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REFLECTIONS ON ENVIRONMENTAL JUSTICE

*Michael B. Gerrard**

Environmental justice is a very hot topic. Yesterday's New York Times on the front page of the Metropolitan section had a story stating: *Mid-Sized Plants Headed to Poor Areas*.¹ The story stated, "The Pataki administration acknowledges in its own study that the electric generators that it wants to install around New York City would go into poor heavily minority communities, a finding that supports some of the arguments of the project's opponents."² This is quoting an unreleased environmental justice analysis that may or may not be valid, but it certainly shows how hot a topic it is. This morning I would like to say a couple of words about what environmental justice is, on what is the over-arching law on the subject at the federal level, and then to speculate a little bit—we're still at such an early stage that only speculation is warranted—as to how it will affect SEQRA [State Environmental Quality Review Act] and related processes.

The basic idea underlying environmental justice is that minority and low income individuals and communities should not be disproportionately exposed to environmental hazards and should be able to participate meaningfully in the decisions that affect their exposure to those hazards. Environmental justice first became a major issue in 1987 with the publication of a report called *Toxic Wastes and Race in the United States*,³ published by the

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¹ Richard Pérez-Peña, *State Admits Plants Headed to Poor Areas*, N.Y. TIMES, Mar. 15, 2001, at B1.

² *Id.*

³ UNITED CHURCH OF CHRIST COMM'N FOR RACIAL JUSTICE, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIOECONOMIC

Commission of Racial Justice of the United Church of Christ, concluding that the racial characteristics of a community were the most important single indicator of proximity to hazardous waste sites. A lot of methodological issues have been raised about that study, but it had a tremendous impact.

The first fundamental legal basis for environmental justice law is the Equal Protection Clause of the United States Constitution. However, plaintiffs seeking to use the Equal Protection Clause to bring complaints on environmental justice grounds have uniformly failed because the courts require a showing of discriminatory intent before allowing an equal protection claim, and no one has ever been able to prove discriminatory intent in the environmental justice context of a litigation.

The Civil Rights Act of 1964 contained a very important provision, Title VI,⁴ which has also become of great importance in environmental justice. Title VI says that “[n]o 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 subject[] to discrimination [involving] any program or activity receiving federal financial assistance.”⁵ So Title VI aims at recipients of federal financial assistance. Every state environment agency including the DEC [Department of Environmental Conservation] is a recipient of federal financial assistance and therefore is subject to Title VI. It doesn’t matter whether the money goes to the particular program at issue; DEC is subject to Title VI. Title VI itself has been interpreted also to require a showing of discriminatory intent before it can be forced in court. However, Title VI allowed federal agencies to adopt implementing regulations. The Title VI regulations adopted by EPA [Environmental Protection Agency] as well of those of a number of other federal agencies don’t require intent. Discriminatory effect is enough.

The question then arises: Can you go to court to challenge a recipient of an EPA grant, such as the DEC, if there is a finding of discriminatory effect? The issue of whether there is a private right of action for violations of EPA regulations is an unresolved issue. Three years ago, the U.S. Court of Appeals for the Third Circuit

CHARACTERISTICS OF COMMUNITIES SURROUNDING HAZARDOUS WASTE SITES (1987).

⁴ Civil Rights Act of 1964, Pub. L. 88-352, § 601, 78 Stat. 252, 252 (1964) (codified as amended at 42 U.S.C. § 2000d (1994)).

⁵ 42 U.S.C. § 2000d (1994).

ruled that there was such a right in the *Chester* case.⁶ The U.S. Supreme Court agreed to hear the case; but then the plant that was the subject of the controversy in the *Chester* case—a proposed soil remediation plant—was cancelled and the Supreme Court vacated the decision as moot. So we don't really know the answer to that.

The Supreme Court is about to decide another case called *Alexander v. Sandoval*⁷ which is in a different area of law, but which also raises the same question. So by the time the Court adjourns for the year, around June or July, we may have an answer as to whether there is a private right of action for violations of Title VI regulations.⁸

Also very important is an Executive Order issued by President Clinton in 1994. Executive Order No. 12,898⁹ directs all federal agencies to consider environmental justice in their decision-making processes. The Executive Order, unlike Title VI, applies not only to issues of race and national origin but also to issues of low income. So, at the federal level, the federal agencies look at low-income communities as well as at those that are in areas of racial minorities. In 1998, EPA promulgated proposed guidelines for implementing the Executive Order and Title VI.¹⁰ These guidelines led to a firestorm of activity, in large part because one of the provisions said that somebody who is unhappy with a state permitting decision, after the permitting decision had been made final, could go to EPA and raise an environmental justice complaint—which might take many months to resolve. Therefore, there would be a tremendous amount of uncertainty about whether permits received from the state were valid until the EPA process was complete.

EPA backed down, and in June 2000 issued a new draft of these guidelines not containing that provision.¹¹ There was an extensive

⁶ *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925 (3d Cir. 1997), *vacated*, 524 U.S. 974 (1998).

⁷ 121 S. Ct. 1511 (2001).

⁸ The Supreme Court decided this case on April 24, 2001, ruling that there is no private right of action to challenge a violation of agency regulations under Title VI. *Id.* at 1523. This decision left open the question of whether section 1983 provided an avenue for private suits under agency Title VI regulations. That question was answered in the negative in *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*, 2001 WL 1602144 (3d Cir., Dec. 17, 2001).

⁹ Exec. Order No. 12,898, 3 C.F.R. 859 (1995), *reprinted in* 42 U.S.C. § 4321 (1994) (as amended by Exec. Order 12,948, 3 C.F.R. 321 (1996) *reprinted in* 42 U.S.C. § 4321, (Supp. II 1996).

¹⁰ U.S. Env'tl. Prot. Agency, Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Feb. 1998), at <http://es.epa/oeca/oej/titlevi.pdf>.

¹¹ Draft Revised Guidance for Investigating Title VI Administrative Complaints

comment period; the clock ran out on the Clinton administration before the rules were made final, and, as far as I know, the Bush administration has not indicated one way or another what attitude it is going to have toward these proposed guidelines.

Meanwhile, several federal agencies have come out with guidance on environmental justice analysis in the NEPA [National Environmental Policy Act] context. There was a set of guidance documents from the President's Council on Environmental Quality issued in 1997,¹² and another from the EPA in 1998,¹³ that are very helpful to agencies doing NEPA analysis—to show how they should do environmental justice analysis.

At the New York State level, there is of course no New York State statute on environmental justice, nor is there a state regulation, nor an executive order. In October 1999, Commissioner Cahill appointed a task force on environmental justice.¹⁴ That task force is now hard at work and may in the coming months come out with recommendations for what the state should do.¹⁵ Those recommendations may involve proposals for an executive order, regulations, or statutory changes.

A number of other states do have formal regulatory systems in place for environmental justice, including Connecticut, New Hampshire, Oklahoma, and Texas.¹⁶ But New York does not.

Challenging Permits, 65 Fed. Reg. 39,650 (June 27, 2000). This guideline was issued "to address the application of Title VI to alleged disparate impacts caused by environmental permitting." *Id.* at 39,650. The Environmental Protection Agency's Title VI implementing regulations can be found in the Code of Federal Regulations. 40 C.F.R. § 7.15 (2001).

¹² COUNCIL ON ENVTL. QUALITY, ENVIRONMENTAL JUSTICE: GUIDANCE UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT, Dec. 10, 1997, <http://www.whitehouse.gov/CEQ>.

¹³ U.S. ENVTL. PROT. AGENCY, FINAL GUIDANCE FOR INCORPORATING ENVIRONMENTAL JUSTICE CONCERNS IN EPA'S NEPA COMPLIANCE ANALYSIS (April 1998), <http://es.epa.gov/oeca/ofa/ejapa.html>.

¹⁴ See N.Y. Dep't of Envtl. Conserv., *New York State Environmental Justice Advisory Group*, at <http://www.dec.state.ny.us/website/ej/advisorygroup.html> (last visited Dec. 10, 2001).

¹⁵ ENVTL. JUSTICE ADVISORY GROUP, RECOMMENDATIONS FOR THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION ENVIRONMENTAL JUSTICE PROGRAM (Jan. 2002), <http://www.dec.state.ny.us/website/ej/ejfinalreport.pdf>. The report cautions that it is simply advisory and does not "create, any right or benefit . . . enforceable at law or equity by a party against the state of New York, its agencies, its officers, or any person." *Id.* at 4. The report includes recommendations for incorporating environmental justice into SEQRA. It also includes a framework for the DEC's permitting process. *See id.* at 10-19.

¹⁶ All of these state programs are discussed in Chuck D. Barlow, *State Environmental Justice Programs and Related Authorities*, in *THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS* 140 (Michael B. Gerrard ed., 1999).

New York City has an interesting provision added by the City Charter in 1989 called “The Fair Share Clause,”¹⁷ which requires that whenever there is a proposed city facility there should be an analysis of whether that facility—especially if it is an “undesirable” kind of facility like a solid-waste transfer station—is going into a community that has more than its fair share of those kinds of facilities.

Let me now turn to some thoughts on the relationship between environmental justice and SEQRA. First of all, if the State or a locality is considering under SEQRA an action in a minority community that also requires a federal permit or that receives federal money, then the federal agency is likely going to be calling for an environmental justice analysis, or it may be calling for that in conjunction with the EIS [environmental impact statement]. For instance, if there is a discretionary [Army] Corps of Engineers permit, as opposed to a nationwide permit, or if there is federal funding going into a project like a transportation project, then it wouldn’t be surprising for the federal agency to call for an environmental justice analysis.

Similarly, when the state is administering a federal permit program—such as the PSD [prevention of significant deterioration] program—EPA has in some instances been calling for environmental justice analyses in the state permitting process. EPA has not been calling for environmental justice analysis for delegated programs, such as the SPDES [State Pollutant Discharge Elimination System] program.

If you don’t have that kind of federal “hook,” the closest decision is the *American Marine Rail*¹⁸ decision, which concerned a proposed barge-to-rail solid waste transfer station in the Bronx. In that case, Administrative Law Judge Goldberger said that SEQRA’s broad mandate would appear to encompass concerns of environmental justice with respect to the application, and she called for further environmental analysis of that issue. The *American Marine Rail* matter went up to Commissioner Cahill, who, just a few weeks ago, reversed those portions of the decisions that dealt with the PM-2.5 standards: the issue of what would be a permissible level of fine particulates.¹⁹ (That in itself was cast into some question a couple

¹⁷ N.Y. CITY, N.Y., CHARTER & ADMIN. CODE, ch. 8, § 203 (2001).

¹⁸ See *In re American Marine Rail, LLC*, 2000 WL 1299571, (N.Y. Dep’t of Env’tl. Conserv., Aug. 25, 2000) (Administrative Law Judge Rulings on Issues and Party Status and Environmental Significance).

¹⁹ See *In re American Marine Rail, LLC*, 2001 WL 172285, (N.Y. Dep’t of Env’tl. Conserv.,

of weeks later by a decision of the U.S. Supreme Court in *American Trucking*,²⁰ but that's a whole other story.) But Commissioner Cahill's decision did not address the environmental justice aspect of the administrative law judge's decision.

What is it that would trigger an environmental justice analysis? At the federal level it has been established (and I think that the same thing may evolve at the state level) that two things are necessary in order to trigger it. First, an adverse effect; and second, that that effect would be on an environmental justice community. With respect to the requirement of an adverse effect, in 1998 the EPA Office of Civil Rights issued the *Select Steel*²¹ decision—which concerned a proposed facility in Michigan—that essentially said that if you have a project that is subject to health-based standards and the project would comply with those health-based standards, then you've shown that there's no adverse effect and that no further environmental justice analysis is necessary. That leaves open a number of questions. One of them is clearly that not all effects are quantifiable or subject to health numbers; for instance, aesthetic impacts aren't. And another is that there is dissatisfaction among some environmental justice advocates with the standards that exist. But I think that most of us would agree that that kind of permitting situation is probably not the appropriate forum for revisiting whether air quality or water quality standards are adequate.

With respect to what is an "environmental justice community," the U.S. EPA Region Two in December 2000 issued a guidance document on how to identify an environmental justice community, i.e., a community that has such a high percentage of minorities in the population that it is to be considered as one.²² If that kind of analysis is triggered, clearly one of the major issues that will be debated is cumulative impacts, and this is highlighted in the current controversy over new power plants in New York City. There are many other examples. Questions about cumulative impact analysis have been litigated under SEQRA of course, notably *Long Island Pine Barrens v. Town of Brookhaven*.²³ Cumulative impact analysis is required only for proposed projects that are

Feb. 14, 2001) (Interim Decision).

²⁰ *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457 (2001).

²¹ Letter from Ann E. Goode, U.S. Env'tl. Prot. Agency, Office of Civil Rights, to Father Phil Schmitter, Sister Joanne Chiaverini, St. Francis Prayer Center, and Russell J. Harding, Michigan Dep't of Env'tl. Quality, (Oct. 30, 1998), at www.epa.gov/reg50opa/steelcvr.htm.

²² U.S. ENVTL. PROT. AGENCY, REGION TWO, INTERIM ENVIRONMENTAL JUSTICE POLICY (Dec. 2000), <http://www.epa.gov/region02/community/ej/>.

²³ *Long Island Pine Barrens Soc'y, Inc. v. Planning Bd.*, 606 N.E.2d 1373 (N.Y.1992).

coming from a common plan; that Court of Appeals decision interpreted this requirement fairly narrowly to require, for example, a common proponent.²⁴ Additionally there is a question about how far along in the process a proposed project has to be before it gets to that trigger point.

Another issue that will come up in environmental justice analysis is what is the nature of the demographic analysis that is required. Several years ago, before the emergence of environmental justice issues, there were a couple of decisions saying it was impermissible to talk about the racial composition of the community. Now, it is increasingly becoming required by the EPA and CEQ [Council on Environmental Quality] documents that talk about how to do it.²⁵ There was a major litigation last year, called *New York City Environmental Justice Alliance v. Giuliani*,²⁶ that raised those issues. It concerned New York City's proposal to take many of the community gardens in New York City and auction them off for other uses. The Second Circuit dismissed the lawsuit, finding among other things that the plaintiffs had not made out their case that there really would be disproportionately adverse impacts from the project—even though everybody acknowledged that the community gardens were disproportionately located in low income and minority communities.²⁷ Those communities were also served by regional parks like Central Park and Prospect Park. There were a number of other factors that went into the Second Circuit's decision that an environmental justice case had not been made out.

Alternatives are also going to be a difficult issue with environmental justice. The Appellate Division, Second Department, ruled in a case called *Horn v. IBM*²⁸—which was then codified in the Part 617 regulations²⁹—that the alternatives that are considered in a private project can be limited to alternative sites that are already owned by the applicant or that the applicant has under option to buy. That creates an obvious tension with environmental justice considerations, which would want you to look at a broader range of alternative sites. Moreover, as we all know, every EIS has to include a discussion of the “no build” alternative; but the “no build” discussions in EISs are seldom much more than a page.

²⁴ *Id.* at 1378-79.

²⁵ U.S. ENVTL. PROT. AGENCY, *supra* note 13; COUNCIL ON ENVTL. QUALITY, *supra* note 12.

²⁶ 214 F.3d 65 (2d Cir. 2000), *aff'g*, 50 F. Supp. 2d 250 (S.D.N.Y. 1999).

²⁷ *Id.* at 70-72 (requiring plaintiffs to use an “appropriate measure” to demonstrate a disparate impact).

²⁸ *Horn v. Int'l Bus. Machines Corp.*, 493 N.Y.S.2d 184 (App. Div. 1985).

²⁹ N.Y. COMP. CODES R. & REGS. tit. 6, § 617.9 (2001).

Environmental justice advocates call for a more searching analysis of whether waste minimization or some other kind of alternative is available to reduce this problem.

There are a number of exemptions from SEQRA that are also in tension with environmental justice. One of them is the exemption for actions taken pursuant to consent orders, including consent orders achieved as the result of administrative actions. As the Court of Appeals told us in *NYPIRG v. Town of Islip*,³⁰ you can expand a landfill or take other major physical action totally outside of SEQRA, if it is done pursuant to a settlement of an enforcement action. Additionally, there's the legislative exemption from SEQRA. Arguably, the environmental decision in the last decade with the greatest environmental justice impact in New York State was the decision to close the Fresh Kills Landfill on Staten Island, effectively meaning that no longer will all of New York City's solid waste go to one location, but it will go to a variety of transfer stations and then be exported. That is a decision that has colossal environmental justice impacts but it completely avoided SEQRA review because it was a legislative decision. Instead, the SEQRA review has been limited to the site-specific impacts—do you put a transfer station *here* or a landfill *there*. Not only does environmental justice affect the EIS process, but there is a potential for an impact on substantive decisions. And we may begin to see litigation on the question of whether an agency *may* or an agency *must* consider disproportionate impacts in making decisions on whether or not to allow a project to go forward.

So it's clear that we are potentially at the dawn of an era, but we don't know whether it's going to be a short era or a long era with environmental justice. Some of that will depend of what happens in Washington. At this point there are many more questions than there are answers on the interrelationship between environmental justice on one hand and SEQRA and other aspects of environmental law on the other.

³⁰ 520 N.E.2d 517 (N.Y. 1988).