

IT IS TIME FOR A CHANGE¹

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ABSTRACT

Minority and low-income communities are unable to protect their neighborhoods from disproportionate pollution and industrial sitting under the present environmental justice system based upon the Civil Rights Act of 1964 and the Environmental Protection Agency's ("EPA") civil rights regulations. Strict adherence to the EPA's civil rights guidelines has resulted in a backlog of complaints that are either uninvestigated or never corrected. Even when the EPA finds environmental civil rights violations, it is relatively powerless to prevent continued violations because its only recourse is to threaten to cut-off financial assistance to the violating state. These cut-offs, however, rarely take place because they require both the United States House of Representatives and the United States Senate to concur in the action. Despite its investigations and purported action, the EPA has never requested a financial assistance cut-off for any state.

This article urges the National Environmental Justice Advisory Committee ("NEJAC") to support a change in EPA "Guidance" – a test used by the EPA to evaluate whether permits issued to polluting facilities to operate in minority communities constitute civil rights violations – from a "disparate cumulative analysis" to a protocol based on comparative public health. Finally, the article presents a proposed draft of an Environmental Justice Act ("EJA") predicated on protecting the poorest communities by including local input in the zoning process for proposed polluting facilities in their communities. As an alternative proposal, the article includes an Environmental Justice Protocol developed by the Public Interest Law Center of Philadelphia to serve as a substitute for the current EPA's "Guidance."

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I. INTRODUCTION

The Environmental Protection Agency (EPA) environmental justice program is a fraud. The EPA has produced innumerable articles about the need for environmental justice, but in its entire existence it has never found a single case of environmental racism. It is time to end this fraud.

The year 2002 will be remembered as the year when the EPA's environmental hoax was exposed. In 2002, the EPA received its 130th environmental justice complaint from minority communities across the nation. Of these, the EPA has only been able to investigate four and in all four cases the EPA ruled against the minority complainants. Available at www.epa.gov/civilrights. If some day the EPA should, by chance, ever find an environmental civil rights violation, the EPA would be powerless, nonetheless, to provide any relief for the complaining community.

Here's how the EPA's Civil Rights enforcement system works:

1. A minority community may file a civil rights complaint with the EPA, but only after a state has already issued a permit to operate the facility being opposed. 40 C.F.R. § 7.120 (2003).

2. If, subsequent to the issuance of an operating permit, the EPA were to find a civil rights violation, the EPA would have no power to stop the operation or even to provide any other form of relief to the victimized community. 40 C.F.R. § 7.120 (b)(2) (2003).

3. EPA's only remedy against an environmental civil rights violating state is to attempt to cut-off financial assistance to the violating state. Such cut-offs, however, can only take place if both the United States House of Representatives and the United States Senate do not object to the action. 40 C.F.R. § 7.80(a) (2003). The EPA, of course, has never requested a cut-off of financial assistance to a state.

The EPA's inability to provide meaningful relief to a minority community suffering from environmental racism has remained hidden because the EPA has never fought a single case of environmental discrimination. Since 1998, to escape criticism of its totally ineffective environmental justice program, the EPA has engaged the environmental justice community in an endless search for a "Guidance," which the EPA says that it would be able use to evaluate whether the permit a polluting facility to operate in a minority community constitutes a civil right violation. Available at www.epa.gov/civilrights/docs/interim.pdf. The EPA refers to this type of investigation as a search for a "significant disparate cumulative investigation." *Id.* It sounds scientific, but it is mostly smoke and mirrors because such investigations require investigators to make numerous choices between oranges and apples that create a problematic outcome. Significantly, the EPA has refused to include in its proposed "Guidance" investigation any evaluation of comparative community health. Jerome Balter, *Environmental Justice: Time For Meaningful Action*, 18 Temple Environmental Law & Technology Journal 5 (2002).

The fact that the EPA program is without the ability to prevent the start up of a new (or expanded) polluting facility, stirred at least two communities to initiate their own private actions to enforce the Civil Rights Act and the EPA's civil rights regulations. *Chester Residence Concerned for Quality Living v. Seif*, 132 F.3d 925 (3d. Cir. 1997), resulted in a community victory when the permit applicant decided to drop his application after the court of appeals ruled that the community could bring a private enforcement action. *South Camden Citizens in Action v. New Jersey Dep't of Env'tl. Protection*, 274 F.3d 771 (3d. Cir. 2001), had a temporary victory when the district court enjoined the operation of a large cement grinding facility. But this victory was short lived because just five days latter, the United States Supreme Court ruled in *Alexander v. Sandoval*, 532 U.S. 275 (2001), that victims of racial discrimination have no standing to privately enforce federal agency civil rights regulations. The injunction in Camden has been lifted and the cement plant has been operating ever since.³

In sum, the environmental justice program under Title VI, at this time, consists of the following:

1. Victims of civil rights discrimination may file a complaint with the EPA. 40 C.F.R. § 7.120.
2. The EPA will accept environmental civil rights complaints, but only after a state has granted an operating permit. 40 C.F.R. § 7.120 (b)(2).
3. The EPA never investigates whether a state department of environmental protection is complying with its civil rights obligation. 40 C.F.R. § 7.80(a).
4. The EPA cannot provide any effective relief to a civil rights complaint under its own regulations. Available at www.epa.gov/civilrights/docs/interim.pdf.
5. The sole relief available for victims of environmental civil rights violations is through a private action against a state if the community can prove intentional discrimination; such action has not been successful as of this date.

II. THE ENVIRONMENTAL JUSTICE ACT (EJA)

It should be clear that the existing civil rights laws and regulations do not provide any relief for victims of environmental injustice. The criteria for defining environmental racism are so different in nature from the criteria used to define individualized racial discrimination that the Civil Rights Act of 1964 is not really applicable for resolving environmental racism problems. Accordingly, there is a need for new legislation and new regulations specifically designed to end environmental racism.

³ An interesting sidelight to the Camden case is the fact that Governor Christie Whitman, was chief sponsor for the cement plant built in South Camden, who became the National EPA Administrator the following year.

I propose that the environmental justice movement should abandon its efforts to make a silk purse out of a sow's ear and put its efforts and resources into a legislative enactment of an Environmental Justice Act (EJA). Such a statute would be based on the need to protect communities with the poorest health, predominantly minority communities, from being exposed to additional environmental pollution, and would provide such communities with the power to meaningfully participate in the permitting processes for the facilities proposed for their respective areas.

Such an Environmental Justice Act would include the following characteristics:

1. The EJA would include a citizen lawsuit provision to allow potential victims of environmental race discrimination to enforce the EJA and the regulations promulgated there under.
2. The sole criteria for determining potential violations of the EJA would be based on comparative community health statistics.
3. The EPA would have the responsibility to develop the EJA regulations.
4. The EJA would cover acts of intentional discrimination and existing comparative community health.
5. The EPA would be obligated to accept and investigate all community complaints whether filed before or after the state issuance of an operating permit.
6. The EPA and private enforcers of the EJA would have a right to obtain injunctions to prevent operations, which would violate the EJA and its regulations.

Attached to this article is a copy of an environmental Justice Protocol developed by the Law Center to serve as an alternative to EPA's "Guidance". The Protocol contains many of the characteristics suggested for the EJA legislation. The Law Center is located at 125 S. 9th Street, Philadelphia PA 19107; Phone 216-627-7100; email: pubint@aol.com

III. DRAFT OF ENVIRONMENTAL JUSTICE PROTOCOL⁴

The Public Interest Law Center of Philadelphia (Law Center) presents its Draft "Environmental Justice Protocol" (EJP) for use by state legislatures and state departments of environmental protection (DEP) who seek to ensure that all state residents, without regard to race, color, national origin, or income, who reside in communities with poor public health will be protected against the construction and operation of new enlarged facilities which would exacerbate their poor health.

The present environmental justice system is based on the Civil Rights Act of 1964 and the EPA's civil rights regulations. These laws and regulations are not well designed for advancing environmental justice. The EPA's civil right's guidelines for investigating

⁴ DRAFT: ENVIRONMENTAL JUSTICE PROTOCOL

permit applications has resulted in a backlog of complaints which can never provide relief for victims of discrimination. Added to these inadequacies have been the decisions of the United States Supreme Court in 2002, which deny victims of environmental injustice the opportunity to seek environmental justice from our courts.

Overcoming the inadequacies in the existing laws, regulations, and court rulings will require new state legislation and state regulation. The Law Center's Draft EJP herein sets forth an outline for the changes in state environmental justice systems needed for a workable, transparent, and enforceable environmental civil rights system.

A. PROTOCOL: AFFECTED AREA

1. The affected area of a proposed new or enlarged facility shall consist of all census tracts wholly or partially within a circle one-half mile in radius, except that the radius will be increased to one mile if the number of residence in the half-mile radius circle is less than 2500. The center of the circle shall be located at the centroid of the property owned or leased by the permit applicant for operation of the facility covered by the permit application.

B. PUBLIC HEALTH

2. The public health of the residents of each census tract shall be determined by the public health records of the state department of health and the local department of health for the most recently published five year period preceding the date of the permit application.

3. The public health of the residents of a census tract shall be evaluated on four health factors:

- (a) Age adjusted cancer mortality rate (per 100,000 population),
- (b) Age adjusted non-cancer mortality rate (per 100,000 population),
- (c) Infant mortality rate (per 1000 live births),
- (d) Low birth weight (under 2500 grams) rate (per 100 live births),

4. The Total Health Index (THI) of each census tract shall be determined as follows:

(a) For each Public health factor the census tracts of the county or state will be divided into 20 census tract groups, each group containing approximately five percent of the county or state population. The census tract group with the best health, for that factor, shall be ranked number one. The group with the worst public health for that factor will be ranked number 20.

(b) The THI of each census tract shall be the sum of its rankings in the four factors. Census tracts with the best public health have a number one ranking in each of the four factors and would have a THI of four; the census tracts with the worst public health would have a number 20 ranking in each of the four factors and would have a THI of 80.

C. PROTECTED AREA

5. An affected area that includes one or more census tracts with a THI of 60 or higher (approximately 20% of the total city population) shall be deemed to be a Protected Area.

D. PERMIT PROHIBITION

6. (a) The DEP shall not grant a construction permit or an operating permit for a new facility or for the enlargement of an existing facility if the DEP determined that the proposed facility will not comply with all relevant environmental laws and regulations. This prohibition is not subject to community waiver.

(b) The DEP shall not grant a construction permit or an operating permit in a Protected Area. Except a permit may be granted if:

(i) The polluting releases from the proposed facility into the environment are de minimus; or

(ii) The residents of the protected area waive the prohibition

E. DE MINIMUS RELEASES

7. Releases of pollutants from a proposed facility and the associated trucking shall be considered de minimus when:

(a) Release of a criteria pollutants form the facility and the associated trucking will not result in a cumulative ambient concentration of any criteria pollutant that exceeds 50% of any National Ambient Air Quality Standard (NAAQS); and

(b) Release of hazardous pollutants from the facility will not exceed 25% of the National Emissions Standards for Hazardous Air Pollutants. 40 C.F.R. § 61 (2003); and

(c) Release of a pollutant from the facility and the associated trucking will not create a cancer risk greater than one in a million for 70 years of exposure at the point of maximum ambient concentration.

F. WAIVERS

8. (a) Residents of a Protected Area may waive the prohibition, pursuant to paragraph 6(b), against construction/operation permit for the proposed facility. Such waiver shall require a majority vote of the Registered Voters of the Protected Area, who attend a "Town Hall" type meeting. The meeting shall be held within the Protected Area. Prior to the Town Hall meeting, the state permitting agency shall publish Public Notices and each household in the Protected Area shall receive a copy of the Public Notice as well as statements by the agency, the permit applicant, and any community groups regarding the proposed facility.

(b) All notices shall be printed in English and any other language, which is the primary language of 10% or more of the residents of the Protected Area.

(c) All costs associated with the public notice, distribution of the statements of the state agency, the permit applicant, the community groups of the Protected Areas, and costs of the Town Hall, shall be the responsibility of the permit applicant.

10. Whenever the state permitting agency grants a permit to construct or to operate a facility in the Protected Area, the permit shall require the permittee to furnish, install, operate, and maintain ambient air monitors and stack emission monitors to demonstrate the facility's compliance with relevant air emission regulations, ambient air regulations, and all permit limitations. The permitting agency shall make this data available to the public upon request. .

11. All final decisions of the permitting agency shall be subject to administrative appeal and to judicial appeal by the permit applicant and by a resident of the Protected Area.

