CONFERENCE I RESOURCE PAPER

Environmental Justice and Where It Should Be Addressed in the 21st Century Concerning the Transportation Industry

Historical Perspective and Summary

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There is an underlying tug of war going on in the world of transportation: human rights versus environmental rights. This paper outlines the differences between human rights and environmental rights through a review of Title VI of the Civil Rights Act of 1964, Title VIII of the Civil Rights Act of 1968 (Fair Housing Act), the National Environmental Protection Act (NEPA) of 1969, and various executive orders that are related to environmental protection and human rights. An analysis of a number of legal cases concerning environmental justice (i.e., human rights) is also provided. This analysis offers various planning tools that the reader can use to minimize environmental justice concerns as they relate to transportation projects. Also shown are ways in which transportation planners and engineers can use these planning tools while working with strategies to solve major transportation issues or problems. Finally, environmental justice is examined as it relates to needed research to fill existing gaps with available tools.

HUMAN RIGHTS VERSUS ENVIRONMENTAL RIGHTS

Title VI of the Civil Rights Act of 1964

Section 601 of the Civil Rights Act (PL 88-352) specifically states that no person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity that receives federal financial assistance. Section 602 of the act requires that each federal agency empowered to administer a federal program to draw on the provisions of Section 601 by issuing rules, regulations, or orders that will be consistent with the objectives of the statute. The Federal Highway Administration (FHWA) is the federal agency under the U.S. Department of Transportation (USDOT) that administers federal financial assistance to all state highway departments for the planning and construction of many of the transportation projects in the United States and that is responsible for ensuring compliance with Title VI.

Through a review of the legislative history, Title VI of the Civil Rights Act of 1964 was enacted because of the many examples that were cited in which people of color in the United States were denied equal protection and equal benefits under federal assistance programs that were related to vocational and technical assistance, public employment services, manpower development and training, and vocational rehabilitation, to name a few. Specifically, the legislative history states that, in every essential walk of life, American citizens are affected by programs involving federal financial assistance. Through these programs, medical care, food, employment, education, and welfare are supplied to those in

need. For the government, then, to permit the extension of such assistance to be carried on in a racially discriminatory manner is to violate the precepts of democracy and undermine the foundations of the government (Civil Rights Act of 1964, Title VI, Legislative History).

Although Title VI of the Civil Rights Act of 1964 and Title VIII of the Civil Rights Act of 1968 have been around for decades, many audiences in the environmental and transportation arenas believe that the acts have not received the necessary attention by officials to ensure that discrimination is not occurring in federally assisted programs. As a result, key Title VI and Title VIII cases that involve land use and transportation issues have been litigated in the courts.

NEPA

NEPA, one of the major statutes that governs FHWA in terms of its planning for federally assisted transportation projects, was enacted, among other purposes, to establish a national policy for the environment and to establish a Council on Environmental Quality (CEQ). Specifically, the purpose of the act was to declare a national policy that would encourage productive and enjoyable harmony between man and his environment; to promote efforts that would prevent or eliminate damage to the environment and the biosphere and stimulate the health and welfare of man; and to enrich the understanding of the ecological systems and natural resources that are important to the nation (NEPA of 1969, PL 91-190, 42 USC 4321-4347, Jan. 1, 1970, as amended by PL 94-52, July 3, 1975, and PL 94-83, Aug. 9, 1975).

After reading the purpose of NEPA, one cannot help but observe why a tug of war has emerged between human rights and environmental rights concerning transportation projects in the United States. Obviously, NEPA has placed a great emphasis on protecting the environment. However, that is not to say the act did not intend for society (human rights) and communities to be a part of the "environment" that they set out to protect. Yet, further sections of the act clearly identify that the role of the federal government is to protect environmental rights.

Section 101(b) of the act requires that the federal government use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate federal plans, functions, programs, and resources to "fulfill the responsibilities of each generation as *trustee of the environment*...; assure for all Americans...esthetically and culturally *pleasing surroundings*; attain the widest range of beneficial uses of the environment without degradation...; *preserve important historic, cultural, and natural aspects* of our national heritage...; achieve a balance between population and *resource use*...; and *enhance the quality of renewable resources.*"

Section 102(2) of the act requires policies, regulations, and public laws of the United States and all agencies of the federal government to

> insure the integrated use of the *natural and social sciences and the environment design arts in planning and in decision making* which may have an impact on *man's environment;* identify and develop methods and procedures...which will insure that presently unquantified *environmental amenities and values* be given appropriate consideration...; include in every recommendation or report affecting the *quality of the human environment*, a detailed statement by the responsible official on
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> (i) the *environmental impact* of the proposed action,
> (ii) any *adverse environmental* effects which cannot be avoided,
> (iii) alternatives to the proposed action,
> (iv) the relationship between local short-term uses of *man's environment* and the maintenance and enhancement of long-term productivity, and
> (v) any *irreversible and irretrievable commitments of resources.*

Executive Order 11514

Executive Order 11514, *Protection and Enhancement of Environmental Quality*, signed by President Nixon on March 5, 1970, shows additional measures taken by the government to ensure protection and enhancement of the environment. Section 1 of the order states that "the Federal Government shall provide leadership in *protecting and enhancing the quality of the Nation's environment* to sustain and enrich human life."

The responsibilities of federal agencies under this executive order are outlined in later in this paper. Consonant with Title I of NEPA, the heads of federal agencies are required to "monitor, evaluate, and control on a continuing basis their agencies' activities so as to *protect and enhance the quality of the environment*; and develop procedures to ensure the fullest practicable provision of timely public information and understanding of Federal plans and programs *with environmental impact* in order to obtain the views of interested parties."

There is clearly a protection of the "environmental rights" that is promulgated in NEPA and Executive Order 11514 that has sparked civil rights activists over the past decade to question "human rights" in the equation of human rights versus environmental

rights. Have we as professionals overlooked the protection of society (human rights) and communities in the environment when balancing the impacts studied under NEPA in determining our final decisions and conclusions? Many of these human rights questions have been raised in a history of case law, which is discussed later in detail, over the past decade and a half. On one side of the equation, many governmental agencies believe they have addressed human rights through the adherence of NEPA and the Civil Rights Act, yet on the other side of the equation, civil rights activists believe that human rights have been ignored under NEPA and only environmental rights have been protected.

Although Title VI of the Civil Rights Act of 1964 and Title VIII of the Civil Rights Act of 1968 (Fair Housing Act) are not new to many governmental agencies that are charged with administering federally assisted programs, President Clinton recently signed Executive Order 12898, sparking yet a greater understanding of the human rights issues in the overall equation. It has therefore become apparent to many grassroots organizations and foundations that NEPA and other related federal regulations have not done enough in the past to ensure that these organizations' human rights are protected in terms of planning and constructing transportation projects throughout the country. The term environmental justice is the name many civil rights activists have given the term human rights in the human rights versus environmental rights equation.

What is environmental justice? Many professionals are struggling with this term. Suggestions have been made to call it something else. Does environmental justice mean discrimination? Is environmental justice an equity issue? Is environmental justice inclusive of social and community impacts? Can environmental justice arise at a project-specific level? Should environmental justice be evaluated in the planning stage? The answer to these questions is simply yes. Transportation professionals should focus on the evolution of the term environmental justice through the many cases and legislative acts in which it is found and not so much on the terminology. One will find in the review of legislation and in these cases that environmental justice is very broad reaching—from transportation-project-specific to intrarelated to transportation projects and planning. Are transportation professionals obligated to speak up for disadvantaged persons? Are transportation professionals obligated to use existing legislation, regulations, and tools that are available to them to identify disadvantaged populations in the planning phase and project stages of their programs and to include these populations in the decision-making process at the planning-program level and the project-specific level?

Executive Order 12898

Executive Order 12898, *Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations*, was signed by President Clinton on February 11, 1994, in an effort to address environmental justice. Under the order, each federal agency will make the achievement of environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority and low-income populations in the United States and its territories and possessions (the Commonwealth of Puerto Rico and the Commonwealth of the Mariana Islands). The order also requires the creation of an interagency working group on environmental justice by the U.S. Environmental Protection Agency that includes USDOT.

The working group is required to

(1) provide guidance to federal agencies on criteria for identifying disproportionately high and adverse human health or environmental effects on minority populations and low-income populations;
(2) coordinate with, provide guidance to, and serve as a clearinghouse for, each federal agency as it develops an environmental justice strategy in order to ensure that the administration, interpretation and enforcement of programs, activities and policies are undertaken in a consistent manner;
(3) assist in coordinating research by, and stimulating cooperation among, the Environmental Protection Agency, the Department of Health and Human Services, the Department of Housing and Urban Development, and other agencies conducting research or other activities in accordance with the order;
(4) assist in coordinating data collection, required by this order;
(5) examine data and studies on environmental justice;
(6) hold public meetings; and
(7) develop interagency model projects on environmental justice that evidence cooperation among federal agencies.

DOT Environmental Justice Strategy

In addition, Executive Order 12898 requires that each federal agency develop an agencywide environmental justice strategy that identifies and addresses disproportionately high and adverse human health and environmental effects of its programs, policies, and activities on minority and low-income populations. USDOT issued its final environmental justice strategy in the *Federal*

Register on June 29, 1995. Elements of this strategy are as follows:

> 1) *Public Outreach on Implementation of the Environmental Justice Strategy*—a review with environmental justice stakeholders, DOT's plans for the following activities: (*a*) grass roots meetings to better understand the environmental justice concerns and provide training on the transportation processes; (*b*) a secretarial level meeting of experts, traditional DOT stakeholders and environmental justice representatives to recommend specific policies and actions to implement Executive Order 12898 and the Department's Environmental Justice Strategy; and (*c*) regional workshops for state and local officials on implementing the Strategy.
> 2) *DOT Order on Environmental Justice*—ensure DOT managers are fully aware of their responsibilities under Executive Order 12898 and pre-existing statutory mandates through information seminars (*1*).

USDOT Final Order on Environmental Justice

On February 3, 1997, Secretary of Transportation Federico F. Peña signed the USDOT Final Order on Environmental Justice, *DOT Actions To Address Environmental Justice in Minority Populations and Low-Income Populations.* Within 6 months of the date of this order, each operating administration is required to provide a report to the assistant secretary for transportation policy and to the director of the departmental Office of Civil Rights describing the procedures that it has developed to integrate, or how it is integrating, the processes and objectives set forth in the order into its operations.

In accordance with this order, each operating administration (U.S. Coast Guard, Federal Aviation Administration, FHWA, Federal Railroad Administration, National Highway Traffic Safety Administration, Federal Transit Administration, St. Lawrence Seaway Development Corporation, Maritime Administration, and Research and Special Programs Administration) and responsible officials shall determine whether programs, policies, and activities for which they are responsible will have an adverse impact on minority and low-income populations and whether that adverse impact will be disproportionately high (2). In making determinations about disproportionately high and adverse effects on minority and low-income populations, mitigation and enhancement measures that will be taken and all offsetting benefits to the affected minority and low-income populations may be taken into account, as well as the design, comparative impacts, and the relevant number of similar existing system elements in nonminority and non-low-income areas (2).

The operating administrators and other responsible USDOT officials will ensure that any of their respective programs, policies, or activities that will have a disproportionately high and adverse effect on minority or low-income populations will be carried out only if further mitigation measures or alternatives that would avoid or reduce the disproportionately high and adverse effect are "not practicable." In determining whether a mitigation measure or an alternative is "practicable," the social, economic (including costs), and environmental effects of avoiding or mitigating the adverse effects will be taken into account (2). Operating administrators and other responsible USDOT officials will also ensure that any of their respective programs, policies, or activities that will have a disproportionately high and adverse effect on populations protected by Title VI ("protected populations") will be carried out only if

- A substantial need for the program, policy, or activity exists on the basis of the overall public interest; and
- Alternatives that would have less adverse effects on protected populations (and that still satisfy the need identified in the previous bullet) either would (*a*) have other adverse social, economic, environmental, or human health impacts that are more severe; or (*b*) involve increased costs of extraordinary magnitude. (2)

FHWA Final Order on Environmental Justice

On December 2, 1998, FHWA issued its Final Order on Environmental Justice, *FHWA Actions To Address Environmental Justice in Minority Populations and Low-Income Populations.* FHWA's order basically provides the same information and format as the Final USDOT Order.

Case History

Environmental justice or environmental discrimination was just as prevalent several decades ago as it is today; yet, because of societal emphases and differences, little litigation has ensued the topic. Looking back in history, in the 1950s urban renewal and freeway locations in parks and inner cities affected minority communities, yet hardly any litigation resulted. In the 1970s and 1980s, one can observe how NEPA was used frequently as a vehicle to stop undesirable development, such as low-income housing. Reviewing two mainstream cases and several central cases that surround the topic of environmental justice and environmental discrimination, one can observe the evolution of the important issues that transportation professionals need to be concerned with when addressing and planning for social and com-

munity impacts on a project-specific and program-level basis.

U.S. Supreme Court Cases

Two U.S. Supreme Court cases have played important roles in lower-court decisions that surround environmental justice cases, particularly in land use-related cases as well as in transportation-related cases to some degree: *Washington v. Davis*, 96 SCt 2040 (1976) and *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 97 SCt 555 (1977).

Both cases deal with the violation of the Equal Protection Clause under the Fourteenth Amendment of the U.S. Constitution. Also, in both cases, the U.S. Supreme Court concluded an important point that has been observed and used in subsequent cases—"official action will not be held unconstitutional solely because it results in a racially disproportionate impact; proof of racially *discriminatory intent* or purpose is required to show violation of the Equal Protection Clause" (*3*).

Washington v. Davis, 96 SCt 2040 (1976) is a case that surrounds black applicants for employment as police officers in the District of Columbia, challenging that recruiting procedures were racially discriminatory. The plaintiffs specifically challenged a written personnel test that was administered to applicants to determine a particular level of verbal skill. The plaintiffs in this case claimed that the written test was racially discriminatory, bore no relationship to job performance, and excluded a disproportionately high number (a disproportionate impact) of black applicants.

The district court noted no claim by the plaintiffs of intentional discrimination. However, the plaintiffs showed certain evidence that shifted the burden of proof to the defendants, but the court concluded that the plaintiffs were not entitled to relief because the defendants supported their burden of proof with several facts.

The court of appeals reversed the district court's decision and held that (*a*) the lack of discriminatory intent in the enactment and administration of the test was irrelevant; (*b*) the critical fact was that four times as many blacks as whites failed the test; and (*c*) such disproportionate impact was sufficient to establish a constitutional violation, absent any proof by the defendants that the test adequately measured job performance.

The U.S. Supreme Court held that (*a*) a law is not unconstitutional solely because it has a racially disproportionate impact regardless of whether it reflects a racially discriminatory purpose; (*b*) the disproportionate impact of the test, which was neutral on its face, did not warrant conclusion that the test was a purposely discriminatory device; and (*c*) a positive relationship between the test and the training school performance was sufficient to validate the test, wholly aside from its possible relationship to actual performance as a police officer (*4*).

The result of this U.S. Supreme Court case is not to say that evidence alone that supports a discriminatory impact can rise to the level to show discriminatory intent. The U.S. Supreme Court emphasized that "this is not to say that the necessary *discriminatory racial intent* must be expressed or appear on the face of the statute, or that a law's disproportionate impact is irrelevant in cases involving Constitution-based claims of racial discrimination. A statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race, *Yick Wo v. Hopkins*, 6 SCt 1064." (*4*)

However, the U.S. Supreme Court also emphasized that an

> invidious *discriminatory intent* may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another. Nevertheless, we have not held that laws, neutral on its [their] face and serving ends otherwise within the power of government pursue, are invalid under the Equal Protection Clause simply because it [they] may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution (*4*).

Yick Wo v. Hopkins, 6 SCt 1064 (1886), the first racism case in the United States that was argued in the California Supreme Court, concerns an ordinance that was passed in 1880 by the city of San Francisco in which permission to carry on laundries were refused except in buildings of brick or stone. The plaintiff in this was case Yick Wo, a native of China, who came to California in 1861 and engaged in the laundry business for 22 years in the same building. The California Supreme Court found that there was no reason for the ordinance, except hostility to race and nationality, and that the resulting discrimination was illegal and in violation of the Equal Protection Clause under the Fourteenth Amendment of the U.S. Constitution.

Village of Arlington Heights v. Metropolitan Housing Development Corporation, 97 SCt 555 (1977), is a U.S. Supreme Court case that has taken the Davis case one step further by identifying specific factors to be present in determining discriminatory intent. Arlington Heights is a suburb of Chicago where a nonprofit real estate developer had contracted to purchase a tract of land for building racially integrated low- and moderate-income housing and then brought action against local authori-

ties because of their refusal to change the tract from a single-family to a multifamily classification, arguing that their decision was racially discriminatory.

Although the court of appeals reversed the district court's finding and found that the "ultimate effect" of the rezoning denial was racially discriminatory, the U.S. Supreme Court held that the plaintiff failed to carry the burden of proving that racially discriminatory intent or purpose was a motivating factor in the local authorities' decision surrounding the rezoning. It was noted that "official action will not be held unconstitutional solely because it results in a racially disproportionate impact. (Such) impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination" [*Washington v. Davis*, 96 SCt 2040 (1977)] (3).

The most important point that was emphasized by the U.S. Supreme Court in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, and one that has been used in many subsequent cases, was that "a racially *discriminatory intent*, as evidenced by such factors, ... must be shown." These are the factors that the U.S. Supreme Court evidenced for other courts to review in deciding discriminatory intent when a disproportionate impact has been identified.

In reaching these factors, the U.S. Supreme Court stated the following:

> [*Washington v.*] *Davis* does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory intents. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration. *When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified* (3).

In identifying the factors, the U.S. Supreme Court stated the following:

> Determining whether invidious *discriminatory purpose* was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. 1) *The impact of the official action*—whether it 'bears more heavily on one race than another,' *Washington v. Davis*—may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face, *Yick Wo v. Hopkins*, 6 SCt 1064 (1886). The evidentiary inquiry is then relatively easy. But such cases are rare. Absent a pattern as stark as that in *Yick Wo v. Hopkins*, impact alone is not determinative, and the Court must look to other evidence...2) *The historical background of the decision* is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes...3) The specific sequence of *events leading up to the challenged decision* also may shed some light on the decision maker's purposes...4) *Departures from the normal procedural sequence* also might afford evidence that improper purposes are playing a role...5) *Substantive departures* too may be relevant, particularly if the factors usually considered important by the decision maker strongly favor a decision contrary to the one reached...6) *Legislative or administrative history* may be highly relevant, especially where there are contemporary statements by members of the decision making body (3).

Court of Appeals Case

In the U.S. Supreme Court case of *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 97 SCt 555 (1977), the plaintiffs also alleged that the refusal to rezone also violated Title VIII of the Civil Rights Act of 1968 (Fair Housing Act). Because the Supreme Court believed that the court of appeals did not address this statutory question, they remanded the case to the court of appeals for further consideration.

In the case *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 558 F2d 1283 (1977), the court of appeals pointed out that "in determining whether the Village's failure to rezone violated the Fair Housing Act, it is important to note that the Supreme Court's decision does not require us to change our previous conclusion that the Village's action had a racially discriminatory effect. What the Court held is that under the Equal Protection Clause that conclusion is irrelevant" (5).

The basic question that the court of appeals was required to answer was whether the village's action violated the Fair Housing Act because it had discriminatory effects, even when that action was taken without discriminatory intent. The court found

> the major obstacle to concluding that action taken without discriminatory intent can violate the Fair Housing Act is the phrase 'because of race' contained in the statutory provision. The narrow view of the phrase is that a party cannot commit an act 'because

> of race' unless he intends to discriminate between races. The broad view is that a party commits an act 'because of race' whenever the natural and foreseeable consequences of that act are to discriminate between races, regardless of his intent. Under this statistical, effect-oriented view of causality, the Village could be liable since the natural and foreseeable consequence of its failure to rezone was to adversely affect black people seeking low-cost housing and to perpetuate segregation in Arlington Heights (*5*).

The court of appeals noted that the U.S. Supreme Court adopted the narrow view for equal protection purposes in *Washington v. Davis*. Specifically, the court of appeals pointed out that the U.S. Supreme Court

> created a dichotomy between the Equal Protection Clause and Title VII of the Civil Rights Act of 1964. Although the Court announced its new intent requirement for equal protection cases, it reaffirmed the viability of *Griggs v. Duke Power Co.*, 91 SCt 849 (1971), in which it had previously held that an employment practice that produced a racially discriminatory effect was invalid under Title VII unless it was shown to be job-related. Thus, a prima facie case of employment discrimination can still be established under Title VII by statistical evidence of discriminatory impact, without a showing of discriminatory intent (*5*).

The court of appeals also pointed out that "the Supreme Court in *Griggs* held that this provision did not sanction all employment tests administered without *discriminatory intent*, in spite of the "because of race" language that it contains. Rather, the Court looked to the general congressional purpose in enacting Title VII—which was to achieve equality of employment opportunities-and interpreted VII in a broad fashion in order to effectuate that purpose." (*5*) Because of this, the court of appeals chose not to take a narrow view of the phrase "because of race" that was contained in the Fair Housing Act. Therefore, the court of appeals concluded that "at least under some circumstances a violation of the Fair Housing Act can be established by a showing of discriminatory effect without a showing of *discriminatory intent*." (*5*)

In the remanded case, *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 558 F2d 1283 (1977), the court of appeals found that the village's refusal to rezone constituted a violation under the Fair Housing Act of 1968. Similar to the U.S. Supreme Court's *Village of Arlington Heights* case, the court of appeals on remand used four critical factors in its decision:

1. How strong are the plaintiffs' showings of discriminatory effect?
2. Is there some evidence of discriminatory intent, though not enough to satisfy the constitutional standard of *Washington v. Davis*?
3. What is the defendant's interest in taking the action in question?
4. Do the plaintiffs seek to compel the defendant to affirmatively provide housing for members of minority groups or merely to restrain the defendant from interfering with individual property owners who wish to provide such housing?

The court of appeals pointed out two types of racially discriminatory effects that a facially neutral decision about housing can produce: (*a*) the decision has a greater adverse impact on one racial group than on another; and (*b*) the effect that the decision has on the community that is involved: if the decision perpetuates segregation, and thereby prevents interracial association, it will be considered invidious under the Fair Housing Act, independently of the extent to which it produces a disparate effect on different racial groups (*5*).

In this case, the court believed that discriminatory effect was weak, because the class that was disadvantaged by the village's action was not predominantly nonwhite (60 percent of the people in the Chicago that were eligible for federal housing subsidization in 1970 were white). In addition, the court believed that the second fact, evidence of discriminatory intent, was the least important of the four factors they were examining. The court stated that "if we were to place great emphasis on partial evidence of purposeful discrimination we would be relying on an inference—that the defendant is a wrongdoer—which is at best conjectural." (*5*)

The court found the third factor, the defendant's interest in taking the action in question, thus producing a discriminatory impact, to be important. Because the village was acting within the scope of its authority to zone under state law, the court believed that this factor weakened the plaintiff's case.

The court found the final factor, the type of relief sought by the plaintiffs, to favor the plaintiffs. The court concluded that "they own the land on which Lincoln Green would be built and do not seek any affirmative help from the Village in aid of the project's construction. Rather, they seek to enjoin the Village from interfering with their plan to dedicate their land to furthering the congressionally sanctioned goal of integrated housing." (*5*)

Land Use: Case Histories

Little has been written on the topic of environmental justice as it relates to transportation. Although environ-

mental justice has not been the main issue that has been brought to the surface with several documented transportation-related legal cases, it has always been an underlying theme. Several of the legal cases that surrounded environmental justice surfaced from the 1950s through the 1980s in the area of urban land use (e.g., landfills, hazardous waste sites, and zoning). Many authors who have written on the topic to date have cited the following three cases as the core sources of the environmental justice movement.

East Bibb Twiggs Neighborhood Association v. Macon-Bibb County Planning & Zoning Commission

The case *East Bibb Twiggs Neighborhood Association v. Macon-Bibb County Planning & Zoning Commission*, F. Supp. 880 (M.D. GA, 1989), concerns the development of a private landfill. The residents of the area brought action against the Macon-Bibb County Planning and Zoning Commission for a decision that allowed the development of a private landfill in a census tract that was mostly black. A judgment in favor of the defendants was rendered by the U.S. District Court and affirmed by the U.S. Court of Appeals for the 11th Circuit. The court considered the same six factors that the U.S. Supreme Court cited in the *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 97 SCt 555 (1977), case in determining its decision:

1. Effects of the official action;
2. Historical background of the decision;
3. Specific sequence of events leading up to the challenged decision;
4. Any departures, substantive or procedural, from the normal decision-making process;
5. Departures from normal substantive criteria; and
6. Legislative or administrative history of the challenged decision [97 SCt 555 (1977)] (6).

The court found insufficient evidence that the commission's decision was motivated by race discrimination and that the only other commission-approved landfill was located in a mostly white area.

With respect to the impact of the official action, the court did not argue that the decision surrounding the location of the landfill was in a predominately black area (60 percent of the total population of the census tract). However, the court pointed out that the only other landfill approved by the commission was located in a census tract that was mostly white (76 percent of the total population). The court stated that the decision failed to establish a clear pattern of racially motivated decisions (6). Specifically, the court noted that the commission may not actively solicit a landfill application and that the commission reacts to applications from private landowners requesting permission to use their property in a particular manner (6). In this case, a private developer, Mullis Tree Service, Inc., applied for a conditional use to operate a nonputrescible waste landfill.

The court also looked at the historical background of the commission's decision by reviewing several newspaper articles that the plaintiff submitted as evidence. It concluded that often times the commission refused development proposed by the opposition, while other times development was allowed. The court found that the plaintiff's evidence did not establish a background of discrimination.

Upon examination of the specific sequences that led to the challenged decisions, the court could not find any support that race was a motivating factor in the commission's decision. Specifically, the court believed that the statements made by the commissioner during deliberations indicated real concern about both the desires of the opposing citizens and the needs of the community in general. An excerpt of one of the statements is as follows:

> I'm interested in that because I think government and ultimately democracy functions on the legitimacy of its purpose and if people don't have faith in their institutions, the system won't work. They may not like all of the decisions that government institutions make, but I would feel badly if they thought that there was some sort of conspiracy afoot and I can tell you that I received a number of calls before and after my own meanderings through that land and I received no calls from big corporate people asking me to vote a particular way (6).

The plaintiff also believed that because the commission solicited input from the county and the city on the matter, the commission deviated from normal procedures. The court made it clear that, because of these efforts made by the commission, such efforts had their genesis in the commission's concerns about accountability to the public for certain controversial governmental decisions (6).

The final factor that was examined by the court was the legislative or administrative history. The plaintiff believed that because the commission initially denied the petitioner's application for the landfill, there was some racial purpose in motivating the commission to reconsider and approve the landfill site. The court disagreed with this.

In the court's discussion of the case, it quoted an important point that has been cited in other relevant cases: "to prove a claim of discrimination in violation of the Equal Protection Clause a plaintiff must show not only that the state action complained of had a dispro-

portionate or discriminatory impact but also that the defendant acted with the *intent to discriminate*, *Washington v. Davis*, 96 SCt 2040 (1976)." (6) In other words, although the plaintiff showed a disproportionate impact, the fact that the landfill location was in a predominately black area, racial motivations were not established under the applied factors.

Margaret Bean v. Southwestern Waste Management Corporation

The case of *Margaret Bean v. Southwestern Waste Management Corporation*, 482 F. Supp. 673 (S.D. Texas, 1979), also involves the selection of a site for the development of a solid waste facility. In this case, the plaintiff moved for a preliminary injunction to stop the selection of a site for a solid waste facility because of a racially discriminatory motive. The court reviewed the following four prerequisites in granting the preliminary injunction:

1. Substantial likelihood of success on the merits.
2. Substantial threat of irreparable injury.
3. Threatened injury to the plaintiff outweighs the threatened harm that the injunction may cause the defendant.
4. Granting the preliminary injunction will not deserve the public interest [*Canal Authority of State of Florida v. Callaway*, 489 F2d 567, 572 (5th Cir. 1974)]. (7)

The court found that the plaintiff did adequately establish a substantial threat of irreparable injury. The court specifically stated that the opening of the facility will affect the entire nature of the community—its land values, its tax base, its aesthetics, the health and safety of its inhabitants, and the operation of Smiley High School, located only 1,700 feet from the site (7). However, the court also found that the plaintiff did not establish a substantial likelihood of success on the merits. As in the *East Bibb Twiggs Neighborhood Association v. Macon-Bibb County Planning & Zoning Commission*, the burden of proving discriminatory purpose was placed on the plaintiff [*Washington v. Davis*, 96 SCt 2040 (1976); *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 97 SCt 555 (1977)]. Similarly, the court stated that the plaintiff must show not just that the decision to grant the permit is objectionable or even wrong, but also that it is attributable to an intent *to discriminate* on the basis of race. However, statistical proof can rise to the level that it, alone, proves discriminatory intent as in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (7).

The court viewed two different theories of liability that were similar to the factors the U.S. Supreme Court raised in the *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 97 SCt 555 (1977). First, the court looked at whether the Texas Department of Health's (TDH's) approval of the permit was part of a pattern or practice of discriminating in the placement of solid waste sites. Second, the court looked at whether 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. In both theories the court found that the plaintiff failed to prove intent to discriminate.

Under the first theory the court viewed statistical data, both citywide and in the target area. Of the 17 sites that were viewed in the citywide area, the court found that 58.8 percent of them were located in areas with a <25 percent minority population, and 82.4 percent of them were located in areas with a <50 percent minority population. Of the two sites that were viewed in the target area, the court found that Site 1 comprised a <10 percent minority population and that Site 2 comprised a 60 percent minority population. From this data, the court concluded that there was no discriminatory intent.

Under the second theory, the plaintiff focused on the two solid waste sites that were used by the city of Houston (target area). First, the plaintiff argued that 100 percent of the Type I municipal landfill sites that Houston uses contain only 6.9 percent of the entire population of Houston. The court countered by stating that two sites are not a statistically significant number to make an argument and that 58.4 percent of the population is minority in Site 1, and 18.4 percent of the population is minority in Site 2, thus proving no inference of discrimination.

Second, the plaintiff argued that the total number of solid waste sites that were located in the target area have created a statistical disparity. The plaintiff argued that the target area contained 15 percent of Houston's solid waste sites but contained only 6.9 percent of its population, with an overall 70 percent minority population comprising the target area. The court countered by looking specifically at the location of the particular sites in the target area and found that half of the sites in this area were in census tracts with a >70 percent white population.

Third, the plaintiff looked at the city as a whole and argued the following: 17.1 percent of the city's solid waste sites were located in the southwest quadrant where 53.3 percent of the white population lived, and 15.3 percent of the sites were located in the northwest quadrant where 20.1 percent of the white population lived; thus, 32.4 percent of the sites were located in the western half of the city where 73.4 percent of the white population lived, and 67.7 percent of the sites were located in the eastern half of the city where 61.6 percent

of the minority population lived. The court again countered with (*a*) the fact that a large number of the sites were located around Houston's ship channel (eastern half of the city) because of industry and not because a minority population lived there, and (*b*) 42.3 percent of the sites in Houston were located in minority census tracts, while 57.7 percent of the sites were located in white census tracts.

The court finally allowed the plaintiff to present nonstatistical data to establish purposeful discrimination. On this issue the plaintiff presented the fact that the county commissioners denied a permit for a site that was proposed for the almost identical location in 1971. The plaintiff also pointed out that the site, which was being placed within 1,700 feet of Smiley High School, had changed from a white school to one that was predominantly minority.

The court's final statements were that the plaintiff established that the decision to grant the permit was both unfortunate and insensitive; however, the plaintiff did not establish a substantial likelihood of proving that the decision to grant the permit was motivated by purposeful racial discrimination. The court also pointed to several unanswered questions, such as,

> Where, for instance, are the solid waste sites located in each census tract? How large an area does a solid waste site affect? How are solid waste site locations selected? What factors entered into TDH's decision to grant the permit? The court believed that racial composition of the neighborhood and the racial distribution of solid waste sites in Houston were primary concerns of the plaintiffs. And it remains unclear to what degree TDH was informed of these concerns (*7*).

In conclusion, the court believed that, in accordance to the evidence, it would have denied the permit. However, under the court's responsibility—to find whether the plaintiff has established a substantial likelihood of proving that the decision to issue the permit was motivated by purposeful discrimination—it could only deny the injunction.

R.I.S.E., Inc. v. Robert A. Kay, Jr.

R.I.S.E., Inc. v. Robert A. Kay, Jr., 768 F. Supp. 1141 (E.D. VA, 1991), is yet another case that involves the site location of a regional landfill. R.I.S.E. (Residents Involved in Saving the Environment), a biracial community organization, was formed to stop the development of a regional landfill in King and Queen County, Virginia. R.I.S.E. challenged the County Board of Supervisors on the following counts: equal protection violation, conspiracy to deny equal protection, due process violation, and violation of the Virginia Procurement Act. In this case, the court again looked at the six factors (presented earlier) that the U.S. Supreme Court identified in the *Village of Arlington Heights v. Metropolitan Housing Development Corporation*.

The court did not argue that the placement of landfills in King and Queen County from 1969 to the present had a disproportionate impact on black residents (*8*). After reviewing the facts, the court concluded:

> The population of King and Queen County is approximately 50 percent black and 50 percent white. Sixty-four percent blacks and thirty-six percent whites live within a half-mile radius of the proposed regional landfill site. A 100 prcent black population lived within a one mile radius of the Mascot landfill when it was sited in 1969. An estimated 95 percent black population lived in the immediate area of the Dahlgren landfill when it was sited in 1971. And, an estimated 100 percent black population lived within a half-mile radius of the Owenton landfill when it was sited in 1977 (*8*).

However, the court stated that official action is not unconstitutional solely because it results in a racially disproportional impact and that such action only violates the Fourteenth Amendment's Equal Protection Clause if it is *intentionally discriminatory* and cited *Washington v. Davis*, 96 SCT 2040 (1976) (*8*).

The court specifically stated that the impact of an official action—in this case, the historical placement of landfills in predominantly black communities—provides "an important starting point" for the determination of whether official action was motivated by discriminatory intent [*Arlington Heights*, 97 SCt 555 (1977)]; however, the plaintiff did not provide any evidence that satisfied the remainder of the discriminatory purpose equation as set forth in *Arlington Heights* (*8*). In this case, the judgment was again entered for the defendants.

Statistical evidence and data certainly play an important role in proving discrimination in environmental justice cases. However, statistics alone that show a disproportionate or discriminatory impact are not enough, as illustrated in this case history involving land use. Plaintiffs must show that the defendants intentionally discriminated; the court cited *Washington v. Davis* in all three cases. Yet, it is important to remember that "statistical proof can rise to the level that it, alone, proves intentional discrimination, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)." (*7*) These three cited cases were unable to do this with the factual statistics presented.

Transportation: Case Histories

Transportation cases involving environmental justice have also addressed the issues of disparate effect and impact. However, they have done so under Title VIII of the Civil Rights Act of 1968 (Fair Housing Act), Title VI of the Civil Rights Act of 1964, and the Federal-Aid Highway Act.

Ralph W. Keith v. Volpe

Ralph W. Keith v. Volpe, 858 F2d 467 (9th Cir., 1988), is a case that concerns the displacement of minority and low-income residents because of freeway construction. In 1972, individuals and organizations that were concerned about people being displaced by the proposed I-105, "Century Freeway," construction, brought action against state and federal government officials. The plaintiffs sought injunctive relief.

In 1982, a final consent that permitted further work on the freeway subject to the decree's provisions was approved by the district court. Specifically, the decree required that the state and federal defendants provide freeway displacees with 3,700 units of decent, safe, and sanitary replenishment housing, either by rehabilitating existing structures or constructing new units. The decree referenced a "housing plan" to be coordinated and implemented by the California Department of Housing and Community Development. It also established a housing advisory committee comprised of representatives from each city that was affected by the freeway. Under the plan, 55 percent of all replenishment units must be affordable to low-income households, and 25 percent must be affordable to moderate-income households. Finally, the plan required that as many of the units as possible must be placed in the "primary zone," located within 6 miles of each side of the proposed freeway.

The proposed freeway ran through the northern edge of the city of Hawthorne, thus reducing their housing supply by about 1,104 units. Although the decree's housing plan required 275 units to be built in Hawthorne, there were only 128 units, including the development outside of Hawthorne's city limits, pending development.

In response to the decree, two Century Freeway apartment developments were proposed for construction in Hawthorne—Cerise Development and Kornblum Development. The Century Freeway housing program approved both development projects, and the state agreed to fund them in accordance with the decree.

The Cerise Development consisted of 32 apartment units. The Planning Department of Hawthorne recommended approval of the developer's application for a change of zone from limited industrial to high-density residential and for a site-development permit with a disclaimer that only 35 percent of the units be rented to low-income households. The Hawthorne Planning Commission approved the zoning change and the 35 percent disclaimer. The developer appealed to the Hawthorne City Council. The City Council affirmed the Planning Commission's decision even though the 35 percent disclaimer conflicted with the terms of the consent decree.

The Kornblum Development consisted of 96 apartment units. The Planning Department of Hawthorne recommended approval of the developer's application for a lot split, a zoning change from horticultural to residential, and site development. The planning commission denied the applications for lot split, zone change, and site development. The developer appealed to the Hawthorne City Council. The council held two public hearings at which local residents expressed position-raising concerns about tax loss to the city, traffic increases, school crowding, maintenance of the development, and low-income tenants. The developer addressed each of the legitimate concerns that were raised (9). The city council affirmed the planning commission's decision.

As a result of the city council's actions against the development for the low-income housing, the plaintiffs filed a supplemental complaint to add allegations that the city of Hawthorne had illegally refused to permit the construction of two replenishment rental developments, violating the Fair Housing Act, Title VIII of the Civil Rights Act of 1968, and the Fourteenth Amendment of the U.S. Constitution. In response, the city of Hawthorne submitted to the developers a compilation of 52 alternate parcels of property where the housing for the Century Freeway could be developed. The court concluded that a prima facie case of race discrimination was established and awarded the plaintiffs costs and attorney's fees.

Under Title VIII of the Civil Rights Act of 1968 (Fair Housing Act), the district court reemphasized that it is unlawful to "make unavailable...a dwelling to any person because of race, color, religion, sex, or national origin." (9). Unlike the land use cases cited earlier, in this case the district court stated that under the Fair Housing Act, the circuits that have addressed the issue have agreed that the phrase "because of race" does not require proof of discriminatory intent; rather proof of discriminatory effect may be sufficient to demonstrate a violation of Title VIII [*Metropolitan Housing Development Corporation v. Village of Arlington Heights*, 558 F2d 1283 (1977)] (9).

> Once the plaintiff has established a prima facie case by demonstrating racially discriminatory effect, the

> burden shifts to the defendant to demonstrate that non-discriminatory reasons justify its conduct. If the defendant offers no valid non-discriminatory reason for its [his or her] actions, then the plaintiff has succeeded in proving a Title VIII violation. If the defendant does offer valid non-discriminatory reasons, the court must determine whether they are substantial enough to justify the racially discriminatory effect, *Arlington Heights*, 558 F2d 1283 (1977) (9).

The district court in this case also pointed out that the circuit courts have applied different standards in proving a prima facie case that involves discriminatory effect. Under Title VIII, the third and eighth circuits have held that proof of discriminatory effect alone is always sufficient to establish a prima facie case. Yet, the seventh circuit has held that proof of discriminatory effect without discriminatory intent, only under certain circumstances, violates Title VIII [*Arlington Heights*, 558 F2d 1283 (1977)]. *Arlington Heights*, 558 F2d 1283, listed the following critical factors for determining whether discriminatory effect establishes a prima facie case:

1. Effect—How strong is the plaintiff's showing of discriminatory effect?
2. Intent—Is there some evidence of discriminatory intent, though not enough to satisfy the constitutional standard of *Washington v. Davis*, 96 SCt 2040?
3. Justifications—What is the defendant's interest in taking the action complained of?
4. Prohibitory remedy—Does the plaintiff seek to compel the defendant to affirmatively provide housing for members of minority groups or to merely restrain the defendant from interfering with individual property owners who wish to provide such housing (9)?

The fourth circuit has used the same four-factor analysis (*Smith*, 682 F2d 1065).

In light of other circuit rulings, the district court in this case believed that the city of Hawthorne would be liable under any of the standards that the other circuits have applied. Specifically, the court believed that, aside from the discriminatory effect, two of the other three factors under *Arlington Heights*, 558 F2d 1283 (1977), have been shown to establish a prima facie case:

> (1) Effect—The evidence clearly demonstrates that Hawthorne's actions in imposing the 35 percent limitation on the Cerise Development, knowing it would prevent funding of the project, and in denying the applications for zone change, lot split, and site development on the Kornblum Development, had a racially discriminatory effect.
>
> The District Court also pointed out that under *Arlington Heights*, 558 F2d 1283 (1977), the seventh circuit identified two kinds of racially discriminatory effect a facially neutral decision about housing can produce:
>
> (a) when the decision has a greater adverse impact on one racial group than on another, and
>
> (b) the effect which the decision has on the community involved; if it perpetuates segregation and thereby prevents interracial association it will be considered invidious under Title VIII independently of the extent to which it produces a disparate effect.
>
> (2) Intent—The court found that the plaintiffs failed to show that the City Council acted with discriminatory intent. But, reaffirmed *Arlington Heights*, 558 F2d 1283, "this is the least important of the four factors" and "should be partially discounted."
>
> (3) Justifications—The court found the city of Hawthorne's justifications for imposing the 35 percent limitation on the number of units in the Cerise Development that may be rented to low-income tenants and [for] denying the zone change, lot split, and site development applications for the Kornblum Development pretextual.
>
> (4) Prohibitory remedy—The court found that the plaintiffs do not seek to compel Hawthorne affirmatively to provide housing for members of minority groups, but merely to enjoin Hawthorne from interfering with private property developers who wish to provide such housing (9).

The district court in this case also pointed out that once a plaintiff has established a prima facie case of discriminatory effect, the circuits apply different tests or standards for the defendants rebutting the established discriminatory effect. The eighth circuit court has used the "compelling interest" test in *Black Jack*, 508 F2d 1185. Under this test, the defendant must demonstrate that his or her conduct was necessary to promote a compelling government interest. Although the eighth circuit court has ruled the same as the third circuit in proving a prima facie case, the courts differ in the rebuttal of a prima facie case. The third circuit rejected the "compelling interest" test of the eighth circuit and held that the defendant need only prove a compelling government interest when the plaintiff has made a showing of purposeful discrimination sufficient to establish a constitutional violation (*Rizzo*, 564 F2d 148). For the third circuit court, the analogy is the "business necessity" test that is applied in Title VII employment discrimination cases. The *Rizzo* case formulated the following test: "a justification must serve, in theory and practice, *a legitimate, bona fide interest* of the Title VIII defendant, and the defendant must *show that no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact*" (9).

Under Title VII of the Civil Rights Act of 1991, unlawful disparate impact exists when (*a*) a plaintiff demonstrates that an employment practice results in a disparate impact of a protected group, and (*b*) the defendant is unable to demonstrate that the employment practice is required by "business necessity." Under Title VII, unlike Title VI, the burden of proof is put on the defendant. Therefore, under the *Rizzo* case, one focuses on the "consequences" of the embodied government's decision instead of the "motivation" of that decision, as observed in the land use cases discussed earlier.

Coalition of Concerned Citizens Against I-670 v. Damian

In October 1984, the Coalition of Concerned Citizens Against I-670 brought action against city, state, and federal officials claiming that (*a*) defendants failed to involve the public in the decision process that concerned the need of the freeway, thereby violating federal requirements under the Federal-Aid Highway Act; and (*b*) defendants failed to account for the disproportionate impact of I-670 on minority citizens of Columbus, Ohio, thus violating Title VI of the Civil Rights Act of 1964. The plaintiff sought an injunction to stop the construction of I-670 until further public hearings were held. The district court held that although the plaintiff made a prima facie case of the proposed freeway's disparate effect on racial minorities, the officials met their burden of justifying the location of the proposed freeway.

The proposed project involved the extension of I-670 (about 5.7 miles) that would connect the Columbus, Ohio, Innerbelt and I-71, a north-to-south route that runs through Columbus, with I-270, the Columbus Outerbelt. The origination of the proposed I-670 extension was located in the northeast quadrant of Columbus, near the existing Fort Hayes Interchange. From this interchange, I-670 was proposed to run east following Penn Central Railroad, an abandoned railroad line, and also to run in an area that was more than 90 percent black. However, there was minimal displacement of the residents in this area because of the available right-of-way from the abandoned railroad line. I-670 was then proposed to run north to follow Alum Creek and to turn northeast to follow US-62. About 85 percent of the displacees in these areas were members of racial minorities. The proposed I-670 was then to join I-270, the Columbus Outerbelt. Also a major interchange was being proposed in this area to provide access to Port Columbus Airport. About 20 percent of the residents that would be displaced in this area were minorities.

To comply with the regulations that address economic, social, and environmental impacts, the Ohio Department of Transportation (ODOT) published an "action plan" that was approved by FHWA on February 19, 1974, along with procedures for the plan that were also approved on July 29, 1977. The ODOT development projects were divided into the following phases:

- Phase I—systems planning phase,
- Phase II—location phase,
- Phase III—design phase, and
- Phase IV—construction phase.

The Mid-Ohio Regional Planning Commission (MORPC) is the federally designated metropolitan planning organization (MPO) for the central Ohio area and has held this role since the conception of I-670. MORPC includes an executive committee that consists of 10 members (51 percent of the membership are elected officials, one member is appointed to represent minority, disadvantaged, and low-income groups) who ultimately hold authority within MORPC. The policy committee, an expansion of the executive committee, also includes representatives from the Transit Authority and from state and federal highway departments.

Two additional committees, the Transportation Advisory Committee and the Citizens' Advisory Committee (CAC), periodically review staff proposals and reports before they are referred to the policy and executive committees. CAC includes individuals from government, neighborhood organizations, civil groups, organized professional interest groups, and low-income and minority groups. Membership in CAC is open to all interested parties. However, there is no formal process by which applicants are solicited. To become a member, an individual or an organization must hear of the existence of CAC and its activities through the media and take the initiative to join.

During the planning process, the need for transportation improvements in the northeast quadrant of Columbus was never disputed. The planning process for the area is outlined in Table 1.

As was similar in earlier cases, the burden of proof in this case was on the plaintiff to show that the federally aided administrative action had a disproportionate effect on racial minorities. The plaintiff here was able to show a disproportionate impact—the extension of I-670 would extend through neighborhoods that were 50 to 90 percent minorities. However, the defendants were able to show that their actions in determining the location of the proposed project were based on nondiscriminatory reasons, specifically, the fact that the proposed project had less impact on minorities than the construction of an alternative location.

Upon examining this case, the court raised several interesting observations. In the June 1974 systems analysis study that compared I-670 with the 17th

TABLE 1 Planning Process for the Proposed Freeway Project

1957	Columbus City Planning Commission proposed in its annual report a freeway connecting Fort Hayes Interchange to the Port Columbus Airport. Also proposed an expressway connection between I-71 and airport along 17th Avenue (17th Avenue Freeway).
1961	Franklin County Commissioners authorized engineering study of feasibility of 17th Avenue Freeway.
1967	Portion of 17th Avenue Freeway ready for construction.
1972	MORPC completed the Franklin County Regional Transportation Plan that included the 17th Avenue Freeway and Leonard, Maryland, and Sunbury Avenues as an artery to northeast corridor, meeting transportation needs up to 1990.
1973	FHWA, ODOT, City of Columbus, and MORPC met and discussed how "action plan" requirements will affect 17th Avenue Freeway. Concluded that a corridor location alternative report should be prepared.
3/1974	An extension of I-670 as an alternative to 17th Avenue Freeway proposed publicly by City of Columbus due to growing concern by government entities and local organizations of the impacts from 17th Avenue Freeway on other local streets and environmental concerns, as well as the availability of right-of-way from abandoned railways.
6/1974	City, MORPC, ODOT, and FHWA met to determine methodologies for a systems analysis to compare I-670 and 17th Avenue Freeway as solution to northeast corridor. Study looked at five alternatives, including a no-build alternative. Conclusion of study—build I-670.
6/1976	I-670 project entered Phase II-Location phase. I-670 coordinating committee, consisting of FHWA, ODOT, City of Columbus, and project consultants, had primary responsibility for this phase. During this phase, location of I-670 was selected according to social, economic, and environmental impacts of various alternatives, using the no-build alternative as the point of comparison for defining beneficial and adverse impacts.
1977	Due to significant public opposition, Columbus City Council authorized funds for the restudy of mass transit alternatives to the construction of I-670, "Northeast Corridor Transit Alternative Study to I-670." Study concluded that the light rail alternative to the freeway would not provide sufficient ridership.
10/1980	Final environmental impact statement completed after public hearing and solicitation of comments. Sixteen different "reasonable alternatives" were considered.

Avenue Freeway, the court noted that, with the exception of the number of businesses and residences displaced, there was minimal discussion of the social impacts of the alternatives that were studied, and there was specifically no discussion of the impact on racial groups and on other minority groups of the various alternatives (*10*). The MORPC report noted several primary reasons for the selection of I-670 as an alternative to the 17th Avenue Freeway: (*a*) I-670 would minimize the taking of homes as compared with the 17th Avenue Freeway; (*b*) I-670 would allow use of an abandoned railroad track, minimizing acquisition of right-of-way; and (*c*) I-670 would create opportunities for industrial and commercial development in the area.

The final environmental impact statement noted that reasonable alternatives were evaluated according to four categories of impacts: socioeconomic and land use, environmental, transportation, and cost. Within each category, several variables were assessed, with a total of 37 being considered. Specifically, under the first category, the effect of different freeway locations on community cohesion, accessibility, and availability of services and their impact on disadvantaged groups were considered. The court noted that it was clear during this stage that public involvement was substantial (*10*). Efforts that involved the public include the following:

- A citizens advisory committee was established to receive public comments and to provide information to the public; met at least 16 times to discuss the project.
- A number of public information meetings were held.
- The I-670 newsletter was published with a mailing list of 2,000 people.
- Radio talk show participation by public officials was developed.

Finally, the court concluded from the record that the restudy performed in 1977 showed that the coalition's alternative solution to the acknowledged transportation problem in the northeast quadrant of the city was considered in good faith and was rejected as inadequate (*10*). The court also noted that the restudy was unique and was not directly comparable to the results of the other I-670 studies (*10*).

Despite the observations that were raised by the court, the merits of the case were judged on the following two claims: (*a*) violation of regulations under the Federal-Aid Highway Act, and (*b*) violation of Title VI of the Civil Rights Act.

Before the court judged the merits of the case, the limits of their review, as observed by the court, were outlined. Specifically, the court stated that unless it could conclude from the whole record of this case that the defendants acted arbitrarily, capriciously, or otherwise not in accordance with the law, or that the defendant's actions failed to meet statutory, procedural, or constitutional requirements, the agency's actions must be upheld (*10*). The court was not to conduct a *de novo* review or to substitute that the defendants had taken a "hard look" at the impacts that the law mandates to be considered; therefore, its inquiry was over (*10*). With this scope of review in mind, the court judged the merits of the two claims.

Under the Federal-Aid Highway Act, the plaintiffs challenged compliance with regulations promulgated under Sections 128 and 129. Under Section 109(h), Congress directed the secretary of transportation to promulgate regulations "designed to assure that possible adverse economic, social, and environmental effects relating to any proposed project...have been fully considered in developing such project." (*10*) Specifically, the plaintiffs argued that the requirements of public involvement in the planning and development process within these regulations were violated under 23 CFR 795. The court concluded that CAC was not sufficient in complying with the public involvement requirements of Part 795, citing the following observations: (*a*) no attempt was made to solicit involvement in CAC of persons representing neighborhood groups in the affected area; (*b*) the membership of CAC was heavily weighted in favor of business and governmental groups; and (*c*) the proposed analysis of the I-670 and 17th Avenue Freeway systems focused very little on social impacts and impacts on racial minorities (*10*).

The court therefore concluded that the plaintiff had carried the burden with respect to its claim that the defendants' provision for public input during the systems planning phase of the I-670 project was inadequate to meet the regulations under Section 109(h). Under Section 128 every state highway department is to offer certification to the secretary of transportation that it has held public hearings, or has afforded the opportunity for such hearings. State highway departments must also consider the economic and social effects of each proposed project's location, its impact on the environment, and its consistency with the goals and objectives of such urban planning as has been promulgated by the community when plans are submitted for a Federal-Aid Highway Project that involves the bypassing of or going through any city, town, or village (*10*).

In this case, the plaintiff did not carry its burden with respect to Section 128. The court pointed out that the proper issue is whether public hearings are conducted "to assure consideration of (social, economic and environmental impacts) at a point that is meaningful. That is, the planners are permitted to have a specific proposal and even to be promoting it. Unless there is a specific proposal to be discussed, it is difficult to see how meaningful public meetings could be held, for there would be no focus. However, planners are not permitted to have closed their minds to the social, economic and environmental impacts of their proposal. The law requires good faith objectivity, not subjective impartiality. The purpose of public hearings is to bring the planners face-to-face with public reaction to their proposals and projects." (*10*)

In the second claim raised by the plaintiff, violation of Title VI of the Civil Rights Act, the court concluded that the defendants had met their burden of justifying the location of I-670 with legitimate nondiscriminatory reasons for the location. The defendants specifically stated that the construction of I-670 would have substantially less impact on racial minorities than would the construction of a freeway along the 17th Avenue Freeway (10). The court also recognized that the preferred alternative was selected to minimize impacts on minority neighborhoods. The alternative was aligned along Alum Creek and the existing railroad right-of-way to avoid dividing neighborhoods and to minimize displacements of persons and businesses (*10*).

As shown in the previous Title VI cases, plaintiffs have the initial burden of proof of showing disparate impact. Once the plaintiffs demonstrate a prima facie case, the defendants have the burden of justifying their actions. Unlike the previous cases, the court in this case noted that FHWA regulations, 23 CFR 710.405, provide that discriminatory effect can be a violation, even in cases in which there is no discriminatory purpose. Although the plaintiff in this case showed discriminatory effect because the location of the proposed I-670 would have had a disparate impact on minorities, the court was quick to point out that the defendants are not prohibited from locating a highway to an area where disparate impacts on minorities will occur; Title VI only prohibits officials from taking actions with disparate impacts without adequate justification. The court in this case believed that the defendant had adequate justification.

From these conclusions, the court determined that, although the defendants did violate Section 109(h) of the Federal-Aid Highway Act, the defendants did not violate the law in all other respects. Therefore, violation of Section 109(h) alone does not justify injunctive relief for the plaintiff; instead the court must balance the equities of the parties and the interest of the public (*10*).

Summary of Cases

What can be learned from these cases? Table 2 summarizes the issues and the concluding points of each case. The following information constitutes important facts and points to remember in distinguishing the cases from each other.

Yick Wo v. Hopkins

- First discrimination case in the United States in which the defendant was found to be in violation of the Equal Protection Clause under the Fourteenth Amendment of the U.S. Constitution.
- The totality of the facts will determine whether the disparate impact rises to the level of discriminatory intent.

Washington v. Davis

- Disproportionate impact was shown by the plaintiffs.
- Under the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution, the burden of proof is on the plaintiff to show discriminatory intent.
- A purpose to discriminate (intentional discrimination) must be present to show a violation of the Equal Protection Clause under the Fourteenth Amendment of the U.S. Constitution.
- Disproportionate impact is not irrelevant in cases that involve Constitution-based claims; however, the disproportionate impact must be shown to have been applied so invidiously so as to discriminate on the basis of race that it rises to the level shown in *Yick Wo v. Hopkins.*
- The totality of the facts will determine whether the disparate impact rises to the level of discriminatory intent.

Village of Arlington Heights v. Metropolitan Housing Development Corporation, 97 SCt 555 (1977)

- Disproportionate impact was shown by the plaintiffs.
- Under the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution, burden of proof is on the plaintiff to show discriminatory intent.
- A purpose to discriminate (intentional discrimination) must be present to show a violation of the Equal Protection Clause under the Fourteenth Amendment of the U.S. Constitution.
- Disparate impact alone is not the determining factor for showing intentional discrimination or purpose.
- Six factors must be evaluated to show discriminatory intent was a motivating factor:
  - Impact of official action,
  - Historical background of the decision,
  - Events leading up to the challenged decision,
  - Departures from the normal procedural sequence,
  - Substantive departures, and
  - Legislative or administrative history.

Village of Arlington Heights v. Metropolitan Housing Development Corporation, 558 F2d 1283 (1977)

- Discriminatory effect was shown by the plaintiff.
- Violation of Title VIII of the Civil Rights Act of 1968 (Fair Housing Act) can be established by showing discriminatory effect without showing discriminatory intent.
- Burden of proof shifts to defendant to demonstrate that nondiscriminatory reasons justify action.
- Four factors must be evaluated to show discriminatory intent was a motivating factor:
  - Strength of plaintiff's showing discriminatory effect.
  - Some evidence of discriminatory intent, though not enough to satisfy the constitutional standard of Washington.
  - Defendant's interest in taking the action complained of.
  - Does the plaintiff seek to compel the defendant to affirmatively provide housing for members of minority groups or merely to restrain the defendant from interfering with individual property owners who wish to provide such housing?

East Bibb Twiggs Neighborhood Association v. Macon-Bibb County Planning & Zoning Commission; Margaret Bean v. Southwestern Waste Management Corporation; and R.I.S.E., Inc. v. Robert A. Kay, Jr.

- Discriminatory impact was shown by the plaintiff.
- Under the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution, burden of proof is on the plaintiff to show discriminatory intent.
- A purpose to discriminate (intentional discrimination) must be present to show a violation of the Equal Protection Clause under the Fourteenth Amendment of the U.S. Constitution.
- Disparate impact alone is not the determining factor for showing intentional discrimination or purpose.

TABLE 2 Case Summary

Case	*For*	*Issues*	*Prima Facie Case*	*Burden of Proof*
Supreme Court Cases				
Washington v. Davis (1976)	Defendant	Police officer recruiting practices discriminatory under the Equal Protection Clause of the 14th Amendment	Discriminatory intent from totality of relevant facts	Plaintiff (discriminatory intent)
Arlington Heights (1977)	Defendant	Rezoning denial of tract of land to build racially integrated low & moderate housing racially discriminatory under the Equal Protection Clause of the 14th Amendment	Discriminatory intent from totality of six established factors	Plaintiff (discriminatory intent)
Court of Appeals Case				
Arlington Heights Remanded (1977)	Plaintiff	Supreme Court case remanded to determine if rezoning denial of tract of land to build racially integrated low and moderate housing racially discriminatory under Title VIII of the Civil Rights Act of 1968 (Fair Housing Act)	Discriminatory effect from four critical factors	Plaintiff (discriminatory effect)
Land Use Cases				
East Bibb Twiggs (1989)	Defendant	Development of private landfill in mostly black census tract racially motivated	Six factors of Arlington Heights (Supreme Court)	Plaintiff (discriminatory intent)
Bean (1979)	Defendant	Development of a solid waste facility racially motivated	Six factors of Arlington Heights (Supreme Court)	Plaintiff (discriminatory intent)
R.I.S.E. (1991)	Defendant	Development of a regional landfill created a racially disparate impact	Six factors of Arlington Heights (Supreme Court)	Plaintiff (discriminatory intent)
Transportation Cases				
Keith (1988)	Plaintiff	Displacement of minority and low-income residents by freeway construction resulted in racial discrimination under Title VIII of the Civil Rights Acts of 1968 (Fair Housing Act)	Four factors of Arlington Heights (Court of Appeals)	Defendant, once prima facie case shown
Coalition of Concerned Citizens (1984)	Defendant	Extension of I-670 had disproportionate impact on minority citizens. Systems planning phase of project violated public involvement requirements under Federal-Aid Highway Act & Title VII of the Civil Rights Act	Disparate impact shown through statistics	Defendant, once prima facie case shown

• Six factors in *Arlington* were used to show that the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution was not violated.

• Similar factors (2) that were used in *Arlington* were also used to show that the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution was not violated in *Bean.* These factors are pattern or practice and historical placement.

Ralph W. Keith v. Volpe

• Discriminatory effect was shown by the plaintiff.

• Violation of Title VIII of the Civil Rights Act of 1968 (Fair Housing Act) can be established by showing discriminatory effect without showing discriminatory intent.

• Burden of proof shifts to defendant to demonstrate nondiscriminatory reasons justify action.

• Under the Fair Housing Act, circuit courts that have addressed this issue all agree that the phrase "because of race" does not require proof of discriminatory intent; discriminatory effect is sufficient to show violation.

• Different standard used by the circuit courts in proving prima facie case that involves discriminatory effect. In the third and eighth circuits, under Title VIII, proof of discriminatory effect alone is sufficient to establish a prima facie case. Seventh and fourth circuits use a four-factor analysis, as observed in *Arlington*, to establish a prima facie case.

• Different standards were also used by the circuit courts for defendants to rebut prima facie cases. The eighth circuit uses a "compelling interest" test in which defendants must show that conduct was necessary to promote a compelling government interest. The third circuit uses a "business necessity" test in which defendants must show that

  – Justification served a legitimate bona fide interest, and
  – No alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact.

Coalition of Concerned Citizens Against I-670 v. Damian

• Plaintiffs made a prima facie case of disparate effect under Title VI of the Civil Rights Act.

• Defendants met their burden of justifying their action under Title VI of the Civil Rights Act. Defendants showed that their actions were based on nondiscriminatory reasons.

• There was substantial involvement with the public (i.e., a citizen advisory committee, several public information meetings, a newsletter, and radio talk show participation.

• Court noted that FHWA regulations (23 CFR 710.405) provide that discriminatory effect can be a violation even in cases in which there is no discriminatory purpose (intent). Defendants are not prohibited from locating highways where disparate impact exists; however, adequate justification must be shown under Title VI.

• Although the defendants did violate the Federal-Aid Highway Act, they did not violate the law in all other respects. Violation of the Federal-Aid Highway Act alone does not justify injunctive relief for plaintiffs; the court must balance equities.

All these cases that were analyzed showed a prima facie case of disparate impact by the plaintiffs. The land use cases looked to the Supreme Court cases of *Washington* and *Arlington* and required the plaintiffs to provide a showing of discriminatory intent or purpose by the defendant. However, the two transportation cases paralleled the Title VII of the Civil Rights Act of 1964 cases in that, once a prima facie case is established, defendants are required to justify their actions that led to the disparate impact.

Planning for the Future

NEPA

Does the fact that NEPA provides very limited case law on environmental justice mean that we should not take a hard look at environmental justice during this stage? Regardless of whether a minority or low-income population is within the study project area that is involved, environmental justice and discrimination claims have the potential to surface when any type of social impact, community impact, or relocation impact is inevitable. This is evident in the cases that have been reviewed here. Perhaps NEPA will not be the vehicle to be used to enjoin the officials whose actions have resulted in a disparate impact, but the Civil Rights Act and the Fair Housing Act will be used.

It is clear that the term "environment" mentioned in NEPA, CEQ, and other executive orders does include both the human environment and the natural environment. Transportation professionals have an obligation to balance these impacts from both environments and to ensure that once a disparate impact exists, it is without discriminatory intent.

Also defined in NEPA are secondary and cumulative impacts. Secondary impacts are caused by an action and occur later in time or are farther removed in distance but are still reasonably foreseeable (*11*).

Examples of secondary impacts from transportation-related projects include land use changes, water quality, floodplains, population changes, community impacts, and economic impacts. Cumulative impacts result from the incremental consequences of an action when added to other past and reasonably foreseeable future actions (*12*). These impacts are less defined than secondary impacts; however, examples often overlap secondary impact examples.

NEPA requires transportation professionals to examine "direct effects" as well as "indeterminate effects" that are sometimes not easily recognizable (i.e., cumulative and secondary impacts). Just as environmental justice has been a term with which we have struggled, cumulative and secondary impacts are also terms with which transportation professionals have grappled when evaluating NEPA documents. We do not lack in the development of techniques for measuring and analyzing direct impacts. But techniques for measuring the indirect impacts, such as cumulative and secondary impacts and discriminatory impacts (i.e., environmental justice), are lacking.

Ralph W. Keith v. Volpe, 858 F2d 467 (1988), showed that it was the "consequences" of the government's decision instead of the "motivation." Therefore, the ramifications of disparate impacts as cumulative or secondary impacts, although difficult to evaluate, must be determined beyond their immediate effects on the existing environment. Several factors to consider when evaluating disparate impacts as possible secondary or cumulative impacts are as follows:

- Use an interdisciplinary approach (social, economic, and environmental effects);
- Look at the impacts as a cause and effect relationship;
- Look at the impacts from a functional relationship to the larger system; and
- Evaluate secondary and cumulative impacts as early as possible in the planning stage, thereby allowing more information to be accessible to those who evaluate and analyze the impacts at the project level.

Planning

The following seven broad areas should be considered in the planning process under the Transportation Equity Act for the 21st Century (TEA-21):

1. Support the economic vitality of the metropolitan area, especially by enabling global competitiveness, productivity, and efficiency;
2. Increase the safety and security of the transportation system for motorized and nonmotorized users;
3. Increase the accessibility and mobility options that are available to people and for freight;
4. Protect and enhance the environment, promote energy conservation, and improve quality of life;
5. Enhance the integration and the connectivity of the transportation system, across and between modes, for people and freight;
6. Promote efficient system management and operation; and
7. Emphasize the preservation of the existing transportation system.

Can environmental justice concerns be incorporated into these seven planning factors? Yes, environmental justice issues can and should be incorporated into these seven planning factors under TEA-21. Governmental agencies and organizations that are involved in decision making that has any effect on society and communities should use existing information and data and new information and data to the extent possible so as to evaluate the effects their short-term and long-term plans have on society and communities. Techniques to consider when incorporating disparate impact analysis into short- and long-term planning processes should include the following:

- Involve the public extensively through public meetings, workshops, newsletters, questionnaires, surveys, personal contact, radio talk shows, to name a few;
- Conduct meetings in locations that are accessible to the minority and low-income communities;
- Use a multilingual professional in nonspeaking communities;
- Document your findings;
- Keep a historic record of your findings;
- Use a variety of sources to gather your data (public involvement, MPOs, DOTs, local agencies or organizations, labor departments or other state agencies, libraries, local historical societies, census bureau statistics and publications, tax records, real estate surveys, to name of few); and
- Consider the development of a clearinghouse at the regional, statewide, or tristate level.

One of the more difficult aspects during the planning process may be the encouragement of community participation when dealing with environmental justice. The demographics and the population characteristics are a good starting point. The economic and social history of the community, as well as the physical attributes, is also important. Once these characteristics are determined, factors such as who to involve in the community and where to meet in the community become clearer.

If environmental justice has already been raised as a concern at a project level or a planning level, address the concerns immediately. This may require additional

public involvement. Document the historical findings of all public and community meetings. Documentation was shown to be an important tool in *Coalition of Concerned Citizens Against I-670 v. Damian*, 608 F. Supp. 110 (S.D. Ohio, 1984).

Gaps

Although *Washington* and *Arlington* showed disparate impact but could not show that governmental actions rose to the level of discriminatory intent, as in *Yick Wo v. Hopkins*, 6 SCt 1064 (1886), what level of action will it take to prove discriminatory intent? Certainly the "totality" of the facts will be important to keep in mind and will include, at a minimum, public involvement, impact of the action(s), historical background information, sequence of events, departures from normal procedures, substantive departures, legislative or administrative history, and so on. This and other information are the same information transportation professionals should be guided by in their planning phases (short term and long term) and at the project-specific level. Is this an area of the law in which a gap exists? Perhaps we won't have more definitive definitions and answers without more case law from which to draw.

References

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3. *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 97 SCt 555 (1977).
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9. *Ralph W. Keith v. Volpe*, 858 F2d 467 (9th Cir., 1988).
10. *Coalition of Concerned Citizens Against I-670 v. Damian*, 608 F. Supp. 110 (S.D. Ohio, 1984).
11. 40 CFR 1508.8.
12. 40 CFR 1508.7.