battle by local residents at Love Canal in upstate New York brought the risks of abandoned hazardous waste sites to national and even international attention. The political energy that flowed from that battle helped to ensure passage of the Superfund program in Congress. However, President Reagan was elected in 1980 and his administration insisted that environmental regulation was too aggressive and too intrusive, resulting in a undue burdens on economic growth. On the international level, the Reagan administration dramatically changed the U.S. positions on a
variety of issues, leading to major confrontations in 1982 at Nairobi conference at the ten year point after Stockholm. This was also a difficult period for the civil rights movement in the U.S. as the old coalition that had been responsible for so much success earlier found it difficult to attract young members and had difficulty identifying an agenda that would engage their imagination.

It was in this context that many Americans began saying firmly "Not in My Backyard" to any hint that environmentally undesirable businesses might be located in their area. It was also when African Americans, Latinos, and Native Americans began asking in response "Why Always in My Backyard?" And when efforts were made to locate a disposal site for soil mixed with PCB contaminated oil in a largely African-American area in Warren County, North Carolina, the civil rights community reacted strongly with protests joined by a number of leaders. One of those involved in mounting the protests was Benjamin Chavis, then head of the United Church of Christ Commission for Racial Justice and later head of the National Association for the Advancement of Colored People (NAACP). It was Chavis who coined the term "environmental racism" which he later defined as follows:

Environmental racism is defined as racial discrimination in environmental policy making and the unequal enforcement of environment laws and regulations. It is the deliberate targeting of people of color communities for toxic waste facilities and the official sanctioning of a life threatening presence of poisons and pollutants in people of color communities. It is also manifested in the history of excluding people of color from the leadership of the environmental movement.

His United Church of Christ Commission for Racial Justice then undertook a study, published in 1987, which found not only that there was a pattern of siting various kinds of waste facilities and other undesirable industries in predominantly minority communities but that race, rather than class, was the best predictor of this pattern.

Another of those participating in the North Carolina demonstrations was Walter Fauntroy, who represented the District of Columbia in the U.S. House of Representatives. Fauntroy called upon the U.S. General Accounting Office (GAO), the investigatory arm of the Congress, to explore the environmental racism question. The GAO produced its report in 1983 and its findings were like those of the Church of Christ Commission report.

Even before the Warren County episode set all of this in motion, Robert Bullard, who would become the leading advocate for what was coming to be known as the environmental justice movement, had begun research on the issue. In 1979, Bullard was a sociology professor at Texas Southern University in Houston, Texas when his wife, attorney Linda McKeever, asked his help with a case she was bringing against the city, the state, and Browning Ferris Industries on behalf of home owners against the siting of a solid waste facility in their neighborhood. Bullard and his students found that waste facilities in the area were overwhelmingly concentrated in minority neighborhoods. Bullard went on to publish his research on the environmental justice problems in the American South and other collections that included cases affecting Latino and Native American communities in other parts of the country.

By 1990 efforts were underway to get a better understanding of this emerging phenomenon. In that year the University of Michigan hosted a conference on "The Incidence
of Environmental Hazards" which brought together a variety of those doing research in this new field. In 1991, some 650 such activists gathered in Washington for what was termed the "First National Environmental Leadership Summit." Shortly thereafter, the National Law Journal published a special study on environmental justice, concluding that: (1) there was unequal treatment of communities of color as compared to white communities even taking income into account; (2) enforcement actions by federal authorities on pollution problems were slower to come in minority communities; (3) cleanups in those communities were less thorough than in white communities; and (4) enforcement penalties were lower than in white communities.

These events were followed by a wave of similar gatherings and studies. Each produced a new collection of research and commentary, a kind of running chronicle of the rise of a social/political movement. However, even as the movement was gaining momentum, its internal and external tensions were beginning to surface. One of the first such tensions was the fact that the meetings and the movement itself quite deliberately did not include mainline environmentalist leaders or their organizations. Indeed, the advocates of environmental justice began from the premise that those groups and their spokespersons were part of the problem rather than allies in possible solutions. Bullard put it bluntly:

Historically, the mainstream environmental movement in the United States has developed agendas that focus on such goals as wilderness and wildlife preservation, wise resource management, pollution abatement, and population control. It has been primarily supported by middle- and upper-middle-class whites. . . .

Not surprisingly, mainstream groups were slow in broadening their base to include poor and working-class whites, let alone African Americans and other people of color. Moreover, they were ill-equipped to deal with the environmental, economic, and social concerns of these communities.

Of course, it came as no surprise that mainstream environmentalist were not pleased at the characterization that had been painted of them and a number were fully prepared to point out that the environmental justice movement could have been supported by some of those with well established scientific expertise in a number of critical areas. After all, it was becoming increasingly clear that while the leaders of what was coming to be called the EJ movement had certainly raised the consciences of many and had placed an important set of problems on the policy agenda, there was much work to be done to develop effective methodologies and launch important research to support the policy development process to come. The response from Bullard, Bunyan Bryant, and other EJ leaders was that scientific debates had for too long tied up the effort to bring environmental justice. Indeed, there was a clear sense of frustration in some of their writings which charged, in essence, that debates over just what level of causation had to be proven to show harm from hazardous chemical exposure was little more than a cover to maintain the status quo.

It was also becoming increasingly clear that Native Americans and Latinos felt strongly that each group had special problems quite different from those of African Americans or others. That was one of the reasons why some native Americans refused to participate in a proposed World Council of Churches sponsored conference. Jace Weaver, who ultimately organized the North American Native Workshop on Environmental Justice, wrote:
Both George [Tinker] and I previously had spoken and participated at conferences planned by one or another of the organizations making up the loose-knit movement. We had experienced firsthand the marginalization of indigenous concerns at such meetings, and we had no desire to once again be token presences at largely non-Native gatherings. Instead, we proposed an all-Native workshop, which would assemble some of the people working on the grassroots, national, and international levels, to address the wide range of environmental problems facing Native communities.

Among other things, Native Americans were concerned about issues that related the spiritual elements of their cultures to questions of land and resource use as in the debate over placement of nuclear wastes in Ward Valley, California. On the other hand, they were frustrated by stereotypes about the relationships between indigenous peoples and the environment that went from naive on the one hand to malevolent on the other extreme. Then there was the fact that it was learned in the 1980's that, during the 1950's and 1960's, federal officials had knowingly and deliberately permitted Navajo uranium miners to be exposed to radioactive gases destined to cause them serious illness and death while withholding knowledge of the situation from the miners.

Latinos also felt that they had special issues for which they needed to advocate. It was with no small bit of irony that Chairman John Conyers had to announce that Congressman Estaban Torres was unable to be present at hearings on environmental justice in early 1993 because he was attending the funeral of Cesar Chavez who had fought against the exposure of farmworkers to toxic pesticides and herbicides and worked to improve their health and sanitation conditions. There were also numerous issues relating to communities in the West and Southwest that involved mining and other environmental concerns that were quite different from the issues most often identified by African-American leaders in the East and Southeast. The civil rights movement had not always seen a strong alliance between African-American and Latino leaders.

Even with these concerns and tensions, however, it was clear that the EJ movement was gaining force. Its leaders were being heard and, thanks to their diligent efforts, the momentum was building toward some kind of environmental justice policy.

Government Produces Inadequate Policy Via an Unusual Route

The Bush administration was having a difficult time on the environmental front as the presidential elections approached. The policies and tactics of the Reagan administration in the environmental field as well as in the field of civil rights were widely attacked, not only in the U.S. but around the world. President Bush insisted that he wanted to be known as "the Environmental President," and that he would take such unusual actions to achieve that goal as appointing well known environmentalist William Reilly to head the effort at the Environmental Protection Agency (EPA). And in fact, in 1990, Reilly began conversations with leaders of the EJ movement, eventually creating the Office of Environmental Equity and establishing an Environmental Equity Work Group. However, the administration got into serious trouble in the run-up to the Rio Earth Summit. Bush opposed a number of agreements pending for the Summit. To make matters worse, the president ran hot and cold on whether and how he would participate. He sent EPA Administrator Reilly who found himself left high and dry as the administration changed its public line, concluding with a late decision by Bush
to attend the conference himself. Reilly was quoted as saying that "he felt like he was 'bungee jumping where someone else might cut the cord.'"

The Clinton administration came to office campaigning on a strong commitment to the environment. Indeed, one of the reasons for including Al Gore on the ticket was his environmentalist reputation. Bullard and Chavis participated in the presidential transition process in the natural resources cluster in early 1993. Their efforts were rewarded in 1994 when President Clinton issued Executive Order 12898 entitled "Environmental Justice for Minority Populations." The order called upon executive branch agencies to develop processes for including environmental justice considerations in their decisionmaking. It also established an interagency working group on EJ. Unfortunately, it did not add resources to the agencies for the purpose of implementing the policy.

There was also activity in Congress. In March of 1993 the Civil and Constitutional Rights Subcommittee of the House Judiciary Committee held hearings under its Chair, long time civil rights advocate, Don Edwards of California. The following month, Edwards appeared before a subcommittee of the Government Operations Committee in hearings on environmental justice and called for the use of civil rights laws to address EJ issues.

I call on the E.P.A. to enforce Title VI by requiring the recipients of federal pollution control funds to show that they are being used in a non-discriminatory way. Racial minority groups must be proportionately represented among the beneficiaries of federal funds.

Furthermore, the E.P.A. must establish and enforce siting and permitting guidelines that will take into consideration the existing environmental burden of a community. Communities of color must not continue to be the dumping grounds for our nation’s wastes because the politically powerful say "Not in My Backyard."

The Title VI to which Congressman Edwards referred is a part of the Civil Rights Act of 1964 that prohibits discrimination in any activities receiving funds from the national government. The idea was to have the Environmental Protection Agency threaten to cut off federal funds if state or local officials, or any other entity receiving federal dollars, engaged in environmental racism. This was a position advocated by several of the legal advocacy groups that had joined the discussion. And, in fact, it was in 1993 that the first petition was presented to EPA on Title VI grounds, asking the agency to take action.

Indeed, the discussion was shifting to focus debate on a number of specific environmental justice battles emerging around the country. One of the centers of this conflict was the state of Louisiana, and an area in that state known as "Cancer Alley." This stretch of land along the Mississippi River between Baton Rouge and New Orleans in the South is lined with one chemical or petroleum based industry after another. In 1993, the Louisiana Advisory Committee to the U.S. Commission on Civil Rights issued its report entitled The Battle for Environmental Justice in Louisiana: Government, Industry, and the People.

At least 38 major chemical companies and 112 industrial sites are located in the industrial corridor. Discharges are calculated upwards to 400 million pounds of waste into the environment each year. At last county, there are approximately 800 suspected and confirmed hazardous waste sites in Louisiana and 12 Superfund sites.
The Advisory Committee pointed out that most of the residents of the area were relatively poor and mostly African-American. The committee called for action by both state and federal environmental regulatory authorities. The U.S. Commission on Civil Rights concurred in those recommendations and, in a letter to EPA Administrator Carol Browner, Commission Chairman, Arthur Fletcher specifically called upon the agency to develop strategies "which will target environmental equity enforcement under the civil rights statutes and regulations administered by the U.S. Environmental Protection Agencies."

In fact, EPA was already giving consideration to that approach, but the process slowed as controversy grew. In its early budget request, the Clinton administration had actually suggested a budget cut for EPA, but Congress rejected that plan. Moreover, the administration in general and EPA in particular was emphasizing a new approach to regulation that called for less formal legal enforcement and more negotiation. Moreover, differences of opinion began to surface within EPA over what kind of policy to pursue, what the data were that supported it, and what the process should be by which the policy was to be generated. Even as more interest groups were launching law suits as private attorneys general (private parties claiming to represent the public interest), studies were beginning to emerge from several sources that challenged earlier claims about the causes and patterns of environmental justice problems. Thus, the General Accounting Office that had formerly supported the claim that race was the dominant indicator in explaining the siting of hazardous facilities issued a new report in 1995 raising doubts about the primacy of race as an explanation. New York University Law Professor Vicki Been published an influential article that found that in some cases permits had been issued when a community was majority white but that after industrial facilities came into the area, the properties declined in value. Poorer families, many of which were minority families, then moved in because those were the homes they could afford. Thus, attention to permitting processes and assumptions about race-based decisions might miss the point entirely. It could be that the more important emphasis needed to be on housing discrimination or other kinds of policy issues. At a minimum, she said, studies that simply correlated current demographics with numbers of facilities really did not explain what had happened to cause the situation or why it had occurred, and really could not do so. On top of these studies, rumors surfaced that some within EPA had the same kinds of views.

The EPA had a variety of other concerns at the time. It had been facing a range of issues around the country, including several sets of legislative debates over reauthorization of environmental laws like the Superfund statute. The agency had been very much involved in the administrations effort to move away from a legal enforcement approach to regulation and toward market tools, like establishing a market for the trading of emission permits. When it was necessary to move in a particular case, pressures were strong within the administration to negotiate rather than enforce. The Congress and the administration moved to put more burdens on regulatory agencies that sought to issue new rules. Ironically, although Clinton had run against Bush in part on grounds that burdens on rulemaking had prevented vigorous environmental action, Clinton issued Executive Order 12866 that was in some respects even more burdensome than what had existed before. Specifically, agencies like EPA were now responsible not only to do extensive cost/benefit analyses to justify action, but were also required to provide risk analyses and tie the level of regulatory action to the level of risk in any given situation. Both environmental activists and environmental justice advocates saw this as a vehicle to avoid serious regulatory requirements and a move undermining efforts to really clean up existing polluted sites.
There was also growing frustration with the Clinton administration in general. Despite its rhetoric, it was clear that the administration had chosen economic development as its primary focus. It seemed to many that the administration was abandoning its Democratic allies in Congress as it negotiated budget deals with Republican leaders and brought the Democrats in only after the fact. Indeed, it appeared as though the administration had entered a budget deal that cut the ground out from under its allies on the Hill. Environmentalists and civil rights leaders both, along with their congressional supporters, were fast becoming frustrated. The fact that the Los Angeles riots, in which dozens had been killed and much promised by Washington, actually produced little real policy change or financial support was not a positive sign. Then, on top of everything else, the Democrats lost control of Congress for the first time in decades, which led to pitched battles and resulted in an effort by congressional Republicans to shut down the federal government in order to force administration budget concessions.

There was also growing frustration at the state and local government levels as Washington seemed to continue the trend of the 1980's to push greater responsibility to them without adequate resources. Even so, what funds were coming to the states and local governments seemed to come with more conditions and controls attached even though administration rhetoric ran the other way. This led to passage in 1995 of the Unfunded Mandates Reform Act, but the legislation was not made retroactive and really made little impact at least in the short term.

Against this background, and given the momentum toward the use of civil rights laws to address environmental justice issues, it was not surprising that lawyers would emerge as policy entrepreneurs in the policy development process. California based attorney Luke Cole of the Center on Race, Poverty, and the Environment wrote EPA Administrator Browner in 1996 demanding action. Environmental justice advocates saw EPA's lack of action itself as a violation of Title VI. The Civil Rights Commission and others kept the pressure on EPA. However, EJ advocates around the country did not limit themselves to lobbying EPA. Historically, civil rights attorneys have used cases brought under existing laws to push the policy process. Besides, people in many communities were losing hope that Washington would come to their aid. In 1996 a citizens group in Chester, Pennsylvania, the Chester Residents Concerned for Quality Living, challenged the Pennsylvania Department of Environmental Protection (DEP) on grounds that their permitting processes were discriminatory in violation of Title VI and associated regulations. The case wound its way through the administrative process and into the federal courts where it was initially dismissed by a district court, but that decision was overturned by the U.S. Court of Appeals for the Third Circuit which recognized the right of the citizens' group to bring the action. At the same time, Robert Kuehn of the Tulane University Environmental Law Clinic in Louisiana was working with citizens' groups there in efforts to block a planned uranium reprocessing plant and a proposed polyvinyl Chloride (PVC) production facility. In 1997, they brought formal charges against the Louisiana Department of Environmental Quality for violating Title VI in its permitting processes.

In February of 1998, the Environmental Protection Agency issued what it termed "Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits," triggering a firestorm of controversy. The document was presented not as a legally binding rule but as an interim guidance document, what would be termed under the Administrative
Procedure Act (APA) as a policy statement. This choice meant that EPA was not required to meet the normal legal requirements for the issuance of regulations, including advanced publication of notice and extensive opportunities for public participation before the agency acted. It also left the agency a great deal of freedom rather than stating a firm rule with which the agency itself would be expected to comply. The document concludes:

EPA may decide to follow the guidance provided in this document, or to act at variance with the guidance, based on its analysis of the specific facts presented. This guidance may be revised without public notice to reflect changes in EPA’s approach to implementing the Small Business Regulatory Enforcement Fairness Act of the Regulatory Flexibility Act, or to clarify and update text.

The guidance document cited Executive Order 12898 and the memorandum issued along with it, relying on Title VI as its authority. The agency asserted jurisdiction over any agency, activity or program at any level of government if any portion of the organization targeted received any funds for any purposes from EPA even if the particular program at issue did not itself receive EPA funds.

Therefore, unless expressly exempted from Title VI by Federal statute, all programs and activities of a department or agency that receives EPA funds are subject to Title VI, including those programs and activities that are not EPA-funded.

If the agency found upon review that a state or local government's permitting processes resulted in environmental discrimination, it could move to block EPA funding or refer the case to the Department of Justice for court action.

The Interim Guidance also asserted that: "Moreover, individuals may file a private right of action in court to enforce the nondiscrimination requirements in Title VI or EPA's implementing regulations without exhausting administrative remedies." This was important to EJ advocates for a number of reasons. First, it supported claims by attorneys that they were not required to take their complaints through EPA before bringing a suit in court, known as exhaustion of administrative remedies.

Second, it provided support for a claim that these advocates were not required to rely upon EPA or the Department of Justice to bring a case, but could launch one on their own. Given that the U.S. Supreme Court had been moving to limit these so-called implied private rights of action, that was important support.

Interestingly, EPA chose to cite the Court of Appeals ruling in the Chester, Pennsylvania case as support for its assertion. That was a red flag because the Chester ruling was itself open to debate which was to be increased as the case was take on appeal to the United States Supreme Court. Later, in August of 1998, the Supreme Court dismissed the case at the request of the citizens group on claims that because the permit that was the target of the case was no longer pending, the case was moot. However, state attorneys general, who did not want the Third Circuit ruling to stand, convinced the Supreme Court even as it dismissed the case to nullify the appeals court ruling which left EPA without support for that portion of its policy.
Finally, to those who understand civil rights law, the EPA statement was extremely important for another reason. It changed the burden that the advocates would have to meet in court to prove an environmental racism claim. Under existing Supreme Court rulings, in the absence of agency implementing regulations for Title VI, those bringing the case would have to provide both the effect of discrimination and the intent to discriminate. Proving intent to discriminate can be extremely difficult. However, if intent can be inferred from the fact of disparate impact of a particular action, the burden is much reduced. However, the Court ruled that where an agency had issued regulations aimed at disparate impact, a private party could sue and need demonstrate only discriminatory effect. And EPA specifically indicated that this guidance document applied whether the complaint alleged "either discriminatory intent and/or discriminatory effect in the context of environmental permitting."

The policy then explained that EPA would base its handling of and decision on a complaint on the question whether the permit involved would "create a disparate impact, or add to an existing disparate impact, on a racial or ethnic population." However, the document did not explain how it disparate impact was to be defined and what methodology would be used to determine its existence. All that was required was that the EPA Office of Civil Rights should use a "reasonably reliable indicator of disparity." There were similar levels of ambiguity with respect to the process for identifying the affected population.

The Politics of Negativity: Pitting Governments and Communities Against Each Other

Tensions had been building like a dry forest ready to burn and the publication of the EPA "Interim Guidance" provided the lightening strike to set it off. It was a multidimensional conflict that involved a wide range of stakeholders. The clashes came between state and local governments and the EPA, the EPA and the commercial sector and their congressional supporters, between minority environmental racism warriors and economic development advocates in minority communities, and between long time advocates of environmental justice and emerging critics of that movement. The conflicts were both general as to the nature and contents of the EPA policy and also specific with respect to pending projects.

State and local reaction was swift and strong. Richard Harding, Director of Michigan's Department of Environmental Quality, writing in Ecostates, the journal of the Environmental Council of the States (ECOS) (a group made up of heads of state environmental agencies), blasted EPA.

Anticipating a firestorm of protest, EPA officials circumvented the congressional oversight process by putting this issue in agency guidance. Other than a brief public comment period, EPA has done nothing to encourage a thoughtful discussion of the issue. The April 19, 1998, Detroit News reports that EPA documents show State regulators were deliberately shut out of the planning process because they `might slow down the process.'

The ECOS organization ultimately took a position opposing the EPA guidance in a letter signed by 34 state environmental commissioners. Other organizations that came out in opposition included the U.S. Conference of Mayors, the National Association of Counties, the National Governors' Association, and the Western Governor's Association. Apart from their criticisms of the way the policy had been developed, these and other officials worried aloud that the policy could be used by radical environmentalists or others to block efforts to revitalize so-called Brownfields areas, formerly polluted sites within urban areas targeted for
redevelopment after clean-up. They charged that such moves would cripple efforts to bring jobs and economic growth to minority communities and lead to the use of "green fields" (presently pristine sites) as the locations for new industrial development adding to existing environmental problems.

Supporters of the EPA policy, including some of the attorneys leading the EJ effort, charged that this was nothing more than evidence that environmental racism was alive and well. They challenged what they regarded as the effort to maintain business as usual in the face of a growing number of cases of communities racked by the effects of pollution from Chicago to Cancer Alley in Louisiana and from Chester, Pennsylvania to Los Angeles. Robert Bullard warned that there was more on the way because communities were organizing to fight.

Whether we talk about the miners in New Mexico, or the nuclear dump proposed for California's Ward Valley, which also affect Native Americans, or the Sierra Blanca nuclear dump in Texas, in a mostly Hispanic area, there's clearly a pattern of attacks on communities of color, and they're forming alliances. The Navajo's are not alone, and the people of Ward Valley are not alone. It's a signal that the environmental justice movement has matured, and we can tap into each other's resources, experiences and expertise.

And the message was also that this was a movement that was mobilizing people who for too long had not become active in the civil rights movement, including young people who could identify with the environmental issues.

But there were also sharp disputes among different groups who saw themselves as the legitimate spokespersons for minority communities. These disputes came in intergovernmental disputes, others emerged around proposed projects, and still others came in scholarly exchanges. Among those groups that responded strongly against the EPA's Interim Guidance, were the National Association of Black County Officials who objected that the new policy preempted the local land use processes. The National Chamber of Commerce also came out in opposition. The president of the organization charged that: "The EPA is pimping the black community to further their own agenda of a pristine earth at the expense of our jobs." The phrase green racism emerged to characterize the frustration that elite outsiders, whatever their race or background, were coming in the name of civil rights and interfering in local decisions about development in minority communities that would provide jobs.

A number of these tensions emerged as members of minority communities took opposing views on proposed projects. The clash over the effort by Shintech to open a $700 million PVC plant in St. James Perish, Louisiana was a very visible symbol of this problem during 1997 and 1998. The Shintech project was challenged on Title VI grounds by Robert Kuehn of the Tulane Environmental Law Clinic and the approval of the project was delayed pending consideration of that complaint. The local and State NAACP chapters took positions in favor of the Shintech plant but the national environmental justice leaders, including the national NAACP opposed it. In the midst of the Shintech case, another firm, Louisiana Energy Services, announced that after a process lasting more than seven years, and with some $34 million invested, it was terminating its proposal to build the Claiborne Enrichment Center, a uranium enrichment facility. Environment justice advocates celebrated the victory, but opponents saw it as evidence that would-be investors really would pull out rather than face...
the burdens of lengthy litigation and the delays in the permitting processes that would come with EPA involvement. To EJ advocates, there was nothing new about the claims that civil rights advocates were disruptive outsiders who would cause damage to those they purported to help. On the other hand, that kind of response caused local African-American supporters of the pending projects to become even more frustrated.

In addition to these reactions by minority groups, there was also evidence of differences of opinion within the intellectual community. While a number of debates have appeared in the law review literature in recent years, the most recent round of disputes developed around a book published in the midst of the current battle, during the summer of 1998, by Christopher H. Foreman, Jr., entitled *The Promise and Peril of Environmental Justice*. Foreman had already published pieces critical of the EJ movement but this volume challenges virtually every aspect of the effort. Foreman, a Senior Fellow in the Governmental Studies Program at the Brookings Institution, described himself as a black, liberal Democrat who voted for Clinton twice, but was more than willing to take on both EPA and EJ advocates, and Robert Bullard in particular. His criticisms of the research on EJ was harsh and unrelenting and his characterization of the movement as it has evolved is that it is in many respects counterproductive.

The battle was raging at the national level in Washington as well. The U.S. Chamber of Commerce president wrote President Clinton attacking the EPA policy. Business leaders expressed their frustration on Capital Hill as well. There were two rapid responses. First, in June, the House Appropriations Committee moved to block further action under the EPA policy, adding an amendment to the appropriations bill stating that:

None of the funds made available in this Act may be used to implement or administer the interim guidance issued February 5, 1998 by the Environmental Protection Agency relating to Title VI of the Civil Rights Act of 1964 and designated as the "Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits" with respect to complaints filed under such title after the date of enactment of this Act until guidance is finalized. Nothing in this section may be construed to restrict the Environmental Protection Agency from developing or issuing a final guidance relating to Title VI of the Civil Rights Act of 1964.

Second, the House Commerce Committee held oversight hearings in early August on the EPA policy at which the EPA Interim Guidance was harshly criticized. Ann Goode, head of EPA's Office of Civil Rights, was grilled by Congressman John Dingell. The next day, the Detroit News featured a story recounting the exchange between Dingell and Goode. It concluded that in response to Dingell's demanding questions, a frustrated Goode replied, "As director of the Office of Civil Rights, local economic development is not something I can help with." The EPA supporters were not surprised by the grilling by the Michigan Congressman, long an EPA critic or by critical articles in the Detroit newspapers, nor were they deterred by them.

**Struggling to Recover: A Failure by Most Participants to Address the Real Problem**

On the other hand, it was clear to EPA Administrator Carol Browner that EPA was in trouble. She had led the agency's attempt to recover from the wide-ranging attacks it had suffered over much of the past year. However, the outcome is still very much in doubt.
One of Browner's concerns was to challenge the argument that the policy would block urban redevelopment efforts and particularly the so-called brownfields projects. She wrote the Mayor of Detroit, one of the most vocal critics, and officials of the U.S. Conference of Mayors in mid-June calling for EPA and the Mayors jointly to host a roundtable discussion of the policy.

The U.S. Conference of Mayors has under consideration whether EPA's recent focus on resolving environmental justice complaints is at odds with accomplishing urban redevelopment. As our brownfields efforts demonstrate, this is not the case. Our experience across the nation has shown that, working in partnerships with communities, we can identify plans for the cleanup and redevelopment of polluted sites that jobs and hope -- not division and charges of racism. In fact, none of the currently pending environmental justice complaints registered with EPA concerns a brownfields development. Justice the opposite is true -- eliminating pollution and restoring hope and jobs is vital to bringing justice to many urban communities.

It was becoming crystal clear to Browner and others that part of the anger was aimed at the EPA policy, but a very significant portion of it was also aimed at the process by which it had been developed. At the time the Interim Guidance was published, EPA called for a 90 day comment period. However, it was clear that few of those affected considered that an adequate opportunity to participate in the process. Browner announced that: "We have heard the criticism that EPA's interim guidance for evaluating Title VI complaints was developed without sufficient public input. That is why we have convened a group of highly respected community and business leaders, state and local officials, and community and environmental groups to advise us on these matters." Of course, as soon as EPA began to announce the membership of its 23 person advisory committee, various stakeholders began to criticize the choices and to demand their own representation. The committee met for the first time in July. Before that federal officials had convened at an environmental justice meeting in Los Angeles where they participated in what was termed a "toxic tour" of largely minority neighborhoods that had been suffering from severe pollution. The advisory committee convened in Philadelphia on July 27-28. As part of the program, the committee toured the now famous community of Chester. While local officials and some residents felt that the tour was rigged to present the most extreme situations, committee members were still impressed by the severity of what they had seen.

By mid-summer, EPA had 15 active complaints that it was considering under its policy, including the Shintech issue in Louisiana. Disputes within those cases and the public criticism that EPA was receiving led Ann Goode, head of the EPA Office of Civil Rights, to state what EPA saw as the problems to be remedied during her testimony in early August before the Commerce Committee.

The issues identified include the need for:

* substantial involvement from stakeholders;

* clear definitions of terms like "disparate impact" and "affected community";

* addressing concerns that the Interim Guidance will not hinder or halt
economic re-development in the nation's urban areas and exacerbate urban
sprawl;

* technical assistance to recipients; and

* peer reviewed methodologies for the assessment of disparate impact and

harm based on sound science.

She announced that EPA intended to move on all of those fronts to meet the concerns of the
states and local governments and to improve communications with EPA decisionmakers. She
noted that the questions about methodologies for evaluating disparate impact were being
referred to EPA’s Scientific Advisory Board (SAB) for peer review.

The EPA assurances did not satisfy the many critics that had come forward to
challenge the interim guidance. A hint of the tenor of things to come came only a week later
when Robert Kuehn of the Tulane Environmental Law Clinic responded to a letter from
Goode, indicating that a set of questions had been submitted to the SAB for peer review.
Kuehn challenged the lack of representativeness of the SAB and his view of biases
demonstrated by its performance on other issues. "Therefore, it is crucial that the committee
chosen by the SAB to review and answer the OCR's questions be a racially and ethnically
diverse as well as one that fully meets the Federal Advisory Committee Act's requirement that
it contain a balanced representation of competing views on an issue." That was a not so
veiled threat that a legal challenge brought under the Federal Advisory Committee Act could
very well be in the offing. The irony is that if EPA had used traditional rulemaking proceedings
in the first place, it would not have been subject to this criticism or the accompanying threat.
Further, there is little likelihood that state and local officials will drop their opposition to more
EPA involvement in their land use decisions, an area that is generally regarded in the United
States as one of the most important prerogatives of state and local governments. There is no
sign that opposition from the private sector will decline or that Congress will be any more
favorably disposed toward EPA on this issue in the months to come. The battles within the
academic community and indeed within and among minority groups show no signs of abating.
Finally, it seems as though control of the substantive disputes have slowly been shifting from
the original EJ advocates to lawyers.

In the face of all of this, it appears unlikely that EPA will meet its goal of finalizing its
policy by next spring. There is every likelihood that some of the 15 pending complaints may
very well land in the courts unless: (1) the complainants drop their Title VI charges; (2) the
firms drop their permit requests; and (3) the states and localities involved are prepared to
accept EPA's verdict on their permitting procedures. None of these seem to be likely in the
current atmosphere, particularly in light of the positions taken by the various groups involved
and the fact that 10 state attorneys general have already taken positions in opposition to the
EPA guidance.

ENVIRONMENTAL JUSTICE, SOCIAL POLICY, AND SUSTAINABLE DEVELOPMENT:
LESSONS FROM THE U.S. CASE STUDY
At the end of the day, then, can it be said that the citizens of Chester, Pennsylvania, Louisiana's Cancer Alley, South Chicago, or the pollution ridden neighborhoods of Los Angeles have had their lives improved as a result of all of the effort and the resources that have been invested in the conflicts to date? It would be very difficult to make that case. Does that mean, however, that the effort to press a commitment to environmental justice is not a fruitful direction for the United States, other countries, or international institutions to pursue? On the contrary. There are lessons from the U.S. case, albeit primarily lessons about how not to proceed, that can be learned. At the same time, the international agreements from Rio to Istanbul, commit the global community to sustainable development in which environmental justice can be and must be a useful tool and also an essential element provided that the concept of equity is more adequately developed.

Let us consider first the lessons from the U.S. experience and an alternative approach based on analysis of context, conditions, and responses in equity.

**Lessons From the U.S. Case**

While most of the lessons from this case study of environmental justice in the U.S. to date are negative, it would be irresponsible not to recognize three positive features of the EJ effort. First, virtually every international discussion of sustainable development since the Stockholm meeting has resulted in agreement about the importance of building the capability and sense of efficacy of all people, and particularly to attend to those needs for groups who have traditionally been excluded from active participation in critical decisionmaking. The EJ movement seeks to address that need in very real ways and not with mere rhetoric. Second, there is great power in identifying situations of inequity and providing mechanisms to place them in the public eye and on the policy agenda. Third, the EJ movement has served notice that it is not going to be acceptable as it has been in some places for decisionmakers to ignore or undervalue the environmental and social dimensions of the sustainable development triangle.

However, there are many serious problems in evidence in the story of environmental justice in the United States to date. These start from very basic issues of conceptual, political, and legal approach. While it is true that the EJ movement has come to define three basic concepts that provide its foundation, "environmental racism," "environmental equity," and "environmental justice," in the U.S. case, environmental racism has come to predominate and shape the tenor and character of the movement. Thus, the effort to achieve environmental justice has come down to an effort to fight environmental racism through a civil rights enforcement model focused almost completely on Title VI of the Civil Rights Act of 1964. Traditionally, this model seeks to find specific past decisions or block current decisions by public officials that are intentionally discriminatory (even if that intent is to be implied from the effects of the discriminatory actions) in violation of law. So framed, it came as no surprise that it was necessary to find an appropriate type of decision to challenge. Hence, virtually the entire effort has come to focus on blocking decisions to issue new permits for industrial development or facility siting. There are three sets of decisionmakers who can be targeted in that effort: (1) the federal agency that seems most closely associated with those decisions (even though it usually has little to do with them directly); (2) state environmental protection agencies which presumably issue rules in the environmental arena; and (3) local governments which are traditionally the units of government in the U.S. charged with land use planning and the permitting of businesses. While there is a desire to see a new
permit/development request in the context of existing environmental problems, this enforcement model does not address the issue in full terms, eg. relating to poverty alleviation, health improvements, or educational advancement. In fact, there is irony in what has occurred to date. Although environmental justice critics, like Foreman, have attacked the movement on grounds that it is unfocused and attempting to resolve all of the social problems under the banner of fighting environmental racism, the actions to date have been very narrow, emphasizing an extremely limited aspect of the environment rather than the social or economic issues.

A second irony is that the story of the policy effort to date has not been directed toward achieving a positive end state that could be defined as environmental justice. Rather, the effort has tended to be negative in the sense of prohibiting action. In its nature it has tended to move control over the action to the legal community. One of the lessons over the years is that attorneys are better at stopping action or convicting someone of an illegal action than they are at fashioning solutions to the problems they see. Judges tend to suggest in civil rights cases, that attorneys often lose interest once the liability finding has been entered and remedies must be fashioned. And once fashioned, there is often no one to help the court ensure implementation.

The other issue that arises in this respect that is quite different from most of the areas in which a civil rights enforcement approach has been taken is that there are significant differences within the affected communities as to what constitutes environmental racism. In general, surveys indicate that communities of color often perceive the presence of racism in the conditions that they find in their communities, but, as this case study demonstrates, there are sharp differences when the issue is a specific decision over a planned facility, particularly if there seems to be a promise of economic development. In part because of such differences, there continues to be criticism that the process is not bottom-up and based upon participation but often elite and top down, a criticism often levelled at environmentalists generally who are not seen as bringing positive change to the community.

One of the other sets of lessons that emerges from the U.S. case is that the current EJ approach assumes an ability to use a national agency operating in a particular sector to address complex problems in a political, legal, and administrative context that has long since decentralized. The EPA of the 1990's is not the Civil Rights Division of the Department of Justice in the late 1960's and early 1970's.

First, it should be clear from any examination of the communities most often identified as in need of achieving environmental justice, that no single sectoral agency exercising relatively narrow and limited powers can accomplish the task. Even the critics of the environmental justice movement admit that there are critical issues of housing, health care, and education as well as environmental concerns to be addressed in these communities. It is not sufficient merely to say that the EJ executive order and EPA policy call for an interagency committee will produce the needed changes. For one thing, it is well understood by practitioners around the world that inter-ministerial committees are notoriously unhelpful. First, unless there are substantial resources to be shared or very significant and direct involvement on a continuing basis by the prime minister or president, these committees are more often a hindrance to policy development and implementation rather than a facilitator of these outcomes.
Second, it is clear that EPA remains, even after almost three decades of operation, a relatively small and very much under-resourced agency. Unlike the Civil Rights Division of the Department of Justice, EPA has traditionally split its legal roles, with counsel for policymaking focused in Washington and lawyers who lead enforcement efforts located in the regional offices around the nation. While the agency has moved to reorganize and rationalize its enforcement operations, it is still a long way from the kind of structure and process that is well suited to civil rights enforcement.

The modest size, limited finances, and broad array of legislative mandates of the EPA are important in this EJ case for another reason. The agency is responsible for a range of very diverse and decentralized programs and operations in which state and local governments are critically important partners. That partnership is largely based upon modest support by EPA. Moreover, the funds available to state and local governments through the EPA have become a small proportion of the overall costs of state and local environmental operations. The days when threatening to withhold federal funding as leverage to coerce state and local compliance with federal agencies are over. A number of the state environmental commissioners in this case study indicated that they were about ready to recommend to their governors that they should tell EPA to keep its money and the mandates that come with it.

Quite about from the financial leverage, the changing character of regulation depends upon the active involvement of the states and local governments. Starting in the 1970's Congress began to use a three tiered regulatory process. At level one, if states were willing to create their own environmental standards at least as rigorous as the national standards, they would be permitted, upon approval by the national agency, to implement those standards at the state level using their own organizations and people. If the state wanted to use federal standards, it could still do the enforcement itself. Only if the state refused to create rigorous standards or to enforce federal standards would the national agency step in. In truth, many policies now operate completely on the basis of nationally approved state programs and EPA would not have the capacity to step in if the states did abandon their cooperation. Moreover, programs that affect state and local land use decisions, even if enacted by the Congress, face an uncertain future in the Supreme Court. For example, the Supreme Court struck down a low level nuclear waste siting law on grounds that it interfered with the constitutional powers of the states because it tried to coerce states into using their regulatory authority. And while it is true that the fact that what is involved here is a civil rights claim gives the national government special authority, there are still a host of constitutional questions that could be litigated if the state and local governments chose to resist EPA rather than to cooperate with it.

Of course, it is clear from this case study that neither the leaders of the EJ movement nor the EPA did anything but antagonize state and local governments, not to mention other NGOs. That is not important solely because it is unlikely to engender the kind of cooperation needed to achieve environmental justice. It also means that a variety of parties on all sides of the issue have the motivation and the grounds on which to challenge the agency's policy in administrative law. The authority for the Interim Guidance is stated as Section 2-2 of Executive Order 12898, but that executive order does not assert any particular statute or constitutional power as its basis, nor does it specifically refer to Title VI. The fact is that a reviewing court could find that EPA has not clearly established the legal authority on which it is operating. Second, it tries to use a policy statement called "interim guidance" rather than a legislative rule issued pursuant to the Administrative Procedure Act to present what is plainly intended to bind states and localities in their permitting processes. Policy statements and
interpretive rules are very ambiguous policy tools in administrative law. While an agency may choose to call a statement a policy statement, a court will decide whether the agency is really issuing something that it means to treat as binding under its authority to issue rules having the force of law. If so, the court would likely find that this is a legislative rule and that it was not issued in accordance with the requirements of the APA. And given the importance of public participation in rulemaking processes, the courts are particularly diligent if they are of the view that an agency is calling a rule a policy statement to avoid the participation requirements of rulemaking. Moreover, having been challenged on its lack of opportunity for participation, the agency created an advisory committee. However, as the case study demonstrated, in choosing that course, the agency has made itself vulnerable to challenge under the Federal Advisory Committee Act. Given its lack of clarity and specificity with respect to the definition of the concept of disparate impact and the lack of clear methodologies for its application, EPA will doubtless face due process issues as well as allegations that its decisions are arbitrary and capricious in violation of the APA. And having chosen to accept complaints for resolution under the Interim Guidance, a court could find that there has been "agency action unlawfully withheld," if the agency waits too long to reach decisions in the pending cases. Presumably, the agency would be subject not only to having to respond to a court order in such a situation, but it would also be vulnerable to paying the plaintiffs costs under the provisions of the Equal Access to Justice Act.

In the end, even if EPA does meet its target of issuing final guidelines in the spring of 1999 and even if their policy and the decisions they must make in cases pending under it should survive legal challenge, that will not begin to solve the problems of environmental justice that exist now or are likely to emerge in the future. That is not to say that the long sad history of racial discrimination in the United States has not played a terrible part in bringing about some of the environmental justice tragedies that exist. It has. The point is that the problems are even wider and deeper than EJ advocates have suggested. The records of congressional hearings and other studies cited earlier justify the assertions that there are many communities where people live in terrible environmental conditions with little serious effort at enforcement and no evidence that the residents share in the economic benefits that flow from industries and other commercial activity in their neighborhoods, though they certainly experience the costs. They represent classic examples of the downward spirals that develop when economic development, social conditions, and environmental realities are not seen as mutually interdependent but are allowed to drift. Indeed, in some communities the situations devolve to a point where the EJ advocates’ can right claim that, by design or by momentum, the areas can be aptly described as "sacrifice zones," areas effectively abandoned to their fate. These communities present serious issues of equity. Markets are not designed to resolve such issues. Neither can they be addressed by efforts to block all development. As Laura Pulido has argued persuasively, it is no answer to tell people who want to make their own decisions about local development that they should set aside the properties for tourism or recreation.

Of course, there are parallel concerns in the international arena notwithstanding the passage of the Basel Convention and the Bamako Convention. To stay with the U.S. case for a moment, there are environmental justice claims being lodged against the U.S. with respect to the impact of pollution at military facilities in Panama and in the border industrial zones in Mexico. And well beyond the U.S. case, there are any number of other examples where some communities' issues of environmental justice represent festering sores. While it is important to understand the forces that brought these situations about and it is very important to stop
similar behaviors in the future, a narrow civil rights enforcement orientation of the sort pursued in the United States will not address the conditions that currently exist and is unlikely to help in more than marginal ways in the future.

The Context, Conditions, and Responses in Equity as a Basis for Environmental Justice

If real progress is to be made, it must be understood that the only way to address all the elements that exist in these communities is through the international commitment to sustainable development. For it is in that framework that all of the elements of what is generally understood to be included in a condition of environmental justice are brought together. And, at root, the challenge is to understand the problem of equity in environmental justice within this sustainable development effort. The issue of equity is a concept and area of concern in which all of the players in sustainable development have important interests. Environmental justice should be an area in which to focus conversations about both intergenerational and intragenerational dimensions of equity and to do so in the context of the common commitments that have been reached over a decade of international summits. As Edith Brown Weiss has observed: “Today the traditional definition of equity is eroding. There is a search, though unsystematic, for a new definition. The quest for a consensus on equity in particular contexts will be a major factor affecting international environmental agreements and non-binding legal instruments in the future.”

The starting point to address equity issues in environmental justice is a recognition that, for reasons addressed at the outset of this paper, equity is not a unified concept but one which has several dimensions. Hence, it is necessary to develop not a single answer to the question "What is environmental equity?", but to develop a framework that can be used to engage the many different kinds of equity problems that we find around the world. One possible framework that meets this need considers the context, conditions, and responses in equity as a basis for action.

The Context. The context of the equity problem in any given situation is both general and particular. At the general level the context consists of the international commitments and treaties, the regional agreements, the national political and legal institutions and processes, and the culture within which the situation exists. Of the international commitments, those outlined earlier in the paper, including the environmental protection principle (with both the green and brown elements), the principle of integration and balance, the right to development with an obligation of mutual respect, the equality principle (including both the nondiscrimination and participation principles), and the equity principle (in both its inter- and intragenerational aspects). These principles set the broad frame and boundaries for consideration of the equity problem which then must be understood within a set of national institutions and processes. The strengths, weaknesses, and options available must be understood if responses to any given situation are to be effective. That also means that it is essential to ensure adequate and effective institutions and processes. However, that kind of change takes time, and near term responses to particular problems most often must be sought within the existing context. It is critically important to understand that the context is very much affected by the culture.

At the specific level, the context consists of the institutions, policies, resources, and stakeholders who must be involved to address the problem and the special cultural features that guide their behavior, as well as the proximate and other causes that brought about the
current situation, to the degree that they can readily be determined. Even in countries with unified governments, a variety of factors have led ministries to increasingly rely on subnational units at the regional (or state where applicable) or local levels. It should also be said both national and subnational governments are now often dependent upon NGOs performing government functions and services under contract. Environmental equity issues may be problems at the national level, or even issues between nations, but most usually arise in a particular temporal and physical setting. Any attempt to achieve environmental equity that ignores that reality is doomed to failure. If there is any clear lesson that we have gleaned from efforts at sustainable development in addition to the critical interdependence among the economic, social, and environmental dimensions, it is that top down solutions rarely succeed. It is important to understand the cultural characteristics operating at the local level. Particularly in larger countries or those where the population is racially or ethnically diverse, the differences in local culture can be dramatic. Similarly, difference among the cultures that operate within relevant organizations matter as well. This true not only of government organizations, but also NGO's and private firms, and solutions to environmental equity issues usually involve all three.

Finally, the context also includes the causes of the problem to the degree that they can be readily identified. If the situation is focused on the current or recent behavior by one or a few specified actors that threatens a particular population with clearly identifiable harm, the problem solving challenge is relatively easy. If, as is often true, the problem is more diffuse, with indeterminate impact and causes that are many and spread over a long period of time, as in the Chester, Pennsylvania case discussed earlier, the situation is very different. There may very well be situations were it is not possible to determine exactly how and why a current problem came into being. That does not mean that it is acceptable to permit the situation to continue. It does mean that the approach to its resolution will be different from other contexts.

The Conditions of Equity. Once we understand the context, we can proceed to identify and then address the particular condition of equity that exists. It is not possible to have a one size fits all response to a problem of environmental equity because there are several quite different conditions that can exist in which judgments as to equity are made. These can be divided into prospective judgments that govern future behavior and present judgments that often consider present conditions caused by past behavior, frequently involving some kind of compensatory response. It is also possible to divide equity judgments between those which involve a comparative assessment (What is equitable as between two or more parties?) and individual determinations (What is an equitable response to one party in a particular circumstance?).

Against that backdrop, it is possible to identify several classes of problems that commonly arise. First, it is common to seek equity in the future allocation of natural resources and in the distribution of costs. This often arises in treaties or in international contracts, as in discussions of bioprospecting. A second prospective but noncomparative case involves a decision to permit a community or an organization to act in the absence of rules. This is the classic problem of permitting decisions in the absence of clear policy, in which the choice is not between which of two development projects should be allowed to go forward but whether a single proposed project should be authorized and, if so, what burden it should carry for the potential impacts of its action.
Similarly, in present judgements about past conduct, it may be necessary to do equity in the absence of rules. It is common in those jurisdictions where courts have equity powers to conclude that although there is an unacceptable condition for which corrective action must be taken, there is no clear guidance as to what that remedy should be. In such cases, the decisionmaker is called upon to fashion a remedy based upon the unique circumstances of the situation and to make the victim whole again. Where the effort is to provide a remedy for previous conduct, the situation may involve a comparative equity assessment. That is, there must be an allocation of costs among a number of parties responsible for a problem. This is the most common issue presented in the clean-up of abandoned toxic sites such as are addressed by the Superfund program in the U.S. There are many complexities in such judgments because there are issues of quantity and quality (What type of harm and how much of it?) as well as ability to pay that must be considered.

Next, there is a condition that may occur in which the court determines that the decisionmaker is asked to make an exception to an existing rule or to ignore a rule completely in the interest of justice. These may occur either in prospective or present equity judgments. For example, a local community group may develop a microenterprise. If government officials apply all of the existing regulations as written, the group will very likely be unable to operate because of the burdens. However, by making an exception, the decisionmaker is in essence making an allocation of risk and cost. With respect to past actions, the decisionmaker may decide not apply the same responsibility to a small organization that gave no indication that its leaders knew they were breaking a rule or in any way intended harm. The group may still be responsible for, say, improper disposal of paint, but equity is used to mitigate the severity of the sanction. This is a classic problem of equity.

Responses in Equity. Once having established the context and the particular condition of equity that is in question, the problem is to select a process for responding to it. That requires both an approach to decision and the means to ensure implementation. The methods of decision usually divide into negotiated resolutions or authoritative institutional decisions.

Negotiated resolutions may either be processes involving equals or they may involve negotiated resolutions among differentially empowered stakeholders. Both of these types negotiations may involve a substantial number of parties, depending upon the equity condition they are designed to address. The obvious example of the first variety is a treaty negotiation in which sovereign nations agree on a method for an allocation of natural resources and costs. These equal negotiating partners may elect to solve their issues through direct negotiation in the event of a disagreement, to use a mediator to aid negotiations, or even to submit disputes to an arbitrator who will make binding decisions.

However, it is obviously the case that many negotiations between developed nations and developing countries are not negotiations among equals, notwithstanding the legal fictions of international law. Indeed, most situations in environmental justice that are to be resolved through negotiations involve attempts at settlement among a substantial number of parties with wide disparities as to their relative resources, expertise, and social, political, or legal power. For negotiation to function as a means to do equity in such cases, it is usually necessary for the negotiations to involve some kind of neutral third party mediation or facilitation. This is particularly important if community groups are to be able to participate in a serious way. Without challenging the motives of any parties to the negotiation, the imbalances are simply too great in many environmental justice problems for the parties themselves to
achieve the balance necessary to do equity without outside help. And even with a third party neutral, it is still often necessary to provide some kind of resource support for community groups if they are to participate effectively. It is also necessary to address the special concerns raised when one or more of the parties to a negotiation is a government agency. The point here is that if negotiation is to be the tool by which to do equity, the design and support of the process and consideration of the elements necessary to ensure balance and effectiveness are as important as the actual talks about the substantive question at issue.

The alternative to some form of negotiated means for doing equity, is to submit the matter to an authoritative institutional decision process. In some cases, the matter may fall under the jurisdiction of a ministry or administrative agency, while in others the issue may be submitted to a judicial tribunal. There are two critical qualifications that must be addressed if it can be said that these processes can achieve environmental justice by doing equity. First, if ministries or local agencies are to make the decision, there must be an accessible opportunity for an appeal to an independent institution, most often a court though there could conceivably be an alternative. The reason quite simply is that the ministry and local agency are very often parties at interest in environmental justice problems and may be accused of wrongdoing. The dangers of bias, conscious or otherwise, can be quite high. That is not to impugn the integrity of the officials involved, but to recognize the realities of institutional life. It also cannot be ignored that, in some cases, part of the problem may be a concern about corruption. Assuming that the decision is to be rendered by a court, there must be assurance of independence. The effort to enhance the credibility of courts in some countries is critically important to sustainable development in general and for environmental justice in particular.

It should also be clear from the many studies of sustainable development, as well as from virtually all of the policy implementation literature, that a decision as to what equity requires in a given environmental justice situation often requires considerable attention to implementation and monitoring. The fact that the decision is reached through a negotiation process does not, of course, reduce this need. The process for implementation should include mechanisms for reopening the decision process if, as sometimes happens, new information is uncovered during the process of implementation.

CONCLUSION

The effort to achieve sustainable development to which the nations of the world have committed themselves clearly requires the need to deal with problems of equity. The concept of environmental justice is a useful perspective from which to approach this challenge. However, if it is to be useful, it is necessary to move beyond the relatively narrow view of the subject that has been taken to date. A study of the case of the development of environmental justice in the United States raises a number of issues and suggests a host of useful lessons, though they are most often lessons about what not to do. For one thing, it seems clear that a civil rights enforcement approach is not going to address the range of problems that we face in seeking to achieve environmental justice is particular situations or more generally.

If we are to make progress, it is essential to get to the core of problems of environmental justice and address key inequities. These issues of equity go to questions of who benefits from development and who pays. In order to meet the commitments in the various international accords of the past decade, it is necessary to focus on the problem of doing equity. To date, the tendency in the environmental literature has been to focus on
intergenerational equity. It is important to consider new approaches to equity that contemplate both inter- and intragenerational equity.

Because the need to do equity to achieve environmental justice requires varied responses in many different situations, it will never be possible to issue a simple statement as to what is required by equity. However, it is possible to fashion frameworks to consider how to meet the challenge. This paper provides such a framework based upon the context, conditions, and responses to equity issues. While this is but a beginning, it represents a very different, and hopefully a constructive way to contemplate the problems of environmental justice in sustainable development.