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THE VISIBLE SPECTRUM

Nancy E. Anderson, Ph.D.†

I. The View From Washington

Environmental protection as a social movement in the United States has undergone two distinct changes. At the turn of the century, conservationists, exemplified by Theodore Roosevelt, became concerned with wilderness preservation and the judicious management of natural resources.¹ Conservationist leaders were the mainstream elite and political reformers. The second phase, emerging in the late 1960's, was a social movement made up of young, well educated, left of center activists. This movement is usually seen as part of the social ferment of the Sixties, which also included the civil rights, anti-war, and women's movements. Such movements were often formed on and centered around college campuses. As the student participants of these movements graduated, the ideas of this second phase moved into the labor market. Although a first generation environmental protection movement had existed for decades, this second generation formed organizations that employed tactics more confrontational than those of their predecessors. These tactics closely resembled those employed by the social movements of the Sixties.

The late Sixties and early 1970's saw a tremendous spurt of federal environmental legislation. Congress enacted such landmark environmental statutes as the Clean Air Act,² the Clean Water Act,³ the Toxic Substances Control Act⁴, and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).⁵ As complicated as these laws are, their implementing regulations are even more complex. Running thousands of pages, they have proven very costly for both the government and private industry to effect. Billions of dollars have been spent on the con-

† New York City Department of Environmental Protection. The author received her B.A. and Ph.D. degrees from New York University. Opinions expressed in this Essay are those of the author alone and are not intended to represent the views of the New York City Department of Environmental Protection.

1. See ROBERT E. TAYLOR, *AHEAD OF THE CURVE* 12-13 (1990).

2. 42 U.S.C. §§ 7401-7642 (1988).

3. The Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (1992) (the "Clean Water Act").

4. 15 U.S.C. §§ 2601-2671 (1988).

5. 42 U.S.C. §§ 9601-9675 (1988).

struction or upgrading of infrastructure projects, like sewage treatment plants, in order to achieve regulatory compliance.

During the 1970s and 1980s, much time and money was spent on litigation between the government and, in most cases, private industry, contesting and defining the precise meaning and reach of these federal regulations. Other litigation, brought by new national environmental groups such as the Natural Resources Defense Council, challenged government delays in writing regulations necessary to carry out these laws.⁶ Direct action groups, like Greenpeace and Earth First, shunned lobbying and litigation. Such groups instead organized demonstrations, such as "lie-ins," to stop polluters.

By 1980 and the election of Ronald Reagan, environmental politics had become a part of the Washington political landscape and organizations from the second generation were transforming into national membership organizations. Environmental protection, however, still was not a central political issue, and its impact on local politics and economic interest rarely was recognized. During this period, environmental protection had an indirect impact on certain decisions made at the local level, such as those concerning real estate development and land use.

Today, the national environmental movement is entering a new phase, led by new players, just as the still young environmental protection movement is becoming more politically influential at the local level. The political power of the environmental justice and equity movement and its links with racial and social justice organizations makes its potential impact reach far beyond "NIMBY" (not-in-my-backyard) protests. NIMBY was the first wave of quasi-organized local environmental protests, usually rooted in a single issue. Environmental justice is the next wave, drawing in a broader range of concerns.

The focus of this analysis is on how environmental issues are manifesting themselves in the Greenpoint/Williamsburg area of Brooklyn. The experience of West Harlem in opposing the operation of the North River Treatment Plant is also examined. In both instances the social class and ethnic identity of these grassroots environmentalists significantly differ from those of the environmental activists of previous generations.

6. See, e.g., *Natural Resources Defense Council v. EPA*, 475 F.2d 968 (D.C. Cir. 1973) (challenging EPA's grant of permission to several states to delay submission of portions of implementation plans required by the Clean Air Act).

II. The View From Brooklyn

Standing along the East River's edge in Greenpoint/Williamsburg, Manhattan's picture perfect skyline seems just a stone's throw away. Turn around, however, and you could be in some other country. Here, Spanish, Polish, and Yiddish are commonly heard and store signs are often not in English. Manhattan, that concentration of wealth and power, is the foreign land from this vantage. Manhattan is also the location of City Hall, proverbially the place you can't fight.

Although Manhattan seems very close, appearances can be tricky; they do not tell the whole story. It is cumbersome to take a subway from Greenpoint/Williamsburg to City Hall, yet human products, such as raw sewage, are piped in from Manhattan to Greenpoint/Williamsburg's Newtown Creek Sewage Treatment Plant twenty-four hours a day. A significant proportion of this sewage comes from Manhattan's East Side, that real estate "gold coast," and the financial district, which includes the World Financial Center and the Battery Park development, not to mention City Hall.⁷ Although rarely considered by people in Manhattan or Greenpoint/Williamsburg, their sanitary waste and urban runoff drain into and receive federally required treatment at the Newtown Creek facility.

A. Bearing the Infrastructure Burden

The East Side of Manhattan and the financial district were not alone in experiencing an explosion of new office and residential skyscraper construction in the Eighties. These areas, however, were the building boom's epicenter. The sanitary waste from these new buildings, from 72nd Street to the tip of downtown Manhattan, went to the Newtown Creek Plant in Greenpoint/Williamsburg.⁸ Neither the building boom nor the money it generated had any

7. The New York City Department of Environmental Protection does not separately measure the sewage flow into the Newtown Creek plant from Brooklyn, Queens and Manhattan. When designed, the sewage flow into Newtown Creek was estimated to average 170 million gallons per day ("MGD") from Manhattan, with the remaining flow to come from the other two boroughs, for a total of 310 MGD. The plant is the largest in the City and is designed to serve a population of 2,500,000. JOSEPH CUNETTA & ROBERT FEVER, NEW YORK CITY DEP'T OF PUBLIC WORKS, DESIGN OF THE NEWTOWN CREEK WATER POLLUTION CONTROL PROJECT 3-4 (1967).

8. *Id.* at 3.

noticeable benefit for the Greenpoint/Williamsburg community, an area with an average household income of only \$18,905.⁹

The sewage treatment burden imposed on Greenpoint/Williamsburg reflected the City's then current infrastructure and the availability of suitably zoned land. It was not part of a deliberate plot to place further burdens on the Greenpoint/Williamsburg community. Other treatment plants that were not connected to the City's development core, however, continued to operate at or even below permitted capacity.

The Newtown Creek plant is relatively old. First opened in 1967, it has regularly operated above its New York State permitted capacity and is not engineered to perform secondary treatment.¹⁰ It is also the largest of the fourteen sewage treatment plants in the City and receives sewage from one of the few remaining industrial segments of the City. Like the North River plant in West Harlem, it is subject to consent orders with New York State for permit violations.¹¹ Further, treatment of sewage at Newtown Creek can create foul odors. Greenpoint/Williamsburg residents are not happy about this.

Greenpoint/Williamsburg is a working class neighborhood with large pockets of poverty and home to many recent immigrants. This area, designated Community District 1 by City government, is unified in name, but not across neighborhood or ethnic lines. Nevertheless, fears of industrial pollution and outrage within this community over having more than its "fair share" of noxious municipal infrastructure have crossed these lines.

Although the provision of pure drinking water and the competent management of human waste are essential infrastructure functions, there is less consensus on where to locate the necessary physical plants. While concern over the potentially noxious impact of a sewage treatment plant is not surprising, the City now encounters opposition to other facilities, such as bus depots and park-

9. CITY OF NEW YORK, FISCAL YEAR 1994 BROOKLYN COMMUNITY DISTRICT NEEDS STATEMENT 20 (1994) [hereinafter BROOKLYN NEEDS STATEMENT].

10. See *In re* City of N.Y. Dep't Env'tl. Protection, No. R2-3183-90-08, slip op. at 1-5 (N.Y. Dep't Env'tl. Conservation Aug. 6, 1990) (Order on Consent) (stating that the flow of sewage into Newtown Creek plant regularly exceeded N.Y.S. Department of Environmental Conservation permitted sewage treatment limit of 310 million gallons of sewage per day).

11. *Id.*

ing lots.¹² This environmental basis for opposing such facilities is new to local politics.

In brief, host communities may view almost all public works as environmentally noxious neighbors and even public nuisances. These facilities also may cause adjacent property values to drop. On the other hand, municipalities invest billions to construct and millions every year to operate public works, especially sewage treatment plants; much is at stake here.

B. Legal Remedies

The salience of concerns about noxious facilities and a neighborhood's "fair share" was an underlying theme in the settlement of two suits brought by New York State against New York City.¹³ In the first suit, the State alleged that Newtown Creek's failure to install secondary sewage treatment technology violated federally mandated state standards.¹⁴ The second suit charged that Newtown Creek's excess sewage flow had violated its operating permit.¹⁵ Instead of simply paying a fine, it was agreed that the City would be required to set aside \$850,000 to fund an Environmental Benefits Program in Greenpoint/Williamsburg.¹⁶ This choice of remedy reflected the sustained and vocal community outrage about the plant. The fund was placed under the management of the New York City Department of Environmental Protection (NYCDEP), which operates the City's water supply, sewers, and sewage treatment system. Additionally, the settlement committed the City to

12. See *Silver v. Dinkins*, 601 N.Y.S.2d 366 (Sup. Ct.), *aff'd*, 602 N.Y.S.2d 540 (App. Div. 1993) (finding plan to construct a new garage on the Lower East Side of Manhattan to be in violation of City Charter Fair Share criteria); Peggy Shepard, *Issues of Community Empowerment*, 21 *FORDHAM URB. L.J.* 739, 746-48 (1994) (stating that the siting of the majority of New York City's bus depots north of 110th Street has led to an increased incidence of respiratory health problems in West Harlem).

13. See *State of N.Y. Dep't Envtl. Conservation v. City of N.Y. Dep't Envtl. Protection*, No. 196-88 (Sup. Ct. Kings County June 23, 1988) (Judgment on Consent); *In re City of N.Y. Dep't Envtl. Protection*, No. R2-3183-90-08 (N.Y. Dep't Envtl. Conservation Aug. 6, 1990) (Order on Consent) (DEC action brought for alleged failure by City to comply with 1988 Judgment on Consent).

14. *State of N.Y. Dep't Envtl. Conservation*, No. 196-88, slip op. at 1. The New York City Department of Environmental Protection ("NYCDEP") agreed to upgrade the Newtown Creek sewage treatment plant to perform full secondary treatment by December 31, 1996. The provisions of this 1988 judgment were incorporated into the plant's State Pollutant Discharge Elimination System ("SPDES") permit. The deadline and detailed methods for achieving full secondary treatment are the subject of new Consent Order negotiations.

15. *In re City of N.Y. Dep't Envtl. Protection*, No. R2-3183-90-08, slip op. at 3.

16. *Id.* at 9-10.

upgrading the plant to secondary treatment levels and to resolving the problem of excess sewage volume.¹⁷

The Environmental Benefits Program was new to the City government. First, better communication between community residents and local government had to be fostered. Next, all parties needed to determine the substance of the Program. To this end, NYCDEP met regularly with residents to hear their complaints and concerns, and to develop outlines for local environmental studies and concrete programs to improve the local environment and the quality of life. These meetings faced problems common to any community mobilization effort. Efforts to ensure the participation of all sectors in Greenpoint/Williamsburg were of debatable success. Ethnic division within the neighborhood, questions of organizational competition, and turf control were, and continue to be, divisive issues.

The neighbors of the Newtown Creek plant, however, do share a common perception: since City Hall is in Manhattan, it would continue to dump its sewage on Greenpoint/Williamsburg because the residents of Greenpoint/Williamsburg lack the power or the money to influence municipal siting decisions. The residents' frustration is not solely caused by the sewage plant, but also by some of the inherited characteristics of the Greenpoint/Williamsburg area as well.

C. Local Business and Its Environmental Impact

Greenpoint/Williamsburg developed much of its current character in the nineteenth century as a center of manufacturing, storage, and transport. As was common at the time, factories, oil depots, and other manufacturing-related establishments were clustered together with housing; people lived where they worked. Greenpoint/Williamsburg's character did not change over the years. In the twentieth century's zoning grid, the mixed-use nature of the area influenced the City's zoning and land use decisions.

17. *Id.* at 7-15. The settlement also committed the City to augment water conservation measures and other NYCDEP measures to identify and reduce toxic metals in the effluent of the Newtown Creek sewage treatment plant and Citywide, revise the sewer system evaluation survey plan and inflow/infiltration reduction, provide NYS-DEC with sewage treatment availability reporting, extend the SPDES moratorium provisions, extend the provision of the 1988 SPDES permit during pending permit modification hearings, hire two persons to monitor compliance with this Consent Order, and agree to a penalty table for non-compliance. *Id.*

Today, as a center of manufacturing and allied industries,¹⁸ Greenpoint/Williamsburg is home to very small companies that are apt to use a wide array of hazardous substances. These manufacturers include metal platers, woodworkers, fabricators of chemical dyes, and plastic consumer goods. Some of the bigger companies include the Amstar Sugar Company, Pfizer Drugs, and Mobil Oil, which are exceptions to the community both in scale and capitalization. Greenpoint/Williamsburg also houses the only firm in New York City permitted to store both low level radioactive waste and radioactive mixed with hazardous waste¹⁹—located down the block from a public school. The construction of the public school preceded the opening of the hazardous wastes storage facility.

Some residents would like to protect the local environment by having *all* manufacturing and the sewage treatment plant move out. Such demands conflict with federal sewage treatment laws, as well as with the need to protect jobs and the local industrial base. Manufacturers in areas like Greenpoint/Williamsburg provide entry level, steady employment for local residents. The disappearance of such jobs would significantly narrow the range of employment options outside the service sector.

While many local businesses probably comply with relevant City, State and Federal laws, the large number of small companies compared to the few government environmental inspectors makes compliance uncertain. Further, state or federal officials may not necessarily view small companies as prime compliance or investigative targets; they can be characterized as the City's responsibility.²⁰ Although the City may be the ideal party to regulate local businesses, the number of City inspectors allotted to controlling air and

18. Allied industry is used here to refer to businesses that: 1) fall outside the Standard Industrial Classification Codes assigned to manufacturers, but closely resemble manufacturers in terms of their functions and performance criteria; and 2) can operate in New York City in areas zoned for manufacturing. For example, the management of hazardous waste from industrial customers would be considered an allied industry under this definition.

19. Telephone Interview with Hassan Hussein, Environmental Engineer for the New York State Department of Environmental Conservation (Feb. 17, 1994). As part of its operating permit the facility has submitted a closure plan, which, as of the publication of this Essay, is being evaluated by the New York State Department of Environmental Conservation. *Id.*

20. This view has been expressed to the author by staff members at the U.S. Environmental Protection Agency, Region II (Nov. 15, 1993) and by a staff attorney of the New York State Attorney General's Office (Aug. 1992), both in telephone interviews. Neither communication necessarily reflects the official position of either the U.S. EPA or the N.Y.S. Attorney General.

water pollution and monitoring the management of hazardous materials and wastes is small.²¹

D. Municipal and Community Response

Funding from the City government for the remediation and prevention of pollution through engineering, process, or housekeeping changes is even more limited than resources for law enforcement.²² Efforts to bring small manufacturers up to modern non-polluting standards have begun only recently. This effectively forces many residents of neighborhoods like Greenpoint/Williamsburg to seek the closure of their manufacturing neighbors, regardless of job losses and a diminished tax base. The practical effect of taming pollution, rather than preventing it, is that polluters may be punished. Punishment, however, rarely leads to new solutions or better neighborhood relations.

Approximately 155,000 people live in Greenpoint/Williamsburg, often in close proximity to sewage treatment plants, incinerators, and factories using hazardous materials. In Greenpoint/Williamsburg, residents have organized groups such as the Concerned Citizens of Greenpoint, the multi-ethnic "CAFE," or the Latino "El Puente," to protest what they view as City Hall's indifference to municipal pollution. These groups claim that municipal pollution, when compounded by pollution from neighborhood industries, creates an unfair burden on the community. This burden, many grassroots activists claim, is an environmental injustice.

The influx of artists and "downtown" social activist types to Greenpoint/Williamsburg, who have left Manhattan's high rents for Brooklyn's more affordable living and working quarters, has also aided the new activism emerging in the community. Their voices are heard at the local community board. Their outspoken presence at environmental protests, the creation of art installations about Greenpoint/Williamsburg in a Soho-style art gallery, and publication of community-based newspapers oriented toward environmental and social activism is gaining increasing attention beyond the perimeters of Greenpoint/Williamsburg.

21. Approximately 65 NYCDEP environmental inspectors are assigned to the five boroughs.

22. NYCDEP has only two employees dedicated to pollution prevention.

III. Everybody Makes It — Nobody Wants It

Alternatives to the Newtown Creek plant rarely have been seriously explored. A notable exception is a recent City-sponsored campaign to foster water conservation, which is aimed at reducing the total outflow to the treatment plants. The installation of "low flow" plumbing fixtures, mandated by a 1990 Consent Order, is a key element in this conservation campaign.²³ It is still too early to determine whether this measure will keep sewage flows to the plants below the State-permitted maximum.

Developing alternatives to new plant construction is of real importance. The City has increasingly limited funds for sewage treatment plant construction. By the 1980's, Federal construction grants had dried up; a loan fund took its place.²⁴

After the opening of the North River Plant in Harlem in 1986, construction grants from Washington were no longer regularly available.²⁵ Further, the trend seemed to indicate that the federal loan pool would be phased out or sharply downsized by the mid-90's with the next reauthorization of the Clean Water Act.²⁶ Thus, New York City and all other local governments were left to shoulder a federally mandated responsibility with a potential cost running into the billions of dollars.

The current system of fourteen treatment plants provides at least primary treatment²⁷ for the City's sewage on dry weather days. The City still faces the obligation of providing secondary treatment²⁸ for all sewage treatment plants.²⁹ This obligation is in addition to routine operating and maintenance costs.

23. *In re* City of New York Dep't Env'tl. Protection, No. R2-3183-90-08, slip op. at 7 (N.Y. Dep't Env'tl. Conservation Aug. 6, 1990) (Order on Consent); *see also* NEW YORK CITY DEP'T OF CITY PLANNING, ANNUAL REPORT ON SOCIAL INDICATORS 175 (1993).

24. *See* Federal Water Pollution Control Amendments, Pub. L. No. 100-4, 101 Stat. 7, tit. II (1987).

25. *See id.* tit. VI.

26. At this time the defunding trend for federally mandated environmental construction, so pronounced under the Reagan-Bush administrations, appears to be somewhat mitigated. The U.S. EPA announced in its proposed budget for the fiscal year of 1995 \$1.6 billion for the sewage treatment state revolving loan fund. OFFICE OF COMMUNICATION, U.S. ENVTL. PROTECTION AGENCY, EDUCATION AND PUBLIC AFFAIRS, ACTIVITIES UPDATE 1 (Feb. 22, 1994).

27. Primary Treatment is the mechanical removal of 40-60% of solids in the sewage flow. Interview with Natalie Milner, NYCDEP Public Affairs Office, in New York, N.Y. (Oct. 1993).

28. Secondary treatment is the biological treatment to remove an additional 25-30% of sewage-based contaminants after primary treatment has been performed. *Id.*

29. Federal Clean Water Act, 33 U.S.C. § 1311(b)(1)(B) (1992).

A. Zoning and Conflicting Goals

Even if the construction of new sewage treatment plants was possible, available sites are limited and the political feasibility of the City government building or expanding sewage treatment plants outside designated zones ("M" zones) is nil. "M" zones are parcels of land that can be used for manufacturing and allied purposes.³⁰ Among those allied purposes are public infrastructure works. The City cannot build an incinerator or a sewage treatment plant outside of an "M" zone. The redesignation of areas as "M" zones or the use of emergency zoning overrides are options which the City does not seem to exercise.

Greenpoint/Williamsburg, because of its history, contains "M" zones. Greenpoint/Williamsburg's checkerboard of manufacturing and residential zoning reflects the tremendous impact that pre-existing zoning laws have had on the range of economic activities and the real estate development of the area. Still, from the inception of zoning in 1916,³¹ the Citywide trend has been to rezone land from "M" to non-"M" classifications.³² Greenpoint/Williamsburg's "M" zones have been retained primarily because the area never attracted the twentieth century commercial or residential development that would have been the impetus for rezoning.³³ Until the mid-1960's, its manufacturing base was strong enough to easily sustain and justify its "M" zones.³⁴ Further, Greenpoint/Williamsburg's existing "M" zones were useful to city planners and public works builders.

In other parts of New York City, "M" zones and residential zones are somewhat removed from each other or have a "buffer," usually an "M-1" (light manufacturing zone), but not in Greenpoint/Williamsburg. The neighborhood's enforced intimacy has not proven to be amicable. Angry citizens are now demanding rep-

30. New York City's rules about land use are set forth in the 1961 New York City Zoning Resolution. See New York City Zoning Resolution, art. IV, § 41-10 (1961); see also *id.* § 42-20 (performance standards governing manufacturers).

31. See CHARLES N. GLAAB & A. THEODORE BROWN, A HISTORY OF URBAN AMERICA 291 (1967). Although the first City zoning rules were promulgated in 1916, the zoning rules that govern land use in New York City were promulgated in 1961.

32. See NEW YORK CITY DEP'T OF CITY PLANNING, CITYWIDE INDUSTRY STUDY, PART I, at 5 (1993).

33. NEW YORK CITY PLANNING COMM'N, GREENPOINT, STRIKING A BALANCE BETWEEN INDUSTRY AND HOUSING 43-45 (Aug. 1974).

34. *Id.*

arations and sometimes, as with the Environmental Benefits Program,³⁵ the City is paying out.

Neighborhoods calling for environmental reparations should not presume that City Hall is victimizing them at the behest of Manhattan real estate developers. The City does not decide how much sewage to process, and it does not set treatment standards.³⁶ Successful state suits against the City for the violation of its treatment permits demonstrates this.³⁷ Moreover, the City faces the threat of federally imposed moratoriums on new hookups into troubled sewage treatment plants.³⁸ Without new treatment options, the City must operate within the existing framework or commercial and residential real estate development must stop. Stopping such development would negatively impact the local economy, as prosperity is often critically linked to market activity in the real estate and construction sectors.

B. The North River Treatment Plant

While Newtown Creek receives the bulk of Manhattan's East Side, City Hall and financial district sewage, the troubled North River Sewage Treatment Plant, which opened in 1986, captures Manhattan's West Side flow.³⁹ Pending development plans could hinge on how well the plant manages its capacity. Should Donald Trump's development plans for the Hudson River Penn Central Rail Yards materialize, the North River would receive its sewage. West Harlem residents are unhappy about this prospect.

New York City's environmental justice and equity movement is taking root and organizing around such issues as the hosting of sewage treatment plants in poor communities, where residents are overwhelmingly Black and Latino.⁴⁰ From West Harlem's perspec-

35. *In re* City of N.Y. Dep't Env'tl. Protection, No. R2-3183-90-08, slip op. at 9-10 (N.Y. Dep't Env'tl. Conservation Aug. 6, 1990) (Order on Consent).

36. State Pollution Discharge Elimination System (SPDES) permits are established by Article 17, Title 8 of the New York State Environmental Conservation Law (McKinney 1992).

37. *See, e.g.*, State of N.Y. Dep't Env'tl. Conservation v. City of N.Y. Dep't Env'tl. Protection, No. 196088 (Sup. Ct. N.Y. County June 23, 1988) (Judgment on Consent) (directing City of New York to comply with limits and treatment standards).

38. 33 U.S.C. § 1342(h) (1988); *see also* United States v. Metropolitan Dist. Comm'n, 761 F. Supp. 206 (D. Mass.), *aff'd*, 930 F.2d 132 (1st Cir. 1991) (upholding moratorium on new hookups to sewage treatment plants discharging into Boston Harbor).

39. CUNETTA & FEVER, *supra* note 7, at 3.

40. *See* BROOKLYN NEEDS STATEMENT, *supra* note 9, at 11, 15 (Greenpoint/Williamsburg is more than 50% Black and Latino. Of the total district population, 33.7% receive some form of public income support.); CITY OF NEW YORK, FISCAL YEAR

tive, by hosting the North River Plant it received more than its "fair share" of burdensome infrastructure and less than its "fair share" of municipal assistance. Some oppose developments outside Harlem that might bring the North River plant to its operating capacity. If these opponents are successful, new building and related economic development opportunities would be foreclosed uptown. The risk of state or federal governments or judicial systems imposing moratoriums or requiring billions of dollars in infrastructure improvements, challenges the City government to construct innovative ways of placating everyone.

The contest over the environmental impact of municipal public works, such as North River Treatment Plant, has been played out in the courts. In 1992, in another settlement involving a State authorized sewage treatment permit, New York City was ordered to create a \$1.1 million fund for an Environmental Benefits Program in West Harlem.⁴¹ In addition, the Natural Resources Defense Council ("NRDC") and the community-based activist group West Harlem Environmental Action ("WHE ACT") brought a public nuisance action against the City.⁴² New York City argued that, in settling the State's suit,⁴³ it had acted on behalf of New York City residents. The State Supreme Court rejected this argument and found for NRDC and WHE ACT on the grounds that settlements between government agencies do not necessarily serve the public interest.

The NRDC/WHE ACT case is significant for several reasons. First, it effectively holds that local government may not have the last word on its citizens' best interests. Second, it demonstrates how a very small number of local activists can successfully mobilize pressure on the state and the city to make amends to a community hosting a noxious municipal facility. Third, the outcome of the suit,

1994 MANHATTAN DISTRICT NEEDS STATEMENT 237, 241 (West Harlem is 75% Black and Latino. Of the total district population, 30.9% received some form of public income support.).

41. *In re* New York City Dep't Env'tl. Protection, No. R2-3669-91-05 (N.Y. Dep't Env'tl. Conservation July 1, 1992) (North River Sewage Treatment Plant—Odor, Flow and Air Emissions Control Order).

42. *West Harlem Env'tl. Action v. New York City Dep't Env'tl. Protection*, N.Y. L.J., May 10, 1993, at 28 (Sup. Ct. N.Y. County May 10, 1993) (denying City's motion for summary judgment in plaintiff's public nuisance action against North River plant); *cf.* *Silver v. Dinkins*, 601 N.Y.S.2d 366 (Sup. Ct. 1993) (upholding plaintiff's claim that the proposed siting of parking garage for City vehicles violated the NYC Charter's Fair Share provisions).

43. *West Harlem Env'tl. Action v. New York City Dep't of Env'tl. Protection*, No. 92-45133 (Sup. Ct. New York County Dec. 30, 1993) (stipulated settlement granting plaintiffs \$1.1 million for harm sustained under claims of public and private nuisance).

with its \$1.1 million award, may create new legal obligations on municipalities and community targeted resources.

IV. Looking Forward and Seeing Some Light

Traditional government decisions about siting and operating the infrastructure are becoming hotly contested in the political arena with politicians and planners on one side and neighborhoods and high visibility environmental organizations on the other. The political legitimacy of elected officials lies in the public perception that they act fairly and equitably for the City's good. The NRDC/WHE ACT court decision threatens this legitimacy. Once lost, it is hard to regain and leads to defeat at the ballot box.

As a result of the NRDC/WHE ACT decision, local activists may now have a greater burden to persuade others that they are acting in good faith. On one hand, they may be accepted as crusaders for environmental protection and ensuring a neighborhood's "fair share" of environmental burdens. On the other hand, they may be tagged as just another special interest trying to force local governments to deliver to them a "piece of the action."

Due to the favorable outcome for West Harlem, the NRDC/WHE ACT action is unlikely to be the last of its type. The New York State Bar Association recently sponsored a meeting on siting controversial (i.e., noxious) facilities, indicating a new current among lawyers. A plaintiff's bar is now emerging armed with arguments about equity and fairness.⁴⁴

Governmental agencies have also recognized environmental concerns. A 1992 Environmental Protection Agency report found that "clear" differences exist between the disease and death rates among racial groups, but that inadequate data was available to analyze the health effects in terms of race and income.⁴⁵ The report also found that people of color and the poor experience "higher than average exposures to selected air pollutants, hazardous waste facilities . . ."⁴⁶ Although these findings were boldly stated, EPA's

44. Memorandum from Lenore Epstein to Nancy Anderson (Feb. 2, 1993) (regarding New York State Bar Association Annual Meeting on Jan. 1, 1993) (on file with author).

45. U.S. ENVTL. PROTECTION AGENCY, 1 ENVIRONMENTAL EQUITY: REDUCING RISK FOR ALL COMMUNITIES 3 (1992) [hereinafter EPA ENVIRONMENTAL EQUITY REPORT]. For a general discussion of the United States E.P.A.'s evolving approach to urban environmental issues, see DOMINIQUE LUCKENHOFF, U.S. DEP'T OF ENVTL. PROTECTION, COMPARATIVE RISK IN AN URBAN SETTING: ISSUES TO CONSIDER (1993).

46. EPA ENVIRONMENTAL EQUITY REPORT, *supra* note 45, at 3.

recommendations were mild.⁴⁷ It recommended that the agency "increase the priority that it gives to [the] issues of environmental equity" and maintain (but not create) information, and that it should include considerations of environmental equity in mandated risk assessments.⁴⁸

In a similar vein, bills were introduced in the New York State legislature in 1993, requiring "fair share" type studies as well as environmental benefits programs for burdened communities.⁴⁹ The City's official response to such proposed legislation has been to point first to the Mayor's concern about environmental equity in the matter of facility siting, second to the guiding principle of community "fair share" as incorporated into 1989 amendments to the City Charter, and third to the Greenpoint/Williamsburg and West Harlem Environmental Benefits Programs.⁵⁰ Endorsement of proposed state legislation, however, has not been forthcoming from City Hall.⁵¹ Given the potential impact on the City's economic development and land use policies, and the possibility that state and city money would have to be appropriated to designated neighborhoods, this lack of endorsement is unsurprising. Nevertheless, fair share and environmental justice and equity issues are setting new standards and are having a considerable impact on local politics.

New York City's Department of Environmental Protection must be seen as a catalyst for defining environmental justice, environmental equity, and fair share. The Greenpoint/Williamsburg and West Harlem Environmental Benefits Programs, while viewed by their beneficiaries with skepticism, create public forums at the grassroots levels. These fora encourage dialogue among community activists, professional environmentalists, and other relevant players regarding ways to influence local politics and environmental policy to alleviate their neighborhood's environmental burdens.

47. The Clinton administration, however, indicates that it will move more boldly in this arena. See Exec. Order No. 12,898, 59 Fed. Reg. 7629 (1994); see also Marianne Lavelle, *Clinton Pushes on Race and Environment*, NAT'L L.J., Dec. 6, 1993, at 1. Foreshadowing the promise implicit in Clinton's Executive Order, the U.S. E.P.A. announced an environmental justice grants program with total funding of \$500,000 for the 1994 fiscal year. See 58 Fed. Reg. 63,955 (1993).

48. EPA ENVIRONMENTAL EQUITY REPORT, *supra* note 45, at 4.

49. See S. 5742, 215th Gen. Assembly, 1st Sess. (1993); A. 7140, 215th Gen. Assembly, 1st Sess. (1993) (introduced by Assemblyman Richard L. Brodsky).

50. See Letter from Barbara Fife, New York City Deputy Mayor, to Assemblyman Richard L. Brodsky (June 23, 1993) (on behalf of Mayor Dinkins) (on file with author).

51. *Id.*

In the West Harlem and North River consent orders discussed earlier, New York State's oversight role regarding sewage treatment, coupled with the relatively greater distance it has from local political pressures, led to outcomes that provided Greenpoint/Williamsburg and West Harlem with resources in the form of the Environmental Benefits Program funds and DEP staff time. The orders show how the responsibilities and political configurations of governments can benefit a wide range of interests. Citizens who make little headway at influencing local government decisions may fare better in a state or federal government forum. Although the state government's goals may not always favor local communities over a municipal government, future overlap may provide great opportunities for local activists to realize powerful synergies.

V. Conclusion

The Newtown Creek, North River, and NRDC/WHE ACT decisions set new terms for urban politics and the environmental justice debate by recognizing community-based environmental interests and limiting a government's ability to justify its actions by claiming to act in its citizens' best interests. These decisions, however, cannot predetermine the outcome on local politics or the scope of its impact; several other factors will influence this.

First, although new actors are making demands on the local political system, such demands are often voiced by community-based environmental activists taking a very local view. What some might call community empowerment or community initiated planning, others might call provincialism or urban balkanization. Such a stigma can limit success in the political arena. Second, sometimes groups fail to coalesce into a functioning force. Third, personalities or diverse ethnic identities can clash. Lastly, conflicts over infrastructure Locally Undesirable Land Uses ("LULUs") are also battles over land use decisions and environmental concerns. Since land use decisions impact business interests, especially real estate and construction interests, local groups may lack the resources to wage successful battles against such concerns.

These factors raise two important questions. First, what impact will local environmental activism have on the governmental obligation to protect its citizens by properly managing society's wastes? The stakes are high; billions of tax dollars will be spent on consulting, engineering, and construction contracts. Additional cost factors are the economic consequences of making certain land use decisions and lobbying costs. Second, how will the discharge of this

public responsibility fit with the public's standards of fairness and equity? How cities answer these two questions will determine the extent of the environmental movement's impact on local politics.

The general media, academic writing, and the environmental protection movement have yet to come to grips with or clearly define the environmental justice movement. Still, one thing is indisputable: the political power of the movement and its links with racial and social justice organizations have permanently changed the terms of the environmental protection debate and the rules of local politics and economic development. There is a growing awareness that environmental justice is worth fighting for and that progress is achievable. Although the result of this growing awareness is unforeseeable, things will never be the same again for all involved.