Two Sides of the Same Coin--Hazardous Waste Siting on Indian Reservations and in Minority Communities

Jeffrey R. Cluett
Two Sides of the Same Coin
Hazardous Waste Siting on Indian Reservations and in Minority Communities
By Jeffrey R. Cluett

I. Introduction

“We are recruiting all of the garbage, the scum that nobody else wants.”

In the last fifteen years, the environmental community has become increasingly aware of the effects of environmental racism upon the siting of hazardous waste treatment and storage facilities. Little of the literature on environmental racism however, has recognized that different minority communities are affected in disparate ways by this phenomenon. Part II of this Note begins with a general discussion of the issue of environmental racism and an analysis of the literature that debates its existence. Part III looks at how the federal government empowers Indian tribes to play a greater role in regulating hazardous waste projects. Although it is beyond the scope of the Note to statistically analyze the disparate effects among different minorities, this Note focuses on how environmental racism affects American Indians differently than other minority groups. Part IV discusses a minority community’s inability to have its environmental needs addressed. In Part V, the author proposes a means by which minorities, and citizens generally, can have a greater say over the siting of hazardous waste facilities in their community.

II. The Recognition of Environmental Racism

Reverend Benjamin Chavis, Executive Director of the United Church of Christ Commission for Racial Justice, coined the term “environmental racism” in response to a 1982 decision to site a polychlorinated biphenyl (PCB) landfill in the community of Afton, Warren County, North Carolina.

1 Dan Hardy & Anthony R Wood, In the City of Chester, Treatment Questioned—City Council Says Waste is a Business They Can Lure Residents Say They’re Being Dumped On PHILA INQURER, Sept. 5, 1993, at A1 [hereinafter Hardy & Wood, Treatment Questioned]

2 See ROBERT D BULLARD, DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY 35 (1991). Chavis notes that today, minorities are “fighting back. Even in the worst situations, glimmers of hope emerge, because people are uniting—uniting across racial lines and socio-economic lines—and the common demand is for environmental justice.” Marianne Lavelle and Marcia Coyle, Unequal Protection, the Racial Divide in Environmental Law, a Special Investigation, NAT’L L.J., Sept. 21, 1992, at S2 [hereinafter Lavelle & Coyle, Special Investigation].

* J.D., 1998, University of California, Hastings College of the Law.
African-American, while African-Americans constitute 63.7 percent of the county population and 24.2 percent of the state population. The siting decision sparked a church-led protest by African-American residents, resulting in 500 arrests. The protest generated national support and greater awareness of the effect of hazardous waste siting on minority communities.

The movement sparked a number of studies, including the United Church of Christ Commission for Racial Justice’s 1987 study, “Toxic Wastes and Race in the United States: A National Report on the Racial and Socio-economic Characteristics of Communities with Hazardous Waste Sites” (Church of Christ Study), and the General Accounting Office of Congress’ 1983 study, “Siting of Hazardous Waste Landfills and Their Correlation with the Racial and Economic Status of Surrounding Communities” (GAO Study). The Church of Christ Study is considered one of the most important analyses of environmental racism. Consequently, activists increasingly use the Church of Christ Study, along with a growing body of other scientific research, to show that minorities bear a disproportionate amount of the country’s worst pollution.

The Church of Christ Study used residential zip codes to define “communities” and United States Census Bureau statistics to measure “race.” While the Commission of Racial Justice realized that variations in a given geographic area limits the usefulness of a study based on zip codes, it believed that zip codes were still the best units of analysis.

The study made several important findings. Race proved to be the most important variable associated with the siting of hazardous waste facilities nationwide. The study also found that the mean value of homes was a significant factor in the presence of hazardous waste sites. The study noted, however, that the availability of cheaper land always influences hazardous waste siting. The fact that minorities are often present in these areas suggests the interplay of environmental and other institutionalized racism. In communities with one commercial waste facility, the minority percentage of the population was twice the national average. In those communities with more than one facility, the minority percentage was three times the national average. In addition, three of the five largest landfills in the country, comprising 40 percent of the nation’s total estimated landfill capacity, were located in mostly Hispanic or African-American communities.

See BULLARD, supra note 2, at 36.
See Lavelle & Coyle, Special Investigation, supra note 2, at S2.
See id. at 3.
See Lavelle & Coyle, Special Investigation, supra note 2, at S2.
Church of Christ Study, supra note 5, at 9.
See id. at 62.
See id. at 15.
See id. at 16.
See id.
Studies by the Social and Demographic Research Institute at the University of Massachusetts (SADRI), however, challenged the studies' findings. Using 1990 census data, SADRI found no statistically significant differences between the percentages of African-Americans in host and non-host census tracts. SADRI did find a significant difference in the percentage of families living below the poverty line. SADRI claimed that there are "no consistent and statistically significant differences in the racial or ethnic composition of tracts that contain commercial [treatment, storage and disposal of hazardous waste facilities] and those that do not." One reason for the differences may have been the geographical units used. SADRI used census tracts in which locally undesirable land uses (LULUs) were located, rather than using zip codes as the Church of Christ study had done.

The SADRI studies have been extremely criticized. In fact, SADRI is almost alone in suggesting that environmental racism is not a serious problem. One critic, Professor Vicki Been, also using census tracts, obtained different results. While median income and the level of education obtained were markedly lower in communities with a hazardous waste facility, the percentage of racial minorities within a community also indicated the likelihood of the existence of a hazardous waste site.

Unlike the SADRI study, Been's study cross-referenced the following three lists of hazardous waste sites: (1) The 1994 Environmental Services Directory, (2) the 1992 Environmental Services Directory, and (3) the federal Environmental Protection Agency's (EPA's) database, the Resource Conservation and Recovery Information System. The SADRI study used only the 1992 Environmental Services Directory. In addition to adding a number of facilities which had been omitted in the earlier studies, Been also eliminated a number of facilities which were closed, closing, or which no longer accepted hazardous waste; the study included only sites currently accepting waste.

Generally, Been's study found no statistically significant difference between the mean percentage of African-Americans in host and non-host communities, and a small, statistically significant difference between the mean percentages of Hispanics. Yet, Been did determine that some tracts bore a disproportional burden of hazardous waste.

---


19. See Anderton, Evaluating TSDF Siting, supra note 18, at 84.

20. See id.

21. Anderton, Issues in Metropolitan Areas, supra note used census tracts rather than zip codes for a number of reasons. Census tracts tend to change boundaries less than zip codes, are drawn up by local committees and are therefore more likely to reflect actual neighborhoods, are roughly equal in size, and better reflect the area immediately around a waste site.

22. See Anderton, Evaluating TSDF Siting, supra note 18, at 85

23. CHURCH OF CHRIST STUDY, supra note 5, at 5


25. Been, supra note 7, at 4

26. See id. at 5-6, 21

27. Id at 4-5


29. Been, supra note 7, at 9-11.

30. See generally Mohai, supra note 24

31. Been, supra note 7, at 9-11. Been's study looked at 608 facilities, as opposed to SADRI's 520.

32. Id at 5

Note: The references are numbered and correspond to the necessary citations within the text. The page number 193 is mentioned, indicating the end of this specific section or page of the document.
tionate burden of hazardous waste sites—those with median family incomes between $10,001 and $40,000, those with African-American populations between 10 percent and 70 percent, those with Hispanic populations greater than 20 percent, and those with lower educational attainment levels.33 Thus, while income and education were predictors of hazardous waste siting, race remained an important indicator.

In terms of raw numbers, if the distribution of facilities followed the distribution of the population, there would be twenty-four more facilities sited in the neighborhoods with no or very few African-Americans. In neighborhoods where African-Americans made up more than 10 percent but less than 70 percent of the population, there would be thirty-four fewer facilities. Neighborhoods with African-American populations of more than 70 percent would have ten more facilities.34

Other professors also note that "minorities, disadvantaged in terms of education, income and occupation bear a disproportionate environmental risk. Socio-economically deprived groups are more likely than affluent whites to live near polluting facilities, eat contaminated fish and be employed at risky occupations."35 Political and economic resources are inextricably intertwined with environmental activism and the ability to get results. "Those who complain, who have greater access, who know how to tweak their Congresspeople to do something, are more likely to get the attention of very busy people. And the people with greater know-how are generally those with greater political and economic resources, who tend to be white."36 In addition, African-Americans and other minorities appear to be underrepresented among the memberships and staffs of major environmental organizations.37

Professor Paul Mohai agrees that race affects hazardous waste siting but chose to focus upon a different set of statistics and factors.38 First, he examined the control groups in the Church of Christ and SADRI studies.39 The Church of Christ study measured all zip codes with sites against those without.40 The SADRI study, however, analyzed only those census tracts within Standard Metropolitan Statistical Areas (SMSAs) with hazardous waste sites.41 Therefore, the SADRI study eliminated all tracts outside [SMSAs] regardless of whether or not these tracts contained a hazardous waste facility.42 As a result, the SADRI study excluded 32 percent of census tracts.43 Mohai observed that due to the Church of Christ study's use of zip codes, the Church of Christ control group (comprised of those living outside tracts with hazardous waste sites) had a lower percentage of people of color (12 percent) than the SADRI control group (23 percent), making a significant difference in the studies' findings of affected races.44

Second, Mohai noted that the Church of Christ and SADRI studies posed different questions.45 The Church of Christ study asked how host zip codes compared racially to non-host zip codes.46 The SADRI study wanted only to know how census tracts within host SMSAs compared in terms of racial makeup.47 The authors of the SADRI study used only census tracts within SMSAs because the authors believed that rural areas and cities without hazardous waste should be excluded.48

33. Id. at 21.
34. Id. at 18 (emphasis added).
35. Wigley & Shrad-Thr-Frechette, supra note 7, at 55-56 (citations omitted).
36. Lavelle & Coyle, Special Investigation, supra note 2, at S2.
37. See BULLARD, supra note 2, at 96.
38. Mohai, supra note 24, at 617.
39. See id. at 620.
40. See id.
underlying reason was to "exclude national parks, rural areas without any transportation facilities, [and] cities without an industrial economy that would require [a site]." This effectively excluded a large number of tracts from the study. Mohai noted that such assertions are "purely conjectural," often having little relevance in analyzing the communities most affected by hazardous waste sites. In fact, rural areas host many of the nation's largest hazardous waste sites.

Finally, Mohai criticized SADRI's use of census tracts. By using census tracts to measure populations affected by hazardous waste sites, SADRI failed to examine populations within a 2.5 mile radius of hazardous waste sites. The use of tracts which are often small, especially in densely populated urban areas, underestimates the extent to which those living in neighboring tracts (often bordering the waste sites) may be affected. The approach risks overlooking many of those affected living outside the selected tracts.

In evaluating the impact of hazardous waste sites, Mohai examined areas within a 2.5 mile radius of a waste site: "[D]ifferences in the proportion of African-Americans and Hispanics within these areas and areas farther away become very apparent. The contrast is 35 percent versus 21 percent [using census tracts]." The difference is even greater within the twenty-five largest SMSAs. The proportion of African-Americans within 2.5 miles of the host tracts is 42 percent, as compared to 24 percent farther away. As Mohai noted, "if zip codes areas represent geographic areas which may be too big, census tracts may represent geographic areas that are too small." By using census tracts or zip codes rather than areas within a 2.5 miles radius, many of those affected by hazardous waste sitting are ignored.

A National Law Journal study similarly concluded that environmental racism continues to be a factor in hazardous waste sitting. The study made several findings based on computer-assisted analysis of census data, the EPA's civil court case docket, and the EPA's record of performance at 1,177 Superfund toxic waste sites. First, environmental racism affects the rate at which sites are identified as hazardous waste sites and cleaned up. Second, assessed penalties for hazardous waste violations at sites having the greatest white population were approximately 500 percent higher than penalties at sites with the greatest minority population. For federal environmental laws aimed at protecting citizens from air, water and waste pollution, penalties in white communities were 46 percent greater than those in minority communities. Third, under Superfund, abandoned hazardous waste sites in minority areas took 20 percent longer to be placed on the national priority action list than those in white areas. Fourth, in more than half of the ten autonomous regions that administer the country's EPA programs, cleanup at Superfund sites began 12 percent to 42 percent later at minority sites. Finally, under current law, permanent "treatment" of hazardous waste, the elimination of waste or its toxins, is preferred over "containment," the capping or walling off of a hazardous dump site. At minority sites, containment occurred 7 percent more frequently than treatment.
the white sites, treatment occurred 22 percent more frequently than containment.68

Lack of media attention given to environmental problems occurring in minority communities also hurts minorities.69 As Professor Lazarus of St. Louis' Washington University's School of Law notes, "the fact is that all environmental statutes pick winners and losers; they pick between problems because there aren't enough resources to deal with all the problems in the environmental game minority communities have been the biggest losers."70

Professor Mohai believes that the disparity in treatment stems from the classic effects of racism.71 First, minorities remain underrepresented in government and on the boards of polluting companies.72 Also, housing discrimination keeps minorities from leaving their segregated communities.73 In addition, minorities, even as their levels of income and education rise, continue to live in segregated enclaves.74

Moreover, the rate at which hazardous waste sites are cleaned up further demonstrates the disparity between minority and non-minority communities.75 Two southwestern communities, a white, blue-collar mobile home park in Globe, Arizona and an African-American, middle-class neighborhood in Texarkana, Texas, discovered that their homes were located on land which had become contaminated by industrial waste twenty years earlier.76 In Globe, residents of the 130 homes in the Mountain View Mobile Home park waged an intense legal and political battle, involving federal, state and private entities, after their 1979 discovery that the community was grounded in the most dangerous form of asbestos.77 After two years, the residents won $80,000 each, which enabled them to move from their contaminated homes.78 In Texarkana, residents of Carver Terrace, a neighborhood of seventy-nine one-story homes and a church, noticed the following problems soon after they moved there in 1968: When it rained, chemicals bubbled up to the surface; stench from the chemical bubbles filled the air; residents developed rashes and nose bleeds; and pets died.79 Throughout the 1970s, residents sought answers and aid from federal health and environmental officials, but to no avail.80 After years of effort, they succeeded in having the site placed on the Superfund list in 1986.81 In 1990, twenty-two years after initial discovery of the chemicals, funds for a buyout of their homes were inserted into the federal budget.82 Residents received an average of $30,000 to $40,000 for their homes.83 The small payments forced many residents to relocate in ghettos and high-crime neighborhoods.84

The small, all-African-American town of Triana, Alabama, faced a similar struggle.85 The pesticide DDT had been produced at the nearby Redstone Arsenal Army Missile Base from 1947 to 1971.86 Testing of town residents revealed contamination by DDT and the highly toxic chemical PCB (polychlorinated biphenyl).87 Some residents manifested the highest-ever recorded levels of DDT contamination.88 The federal government had known for

68. See id.
69. See BULLARD, supra note 2, at 19.
70. Lavelle & Coyle, Special Investigation, supra note 2, at 52.
71. See id.
72. See id.
73. See id.
74. See id.
75. See BULLARD, supra note 2, at 19-21. See generally Marianne Lavelle and Marcia Coyle, Unequal Protection, the Racial Divide in Environmental Law, a Special Investigation, Bottom Line: Tale of Two Cities, NAT'L L.J., Sept. 21, 1992, at S10 [hereinafter Lavelle & Coyle, Tale of Two Cities].
76. Lavelle & Coyle, Tale of Two Cities, supra note 75, at S10.
77. See id.
78. See id.
79. See id.
80. See id.
81. See id.
82. See id.
83. See id.
84. See id.
85. See BULLARD, supra note 2, at 19-20.
86. See id.
87. See id.
88. See id.
many years that fish, which many residents ate daily from the nearby Indian Creek, contained one hundred times the safe DDT levels. The government learned of the residents’ high contamination levels in 1979. The government’s failure to respond however, ultimately forced Trian’s mayor to institute a class action suit.

Under Superfund, the sites with the most minorities take an average of 5.6 years from the date a toxic dump is discovered to be placed on a Superfund list, 20 percent longer than the 4.7 years it takes for sites with the highest white population. Once a site is placed on a list, however, it takes 10.4 years at a minority site to begin a comprehensive clean-up, which is only 4 percent longer than the 9.9 years it takes at white sites. Sociology Professor John D. Bullard of Texas Southern University noted: “There are numerous cases of poor, [African-American], and powerless communities that are victimized and ignored when it comes to enforcing environmental quality standards equitably.”

As noted above, race continues to play a large role in hazardous waste facility siting and in how quickly and comprehensively toxic contamination is addressed. While income and home value are important indicators in the placement of hazardous waste projects, race remains a predominant factor. As a result, minorities are disproportionately affected by hazardous waste facilities. Consequently, environmental racism remains an issue which the environmental community needs to address.

III. American Indians and Environmental Justice

American Indians are rarely treated as a separate group for the purposes of examining environmental racism. Professor Mohai notes that SADRI fails to include Asians and American Indians in its finding. Mohai observed, however, that it is nevertheless doubtful that this difference appreciably affects the outcomes. This is because people of color other than African-Americans and Hispanics account for only 2.3 percent of the total United States population, a number too small to significantly alter the respective findings of either the United Church of Christ or the SADRI study.

While it is undoubtedly true that including these two groups in the studies would have little effect on the overall findings, it ignores the fact that these statistics probably have a great deal of importance for those within these communities. As this Note will demonstrate, Indian tribes’ experiences with hazardous waste projects often strikingly differ from that of other minority communities.

Like many minority communities, Indian reservations have been prime targets of the hazardous waste industry. Almost all reservations have been contacted by at least one hazardous waste management company. In San Diego County, which has more Indian reservations than any other area of the country, three “serious” hazardous waste projects were under
consideration in 1993. Companies often look for the poorest, least-educated and least-politically organized communities in which to site their projects. Most of those chosen are minority communities, many being Indian reservations.

Unlike most minority communities, however, Indian tribes possess a great deal of sovereignty over their affairs. "Absent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe." A state court, therefore, may not order relief against a tribe in determining restrictions on their fishing rights, although it may adjudicate the rights of the individual members of a tribe over whom it has gained personal jurisdiction. Similarly, a state court may not apply a state income tax, or any other law, to tribal Indians on a tribal reservation unless Congress has expressly provided that state law shall apply.

As one author noted, "[t]ribes have a strong interest in self-regulation and self-government that flows from the tribal sovereignty doctrine." However, "the trend has been away from the idea of inherent Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power." Federal laws, therefore, must preempt states from gaining control over Indian tribes. "While under some circumstances a state may exercise concurrent jurisdiction over non-Indians acting on tribal reservations, such authority may be asserted only if not preempted by the operation of federal law."

Many federal environmental statutes do, however, grant Indian tribes a great deal of sovereignty and in so doing preempt states from applying their laws to Indian tribes. Subchapter I of the United States Nuclear Waste Policy Act provides for equal participation of both tribes and states when a facility is to be located on tribal or state land, effectively treating a tribe as a state and thereby recognizing its sovereignty. The governing body of an Indian tribe is afforded the same notice as the governor and legislature of a state when a facility is proposed for the reservation. A local community is guaranteed no such notice. Tribes, like states, may notify Congress of their disapproval of a decision to site a nuclear waste facility on tribal land. Tribes with an approved candidate repository site are provided with federal funding to review, evaluate, test and monitor activities undertaken under the chapter to evaluate the site's effects, and to develop a request for impact assistance. Additionally, "the Indian tribe on whose rese-

---

100. See id.
101. See id.
102. See id.
105. See id.
106. See McClanahan, 411 U.S. at 170-71.
112. See 42 U.S.C. § 10136 (West 1997)
vation the site is located, or, in the case that the site is not located on a reservation, the State in which the site is located, shall be eligible to enter a benefits agreement with the Secretary under section 10173 of this title.\textsuperscript{116}

Courts recognize that Indian tribes have some control over the siting of hazardous waste facilities; however, tribes are still subject to environmental regulations.\textsuperscript{117} The Ninth Circuit noted that because of tribal sovereignty, “RCRA [the Resource Conservation and Recovery Act] does not authorize the states to regulate Indians on Indian lands.”\textsuperscript{118} Tribal sovereignty, however, may be preempted by federal statutes, thereby giving tribes the responsibility of enforcing environmental statutes such as RCRA.\textsuperscript{119}

In Blue Legs v. EPA, the Oglala Sioux tribe operated twelve solid waste disposal facilities, all but one located on lands of the tribe and/or of individual tribal members and held in trust for the tribe by the federal government.\textsuperscript{120} The court noted that the tribe had sovereignty over its lands and that “tribes still possess their inherent sovereignty, except where it has been specifically taken from them either by treaty or by Congressional act.”\textsuperscript{121} Although holding that RCRA was an explicit preemption upon the sovereignty of the Oglala Sioux Tribe,\textsuperscript{122} the court noted that RCRA fails to address how tribes should implement hazardous waste sites on reservations.\textsuperscript{123}

The battle over the hazardous waste facility on the Campo Indian Reservation emphasizes the fact that while tribes are still subject to environmental laws, often having less flexibility than states, they still retain an inherent sovereignty which gives them greater power to manage hazardous waste projects.\textsuperscript{124} Approximately 300 tribal members live on the Campo reservation, located about seventy miles east of San Diego.\textsuperscript{125} In 1987, when the Campos began consideration of a landfill, the tribe's unemployment rate had reached 79 percent.\textsuperscript{126} In 1990, Mid-American Waste Systems, Inc. (MAW) proposed a 600-acre landfill in the southeast corner of the Campo reservation.\textsuperscript{127} The district court noted that the purpose of the project was to provide economic opportunities for the members of the tribe.\textsuperscript{128} The Campos, like many other Indian tribes with sites on their reservations, would own a share of the proposed project.\textsuperscript{129} The district court twice held that the project could go forward.\textsuperscript{130} Thus, EPA approved the project.\textsuperscript{131} The District of Columbia Court of Appeals, however, vacated EPA's approval.\textsuperscript{132}

Under RCRA, Indian tribes, though they possess inherent sovereignty, continue to be treated as municipalities, not states.\textsuperscript{133} Therefore, Indian tribes are not given the flexi-

\textsuperscript{116} 42 U.S.C. \textsection 10167 (West 1997) (emphasis added). Most statutes treat states and Indian reservations equally as potential sites for hazardous waste facilities. Camporee 42 U.S.C. \textsection\textsection 10121, 10136, 10137, 10169, 10173 (West 1997) with 42 U.S.C. \textsection\textsection 10166, 10167 (West 1997). Section 10167's language seems to assume that Indian reservations will constitute the majority of sites chosen; the financial incentives, which are limited to $3 million, would likely be more attractive to a small, impoverished Indian tribe than a state. See 42 U.S.C. \textsection 10199 (West 1997).

\textsuperscript{117} See Blue Legs v. EPA, 668 F Supp. 1329, 1339 (D.S.D. 1987); Washington Dep’t of Ecology v. EPA, 752 F 2d 1455, 1469 (9th Cir. 1985).

\textsuperscript{118} Washington Dep’t of Ecology, 752 F 2d at 1467–68 (emphasis added).

\textsuperscript{119} See Blue Legs, 668 F Supp. at 1341.

\textsuperscript{120} Id. at 1331.

\textsuperscript{121} Id. at 1338.

\textsuperscript{122} See id. at 1341.

\textsuperscript{123} See Washington Dep’t of Ecology, 752 F 2d at 1469.


\textsuperscript{125} See McGovern, supra note 98, at 145

\textsuperscript{126} See id

\textsuperscript{127} See Backcountry Against Dumps, 100 F 3d at 149.

\textsuperscript{128} See Babbitt, 1993 WL 476414, at *5. Almost every tribe in the country has been contacted by at least one hazardous waste company. See McGovern, supra note 98, at 145.

\textsuperscript{129} See McGovern, supra note 98, at 147


\textsuperscript{131} See Backcountry Against Dumps, 100 F 3d at 148.

\textsuperscript{132} See id

\textsuperscript{133} See id
bility which states are given in submitting haz-
ardous waste site plans to EPA.134 “States
determined to have developed adequate pro-
grams are labeled ‘approved states.’” [While
the baseline criteria are the same for approved
and unapproved states, approved states may
use different means to reach those ends.”135
Because the statute defines Indian tribes as
municipalities rather than as states, and
because only states may submit solid waste
management plans for EPA approval, EPA does
not possess the authority to approve the
Campo tribe’s plans.136 Rather, the Campo tribe
must follow the design standards which EPA
has promulgated.137 The Campo tribe may, how-
ever, seek EPA approval for a site-specific regu-
lation, thereby satisfying both the tribe’s desire
for flexibility and RCRA.138

More pertinent than the court’s determina-
tion of tribal authority is the Campo tribe’s
ability to play a role in the decision-making
process concerning the hazardous waste pro-
ject.139 The Campo tribe sought economic
development on the reservation for years but
with little success.140 In 1987, the tribe began
investigating the possibility of siting a haz-
ardous waste facility on the reservation.141
Consequently, the tribe learned that San Diego
County’s lack of landfill space and the reserva-
tion’s remote location made the reservation an
excellent site for a solid waste landfill.142

The tribe’s legislative and proprietary pow-
134. See id. at 151.
135. Id. at 148-49.
136. See id. at 151.
137. See id. at 148-49.
138. See id. at 151.
139. See generally San Diego v. Babbitt, 847 F.Supp. 768 (S.D. Cal. 1994); San Diego v. Babbitt, No. 93-0986-
IEG, 1993 WL 476414 (S.D. Cal. Oct. 25, 1993); McGovern, supra note 98; Jana L. Walker & Kevin Gover, Commer-
cial Solid and Hazardous Waste Disposal Projects on Indian Lands, 10 YALE J. ON REG. 229 (1993); Rempole, supra note 98.
140. See Walker & Gover, supra note 139, at 251.
141. See id.
142. See id. at 251-52. The landfill would not handle any hazardous waste. See id. at 253.
143. See id. at 253.
144. See id.
145. See id.
146. See McGovern, supra note 98, at 145.
147. See Walker & Gover, supra note 139, at 254.
148. See McGovern, supra note 98, at 147
149. See Walker & Gover, supra note 139, at 253-54.
150. See id. at 254.
151. See id. at 252.
152. See Rempole, supra note 98, at 229.
153. See McGovern, supra note 98, at 153-57
154. See San Diego v. Babbitt, 847 F. Supp. 768, 774 (S.D. Cal. 1994); McGovern, supra note 98, at 153-57 (dis-
cussing the proposed site’s comprehensive plan to con-
trol hazardous waste leachate). As reservation land is
held in trust by the federal government, the National
Environmental Protection Act was implicated and an
ers are all vested in the General Council of the
tribe, which consists of all adult members of
the tribe.143 The tribe voted dozens of times on
various aspects of the project.144 On every
occasion, the project had overwhelming sup-
port.145 To establish a governing body to gov-
ern the site, the tribe created the Campo
Environmental Protection Agency (CEPA).146
CEPA is completely responsible for enforcing
the environmental laws which the General
Council of the Tribe enacts.147 Tribes can, like
the Campo, insist on preferential hiring and
divide proceeds from the sites among tribal
members.148 The Council also created a corpo-
ration, Muht-Hei, Inc., to manage the tribe’s
business, and enacted the Campo Solid Waste
Management Code.149 The Code authorizes
CEPA to develop regulations for the manage-
ment of hazardous waste sites and for any
needed clean-ups.150 Notably, consultants paid
for by MAW drafted both the Code and CEPA.151
CEPA also made possible the opportunity for
the tribe to address other environmental con-
cerns.152

The Campo tribe strictly regulated the pro-
posed project.153 The landfill containment sys-
tem proposed in the Environmental Impact
Statement (EIS), consisting of redundant pri-
mary and secondary liners to isolate the waste
from the groundwater supply, well exceeded
both state and federal environmental regula-
tions.154 CEPA maintains stricter safety require-
ments than required by the federal government. Consequently, the containment system's risk of failure within 150 years is 3 percent, as compared to 30 percent for a landfill which satisfies federal design criteria. CEPA also requires the landfill operator to operate a groundwater monitoring system which accords with both federal and tribal regulations which satisfies federal design requirements more than required by the federal government. As Secretary James M. Strock of the California EPA noted, the regulations appear "as protective, and in some cases more so than California's." In addition, the Department of Interior promulgated strict guidelines for projects on Indian reservations, including a strict regulatory system and a requirement of notice of risks and of financial terms.

Many authors have noted the contradictions inherent in waste siting on Indian reservations. Hazardous waste sites generally seem forced upon communities which are unwilling to host them. Yet, Indian tribes willingly allow these sites to be placed on their land, and indeed seek them out. Professor Nancy B. Collins of the University of Richmond School of Law believes that the use of tribal lands as sites for the federal government's nuclear waste is another example of "[t]he exchange of Indian land for the federal government's money or promises [which] has defined tribal-U.S. relations since the founding of this nation." She notes that while nuclear waste can provide a tribe with future economic strength, jobs and money for health care, it can also destroy tribal lands.

Nonetheless, hosting dangerous activities on tribal land produces the much needed benefit of increased tribal income. Laguna Pueblo in New Mexico provides an example of how money procured by hosting dangerous activities can benefit a tribe. As host to a uranium mine, Laguna Pueblo has become one of the best-educated tribes, having produced poets, doctors, writers, lawyers and academics.

Such benefits, however, come at the price of sovereignty. Under the 1982 Nuclear Waste Policy Act, the federal government controls the nuclear waste dumped on Indian land. The Act requires both states and Indian tribes to apply for grants from the federal government for Monitored Retrievable Storage Facilities where spent nuclear and high-level waste is packaged, handled and temporarily stored before disposal in deep geological depositories. Despite the loss of sovereignty which the Act mandates, sixteen of the twenty applicants for Phase I of the grants were Indian tribes, as were all of the Phase II applicants.

Another author, Eleanor N. Metzger, however, suggested that minority communities are unable to protect themselves from environmental racism. Consequently, remedying the injustice done to minority communities mandates a paternalistic approach by the federal government. Metzger believes that because minority communities lack education and

Environmental Impact Statement (EIS) was necessary. See id. at 148-49.

155. See Walker & Gover, supra note 139, at 257.
156. See Babbitt, 847 F. Supp. at 774.
157. See id.
158. See id.
159. McGovern, supra note 98, at 145.
162. See Collins & Hall, supra note 161, at 270; Martella, supra note 107, at 1868, Sitkowski, supra note 161, at 244.
163. Collins & Hall, supra note 161, at 270
164. See id. at 274
165. See id. at 297
166. See id. at 297
167. See id. at 270
169. See id. at 287
170. See id. at 299-300
171. Metzger, supra note 110, at 379
172. See id.
resources and because the immediacy of environmental problems precludes any effective education, any non-paternalistic approach will fail. However, Jana L. Walker and Kevin Gover, who represented the Campo tribe, noted that "[u]nder certain circumstances, a solid or hazardous waste disposal project is a viable and appropriate form of industrial development for some Indian tribes."  

IV. Chester, Pennsylvania: An Example of Environmental Racism?  

The extent to which Chester, Pennsylvania, a small city near Philadelphia, has been affected by hazardous waste sites is well-documented. African-Americans constitute 65 percent of Chester's 42,000 residents; one quarter live below the poverty line. Chester possesses public housing ranked among the nation's worst, and high rates of truancy, crime, teenage pregnancy and infant mortality. Homelessness, AIDS and drug abuse also add to the city's problems. Its schools adduce the highest absentee teacher rate and the lowest standardized scores in the state. A landmark sign near the Chester train station reads "[w]hat Chester makes, makes Chester." Now, however, the only industry associated with Chester is the hazardous waste industry. One resident noted: "Right now we are recruiting all of the garbage, the scum nobody wants. I ask you: What does that make Chester?"

In the early 1970s, a Chester resident, Melvin R. Wade, began leasing land to the ABM Disposal Company. ABM brought hazardous waste to the property in tank cars and drums. ABM then stored the hazardous waste either in the tank cars and drums or emptied it directly onto the soil. At one point, more than 100,000 drums cluttered the property. In February, 1978, one of the largest chemical waste fires in this country's history erupted on the property. Firefighters and others who came into contact with the site fell ill. A number of those exposed ultimately died of cancer. Fifty hazardous substances were found in the soil when tested. "[T]he immense destruction—including wildlife and soil contamination, and wildlife devastation—that already been inflicted on the environment."  

Today Chester, a city of 42,000 people, boasts no McDonald's, ACME drug store, Burger King, or public swimming pool. Yet by 1993, Chester housed five different waste facilities. The different facilities include a large Westinghouse trash-to-steam plant (the
fourth largest incinerator of solid waste in the world), the Delaware County Regional Water Control Authority sewage treatment plant, a hospital-waste sterilization operation, a rock-crushing plant, and an incinerator for oil-contaminated soil. The trash-to-steam plant, which processes 985,000 tons of waste annually, creates an ominous, persistent rumble. The sewage treatment plant, which treats waste from forty of forty-nine municipalities in the county, fills the air with a pungent odor. Soil Remediation Systems plan to burn up to 1,200 tons of oil-tainted soil every day. The hospital-waste sterilization facility expects to receive 300 tons of medical waste daily and to operate around the clock. In addition to the noise and odors emanating from the plants, Chester residents also deal with increased traffic. Hundreds of waste-bearing diesel trucks travel through well-populated areas daily. Black diesel exhaust follows in their wake along streets where children play.

Nevertheless, the City of Chester receives compensation for becoming the site of numerous hazardous waste facilities. The Westinghouse plant contracted to pay $2.50 a ton or at least $2 million to the city treasury annually. In addition, about 38 percent of Westinghouse’s workforce of 112 lives in Chester. The BioMedical plant promised to hire 75 percent of its workforce from Chester, just over 100 people work at the sewage treatment plant.

Seeing no other alternative, residents of minority and economically crippled communities, presented with promises of money and jobs, unwillingly receive hazardous waste facilities. This dilemma may, in part, explain the situation in Chester. Chester certainly is in dire financial straits, one quarter of the population lives below the poverty line. Additionally, most of the city’s industrial base has departed. The city budget remains consistently in the red, and property taxes place among the highest in the country. “No one is lining up to build Marriotts and luxury condos in Chester these days, the argument goes. You take what you can get and make the best deal you can.”

The community appears split, however, on whether to allow waste facilities in exchange for the benefits of jobs and money which they bring. City Councilman Ed Zetuskey argues that Chester needs to lure these facilities precisely because Chester has nothing else going for it. The city generates money through host fees and taxes. By bringing jobs, the facilities can stimulate Chester’s economy. City Councilman Charles McLaughlin echoed Zetuskey, noting that “the city will benefit financially from our agreement with Thermal.

195. See Stranahan, supra note 175, at B1.
197. See id.
198. See Stranahan, supra note 175, at B1.
199. See Hardy & Wood, Treatment Questioned, supra note 1, at A1.
200. See id.
201. See id.
202. See generally id; Czmus, supra note 175; Stranahan, supra note 175.
203. See Hardy & Wood, Treatment Questioned, supra note 1, at A1.
204. See id.
205. See id
206. See id.
208. See Czmus, supra note 175, at 101
209. See id
210. See id
211. See Hinds, supra note 176, at 14
213. See generally id, Stranahan, supra note 175.
214. See Hardy & Wood, Treatment Questioned, supra note 1, at A1
215. See id.
216. See id
Pure [operator of the proposed hospital waste treatment plant].”

Others, however, maintain that such siting is merely another example of environmental racism.\textsuperscript{218} The communities that host the facilities have the common characteristic of lacking the economic resources and political clout to oppose the siting decisions.\textsuperscript{219} Alice Brown, assistant counsel for the NAACP Legal Defense Fund, called such siting decisions “environmental insults.”\textsuperscript{220} She further commented that “[i]t doesn’t make it any less odious, but it’s not unique.”\textsuperscript{221}

Chester, however, wanted the facilities – at least its City Council did.\textsuperscript{222} Nonetheless, many residents opposed the siting decisions\textsuperscript{223} and wanted Westinghouse, owner of the waste-to-steam facility, to purchase their homes so they could move out of the neighborhood.\textsuperscript{224} Others complained that they go outside less often and that their children have to play in smoke and exhaust.\textsuperscript{225}

The opposition consequently led residents to organize into groups, including the Chester/Delaware County Residents for the Environment and Chester Residents Concerned for Quality Living [CRCOL].\textsuperscript{226} Even the new mayor, Barbara Bohannan-Shephard, declared “[w]e’re going to have town meetings, we’re going to work as a team and we’re going to step on a lot of toes to make changes around here.”\textsuperscript{227} Yet, this change failed to create an opportunity for residents to weigh the pros and cons of another hazardous waste facility.\textsuperscript{228} As the Reverend Horace W. Strand, a leader of CRCOL, noted in reference to the Westinghouse trash-to-steam plant. “The people of Chester never really understood what was taking place. No one intelligently explained the health risks or the immediate effects this facility would have on their lives.”\textsuperscript{229}

In 1993, CRCOL brought suit against Thermal Pure Systems, Inc., seeking review of the permit issued to Thermal Pure’s commercial infectious waste treatment facility.\textsuperscript{230} The treatment plant is located on a fifty-two acre parcel which contains the Westinghouse Incinerator, the sewage treatment plant and a municipal waste transfer station.\textsuperscript{231} While the incinerator and the transfer station accept 5,700 tons of waste daily, the new facility anticipates accepting up to 488 tons daily and processing waste twenty-four hours a day, seven days a week.\textsuperscript{232} According to CRCOL’s attorney, the permit would allow the plant to treat about twelve times the waste that would be available from the entire state.\textsuperscript{233} The city entered into the contract with Thermal Pure, by which it would receive $5 per ton and 80 percent of all the jobs created, “primarily because of [its] high unemployment rate and poor economic condition.”\textsuperscript{234} The Department of Environmental Resources (DER) did not hold hearings on the project, nor did DER consider the racial makeup of the site when making its decision.\textsuperscript{235}

In reviewing the appeal made by CRCOL, the Pennsylvania Environmental Hearing Board noted that Chester residents are affected by the volume of truck traffic all day and night, by diesel fumes, by odors and dirt, and

\begin{flushleft}

\textsuperscript{218} See, e.g., Strand, supra note 194, at MD3.

\textsuperscript{219} See Hardy & Wood, \textit{Treatment Questioned}, supra note 1, at AI.

\textsuperscript{220} See id.

\textsuperscript{221} Id.

\textsuperscript{222} See id.

\textsuperscript{223} See id.

\textsuperscript{224} See id.

\textsuperscript{225} See id.

\textsuperscript{226} See id., Stranahan, supra note 175, at B1.

\textsuperscript{227} Hinds, supra note 176, at 14.

\textsuperscript{228} See Strand, supra note 194, at MD3.

\textsuperscript{229} Id.


\textsuperscript{231} See id.

\textsuperscript{232} See id. at *2.

\textsuperscript{233} See Hardy & Wood, \textit{Environmental Racism}, supra note 217, at MDI.

\textsuperscript{234} See Chester Residents Concerned for Quality Living, 1993 WL at *2.

\textsuperscript{235} See id. at *3.
\end{flushleft}
by health and safety concerns. The board denied review, however, holding that the facility would not cause residents any additional problems: "Obviously these conditions already exist, caused apparently by the Westinghouse incinerator and to a lesser extent, by the transfer station. [Thermal Pure's] facility will not add to them." The board also found it unnecessary to hold any public hearings. Because DER attended city council meetings where the plan had been discussed, "[i]t may have been concluded that a public hearing would not have accomplished anything more." CRCOL also claimed that Chester residents were victims of environmental racism. The board, however, noted that, except along the north side, the population around the sites was almost evenly split. Also, waste sites throughout southeastern Pennsylvania were located predominately in mostly white neighborhoods. Therefore, the board held that CRCOL failed to establish the invidious discriminatory intent necessary to support a claim of environmental racism. The board concluded that "[l]ife in organized society necessarily involves risks, burdens, and benefits. These all increase as the society grows larger and more complex. Ideally, they should be shared equally by all members of society, but that is rarely, if ever possible." Though the City of Chester agreed to host Thermal Pure's hospital waste sterilization plant, many residents opposed any additional hazardous waste facilities. The board's failure to ensure that open, public meetings were held on the facility and to consider the cumulative effects of a large number of hazardous waste facilities demonstrate a lack of concern for those, often minorities, who are affected by the aggregation of incinerators and treatment plants. As Professor Bullard noted, "[t]he siting process has resulted in minority neighborhoods (regardless of class) carrying a greater burden of localized costs than either affluent or poor white neighborhoods." Judicial ignorance of these racially disparate siting decisions will not change the undue burdens which confront minorities.

V. A Suggestion for Increasing Environmental Equity

Due to their unique status, American Indian reservations can attract and procure hazardous waste facilities while retaining control over the facilities. Like the Campos, many tribes view these facilities as viable options by which to create jobs and to spur a weak economy. Often, many of the tribal members agree on and overwhelmingly support the siting decisions. Individual tribe members play significant roles in assuring that their concerns are addressed and that the facilities will benefit, rather than disadvantage, the community.

Other minority communities are not so favored. Residents of cities or neighborhoods often play little or no role in the siting of hazardous waste facilities. As in Chester, city councils often make the siting decisions, affording little opportunity for input from city residents. City government is ultimately accountable to its residents. In the meantime, a city may be given a hazardous waste facility which severely harms the environment of the community.

Minority communities will never have the sovereignty granted American Indians. To help ensure environmental equity, however, minori-
ty communities must be given greater input into siting decisions. One way to afford these communities greater input would be to require hearings regarding hazardous waste projects proposed by federal, local and state governments. Another option, however, is a statutory requirement that any hazardous waste project be approved, by town, city or county vote, by the residents of the community which will be affected by the site. The affected communities could be determined by state or federal environmental protection agencies. Currently, such votes are required for bond measures in many states and cities. Any such vote on a hazardous waste facility would certainly engender a great deal of debate, controversy and discussion.

Whatever a community decides, it should be given the opportunity to make its voice heard, either during discussion of the facility or at the ballot box. While a simple suggestion, it would give a voice to those who have been largely silenced in the debate over hazardous waste sites.