

Legal Strategies for Achieving Environmental Equity

Samara F. Swanston[†]

I. INTRODUCTION	337
II. STRATEGIES INVOLVING STATUTORY LIMITATIONS ON DISPROPORTIONATE ENVIRONMENTAL HEALTH EFFECTS	338
A. <i>Environmental Quality Review Statutes</i>	338
B. <i>Public Health Statutes</i>	340
III. ADDITIONAL STRATEGIES FOR COMMUNITY ACTION	342
IV. CONCLUSION	343

I. INTRODUCTION

Recent studies have shown that minorities are disproportionately exposed to pollutants and contaminants, including carcinogens, because unsafe land uses are sited more frequently in or near minority neighborhoods than in or near white neighborhoods.¹ The Commission for Racial Justice has identified the racial composition of a community as the single most significant predictor of the location of commercial hazardous waste facilities.² Given that hazardous waste sites pose serious human health risks,³ minority communities face greater health threats from environmental factors than do white communities.⁴ Without question, the risk to human health is greatest among: (1) individuals who live in urban areas with poor air quality and multiple waste sites or disposal activities; (2) individuals, such as farmworkers, who experience greater exposures to pesticides and live near waste disposal activities or polluting facilities; and (3) individuals who have been exposed to

[†] Adjunct Professor at the City University of New York Law School and Assistant Regional Counsel for the U.S. Environmental Protection Agency, Region II.

1. ROBERT D. BULLARD, *DUMPING IN DIXIE: RACE, CLASS AND ENVIRONMENTAL QUALITY* (1990); COMMISSION FOR RACIAL JUSTICE OF THE UNITED CHURCH OF CHRIST, *TOXIC WASTES AND RACE IN THE UNITED STATES* (1987); U.S. GEN. ACCOUNTING OFFICE, *SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES* (1983).

2. COMMISSION FOR RACIAL JUSTICE, *supra* note 1, at xii.

3. Not everyone accepts this as a given. A National Research Council Study, "Environmental Epidemiology: Public Health and Hazardous Wastes," concluded that the Environmental Protection Agency seriously underestimates the risk of these sites to surrounding communities. *Major New Study Questions EPA's Ability to Rank Superfund Site Risks*, *INSIDE E.P.A. WKLY. REP.*, Nov. 1, 1991, at 1, 8.

4. Air pollution, which is largely an urban phenomenon, also disproportionately increases health risks to minorities because most African Americans and Latinos live in urban communities. See U.S. ENV'T PROTECTION AGENCY, *2 ENVIRONMENTAL EQUITY: REDUCING RISKS FOR ALL COMMUNITIES* 10-11 (1992) (according to Clear Air Act standards, more minorities live in areas with unhealthy air than do whites) [hereinafter EPA, ENVIRONMENTAL EQUITY].

hazardous substances and are more biologically susceptible to environmentally induced disease or injury.⁵ Minorities are disproportionately represented in each of these groups.⁶

Courts have been reluctant to recognize a constitutional right to a healthy working and living environment. Legal challenges under the equal protection and due process clauses of the 14th Amendment or under federal anti-discrimination statutes have not been successful thus far, despite evidence of racially motivated decision making.⁷ As Robert D. Bullard notes, "waste facility siting practices that disproportionately affect minority communities . . . are not illegal"⁸ — at least not because they stem from racism.

Nevertheless, racially motivated environmental decisions that create disproportionate health risks in minority communities may well be illegal for other reasons. This paper explores several alternative legal strategies that can help reduce the disproportionate impact of facility siting and other decisions upon the health of minorities and the poor. Part II of this paper analyzes the provisions of environmental quality review statutes and public health statutes that communities can invoke to challenge siting decisions. Part III discusses additional proposals for community action, including citizen suits under several federal environmental statutes and community challenges to zoning laws. Legal strategies such as these may offer minority communities the best hope for achieving environmental equity.

II. STRATEGIES INVOLVING STATUTORY LIMITATIONS ON DISPROPORTIONATE ENVIRONMENTAL HEALTH EFFECTS

A. *Environmental Quality Review Statutes*

Twenty-four states have enacted environmental quality review statutes modeled on the National Environmental Policy Act (NEPA).⁹ These statutes

5. EPA, 1 ENVIRONMENTAL EQUITY, *supra* note 4, at 14-17.

6. *Id.* at 12-13.

7. *See, e.g.,* *Bean v. Southwestern Waste Management Corp.*, 482 F. Supp. 673, 680 (S.D. Tex. 1979) (preliminary injunction denied because plaintiffs did not establish substantial likelihood of proving that decision to grant waste site permit was racially motivated), *aff'd*, 782 F.2d 1038 (5th Cir. 1986); *East-Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb Planning and Zoning Comm'n*, 662 F. Supp. 1465, 1469 (M.D. Ga. 1987) (plaintiffs alleged that defendant's grant of waste landfill permit was motivated by race; court found that equal protection claim was properly before court); *East-Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb County Planning and Zoning Comm'n*, 706 F. Supp. 880, 884 (M.D. Ga. 1989) (same court held that evidence was insufficient to establish that defendant's decision was motivated by race), *aff'd* 896 F.2d 1264, 1267 (11th Cir. 1990); Wendy R. Brown, *Strategy Group Workshop: Law, in PROGRAM GUIDE TO THE FIRST NATIONAL PEOPLE OF COLOR ENVIRONMENTAL LEADERSHIP SUMMIT* 31, 32-33 (Commission for Racial Justice of the United Church of Christ ed., 1991).

8. Robert D. Bullard, *Race and Environmental Justice in the United States, in this issue*, at 319, 334.

9. Jeffrey T. Renz, *The Coming of Age of State Environmental Policy Acts*, 5 PUB. LAND L. REV. 31, 31 (1984).

provide a legal basis to challenge siting decisions and other practices. For example, a little-used statutory provision in New York's State Environmental Quality Review Act (SEQR)¹⁰ can be invoked to block facility siting in areas already inundated with industrial or solid waste. SEQR allows a local agency to designate a specific geographic area within its jurisdiction as a Critical Environmental Area (CEA) if the area is an exceptional "benefit or threat to human health."¹¹ Areas designated as CEAs are invariably unique natural settings that offer benefits to human health. Research discloses no instance in which an area inundated with noxious and unhealthy uses was designated as a CEA because it posed a threat to human health. Yet there is no reason why detrimentally affected minority communities cannot be designated as CEAs as well. According to SEQR, no agency may implement a decision likely to have a significant effect upon the environment in a CEA without preparing an environmental impact statement (EIS).¹² SEQR also mandates that agencies responsible for approving proposals concerning a CEA certify that the proposal minimizes adverse environmental effects and contains adequate mitigative measures.¹³ If an agency rejects a proposal, it must provide a statement of the facts and conclusions relied upon to support its decision.¹⁴

An EIS required under SEQR should consider the cumulative environmental impact of all local facilities permitted to discharge pollutants, including the one proposed. Relevant data can be obtained from the Toxic Release Inventory, an Environmental Protection Agency (EPA) database to which companies are required to disclose annually the nature and volume of toxic substances they release into the environment.

Case law requires that proper administrative reviews under SEQR and similar statutes take a "hard look" at the relevant environmental concerns and consequences.¹⁵ In reality, however, environmental impact statements rarely, if ever, consider cumulative or disproportionate health impacts. The failure to consider these factors may leave an EIS vulnerable to legal attack. In a 1986 case, *Chinese Staff Workers v. City of New York*, New York's Court of Appeals ruled that the city had not complied with SEQR's mandate because

10. N.Y. COMP. CODES R. & REGS. tit. 6, § 617 (1992).

11. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.4(h)(1)(i) (1992).

12. While NEPA does not contain an analogous provision allowing designation of CEAs, NEPA does mandate that its impact statements consider "adverse environmental effects." 42 U.S.C. § 4332(2)(C)(ii); 40 C.F.R. § 1508.8(b) (1991) (defining "effects" to include reasonably foreseeable health impacts).

13. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.9(c)(3), (4) (1992).

14. *Id.* § 617.9(d) (1992).

15. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n. 21 (1976) ("The only role for a court is to insure that the agency has taken a 'hard look' at environmental consequences."); *Maryland-Nat'l Capital Park & Planning Comm'n v. United States Postal Serv.*, 487 F.2d 1029, 1040 (D.C. Cir. 1973) (listing questions court may ask to determine if agency has offered convincing reasons why impact statements are insignificant); *Jackson v. New York Urban Dev. Corp.*, 67 N.Y.2d 400, 417 (1986) (courts may review agency procedures and records to determine whether agency identified relevant areas of environmental concern, took "hard look" at them, and made "reasoned elaboration of basis for decision").

the city had not considered several relevant environmental factors before issuing a special permit for development.¹⁶ Those "relevant factors" included existing patterns of population concentration, neighborhood character, and long-term secondary displacement of residents and businesses. The court also held that the EIS should consider the possible impact of other planned buildings on the community.¹⁷

Just as an Asian community raised secondary displacement as a relevant environmental factor by bringing a SEQR lawsuit in *Chinese Staff Workers*, other aggrieved minorities should raise cumulative, disproportionate, and foreseeable health effects as relevant environmental factors when unwelcome land uses are proposed for their communities. Indeed, evidence suggests that the EPA increasingly views cumulative and disproportionate health effects as relevant environmental factors. A recent issue of *INSIDE EPA* noted that the EPA will be examining the cumulative exposure that minorities face because "total exposure to many different sources of pollution may result in health problems that would not occur if only a single pollution exposure were occurring."¹⁸ According to agency sources, EPA opposition to a new waste incinerator could arise where a local community "already face[s] too high an exposure from various sources."¹⁹

B. *Public Health Statutes*

Public health statutes may provide another means for achieving more equity in the environmental decision-making process. Minority communities may invoke these statutes to pressure agencies to assess the cumulative health effects of exposure to pollutants and to consider those effects in their decisions. For example, safeguarding the health of mothers and children and providing prenatal care in low-income communities are important governmental concerns, regulated extensively in New York's Public Health Law and in federal statutes.²⁰ Section 2522 of the New York Public Health Law authorizes comprehensive prenatal health care services, including health education and prenatal risk assessments.²¹ However, prenatal risk assessments generally have not focused on environmental pollutants to which the fetus may be exposed unintentionally. Studies show that exposure to pollutants poses a greater threat to a developing fetus than to an adult because of distinct physiological differences, such as the greater capacity of an adult's liver to

16. *Chinese Staff & Workers Ass'n v. City of New York*, 68 N.Y.2d 359, 368 (1986).

17. *Id.* at 367.

18. *EPA Efforts to Cut Minority Pollution Risks Could Push Tighter Regs, Staff Say*, *INSIDE E.P.A. WKLY. REP.*, Nov. 8, 1991, at 12.

19. *Id.*

20. N.Y. PUB. HEALTH LAW §§ 2500-2529 (McKinney Supp. 1992); 42 U.S.C. § 285(g) (1989).

21. N.Y. PUB. HEALTH LAW § 2522.1(b), (d) (McKinney Supp. 1992).

metabolize foreign substances.²² New York state authorities that supervise prenatal, maternal, and child health care services have a duty to establish minimum standards for those services in accordance with accepted medical practices.²³ However, the standards they have established generally do not take into account the greater threat that environmental pollutants pose to immature immune systems. A number of environmental pollutants — including aluminum, benzene, cadmium, copper, fluorine, lead, mercury, and polychlorinated biphenyls (PCBs) — cause birth defects.²⁴ Furthermore, physiological changes occurring during pregnancy place pregnant women at greater risk of suffering harmful effects from exposure to pollutants.²⁵ In order to satisfy fully the goals of the Public Health Law, the government should inform poor women and women of color of these risks.

Federal public health statutes may also help achieve environmental equity. For example, the Health Research Extension Act of 1985 created the National Institute of Child Health and Human Development to conduct and support research and training, and to disseminate information on maternal health, prenatal development, and child health and development.²⁶ One of the Institute's tasks is to coordinate and promote programs "concerning the prevention of health problems of mothers and children."²⁷ Environmental activists should encourage the Institute to expand its research on the threat that environmental pollutants pose to fetuses, children, and pregnant women. Assessing the adequacy of pre- and postnatal care for low-income pregnant women, mothers, and infants is also within the jurisdiction of the National Commission to Prevent Infant Mortality.²⁸ This commission has the authority to recommend to Congress and the President legislative changes designed to increase the federal role in preventing infant mortality.²⁹ The duties of this commission can reasonably be construed to include assessing cumulative health risks due to environmental inequities.

Finally, a federal statute that does not focus on public health provides a good means of obtaining health assessment studies that may be used to fight environmental disparities. The Comprehensive Response Compensation and Liability Act (CERCLA) specifically authorizes state and local governments and the Agency for Toxic Substances and Disease Registry to perform health

22. EDWARD J. CALABRESE, POLLUTANTS AND HIGH RISK GROUPS: THE BIOLOGICAL BASIS OF INCREASED HUMAN SUSCEPTIBILITY TO ENVIRONMENTAL AND OCCUPATIONAL POLLUTANTS 5 (1978).

23. N.Y. PUB. HEALTH LAW § 2500.2 (McKinney Supp. 1992).

24. CALABRESE, *supra* note 22, at 5.

25. *Id.* at 24.

26. Pub. L. No. 99-158, § 448, 99 Stat. 820, 856 (codified at 42 U.S.C. § 285(g) (1988)).

27. 42 U.S.C. § 285(g)-3(a) (1988).

28. Pub. L. No. 99-660, § 204(a)(1), 100 Stat. 3752 (1986) (codified at 42 U.S.C. § 285(g) note (1988)).

29. Pub. L. No. 99-660, § 204(b)(2), 100 Stat. 3752 (1986) (codified at 42 U.S.C. § 285(g) note (1988)).

assessments where individuals have been exposed to hazardous substances.³⁰ These studies may be used to help prove that particular communities are disproportionately affected by environmental toxins.

III. ADDITIONAL STRATEGIES FOR COMMUNITY ACTION

Since various factors may combine to magnify risks, environmental studies should characterize disproportionately affected communities by age, gender ratios, racial background, nutritional status, and general health status. This information can help regulatory agencies select priorities for risk reduction. For example, high percentages of African Americans live in areas that do not comply with Clean Air Act standards on particulate matter, carbon monoxide, ozone, sulfur dioxide, and lead.³¹ Furthermore, a high percentage of African Americans suffer from glucose-6-phosphate dehydrogenase (G-6-PD) deficiency, a genetic disease whose victims are at high risk for suffering a hemolytic crisis following short periods of exposure to breathable ozone.³² People within urban communities — where ozone levels tend to be highest³³ — who have G-6-PD deficiencies are subject to even greater health risks than fellow residents³⁴ and would, therefore, warrant greater regulatory protection.

Once communities and individuals subject to the highest risks are identified, education can play a critical role. If trained to monitor environmental notice mechanisms (such as legal notices in newspapers and entries in the Federal Register) and to focus on existing polluting facilities, residents can have a greater say in environmental decisions. Funding for such educational activities is already available from various sources, including the National Environmental Education Act of 1990.³⁵

Community activists can also be trained to bring citizen suits. Many federal environmental statutes, including CERCLA,³⁶ the Clean Water Act,³⁷ the Clean Air Act,³⁸ the Toxic Substances Control Act,³⁹ the Resource

30. 42 U.S.C. § 9604(i) (1988).

31. EPA, 1 ENVIRONMENTAL EQUITY, *supra* note 4, at 13-14.

32. EPA, 2 ENVIRONMENTAL EQUITY, *supra* note 4, at 13, 49.

33. *Id.* at 13.

34. CALABRESE, *supra* note 22, at 197. G-6-PD deficient individuals are at even greater risk if they are also deficient in Vitamin C, Vitamin E, or selenium. African Americans suffer more frequently from such nutritional deficiencies than the general population. CALABRESE, *supra* note 22, at 167.

35. National Environmental Education Act, Pub. L. No. 101-619, 104 Stat. 3325 (1990) (codified at 42 U.S.C. § 5501 (Supp. II 1990)).

36. 42 U.S.C. § 9659 (1988).

37. 33 U.S.C. § 1365 (1988).

38. 42 U.S.C. § 7604 (1988).

39. 15 U.S.C. § 2619 (1988).

Conservation and Recovery Act,⁴⁰ and the Safe Drinking Water Act⁴¹ contain provisions on which such suits could be based.⁴² Such suits may allow courts to recognize and address disproportionate environmental health risks in the context of statutory violations without having to decide whether a federal constitutional right to a healthy living and working environment exists.

Community activists should also be encouraged to attack zoning laws, because these laws can have a significant impact on siting decisions.⁴³ Zoning laws that allow residential and industrial properties to coexist increase the burden on minority communities that tend to live in such areas. Governmental authorities must be confronted with evidence that siting more noxious facilities in mixed zoning areas will create unacceptable health risks or exacerbate existing environmental health problems. Such evidence should prompt governmental authorities to consider upzoning. Again, cumulative exposures and disproportionate risks documented by health assessment studies are essential to building a case for government action.

Finally, minority communities should recognize that pollution prevention, recycling, and solid waste reduction programs are the most effective long-term strategies for reversing the environmental trends in their communities. Therefore, minority businesses should be encouraged to enter the pollution prevention field.⁴⁴ However, even minority communities in desperate need of economic development opportunities should eschew waste management enterprises such as hazardous waste abatement or asbestos removal, which may add to the exposures they already face, in favor of pollution prevention opportunities.

IV. CONCLUSION

Several states provide a constitutional right to a healthy living and working environment.⁴⁵ However, most state constitutions do not provide this right.⁴⁶ States have not yet recognized that the protection of people from a harmful and degraded environment is a significant constitutional concern.

Legal strategies to achieve environmental equity cannot wait for states or the federal government to acknowledge the illegality and immorality of

40. 42 U.S.C. § 6972 (1988).

41. 42 U.S.C. § 300j-8 (1988).

42. For example, in one such suit, a federal court fined a paper mill almost \$1 million for violating the Clean Water Act. *Sierra Club v. Simkins Indus., Inc.*, 847 F.2d 1109 (4th Cir. 1988).

43. CITY OF NEW YORK, TASK FORCE REPORT ON SLUDGE MAINTENANCE 2 (1991).

44. Bullard, *supra* note 8, at 334.

45. J.B. ZYGMUNT & ABRAM PLATER, ENVIRONMENTAL LAW AND POLICY: NATURE, LAW AND SOCIETY 412-13 (1992). The states include Illinois, Massachusetts, Michigan, and Pennsylvania.

46. New York's constitution, for example, merely provides that it is the policy of the state to protect and conserve its natural resources and scenic beauty. *Id.*

targeting minority communities to receive society's waste. Minority communities must aggressively assert their human right to a healthy living and working environment. Minority communities should characterize their populations by risk, including age, health status, gender ratios, and cumulative pollution load. Once in possession of this information, a minority community can request upzoning and enforcement initiatives and can raise disproportionate health risks as relevant environmental factors under environmental quality review statutes. Residents of high-risk neighborhoods must use these strategies to convince all levels of government that they will no longer be the nation's dumping ground.