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Balancing the Scales of Environmental Justice

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Our society has not done enough to ensure environmental equity. The evidence cannot be ignored. African-American children are two times more likely than white children to suffer from lead poisoning in low income families.[1] At other income levels, the disparity is even greater.[2] In comparison to the White population, a higher proportion of African Americans and Hispanics live in areas where air pollutants surpass federal limits for carbon monoxide, sulfur dioxide, and lead.[3] These problems may only represent the tip of the iceberg; the U.S. Environmental Protection Agency (EPA) has reported that "there is a general lack of data on health effects [of exposure to pollution] by race and income."[4]

The racial imbalance, while not yet fully known, nonetheless has created a growing movement against "environmental racism," which has become one of the most galvanizing civil rights efforts of our day. Charges of environmental racism have, in turn, given birth to new movements of "environmental equity" and "environmental justice."

Initially, environmental justice and environmental equity were more or less synonymous. As the issue of environmental racism has evolved, however, so has the terminology. Environmental racism is the intentional or unintentional practice of racially discriminatory siting. Environmental equity involves evenly balancing the siting of potentially environmentally hazardous facilities among communities of all backgrounds. Environmental justice, on the other hand, has emerged as a movement to relieve all communities of the burden of emissions by curtailing waste generation and preventing all pollution.

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1. 2 U.S. ENVTL. PROTECTION AGENCY, ENVIRONMENTAL EQUITY: REDUCING RISK FOR ALL COMMUNITIES 9, Table 6 (1992).

2. *Id.*

3. Robert W. Collin, *Environmental Equity: A Law and Planning Approach to Environmental Racism*, 11 VA. ENVTL. L.J. 495, 502 (1992).

4. William K. Reilly, *Environmental Equity: EPA's Position*, EPA J., Mar.-Apr. 1992, at 20.

Concepts of equity and justice can and should be applied to solving environmental racism. In seeking environmental justice, the focus should be on safe, fair, and attainable goals.

This Essay discusses various ways to weave principles of justice and equity into solving the problem of environmental racism. This Essay also demonstrates the enormous potential of the waste management industry to act as an agent for environmental equity. Part I identifies problems that have led to accusations of environmental racism and conditions that have contributed to the definition of environmental racism. Part II discusses issues of the actual and perceived risks posed by waste treatment facilities, and the need for an understanding of these risks. The Essay next considers the issues raised in siting facilities, and the importance of community involvement and corporate responsibility in the decision-making process.

I. The Problem

At the crossroads where race and environment meet, the most fundamental problem—and the one most often lost in the emotion of the debate—is *pollution*. An examination of environmental inequity is a study of the demographics of exposure to pollution. According to the EPA, the causes of environmental inequity are "deeply rooted in historical patterns of commerce, geography, state and local land use decisions and other factors that affect where people live and work."[5] Consider, for example, the proliferation of lead in the environment. The impact of lead on the poor and minorities is devastating: in African-American families earning less than $6,000 a year, 68% of children suffer from lead poisoning, as opposed to 36% of White children in the same financial stratum.[6] Further, although the overall percentage of lead poisoning in families earning over $15,000 a year drops for both races, the spread between affected African Americans and Whites extends to three to one: 38% of African-American children suffer from high levels of lead, versus 12% of White children.[7] These statistics are just one illustration of how minority communities shoulder more than their fair share of society's pollution.

5. U.S. ENVTL. PROTECTION AGENCY, ENVIRONMENTAL EQUITY: REDUCING RISK FOR ALL COMMUNITIES, WORKGROUP REPORT TO THE ADMINISTRATOR 2 (1992).

6. 2 U.S. ENVTL. PROTECTION AGENCY, *supra* note 1.

7. *Id.*

II. Actual vs. Perceived Risk

Safe and effective waste management is a logical solution to society's two major pollution problems: cleaning up existing pollution dangers such as lead, and controlling and disposing of currently produced waste.

Safe waste management requires the siting and maintenance of treatment and disposal facilities. Not surprisingly, public fears often lead local communities to stand in opposition to the development of facilities, even though such facilities are necessary to manage our nation's existing waste and to remediate polluted areas. Residents' concern over the health and safety of their communities is entirely reasonable; however, their fears sometimes run counter to generally accepted scientific evidence.

The supremacy of fear over evidence is not a new phenomenon in the environmental arena. As recognized in a statement, made before the House Committee on Public Lands eighty years ago, regarding the development of the Hetch Hetchy Reservoir: "I do not think it is a question of what the experts tell us; it is a question of what the great body of the people are afraid of."[8] The reservoir, which was to provide clean water to San Francisco, is one example of the general temptation to utilize public fears to rally opposition to unpopular but necessary projects.

WMX Technologies'[9] view is shaped by its experience in collecting, treating, and disposing of everything from commonplace household trash to the most toxic and hazardous materials created by American industry. WMX designs and builds hazardous waste treatment plants, and air and water pollution control equipment. WMX is also the nation's largest recycling company, and it provides a range of other environmental services. Accordingly, WMX can rely on multiple resources to combat the problem of environmental racism and to tackle the challenge of environmental equity.

Given both WMX's experience in environmental management and its familiarity with literature and research in the area, WMX accepts the premise that environmental assets and liabilities in this country are unevenly distributed among racial groups. In dealing

8. *Hetch Hetchy Dam Site: Hearing on H.R. 6281 Before the House Comm. on Public Lands*, 63d Cong., 1st Sess. 220 (1913) (statement of Mr. Whitman).

9. WMX Technologies, Inc. is a global environmental services company providing comprehensive solid and hazardous waste management programs, energy recovery, and environmental technologies and engineering resources. The company's nearly 70,000 people provide quality environmental services through more than 900 operative divisions throughout North America and in a growing number of countries overseas.

with environmental inequity, however, our society must bear in mind that it has established different pollution standards for those activities that *generate* wastes than for those activities that *manage* wastes.[10]

Society has bargained for decades over the levels of waste generation that are considered acceptable by-products of economic development. For waste management facilities, however, an essentially zero emissions standard has been set. This is an appropriate although often unachieved goal. Still, such high goals have successfully spurred the waste management industry to seek out and adopt better technologies then were used ten years ago. This continuing search for better methods will lead to even more effective waste management in the future.

Although this is not the forum to address the philosophical question of why there are acceptable levels of pollution for waste generation and not for waste treatment and disposal, it is relevant to this Essay to consider the comparative impact that the waste management industry has on human health and the environment.

The waste management system in this country, both in terms of regulatory oversight and provision of quality of waste management services, delivers on its obligation to protect human health and the environment as effectively as any system employed by any industrialized nation. That is not to imply that the management system is perfect, nor to deny the inequitably distributed consequences of some of this country's environmental policies. With respect to facilities receiving permits under the Resource Conservation and Recovery Act of 1976 (RCRA),[11] however, the relative risks to human health and the environment are better known and substantially lower than those attributable to many other industrial activities and environmental conditions. For instance, EPA Region 5 issued a report in May 1991 ranking the relative risk posed by twenty-six different environmental problems ranging from ozone depletion and radon exposure to several common industrial activities and RCRA-permitted facilities.[12] The EPA ranked the risk posed by RCRA-permitted facilities among the lowest tested.[13]

10. Waste managers are regulated by the Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-6992 (1992), while many industrial generators are regulated under the Clean Air Act, 42 U.S.C. §§ 7401-7671 (1990).

11. 42 U.S.C. §§ 6901-6992k (1988).

12. U.S. ENVTL. PROTECTION AGENCY, A RISK ANALYSIS OF TWENTY-SIX ENVIRONMENTAL PROBLEMS: SUMMARY REPORT (1991).

13. *Id.* at 9.

This is not, however, how the public sees the relative risk of waste facilities. Moreover, public concern tends to focus on the subset consisting of commercial hazardous waste disposal facilities. The commercial hazardous waste industry, however, handles only four percent of the hazardous waste generated by the country.[14] The other ninety six percent is handled on-site by the generators of the waste.[15]

There are wide gaps between perceived risks and actual risk in this area, and, quite frankly, the waste management industry shares the fault for that. The industry has not effectively communicated the actual versus perceived risk, nor has it adequately described the many improvements made in the design and construction of disposal facilities, but has, instead, let linger the mental image of an "old town dump." The industry has not educated the public about the dramatic changes in the regulatory field over the last twenty years, which have transformed the industry from one of virtually no regulatory oversight to one of the most scrutinized activities in the world. The commercial hazardous waste management industry is regulated at the federal, state and local levels, and is closely watched by a wide range of environmental organizations.

A brief explanation of how Chemical Waste Management[16] (CWM) handles hazardous waste should end the misconceptions that waste is dumped in the ground and neglected. The primary features of a modern hazardous waste landfill are double composite liners and leachate collection systems, which, when combined, exceed federal safety standards.[17] In essence, the liners stop fluids from escaping into the surrounding geology, and the leachate collection system prevents stress on the liners by removing any fluids that accumulate on them.[18] Liner materials are tested under high stress conditions to ensure compatibility with the disposed wastes, and no material used in landfill liners has demonstrated significant degradation from contact with such wastes.[19]

Once at the landfill, waste is not dumped randomly; instead, it is layered in landfill cells, with the location of each waste carefully

14. U.S. ENVTL. PROTECTION AGENCY, NATIONAL BIENNIAL RCRA HAZARDOUS WASTE REPORT 4 (1993) [hereinafter EPA BIENNIAL REPORT].

15. *Id.*

16. Chemical Waste Management is a subsidiary of WMX Technologies.

17. WASTE MANAGEMENT, INC., 1992 ANNUAL ENVIRONMENTAL REPORT 3-14 (1992).

18. *Id.* at 3-15.

19. *Id.* at 3-16.

recorded through a three dimensional grid system.[20] Wastes that may produce dust or odors are covered with soil or another non-hazardous material to prevent these problems.[21] Finally, when a site is filled, it is not, as many fear, abandoned. The responsibility to monitor for releases and to remediate continues.[22] Thus far, CWM has never experienced a release of hazardous material from a double lined landfill.[23]

In the past several years people of color began to question the fairness of environmental decision-making. The impulse to question waste disposal practices is an understandable one from the perspective of community activism; the perceived threat inherent in the siting of a hazardous waste disposal facility is immediate, and the battle is emotional and symbolic. Thus, given the absence of good communication about evolving technologies and standards in the waste management industry, it is natural that communities would choose this industry as a starting point in their assault on environmental racism.

There is little evidence, however, that emissions from waste facilities pose the greatest risk to the a minority community. While waste facilities should not be ignored insofar as they do *pollute*, communities must realize that such facilities are sited, designed, constructed, engineered, and managed with the foremost goal being to minimize pollution.

III. Using Waste Treatment Facilities as Tools

While present pollution generation levels must be reduced, strides must also be made to effectively manage the vast amounts of waste that has been generated through years of virtually unregulated industrial activity and to clean up communities affected by this pollution.

The capacity for waste management facilities to isolate or destroy dangerous substances in a safe, controlled manner should be considered a valuable tool in the environmental justice movement. Existing waste will not simply disappear. Moreover, the generation of new waste will not simply stop, although recycling and source reduction can lessen the amount of new waste generated.[24] Today,

20. *Id.*
21. *Id.*
22. *Id.* at 3-17.
23. *Id.* at 3-16.
24. WMX is active in both of these fields, and looks forward to the day when some combination of these activities stems the increase in the volumes of generated waste.

roughly one ton of hazardous waste is generated each year for every man, woman, and child in the United States.[25] The numbers for solid waste are slightly higher. Even if all generation of wastes were to cease today, our pollution problem would be far from solved. Thus, waste management has a great potential for solving our hazardous waste problems.

Recall, for instance, the problem of lead poisoning. A comprehensive program to remove lead from housing stock and contaminated soils would create a need for technologically advanced disposal capacity to contain and isolate the problem. In the meantime, by aiding the remediation process in communities already contaminated by lead, waste facilities can play a positive role in the pursuit of greater environmental activity.

Efforts at remediation are more difficult than they should be because of the fractious political climate that surrounds these issues. Recently, WMX was involved in a remediation effort contracted by EPA in Texas to remove lead-contaminated soils from a predominantly African-American housing development in West Dallas. One of WMX's landfills in Louisiana was the lowest bidder and was awarded the disposal contract. However, as the soils began to arrive at the Louisiana landfill, which was located in a predominantly White community, local residents rose in opposition to wastes coming in from out of state.

While this incident offered the environmental equity movement an opportunity to assuage the parochial fears of residents through fact-based arguments and to join with WMX in creating a cleaner environment,[26] no such support was forthcoming. Nevertheless, WMX is hopeful that open discussion on issues of environmental equity will soon create such coalitions between advocates and remedial service companies.

IV. The Siting Process

An often addressed environmental equity issue is the siting of facilities on land perceived to be "undesirable". Much of the important debate on this issue has been stimulated by the study com-

25. The EPA BIENNIAL REPORT, *supra* note 14, at 4, indicates that over 196 million tons of RCRA hazardous waste was generated in the U.S. in 1989. This figure does not include unreported hazardous waste such as household waste.

26. WMX argues that the leaden soils belong in a secure, permitted landfill, not beneath the feet of children who have nowhere else to play. Moreover, the EPA should take the most reasonable bid, regardless of state boundaries, to assure that scarce clean up funds are well used.

missioned by the Commission for Racial Justice of the United Church of Christ ("UCC Report").[27] If one were to read only the UCC Report, however, he or she would not understand the profound impact that federal and state regulation has had on the commercial hazardous waste industry.

When Congress passed RCRA in 1976, it directed EPA to develop standards for the siting, design, construction, operation and closure of hazardous waste facilities.[28] EPA issued its first rules in 1980.[29] Before that, there were no federal siting standards for such facilities.

EPA's first action in implementing the RCRA hazardous waste regulatory system in 1980 was to establish the "interim status" program that would serve until final permitting standards were developed.[30] Under interim status, facilities that had already been handling hazardous wastes could continue to do so until they received a permit.[31]

Several thousand facilities applied for and received interim status under the program; today, there are roughly 1200 facilities operating under interim status.[32] During that same period of time, there has been only one "greenfield" or newly sited facility that has navigated the entire permitting system to become fully permitted.[33] Thus, siting has not proliferated over the last decade or so; rather, there has in fact been a winnowing down of operating facilities.[34]

While the UCC Report is useful in describing where these operating facilities are located, it tells nothing about what differentiates the still active facilities from those shut down because of their potential environmental impact. Furthermore, the report does not address the demographic makeup of host communities *at the time of siting*, but shows only the demographics as they existed years after the initial siting decisions had been made. The UCC Report

27. COMMISSION FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES (1987) [hereinafter UCC REPORT].

28. 42 U.S.C. § 6924 (1988).

29. 40 C.F.R. § 264 (1991).

30. 40 C.F.R. § 265 (1991).

31. 42 U.S.C. § 6925(e) (1988).

32. Telephone interview with Wayne Roepe, Environmental Protection Specialist, Office of Solid Waste, Permits and State Programs Division, U.S. Envtl. Protection Agency (Apr. 19, 1993).

33. *See* Michael B. Gerrard, *The Victims of NIMBY*, 21 FORDHAM URB. L. J. 495, 509-10, notes 97-98 (1994).

34. The implementation of RCRA has forced substandard sites to close and made new facilities extremely difficult to build.

uses 1980 census information.[35] Many sites began operations in the early 1970s or before. Thus, data from the 1970 census would have given a much more accurate picture of the community as it looked when the siting decision was made. Unless the demographic snapshot is taken as close to the time of siting as possible, discriminatory intent should not be presumed.

In order to understand the racial composition of the communities in which WMX operates, WMX examined the demographics around the approximately 130 waste disposal units throughout its solid waste, hazardous waste, and waste-to-energy systems. Using the same methodology employed in the UCC Report—*i.e.* 1980 census data—and defining "community" as the five-digit postal zip code area in which the facility is located, the WMX study determined that 76% of its disposal facilities are located in communities having a White population equal to or greater than the host state average.[36]

Still some facilities are located in predominantly minority communities. A few of these facilities are often held up as examples of discriminatory siting. WMX's Emelle landfill, located in Sumter County, Alabama, is one such facility. As in most of rural Alabama, the people of Sumter county are predominantly African-American and have been painfully poor for generations. For some, those two factors alone are enough to explain why the town of Emelle is home to a disposal site for hazardous wastes, but the story of the Emelle siting is more involved.

The safest locations for disposal facilities exhibit several important characteristics. First, they have access to good transportation systems — rail, water, or highway. Second, they will possess geologic conditions suitable for land disposal. Finally, climatic conditions will minimize the amount of precipitation coming into contact with the waste. One of the sites east of the Mississippi that rates most highly in all these areas is Sumter County, Alabama. Its initial selection as a hazardous waste site was based on its strength in meeting these criteria. It was sparsely populated, had good access to transportation, was relatively arid, and, most importantly, was located atop the "Selma chalk formation"—several hundred square miles of dense, natural chalk 700 feet deep, an ideal barrier between any disposal activities and the nearest aquifer feeding a drinking source, located 700 feet below.

35. UCC REPORT, *supra* note 27, at 9.

36. WMX Technologies, Study Commissioned by National Planning Data Corporation (Dec. 1991) (on file with author).

Another developer first obtained state permits for the site. In 1977, that developer was acquired by WMX's hazardous waste management subsidiary, Chemical Waste Management (CWM). Since that time, CWM has invested millions of dollars in technology to make the landfill in Emelle one of the safest in the world.

When CWM acquired the site, Sumter County was struggling with infant mortality rates that were among the highest in the state.[37] Over time, the landfill brought revenue into the county; that revenue has been used to improve the schools, to build the fire station and the town hall, to improve health care delivery, to provide employment, and to reverse infant mortality rate.[38] Three hundred people are currently employed at the CWM Emelle facility. The annual payroll is $10 million, and 60 percent of the CWM employees live in Sumter County. In addition, state tax law requires that a portion of the tax on hazardous waste received at Emelle be given to Sumter County, with a minimum annual guaranty of $4.2 million to the county. The facility also has provided in-kind services to the surrounding community in the form of water supply hookups, and the construction of the town hall and a baseball field.

These improvements in quality of life are desirable for all people, no matter what their race. In Emelle, sound geology and careful management have isolated local residents from negative health impacts. The Northern District Court for Alabama found that there had been "no showing of improper storage of PCBs" or "of any other danger, real or imagined, to the public health, safety or welfare" at the Emelle landfill.[39]

WMX does not claim that its facilities pose zero risk, but if society is to effectively improve the health and well being of the most disadvantaged, it must first understand and monitor those activities

37. For the years 1975-77, Sumter County's infant mortality rate was 27%, Alabama's was 18.8%. Telephone interview with Albert Woolbright, Statistician, Office of Vital Records, Center for Heath Statistics, Alabama Dep't of Pub. Health (Apr. 14, 1994).

38. For the years 1985-87, Sumter County's infant mortality rate was 14.4%, Alabama's was 12.7%. For the years 1989-91, Sumter County's infant mortality rate was 8.5%, Alabama's was 11.4%. *Id.*

39. Chemical Waste Management v. Broadwater, No. 84-G-1208-W (N.D. Ala. May 24, 1984)(Order Granting Preliminary Injunction) (enjoining the Alabama Department of Environmental Management from enforcing an order requiring the Emelle facility to cease accepting PCB wastes); WARREN CHRISTOPHER ET AL., O'MELVENY & MYERS, A CRITICAL ANALYSIS OF THE SAN DIEGO COUNTY DISTRICT ATTORNEY'S FINAL REPORT ON WASTE MANAGEMENT 5, app. A (May 28, 1992).

that pose the *greatest* risk. The greatest gains in risk reduction will be achieved only if society addresses the problem as a whole. While the absolute elimination of risk in an isolated industry might appear to be the simplest solution, such an approach ignores the potential for much greater gains which can be achieved by monitoring a wider variety of practices.

Absolutes are more easily discerned than relatives. While a total reduction of risk in one industry can be better envisioned than a wide-spread relative reduction across all media, the public's gravitation towards a symbolic and emotional controversy, understandable as it is, does not negate the possibility that the greatest gains might be achievable elsewhere. It is not sufficient to act solely on our emotions: we must act on the best, most credible information we can find. WMX acknowledges its responsibility to accurately communicate risk, but that responsibility also falls on every professional in this area.

Often overlooked is that siting is ultimately a local land use issue. It is a legal, emotional, political, and sometimes irrational decision. Clearly, more community involvement in siting decisions would be a good thing, but that participation must be coupled with an honest, accurate, discussion of risk. If the risks of hosting waste facilities are routinely exaggerated, *only* the voiceless will likely play host to such necessary activities. Conversely, the more reasonable the discussion, the greater the likelihood that a diverse mix of communities will determine that a well-managed landfill is a positive complement to the area's residential and industrial land uses.

Siting should be driven by concerns of environmental protection. Risk is a function of exposure, not simply of proximity. Therefore, the most advanced designs and technologies should be selected based on their effectiveness in limiting exposure. Society should insist on state-of-the-art, redundant safeguards at facilities located where nature provides a backup.[40] Siting, however, is often not driven by a concern for environmental protection, but by economic

40. Examples of safeguards include: a double liner system, which consists of a type of clay and/or synthetic layers to prevent the escape of leachate; Leachate collection systems, to remove and prevent the accumulation of any fluids that do seep down to the liner; groundwater monitoring systems, which enable operators to detect any escape of pollutants (any detected problems must be remediated); and, to safely handle gases that form as landfilled waste decomposes, methane recovery systems. The cumulative effect of these safeguards coupled with a low-risk geology which inhibits the seepage of pollutants to groundwater or drinking water sources results in an extremely safe landfill.

considerations, the most notable being the impact the siting decision may have on residential property values.

While the predictable emotional response is that the presence of a hazardous waste management facility will negatively affect property values, research on the issue often fails to support the conclusion and actually contradicts it. For instance, a study performed by the Public Interest Economics Foundation concluded "that the preponderance of evidence failed to show any relationship between land values and distance from the disposal site."[41] Even the UCC Report contradicted the perception that commercial waste disposal facilities are usually located in poor communities. The UCC Report found that the communities hosting facilities had both mean household incomes and mean values of owner-occupied houses that were higher than the national average.[42] This finding is at odds with commonly held, and often repeated, assumptions about the location and impact of such facilities. The best way to address these misperceptions is to have open, honest, and inclusive discussion of risks and benefits of siting options.

V. Community Involvement and the Role of Corporations

All new RCRA facilities must have a permit before construction and operations can begin. For a myriad of reasons, including the communication of risks, community involvement is crucial to the siting and permitting process. RCRA requires community involvement but leaves the details of implementation to the states.[43] State programs necessarily differ. No matter how well intentioned, however, such programs are not always successful in giving local communities a meaningful share of decision-making power. A recent example involving WMX illustrates the problem.

Although the EPA and the State of California, which boasts the seventh largest economy in the world, required incineration for 180,000 tons of hazardous waste in California in 1990, there is no commercial incineration capacity in the state. All toxic materials requiring commercial incineration must currently be moved out of state. In order to provide incineration capacity at a price that would keep California's industries competitive, CWM proposed to build a hazardous waste incinerator adjacent to its landfill in Ket-

41. OFFICE OF POLICY ANALYSIS, U.S. ENVTL. PROTECTION AGENCY, BENEFITS OF REGULATING HAZARDOUS WASTE DISPOSAL: LAND VALUES AS AN ESTIMATOR: EXECUTIVE SUMMARY (June 1984).

42. UCC REPORT, *supra* note 27, at 41, Exhibit B-1.

43. *See* 40 C.F.R. § 271.14(v)-(aa) (1983).

tleman City, California. In this way, CWM could offer its customers lower costs by using existing laboratory facilities and highly trained personnel to improve its economies of scale. Due to changing market conditions, CWM recently withdrew its proposal to develop the incinerator in Kettleman City, but the experience is still valuable in examining how corporations can work with local communities.

The landfill had been operating free from community opposition for many years, yet the announcement of plans to construct an incinerator triggered immediate opposition. The site is located in a portion of the San Joaquin Valley that is predominantly Hispanic. Lawsuits were filed alleging that Kings County's decision to allow CWM to build an incinerator reflected racism.[44] Although the courts have refused to hear the allegations of racism, the charges are still revealing. Were CWM building an industrial park, no one would have spoken of racism. Inherent in the lawsuit was the notion that the incinerator would have a negative impact on the community. Since it is well documented[45] that these activities have not generally been shown to lower property values, the focus should have been on the possible adverse impact to the health of the community. Yet, even that concern about this highly regulated industry is a red herring.

The California RCRA permitting process was created to address the community health issue. Like most states, California requires that an independent group assess the risk an incinerator would pose.[46] The study uses a statistical model to evaluate the health impact on the "most exposed individual"—a person who over his or her life span remains within a ten mile radius of the facility twenty four hours a day for the entire twenty year useful life of the incinerator.[47] Using highly conservative assumptions, the study for the Kettleman City project concluded that the number of additional cancer cases potentially attributable to the incinerator would be 3 in 100,000,000. In the United States, roughly one third of the population will contract some form of cancer in their lifetime, which is about 33,000,000 cases in 100,000,000.[48] The health risk

44. El Pueblo Para el Aire y Agua Limpio v. County of Kings, 22 Envtl. L. Rep. (Envtl. L. Inst.) 20,357 (Cal. App. Dep't Super. Ct. 1991).

45. *See, e.g.*, UCC REPORT, *supra* note 27.

46. CAL. HEALTH & SAFETY CODE § 25199.7(d) (1990).

47. WOODWARD-CLYDE CONSULTANTS AND RISK SCIENCE ASSOCS., CWM-KETTLEMAN HILLS HAZARDOUS WASTE INCINERATOR HEALTH RISK ASSESSMENT SUMMARY 6 (1988) (on file with author).

48. AMERICAN CANCER SOC'Y, CANCER FACTS AND FIGURES—1993, at 1 (1993).

posed to the 1400 residents of Kettleman City, therefore, could fairly be described as negligible.

The State of California has a rigorous program for community participation in site selection. The Kings County Local Assessment Committee (LAsC) was created in March 1988 and operated under the California Health and Safety Code,[49] one of the siting provisions of the Tanner Act.[50] The statutory role of the LAsC is to advise the local agencies' legislative bodies, such as the Kings County Planning Commission, in their decisions regarding the issuance of land use permits for commercial hazardous waste facilities and the conditions that should attach if permits are issued.[51] The LAsC may engage the services of a consultant—which it did in the Kettleman City case—the cost of which is borne by the proponent.[52]

For the Kettleman City siting, the LAsC met regularly from its inception until it presented its report to the Kings County Planning Commission in September 1990. The report contained 37 items covering 57 specific issues that the LAsC had negotiated with CWM. Among other things, CWM agreed to

> —provide waste reduction information to all incinerator customers and hold at least one waste reduction seminar for customers annually,
>
> —provide the local community with general information regarding hazardous waste, including source reduction and use of safe alternatives in the home,
>
> —hold annual town meetings to exchange information with the community regarding the emergency response planning that is part of every hazardous waste facility permit,
>
> —implement and maintain earthquake response measures,
>
> —provide free disposal of household hazardous wastes and agricultural wastes for community residents,
>
> —create a permanent Standing Community Facility Review Committee to replace the LAsC, should the facility be permitted,
>
> —provide computer monitoring equipment which would give real-time monitoring data to the air regulatory agency office,
>
> —provide an employee "hotline" for reporting facility problems directly to an on-site county inspector,

49. CAL. HEALTH & SAFETY CODE § 25199.7(d) (1990).
50. *Id.* §§ 25199-25199.14.
51. *Id.* § 25199.7(d)(1).
52. *Id.* § 25199.7(d)(3).

—provide five dollars per ton of untreated waste to a community development fund, in addition to the ten percent gross receipts tax collected by the county pursuant to state law,

—fund the development of a crop testing protocol to detect airborne contamination and conduct a crop testing program,

—provide incineration services to all county businesses at a ten percent discount, and

—provide on-site office space to a county inspector.

While this process might appear to be comprehensive and responsive to the community's needs, it failed to achieve community understanding and support.

Despite the above assurances, an LAsC member who had been intimately involved in the community participation aspects of the project, nevertheless joined as a plaintiff in the suit that followed our announcement to build the incinerator. Although all but one of the complaints in the suit were directed at the State of California and Kings County, and only one at CWM, the advocacy groups that encouraged the suit continue to portray the suit as a landmark effort to stop an insensitive corporate giant. The only complaint made against CWM was that the siting decision represented a pattern of discriminatory siting practices. The court has refused to hear that civil rights claim.[53]

The primary thrust of the suit was that the State and the County failed to execute their responsibilities to involve the community, by failing to provide notifications, documents, and translations services for the Spanish-speaking members of the community, thus violating CEQA and the U.S. Constitution. Such responsibility clearly falls on the government entities involved, and although they decided to conduct their affairs only in English, CWM voluntarily, and at its own expense, provided meeting notifications in Spanish, translated the Summary of the Environmental Impact Report, and provided for Spanish language translators during the public hearings on the incinerator.

Although all parties agreed to community involvement in the planning and approval process and all acknowledged the sincerity of the Kettleman City residents' concerns, as were CWM's efforts to address these concerns through the LAsC and public hearing process, the process still broke down. The issue is, why?

53. El Pueblo Para el Aire y Agua Limpio v. Chemical Waste Management, Inc., No. C-91-2083-SBA at 1 (N.D. Cal. Oct. 17, 1991) (dismissing the civil rights claim on the grounds that it was not ripe for adjudication).

Certain aspects of the Kettleman City case stand out. Despite the best intentions of the Tanner Act process, in this case it may have failed to provide sufficient inclusion for those most directly affected by the incinerator plans. Kings County has a population of 110,000 of which 34% is Hispanic.[54] Kettleman City, the town nearest the facility, has a population of 1411—almost all are Hispanic.[55] At the time of these proceedings, none of the five members of the Kings County Board of supervisors were Hispanic. Of the seven members of the LAsC, only one was from Kettleman City. Of the $7,000,000 CWM pays annually in taxes to the county, little of it is spent in Kettleman City. Thus it can be seen that those most affected by the site need better access to the process of siting and to the services afforded by the site. Otherwise, as in this case, community opposition will be fierce and the chances for success lessened.

CWM's experience in Kettleman City illuminates the role that corporations should play in fighting environmental racism. First, corporations *must* communicate with the communities where they operate or seek to develop. The difference between perceived fears and actual risk can be huge, and the failure to effectively inform and educate local residents about these differences can be fatal. Corporations must also bear in mind that communication functions in two directions; the responsibility to *listen* and thoughtfully address the concerns of the local community cannot be neglected.

Secondly, corporations should form active partnerships with members of the local community. This would facilitate efforts to communicate effectively, and, more importantly, it would bring community members into the decision making process.

Finally, the corporation must recognize that its partnership with the local community should be economic as well. Corporations' commitment to sharing the reward as well as the risk should extend beyond payment of local taxes to hiring practices, choice of vendors, and other areas.

Because the questions raised in the environmental equity debate are important and fundamental, the hazardous waste disposal industry must maintain an ongoing dialogue with the communities in which they operate, with lawmakers and regulators, and with advocates who care about the issue.

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54. *See* U.S. BUREAU OF THE CENSUS, 1990 CENSUS OF POPULATION AND HOUSING SUMMARY Tape File 1A (1991).

55. *Id.*

VI. Conclusion

Environmental decision-makers have not looked through the lens of fairness in the social justice context. Industry and government officials should take measures to ensure that environmental services and protection are more evenly distributed among all Americans. In order to do so, however, such subjects as the effects of cumulative loadings of toxic emissions into individual geographic areas must be better understood. The EPA has begun to acknowledge this, and Congress has recently begun to tackle the problem as well. In the 102d Congress, Representative John Lewis and Vice President Al Gore introduced the Environmental Justice Act of 1992,[56] which seeks to identify those communities bearing the heaviest pollution burdens—termed Environmental High Impact Areas—and to ensure that those "hot spots" get rigorous regulatory oversight, technical assistance, and health assessments. Congressman Lewis has reintroduced this legislation in the 103d Congress, and it is now sponsored in the Senate by the Environment and Public Works Committee Chairman, Max Baucus (D-Mont).[57] This is a promising approach.

In making environmental-impact decisions, principles of justice must guide environmental decision-makers. To be led by justice, however, demands that each case is judged on its merits. A reliance on absolute preconceptions that any siting is racist and that any effort to develop capacity to effectively manage the waste produced is unjust will lead to gross perversions of justice. Accusations cannot simply be made without discretion, and judgement cannot pass without knowing the facts. There must be an honest and fair discussion of risk, a reexamination of how decisions are made, and special attention paid to the interests of the least powerful if environmental fairness concerns are to be translated into meaningful action.[58]

56. *See* S. 2806, 102d Cong., 2d Sess. (1992) (introduced by Sen. Gore (D. Tenn.), 138 CONG. REC. S7489 (June 3, 1992)); H.R. 5286, 102d Cong., 2d Sess. (1992) (introduced by Rep. Lewis (D. Ga.), 138 CONG. REC. H4157 (June 4, 1992)).

57. H.R. REP. NO. 2105, 103d Cong., 1st Sess. (1993).

58. WMX Technologies will continue its efforts to keep local communities informed and involved in the decision making process, and the company looks forward to being an active participant in the discussion on environmental fairness.