

2000

Environmental Justice and Natural Areas Protection Trends & Insight

Michael B. Gerrard

Columbia Law School, michael.gerrard@law.columbia.edu

Follow this and additional works at: https://scholarship.law.columbia.edu/faculty_scholarship



Part of the [Civil Rights and Discrimination Commons](#), [Environmental Law Commons](#), and the [Natural Resources Law Commons](#)

Recommended Citation

Michael B. Gerrard, *Environmental Justice and Natural Areas Protection Trends & Insight*, 15 NAT. RESOURCES & ENV'T. 44 (2000).

Available at: https://scholarship.law.columbia.edu/faculty_scholarship/704

This Article is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact cls2184@columbia.edu.



Trends & Insights

Edited by Patrick O. Cavanaugh

- *Environmental Justice and Natural Areas Protection*
- *OPA '90 at Ten*
- *Trust Funds and Trust Lands: The Stories Beneath the Story*
- *D.C. Circuit Strikes Down EPA's Use of the Linear Default Assumption*

Environmental Justice and Natural Areas Protection

Michael B. Gerrard

There are 3,119,963 square miles in the continental United States. That sounds like plenty of space to put just about anything. However, when the facility seeking a home is environmentally controversial, finding even one square mile can seem almost impossible.

This country is now in its third major era in making siting decisions. The first era—unconstrained siting—lasted until the late 1960s. Then began the second era—protecting natural areas. In the early 1990s, we embarked upon a third era—environmental justice. The growing tensions between protecting natural areas and achieving environmental justice suggest that we should strive for a fourth era, in which these two important goals are reconciled and allowed to work together.

For most of American history, and particularly since the Industrial Revolution, the decision of where to locate a facility was made based on engineering considerations. If a manufacturing plant required large amounts of water for power or for waste disposal, it could be put alongside a mighty river. If a site was otherwise desirable but it lacked water, a river could be diverted to it. If the coastline was too crowded or too marshy, fill would be brought in to create new dry land. If the best place to run a new highway was through an established neighborhood (and if no one with political influence lived there), that's what eminent domain was for.

Few procedures existed to identify the environmental impacts of proposed actions, and if any such impacts were found, there were few legal mandates to avoid or minimize them. The nation's industrial base and its transportation and utility infrastructure expanded rapidly through the post-World War II years, unconstrained by the yet-to-be-born impediments of environmental law.

By the 1960s some of the consequences began to be felt. Rivers running through great cities resembled industrial sewers and occasionally caught fire, and sunsets took on the hues of smog. A nascent environmental movement began to stir, and after Woodstock Joni Mitchell sang of going "back to the garden."

The modern era in environmental law has been traced in part to the litigation over a proposed pumped storage power plant on the Hudson River north of New York City. The plant would have involved blasting a

Mr. Gerrard is a partner in the New York office of Arnold & Porter and an adjunct professor at Columbia and Yale. He is a member of the Section's Council and is chair of the Section's Strategic Planning Committee.

huge hole in the side of Storm King Mountain, so that water could be pumped in at night when power demand was low and let back down past turbines during the day when the electricity was needed. In licensing the facility, the Federal Power Commission had given scant regard to the consequences to the river's aquatic life and to the humans who enjoyed its beauty. A group called Scenic Hudson Preservation Conference formed to fight the project. In a series of decisions, the U.S. Court of Appeals for the Second Circuit ruled that the FPC should have examined the proposal's environmental impacts. Ultimately, the project was killed.

Several statutes designed to protect natural areas and other special places were enacted in the 1960s, including the Wilderness Act of 1964, the National Historic Preservation Act of 1966, and the Wild and Scenic Rivers Act of 1968. In 1966, Congress enacted Section 4(f) of the Department of Transportation Act, and in 1971 the U.S. Supreme Court, in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), held that the statute really meant what it said—that a federal highway cannot go through a park if there are alternatives. The National Environmental Policy Act (NEPA) was enacted in 1970, requiring systematic review of all major federal projects that could affect the environment; about half of the states enacted their own “little NEPAs.”

Other environmental statutes followed in a torrent during the Nixon and Ford administrations, and several of them declared certain kinds of natural areas to be off limits—or at least hotly contested grounds—for development. The Federal Water Pollution Control Act of 1972 included Section 404, which subjected the filling of wetlands (which had previously been known as swamps) to rigorous review. That same year, ocean dumping was inhibited by the Marine Protection, Research, and Sanctuaries Act, and coastlines were given a measure of protection by the Coastal Zone Management Act. The Endangered Species Act of 1973 protected the critical habitat of certain plant and animal species. The Safe Drinking Water Act of 1974 made it harder to build on sole-source aquifers.

The other great environmental statutes of the 1970s were aimed less at protecting natural areas and more at reducing technological threats to human health. The Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA or Superfund), aimed to force the cleanup of land that was heavily contaminated with hazardous substances, typically the mess left behind by the era of unconstrained development. More than one thousand sites nationwide were ultimately placed on CERCLA's National Priorities List, but the reach of CERCLA was far greater. It created a private right of action on behalf of those who investigated or cleaned up a wide variety of contaminated sites not on the priorities list. Liability was extended to many who had done nothing to create the contamination.

This far-reaching liability scheme had the unintended

consequence of creating a whole new class of property that was virtually undevelopable. If a parcel's industrial history suggested it might be contaminated, many financial institutions would not go near it, at least unless the proposed use was so profitable and the borrower had such deep pockets that there was little danger that the bank would ultimately have to pay for any cleanup. This led to the brownfields problem: Even slightly contaminated land became virtually undevelopable, deepening the blight upon old urban neighborhoods (where much of this land was located) and driving many projects to untainted suburban or exurban “greenfields.”

At the same time that all of these land development restrictions were being imposed, the demand for new facilities continued to grow with the economy. Most were private projects whose sites were selected behind closed corporate doors. However, some were public projects which, because of their size, unpopularity or unprofitability, few private companies wanted to tackle on their own. A prime example was the siting of facilities for the disposal of solid or hazardous waste.

For these kinds of projects, an iterative siting process evolved. At the first step, all areas in the relevant geographic area (typically a state or county) that were covered by one of the natural area protection laws were disqualified. Thus, protected wetlands, wilderness areas and parklands were taken out of contention. Then cost factors, such as distances from raw materials and markets, were considered. Ultimately the best site was selected, and the project entered the permitting process.

Frequently this process led to sites in or near cities or towns. The reason was that while there are laws protecting natural areas, there is no Populated Areas Protection Act. Areas where people lived could make it all the way through the various steps in the siting process. The theory was that political forces would work to shield these areas, so that environmental constraints were not necessary; the laws were needed by voiceless trees and fish, not by human beings.

The reality was that some communities have far more political clout than others. Scarsdale and Beverly Hills could take care of themselves through their elected representatives, their hired lawyers, and other means. Other areas had no such protections. The author saw this play out in a highway siting case in the late 1980s in a Middle Atlantic state. A proposed highway could take three possible routes: through a wetland, through a protected farmland, and through a proposed affordable housing project. The wetland and the farmland enjoyed legal protection; the housing project did not, so that's where the highway went.

By the mid-1980s, around the time that CERCLA was first baring its teeth and there was new consciousness of hazardous waste in urban neighborhoods, added attention fell upon effects on urban neighborhoods. A

seminal event was the publication in 1987 of a slim volume, *Toxic Wastes and Race in the United States*, by the Commission on Racial Justice of the United Church of Christ. It presented statistics, according to the authors, showing that toxic waste sites were disproportionately located in low-income and minority areas, and that these sites were more closely correlated with race than with income. This book became the manifesto for the nascent environmental justice movement.

This movement focused primarily on distribution and on process. Meticulous studies were performed (and, as this is written, are still being performed) concerning whether the proposed location of a facility has more or fewer people of color or of low incomes than the typical spot in that county, town, zip code, or census block. Elaborate processes were also established to ensure community participation at every stage of the decision-making process; this was a 180-degree turn from the old days of highly centralized decisions, when the neighbors' first sign of a proposal was the sight of a bulldozer.

These new requirements had legal underpinnings in the Equal Protection Clause of the U.S. Constitution, Title VI of the Civil Rights Act of 1964, and an executive order on environmental justice issued by President Clinton in 1994. From these authorities the U.S. Environmental Protection Agency (EPA) has the power to review racial and economic disparities in proposed sitings, and to suggest or require that alternative sites be examined or selected.

To a very real extent, these processes served to create the "Populated Areas Protection Act" that had been lacking before. Even absent an absolute prohibition on siting in a minority area, the assurance of a long, bitter fight with an uncertain outcome became a major deterrent. The focus on distribution moved to the background the question of whether the facility would really have an adverse physical effect, such as a tangible health impact. In 1998, however, EPA issued a decision (arising from an application by Select Steel to build a mill in Flint, Michigan) that a project that would not violate health standards is shielded from environmental justice attack at the legal level.

The growing clout of environmental justice has not undermined the old power of natural area protection. It is no easier now to site a facility in a wetland or a park than it was a decade ago. Rather, it has created a large new class of protected areas. The protection is not absolute (just as permits can be granted for filling wetlands), but it is considerable.

A result has been to squeeze projects into areas that do not yet enjoy special protections, and that do not bear the taint of past industrial contamination. Most older cities do not have many such areas nearby. A prime target is farmland (though, increasingly, this is beginning to enjoy special protections too). An inevitable result is increased sprawl, as new developments are chased from the cities and into the

automobile-dependent hinterlands.

Another result runs directly contrary to the goals of environmental justice itself. The remaining sites are so few and inconvenient, and the processes are so onerous, that many projects do not get built at all. Of course some projects should not be built; they create much pollution and few jobs, what they make is not essential, and their public costs far exceed their benefits. But others would have a positive effect on society, including on low-income communities. A prime example is affordable housing. The traditional environmental laws have long been used to keep such housing out of the suburbs, and, ironically, environmental justice theories are sometimes being used to keep them from city neighborhoods as well. While suppressing the supply of hazardous waste landfills, for example, can increase the price of disposal and thereby encourage pollution prevention, keeping down the supply of affordable housing does not limit the production of babies; it only consigns more people to miserable lives in the overcrowded apartments of relatives, or to spending so much of their income on rent that they have little left for anything else.

The squeeze play also inhibits the replacement of older, polluting facilities with new ones that use modern, cleaner technology. The Clean Air Act, the Clean Water Act, and most other environmental laws contain grandfather clauses that allow old plants to stay in operation. More than a few old plants are still spewing smoke into the air and grime into the water because new replacement plants were stopped by modern environmental laws.

The negative effects of this squeeze play point the way toward a fourth era in facility siting. This area would have four characteristics:

First, the question of the need for the new facility should move closer to center stage in the siting and permitting processes. Facilities for which there is a compelling public need (such as affordable housing) are now treated just about the same as those that serve far less weighty needs (such as golf courses). It makes sense to be more flexible in granting environmental permits for more needed facilities.

Second, for projects that can pose genuinely significant environmental risks, such as hazardous waste disposal facilities, more attention should be paid to whether waste minimization could reduce the need for the facility, or lead to fewer similar facilities nationwide. Current law on reducing the volumes of such waste that are generated is remarkably toothless, in contrast to the laws on reducing air and water pollution.

Third, when considering a new facility, a serious determinant is whether it would displace an old one and the net environmental impacts of the shift. The environment hardly benefits if a new plant is barred because it would emit one pound of Chemical X into the air if it is replacing an old plant that is emitting five pounds.

Fourth, in environmental justice analysis, proximity

to a low-income or minority community should not be the only factor. Proximity should not in and of itself be irrebuttably presumed to mean that the project will have a negative impact. The Select Steel matter is precedent for paying attention to actual impacts. *In re Select Steel*, U.S. EPA No. 5R-98-R5 (Oct. 30, 1998).

All of this comes down to balancing. Society is trying to simultaneously meet several competing objectives. The need to protect natural areas and the need to provide environmental justice both can be served if governmental decision-makers have the flexibility to adjust rules to particular circumstances, and if they have the full information needed to recognize when such adjustment is warranted. Giving all interest groups an automatic veto makes it impossible to achieve the needed balance.

OPA '90 at Ten

Cynthia L. Quarterman and Daniel J. Poynor

On August 18, 2000, the Oil Pollution Act (OPA) will mark its tenth year. OPA of 1990, Pub. L. No. 101-380, 33 U.S.C. §§ 2701 *et seq.* (1994). The OPA was enacted one year after the most calamitous and memorable event of the modern environmental movement: The 11 million gallon oil spill from the Exxon *Valdez* tanker in the Prince William Sound offshore Alaska. The ever-present photographs of oil soaked birds and wildlife following the spill captured the nation's attention and raised its concern about the effects of oil in water on natural resources. Congress responded. It enacted the OPA, a comprehensive environmental law that attempts to ensure that owners or operators of vessels or facilities that pollute the nation's navigable waters with oil will be held financially responsible.

A decade later, the oil spills caused by the sinking of the tanker *Erika* off the Brittany coast and the tanker *Nabodkha* off Japan are raising similar sentiments in the European Union. See Juliette Jowitz, *Crackdown on Oil Tanker Safety*, FIN. TIMES, May 14, 2000; Aviva Freudmann, *Europe considers its own Oil Pollution Act*, J. COMM., Jan. 25, 2000, at 7. This represents a change of heart for the EU, which at the time of the OPA's passage criticized the United States for setting what it viewed as unilateral international shipping requirements. Now Europe is considering heightened safety measures for ships in its own waters.

Ms. Quarterman is a partner at Steptoe & Johnson LLP. She served as director of the Minerals Management Service at the United States Department of the Interior from 1995-1999. Mr. Poynor is an associate in Steptoe & Johnson LLP's energy and natural resources department. The views expressed here are those of the authors and do not necessarily reflect the views of any of the firm's clients.

Back in the United States, an unfortunate accident that occurred last June is causing another public outcry. A pipeline running through a public park in Bellingham, Washington, spilled 280,000 gallons of gasoline into an adjacent creek. The gasoline ignited and killed three people. As a result of this incident, several competing bills have been offered in Congress to reauthorize the Pipeline Safety Act with significant changes, including provisions that would increase fines (last increased by the OPA), safety requirements, and state oversight of interstate pipelines. The intense focus on these and other catastrophic incidents is certain to define the OPA's future as much as it has its past.

Since the beginning of 2000, there have already been headline reports of EPA's recovery of record fines for oil spills in several states. Those headlines related to violations of the OPA, although the public probably did not recognize them as such because the spills occurred inland. Yet, it is more likely to be those surreptitious OPA-related incidents that have the most extensive effects in the regulated community.

The OPA covers oil pollution liability, compensation, prevention, response and contingency planning, removal, research, and development. The Act amended provisions of laws as varying as the High Seas Act, the Clean Water Act, the Deepwater Port Act, the Outer Continental Shelf Lands Act, the Oil Spill Liability Trust Fund, and the Trans-Alaska Pipeline Authorization Act. Not surprisingly, during the first ten years of OPA implementation, the executive agencies have devoted considerable effort to creating a regulatory framework for the Act. A whole host of executive agencies share responsibility for its implementation.

For example, the Department of Transportation's (DOT) United States Coast Guard has broad responsibility for implementing the OPA on navigable waters. The Minerals Management Service (MMS) shares responsibility offshore for oversight of oil spill prevention and control, response planning, response equipment inspection and financial responsibility for pipelines and offshore facilities. See, e.g., *Final Rule, Oil Spill Financial Responsibility for Offshore Facilities*, 63 Fed. Reg. 42,699 (1998) (issued after a multi-year effort to amend the OPA's provisions on which facilities must meet the \$150 million financial responsibility requirements). See also Pub. L. 104-324, tit. XI, § 1125(a), 33 U.S.C.A. § 2716 (West Supp. 2000).

EPA is responsible for implementing OPA for non-transportation-related facilities landward of the coast line, while DOT's Research and Special Program Administration's Office of Pipeline Safety has responsibility for implementing the OPA as it applies to onshore pipelines, such as the one in Bellingham, Washington. The Commerce Department's National Oceanic and Atmospheric Agency (NOAA) is responsible for setting guidelines for assessing natural resource damages from an oil discharge. Although NOAA's rule setting forth