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THE ANTICIPATORY NUISANCE DOCTRINE: ONE COMMON LAW THEORY FOR USE IN ENVIRONMENTAL JUSTICE CASES

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Approximately twenty to forty million citizens live within four miles of America's worst hazardous waste sites.¹ Proximity to those waste sites is not without risks.² However, those sites and the risks associated with them are not shared equally among this nation's inhabitants. A 1987 study published by the United Church of Christ Commission for Racial Justice reported that three out of every five African and Hispanic Americans lived in communities with uncontrolled toxic waste sites.³ Race is the strongest predictor of location for commercial hazardous waste activity.⁴

Unequal distribution of waste facilities is one of many ills included in the concept of "environmental racism," defined as "racial discrimination in environmental policy making, [and the unequal] enforcement of [environmental] regulations and laws."⁵ The idea that people of color are subjected to environmental discrimination, that they suffer disproportionately from the country's environmental degradation, has spawned the environmental justice movement. Activist groups are waging grass roots campaigns in communities of color throughout the country; campaigns particularly aimed at halting the location of toxic waste facilities in their communities.⁶ Although legal actions based on tort and constitutional law are some of the tactics used by those involved in the

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1. Karen Breslin, *In Our Own Backyards: The Continuing Threat of Hazardous Waste*, 101 ENVTL. HEALTH PERSP. 484, 484 (1993).

2. "Investigations of some individual sites [have] revealed increases in [the] risk[s] of birth defects, neurotoxic disorders, leukemia, cardiovascular abnormalities, respiratory and sensory irritation, and dermatitis Elevated exposure levels of lead, PCBs, arsenic, cadmium, chlordane, mercury and a herbicide have been found in individuals studied at [some] sites." *Id.* (citing testimony from Barry Johnson, Assistant Administrator, Agency for Toxic Substances and Disease Registry, before Senate Env't Subcomm., May 1993).

3. UNITED CHURCH OF CHRIST COMM'N FOR RACIAL JUSTICE, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL STUDY OF THE RACIAL AND SOCIOECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES xiv (1987) [hereinafter TOXIC WASTES REPORT].

4. *Id.* at xiii.

5. Karl Grossman, *The People of Color Environmental Summit*, in UNEQUAL PROTECTION: ENVIRONMENTAL JUSTICE AND COMMUNITIES OF COLOR 272, 278 (Robert D. Bullard ed., 1994) (quoting Rev. Benjamin Chavis, Jr., then Executive Director of the Commission for Racial Justice).

6. See Luke W. Cole, *Remedies for Environmental Racism: A View from the Field*, 90 MICH. L. REV. 1991 (1992).

movement, many movement participants, including its lawyers, are skeptical about the effectiveness of using litigation to advance the goals of the movement.⁷

This article examines the failure of the legal system to provide adequate relief for plaintiffs seeking redress from environmental discrimination using equal protection claims. The article then discusses the viability of using the tort theory of anticipatory nuisance as an alternative to equal protection claims. Part I of this article discusses the federal response to the issues raised by the environmental justice movement. It examines several bills that have been introduced in Congress and comments on the insufficiency of the federal response that has led sufferers of environmental discrimination to seek redress in the courts. Part II analyzes the failure of plaintiffs in environmental discrimination cases to succeed on civil rights and equal protection claims. Proving discriminatory intent has been an insurmountable burden to those plaintiffs even where courts have found irreparable harm. Part III introduces the concept of anticipatory nuisance, a doctrine that would allow successful plaintiffs to prevent the siting of waste facilities in their communities before the accompanying harm can occur. Under the doctrine, a defendant may be restrained from conducting an activity where it is highly probable that the activity will lead to a nuisance causing significant harm. Part IV presents an evaluation of the use of the anticipatory nuisance doctrine in environmental justice cases. It concludes that, while the doctrine has several shortcomings, including the difficulty of proving that a waste facility would be a nuisance even before its operation commences, it offers plaintiffs a viable alternative. Whatever its merits, the anticipatory nuisance doctrine, however, is only a secondary solution; the ideal solution would be to alleviate the need for hazardous waste dumping sites.

I. THE FEDERAL RESPONSE TO THE ENVIRONMENTAL JUSTICE MOVEMENT

While some grass root activists rally citizens at local sites to protest the placement of facilities in communities of color, other activists are focusing on the

7. See, e.g., *id.* Cole is a staff attorney for the California Rural Legal Assistance Foundation and has represented residents of Kettleman City, California, who were fighting the siting of a toxic waste incinerator in their town. *Id.* at 1993.

Among the principles declared at one early conference on environmental justice, the First National People of Color Environmental Leadership Summit held in Washington, D.C., in October 1991, were the following:

[(1)] the right to participate as equal partners at every level of decision-making including needs assessment, planning, implementation, enforcement and evaluation;

[(2)] universal protection from . . . the extraction, production and disposal of toxic [and] hazardous wastes; and

[(3)] the rights of victims of environmental injustice to receive full compensation and reparations for damages as well as quality health care.

Grossman, *supra* note 5, at 274.

need for additional empirical investigation and development of aggressive action plans and enforcement at the federal level.⁸ Three routes have been taken: congressional legislation, executive order, and uniform enforcement of existing laws. Although the federal response has included authorizing studies and data collection and mandating agency strategies for environmental justice, the federal government has yet to develop an approach to rectify the discriminatory distribution of environmental risks.⁹ These methods offer affected communities no redress for harms suffered nor do they grant the individuals in those communities any legal cause of action under which to fight the placement in their neighborhoods of unwanted, unsightly, and unhealthy waste dumps. Furthermore, looking to the federal government for a response leaves citizens dependent upon who resides in the White House and who is elected to Congress. The 104th Congress did not make environmental issues a part of the election debate and is unlikely to emphasize them as part of its congressional agenda. Citizens, therefore, must continue to use the courts to fight environmental discrimination.

The federal government entered the environmental justice debate in 1983 when District of Columbia Delegate Walter Fauntroy, then Chairman of the Congressional Black Caucus, directed the United States General Accounting Office ("GAO") to investigate racial disparity in the siting of hazardous waste landfills in the Environmental Protection Agency's ("EPA") Region IV. Eight southern states comprised Region IV: Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee. The resulting study, *Siting of Hazardous Waste Landfills and Their Correlation with Racial and Economic Status of Surrounding Communities*, concluded that three of the four communities where the hazardous waste landfills were sited were majority African American.¹⁰ The three communities were 52%, 63%, and 90% African American, respectively.¹¹

In July 1990, EPA Administrator William K. Reilly established the Environmental Equity Workgroup to review evidence that racial minority and low-income communities bore a higher environmental risk burden.¹² The Workgroup was directed to make recommendations for Agency action on environmental equity.¹³ It was formed after Reilly met with the leaders of a 1990

8. See Cole, *supra* note 6, at 1996.

9. See Rachel D. Godsil, *Remedying Environmental Racism*, 90 MICH. L. REV. 394 (1992).

10. UNITED STATES, GENERAL ACCOUNTING OFFICE, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES 3 (1983).

11. *Id.* at 4.

12. ENVIRONMENTAL PROTECTION AGENCY, ENVIRONMENTAL EQUITY: REDUCING RISK FOR ALL COMMUNITIES, PUB. NO. 230-R-92-0008, at 2 (1992) [hereinafter EPA REPORT].

13. *Id.*

Conference on Race and the Incidence of Environmental Hazards sponsored by the University of Michigan School of Natural Resources.¹⁴

The Workgroup issued its report in June 1992, making six findings.¹⁵ It concluded, among other things, that "[t]here are clear differences between racial groups in terms of disease and death rates," but that "[t]here [was] limited data to explain the environmental contribution to these differences."¹⁶ The notable exception was lead poisoning; the evidence clearly showed that a significantly higher percentage of black children than white children have blood lead levels high enough to cause adverse health effects.¹⁷ The second finding reported that racial minority and low-income communities experience a greater than average exposure to selected air pollutants and hazardous waste facilities, but that exposure did not always result in immediate or acute health effects.¹⁸

The Workgroup made eight recommendations to the EPA Administrator.¹⁹ It suggested, among other things, that EPA increase the priority that it gives to issues of environmental equity²⁰ and that EPA expand and improve the level of communication with minority and low-income communities.²¹ The Workgroup also recommended that EPA "target opportunities to reduce high concentrations of risk to specific population groups" by selecting for enforcement action the most exposed and highly susceptible populations.²² However, it proposed no statutory solutions for victims of environmental inequity seeking damages for the harms they have suffered, nor did it propose any way of preventing those harms before they were incurred by the minority and low-income communities.

With the election of President Clinton came more recommendations addressing environmental justice concerns,²³ culminating in the issuance of Executive Order 12,898.²⁴ The Order created an Interagency Working Group on Environmental Justice to "provide guidance to Federal agencies on criteria for identifying disproportionately high adverse human health or environmental effects

14. *Id.* at 6-7.

15. *Id.*

16. *Id.* at 11.

17. *Id.*

18. *Id.* at 12.

19. *Id.* at 4.

20. *Id.* at 25.

21. *Id.* at 29.

22. *Id.* at 27-28.

23. *See, e.g.*, ENVIRONMENTAL JUSTICE TRANSITION GROUP, RECOMMENDATIONS TO THE PRESIDENTIAL TRANSITION TEAM FOR THE U.S. ENVIRONMENTAL PROTECTION AGENCY ON ENVIRONMENTAL JUSTICE ISSUES (1992). The Group recommended, *inter alia*, that the EPA be elevated to Cabinet status, that the EPA should target compliance inspections and enforcement to protect communities of color exposed to disproportionate environmental risks, and that the EPA should prioritize environmental programs to redress disparate pollution impact. *Id.* at 6-7.

24. Exec. Order No. 12,898, 59 Fed. Reg. 7629 (1994).

on minority populations and low-income populations.”²⁵ The Working Group is comprised of the heads of over fifteen executive agencies and offices.²⁶ The Order required each federal agency to develop an environmental justice strategy.²⁷ Such a strategy would list programs, policies, and rulemakings that should be revised to promote enforcement of health and environmental statutes in areas with minority populations and to identify differential patterns of consumption of natural resources among minority and low-income populations.²⁸

The President also emphasized provisions of existing law that could aid in achieving environmental equity.²⁹ For example, when an analysis of environmental effects is required by the National Environmental Policy Act of 1969 (“NEPA”),³⁰ federal agencies shall include an analysis of the effects on minority and low-income communities: “Mitigation measures outlined or analyzed in an environmental assessment, environmental impact statement, or record of decision, whenever feasible, should address significant and adverse environmental effects of proposed Federal actions on minority communities and low-income communities.”³¹

Title VI of the Civil Rights Act of 1964 was also part of the directive to federal agencies to use existing law.³² Title VI, Nondiscrimination in Federally Assisted Programs, prohibits discrimination on the grounds of race, color, or national origin in any program or activity receiving federal financial assistance.³³ Each federal agency is to ensure that the programs and activities receiving federal financial assistance impacting the environment would not use criteria, practices, or methods that discriminate.³⁴

25. *Id.* § 1-102(b).

26. The agencies and offices included the following: the Departments of Defense, Labor, Agriculture, Health and Human Services, Housing and Urban Development, Transportation, Justice, and Energy; the Environmental Protection Agency; the Office of Management and Budget; the Office of Science and Technology Policy; the National Economic Council; and the Council of Economic Advisors. *Id.* § 1-102(a).

27. *Id.* § 1-103(a).

28. *Id.*

29. Memorandum on Environmental Justice, 30 WEEKLY COMP. PRES. DOC. 279, 280 (Feb. 11, 1994) [hereinafter MEMO].

30. 42 U.S.C. §§ 4321-4370(d) (1988 & Supp. V. 1993).

31. MEMO, *supra* note 29, at 279.

32. *Id.*

33. 42 U.S.C. § 2000(d) (1988 & Supp. V. 1993).

34. MEMO, *supra* note 29. “The EPA has received and accepted . . . two complaints alleging racial discrimination under Title VI. . . . One of the complaints involves a permit application for a hazardous waste treatment and storage facility in Iberville Parish, Louisiana. The other complaint, filed by African Americans for Environmental Justice, involves permit applications for several facilities in or near Noxubee County, Mississippi.” ENVIRONMENTAL PROTECTION AGENCY, ENVIRONMENTAL JUSTICE INITIATIVES 1993, PUB. NO. 200-R-93-001, at 11 (1994).

In January of 1994, EPA created an Environmental Justice Federal Advisory Council.³⁵ The Council was created pursuant to the Federal Advisory Committee Act³⁶ to provide advice and information to the EPA Administrator on domestic environmental justice policies and issues. The Council is to focus on the areas of enforcement, waste, health and research, and communication outreach.³⁷ Members of the Council represent community-based groups, industry and business, tribal government organizations, academic institutions, and environmental groups.³⁸

Several bills have been introduced in Congress to address environmental justice issues, but none has been enacted into law. Senator Baucus of Montana, Senator Moseley-Braun of Illinois, and Senator Campbell of Colorado introduced the Environmental Justice Act of 1993 to establish a program to ensure nondiscriminatory compliance with environmental laws and equal protection of the public health.³⁹ Among the findings listed in section 2 of the bill was that "racial and ethnic minorities and lower income Americans may be disproportionately exposed to toxic chemicals in their residential and workplace environments."⁴⁰ The bill, if passed, would have directed EPA to designate as Environmental High Impact Areas ("EHIAs") the one hundred counties or other geographic units with the highest total weight of toxic chemicals released during the most recent five-year period for which data is available.⁴¹ Various federal agencies would have reported on the exposure to toxic chemicals in the EHIAs.⁴² The President would be required to propose administrative and legislative changes to prevent such impacts.⁴³ The bill would have allowed EPA to promulgate

35. Environmental Protection Agency, Note to Correspondents, Tuesday, April 12, 1994. The first community to ask the Council to intervene on its behalf consisted of a group of homeowners in Texarkana, Texas, who were relocated in 1992 from Carver Terrace, a subdivision built on land containing toxic chemicals from a wood treatment plant. Marianne Lavelle, *Help Sought from "Green" Justice Panel*, NAT'L L.J., Oct. 31, 1994, at A16. The homeowners charged that they were not fairly compensated for the value of their dwellings when the EPA bought out the residents pursuant to a Congressional mandate. *Id.* A lawyer for the group alleged that the African American homeowners were treated differently from white residents of Times Beach, Missouri, another site from which the federal government relocated residents. *Id.*

36. Pub. L. No. 92-463, 86 Stat. 445 (codified at 5 U.S.C. §1988, App. I (1988)).

37. *Id.*

38. *Id.* For example, those represented include People for Community Recovery of Chicago, Ill., Monsanto and Waste Management, Inc., Central Council Tlingit and Haida Tribes of Juneau, Ak., and the Sierra Club Legal Defense Fund.

39. S. 1161, 103d Cong., 1st Sess. (1993). Representative John Lewis of Georgia introduced a similar bill in the House on May 12, 1993. The purpose of H.R. 2105 was to require data collection on health effects, to identify areas subject to the highest level of toxic chemicals, and to require an equitable distribution of environmental pollution. H.R. 2105, 103d Cong., 1st Sess. § 2 (1993).

40. S. 1161 at § 2(3).

41. *Id.* § 5(d)(1).

42. *Id.* § 5(d)(3).

43. *Id.* § 5(d)(4).

regulations for federal permits for the construction or modification of a toxic chemical facility in an EHIA.⁴⁴ The regulations would have required a net reduction in the release of any toxic chemical causing an adverse impact in the EHIA.⁴⁵

Representative Cardiss Collins of Illinois introduced the Environmental Equal Rights Act of 1993 as an amendment to the Solid Waste Disposal Act "to allow petitions to be submitted to prevent certain waste facilities from being constructed in environmentally disadvantaged communities."⁴⁶ The Act would have defined an "environmentally disadvantaged community" as a community located within two miles of the site of a proposed solid waste facility with a minority population greater than the particular state's percentage of population of such individuals or the percentage of the national population for the ethnic group.⁴⁷ The bill provided for hearings on the petitions.⁴⁸ The petition would be approved if the petitioner established that the proposed facility would be located in an environmentally disadvantaged community and would adversely impact the human health or the air, soil, or water of the community.⁴⁹

Representative Barbara Rose Collins of Michigan introduced a bill to amend the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA")⁵⁰ of 1993 which would require the Administrator of the Agency for Toxic Substances and Disease Registry to collect and maintain information on the residents of communities adjacent to areas of toxic substance contamination.⁵¹ The information collected would include the race, age, gender, ethnic origin, income level, educational level and duration of residence of the residents at those locations.⁵²

The Superfund Reform Act of 1994 would also have amended CERCLA to expand public participation in the cleanup process.⁵³ The belief that communities, particularly low-income and minority populations, have been excluded from the Superfund decisionmaking process was one "driving force" behind Superfund reform.⁵⁴ The communities complained that their opportunities for involvement in site cleanup activities came too late in the process.⁵⁵ Thus, section 102 of the bill creates a Community Working Group at each Superfund

44. *Id.* § 6.

45. *Id.*

46. H.R. 1924, 103d Cong., 1st Sess. (1993).

47. *Id.* § 3(d)(1). The affected population consisted of individuals of African, Hispanic, Asian, Native American, Pacific Island or Native Alaskan ancestry. *Id.*

48. *Id.* § 3(b).

49. *Id.* § 3(b)(2).

50. 42 U.S.C. §§ 9601-9675 (1988).

51. H.R. 1925, 103d Cong., 1st Sess. (1993).

52. *Id.*

53. S. REP. NO. 349, 103d Cong., 2d Sess. 9 (1994).

54. *Id.* at 9.

55. *Id.*

facility to advise the lead agency about community preferences for cleanup and seek broad-based community support for remedial decisions affecting land use.⁵⁶ Each state would have a Citizens Information and Access Office to serve as a clearinghouse for information regarding sites and to provide information in a manner easily understood by target communities.⁵⁷

The bill further incorporates provisions intended to help achieve environmental justice for persons near Superfund sites by expanding the list of factors the President can consider when evaluating a facility for listing on the National Priority List ("NPL").⁵⁸ EPA would be allowed "to group together for scoring purposes two or more facilities based on a finding that the facilities affect the same community."⁵⁹ Furthermore, the Act would have directed EPA to identify five facilities in each region where environmental justice concerns may warrant special attention; these facilities would be accorded priority for listing and scoring on the NPL.⁶⁰ A biennial study of environmental justice issues is also required to compare priority-setting, response actions, and public participation activities based on population, race, ethnicity, and income characteristics.⁶¹

Although the federal government has responded to claims of environmental inequity, its response has centered around gathering and studying data on the characteristics of communities alleging environmental inequities to determine the extent of the problem. Proving that a problem exists is an appropriate governmental task; however, the government's failure to do more leaves victims living with the negative health and environmental impacts of having an unwanted hazardous facility in their neighborhood. The Superfund amendments, however, do begin to address the inadequacy of a siting process that tends to exclude low-income and minority populations from cleanup decisions. These communities are also alienated from the decisionmaking process for the siting of waste facilities.⁶² Thus, residents in these neighborhoods must seek other forums in which to struggle to protect themselves from the adverse effects of living in close proximity to toxic-producing facilities.

56. *Id.* at 10-11.

57. *Id.* at 11.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* The Report explained that these and other provisions were necessary to address concerns that Superfund is disproportionately ineffective and discriminatorily implemented. The Report mentioned a *National Law Journal* study showing that permanent treatment remedies were selected 22% more frequently than containment remedies at sites surrounding white communities. *Id.*

62. See Omar Saleem, *Overcoming Environmental Discrimination: The Need for a Disparate Impact Test and Improved Notice Requirements in Facility Siting Decisions*, 19 COLUM. J. ENVTL. L. 211, 231-47 (1994). Saleem discusses federal and state notice requirements for siting a hazardous waste facility and illustrates how the current construction of such notice requirements tends to undermine public participation in the siting process. *Id.*

II. THE FAILURE OF DISCRIMINATION CLAIMS IN ENVIRONMENTAL JUSTICE CASES

African American plaintiffs seeking remedies outside the realm of the federal government regulation have brought judicial challenges to the siting of unwanted facilities, claiming that they have been discriminated against because of their race.⁶³ No plaintiff, however, has prevailed using an equal protection argument.⁶⁴ Residents opposing facilities and raising issues of environmental discrimination have little or no trouble showing that the decision to locate a facility in their community will negatively impact the health and safety of the residents and that the decision will have a disproportionate impact on a particular race.⁶⁵ Rather, the success of their suits is impeded by surmounting the burden of showing discriminatory intent.⁶⁶ Showing irreparable harm and disproportionate impact are not sufficient evidence of a discriminatory purpose to prevail in an equal protection claim.⁶⁷

In one of the most noted cases involving a claim of denial of equal protection in a siting decision, *Bean v. Southwestern Waste Management Corp.*, African American residents of an East Houston, Texas, community contested the decision of the Texas Department of Health ("TDH") to grant a permit to Southwestern Waste Management to operate a solid waste facility in their neighborhood.⁶⁸ The plaintiffs sought a preliminary injunction, contending that the decision was racially motivated in violation of 42 U.S.C. § 1983.⁶⁹ The plaintiffs advanced two theories of liability: (1) that TDH's approval of the permit was part of a pattern or practice by the department of discriminating in the placement of solid waste sites, and (2) that TDH's approval of the permit, in the context of the historical placement of solid waste sites and the events surrounding the application, constituted discrimination.⁷⁰ The court permitted the plaintiffs to

63. Cole, *supra* note 6, at 1992-93.

64. *Id.* at 1993.

65. See, e.g., *infra* notes 90-92 and accompanying text.

66. Courts hearing environmental racism cases have used the five factors recommended by the U.S. Supreme Court in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-68 (1977), for establishing discriminatory purpose: (1) the impact of the official action and whether it bears more heavily on one race than another; (2) the historical background of the decision and whether it reveals a series of official actions taken by the commission for invidious purposes; (3) the sequence of events leading up to the challenged decision; (4) any departures, substantive or procedural, from the normal decision-making process; and (5) the legislative or administrative history of the challenged decision.

67. See *id.* at 269-71.

68. 482 F. Supp. 673, 675 (S.D. Tex. 1979). The subdivision has been described as a suburban neighborhood of African American homeowners, where 83% of the residents owned their homes. Robert Bullard, *Environmental Justice for All*, in *UNEQUAL PROTECTION: ENVIRONMENTAL JUSTICE & COMMUNITIES OF COLOR* 3, 4 (Robert Bullard ed., 1994).

69. *Bean*, 482 F. Supp. at 674-75.

70. *Id.* at 677-78.

offer statistical proof in support of their theories, but it found the data insufficient to prove discriminatory intent and thus insufficient to prove the substantial likelihood of success required for a preliminary injunction.⁷¹

The data submitted to establish a pattern of discrimination examined the minority population in the census tracts where TDH granted permits.⁷² The court interpreted that data as showing that 58.8% of the sites granted permits by TDH were located in census tracts with 25% or less minority population at the time of their opening, and that 82.4% of the sites granted permits by TDH were located in census tracts with 50% or less minority population at the time of their opening.⁷³ The court noted that more particularized data may have shown that even those sites approved in predominantly white census tracts were actually located in minority neighborhoods, but the available data did not show this.⁷⁴

The court found the data submitted by the plaintiffs in support of its second theory of liability similarly lacking.⁷⁵ The plaintiffs focused on statistical disparities indicating that the targeted area contained 15% of Houston's solid waste sites but only 6.9% of its population.⁷⁶ The plaintiffs argued that because the target area was 70% minority, the statistical disparity must be attributable to race discrimination.⁷⁷ Again, the court looked to census tract data in rejecting the statistics as evidence of discrimination, finding that half of the solid waste sites in the target area were in census tracts with more than 70% white populations.⁷⁸

The court denied the plaintiff's motion for a preliminary injunction, finding that plaintiffs had not established a substantial likelihood of proving that TDH was motivated to issue the permit by purposeful discrimination.⁷⁹ However, the court was not entirely unmoved by the circumstances of the residents in the

71. *Id.* at 677. The court cited *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), and *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), as cases in which statistical proof could rise to the level that it, alone, proves discriminatory intent. It held that the data here simply did not rise to that level.

72. *Bean*, 482 F. Supp. at 677-79.

73. *Id.* at 677.

74. *Id.*

75. *Id.* at 678.

76. *Id.*

77. *Id.*

78. *Id.* One unanswered question identified by the court concerned the location of the solid waste sites located within each census tract. The plaintiffs produced evidence that, in one census tract which was a predominantly white tract, the site was located next to an African American community. The outcome of the case might have been different, the court stated, if that were true of most sites in the predominantly white census tracts. *Id.* at 680. Although plaintiffs in *Bean* used census tract data, researchers disagree about what is a "neighborhood" for citing purposes. Vicki Been, *What's Fairness Got To Do With It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, CORNELL L. REV. 1001, 1015 (1993). Been identifies as other "neighborhoods" zip code areas, a municipality, or concentric circles drawn around undesirable land uses. *Id.*

79. *Id.* at 681.

community where the waste site was to be located, calling the decision "insensitive," "illogical" and "unfortunate."⁸⁰

The court questioned the factors which entered into TDH's decision to grant the permit.⁸¹ First, the location had previously been proposed as the site of a similar facility, but the County Commissioners, who were then responsible for the issuance of permits, denied the permit in 1971.⁸² Next, the site was being placed within 1,700 feet of a predominantly black high school with no air conditioning and only somewhat further from a residential neighborhood.⁸³ The plaintiffs pointed out that the school had changed from a white school to one whose body is predominantly minority.⁸⁴

The court expressed consternation about why the permit was granted:

Land use considerations alone would seem to militate against granting this permit If this Court were TDH, it might very well have denied this permit. It simply does not make sense to put a solid waste site so close to a high school, particularly one with no air conditioning. Nor does it make sense to put the land site so close to a residential neighborhood. But I am not TDH From the evidence before me, I can say that the plaintiffs have established that the decision to grant the permit was both unfortunate and insensitive.⁸⁵

With some sympathy for the plight of the plaintiffs, the court held that the plaintiffs had adequately established a substantial threat of irreparable injury.⁸⁶ Damages could not adequately compensate for the injuries caused by the opening of a solid waste facility in their neighborhood including the negative impact on the land values, the tax base, the aesthetics, the health and safety of the inhabitants, and the normal operation of the nearby high school. The threatened injury to the plaintiffs would outweigh that to defendants, and the public interest would be served by granting the plaintiffs an injunction.⁸⁷ Unfortunately, despite

80. *Id.* at 680-81.

81. *Id.* at 679-80.

82. *Id.* at 679. The area then was "mostly white." Bullard, *supra* note 68, at 4.

83. *Bean*, 482 F. Supp at 679.

84. *Id.* That the high school was not equipped with air conditioning was not an insignificant point in Houston's hot and humid climate. ROBERT D. BULLARD, DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY 44 (1994). Windows were usually left open while school was in session. *Id.* Moreover, seven other schools, all without air conditioning, were in the area. *Id.*

85. *Bean*, 482 F. Supp. at 679-680.

86. *Id.* at 677.

87. *Id.*

the threatened irreparable injury, the plaintiffs could not overcome the weighty burden of proving discriminatory purpose.⁸⁸

Similarly, in *East Bibb Twiggs Neighborhood Association v. Macon-Bibb County Planning & Zoning Commission*,⁸⁹ another United States District Court found insufficient evidence to establish that a decision to locate a landfill in a majority African American community was motivated by racial discrimination. In that case, the county planning and zoning commission by approving an application for a conditional use allowed the creation of a private landfill; a decision which area residents alleged deprived them of equal protection of the law.⁹⁰ The landfill would be operated for non-putrescible waste, described as non-garbage waste such as wood, wood by-products, paper products, metal goods, tires, and refrigerators.⁹¹ The waste was located in a census tract containing a 60% black population.⁹² Initially, the Commission voted to deny the landfill application for three reasons: (1) the proposed landfill would be located adjacent to a predominantly residential area; (2) the increase in heavy truck traffic would increase noise in the area; and (3) the additional trucks were undesirable in a residential area (alluding to concerns that area residents raised about hazards to children from increased truck traffic).⁹³ On rehearing, citizens opposing the landfill also expressed concerns "regarding the impact the landfill might have upon the water in an area where many of the residents relied upon wells for their household water."⁹⁴ The Commission approved the application after the hearing subject to certain conditions, including a restriction on the dumping of all but non-putrescible material.⁹⁵ The one negative vote was cast by a commissioner citing the impropriety of reconsidering the application after initially denying it.⁹⁶

The court upheld the Commission's decision to approve the landfill as a conditional use finding that the decision was not motivated by an intent to

88. Bullard acknowledges three changes in how the city and state dealt with environmental issues in the black community that resulted from the lawsuit: (1) the Houston city council passed a resolution in 1980 that prohibited city owned trucks carrying solid waste from dumping at the landfill; (2) the city council passed an ordinance restricting the construction of solid-waste sites near public facilities such as schools; (3) the TDH updated its requirements for landfill permit applicants to include detailed land-use, economic, and socio-demographic data on areas where they proposed to site landfills. Bullard, *supra* note 68, at 44-45.

89. 706 F. Supp. 880 (M.D. Ga. 1989), *aff'd*, 896 F.2d 1264 (11th Cir. 1989).

90. *Id.* at 881.

91. *Id.* at 881 n.1.

92. *Id.* at 884.

93. *Id.* at 882.

94. *Id.* at 883.

95. *Id.*

96. *Id.* at 883 n.4. This was not considered a violation of the *Arlington Heights* factor considering any departures, substantive or procedural, from the normal decision making process. *Id.* at 886. The court considered plaintiff's contentions regarding alleged procedural irregularities, including that a rehearing was improperly granted, to be without merit. *Id.*

discriminate against black persons.⁹⁷ Unlike the court in *Bean*, this court expressed no sympathy for the plight of residents living close to a landfill. The court examined the *Arlington Heights* factors and found the first factor present: The Commission's "decision to approve the landfill in census tract No. 133.02 of necessity impacts greater upon the majority [African American] population."⁹⁸ However, no clear pattern of racially motivated decisions was established by the plaintiffs; the only other Commission-approved landfill was in a census tract containing a majority white population.⁹⁹ The court did not comment on the plaintiffs' evidence that both census tracts, and thus both landfills, were located within a county commission district where the population was roughly 70% black.¹⁰⁰

The court could discern neither a series of actions taken by the Commission for invidious purposes nor an event showing a relaxation or other change in the standards applicable to the granting of a conditional use.¹⁰¹ Furthermore, it found no procedural flaws in fact-finding or the granting of a rehearing even though one commissioner voted against the application because of the impropriety of reconsidering the application.¹⁰² The conditions placed on the operation of the landfill would have to suffice as protection for the area residents from any hazards of living in its vicinity.¹⁰³

In *R.I.S.E., Inc. v. Kay*, a third United States District Court held that the African American plaintiffs had not provided sufficient evidence that government officials had intentionally discriminated on the basis of race.¹⁰⁴ The Board of Supervisors of King and Queen County, Virginia, voted to operate a regional landfill in conjunction with a private entity, the Chesapeake Corporation.¹⁰⁵ Chesapeake would build the landfill on a Piedmont tract and use it for its own waste disposal, and the county would operate it in exchange for free waste disposal.¹⁰⁶ The Board also adopted a resolution approving the Planning

97. *Id.* at 883 n.4.

98. *Id.* at 884.

99. *Id.*

100. *Id.* at 884-85.

101. *Id.* at 886.

102. *Id.*

103. *Id.* at 883. The landfill could not be operated as a public health hazard or a nuisance, nor could any hazardous waste be deposited at the landfill. *Id.*

104. 768 F. Supp. 1144 (E.D. Va. 1991).

105. *Id.* at 1147.

106. *Id.* at 1145. In 1988, the federal government ordered a redistricting of King and Queen County, Virginia, which resulted in an increase in the number of county supervisors from three to five. Robert W. Collin & William Harris, Sr., *Race and Waste in Two Virginia Communities, in CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS* 95 (Robert D. Bullard ed., 1993). The two new supervisors were African Americans. *Id.* In Virginia, each county's board of supervisors makes most of the landuse decisions. *Id.* The Board appoints a planning commission which makes nonbinding recommendations. *Id.*

Commission's recommendation that Piedmont Tract be rezoned from an agricultural to an industrial area.¹⁰⁷

Citizen opposition to the landfill was based on the feared reduction in the quality of life by increased noise, dust and odor, decline in property values, and interference with activities at a nearby church.¹⁰⁸ The church was founded in 1869 by recently freed black slaves.¹⁰⁹ Its minister formed R.I.S.E., Inc. (Residents Involved in Saving the Environment), a bi-racial community organization created for the purpose of opposing the proposed landfill.¹¹⁰

A demographic analysis of the proposed landfill site showed that 64% of the population living within a half-mile radius of the site was black, as were twenty-one of the twenty-six families living along the route where most of the landfill-bound traffic would travel.¹¹¹ The population within the vicinity of three other landfills was also analyzed:

[(1)] The Mascot site landfill was sited in 1969 [T]he estimated racial composition of the population living within a one-mile radius of the site at its development was 100% black. . . . [A] black church was located within two miles of the landfill.

[(2)] The Dahlgren landfill was sited in 1971. An estimated 90-95% of the residents living within a two-mile radius of it [were] black.

[(3)] The Owenton landfill was sited in 1977 [A]n estimated 100% of the residents living within a half-mile radius of the landfill were black [A] black church [was] located one mile from the landfill.¹¹²

One other landfill, the King Land landfill, was located in a predominantly white residential area; it was called an environmental disaster from its inception by the court.¹¹³ At the time of its inception, the County had no zoning ordinance

107. *R.I.S.E.*, 768 F. Supp. at 1147.

108. *Id.* These are all activities that could be raised in a nuisance suit. *See, e.g.*, *Southeast Ark. Landfill, Inc. v. State of Ark.*, 858 S.W.2d 665 (Ark. 1993) (finding that off-loading of waste at a landfill constituted a nuisance because of offensive odors); *Padilla v. Lawrence*, 685 P.2d 964 (N.M. Ct. App. 1984) (annoyance, discomfort, and inconvenience from odors, noise and flies of manure processing plant was a nuisance).

109. *Collin & Harris*, *supra* note 106, at 96.

110. *R.I.S.E.*, 768 F. Supp. at 1147-48. The church had subsidized an inadequately funded school for black children for many years and is described as the "anchor" of the county's black community. *Collin & Harris*, *supra* note 106, at 96.

111. *R.I.S.E.*, 768 F. Supp. at 1148.

112. *Id.*

113. *Id.* at 1149.

and thus no county approval was necessary for its operation.¹¹⁴ After the County implemented a zoning ordinance, King Land sought permission to operate the landfill under the ordinance, but permission was denied because the landfill was not a "nonconforming use" as defined in the ordinance.¹¹⁵ King Land's application for a variance was also denied on the grounds that "the landfill operation would result in a significant decline in the property values of the adjacent properties and that King Land had ignored environmental, health, safety, and welfare concerns."¹¹⁶

In light of this demographic analysis, the court, without any discussion, held that the placement of landfills in King and Queen County from 1969 to the present had a disproportionate impact on black residents.¹¹⁷ But, like the courts in *Bean* and *East Bibb*, the court found no sufficient evidence of discriminatory intent, though the only landfill located in a white residential area was barred from continued operation.¹¹⁸ The court found nothing "suspicious" or "unusual" about the Board's decision, stating that the Supervisors appeared "to have been more concerned about the economic and legal plight of the County as a whole than the sentiments of residents who opposed the placement of the landfill in their neighborhood."¹¹⁹ Furthermore, "the Equal Protection Clause does not impose an affirmative duty to equalize the impact of official decisions on different racial groups."¹²⁰

In an administrative Clean Air Act case, an Environmental Appeals Board at EPA found no support for a claim of racially discriminatory intent when the state of Michigan issued a permit for construction of a power steam electric plant in a predominantly African American neighborhood in Flint, Michigan.¹²¹ The facility was designed to burn several types of wood waste including demolition debris, pallets, dunnage, construction waste, tree trimmings, and sawmill residue.¹²² As a new major stationary source of air pollution, the proposed plant was required under the Clean Air Act to obtain an air pollution permit before beginning operation.¹²³

The Society of Afro-American People argued that the issuance of the permit represented "governmental environmental racism" because the facility would be located near a predominantly African American neighborhood.¹²⁴ The

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 1150.

120. *Id.*

121. *In re Genesee Power Station Ltd. Partnership*, PSD Appeal Nos. 93-1 through 93-7, 1993 WL 484880 (E.P.A. Oct. 22, 1993).

122. *Id.* at *2.

123. *Id.*

124. *Id.* at *4.

Society claimed that the manner in which the public hearings were held evidenced environmental racism, in that "the inability for people of color . . . to attend or be involved in the hearings properly, is a civil rights concern."¹²⁵ The Society noted that a hearing for a different incinerator in a rural farm area was held immediately before the hearing for the permit for the Flint power plant and contended that that permit was denied because of opposition from white residents of the surrounding community.¹²⁶ The executive director of the Society alleged that one of the commissioners stated: "[I]f the people don't want this in their community we shouldn't put it there, because I sure wouldn't want it in my community."¹²⁷

The Appeals Board found no support for that contention in the minutes and declared that the Commission had legitimate, nondiscriminatory reasons for denying the permit.¹²⁸ It held that the record revealed no evidence of racially discriminatory intent when granting the Flint permit.¹²⁹ The Board noted that the permit was not a license to threaten their health and safety because the emissions allowed under the permit would meet all applicable air quality regulations, and, in the case of some pollutants, the emissions would be below levels determined to protect human health.¹³⁰ Furthermore, the Board wrote, the permit was being remanded so that the Commission could consider whether fuel cleaning—the removal of wood waste that is painted or treated with lead-bearing substances—should be required to further reduce lead emissions.¹³¹ The African American residents in that Flint neighborhood would have to be satisfied with such protection.

The difficulty of proving discriminatory intent in siting decisions shows the "limited utility" of current civil rights doctrines in solving environmental equity problems.¹³² This limited utility has given rise to suggestions that residents of areas where landfills and dumps are located or planned should consider alternative causes of action including common law causes of action based in tort.

125. *Id.* at *5.

126. *Id.*

127. *Id.*

128. *Id.* at *6.

129. *Id.*

130. *Id.*

131. *Id.*

132. Regina Austin & Michael Schill, *Black, Brown, Red, and Poisoned*, in *UNEQUAL PROTECTION*, *supra* note 68, at 53, 61 (1994). See also, Godsil, *supra* note 9, at 416-21; Robert M. Frye, *Environmental Injustice: The Failure of American Civil Rights and Environmental Law To Provide Equal Protection from Pollution*, 3 DICK. J. ENVTL. L. & POL'Y 53 (1993); Cole, *supra* note 6.

III. THE DOCTRINE OF ANTICIPATORY NUISANCE

When the courts in *Bean*¹³³ and in *East Bibb*¹³⁴ recited the harms that could follow from the placement of a solid waste facility in a residential community, they listed harms usually found in nuisance suits—threats to the health and safety of the inhabitants, adverse impacts on aesthetics and land values, and increased noise, traffic, dust and odors.¹³⁵ The plaintiffs in *Bean* had adequately demonstrated a substantial threat of irreparable injury, thus damages were not adequate compensation.¹³⁶ Because the plaintiffs could not show discriminatory purpose, however, they would have to suffer the harms of living with a solid waste facility in their residential neighborhood and in close proximity to a high school without air conditioning.¹³⁷

The doctrine of anticipatory nuisance could provide plaintiffs similarly situated with another legal theory with which to fight the placement of a waste facility within their neighborhoods. Plaintiffs could seek an injunction prohibiting the construction of the facility because of a “threat of sufficient seriousness and imminence to justify coercive relief.”¹³⁸ Anticipatory nuisance doctrine would present plaintiffs with the most desirable of results—the prevention of harm before it actually occurs. Even if the court refused to grant complete injunctive relief by prohibiting the siting of the facility in their neighborhood, plaintiffs will have forced some review of the facility and may be awarded an injunction requiring the facility to maintain certain standards or provide particular safeguards.¹³⁹

A. *Fundamentals of Nuisance Law*

Under the doctrine of anticipatory nuisance, a defendant may be restrained from conducting an activity where it is highly probable that the activity will lead

133. 482 F. Supp. 673.

134. 706 F. Supp. 880.

135. For example, in *Padilla v. Lawrence*, 685 P.2d 964 (N.M. Ct. App. 1984), the court upheld a private nuisance where the plant’s operation resulted in plaintiff’s exposure to odors, dust, noise and flies. Compensation was allowed for annoyance, discomfort and inconvenience, but not for a decline in property values. *Id.* at 969.

136. *Bean*, 482 F. Supp. at 677.

137. *Id.* at 680.

138. RESTATEMENT (SECOND) OF TORTS § 933 cmt. b (1977).

139. For example, the Supreme Court of Kansas set aside an injunction to prohibit the construction of a baseball diamond and a football field provided that the defendant construct a fence and protective screen around the area; it also granted an injunction against the installation of floodlights, a public address system, a concession stand, and the playing of varsity football and baseball games. *Vickridge First and Second Addition Homeowners Ass’n v. Catholic Diocese*, 510 P.2d 1296, 1307 (Kan. 1973).

to a nuisance.¹⁴⁰ A "nuisance" is defined as some interference with the use and enjoyment of land.¹⁴¹ It does not require a possessory interference.¹⁴² This type of nuisance is private nuisance, "a nontrespassory invasion of another's interest in the private use and enjoyment of land."¹⁴³ Under the private nuisance doctrine, the harm necessary for nuisance liability must be significant.¹⁴⁴ "The law does not concern itself with trifles, or seek to remedy all the petty annoyances and disturbances of everyday life in a civilized community."¹⁴⁵ Nuisance law takes into account the location, character, and habits of the particular community when determining the significance of the harm.¹⁴⁶

In the case of a private nuisance, the interference with plaintiff's use and enjoyment must be unreasonable.¹⁴⁷ An interference is "unreasonable" when the gravity of the harm outweighs the utility of the actor's conduct.¹⁴⁸ In determining the gravity of harm, factors considered include the extent of the harm involved, the character of the harm involved, the social value that the law attaches to the type of use or enjoyment invaded, the suitability of the particular use or enjoyment invaded to the character of the locality, and the cost to the person harmed of avoiding the harm.¹⁴⁹ The utility of the conduct causing the invasion is determined by the social value that the law attaches to the primary purpose of the conduct, the suitability of the conduct to the character of the locality, and the impracticability of preventing or avoiding the invasion.¹⁵⁰ This balancing of the

140. W. PAGE KEATON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 89 (5th ed. 1984).

141. RESTATEMENT (SECOND) OF TORTS § 821D cmt. d (1979).

142. *Id.*

143. *Id.* § 821D. Another type of nuisance is public nuisance, an unreasonable interference with a right common to the general public. *Id.* § 821B. Circumstances that may sustain a finding of a public nuisance include conduct involving significant interference with the public health and safety. *Id.* § 821B(2)(a). To recover for damages in an individual action for public nuisance, the harm suffered must be of a kind different from that suffered by other members of the public. *Id.* § 821C. Traditionally, if a member of the public has not suffered damages different in kind and cannot maintain an action for damages, he also has no standing to maintain an action for injunctive relief. *Id.* § 821C cmt. j.

144. *Id.* § 821F.

145. KEETON ET AL., *supra* note 40, § 88.

146. RESTATEMENT (SECOND) OF TORTS § 821F cmt. e (1977).

147. Keeton et al., *supra* note 140, § 88.

148. RESTATEMENT (SECOND) OF TORTS § 826 (1977). An interference is also "unreasonable" when "this and similar harm to others caused by the conduct is serious and the financial burden of compensating for the harm would not make the continuation of the conduct unfeasible." See KEETON ET AL., *supra* note 140, § 88A. The two clauses highlight the distinctions courts make between a nuisance suit seeking injunctive relief prohibiting the activity and a suit for compensation for the harm imposed. *Id.* The action for damages does not seek to stop the activity; it seeks instead to place on the activity the cost of compensating for the harm it causes. *Id.* The financial burden of this cost is therefore a significant factor in determining whether the conduct of causing the harm without paying for it is unreasonable. *Id.*

149. RESTATEMENT (SECOND) OF TORTS § 827 (1977).

150. *Id.* § 828.

equities for injunctive relief does not have to occur only after the nuisance activity has commenced. A private nuisance may be enjoined where harm is threatened that would be significant if it occurred.¹⁵¹

B. *Benefits of Anticipatory Nuisance*

The major benefit of the anticipatory nuisance doctrine in cases of siting of facilities is the prevention of harm before it occurs. Prevention of irreparable harms to the environment is particularly suited to injunctive relief under the doctrine because of the difficulty of remediating the environment. For example, the Supreme Court of Oklahoma held that injunctive relief was proper where plaintiffs showed that pollution of their underground water would most probably result from the operation of a landfill nearby.¹⁵² The court noted that "the difficulty, complexity and costliness of remedying ground water contamination is well documented" and that, "once seriously contaminated, groundwater is often rendered unusable and cleaning it up is often unsuccessful."¹⁵³ The balance of equities favored the nearby landowners. Due to the potential long-term effects of groundwater contamination, the injunction was granted.¹⁵⁴ Likewise, opposition to the siting of the landfill in *East Bibb* was based partially on the impact the landfill may have had on the water in an area where many of the residents relied on wells for water.¹⁵⁵ The plaintiffs there, however, were unsuccessful in halting the construction of a landfill because of their inability to prove discriminatory intent,¹⁵⁶ an element they would not have had to prove under the anticipatory nuisance doctrine.

Another benefit of the doctrine of anticipatory nuisance is the prevention of economic waste.¹⁵⁷ If a nuisance is imminent but the plaintiff's only available remedy is to wait for the nuisance to occur before seeking injunctive relief, the defendant may waste resources by investing in an activity which will likely be prohibited after the fact. Anticipatory nuisance would prevent such a waste of the defendant's resources.¹⁵⁸

151. *Id.* § 821F cmt. b.

152. *Sharp v. 251st Street Landfill, Inc.*, 810 P.2d 1270 (Okla. 1991), *overruled on other grounds*, *Dulaney v. Oklahoma State Dep't of Health*, 868 P.2d 676 (Okla. 1993).

153. *Id.* at 1279 n.15.

154. *Id.* at 1281.

155. *East Bibb*, 706 F. Supp. at 883.

156. *Id.*

157. Andrew Sharp, *An Ounce of Prevention: Rehabilitating the Anticipatory Nuisance Doctrine*, 15 B.C. ENVTL. AFF. L. REV. 627, 630 (1988).

158. *Id.*

C. Threatened Nuisance Per Se or Nuisance Per Accidens

Plaintiffs seeking injunctive relief under the doctrine of anticipatory nuisance face their first obstacle when some courts require that the enjoined activity be a nuisance per se.¹⁵⁹ Generally, unless a proposed use is a nuisance per se, an injunction will not readily be granted to restrain an anticipatory nuisance.¹⁶⁰ A nuisance per se is an act, instrument, or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings.¹⁶¹ Nuisances per se have included prostitution¹⁶² and gambling houses,¹⁶³ but not a football field or baseball field,¹⁶⁴ a hog-buying station¹⁶⁵ or a supermarket.¹⁶⁶ Unfortunately for plaintiffs in cases involving the siting of waste or toxic-producing facilities, nuisances per se have not included the storage of petroleum products in residential areas,¹⁶⁷ the trucking of materials in and out of a power plant facility,¹⁶⁸ a wood treatment plant,¹⁶⁹ or a sanitary landfill.¹⁷⁰

Because activities or structures that are not illegal are generally not considered nuisances per se, plaintiffs in cases of the siting of waste or toxic-producing facilities must show that the activity, operation, or structure of which they are complaining will be a nuisance per accidens if it is allowed to operate.¹⁷¹ A nuisance per accidens is an activity or structure which becomes or may become a nuisance based on the facts, circumstances, and surroundings, and as an activity not by its nature a nuisance, but one which may become a nuisance by reason of the locality, surroundings, or the manner in which it may be conducted or managed.¹⁷²

Courts applying the anticipatory nuisance doctrine hesitate to grant injunctions when the activity or structure being complained of is a nuisance accidens and not a nuisance per se.¹⁷³ These courts apply the general rule that, when the thing complained of is not a nuisance per se but may or may not become a nuisance under the circumstances, equity will not interfere on the

159. *See id.*

160. *Id.* at 631.

161. *Duff v. Morgantown Energy Assocs.*, 421 S.E.2d 253, 257 (W.V. 1992); *Vickridge*, 510 P.2d at 1302.

162. 58 AM. JUR. 2d *Nuisances* § 196 (1989).

163. 66 C.J.S. *Nuisance* § 3 (1951 & Supp. 1994).

164. *Vickridge*, 510 P.2d at 1302.

165. *Moody v. Lundy Packing Co.*, 172 S.E.2d 905 (N.C. Ct. App. 1970).

166. *Strong v. Winn-Dixie Stores Inc.*, 125 S.E.2d 628 (S.C. 1962).

167. *Prauner v. Battle Creek Coop. Creamery*, 113 N.W.2d 518, 522 (Neb. 1962).

168. *Duff*, 421 S.E.2d at 260.

169. *McCord v. Green*, 555 So. 2d 743 (Ala. 1989).

170. *Sharp*, 810 P.2d at 1276 n.6.

171. *McCord*, 555 So. 2d at 745; *see also* KEETON ET AL., *supra* note 140, § 88C.

172. *Duff*, 421 S.E.2d at 258 n.8.

173. *See Sharp*, *supra* note 157, at 630-31.

presumption that a person entering into a legitimate business will conduct it in a proper way so that it will not constitute a nuisance.¹⁷⁴ Where the anticipated nuisance is doubtful, contingent, or conjectural, no injunctive relief will be awarded.¹⁷⁵

D. *Likelihood of Harm*

For an injunction abating a threatened nuisance, courts vary on what standard will be applied to the evidence of likelihood of harm that plaintiffs must produce to be awarded equitable relief. One test requires a plaintiff seeking to enjoin a prospective nuisance to prove that the proposed conduct will constitute a nuisance "beyond all ground of fair questioning."¹⁷⁶ The court in *Duff v. Morgantown Energy Associates* explained that the standard required the party seeking to enjoin a prospective nuisance to establish by "conclusive evidence" that the danger be impending and imminent and that the effect be certain.¹⁷⁷ In applying the standard, the court required the plaintiff who complained of increased traffic, noise, dirt and pollution from the trucking of materials to and from a power plant to show that the proposed trucking operation either threatened devastating harm or was certain to result in serious damages or irreparable injury.¹⁷⁸ Plaintiff could show neither "beyond all ground of fair questioning," thus the lower court's order enjoining the trucking of materials was reversed.¹⁷⁹

Another more widely used standard permits the granting of injunctive relief for an anticipated nuisance where a nuisance will "necessarily result" from the contemplated act.¹⁸⁰ As under the previously mentioned test, the plaintiff has the burden of showing a danger of a real and immediate injury occurring.¹⁸¹ The inevitability of a nuisance must be shown; mere speculation is not enough.¹⁸² In *Village of Goodfield v. Jamison*, plaintiff sought to enjoin the construction of a hog transfer station, fearing possible offensive odors and increased traffic, noise, flies, and pests.¹⁸³ However, the plaintiff presented no evidence on traffic, and the defendant countered plaintiff's evidence as to the odor reaching the village due to prevailing winds and as to the noise from the loading and unloading of animals; all evidence concerning the flies and pests indicated that proper operation

174. See *McCord*, 555 So. 2d at 745; *Strong*, 125 S.E.2d at 633; *Duff*, 421 S.E.2d at 258.

175. See *Strong*, 125 S.E.2d at 633; *Duff*, 421 S.E.2d at 258.

176. *Duff*, 421 S.E.2d at 258.

177. *Id.*

178. *Id.* at 260.

179. *Id.* at 263.

180. See, e.g., *Strong*, 125 S.E.2d 628. See also *Roach v. Combined Util. Comm'n*, 351 S.E.2d 168 (S.C. Ct. App. 1986); *Village of Goodfield v. Jamison* 544 N.E.2d 1229 (Ill. Ct. App. 1989).

181. See *Village of Goodfield*, 544 N.E.2d at 1233.

182. *Id.*

183. *Id.* at 1229.

of the station would limit any problems.¹⁸⁴ Thus, the court considered the plaintiff's fears speculative.¹⁸⁵ Before reversing the lower court's decision, the court did remind the plaintiff that if its "worst fears came true," it could seek a remedy at that time.¹⁸⁶

Courts consider the circumstances and surroundings when determining whether an activity is a nuisance per accidens.¹⁸⁷ Similarly, when determining whether a nuisance would necessarily result from a proposed activity, courts consider the circumstances and surroundings of the normal operation of the activity or structure.¹⁸⁸ Thus, the proposed operation of a supermarket was not enjoined in *Strong v. Winn-Dixie*¹⁸⁹ because a nuisance would not necessarily result from the normal operation of a supermarket in that particular neighborhood.¹⁹⁰ The court noted that the plaintiffs did not reside in a secluded residential area; they were in close proximity to a business area with the attendant noises and congestion.¹⁹¹ The issue of the prospective nuisance must be determined in light of those facts.¹⁹² Again, the higher court reversed the trial court's finding of an anticipated nuisance.¹⁹³

That a business could possibly be operated normally in such a way as not to constitute a nuisance was also the deciding factor in *Roach v. Combined Utility Commission*.¹⁹⁴ The plaintiffs in *Roach* sought to enjoin construction of a waste water treatment plant by the city's utility commission because it would be unhealthy and unsightly and would result in odors, noise, flies and vermin in their community.¹⁹⁵ In upholding the trial court's decision to deny plaintiff's request for an injunction, the court quoted the Commission's expert that the modern design would eliminate noise "unless you were standing right up next to the equipment."¹⁹⁶ The expert further testified that, with proper operation and maintenance, the plant would function "without [the] nuisance of the odor, noise, flies, and vermin."¹⁹⁷

A. related standard requires a plaintiff seeking an injunction to demonstrate to a "reasonable certainty" that the proposed activity would be a

184. *Id.* at 1234.

185. *Id.*

186. *Id.* at 1235.

187. *See Sharp, supra* note 157, at 630-31.

188. *Id.*

189. *Strong*, 125 S.E.2d at 628.

190. *Id.* at 633-35.

191. *Id.*

192. *Id.* at 634.

193. *Id.* at 635.

194. 351 S.E.2d 168.

195. *Id.* at 169.

196. *Id.*

197. *Id.*

nuisance.¹⁹⁸ In one instance, the Texas Court of Appeals upheld the award of an injunction for the threatened nuisance of a parking lot and emphasized that a nuisance is to be determined by considering all circumstances, not merely the thing itself.¹⁹⁹ The court stated that “[e]very case must stand on its own footing.”²⁰⁰ The plaintiffs introduced sufficient evidence that the location, time, and manner of use of the proposed parking lot would constitute a nuisance.²⁰¹ Residents expressed concern that access to the proposed parking lot would cause more traffic, increase the opportunity for injury to neighborhood children, heighten the chance of inebriated drivers, and escalate crime.²⁰² The jury concluded from the evidence that the operation of the parking lot in this particular neighborhood was reasonably certain to be a nuisance.²⁰³

The two states, Georgia and Alabama, that have codified the anticipatory nuisance doctrine have incorporated the “reasonably certain” standard into their statutes.²⁰⁴ The Alabama statute authorizes an injunction “[w]here the consequences of a nuisance about to be erected or commenced will be irreparable in damages and such consequences are not merely possible but to a reasonable degree certain.”²⁰⁵ Two cases applying the statute reached different results, demonstrating the confusion surrounding the level of proof required to establish the imminence of a nuisance regardless of how the standard is phrased.²⁰⁶

In upholding an injunction of the construction of an open lagoon-type sewer treatment plant, the Supreme Court of Alabama in *Town of Hokes Bluff v. Butler*²⁰⁷ focused on the location of the plant when deciding that a nuisance was reasonably certain to result. Alabama followed the general principle that “there can be no abatable nuisance for doing in a proper manner what is authorized by law.”²⁰⁸ The court did not question the soundness of the rule but noted that the

198. See *Freedman v. Briarcroft Property Owners*, 776 S.W.2d 212, 216 (Tex. Ct. App. 1989) (citing *O'Daniel v. Libal*, 196 S.W.2d 211, 213 (Tex. Civ. App. 1946)).

199. *Id.* (citing 66 C.J.S. *Nuisances* § 8 (1950)).

200. *Id.*

201. *Id.* at 217.

202. *Id.*

203. *Id.*

204. See *infra* note 217 and accompanying text.

205. ALA. CODE § 6-5-125 (1975 & Supp. 1994). The State of Georgia also has codified the doctrine: “Where the consequences of a nuisance about to be erected or commenced will be irreparable damage and such consequence is not merely possible but to a reasonable degree certain, an injunction may be issued to restrain the nuisance before it is completed.” GA. CODE ANN. § 41-2-4 (1994).

206. Compare *infra* notes 219-23 and accompanying text with *infra* notes 224-31 and accompanying text.

207. 404 So. 2d 623, 625-26 (Ala. 1981).

208. *Id.* at 625 (quoting *Fricke v. City of Guntersville*, 36 So. 2d 321 (1948)).

obverse was true: if a project were not to be operated in a proper manner, then the nuisance was abatable.²⁰⁹ The issue becomes what is "proper."²¹⁰

As stated, location was the determinative factor in the *Hokes Bluff* case.²¹¹ The proposed open lagoon was to be located near the banks of a river and next to a public boat landing ramp in a designated "flood prone area."²¹² The state's water commission discouraged the location of lagoons in areas likely to flood.²¹³ An investigation by the Geological Survey of Alabama stated: "This site is considered poor for but probably adaptive to the construction of the proposed lagoon."²¹⁴ In light of the state's findings, the court held that the plaintiffs had presented enough evidence to show with reasonable certainty that the construction of a lagoon-type facility at that particular location was reasonably certain to constitute a nuisance.²¹⁵

Eight years later, the Alabama Supreme Court in *McCord v. Green*²¹⁶ held that the statute applied in the *Hokes Bluff* case required a complainant to show to a reasonable degree of certainty that the act or structure he sought to enjoin would be a nuisance per se, a nuisance at all times and under all circumstances, regardless of location or surroundings, and not a nuisance per accidens.²¹⁷ This holding made plaintiffs' cases more difficult to prove because courts would no longer engage in an examination of the circumstances of the proposed activity as was done in *Hokes Bluff*—where the court analyzed the plant as a nuisance per accidens and gave strong consideration to its location.²¹⁸ An activity would have to be a nuisance at all locations and under all circumstances, a requirement usually satisfied only by illegal activities. Thus, the court in *McCord* held that the operation of a wood treatment plant in a rural area was not a nuisance per se.²¹⁹ Plaintiffs would have to wait for the plant to begin operation and then return to court to demonstrate that the plant was in fact a nuisance, a sentiment often expressed when courts fail to enjoin an anticipatory nuisance.

E. *Severity of Harm*

In applying the anticipatory nuisance doctrine, courts emphasize the imminence of the threatened harm, rarely considering the severity of the

209. *Id.*

210. *Id.*

211. See *infra* note 219 and accompanying text.

212. *Hokes Bluff*, 404 So. 2d at 626.

213. *Id.*

214. *Id.*

215. *Id.*

216. 55 So. 2d 743 (Ala. 1990).

217. *Id.* at 746.

218. See *infra* note 219 and accompanying text.

219. *McCord*, 555 So. 2d at 746.

anticipated harm.²²⁰ Shifting the analysis to the level of harm could sway a court to enjoin an activity as an anticipated nuisance, particularly in environmental cases where harm is often irreparable due to the improbability of returning the environment to its previous state.²²¹ The Supreme Court of Oklahoma balanced the likelihood of harm with the severity of the harm when it decided to uphold the grant of a temporary injunction in *Sharp v. 251st Street Landfill, Inc.*²²² The proposed landfill would primarily accept domestic, not hazardous, waste.²²³ The cells of the site where waste would be deposited would be lined with a three foot clay liner to provide protection for groundwater in the area.²²⁴ Residents in the area of the landfill had wells on their land for domestic purposes, livestock, and agricultural crops.²²⁵ An expert testified that the wells most likely tapped into an aquifer under the landfill site.²²⁶ He also testified that once groundwater is polluted, it is very difficult to restore it to usable quality.²²⁷

The court noted that the difficulty, complexity, and costliness of remedying groundwater contamination is well-documented and concluded that, once seriously contaminated, groundwater is often rendered unusable and cleaning it up is often unsuccessful.²²⁸ Upholding the temporary injunction, the court found that the evidence supported a determination of irreparable injury: “[W]e have recognized generally invasions of water rights are subject to injunction. . . . Furthermore, pollution of a groundwater source is a type of environmental damage relatively unsusceptible to remediation.”²²⁹ The balance of equities favored the plaintiffs because of the long term effects contamination could have on their water sources.²³⁰ The court did note, however, that it was not prejudging the propriety of a permanent injunction and that an injunction should be limited to the nuisance-creating characteristics of a business; the entire business operation should not be shut down if the nuisance-creating characteristics can be eliminated.²³¹

220. See Charles J. Doane, Comment, *Beyond Fear: Articulating a Modern Doctrine in Anticipatory Nuisance for Enjoining Improbable Threats of Catastrophic Harm*, 17 B.C. ENVTL. AFF. L. REV. 441, 455, 463-68 (1990).

221. See generally *id.* at 468-72.

222. 810 P.2d 1270 (Okla. 1990), *overruled in part by* *Dulaney v. Oklahoma State Dep't of Health*, 826 P.2d 676 (Okla. 1993) (observing that the legislature had effectively “obliterated” *Sharp* of any meaning upon passage of 63 OKLA. STAT. § 1-2415 (1991)).

223. *Id.* at 1279.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.* at 1279 n.15 (citation omitted).

229. *Id.* at 1281.

230. *Id.*

231. *Id.*

In one other case holding promise for the successful use of the anticipatory nuisance doctrine, the Illinois Supreme Court ruled in *Village of Wilsonville v. SCA Services, Inc.*, that it was highly probable that a chemical waste disposal site would bring about a substantial injury and upheld the trial court's decision to enjoin operation of the site.²³² Residents presented evidence not only as to dust and odors from the site, but also of the toxic nature of substances deposited at the site, exposure to which could result in pulmonary diseases, cancer, brain damage and birth defects.²³³ The site was built above an abandoned coal mine, thus increasing the likelihood of an accident.²³⁴ The court thought it "sufficiently clear" that it was highly probable that the site would constitute a nuisance and that the highly toxic chemical wastes at the site would escape and contaminate the air, water, and ground around the site: "A court does not have to wait for it to happen before it can enjoin such a result . . . Under these circumstances, if a court can prevent any damage from occurring, it should do so."²³⁵

The court in *Village of Wilsonville* was faced with a high likelihood of severe harm occurring. In a concurring opinion, Justice Ryan argued for a standard for anticipatory nuisance that allowed for a lesser showing of probability of harm when the potential harm was so devastating.²³⁶ He suggested the rule that if the harm that may result is so severe, a lesser probability of it occurring should be required for injunctive relief.²³⁷ Conversely, if the threatened harm is less severe, a greater possibility that it will happen should be demonstrated by the party seeking to enjoin an activity.²³⁸ Plaintiffs may be entitled to protection not only from "the nearly certain effects of a proposed activity, but also from the catastrophic, yet less certain, effects of a proposed activity."²³⁹

Likewise, the severity of harm was a determinative factor in a decision by the Supreme Court of Louisiana to issue a qualified injunction preventing a chemical waste facility in *Salter v. B.W.S. Corp.*²⁴⁰ The evidence established the probability that disposal of chemical waste by defendant without adequate precautions would pollute a neighboring well, posing a threat to the health and safety of the family using the well for water. However, the court was also convinced that the waste facility could be operated safely if the defendant followed a recommendation that the trenches into which the wastes were

232. 426 N.E.2d 824, 836-37 (Ill. 1981).

233. *Id.* at 828.

234. *Id.*

235. *Id.* at 837.

236. *Id.* at 842.

237. *Id.*

238. *Id.*

239. Sharp, *supra* note 157, at 642.

240. 290 So. 2d 821 (La. 1974).

deposited be lined with an impermeable material.²⁴¹ The court issued a qualified injunction ordering the facility to comply with the recommendation since the consequences of a failure to exercise great care to prevent the escape of poisonous materials were so serious.²⁴²

The lower court in *Salter* had issued a broad injunction which was narrowed on appeal.²⁴³ In several other cases, trial courts have enjoined anticipatory nuisances that were not upheld on appeal.²⁴⁴ This pattern underscores the uncertainty with which the standards of the doctrine of anticipatory nuisance are applied. Although courts have articulated standards such as “necessarily results” and “reasonable certainty,” there is a general lack of predictability as to what factors courts will consider and how courts will weigh those factors.²⁴⁵ For example, some courts will only consider the likelihood of occurrence, while others will take into account the severity of harm.²⁴⁶ Furthermore, the pattern also emphasizes the very factual and circumstantial nature of the doctrine. Plaintiffs in one case were able to enjoin the construction of a parking lot,²⁴⁷ while a plaintiff in another instance was unable to prevent the construction of a nuclear power plant just over one mile from his residence.²⁴⁸ Such uncertainty should lead residents suffering from the harms of environmental discrimination in siting decisions to approach cautiously, but not exclude, the doctrine of anticipatory nuisance as one legal theory under which to seek relief.

IV. CONCLUSION: USING THE DOCTRINE OF ANTICIPATORY NUISANCE IN ENVIRONMENTAL DISCRIMINATION CLAIMS

Use of the doctrine of anticipatory nuisance by citizens wanting to litigate environmental discrimination claims rewards the successful plaintiff with the optimal result: prevention of the harm by stopping the construction and operation of the facility. Residents of the East Houston, Texas community in *Bean* demonstrated a substantial threat of irreparable injury.²⁴⁹ The court found that damages could not adequately compensate for the injuries caused by the opening

241. *Id.* at 824.

242. *Id.* at 825.

243. *Id.* at 822.

244. *Duff*, 421 S.E.2d at 253; *McCord*, 555 So. 2d at 743; *S.M. McAshon v. River Oaks Country Club*, 646 S.W.2d 516 (Tex. Ct. App. 1982) (reversing a decision that proposed use of parking lot by golf course would necessarily create a nuisance); *McQuade v. Tucson Tiller Apartments*, 543 P.2d 150 (Ariz. Ct. App. 1975) (holding that an anticipated nuisance was too doubtful to uphold part of an injunction enjoining the hauling of sand and gravel).

245. Sharp, *supra* note 157, at 642-43.

246. *See id.*

247. *Freedman v. Briarcroft*, 776 S.W.2d 212 (Tex. Ct. App. 1989).

248. *Marshall v. Consumers Power Co.*, 237 N.W.2d 266 (Mich. 1975).

249. *Bean*, 482 F. Supp. at 677.

of a solid waste facility in their neighborhood.²⁵⁰ The threatened injuries included a negative impact on the land values, tax base, aesthetics, and health and safety of the inhabitants, and the operation of a nearby high school without air conditioning would also be severely impacted.²⁵¹ Those residents convinced the judge of the type of harm necessary to prove an anticipatory nuisance. Yet, the facility was built because the plaintiffs could not prove the intent element of their equal protection claim.²⁵² The tort theory of anticipatory nuisance could have given them another opportunity to stop the construction of the facility in their community. On the other hand, the equal protection claim did allow them to introduce evidence of discriminatory decision making, evidence crucial to establishing the inequitable distribution of the nation's environmental degradation.

Generally, litigation of environmental claims under any theory is expensive and time consuming because expert testimony is usually required to prove causation and the extent of harm. However, plaintiffs alleging an actual nuisance can seek injunctive relief for the more easily shown presence of odors, flies, noise and increased traffic beyond a tolerable and safe level.²⁵³ Unfortunately, plaintiffs alleging a prospective nuisance may encounter difficulty proving that an activity or structure is highly likely to be a nuisance without the powerful evidence of the actual stench, vermin and traffic jams. Furthermore, although courts have not expressly held that a higher probability of harm must be shown when the harm is not severe, the decisions seem to imply that the courts are more likely to find an anticipatory nuisance for a likelihood of substantial injury to the occupants and their safe use of the land than for intolerable invasions of the enjoyment of land. However, if the harm alleged includes health effects, expert testimony will be required, and owners of facilities often have more resources to acquire the scientists and technicians than do community groups. Most courts also presume that an activity will be conducted in a proper manner.²⁵⁴ That presumption is difficult to overcome before operation of a facility has begun, and overcoming it would again require the testimony of experts. Thus, bringing an environmental discrimination suit under anticipatory nuisance law shifts the focus of the allegations away from disparate impact and discriminatory intent in the siting process to a more technical and factual discussion of causation and of imminence and severity of harm.

250. *Id.* at 680.

251. *Id.*

252. *Id.*

253. One of the advantages of nuisance in environmental litigation has been described as the simplicity of showing that pollution "looks bad, smells bad, and does bad things." Ronald J. Rychlak, *Common-Law Remedies for Environmental Wrongs: The Role of Private Nuisance*, 59 Miss. L.J. 657, 661 (1989).

254. See, e.g., *Hokes Bluff*, 404 So. 2d., at 625.

While bringing suits under a claim of civil rights violations now has questionable legal value, they do have political value.²⁵⁵ For example, the suits bring attention to the lack of participation of communities of color in the decisionmaking process and to the nationwide inequitable distribution of environmental harms from waste facilities. Because an anticipatory nuisance is often determined based on the particular location and manner of operation of each proposed facility, the doctrine would not easily lend itself to a strategic approach to litigation nationwide or to coordination among community groups. Cases would be brought and facilities enjoined in a piecemeal manner. Furthermore, successful challenges may be of little precedential value due to differences in the facts and circumstances of each case.²⁵⁶

Some attorneys strongly recommend against lawsuits in general. They consider the environmental justice struggle to be a political and economic battle, and thus a legal response can be inappropriate.²⁵⁷ However, a case brought under the anticipatory nuisance doctrine can offer plaintiffs some advantages. First, a plaintiff has some chance of success. No plaintiff to date has been successful in bringing a civil rights claim of environmental discrimination because of the insurmountable burden of showing discriminatory intent. That problem is unlikely to change without a change in the law. However, plaintiffs in environmental cases of anticipatory nuisance have been successful in some instances in enjoining the operation of landfills and other waste-producing facilities. Thus, they have been successful in preventing the harm before it occurs. Second, plaintiffs, if not awarded an injunction prohibiting construction, may possibly obtain a qualified or modified injunction ordering certain safety measures to be undertaken at the facility. Though not ideal, such relief may afford a community some type of protection and provide another legal weapon once operation of the facility begins. Third, the lawsuit can bring publicity and can educate a community about the degradation caused by a facility and the attendant harms incurred from living in close proximity to one. It could even impact the political process and hasten the formation of an adequate government response.

Litigation under any theory is costly and slow. Moreover, the plaintiff must always be prepared for the loss of his or her claim and thus to suffer the harms anyway. For communities exposed to a disproportionate burden of the nation's environmental problems, the ideal solution is not only halting environmental discrimination in the siting of waste facilities, but also halting the need for those waste facilities in the first place.

255. See Luke W. Cole, *Environmental Justice Litigation: Another Stone in David's Sling*, 21 *FORDHAM URB. L.J.* 523, 545 (1994).

256. See *Freedman*, 776 S.W.2d at 216.

257. Cole, *supra* note 255, at 524, 541.