Environmental Racism: Getting Past the Rhetoric

by Jason Heath

For the past eleven years, a quiet but steady murmuring has developed regarding what is variously known as environmental racism and environmental justice. While it has developed slowly, the murmur is growing louder and louder. Lines are being drawn with minority groups on one side and industrial captains and government officials on the other. While minority groups cite discriminatory racial motives for industry's and government's decision to overload their populations with unfair shares of hazardous pollution and waste, industry officials have either ignored their complaints, or given various excuses that, while arguably honest, are ultimately lacking. The main problem is that both groups are missing the forest for the trees. This article will attempt to get past the rhetoric, get to the root of the problem, and develop possible solutions.

First, the problem. Throughout the United States, studies on the subject have strongly confirmed that minority populations are burdened with an unfair share of this country's polluting industries, hazardous waste facilities, and toxic dumps. For instance, two of the largest landfills in the country -- in Emelle, Ala., and Scotlandville, La. -- are in communities in which African-Americans comprise 79% and 93% of the populations respectively. At Kettleman City, Ca., site of the nation's fifth largest landfill, Hispanics make up 78% of the population.[1]

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An eighteen-month survey conducted by the United Church of Christ's Commission for Racial Justice concluded that, in deciding where to put the nation's 415 federally approved disposal facilities, race was a "more prominent factor" than the household income of nearby residents, the value of their homes, or the number of owner-occupied residences. [2] 15 million of the nation's 26 million African-Americans live in communities with one or more uncontrolled toxic dumps. [3] In 1992 the EPA issued a report that cited evidence that racial and ethnic minorities suffer disproportionate exposure to dust, soot, carbon monoxide, ozone, sulphur, sulphur dioxide, and lead, as well as other emissions from hazardous waste dumps. [4]

There is enough evidence to show that there is a real problem here.

But not many are getting down to the real issues. Often too much effort is expended by minorities in gathering attention to their plight and fixing blame, while industries and government have in the past spent too much time coming up with excuses rather than addressing the problem. As an initial proposition, we need to get past the issue of who is to blame, and instead focus on fixing the problem. Whether racially-motivated or not, minorities are burdened with a disproportionate amount of this nation's waste. Once we have accepted that proposition we must then look to the applicable law to see if it addresses the problem of a disproportionate impact. Finally, we need to see how that law, or other laws, can be applied to solve the problem.

First of all, does the law address this problem? Section 101(b) of the National Environmental Policy Act (NEPA) states in pertinent part, " ...it is the continuing responsibility of the Federal Government to use all practicable means to...assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings...." (emphasis added). [5] There are other sections of the statute which use this type of language, but this section in itself is enough to show that the Congress did not intend that a specific group should benefit from the NEPA more than others, and that the NEPA does not sanction any specific group suffering a disproportionate impact. The California Environmental Quality Act carries similar language, leading to the same conclusions. [6]

Congress did not intend for the NEPA to sanction any specific group to suffer a disproportionate impact.

Now that we have seen that the law does address the issue (albeit through inference), we can explore what can and is being done about it. Leaving aside the question of whether anything can be done to change the situation that already exists in neighborhoods around the country, it is certainly possible to create ways to halt the expansion of this disproportionate impact. First, it may be possible to use the statutes we already have, in their existing form, to solve these problems. Both the NEPA and the CEQA have certain requirements that must be addressed in every environmental impact statement or report. [7] It may be possible to effectively interpret these requirements to mandate a consideration of a disproportionate impact on minorities. These issues could be addressed in the NEPA EIS under the sections on the environmental impact of the proposed action, unavoidable environmental impacts, or alternatives to the proposed action. They could be addressed in the CEQA EIR under similar requirements. [8]

This is evidenced by the recent decision regarding Kettleman City, in which the Hispanic community challenged an environmental impact report which recommended approval of a commercial hazardous waste incinerator in their city. In Sacramento County Superior Court, Judge Jeffrey L. Gunther ruled that Chemical Waste Management Inc.'s EIR was inadequate for several reasons, including a deficient analysis of the present and cumulative environmental impacts. What makes the decision interesting is that Gunther also noted that the public participation requirement had been violated because the EIR had not been translated into Spanish (40% of the 95% Hispanic population are monolingual in Spanish). [9] CWM started an appeal, but withdrew it when they decided not to build the incinerator, citing market and economic motives as the reason. [10]

A question arises regarding whether the trial court could have used the violation of the public participation requirement as its sole reason for finding the EIR inadequate, and whether an appellate court would have accepted this as a substantial violation of the public participation requirement. These unanswered questions show the difficulty with using existing laws to combat the problem of disproportionate impact. This approach relies too much on interpretation. Since every judge can find their own interpretation, it is disputable whether the problem could be effectively solved through use of the current laws. Since the NEPA establishes that Congress does not sanction a disproportionate impact, there should not be this much room for interpretation. Therefore, if the goal is to have the courts solve the problem, we need to give the court a hard, fast, and unequivocal rule to apply.

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This could be found in NEPA and CEQA amendments, or in various supplemental legislation. For instance, amendments to both these statutes could involve creating an additional, straightforward requirement that, in considering alternatives to a project, disproportionate impacts on communities of ethnic and racial minorities need to be seriously taken into account. An amendment like this would leave much less discretion with a trial court, and give the court confidence to apply a principle that we have already established is at the heart of environmental policy (namely, no disproportionate impact).

Environmental justice legislation may be another solution. Toxic Materials News noted recently that nine states have passed bills or are

considering legislation that aims to address these problems. Louisiana now requires the state environmental agency to hold at least three fact-finding hearings to investigate environmental equity, and Tennessee requires the commissioners of health and environment to study issues regarding toxic chemical facilities in order to curtail inequitable risk. Arkansas now addresses environmental equity in siting high-impact solid waste facilities, and Virginia is setting up a legislative audit and review commission to review past siting, monitoring and cleanup of solid and hazardous waste facilities [11]. The problem with these methods is in getting the legislature to act.

It may be possible to use existing civil rights legislation to attack environmental injustice. This seems to be the approach that the executive branch is supporting. Both President Clinton and the EPA have admitted there is a problem here, one they want to solve. [12] Environment Week noted recently that in a major policy shift, the EPA has begun referring environmental racism cases to the agency's Office of Civil Rights. Whereas previously complainants have been forced to prove that an action was taken with the intent to discriminate (virtually impossible to prove), now, under Title VI of the Civil Rights Act of 1964, complainants must prove simply that an action has had a disproportionate impact on a community in order to gain relief. [13] If this trend continues, the problem may be effectively solved without need for legislative action. However, in order to use this method, minority groups are forced to go to court. The problem may in fact be more easily solved through legislation which requires industry and government to deal with these problems before the fact rather than after.

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Solutions to these problems do exist. But it takes moving past inflammatory rhetoric and blame-fixing to get to a true understanding of three basic concepts. First, it is evident that a problem truly exists. Secondly, we have found authority to indicate that the problem of disproportionate impact should be remedied. Lastly, we have seen that in all three branches of government, there are methods that can be used to achieve that goal.

The problem of racial minorities carrying a disproportionate impact of this nation's industrial waste is indisputable, and these groups are beginning to band together and show political strength. This problem is too large to simply sweep under the carpet, and it is my feeling that the

solution will come from the legislature. Members of the judiciary such as Judge Gunther are beginning to address their concerns, and the executive branch is getting firmly behind the movement. However, the legislature, whether on the national or state level, can offer the most effective and clear-cut solution to disproportionate impact. A large amount of political pressure is building from affected groups. I do not think it will be long before national and state legislatures will be forced to react to these problems in some manner.

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NOTES

1. Lena Williams, "Race Bias Found in Location of Toxic Dumps," The New York Times, 16 April 1987, Sec. A, p. 20, Col. 1.

2. Michael Weisskopf, "Rights Group Finds Racism in Dump Siting," The Washington Post, 16 April 1987, First Sec., p. 1, Col. 2.

3. Williams, supra.

4. Robert Suro, "Pollution-Weary Minorities Try Civil Rights Tack," The New York Times, 11 January 1993, Sec. A, p. 1, Col. 2.

5. National Environmental Policy Act of 1969 Section 101(b), 42 U.S.C. § 4331 (1988).

6. California Environmental Quality Act of 1970, Pub. Resources Code, §§ 21000 et seq. (1979).

7. National Environmental Policy Act of 1969 Section 102(c), 42 U.S.C. § 4332 (1988).

8. California Environmental Quality Act of 1970, Pub. Resources Code, §§ 21002.1 et seq. (1979).

9. Jane Kay, "The Kettleman City Story," EPA Journal, March - April (1992): p. 47.

10. "Firm Withdraws Its Plans For Toxic Waste Incinerator," The Los Angeles Times, 8 September 1993, Part A, p. 15, Col. 5.

11. "Environmental Racism Heats Up; Communities, States Pass Laws," Toxic Material News, 4 October 1993, No. 39, Vol. 20 (1993).

12. Ron Begley, "The Demand for Environmental Justice," Chemical Week, 15 September 1993, p. 27.

13. Viki Reath, "EPA to Use Civil Rights Act in Siting Decisions," Environment Week, 7 October 1993, No. 39, Vol. 6 (1993).