ENVIRONMENTAL INJUSTICE*

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In the 1960s and 1970s, the environmental movement, and much of the legislation that was passed as a result of this movement, dealt primarily with issues related to the preservation of species and the conservation of our natural resources. Environmental activists were occupied with efforts to save the whales and preserve our trees. However, the Love Canal tragedy made it clear that legislation to address issues related to the regulation and disposal of toxic contaminants and pollutants was desperately needed. Consequently, in the 1980s Congress enacted comprehensive legislation to clean up contaminated sites, and to prevent further contamination by regulating the handling, treatment, and disposal of solid and hazardous wastes. Included in this legislation was the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, also known as the Superfund law),[1] which addressed the problems of contaminated sites by means of an expansive liability scheme intended to reach into the pockets of as many parties as possible in order to fund site clean-ups. Congress also passed the Resource Conservation and Recovery Act (RCRA),[2] which provides a cradle-to-grave regulatory framework for the handling, treatment, and disposal of hazardous wastes; this act includes regulations for the siting of solid and hazardous waste incinerators and other waste disposal facilities.

Over the years, much of the debate surrounding the implementation of CERCLA and RCRA has centered on the statutes' ineffectiveness in achieving their stated purposes. In particular, CERCLA has been criticized for creating a system whereby attorneys extract millions of dollars in legal fees from their clients, while the Superfund sites remain contaminated. Admittedly, much of this criticism is well deserved. Today, however, I

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1. Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675 (1988).

2. Resource Conversation and Recovery Act, 42 U.S.C. §§ 6901-6922k (1988).

do not intend to add to the discussion of whether our environmental laws are realizing their intended purposes. Rather, I want to frame the discussion in terms of social justice and consider an issue that has been largely ignored by the legal profession: the inequitable distribution of environmental risks in our society.

I will highlight, in general terms, the reasons why minority communities have shouldered, and continue to shoulder, a disproportionate burden of the contaminated air, water and soil released into our environment. In addition, I will discuss specific legal theories that can be used to challenge decisions to place risk-laden projects in our communities. I should note that the issues and suggestions I will discuss in relation to the causes of and remedies for environmental injustice are by no means exhaustive. I raise these issues only as a starting point and to encourage you to conduct further research—to develop creative legal theories toward assisting our communities in the struggle for environmental justice.

To begin, it should come as no surprise that our communities have traditionally been the choice locations for the placement of pollution generating industry. As our society is faced with ever-increasing amounts of solid and hazardous wastes, our communities are often used as repositories for the treatment and disposal of these wastes. This comes as no surprise because environmental injustice is a component of greater social injustice, characterized by racism and discrimination which results in inadequate education, substandard housing, and underemployment for our communities. Environmental injustice thrives in this system, where poorer, under-educated, and less informed communities lack the economic and political resources to organize opposition to the placement of undesirable and potentially dangerous projects in their neighborhoods.

In a broad sense, environmental injustice is the direct result of the ability of *empowered* communities to resist the placement of environmentally hazardous projects in their backyards. These communities, which are generally non-minority, rely on their resources to oppose undesirable land uses in their neighborhoods by accessing the political system and, when necessary, by retaining legal counsel. Minority communities, on the other hand, generally lack the education to understand siting procedures, the resources to retain counsel, and the political access to lobby effectively against a proposed project. The end result is that certain communities derive the benefits of industry, while other communities consistently shoulder its burdens.

Environmental injustice, however, is more than a consequence of the "haves" literally dumping on the "have-nots."

Although the "haves" versus "have-nots" analysis, in some ways defines the problem aptly, a better understanding of the issues requires an exploration of other factors which lead to environmental injustice. In my opinion, these factors are a direct consequence of existing social inequalities and explain why our communities become host locations for projects that are harmful to the environment.

The most damaging and perhaps the most obvious causal factor is that our communities do not have access to the decision-making process for the siting of risk-laden projects. The process is inherently political and influenced by organized coalitions resisting the placement of the project in their respective neighborhoods. Participation in the process enables communities to control, if not dictate, the type and quality of land uses in their neighborhoods. Conversely, non-participating communities are vulnerable and more suspectable to hosting such projects.

The importance of public participation at the local level is recognized by the laws and regulations for the placement of projects harmful to the environment, such as incinerators and landfills. These regulations provide for public participation and often require environmental impact reports. It is unfair, however, to expect our communities to be active participants in a political process which, at best, has been the source of neglect, and at worst, has been a source of repression. Disenfranchised communities will not look to the political process for solutions. Moreover, a significant and growing sector of our communities consists of recent immigrants who do not speak English and cannot understand how to use the political process to protect their own backyards.

Our lack of participation in the decision-making process is also harmful because it fosters the misconception that our communities are not concerned—or as concerned—about the quality of their environment. Our preoccupations are thought to be limited to dodging bullets and putting food on the table. This is an offensive supposition, which is derived from a superficial analysis of the needs and problems of our communities. More importantly, the misconception that we are indifferent about the welfare of our environment is dangerous conjecture because it serves as the unstated basis for placing a risk-laden facility in our communities. In fact, our communities are very concerned about the contamination of our water, air, and soils. The lack of resources which affects our ability to voice our concerns effectively should not be misinterpreted as apathy for the quality of our environment.

Another factor advancing environmental injustice is the absence of legal expertise within our community to lead the fight against the placement of dangerous facilities in our neighborhoods. Given the sub-standard education provided to our communities and the ensuing limited opportunities to attend graduate school, it is not surprising that there are few minorities in the legal profession. Moreover, the activists who graduated from law school in the '60s and '70s were interested in political empowerment, social justice, jobs, education, housing and other civil rights issues. Environmental law, and the environmental movement in general, was perceived as a middle- or upper-class cause, advanced by Anglos who demonstrated marginal concern for issues related to environmental injustice. These early environmentalists were more concerned with resource and species preservation and did not see the civil rights movement as part of their agenda.

Most recently, the environmental movement has achieved greater urban appeal and we are now seeing minority and non-minority activists use their legal skills to challenge decisions that place risk-laden projects in our communities. Unfortunately, much damage has already been done, as exemplified by the existence of pollution generating industry, incinerators, landfills and other noxious facilities in and adjacent to our communities.

State and local governments are also to blame for the inequitable distribution of environmental burdens and risks. The permitting process for the siting of hazardous waste disposal facilities contains inadequate safeguards to ensure that poor communities do not become the dumping grounds for toxic wastes. Public notice requirements assume that the community under consideration will resort to the process. This is too much to expect from communities that are disenfranchised, mistrust government, and often do not speak English. Moreover, I surmise that the absence of policy directives to deal with environmental injustice issues is directly related to the absence of minority attorneys and managers at high level positions within the federal and state EPA [Environmental Protection Agency] who can offer meaningful insight into this problem.

Local government officials compound these problems by accepting hazardous projects in order to create jobs in the community. These officials buy into the "jobs versus environment" argument, which preys on the need for jobs, yet serves only to exacerbate existing inequalities by requiring that our communities sacrifice their concern for the environment in order to pay the rent and put food on the table. The willingness by our local elected officials to allow the siting of actual and potentially dan-

gerous facilities in our communities to offer employment opportunities is a self-interested, myopic, short-term solution that fails to account for the long-term health risks emanating from these facilities.

The aforementioned causes, by no means all-encompassing, are inter-related and collectively promote an already exploitive system in which our communities disproportionately bear the risks associated with pollution generating industry and the treatment and disposal of toxic wastes. Our failure to participate in the decision-making process, compounded by the absence of legal expertise within our community to fight proposed hazardous projects and the lack of governmental safeguards, are powerful incentives for developers or companies proposing to construct environmentally hazardous facilities in our communities. We must bear in mind that these companies are motivated by profits and accordingly are more inclined to build where the land is less expensive and resistance is minimal.

One solution is for our community to exert greater influence in the political process. By educating ourselves about the decision-making process for the siting of hazardous facilities, we can influence land-use decisions. Moreover, becoming involved in the political arena can lead to the enactment of legislation that will protect our communities against the present disproportionate burden it carries with regard to environmental hazards. Furthermore, the government must provide legislative safeguards which expressly take into account the likelihood that minority communities will not participate in the local decision-making process.

Political empowerment, however, is a gradual process; while we have made significant strides, we need to address environmental injustice issues on fronts which may provide more immediate solutions. To this end, we must look to the judicial forum to utilize existing environmental laws and constitutional theories.

A possible remedy involves the California Environmental Quality Act (CEQA),[3] whose primary purpose is to inform decision-makers and the public of the environmental effects of a proposed project. CEQA requires an Environmental Impact Report (EIR), which assesses the impact of a proposed project on the surrounding environment. Traditionally, EIRs have been limited to evaluating environmental effects and have not included an analysis of societal effects. However, CEQA's implementing regulations are expansive and may require that issues related to environmental inequalities be considered and addressed in the assessment of the environmental impact of a proposed project.

3. Cal. Public Resources Code §§ 21000-21005 (1987).

Moreover, EIRs are intended to inform the public of the potential risks associated with a proposed project. Thus, in immigrant communities where many of the residents do not speak English, we must argue that a translation of the EIR is required to meet its stated purpose.

This approach to CEQA was advanced by the California Rural Legal Assistance Foundation (CRLA) in a challenge to a proposed hazardous waste incinerator in Kettleman City, California, a community of rural farmworkers. In a lawsuit, aptly titled *El Pueblo Para El Agua y Aire Limpia v. County of King,*[4] CRLA challenged the proposed project on the grounds that the County's EIR was inadequate for its failure to account for the societal effects of the waste incinerator and to translate the EIR documents into Spanish. The trial court judge agreed and overturned the County's approval of the incinerator. The case is on appeal.[5]

In addition, the California Health & Safety Code[6] and the implementing regulations for RCRA[7] provide avenues for community involvement in the siting process of hazardous waste facilities. Failure to adhere to these statutorily mandated public information requirements provides another basis for challenging decisions to place risk-laden projects in our communities.

Legal recourse can also be found in the Constitution which ostensibly guarantees all people equal protection under the law. It can and has been argued that the disproportionate allocation of environmental hazards in our communities is discriminatory, and thus a violation of the Constitution. This argument, however, has been relatively unsuccessful because of the Supreme Court's requirement that aggrieved plaintiffs prove that the challenged act was racially motivated.[8] Despite these rulings, however, challenges to siting decisions based on the Equal Protection Clause should continue to be advanced. The Clinton Administration may give us hope that federal judges may see merit in our arguments.

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4. No. C91-2083 (N.D. Cal. July 8, 1991) (complaint filed).

5. The appeal was dismissed on Sept. 9, 1993, when the application to construct the incinerator was dropped.

6. *See, e.g.*, Cal. Health and Safety Code, §§ 25199-25199.14 (1986).

7. Resource Conservation and Recovery Act, 40 C.F.R. § 271.14(v)-(aa).

8. *See, e.g.*, Bean v. Southwestern Waste Management Operation, 482 F. Supp. 673 (S.D. Tex. 1979), *aff'd*, 782 F.2d 1038 (1986) (plaintiffs did not establish substantial likelihood of proving that decision to grant permit to build solid waste facility was racially motivated); East Bibb Twiggs Neighborhood Association v. Macon-Bibb County Planning and Zoning Commission, 896 F.2d 1264 (1989) (plaintiffs could not prove improper racial motive by defendant in equal protection challenge to siting decision).

These legal remedies are intended to serve only as starting points and encouragement to conduct more extensive research. Other legal remedies may be found in state zoning laws, federal civil rights laws, toxic tort laws, state and U.S. Constitutions, as well as other federal and state environmental laws. We must look for innovative legal theories that can be used effectively to challenge the placement of environmental hazards in our neighborhoods. Moreover, particular attention should be devoted to issues dealing with the siting of solid and hazardous waste landfills, incinerators and other noxious facilities.

In closing, I want to highlight the importance of addressing environmental injustice issues on the political front. The most effective weapon to deter the placement of environmental hazards in our communities lies in the legislative arena. The strength of this weapon depends on the quality of representatives elected. In this regard, I am optimistic about the challenge before us because we have new, energetic leadership within our communities—a leadership consisting of men and women who have the education, intelligence, and training to analyze and resolve complex social issues. Leaders, such as Congressman Xavier Becerra, Assemblywoman Marta Escutia, and Mayor Fidel Vargas, will lead the fight against environmental injustice at the legislative level. With their leadership, the aid of our emerging legal talent, and greater community activism, we may be on our way to transforming our communities into coalitions that can dictate the quality of life in our neighborhoods.