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Clifford Rechtschaffen

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Creating a Roadmap for Achieving Intergenerational Environmental Justice
Clifford Rechtschaffen
Golden Gate University School of Law

Introduction

The environmental justice movement has achieved many important gains over the past 20 years. There is widespread recognition at policy levels that achieving environmental justice is an important issue. An Executive Order on Environmental Justice was adopted in 1994; almost 40 states now have some type of environmental justice policy or strategy, and a few businesses, such as Pacific Gas & Electric (PG& E), have their own environmental justice policies.

But in other important ways the movement has lost some of its cutting edge. While there have been many individual victories, and many public declarations of support for environmental justice concepts, to a large extent the transformative changes in environmental policy and decision making envisioned by the movement have not yet occurred. (See, e.g., U.S. Civil Rights Commission 2003: “[federal] agencies have begun work in protecting minority and low-income communities, but much more needs to be done . . . Environmental justice will not become a reality as long as the issue remains an optional exercise by agency staff, an afterthought to existing programs, or an abstract policy statement that does not change conditions in affected communities....”).

California is a good example. With a progressive legislature and a powerful Latino legislative caucus, the legislature has passed over a half dozen environmental justice statutes in recent years, a Cal/EPA advisory committee suggested many far-reaching reforms, and the California Air Resources Board (CARB) adopted an impressive environmental justice strategy,. But there has been limited progress in translating broad themes into actual hard, enforceable law. Cal/EPA has yet to actually adopt any mandatory environmental justice regulations. CARB hasn’t used its oversight role over local air districts that enforce most of the state’s air quality laws to aggressively promote environmental justice. The California Energy Commission has yet to refuse any power plant based on environmental justice concerns. And when the going got tough—during the 2000-01 “energy crisis”—environmental justice got bypassed, with dirty “peaker” plants sited disproportionately in communities of color.

Moreover, there has been a overall retrenchment from directly confronting the role of race in society’s environmental inequities. EPA, most saliently, has attempted to “whitewash” race by redefining environmental justice to mean “environmental protection for everyone,” rather than a special focus on communities of color and low-income communities, and in arguing that the agency is foreclosed from using race as a basis for making any decisions. Some state agencies have followed EPA’s lead in arguing that they cannot consider race in remedying environmental disparities. EPA’s approach is reflective of a broader societal wariness toward race-conscious remedies & a desire to make race disappear.

The Way Forward

There nonetheless are many strategies that can and should be exploited to advance environmental justice goals.

A. Don't Retreat from Race

Race remains central to understanding environmental injustices. The empirical evidence today is even *stronger* than before that race is the single most important determinant for proximity to environmental bads in our society. See, e.g. Bullard, Mohai, et al, 2007 (using 2000 census data, racial disparities near hazardous waste facilities greater than previously reported); Morello-Frosch & Jesdale (2006) (racial segregation of community linked with increased cancer risk from air toxics); Bernard & McGeehin (2003) (African American children are 7x more likely to have elevated blood lead levels than white children).

The reality is that race-conscious approaches will face difficult sledding, politically and legally. Some substitute approaches, such as EPA's Environmental Justice Smart Enforcement Assessment Tool (EJSEAT), can serve as reasonable proxies for race or overburdened communities. But it nonetheless is important to continue to press for race-conscious tools, such as providing a private right of action to enforce Title VI's discriminatory impact laws, and for state law analogues (such as California Gov't Code 11135), for two reasons. One, these tools can provide remedies for broader societal discrimination not addressed by other statutes. Two, they empower communities by identifying the problem of environmental injustice for what it is.

B. Existing Laws: Limits & Reforms

1. Pollution Control Laws

Our environmental pollution control laws suffer mostly from a "mindset" problem. As has been exhaustively documented, there is no lack of authority in environmental statutes to address environmental justice concerns, but there is a lack of will and imagination. State officials continue to retreat behind claim of lack of authority to take more proactive steps. Or they do the "Environmental Justice shuffle¹," arguing that environmental justice is really a problem for another regulatory body (i.e. environmental agencies often argue the problem is out of their jurisdiction and must be addressed by land use agencies).

Nonetheless, the laws should be reworked to explicitly authorize and require consideration of cumulative impacts in making decisions, such as granting facility permits. Despite extensive discussion of this problem, virtually all environmental laws still authorize decisions on a facility by facility or even source by source basis – without considering other similar facilities, unpermitted sources, mobile sources, or the wide range of additional factors that contribute to higher health risks for residents in overburdened communities. Some activists have proposed ideas such as "community risk

¹ Coined by Professor Eileen Gauna.

caps” or designating “areas of critical environmental concern” to protect overburdened communities from further degradation

2. Land Use Controls/Environmental Review

Local communities and activists have pushed a number of creative ideas for using the land use process to achieve environmental justice -- community-driven planning and redevelopment efforts, adoption of buffer zones and limits on siting near sensitive receptors; amortization ordinances to phase out nonconforming uses; greater participation in comprehensive land use plans, and so forth.

One additional promising idea is to require that agencies evaluate the health impacts of land use decisions. There is a growing recognition that land use decisions and the “built environment” can have a major impact on the health of the population—factors such as open space and parks, access to public transportation, proximity to farmers markets and grocery stores selling healthy food, closeness to major roadways and freeways that create elevated air toxics risks, housing conditions, access to jobs that match the skills of neighborhood residents, and so forth. This type of information is critical to helping to plan for the development of healthier communities, a central goal of the environmental justice movement, but typically is not required by most environmental impact assessment laws. So called “health-impact assessments” are required in a number of countries, and the proposed federal “Healthy Place Act” of 2006 (authored by Sen. Obama) would have required federal agencies to support such assessments. The health impact assessment process has the added benefit of often soliciting additional community input to gather qualitative evidence about the ways in which the surrounding physical environment affects their health.

C. Adopting a Precautionary Approach

Even with a shift to cumulative impact or health impact analysis, industrial facilities will continue to pose residual health and environmental risks, and create other social, psychological, and economic harms. There also remains the unfairness of making the last actor (facility) on the scene to bear the costs of addressing the cumulative risks borne by overstressed communities. Land use reforms, moreover, can only go so far -- industrial facilities still will have to be located somewhere.

The limits of these approaches suggest that we need to shift to some type of precautionary paradigm to better achieve environmental justice—an approach that focuses more on preventing harmful activities whenever possible and searching for safer alternatives. This could be implemented in any number of ways, including laws that require agencies to conduct a “precautionary” assessment or an “alternatives impact analysis” that asks fundamental questions about the need for a given activity and the availability of less harmful substitutes, and requires that agencies select the least harmful product/activity/approach. When fewer hazards are created, environmental justice communities—who bear the brunt of these hazards—benefit. A precautionary approach also could provide the environmental justice movement with broader potential political

appeal. The movement often has been characterized, unfairly, as another form of NIMBYism – even though it always has championed pollution reduction rather than redistribution.

D. Emphasize State and Local Initiatives.

The focal point for environmental justice activism and progress will be at the state and local level, as environmental justice activists have long realized. This, after all, is where the vast majority of decisions are made. States implement 75% of major federal environmental programs, conduct 80-90% of inspections, and carry out 80-90% of enforcement activities. Local and state governments also are responsible for virtually all land use decisions. [Moreover, even under a favorable Clinton Administration, there were limits to what EPA was willing to do to promote environmental justice (e.g., EPA’s reluctance to make achievement of environmental objectives a central consideration in approving delegation or authorization of federal programs to states; its reluctance to push the envelope to incorporate environmental justice considerations into permitting, enforcement, other activities, its disappointing record on Title VI.)]

Moreover, at this particular political moment, grassroots environmental justice groups appear to have a greater ability to influence policy at these levels. Nearly 40 states have adopted environmental justice policies, strategies, or regulations. They vary considerably—some states have adopted procedural and public participation requirements, some special brownfields development initiatives, some demographic, cumulative impact, or alternative site analysis requirements, some have adopted “anti-concentration” laws for hazardous waste or solid waste facilities. As yet most of these initiatives are not truly “transformative,” but there has been much more recent activity at the state rather than federal level.

E. Focus on Expanding the Pie

There should be increased attention to remedying disparities in environmental benefits, not just burdens. There is less empirical research documenting such inequities, although scholarship in this area is increasing. There also is likely to be less political resistance to remedying disparities in benefits, since the focus to a large extent is on expanding the pie rather than redistributing it.

Obtaining equitable transportation funding is one critical issue, since affordable transportation it is a key link to creating healthy communities, with access to jobs. There is nascent litigation to try and equalize funding transportation funding in some urban areas. In the Bay Area, for example, advocates are litigating a Title VI claim against the regional Metropolitan Transportation Commission because subsidies provided to buses in Alameda County, whose passengers are poor and overwhelmingly people of color, are far lower than those provided to the regional subway and commuter rail lines, whose passengers are not.

Another emerging and important issue is access to parks, open spaces and green areas. (The same issue Martin Luther King rallied about over 40 years ago during the Poor People's Campaign in Chicago, when he called for more swimming pools and playgrounds for urban residents.) Poor people and people of color have less access to public parks and open spaces than other communities. They also suffer disproportionately from obesity and inactivity, and time spent outdoors is the most powerful correlate of physical activity. There have been a few important successes in local campaigns to provide urban residents with more public parks, and Los Angeles mayoral candidate Antonio Villaraigosa made equitable park siting a key component of his successful 2006 mayoral race.