

Local Negotiations in Hazardous Waste Incinerator Permitting:  
A Comparison of Economic and Communication Models in Four Case Studies

by

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# Kettleman City

	Kettleman City
	1990
<b>Tract Population</b>	10908
%White	42%
%Black	19%
%Hispanic	51%
%Under 18	23%
%Over 65	4%
%Under 6	8%
%Foreign Born	23%
<b>Education (%pop over 25)</b>	
% 0-8 years	22%
% 9-11 years	27%
%Completed H.S.	24%
%Some College	21%
%Bachelors or Graduate Degree	3%
Persons over 25	6915.5
H.S. Dropout Rate	24%
<b>Labor Market Structure</b>	
Employed Persons	1982
%Operators, Nonfarm Laborers and Service	29%
%Professional & Technical	4%
%Managers & Administrators	4%
%Sales Workers	9%
%Clerical	11%
%Craft Workers	11%
%Operators	9%
%Nonfarm Laborers	4%
%Service Workers	16%
%Farm Workers	33%
%Males Working less than 26 weeks	6.4%

Males over 16	5872
<b>Poverty And Welfare</b>	
%Persons in Impoverished Families	31%
%Whites in Poverty	27%
%Blacks in Poverty	36%
%Hispanics in Poverty	41%
% Families Receiving Welfare or PA	22%
<b>Income</b>	
Aggregate Income	\$ 28,308,159
Number of Families	27,073
Average Family Income	\$ 21,149
Aggregate Wage and Salary Income	\$ 23,252,812
Wage & Salary Households	1,244
Average Wage & Salary Income	\$ 18,692
Aggregate Self-Employed Income	\$ 3,208,923
Self-Employed Households	139
Average Self-Employed Income	\$ 23,086
Aggregate Earned Income	\$ 26,461,735
Earned Income Households	1,278
Average Earned Income	\$ 20,714
Average Welfare Income per Household	\$ 5,053
Households Grouped by Income Level	
Income Under \$5,000	68
Income of \$5,000-9,999	124
Income of \$10,000-14,999	233.5
Income of \$15,000-24,999	325.5
Income of \$25,000-49,999	440.5
Income over \$50,000	147

Last Update: 5/28/96

## **2.2 Kings County, California**

Chemical Waste Management, Inc. (Chem Waste) filed permit applications in 1988 to construct and operate a hazardous waste incinerator at its existing Kettleman Hills facility in Kings County, California (Chem Waste 1988). Chem Waste applied for a conditional use permit for the incinerator from Kings County, as well as state and federal environmental permits. Under the terms of state law, the County Board of Supervisors appointed a seven-member committee of local citizens to negotiate with the company over terms and conditions that might make the facility acceptable to the local community (Kings County LAC 1990). The review of the permit applications, including the environmental review of the project, and the negotiations between the local committee and the company continued through late 1990. The negotiation committee eventually reached full agreement with the company on a wide range of issues, and forwarded the agreement to the County Planning Commission for possible inclusion as conditions in a county permit. The Planning Commission approved a permit December, 1990, that incorporated the negotiated agreement in its entirety with other conditions (Fontana 1990a, 1990b). The Board of Supervisors heard an appeal of this decision in January, 1991, and upheld the commission's decision to grant the permit (Viets 1991; Corwin

1991; Seymour 1991). The decision to grant the land-use permit was appealed in state court and overturned in December, 1991 (Viets 1991; Corwin 1991; *Los Angeles Times* 1992; Clemings and Fontana 1992). Though this initial court ruling was appealed by Chem Waste, the appeal had not been heard by September, 1993, when the company formally withdrew its permit applications (Associated Press 1993; Bailey 1993). In announcing cancellation of the project, Chem Waste noted a major change in the hazardous waste incineration market since the project was initiated (Bailey 1993). A summary timeline for this case is presented in Table 2.2.

Kings County is located in the southwestern portion of the San Joaquin Valley in California, just south of Fresno and roughly 200 miles from Los Angeles, San Francisco, and Sacramento. The San Joaquin Valley, including Kings County, is one of the major agricultural areas in California. In 1982, more than 90% of the land in Kings County was in farms, including almost 20% of the land in the southwestern hills that were pasture or range land (Clements 1985). The county was second in the state in production of cotton, third for olives and pistachios, and fourth for nectarines. Overall, the county ranked eleventh in the state in total agricultural sales, with more than \$478 million in 1982, though the county is much smaller than many of the top agricultural counties in the state.

Chem Waste's Kettleman Hills facility is located in the southwest corner of Kings County, in the hills just above and to the west of the San Joaquin Valley. As shown in Figure 2.3, the facility is about four miles from the nearest community, Kettleman City, and from the main north-south highway in California, Interstate 5. The Chem Waste

**Table 2.2 Timeline for the Kings County Case**

November, 1987	Chemical Waste Management, Inc. (Chem Waste) files a notice of intent to apply for permits to build and operate a hazardous waste incinerator at its Kettleman Hills facility.
March, 1988	Kings County Board of Supervisors appoints a local committee to negotiate with Chem Waste over the proposed incinerator.
October, 1988	Local negotiation committee adopts negotiation procedures.
November, 1988	Local negotiation committee holds first round of community input meetings in Avenal, Hanford, and Kettleman City.
August, 1989	Draft Environmental Impact Report (EIR) released, and local committee restarts operations.
September, 1989	Local negotiation committee holds second round of community input meetings in Avenal, Hanford, and Kettleman City. An additional meeting is held in October in Kettleman City due to problems with the sound system at the September meeting.
October, 1989	Local committee submits list of issues to Chem Waste, and the three subcommittees begin negotiations with company.
October, 1989	A change to the state law governing the negotiation process takes effect, mandating the negotiations to take place in public. The process is delayed while contractual arrangements between the county, the consultant and Chem Waste are revised accordingly.
February, 1990	The negotiation subcommittees reconvene and review issues.
Spring and Summer, 1990	Subcommittees negotiate with Chem Waste on the issues.
September, 1990	Full committee unanimously approves agreement with Chem Waste, and votes to forward its report on the negotiation process and agreement to the county Planning Commission.
December, 1990	Planning Commission unanimously approves conditional use permit for the incinerator, including all conditions recommended by the negotiation committee.
January, 1991	Board of Supervisors upholds Planning Commission decision and grants conditional use permit for the incinerator.
February, 1991	Project opponents file suit against Chem Waste and the county, asking for the permit to be overturned.
December, 1991	Judge rules EIR is inadequate under the California Environmental Quality Act and invalidates permit.
September, 1993	Chem Waste announces that it is canceling the incinerator proposal and formally withdrawing the permit application.

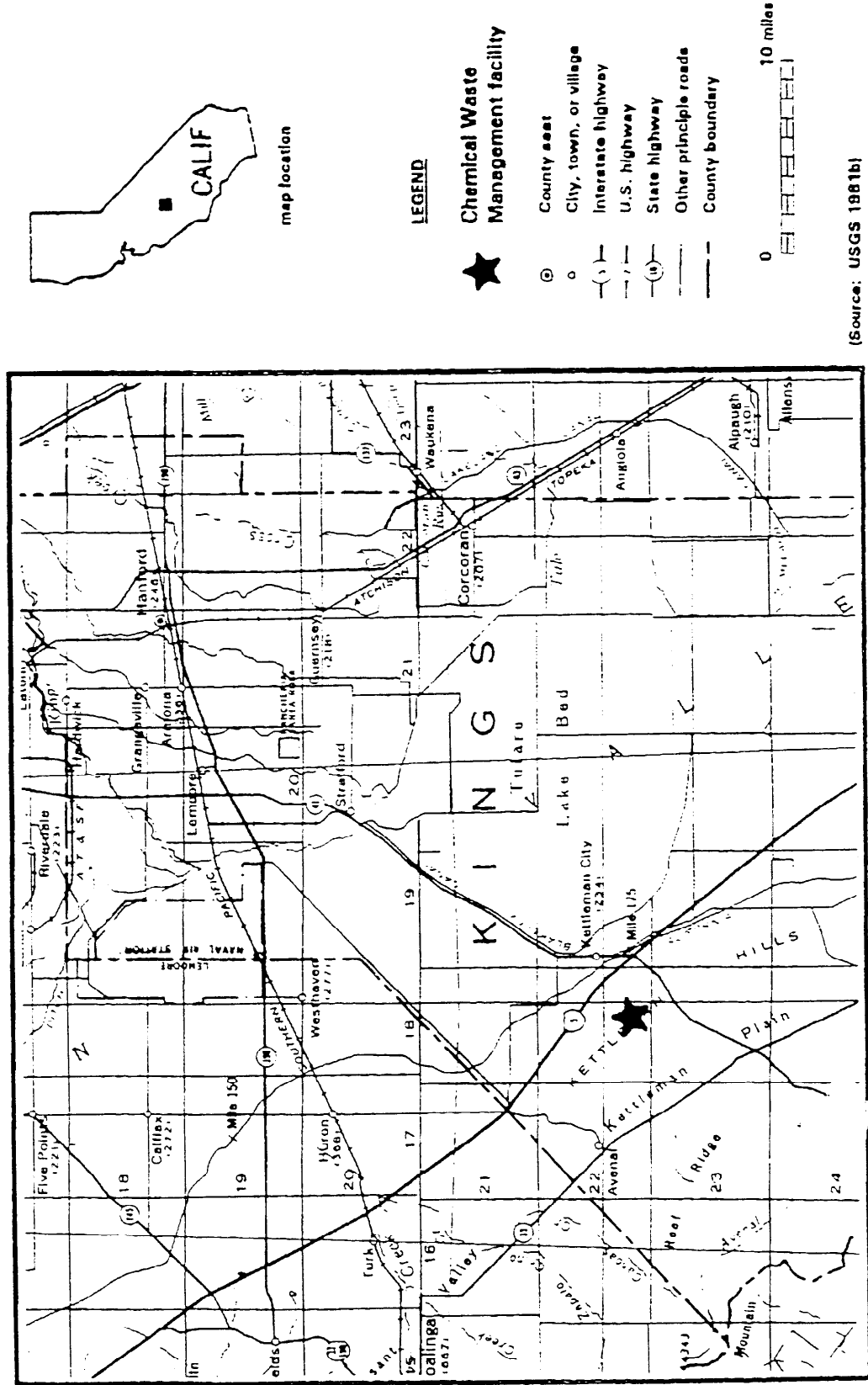


Figure 2.3. Location of the Chemical Waste Management facility in Kings County

facility is in a remote part of the county, with less than 10% of the county's approximately 100,000 people living within 15 miles of the facility.<sup>3</sup> Kettleman City is a small, poor community, with a large portion of its residents employed as farm workers. According to data from the 1990 Census, of the 618 employed residents over the age of 16 living in Kettleman City, 396, or almost two thirds, worked in the agricultural, forestry, and fisheries industry.<sup>4</sup> County wide, this industry was also the largest employer, but the proportion of workers in it was less than 20%. Median household income in Kettleman City was only \$20,976 in 1989, compared to \$25,507 for the county. The difference in per capita income was even greater, only \$5,129 in Kettleman City and \$10,035 in the county overall. Kettleman City is the only predominantly Hispanic community in the county. More than 90% of Kettleman City's 1,505 residents are of Hispanic origin, compared to 34% county wide. A greater proportion of Kettleman City residents are non-citizens as well, 45% compared to less than 10% in the county overall.

The Kettleman Hills facility is one of the largest hazardous waste treatment and disposal facilities in California, and includes the state's only currently operating Class 1 hazardous waste landfill. The facility was originally established in 1972, and was acquired by Chem Waste in 1979 (Chem Waste 1991). Chem Waste is a significant

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<sup>3</sup> Parts of Fresno County are also within 15 miles of the facility, but these areas are also sparsely populated farmland. The single largest population center within 15 miles of the facility is the Avenal State Penitentiary, which houses more than 6,000 prisoners.

<sup>4</sup> Available Census data for Kettleman City does not distinguish among the three industries, but Kings County has a thriving farm economy with little or no fishery or forest industry. Those workers identified in the Census data in this category are almost entirely in the agricultural industry.

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employer in the county. In 1991, the company had 280 employees. Chem Waste is also the largest taxpayer in the county, paying the county a 10% gross receipts tax on its Kettleman Hills operations in addition to being one of the top property taxpayers. The company paid the county more than \$6 million in 1991. According to the Kings County Budget Summary for fiscal year 1993-94, total county revenue, including \$62 million in aid from the state and federal governments, was less than \$92 million for the 1991-92 fiscal year.

The negotiations in this case were affected by the development of two distinct conflicts over the siting and permitting of the incinerator. The first was between the county and the company, and was relatively mild in comparison to most conflicts over incinerator siting. The second conflict was between the Kettleman City community, together with their state and national allies such as Greenpeace, and the county and the company. This conflict was more typical of incinerator battles, and resonated with claims of environmental racism on the part of the county and the company. I will discuss the two conflicts separately, focusing primarily on the first, milder conflict which provided the main context for the negotiation process itself. The second conflict provides an important larger context for understanding the dynamics of this case.

The conflict between the county and the company was a typical siting conflict in substance, though two factors helped keep the intensity at a relatively low level. People in the county expressed concerns about the project about such issues as human health impacts, possible effects on local agriculture, the monitoring of air emissions, emergency response, communication with the community, increased truck traffic, and impacts on



wildlife (Kings County LAC 1990). These concerns were less intense than they might have been, though, largely because of the remoteness of the facility from the main county population center.

Evidence that greater proximity would have engendered greater opposition in and around Hanford, the county seat, can be seen from an earlier siting controversy over a proposed coal-burning cogeneration facility just outside the Hanford city limits. This project created great controversy within the county, and a group formed to oppose the project. That project was in the process of receiving its final approval, having been modified to burn natural gas and coke rather than coal, when Chem Waste initially proposed the incinerator.

According to a Chem Waste official, "this [opposition] group, which kind of was an out shoot from the Kings County Farm Bureau, the 'No to Coal' group is what they called themselves. We kind of assumed that they would eventually take a position [on the proposed incinerator]. They didn't. We went to their meetings, we gave them some information, we answered some questions, and they didn't step in one way or another." Though this group represented the most significant organized environmental group within the county when Chem Waste proposed the incinerator, the group did not play an active role in the incinerator debate. As a committee member commented, at the start of the incinerator proposal, "the community was coming out of a big, long, three- or four-year struggle over the coal, the proposed coal-burning cogeneration plant, and the community wasn't in a mind to really fuss with anything.... There were similar people active, but the glaring difference was that the coal plant was real close to Hanford, and

the proposed incinerator project was forty-five miles away. And we didn't have the large local turnout in Hanford as you did in the coal plant because of the proximity of the project to the population center. So, it was almost out of sight, out of mind. But the people who were active in the coal project from time to time showed up on the incinerator project."

The second factor that helped minimize the normal siting conflict in this case was the county's revenue from Chem Waste's tax payments. In order to help keep public health and safety more important than the tax revenue from the facility, the county did not use the revenue from the 10% gross receipts tax for operational activities. Instead, these funds were generally targeted for one time projects such as buildings or roads. This strategy was intended to ensure the county was not reliant on the Chem Waste facility, and that county operations would not be disrupted by any loss of this tax revenue (Zumwalt 1996). Nonetheless, the money from the company's property taxes and the 10% gross receipts tax represented a significant portion of the county's revenue, and the county community could see a real benefit from the existing Kettleman Hills facility.

The effect on tax payments from the addition of an incinerator was not clear because some of the waste that would be incinerated was already received by Kettleman Hills to be treated by other means or shipped elsewhere for incineration. At least one opponent believed, though, that the tax payments would double. In an interview almost three years after the county granted the permit, an opponent said the county was "getting seven million [without the incinerator], and if they would have had the incinerator, it would have doubled." Nonetheless, Chem Waste's role as the county's largest taxpayer

made it a valued member of the county community, and one whose wishes were to be given serious and careful consideration.

The combination of relatively mild negative impacts due to the remote location of the facility with tangible benefits from the existing facility made the county-wide reaction to the proposal relatively quiet. For Kettleman City, the situation was quite different. Unlike Hanford, forty miles from the facility, Kettleman City was within five miles of the facility and adjacent to the Interstate 5 exit that is the main transportation route to the facility. From the perspective of Kettleman City, Kings County and Chem Waste were working together on this project for their own benefit, and had little or no concern about any possible impacts the project might have on Kettleman City and its residents. One Kettleman City resident said, "It seemed like the county was just a puppet for the company. They did as they wanted. The supervisors seemed like they had an interest in the company, they were some kind of owners, because they would get very angry when we would be fighting with them about the issues. They seemed very protective of the company."

Kettleman City residents also did not see themselves as receiving any significant benefits from the taxes paid by Chem Waste to the county. Since it is an unincorporated community, the county is responsible for most services there. However, Kettleman City is a small community, remote from the county population center, and the level of services it receives does not match that of other communities in the county. For example, most of the roads in Kettleman City are not paved and have neither curbs nor sidewalks. Many local residents feel that the county neglects Kettleman City because it is a poor,

minority community. The local reaction to the project, and to the county's role as permitting agency, built on the local sense of the county's neglect of Kettleman City. A resident spoke of Kettleman City's gravel streets, commenting, "we see Hanford progressing. We see new streets, a new government center in Hanford. Corcoran is doing fine also, and nobody is doing anything for Kettleman City.... They put in these new streets, these gravel whatever, and we complained about it, because there's still holes in it and because it's dangerous. Kids fall, and they really scrape their skin off with this kind of road.... I don't see this stuff in Hanford."

Kettleman City residents felt their health was already affected by the existing operations at the Kettleman Hills facility. One resident said, "the people around here were not feeling well. A lot of people around here have asthma, have rashes, have headaches, burning eyes. We could smell the chemicals." They also feared the impacts would worsen if the incinerator were built. The risk assessment prepared for the company for this project concluded that the lifetime cancer risk from the incinerator emissions for the maximally exposed individual would be less than one in a million. It also showed that the area of maximum exposure would be to the southeast, rather than to the northeast toward Kettleman City (BVA 1988). This report did little to convince Kettleman City residents that the landfill and proposed incinerator were safe.

Opponents of the project expressed a general sense that government views Hispanic farm workers as expendable. One Kettleman City resident expressed this frustration clearly, saying, "the government doesn't want to know what's poisoning us, either from the toxic waste industry or from the pesticides, because it's money into the economy.

We're in trouble with it right now, so if a couple of people die, it doesn't matter as long as we keep the money up. And this has been one of the problems for the campesino people. We've been the guinea pigs. They test pesticides on us, and if too many people die, then they take it out and send it down south to Mexico, South America, and then they bring back the produce and we eat it. So either way, we're going to get it." This statement expresses the context that made the claims of environmental racism compelling for Kettleman City residents. This context helps explain why the environmental racism claims were relatively unaffected by consideration of the magnitude of the impacts that the incinerator might have on the community, or by suggestions that the community faces greater chemical exposures from the cotton fields that surround the town or the farm work so many residents do in the fields. Because this project is viewed as simply one additional example of the low regard in which this Hispanic community is held, arguments that the project will have only minimal effect do not eliminate the basic unfairness of the proposal in the eyes of the Kettleman City residents.

Since the Kettleman Hills facility is in an unincorporated portion of Kings County, the local land use permitting authority and lead agency status under CEQA rest with the county. In March, 1988, the county Board of Supervisors appointed a local assessment committee to conduct the negotiations with the company, in accordance with state law (Kings County LAC 1990). This committee was not technically oriented but was well-connected politically. The committee included a former member of the Planning Commission for Hanford, the largest city in the county, a retired judge, a prominent farmer from Kettleman City who was the committee's only Hispanic, and a former

member of the Corcoran City Council.<sup>5</sup> The committee members represented the interests of the county community through the negotiations in the permitting process. The committee membership provided a fair representation of the county-wide community. The state law required the seven members to “include three representatives of the community at large, two representatives of environmental or public interest groups, and two representatives of affected businesses and industries” (California Health and Safety Code, Section 25199.7(d)(1)). This representation of different interests was not a significant factor in the makeup and operation of the committee. Few of the members could remember, when interviewed three years after the negotiations ended, who was what type of representative. One member could not remember which type of interest he had represented.

The geographic distribution on the negotiation committee reflected the project’s potential impacts on the county. Four of the seven members were from the second supervisorial district where the project was located, which includes approximately one fifth of the county’s population (not including inmates at the two state prisons outside of Avenal and Corcoran). One Kettleman City resident, an Hispanic farm owner, was on the committee. While this community, which is the closest to and most likely to be impacted by the facility, desired greater representation on the committee, the

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<sup>5</sup> The other three people on the committee at the end of the process were a Hanford businessman, a retired Avenal pharmacy owner, and the committee’s only woman, who was a community college student when named to the committee. Since the process ended, the Hanford businessman was elected to the Kings County Board of Supervisors in 1994, and the woman was appointed to the Kings County Planning Commission in 1993.

community's population is less than two percent of the county total.<sup>6</sup> Avenal, the next closest community with slightly more than five percent of the county's population, had two representatives. These two west-side communities, which are the only population centers within fifteen miles of the facility, had three of the seven seats on the negotiation committee, though they have less than ten percent of the county population. On the other hand, the county's north side, with the vast majority of the county population, had four of the seven seats, including one of those in the second supervisorial district.<sup>7</sup> Overall, this distribution reflected both the disproportionate impact the facility would have on the west side, but also the overwhelming balance of population and power held by the north side.

The county planning staff treated this project as a typical, albeit complex, conditional use permit application. At the outset, the staff prepared an extensive timeline, showing when each part of the permit review process was expected to begin, and how long it was

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<sup>6</sup> Both a county official and a company official commented to me that the Kettleman City resident who became a member of the committee did not volunteer initially, but was encouraged to do so when no applications for the committee were received from anyone in Kettleman City. The county official added, though, that the day before the applicants for the committee were interviewed, an application from this man's wife was discovered accidentally attached to someone else's application. When she was then belatedly invited to interview (after her husband had been recruited), she declined. She later became one of the most outspoken community leaders against the project. Another Kettleman City resident noted that this woman had desired to be on the committee before I mentioned that I had heard the county had misplaced her application. She doubted that the wife's application had been accidentally misplaced, and felt that the county had preferred the relatively soft-spoken husband to his more outspoken wife on the committee. I was told, "[she] speaks her mind, and [he] is more political minded. He knows how, he's very quiet, and he knows when to speak, and [she] just speaks."

<sup>7</sup> The distribution of representatives discussed here is for the seven members who completed the negotiations, two of whom were replacements. Only two of the original committee members were from the west side of the county, one each from Kettleman City and Avenal. The second member from Avenal replaced a Hanford resident who retired and moved out of the county. The member from Corcoran, who was the fourth person from the second supervisorial district, had replaced a person from Hanford who died during the process.

expected to take, with the understanding that a permit decision would be made within one year of the acceptance of the application as complete.<sup>8</sup> An early version of the timeline, completed in March, 1988, showed the negotiations being held from June through October and final action on the permit application the following January (Kings County Planning Agency 1988). From the county staff's perspective, the negotiations were a supplement to the existing environmental and planning review in the conditional use permit process. A county planning staff person explained, "we provided staff to both the Planning Commission, the Environmental Review Committee [that evaluated the EIR for completeness], and the [negotiation committee]. I was able to have the various committees focus on their responsibility and try to keep the overlap at a minimum, and I did that on purpose. The [negotiation] committee could make a condition on zoning, but it would have no force unless the Planning Commission approved it. So I tried to keep them out of zoning areas and focus on those additional things, which is what the law said they were supposed to focus on." According to the state law, the committee's job was to "[a]dvice the legislative body of the city or county of the terms, provisions, and conditions for project approval which have been agreed upon by the committee and the proponent, and of any additional information which the committee deems appropriate. The legislative body of the city or county may use this advice for its independent consideration of the project" (California Health and Safety Code, Section

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<sup>8</sup> The one year deadline is a requirement of CEQA for permit applications requiring an EIR. In many complex proposals, though, this deadline is extended by agreement between the applicant and the lead government agency, as happened in this case.



25199.7(d)(2)(E)). The decision to grant or reject the permit would be made by the Planning Commission and the Board of Supervisors, not the negotiation committee.

Once the negotiation committee was named, they were given initial direction by the county planning staff. One of their first actions was to select a consulting firm to offer them technical and procedural assistance during the negotiations (Kings County LAC minutes March 30, 1988, May 4, 1988, and July 27, 1988; Nielsen 1988a). County staff and the consultants provided the committee with technical and regulatory information and expertise for the negotiations. The staff and consultants provided basic information to the committee on the nature of the project and its impacts, drawing on information from the permit application and environmental review (BVA 1988).

The basic negotiation structure adopted by the committee in October, 1988, was suggested by the committee's consultants (Nielsen 1988b, 1988c; Zumwalt 1988). The committee decided to conduct the negotiations through three subcommittees which would consider technical, economic, and environmental issues (Kings County LAC 1990). This strategy was developed so the actual negotiations could take place in private to avoid public posturing and to encourage constructive discussion and dialogue. A 1988 newspaper story quoted Michael Brown, one of the committee's consultants. "We need to be able to take off our coats, let down our hair a little bit and swap ideas," said Brown. "We need to have some give-and-take that isn't on the record so we can understand each other's positions" (Nielsen 1988b). Any meeting of a majority of the committee members would be required to have advance public notice and be held in public, so the subcommittees consisted of three members. Six committee members

served on a single subcommittee each, and the chair of the committee served on all three subcommittees.

Before it began negotiations, the committee sought input from the county community on the issues and concerns people would like to see addressed. During the fall of 1988, the committee distributed a questionnaire in English and Spanish and held a series of public meetings to determine what issues were of concern in the county (Kings County LAC 1988, 1990). Three public input meetings were held initially. The first was held in Avenal, the second in Hanford, and the third in Kettleman City.

After some business meetings of the negotiation committee to begin planning their negotiation strategy in late 1988, the committee decided to wait for completion of the Draft EIR before beginning serious negotiations with Chem Waste so they would have a better base of knowledge about the potential impacts of the facility on the community and of the mitigations that were being proposed under CEQA. After the draft EIR was complete and released to the public in August, 1989, the negotiation committee restarted its operations. Since significant time had passed since their first round of public input meetings, the committee chose to hold a second round of these meetings in September and October.

The opposition to the proposal was strongest in Kettleman City. A local group, the People for Clean Air and Water (PCAW) was formed to oppose the incinerator and was composed primarily of Kettleman City residents. Greenpeace, a national environmental organization that is strongly opposed to incineration, played a key early role in helping to organize the Kettleman City community against the project. One leader of PCAW I

interviewed had not been aware of the presence of the Chem Waste facility, much less of the incinerator project, before Greenpeace distributed flyers advertising a public meeting about the incinerator proposal. Greenpeace, and later the California Rural Legal Assistance League, provided important technical, legal, and organizing support to PCAW. Though this coalition of local and national groups played a key role in derailing the incinerator proposal through their lawsuit against the county's permit, these opponents paid little attention to the negotiation process beyond attending the public input meetings the negotiation committee held in Kettleman City. PCAW and Greenpeace maintained the position that the project should not be built at all, and were not interested in negotiating possible conditions of approval.

The public input meetings at Kettleman City were difficult in many ways. Members of the public at the meeting were looking for answers to questions about the impacts of the project, while the committee was there to hear the community's concerns rather than to provide information. Many of the local residents who came to the meeting spoke against the proposal, expressing both concerns about specific potential impacts and a more general message. A list of specific concerns about the project signed by over sixty Kettleman City residents ended with the message, "Kings County Local Assessment Committee, as from the start, we are telling you again and again we do not want the toxic incinerator in our back yard. We say no to the incinerator!!!" (Kings County LAC minutes attachment September 27, 1989, emphasis in original). Questions were also raised at the meetings concerning the impartiality of the county planning staff on this project. At the input meeting, a Greenpeace representative from San Francisco "called

for the removal of [the project manager for the county planning department] from the entire project review process because he is biased for [Chem Waste]" (Kings County LAC minutes September 27, 1989, p. 2). The committee's insistence that, in the words of the meeting minutes, "the role of the Committee is to negotiate with the applicant, and the purpose of this meeting is to listen to the community concerning what issues of specific terms and conditions the community wants the Committee to negotiate" (Kings County LAC minutes September 27, 1989, p.2) largely fell on deaf ears at the meeting. While much anger and concern was expressed by the local community, neither the Kettleman City residents who came to the meeting nor the committee got what they were looking for out of the exchange. As one project opponent from Kettleman City commented, "they were frustrating meetings, because they were the sort where you were there to give your input, but you're not to get any answers, or you're not supposed to dialogue with anybody. It was real frustrating."

During the fall of 1989, the state legislature amended the statute governing the negotiation process, striking the word "negotiate" and substituting "hold discussions", among other relatively minor changes. The County Counsel determined that the legislative intent of this change was to assure that any discussions between a local negotiation committee and a project proponent would be held in public (Eymil and LaPorte 1990). Though the changes to the law were minor, the process was again delayed while the county staff and the consultants completed procedural and contractual changes based on the amendments (Kings County LAC 1990). The committee decided to keep the basic subcommittee format for the negotiations, but to hold the negotiations

between Chem Waste and the subcommittees in public. The negotiations were then delayed until February, 1990, while the contractual changes necessitated by this change in procedure were completed.

Shortly before this delay in the fall of 1989, each subcommittee developed an initial list of proposed terms and conditions to include in the permit based on the public input meetings, the survey results, staff and consultant recommendations, and the subcommittee's discussions of the issues (Kings County LAC 1990). The subcommittees then discussed the lists with Chem Waste in closed negotiation meetings in October, 1989. Following the delay, the subcommittees met in February, 1990, to review the issues, and then submitted a revised list of proposed terms and conditions to Chem Waste in April. Chem Waste responded in writing to each issue, indicating both its position on the issue, and what it was prepared to offer. The committee then considered Chem Waste's responses, and revised its list appropriately. This process continued back and forth over several months in writing and in face-to-face meetings. Throughout this exchange, the company, the consultant, county planning staff, and staff of relevant regulatory agencies provided input and helped clarify and explain some of the technical details that related to different issues.<sup>9</sup> After a few rounds on each side, most issues had been settled, and intensive negotiations were required on only a small number of issues.

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<sup>9</sup> In May, 1990, I went to work for Brown, Vence, and Associates, the committee's consultants. During that summer, I played a small role in tracking down technical information on several of the issues that were being negotiated, primarily relating to the ability to use epidemiological studies to track health impacts from the facility should they occur, and the technical state-of-the-art in real-time emissions monitoring.

The final agreement between the full committee and Chem Waste was reached in September, 1990, and was approved unanimously by the negotiation committee (Kings County LAC 1990). This final agreement represented full agreement on all 37 issues raised in the negotiations. These issues covered a wide range, including the training of the incinerator operators, mitigation measures to protect endangered species near the facility, establishment of a community fund to benefit the west side of the county funded by Chem Waste, and monitoring the health of Chem Waste workers to provide indication whether the risk assessment missed significant risks from the incinerator. Table 2.3 shows the breadth of issues covered in the agreement.

Some on the committee and at Chem Waste felt that some of the issues raised during the negotiations were coming more from the consultants and staff than from the negotiation committee itself. In the words of one committee member, "in one or two instances, ... the [negotiation] subcommittee wound up being the referee between the county and the applicant. In some instances, the county was asking for what was, [in] the opinion of the subcommittee, exorbitant amount of, excessive demands on the applicant." Later, the same person added, "when we took a position that we thought the county was excessive, we had to line up with Chem Waste. And at other times, when we thought Chem Waste was out of line, we'd line up with the county. So it was two against one."

Full agreement on all issues did not mean that all issues were settled in the manner initially suggested by the committee. Both sides had compromised during the process and some issues had been redefined by mutual agreement along the way. For example,

**Table 2.3 Areas of Agreement in Kings County Negotiations**

Economic Issues:

company financial disclosure  
company insurance disclosure  
clean closure of site after closure of incinerator  
company indemnification of county  
reimbursement for emergency shelter costs in event of incinerator-related evacuation  
company contributions to a west-side community development fund  
development of crop-testing program and education program for agricultural interests  
no-cost waste reduction services for small quantity generators in county  
incineration discount for county businesses

Environmental Issues

assurance that incinerator customers practice waste minimization  
company role in educating community about hazardous materials and waste  
company role in educating community about proper emergency response  
review of road capacity needs and changes for incinerator construction and operation  
company payment of county fees for mitigation monitoring and reporting costs  
procedures for monitoring for earthquake damage and for post-earthquake restart  
company compliance with biological resource impacts agreement with state agency  
company provision of services for household hazardous waste collection in the county  
use of air-pollution offsets, and company contribution to a county 'greening' fund  
provision of an on-site office for county inspector  
annual report on employee health monitoring to test for effects from the incinerator  
provision of data on baseline and operational environmental monitoring  
addition of two monitoring wells between Chem Waste facility and Kettleman City  
provision of trees to county communities  
company efforts to encourage employee commuting program  
on-site emergency response capability  
development of community emergency response program  
provisions relating to staffing requirements, work hours, and chain of command  
installation and operation of automatic waste feed shutdown system

Technical Issues

lifetime maintenance of best available control technology, including possible retrofits  
company payment toward a county computerized geographic information system  
establishment of a standing community facility review committee  
provisions for the safe management of incinerator ash  
provision of equipment for monitoring incinerator by air pollution control district  
installation of a 'hotline' for employee reporting of problems to county inspector  
monitoring of national efforts to establish incinerator operator certification program  
shutdown on unsafe emissions and periodic county review of permit conditions  
provisions for review of county permit on sale of facility

the committee initially wanted the company to pay for a baseline community health survey of Kettleman City and Avenal, with later surveys to determine whether these communities had any adverse health impacts from the incinerator (Kings County LAC 1990). This proposal was dropped after the committee's consultants determined that, while the community health survey could be conducted, it would be both expensive and extremely unlikely to provide a basis for detecting any health effects on the community (Whorton 1990). After this information was given to the committee, it was willing to accept Chem Waste's alternative suggestion of making the annual report on the medical monitoring of its workers available to the county (Kings County LAC 1990). Any indication that the workers' health was being adversely affected by the incinerator would then be used to reexamine the estimates of potential health effects as calculated in the risk assessment for the project. Both the committee and Chem Waste compromised or accepted the other's position on some issues.

The agreement between the committee and Chem Waste was then forwarded to the county's Planning Commission, an appointed body which has the authority to consider the land use permit application. The commission accepted the negotiated agreement, and included it in its entirety as conditions in the land use permit the commission granted Chem Waste for the incinerator. In addition, the Planning Commission included other conditions in the permit based on recommendations from the environmental review of the project and on its own authority over land use and zoning issues within the county. The commission granted the permit on an unanimous vote in December, 1990 (Fontana 1990a, 1990b). The commission's decision to grant the permit was appealed to the



county's Board of Supervisors, the five-member elected body which is the legislative and administrative governing body for the county. In a lame duck session held a few days before two new supervisors were to take office, the board upheld the commission's decision on a three to one vote, with one abstention<sup>10</sup> (Corwin 1991; Seymour 1991). The Board approved the permit with the commission's conditions intact, including the negotiated agreement.

In February, 1991, PCAW and some individual Kettleman City residents, represented by the public interest firm California Rural Legal Assistance, filed suit in state court asking that the permit be overturned (Viets 1991; Corwin 1991). PCAW argued that the company had violated the civil rights of Kettleman City residents by a pattern of singling out poor, minority communities for their hazardous waste facilities. PCAW also argued that the permit was flawed because the county had failed to follow the requirements of CEQA in a number of ways, including a failure to properly inform the public by refusing to provide adequate information on the project in Spanish for the Kettleman City community. None of the issues raised in the suit by PCAW related to the negotiation process or the agreement that resulted. In December, 1991, a state judge upheld some of the plaintiffs' claims, and invalidated the permit the county had granted (*Los Angeles Times* 1992; Clemings and Fontana 1992). The ruling focused on the treatment of air pollution offsets and cumulative air pollution impacts in the EIR, but also noted the

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<sup>10</sup> One supervisor owned a welding company which sold compressed gases to Chem Waste, and chose to abstain from the vote because of the potential conflict of interest. This supervisor was one of the two who had been defeated for re-election that fall and left office the following week. The second lame-duck supervisor voted for the project, and was the member of the board who had pushed for the vote to be held before the new supervisors took office (Fontana 1990c, 1990d).

emphasis in CEQA on informing the public would have justified a Spanish translation of an extended summary of the EIR. Chem Waste appealed that decision. The appeal had not been heard by September, 1993, when Chem Waste decided to withdraw its permit application (Associated Press 1993; Bailey 1993).

In this case, the negotiations altered the distribution of costs and benefits from the project in a way that made the incinerator less burdensome, and possibly beneficial, to the closest communities, including Kettleman City. The agreement negotiated between the committee and the company provided mitigation for some of the impacts of the facility, gave the community additional control and assurances over the operation of the facility, and provided monetary benefit to the west-side communities in the county. Nonetheless, the negotiations appear to have done little or nothing to alter the basic attitudes toward the project of anyone in the county, with the exception of a few people on the negotiation committee itself. The negotiations did not address the main issues of concern to the opponents, since their basic stand was that the incinerator should not be built at all. This stand was based on the perceived unfairness of the project based on claims of environmental racism. In the wider county community, there was little interest in the project, and little concern over its possible impacts even before the negotiations began. To the extent that people were inclined to support the project because of the benefits received by the county from Chem Waste, there is little indication that this attitude was either caused or strengthened by the additional benefits negotiated by the committee.

The only changed attitudes toward the project that I discovered were those of a few of the negotiation committee members. Two members told me in interviews approximately three years after the negotiations ended that they entered the process skeptical of incineration, and inclined to oppose the proposal. Both indicated having started suspicious of the technology and its appropriateness in the county rather than having been clearly opposed to incineration. Their experience during the negotiations left them satisfied that incineration was an appropriate waste management technology if it were properly managed. Both felt that they had learned enough during the course of the negotiation process to change their attitudes in favor of the technology. As one of them said,

when I first applied [to be on the committee], I was more anti-incinerator. I mean anti in being that I thought really the environment was so important, and I looked at it from that aspect. But when I got on the committee, and I started learning more about the incinerator, and I started reading more about incineration, and I followed, there was a case down in La Jolla, where a judge overruled a community and said, you know, you can't discriminate against incinerators coming in here. It's a state-approved mechanism and we want, not so much [to] encourage that, but you can't discourage it. So I tried to increase my knowledge, but I found myself becoming, not pro-incinerator so much, but more of a realistic approach, in that, something needs to be done with the waste, and just to stick our heads in the mud is not the way to do it. I mean, you have to be proactive and you have to look at different things, you know, regardless of whether you like them or not. Just to cut them out on their own, without looking at them and examining them, that's foolish. So, I would say, by the time we got into negotiations, I was more in favor of seeing that incinerator come through as a, I don't want to say a Band-Aid, but as a step toward a future, future steps that might, you know, even improve our getting rid of our waste quicker.

The community and company negotiated an agreement that would have reduced some of the local negative impacts and increased local benefits. The main opposition, though, did not participate in the negotiations, and attacked the project by other means. In spite of the negotiated agreement, no incinerator was permitted or built, and the negotiated agreement was never implemented.

# The Struggle of Kettleman City:

## Lessons for the Movement

Luke W. Cole\*

### INTRODUCTION

*El pueblo unido jamas sera vencido.*<sup>1</sup>

I want to tell a story. Stories are one way we transmit our history, share our successes, and learn from our losses. Stories are also an important part of the movement for environmental justice, which has as one of its central tenets the idea "We speak for ourselves."<sup>2</sup> The stories from the environmental justice movement offer a different perspective from those told by the dominant institutions in society. It is my hope that this story will give the reader another perspective on, and version of, the story told by Chemical Waste Management through Jane Seigler's piece in this journal.<sup>3</sup>

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<sup>1</sup> Chant and slogan from the farmworker justice movement: "The people, united, shall never be defeated." Long-time farmworker activist and California Rural Legal Assistance community worker Hector de la Rosa offers two possible derivations of this slogan, which he first heard in the late 1960s during United Farm Workers' strikes in the Salinas Valley of California. First, de la Rosa thinks it simply may be a Spanish translation of the similar slogan used by Martin Luther King, Jr. and others in the Civil Rights Movement. Or, it may have been imported from struggles for liberation then taking place in Nicaragua and El Salvador. Interview with Hector de la Rosa, in Salinas, Cal. (Oct. 25, 1993).

<sup>2</sup> See, e.g., WE SPEAK FOR OURSELVES: SOCIAL JUSTICE, RACE AND ENVIRONMENT (Dana Alston ed. 1990).

<sup>3</sup> See Jane Seigler, *Environmental Justice: An Industry Perspective*, 5 MD. J. CONTEMP. LEGAL ISSUES 59 (1994). As Richard Delgado notes, one function of legal storytelling "is to deconstruct and displace comfortable, self-serving majoritarian myths and replace them with less sexist and racist views." Richard Delgado, *Rodrigo's Second Chronicle: The Economics and Politics of Race*, 91 MICH. L. REV. 1183, 1191 (1993).

I want to tell the reader the moral of the story at the beginning to give the context for the story. The moral of this story is that environmental justice struggles are *political* problems, not *legal* problems. I know this is an article which had its genesis in a conference on legal approaches to environmental racism, and is in a law review published by, and mostly read by, law students and lawyers. As law students and lawyers, however, we, more than most, need to look at the fact that these are political problems, not legal problems, and understand that one of the great myths of white Americana is the myth that "we need a lawyer."<sup>4</sup>

#### THE STORY

This is a story about Kettleman City.<sup>5</sup> Kettleman City is a tiny farmworker community of 1100 residents in Kings County, in California's Central Valley. Ninety-five percent of Kettleman residents are Latino, seventy percent of the residents speak Spanish in the home, and roughly forty percent are monolingual Spanish speakers. They are primarily farmworkers who work in the fields that spread out in three directions from Kettleman City. Kettleman City is much like many rural communities in the Southwest and few people would know about it were it not for the fact that Kettleman City is also host to the largest toxic waste dump west of the state of Louisiana. This landfill is located about three and a half miles from town, hidden behind some low hills. It is owned and run by Chemical Waste Management, Inc. ("Chem Waste"). The dump was created in the late 1970s without the community's knowledge or consent.<sup>6</sup>

Residents of Kettleman City found out about the dump in the early 1980s, after reading in the local paper about multi-million dollar fines levied against the Chem Waste facility for violations of environmental laws. While residents were non-

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<sup>4</sup> This powerful myth is one of the three great myths of white Americana, according to Patty Prickett, an anti-pesticide activist from Los Angeles. The other two great myths are, "The truth will set you free," and "The government is on our side." It is important for environmental justice activists to understand, and get beyond, these myths in order to be effective.

<sup>5</sup> This story is drawn from my four years of work with the community group *El Pueblo para el Aire y Agua Limpio*, beginning in October 1989, as their attorney.

<sup>6</sup> People marvel that a gigantic toxic waste site can be placed just miles from a community without the community's knowledge. In California, under state environmental laws, government agencies are required to provide public notice in three ways: (1) in a newspaper of general circulation, which in Kettleman City means a small box in the classified advertisements in the *Hanford Sentinel*, published forty miles away; (2) by posting on and off the site, meaning on a fence post three and a half miles from Kettleman City; and (3) by mail to adjacent landowners. CAL. CODE REGS., tit. 14, § 15072(a) (1993). The adjacent landowners to the Chem Waste facility are large agribusiness and oil companies, such as Chevron.

plussed to find out their town was host to a huge toxic waste facility, they saw few avenues to challenge the dump.

Things changed in 1988, when Chem Waste proposed building a toxic waste incinerator at the dump site. People in Kettleman City heard about this proposal not from Chem Waste, not from Kings County or state officials, but rather by a phone call from a Greenpeace organizer in San Francisco. Bradley Angel, Southwest campaigner for Greenpeace's toxics campaign, had received a phone call from the Kings County sheriff one afternoon in January 1988, asking him if Greenpeace planned to demonstrate at the hearing in Kettleman City that night. After finding out about the hearing, Angel called one of the few people in Kettleman City he knew at the time, Esperanza Maya, and said, "Espy, did you know that there's a hearing tonight in your community about a toxic waste incinerator?" She said, "I haven't heard a thing about it."

Maya grabbed a few of her neighbors and went to the hearing. They were shocked to find out that Chem Waste was proposing to build an incinerator that would burn up to a 108,000 tons — 216 million pounds — of toxic waste every year. That translates to about 5000 truckloads of toxic waste which would be passing through the Kettleman area each year, in addition to the hundreds of daily truckloads bound for the toxic dump.

After the hearing, the people of Kettleman City began to do their homework about the dump, the incinerator, and Chemical Waste Management. They formed a community group, *El Pueblo para el Aire y Agua Limpio* (People for Clean Air and Water) (*El Pueblo*). They found that the San Joaquin Valley is considered one of the worst polluted air basins in the United States, second only to Los Angeles. And, while Los Angeles has ocean breezes to cleanse it, the San Joaquin Valley, because of its unique bathtub shape, is a closed system in which pollutants remain and air contamination levels keep rising.

Members of *El Pueblo* also found out about a 1984 report prepared for the California Waste Management Board.<sup>7</sup> That report, known popularly as the "Cerell Report," was written with California taxpayer dollars. The report suggested to companies and localities seeking to site garbage incinerators that the

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<sup>7</sup> J. STEPHEN POWELL, CERELL ASSOCIATES, POLITICAL DIFFICULTIES FACING WASTE TO ENERGY CONVERSION PLANT SITES, REPORT TO THE CALIFORNIA WASTE MANAGEMENT BOARD (1984).

communities which would offer the least resistance to such incinerators were rural communities, poor communities, communities with low educational levels, communities under 25,000 residents, and communities that were largely employed in resource extractive jobs like mining, timber, or agriculture.<sup>8</sup> When members of *El Pueblo* looked around Kettleman City, they saw that they fit the Cerell profile perfectly.

*El Pueblo* also looked at California's other toxic waste dumps. California has three Class I toxic waste dumps — the dumps that can take just about any substance that you want to dump in them. They found out that in addition to Kettleman (ninety-five percent Latino), the two other dumps were in Buttonwillow, which is sixty-three percent people of color, primarily Latino, and in Westmorland, which is seventy-two percent Latino.<sup>9</sup> Both Buttonwillow and Westmorland look just like Kettleman: they are small, predominantly Latino, rural farmworker communities with high levels of poverty. People in Kettleman City began to put two and two together.

#### CHEM WASTE

Then *El Pueblo* looked at the company, Chemical Waste Management. Chem Waste runs the largest toxic waste dump in the country in Emelle, Alabama. Emelle is in the heart of Alabama's black belt, and in a community that is about ninety-five percent African American.<sup>10</sup> Emelle actually looks a great deal like Kettleman City — small, rural, poverty-stricken — but the residents are Black instead of brown.

Even more interesting was where Chem Waste had other incinerators. Chem Waste owns three other toxic waste incinerators: one on the south side of Chicago, in a neighborhood which is fifty-five percent African American and twenty-four percent Latino;<sup>11</sup> one in Port Arthur, Texas, in a community that is about eighty percent African American and Latino;<sup>12</sup> and one in Sauget, Illinois, which is

<sup>8</sup> *Id.* at 17-30.

<sup>9</sup> BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, 1990 CENSUS OF POPULATION AND HOUSING, SUMMARY POPULATION AND HOUSING CHARACTERISTICS: CALIFORNIA 62, 66, 73 (table 4, *Sex, Race and Hispanic Origin: 1990*) (1991).

<sup>10</sup> *See generally* ROBERT D. BULLARD, DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY (1990).

<sup>11</sup> BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, 1980 CENSUS OF POPULATION AND HOUSING, CHARACTERISTICS 205 (*Community Area 51*) (1981).

<sup>12</sup> According to 1980 Census data, the Census Tract which includes the Port Arthur facility is seventy-

surrounded by neighborhoods that are ninety-five percent or more African American,<sup>13</sup> including East St. Louis, an overwhelmingly African American community that has been called "America's Soweto."<sup>14</sup>

The people in Kettleman City started to see a pattern. Every community where Chem Waste operates their toxic waste incinerators is a community of color, and substantially so: starting with seventy-nine percent in Chicago and Port Arthur; up to the nineties in Sauget; well, they have almost reached 100 percent, as Kettleman City is ninety-five percent people of color.<sup>15</sup>

The people of Kettleman City then turned to Chem Waste's compliance record. This is the largest toxic waste dumping company in the country. What did their record look like? At the Kettleman City facility, Chem Waste had been fined \$3.2 million for more than 1500 incidents of overfilling evaporation ponds, dumping too much waste into these ponds.<sup>16</sup> The people in Kettleman said to themselves,

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seven percent African American and two percent Latino, compared to Jefferson County as a whole, which is fifty-five percent white. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, 1980 CENSUS OF POPULATION AND HOUSING, SELECTED DEMOGRAPHIC AND HOUSING DATA (1980).

<sup>13</sup> Martin G. Rosen noted:

[T]he census tracts surrounding Sauget and Trade Waste Incineration [are] more than 96% black. The average racial composition of the first five Census tracts to the north of Sauget . . . is 97.6% black with 40% of the population under the poverty level. The average racial composition of the four Census Tracts to the east of Sauget . . . is 95% black with 43% of the population under the poverty level. These results are significant considering that the average proportion of black people in the St. Louis SMSA is only 17%.

Martin G. Rosen, *A Case Study of Environmental Racism in Sauget, Illinois* (unpublished manuscript, on file with author). I thank Robert Bullard for his extensive help in compiling the demographic figures on Chem Waste facilities nationwide.

<sup>14</sup> Charles Lee, *From Los Angeles, East St. Louis and Matamoros: Developing Working Definitions of Urban Environmental Justice, RACE, POVERTY & THE ENVIRONMENT* (Cal. Rural Legal Assistance Found. & Earth Island Inst.) Winter/Spring 1993, at 4.

<sup>15</sup> We found out later that Chem Waste had built an incinerator in Tijuana, Mexico to hit the 100 percent mark. The Tijuana incinerator was denied a permit by the Mexican government after long community opposition, including a meeting between Kettleman City activists and Mexican environmentalists. Joel Simon, *U.S. and Mexican Activists Stop Incinerator Project*, CALIFORNIA LAWYER 89 (1993); *see also* Mark Grossi, *Tijuana Activists to visit waste site in Kettleman City*, FRESNO BEE, Mar. 7, 1992, at B2.

<sup>16</sup> CALIFORNIA ASSEMBLY OFFICE OF RESEARCH, TODAY'S TOXIC DUMP SITES: TOMORROW'S TOXIC CLEANUP SITES 19, 24 (1986) ("In 1985, the EPA fined CWM Kettleman \$7 million for improper groundwater monitoring, dumping incompatible wastes into ponds, keeping inadequate records, and more than 1,500 incidents of over filling ponds. CWM settled by agreeing to pay EPA \$2.1 million and DHS \$1.1 million."). *See also* DEPARTMENT OF SHERIFF, COUNTY OF VENTURA, WASTE MANAGEMENT, INC. ATTACHMENT 6 (1991) [hereinafter VENTURA COUNTY REPORT]; EDWIN L. MILLER, JR., FINAL REPORT: WASTE MANAGEMENT, INC. (San Diego District Attorney's Office, Mar. 1992).

"Wow, maybe management had some involvement in this; maybe this wasn't just a worker messing up and dumping a little more into the pond." Residents might have believed Chem Waste's claim of worker error if there had been two or three violations, but when they found out it happened 1500 times, it was a little more difficult to believe.

*El Pueblo* looked at the record of the Chicago incinerator and invited people who lived near the Chicago incinerator to come to Kettleman City. Illinois State Representative Clem Balanoff came to Kettleman. He described Chem Waste's overfilling of the Chicago incinerator, of the incinerator spewing black smoke plumes, and of Chem Waste being fined for turning off the air monitoring equipment to the incinerator so that nobody knew what was being emitted — not once, not twice, but many times over a period of months.<sup>17</sup>

*El Pueblo* looked at Chem Waste's facility in Vickery, Ohio where Chem Waste took in oil contaminated with PCB for disposal and then turned around and resold it to a company which used it to repave streets and sold it as fuel oil in nearby communities.<sup>18</sup> They looked at Chem Waste's actions in Louisiana, where the company was caught storing toxic waste in a store-it-yourself type rental locker.<sup>19</sup> Kettleman residents discovered that Chem Waste's incinerator in Chicago blew up and was shut down by the Illinois Environmental Protection Agency.<sup>20</sup>

<sup>17</sup> Cyndee Fontana, *Kettleman Incinerator Draws Fire: Firm's Poor Record in Illinois Cited*, FRESNO BEE, Jan. 17, 1990, at Valley Page. Balanoff told the people of Kettleman City that Chem Waste is "not a company that can be trusted at all." *Id.* See also Ron Nielsen, *Illinois Politician Denigrates Burner*, HANFORD SENTINEL, Jan. 17, 1990, at 1.

<sup>18</sup> Jeff Bailey, *Tough Target: Waste Disposal Giant, Often Under Attack, Seems to Gain from It; Waste Management's Jousts with Environmentalists Deter Rivals from Field; How It Sanitizes Its Image*, WALL ST. J., May 1, 1991, at A1.

<sup>19</sup> SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS, HOUSE COMM. ON ENERGY AND COMMERCE, EPA'S CRIMINAL ENFORCEMENT PROGRAM, H.R. REP. NO. 102-163, 102d Cong., 2d Sess., 13-14, 32-39 (1992) (citing memorandum of Sept. 9, 1992 by John D. Dingell detailing storage of dioxin-contaminated material at David's Mini-U-Storage in a residential neighborhood of Baton Rouge, La.). According to Representative Dingell:

Rather than immediately alerting the EPA, Chem Waste initiated a cover-up effort, designed to protect the reputation and interests of Chem Waste at the expense of the public . . . . The dioxin-contaminated drums were falsely manifested as an "unknown" and delivered by night to Chem Waste's facility at Emelle, Alabama. Emelle had no permit to receive dioxin-contaminated waste.

*Id.* at 14. A criminal prosecution ensued and a trial in Louisiana resulted in felony convictions of several individuals in 1991. *Id.*

<sup>20</sup> See Katherine L. Ratcliffe, *Fusing Civil, Environmental Rights*, CHRISTIAN SCI. MONITOR, May 24, 1991, at 12; Rac Tyson, *Where there's smoke, there's fiery debate*, USA TODAY, May 23, 1991, at 6A.

*El Pueblo* found out that Chem Waste and Waste Management had paid more than \$50 million in fines, settlements, and penalties for price fixing, bribery, and related environmental crimes.<sup>21</sup> This company, they found out, was such an environmental bad actor that the San Diego District Attorney's Office told the San Diego Board of Supervisors that "the company's history requires extreme caution by the San Diego County Board of Supervisors or any other governmental entity contemplating any contractual or business relationship with Waste Management" because of a pattern of continuing criminal behavior.<sup>22</sup>

Nor was this behavior ancient history: in the fall of 1992, Chem Waste was fined a record \$11.5 million for a botched Superfund clean-up in Pennsylvania.<sup>23</sup> Most recently in Kettleman City, just a few months ago, Chem Waste was caught "sample packing." Ten trucks of waste would show up at the gate of the dump, and, by law, Chem Waste was required to sample each truck to determine the contents to ensure that incompatible wastes were not disposed together. What Chem Waste was doing was taking ten samples out of the first truck and then waving all the other trucks through.<sup>24</sup>

Kettleman City residents were certainly justified in being a little alarmed by the prospect of this company running yet another facility near their town. They figured if this company cannot run a hole in the ground correctly, they should not be given the ability to do something worse.

<sup>21</sup> See VENTURA COUNTY REPORT and MILLER, *supra* note 16.

<sup>22</sup> MILLER, *supra* note 16, at 57. According to the District Attorney:

Waste Management, Inc.'s methods of doing business and history of civil and criminal violations has established a predictable pattern which has been fairly consistent over a significant number of years. The history of the company presents a combination of environmental and anti-trust violations and public corruption cases which must be viewed with considerable concern. Waste Management has been capable of absorbing enormous fines and other sanctions levied against it while still maintaining a high earnings ratio. We do not know whether these sanctions have had any punitive effect on the company or have merely been considered as additional operating expenses.

Our examination of the activities of Waste Management in San Diego County causes us additional concern. When viewed in the context of their established history of business practices, it is clear that Waste Management engages in practices designed to gain undue influence over government officials.

*Id.* at 57-58.

<sup>23</sup> Katherine Bouma, *Chem Waste to Pay Millions in Settlement*, MONTGOMERY ADVERTISER, Oct. 10, 1992, available in LEXIS, Nexis Library, Newspapers File; Casey Bukto, *Chemical Waste to Pay \$10 Million Spill Fine*, CHU TRIB., Oct. 10, 1992, at Business section, 3.

<sup>24</sup> Notes on file with author.

## THE PERMITTING PROCESS

As part of the permitting process for the incinerator, Kings County issued an Environmental Impact Report (EIR).<sup>25</sup> The EIR was about 300 pages, with another 700 pages of appendices — about 1000 pages total. The people of Kettleman City, forty percent monolingual Spanish speakers, ninety-five percent Latino — said to Kings County, "Look, to include us in this decision, you need to translate these documents into Spanish." Kings County stonewalled them. The county decisionmakers did not want to set a precedent because if they translated the EIR, they felt they would have to translate documents in other situations, which is something the people of Kettleman City thought would probably be a good idea.<sup>26</sup> Chem Waste, in a generous offer, translated a five-page executive summary and distributed that to every household in Kettleman City. So, English speakers in Kings County had about 1000 pages of data to pore over, while Spanish speakers had five pages.

Despite being shut out by the lack of environmental review in their own language, Kettleman City residents still attempted to take part in the process. More than two-thirds of all the comments on the EIR were from the people of Kettleman City — in Spanish.<sup>27</sup> Residents wrote in saying, "Hey, translate this document. Include us in the process. Let us know what you are proposing to do up on the hill. If you say it's safe, why won't you let us know what you are doing? Why won't you translate this document?"<sup>28</sup>

Then came the public hearing on the project. The public hearing was scheduled not in Kettleman City, but in a town forty miles away, the county seat of Hanford. It was held in the largest venue in Kings County, the County Fairground building, which is about the size of a football field. The hearing room was set up with a

<sup>25</sup> McLAREN, REVISED DRAFT SUBSEQUENT ENVIRONMENTAL IMPACT REPORT, KETTLEMAN HILLS FACILITY, PROPOSED HAZARDOUS WASTE INCINERATOR (Mar. 1990) (prepared for Kings County Planning Commission).

<sup>26</sup> Not was this an isolated incident by the County, whose long history of pervasive discrimination against Latinos earned it the dubious distinction of being one of only three counties in all of California to be specifically mentioned in the regulations implementing the Voting Rights Act of 1965. Because of this history, Kings County must obtain preclearance from the U.S. Department of Justice before changing any of its voting laws. Voting Rights Act of 1965 as amended, 42 U.S.C. § 1973(b) (1988); 28 C.F.R. § 55 (1993).

<sup>27</sup> See McLAREN/HART, FINAL SUBSEQUENT ENVIRONMENTAL IMPACT REPORT, KETTLEMAN HILLS FACILITY, PROPOSED HAZARDOUS WASTE INCINERATOR, (Sept. 1990) (prepared for Kings County Planning Commission).

<sup>28</sup> *Id.*

raised dais in the front, with a table at which the Planning Commission sat, looking down on the room. Then there was an open space, then two microphones set up for the public. Behind the microphones were about fifty rows of seats, and then, behind that, some bleacher seats were set up toward the back of the room. Behind the bleachers was empty concrete floor back to the very rear of the auditorium, about 300 feet from the Planning Commission.

The people of Kettleman City showed up. There were about 200 people who had come by bus and carpool from Kettleman City, and one of their leaders basically said, "We're here, we want to testify on this project and we brought our own translator."<sup>29</sup>

The chair of the Kings County Planning Commission looked down on the crowd and said, "That request has been denied. The translation is taking place in the back of the room and it won't happen up here."<sup>30</sup> The people looked to where the Planning Commissioner was pointing; they looked from the Planning Commission up on their dais, they looked at the open space and the microphones, they looked at all the rows of chairs and they looked at the bleachers. And then, they looked way back behind the bleachers, nearly at the rear of the room, where there was one forlorn man sitting surrounded by a little circle of about twenty-five empty chairs. The Planning Commission chair said again, "Why don't you go back there. There are monitors back there. We are all in the same room."<sup>31</sup> The 200 people from Kettleman City looked around, and they looked at the back of the room at those twenty-five chairs and they looked at the empty chairs up front, and they said, "Adelante, adelante!" (forward, forward), and they moved up to the front of the room. And, from the front of the room they testified, in Spanish, that the last time they had heard about being sent to the back of the room was when their African American brothers and sisters were sent to the back of the bus — a policy dumped in the dustbin of history a generation ago. They said they were not going to stand for such treatment.<sup>32</sup>

<sup>29</sup> The translator was provided by California Rural Legal Assistance, after Kings County made it known to *El Pueblo* that it would not be providing for translation for the audience at the hearing. See, e.g., Reporter's Transcript at 170-72, Kings County Planning Commission Special Meeting, Public Hearing for Conditional Use Permit No. 1480 (Nov. 14, 1990).

<sup>30</sup> Remarks of Kings County Planning Commission Chair Mike Wheatley, Reporter's Transcript at 172, Kings County Planning Commission Special Meeting, Public Hearing for Conditional Use Permit No. 1480 (Nov. 14, 1990).

<sup>31</sup> *Id.*

<sup>32</sup> Testimony of Mary Lou Mares, Reporter's Transcript at 257, Kings County Planning Commission



The public hearing on the project brought to a close the public's ability to comment on the incinerator. The Planning Commission then voted to approve the incinerator, and *El Pueblo* appealed that decision to the Kings County Board of Supervisors.

Before going into the Board's actions, I want to mention one other fact that is relevant to this story. California has a compensated siting law.<sup>33</sup> Under the law, local governments can tax hazardous waste facilities up to ten percent of their gross revenues.

What does this have to do with the story? Well, Kings County, which is about sixty-five percent white, has five members on the Board of Supervisors. They are all white. The whites in Kings County mostly live in one area, while most of the Latinos live in another part of the county. If this page were a map of Kings County, almost all the white people live in the upper right corner of the page, in and around the county seat of Hanford, while most of the Latino people live at the bottom of the page. In this example, Kettleman City would be in the lower left of the page, and the Chem Waste dump would be next to it. Every single town in Kings County is predominantly white except for Kettleman City, which is ninety-five percent Latino, way down in the lower left of the page. Under the California law providing for compensated siting, Kings County gets about \$7 million a year in revenue from Chem Waste's pre-existing dump.<sup>34</sup> That \$7 million is approximately eight percent of the county's annual budget.<sup>35</sup> Kings County likes to keep this company happy because of that big chunk of money. Incidentally, most of the money is spent up near Hanford (in the upper right of the page), in the white community, and very little of it trickles down to the people of Kettleman City (down in the lower left of the page).<sup>36</sup>

The incinerator promised to almost double that tax revenue, so that the county would be receiving about one-sixth of its annual revenue from this single company.

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Special Meeting, Public Hearing for Conditional Use Permit No. 1480 (Nov. 14, 1990); testimony of Ephraim Camacho, *id.* at 180; testimony of Allen Brent, *id.* at 149.

<sup>33</sup> CAL. HEALTH & SAFETY CODE § 25149.5 (West 1991).

<sup>34</sup> See Tracy Correa, *County to Share Chem Waste Tax*, HANFORD SENTINEL, Nov. 16, 1991, at 1 (County revenues from 10% tax on Chem Waste were \$6.1 million in 1990-91, \$7.4 million in 1989-90).

<sup>35</sup> Petitioners' Memorandum of Points and Authorities In Support For Peremptory Writ of Mandate, *El Pueblo para el Aire y Agua Limpio v. County of Kings*, No. 366045 (Cal. Super. Ct. Sept. 20, 1991).

<sup>36</sup> For example, there are no sidewalks throughout most of Kettleman City.

What the compensated siting law did was skew the permitting process, so the Board of Supervisors said to themselves, "Hey, we're getting all this money. We just built this new courthouse and government center in Hanford. This is great and we want more." They look around at their constituents who live up in the upper right of the page, they see what the tax revenues buy in terms of fancy new government buildings,<sup>37</sup> and then they look at where the incinerator is going to go, way down in that Mexican community at the bottom of the page. The Supervisors voted for the incinerator on a three to one vote.

Faced with this situation, we had no choice but to file a lawsuit. To make a long story short, our lawsuit was successful when the judge ruled that the Environmental Impact Report had not sufficiently analyzed the toxic waste incinerator's impacts on air quality and on agriculture in the San Joaquin Valley;<sup>38</sup> and, most importantly, that the people of Kettleman City had not been meaningfully included in the permitting process.<sup>39</sup>

#### THE MORAL, AGAIN

I want to cut to the moral of the story again, which is that these are political problems, not legal problems. Although we won the lawsuit, it is important to point out that legal approaches are the least favored approaches to solving environmental problems. They are disempowering to community residents because they take the struggle out of the community and put it into the hands of a lawyer.<sup>40</sup> In these types of fights there are two types of power: there is the power of money, which the polluters have, and there is the power of people, which we have. In court, the power of money often prevails. A community also has to translate its grievances into the narrow confines of a law — if there is even a law to address

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<sup>37</sup> The new Kings County Government Center is known to locals as "The House that Chem Waste Built."

<sup>38</sup> *El Pueblo para el Aire y Agua Limpio v. County of Kings*, No. 366045 (Cal. Super. Ct. Sept. 20, 1991) (ruling on submitted matter).

<sup>39</sup> The judge stated:

The residents of Kettleman City, almost 40 percent of whom were monolingual in Spanish, expressed continuous and strong interest in participating in the CEQA review process for the incinerator project at the CWM's Kettleman Hills Facility, just four miles from their homes. Their meaningful involvement in the CEQA review process was effectively precluded by the absence of Spanish translation. *Id.* at 10.

<sup>40</sup> For an in depth discussion of the pitfalls of legal actions, see Luke W. Cole, *Remedies for Environmental Racism: A View from the Field*, 90 MICH. L. REV. 1991, 1995-96 (1992) and Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L. Q. 619, 641-54 (1992) (hereinafter *Empowerment*).

what the community is trying to fight. In many of these situations, the law is simply bad. These are political problems: the problem we had in Kings County was that we had lost the vote at the Board of Supervisors.

Now, we won the law suit. Kings County, the government agency we sued, decided not to appeal largely because of the political pressure the Kings County Board of Supervisors was receiving from Kings County residents and their supporters across California.<sup>41</sup> Chem Waste, however, appealed the judgment.<sup>42</sup> Rather than going back and doing the environmental study in response to the judge's (and the people's) concerns, they were more comfortable staying in court. But Kettleman City's struggle had become a national struggle. The people of Kettleman City and their representatives had told the Kettleman City story at meetings, conferences, symposia, and rallies across the country. People all around the country knew about the struggles of the people of Kettleman City.<sup>43</sup> This knowledge is very important because what we need is a political movement to stop the siting of facilities in communities like Kettleman City.<sup>44</sup>

Why is a *political* movement necessary? Environmental justice struggles are "political," in that word's narrowest definition, in at least two ways. The first is

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41 A postcard campaign targeting the Board of Supervisors and the local Farm Bureau, orchestrated by *El Pueblo* and Greenpeace, generated more than 5000 postcards to the Board and the Farm Bureau, while a petition campaign in the San Joaquin Valley by Citizen Action generated more than 17,000 signatures in opposition to the incinerator.

42 *El Pueblo para el Aire y Agua Limpio v. County of Kings*, No. 3 Civil 014017 (Cal. Ct. App. 1992) (notice of appeal).

43 This knowledge was transmitted through a number of stories mentioning the Kettleman City struggle which appeared in local, regional, and national media, including: Julia Flynn Siler, *Environmental Racism: It Could be a Messy Fight*, *BUS. WK.*, May 20, 1991, at 116; Jeff Bailey, *Waste Disposal Giant, Often Under Attack, Seems to Gain From It*, *WALL ST. J.*, May 1, 1991, at A1; Roberto Suro, *Pollution Weary Minorities Try Civil Rights Tack*, *N.Y. TIMES*, Jan. 11, 1993, at A1; Marcia Coyle, *Lawyers Try to Devise New Strategy*, *NAT'L. J.*, Sept. 21, 1992, at 58; Ratcliffe *supra* note 20; as well as segments on National Public Radio on November 8, 1992 and November 27, 1992, and the McNeil Lehrer Newsl Hour on February 11, 1992. Exposure through the press — building a community's movement through public education and consciousness raising — is crucial to a successful struggle.

44 I should point out that the movement for environmental justice is much broader than merely stopping facilities that are inappropriately sited in low-income communities and communities of color. Among other things, the movement for environmental justice is about creating clean jobs, building a sustainable economy, guaranteeing safe and affordable housing, and achieving racial and social justice. See, e.g., *Principles of Environmental Justice*, RACE, POVERTY & THE ENVIRONMENT (Cal. Rural Legal Assistance Found. & Earth Island Inst.) Fall 1991/Winter 1992, at 32 (ratified at the First National People of Color Environmental Leadership Summit in Washington, D.C., in Oct. 1991). I focus on siting in this article as that was the issue in Kettleman City.

that state and federal environmental laws which offer communities a legal handle in environmental justice struggles are almost all procedural. What this means is that if we challenge an environmental impact report as inadequate, and we win in court, the court does not say "You can never build this project in this community." The court instead merely sends the EIR back to the local decisionmaker to do it again, correctly. If a community (and their lawyers) have not done the political ground work to make sure that the vote is different the next time it comes before the Board of Supervisors or City Council, we are going to lose the vote again. In this situation, we may win in the short term, but in the long term, the community is going to lose and the project is going to be built.<sup>45</sup>

The second reason a political response — rather than, or in addition to, a legal response — is necessary is that when polluting companies lose in court, they often seek to change the law. We learned this when the Chamber of Commerce introduced a small bill — about one paragraph long — in this session of the California Legislature, that would have had the effect of overruling the central part of our victory in the Kettleman City case by changing the law to favor Chem Waste's interpretation of the law rather than the Superior Court's interpretation. Luckily, we were able to stop this bill from becoming law. But, if we are not vigilant and we do not have the political muscle behind our position, even if we do win in court, the laws will be rewritten, putting us back out of the equation.<sup>46</sup>

Again, the moral of the story surfaces: these are political struggles. As we go out to do the legal work, which is desperately needed in this field, we have to remember the context of our legal struggles. Our legal work is only a small part of a much larger political movement for environmental justice. We, as lawyers, must focus our talents on educating the public and decisionmakers, and working with our client communities to build the movement for environmental justice.

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45 This is why I constructively criticize much of mainstream environmental organizations' litigation agenda as counter-productive. Such groups have not built the political base upon which to place their court victories. See *Empowerment*, *supra* note 40, at 641-55.

46 In another recent case here in California, Laidlaw Environmental Services went to the state legislature to try to get around environmental review procedures for one of their toxic dump sites after encountering strong opposition from residents of its host community, Buttonwillow. The bill written by Laidlaw, S. 1006, 1993 Cal. Regular Sess., was stopped by a concerted effort by grassroots environmental justice activists throughout California, who educated their legislators and several mainstream environmental groups so that the bill was defeated in the 1993 legislative session. See Tom Maurer, *Hazardous Waste Bill Draws Ire of Environmentalists*, *THE CALIFORNIAN*, Apr. 22, 1993, at B1.

## CONCLUSION

This story has a happy ending. On September 7, 1993, Chem Waste announced that it was withdrawing its application to construct the toxic waste incinerator near Kettleman City.<sup>47</sup> Although Chem Waste cited only changing economic conditions and a new public policy turn away from incineration,<sup>48</sup> the General Manager of the Kettleman Hills Facility personally hand-delivered the news to one of the leaders of the community group *El Pueblo*, acknowledging the group's role in the decision.<sup>49</sup> As *El Pueblo* leader Espy Maya said, "I don't care how they word it, we won."<sup>50</sup>

*Si se puede.*<sup>51</sup>

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<sup>47</sup> CHEMICAL WASTE MANAGEMENT, INC., CHEM WASTE WITHDRAWS INCINERATOR PROPOSAL FOR KETTLEMAN HILLS, (news release of Sept. 7, 1993).

<sup>48</sup> *Id.*; Jeff Bailey, *WMX Technologies Ends Plan to Build California Incinerator: Demand Shrinks*, WALL ST. J., Sept. 8, 1993, at C5.

<sup>49</sup> Dennis Pfaff, *Enemies of Toxics Incinerator are Cheered by End of Project; California Rural Legal Assistance had opposed the construction, once slated for a Hispanic Community*, DAILY J., Sept. 8, 1993, at 3.

<sup>50</sup> Mark Grossi, *Chemwaste Won't Build Kettleman Incinerator*, FRESNO BEE, Sept. 8, 1993, at A1. Even the chemical industry's house organ, *Chemical Week*, credited the environmental justice movement's role in the decision in its editorial accompanying a recent cover story on Environmental Racism. See Ronald Begley and David Hunter, *Environmental Justice: Staying Ahead*, CHEMICAL WK., Sept. 15, 1993, at 2.

<sup>51</sup> Literally, "Yes we can." This expression, originated by Cesar Chavez of the United Farm Workers, is used as a political slogan in Latino communities to mean, "We can win." I learned it from my friends in Kettleman City, who showed me that, yes, we can win.

## BALANCING THE SCALES OF ENVIRONMENTAL JUSTICE

Charles J. McDermott†

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.<sup>1</sup> At other income levels, the disparity is even greater.<sup>2</sup> 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.<sup>3</sup> 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.”<sup>4</sup>

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.”<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup> 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).

### 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.”<sup>8</sup> 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<sup>9</sup> 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

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.<sup>10</sup>

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 than 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),<sup>11</sup> 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.<sup>12</sup> The EPA ranked the risk posed by RCRA-permitted facilities among the lowest tested.<sup>13</sup>

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 ENVI-

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.<sup>14</sup> The other ninety six percent is handled on-site by the generators of the waste.<sup>15</sup>

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<sup>16</sup> (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.<sup>17</sup> 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.<sup>18</sup> 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.<sup>19</sup>

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).

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

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.<sup>24</sup> Today,

20. *Id.*

21. *Id.*

22. *Id.* at 3-17.

roughly one ton of hazardous waste is generated each year for every man, woman, and child in the United States.<sup>25</sup> 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,<sup>26</sup> 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

missioned by the Commission for Racial Justice of the United Church of Christ ("UCC Report").<sup>27</sup> 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.<sup>28</sup> EPA issued its first rules in 1980.<sup>29</sup> 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.<sup>30</sup> Under interim status, facilities that had already been handling hazardous wastes could continue to do so until they received a permit.<sup>31</sup>

Several thousand facilities applied for and received interim status under the program; today, there are roughly 1200 facilities operating under interim status.<sup>32</sup> 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.<sup>33</sup> Thus, siting has not proliferated over the last decade or so; rather, there has in fact been a winnowing down of operating facilities.<sup>34</sup>

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. Env'tl. Protection Agency (Apr. 19, 1993).

33. See Michael B. Gerrard, *The Victims of NIMBY*, 21 FORDHAM URB. L. J. 495,

uses 1980 census information.<sup>35</sup> 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.<sup>36</sup>

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.



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.<sup>37</sup> 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.<sup>38</sup> 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.<sup>39</sup>

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 Health 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., *WMX v. Broadwater*, 84-1208-W (N.D. Ala. May 24, 1984).

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.<sup>40</sup> 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

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."<sup>41</sup> 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.<sup>42</sup> 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.<sup>43</sup> 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-

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.<sup>44</sup> 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<sup>45</sup> 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.<sup>46</sup> 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.<sup>47</sup> 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.<sup>48</sup> The health risk

44. *El Pueblo Para el Aire y Agua Limpio v. County of Kings*, 22 *Env'tl. L. Rep. (Env'tl. 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 CITY HAZARDOUS WASTE INCINERATOR HEALTH RISK ASSESSMENT SUM-

41. OFFICE OF POLICY ANALYSIS, U.S. ENVTL. PROTECTION AGENCY, BENEFITS OF REGULATING HAZARDOUS WASTE DISPOSAL: LAND VALUES AS AN ESTIMATOR:

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,<sup>49</sup> one of the siting provisions of the Tanner Act.<sup>50</sup> 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.<sup>51</sup> 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.<sup>52</sup>

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.

- 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.<sup>53</sup>

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.*

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.<sup>54</sup> Kettleman City, the town nearest the facility, has a population of 1411—almost all are Hispanic.<sup>55</sup> 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.

54. See U.S. REPORT ON THE CONSEQUENCES OF RACIAL DISPARITY AND HEALTH

## 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,<sup>56</sup> 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).<sup>57</sup> 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.<sup>58</sup>

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. WAMY Technologies will continue its efforts to keep local communities in-