

The National Law Journal  
Volume 15, Number 3  
Copyright 1992 by The New York Law Publishing Company,  
The National Law Journal

Monday, September 21, 1992

**Unequal Protection**  
**The Racial Divide In Environmental Law**  
**A Special Investigation**

THE FEDERAL GOVERNMENT, IN ITS CLEANUP OF HAZARDOUS SITES AND ITS PURSUIT OF POLLUTERS, FAVORS WHITE COMMUNITIES OVER MINORITY COMMUNITIES UNDER ENVIRONMENTAL LAWS MEANT TO PROVIDE EQUAL PROTECTION FOR ALL CITIZENS, A NATIONAL LAW JOURNAL INVESTIGATION HAS FOUND.

*Marianne Lavelle and Marcia Coyle*

In a comprehensive analysis of every U.S. environmental lawsuit concluded in the past seven years, the NLJ found penalties against pollution law violators in minority areas are lower than those imposed for violations in largely white areas. In an analysis of every residential toxic waste site in the 12-year-old Superfund program, the NLJ also discovered the government takes longer to address hazards in minority communities, and it accepts solutions less stringent than those recommended by the scientific community.

This racial imbalance, the investigation found, often occurs whether the community is wealthy or poor.

Since 1982, activists with ties to both the civil rights and environmental movements have been pressing their case for "environmental justice" before the U.S. Congress and the Environmental Protection Agency. Using an increasing body of scientific study, they have shown that minorities bear the brunt of the nation's most dangerous pollution.

But The National Law Journal's investigation for the first time scrutinized how the federal government's

policies of dealing with polluters during the past decade have contributed to the racial imbalance.

The life-threatening consequences of these policies are visible in the day-to-day struggles of minority communities throughout the country. These communities feel they are victims three times over - first by polluters, then the government, and finally the legal system.

Black families in South Chicago wonder whether the rampant disease among them springs from the 50 abandoned factory dumps that circle their public housing project, and why the federal government won't help them. In Tacoma, Wash., where paper mills and other industrial polluters ruined the salmon streams and way of life of a Native American tribe, the government never included the tribe in assessing the pollution's impact on residents' health. And, nine years after an Hispanic neighborhood in Tucson, Ariz., poisoned by chemical-infested water, drew federal attention to its problems, nothing has been done to stop the migration of contamination as it creeps underground.

From communities like these across the country has emerged the contour of a new civil rights frontier - a movement against what the activists charge is pervasive "environmental racism." Whether pushing the edges of constitutional law or shaming the environmental establishment into opening up its own white-dominated boards and membership, this movement calls not for "equity" in the face of pollution, but for prevention and equal protection.

The following are key National Law Journal findings, gathered over an eight-month period, and based on a computer-assisted analysis of census data, the civil court case docket of the Environmental Protection Agency, and the agency's own record of performance at 1,177 Superfund toxic waste sites:

- Penalties under hazardous waste laws at sites having the greatest white population were about 500 percent higher than penalties at sites with the greatest minority population. Hazardous waste, meanwhile, is the type of pollution experts say is most concentrated in minority communities.

- For all the federal environmental laws aimed at protecting citizens from air, water and waste pollution, penalties in white communities were 46 percent higher than in minority communities.

- Under the giant Superfund cleanup program, abandoned hazardous waste sites in minority areas take 20 percent longer to be placed on the national priority action list than those in white areas.

- In more than half of the 10 autonomous regions that administer EPA programs around the country, action on cleanup at Superfund sites begins from 12 percent to 42 percent later at minority sites than at white sites.

- At the minority sites, the EPA chooses "containment," the capping or walling off of a hazardous dump site, 7 percent more frequently than the cleanup method preferred under the law, permanent "treatment," to eliminate the waste or rid it of its toxins. At white sites, the EPA orders treatment 22 percent more often than containment.

### *A Racist Imbalance*

EPA lawyers, while declining to respond directly to The National Law Journal's analysis, say they carry out the law, case by case, on the basis of the science, the size and legal complications particular to each toxic waste site or illegal pollution case.

"Environmental equity is serious business for this agency," says Scott Fulton, EPA deputy assistant administrator for enforcement. "We want to guarantee that no segment of society is bearing a disproportionate amount of the consequences of pollution."

But activists who have been working in communities inundated by waste say that the hundreds of seemingly race-neutral decisions in the science and politics of environmental enforcement have created a racist imbalance. Through neglect, not intent, they say minorities are stranded on isolated islands of pollution in the midst of the nation that produced the first, most sophisticated environmental protection laws on earth.

"People say decisions are made based on risk assessment and science," says Prof. Robert D. Bullard, a sociologist at the University of California, Riverside, who has been studying environmental racism for 14 years. "The science may be present, but when it comes to implementation and policy, a lot of decisions appear to be based on the politics of what's appropriate for that community. And low-income and minority communities are not given the same priority, nor do they see the same speed at which something is perceived as a danger and a threat."

Many activists argue the result has been a less safe environment for all citizens, as polluters' use of politically weak minority communities creates a gateway for disposal of wastes that will ultimately affect the larger environment. The lead particles that rise in West Dallas fall on Dallas, they point out, as the chemical stew that starts near slums on the Mississippi ends in the fishing source of the Gulf, and the South Chicago dumps threatens the grand reservoir of the Midwest, Lake Michigan.

"In the metaphor of a rapidly sinking ship, we're all in the same boat, and people of color are closest to the hole," says Deohn Ferris, a former Environmental Protection Agency official who is now environmental quality director at the National Wildlife Federation.

That is why the most hopeful of "environmental justice" advocates believe that if they can force federal leaders to factor in race and poverty in making decisions, it could revolutionize and improve the law.

"This issue has the power to change the fundamental assumptions of environmental protection," says Charles Lee, director of the United Church of Christ's special project on toxic injustice, which did ground-breaking research on the issue in 1987.

Indeed, one wry observation on how much pollution minority communities suffer was made privately by members of an Environmental Protection Agency work group that for the last two years studied "environmental equity." The success of the work-group's labors, they mused, was the best chance for achieving the Bush administration's more publicized goal of "pollution prevention." (See "Residents Want 'Justice,' the EPA Offers 'Equity,'" Page 12.)

Others within the government view the issue with alarm. Said one Bush administration official in a confidential memo earlier this year: "Longsimmering resentment in the minority and Native American communities about environmental fairness could soon be one of the most politically explosive environmental issues yet to emerge."

### *A New Movement*

The movement against environmental racism began to coalesce a decade ago with a church-led protest by black residents against a toxic landfill in North Carolina that led to 500 arrests. (See "When Movements Coalesce," Page 10.)

Minority community leaders today in towns like Wallace, La., and Moss Point, Miss., have taken up the fight, standing firm against two of the most reviled of pollution threats - a hazardous waste burner and a paper

factory - that want to set up shop in their backyards. (See "Same Ills, Different Solutions," Page 10.) They hope to build upon the attempts that have been made since 1979 to use the law and the courts to mete out "environmental justice," as groundbreaking and as difficult an effort as the first equal protection cases that outlawed school segregation 40 years ago. (See "Lawyers Try to Devise New Strategy," Page 8.)

"This is the cutting edge of a new civil rights struggle," says Wade Henderson, director of the Washington office of the NAACP. "For our organization, it is a new and important area of activity."

It has been a difficult struggle, however, for communities that bear all the other historical disadvantages of racism, such as lack of education and money. That's why some community organizers are aiming to create a new civil rights movement that will link the money, contacts and legal know-how of the big national environmental groups with the grassroots people who are tackling local problems.

But at the same time, the nation's handful of mainstream green groups have been criticized roundly for their role in shaping the 22-year history of environmental law - a story of progress that nevertheless has left behind groups without a strong voice or scientific know-how. (See "Tension Underlies Rapport With Grassroots Groups," Page 10.)

Prof. Richard J. Lazarus of Washington University School of Law in St. Louis uses the example of the lobbying frenzy around the Clean Air Act of 1990 as a process that has excluded some of the people, urban minorities, who suffer from toxic air pollution the most.

Environmentalists are accustomed to criticism from political conservatives and those who favor greater industry autonomy, says Professor Lazarus, author of an article on environmental injustice that will appear next spring in Northwestern University Law Review.

But the environmental racism charge has troubled the conscience of a movement accustomed to thinking of itself as progressive. "The fact is that all environmental statutes ... pick winners and losers," he says. "They pick

between problems, because there aren't enough resources to deal with all problems. And certain solutions redistribute risks, the most obvious example being that when you move a hazardous dump, one location is gaining and one is losing."

In the environmental game, Professor Lazarus argues, minority communities have been the biggest losers.

### *Assessing Penalties*

The most striking imbalance between whites and minorities in The National Law Journal's analysis of the EPA's enforcement effort was a 506 percent disparity in fines under the Resource Conservation and Recovery Act - the 13-year-old law intended to assure the safe handling and disposal of hazardous waste. The average fine in the areas with the greatest white population was \$335,566, compared to \$55,318 in the areas with the greatest minority population.

"This particular statistic is probably the most telling," says Arthur Wiley Ray, senior attorney for Baltimore Gas & Electric Co. Mr. Ray, who left the EPA in 1990, says he spent much energy during his 10 years in government urging the agency to heed the environmental racism issue.

RCRA cases, he says, target active toxic dump sites. And in the view of minority communities, "That's where the problem is," he says. "They don't put those dumps on Rodeo Drive; they put them across the tracks."

In fact, the landmark 1987 United Church of Christ study, "Toxic Waste and Race," found that communities that had two or more active hazardous waste plants or major landfills had three times as many minorities as communities without such facilities.

The other type of case in which minority areas also saw far lower fines than white areas was in the 28 cases brought using multiple law charges that the EPA has concluded during the past seven years. In those, fines were 306 percent higher in white than in minority areas, \$239,000 compared to \$59,429.

Only in Superfund enforcement cases, lodged mainly against polluters who have been recalcitrant about cleaning up abandoned toxic waste sites, did fines in minority areas come out higher than in white areas, by 9 percent. Minority communities saw lower average penalties in federal enforcement of the Clean Water Act, by 28 percent, the Clean Air Act, by 8 percent, and the Safe Drinking Water Act, by 15 percent.

The EPA says that many factors go into its determination of penalties, such as the seriousness of an offense, the ability of a polluter to pay, the polluter's history and level of cooperation, as well as the vagaries of judges and the legal system. (See "Negotiations Are Key to Most Fines," Page 6.)

The EPA's Mr. Fulton calls penalties "an unreliable point of departure" for studying equity, and says, "EPA is considering using some other benchmark of enforcement effectiveness." For example, the agency may consider the number of inspections at a facility, or the amount of time between the uncovering of a violation and the lodging of charges.

But Professor Bullard, the environmental racism scholar, says penalties are a key component of deterrence. And he argues violators are driven to minority communities because penalties there are low enough to be discounted as a cost of doing business.

"What the companies are trading off is a minuscule part of the profit," he says. "What the residents living in impacted areas are trading off is their health. Right now, we have not seen a balance between economic development and people's health. Facilities operating in communities of color can operate with impunity."

One law enforcement factor that observers say leads to inequity was apparent in The National Law Journal's statistics - lack of resources. There have been few court cases at all - only 65 concluded in the seven years studied under the hazardous waste law. Even under the Clean Air Act, with more cases than any other law, only 50 suits have been concluded annually.

"It is clear that the environmental statutes promise a great deal," says Professor Lazarus. "But everyone knows that these laws are not self-enforcing.

"Those who complain, who have greater access, who know how to tweak their Congresspeople to do something, are more likely to get the attention of very busy people. And the people with greater know-how are generally those with greater political and economic resources, who tend to be white."

In one area for which the EPA has hard data, it seems clear that enforcement focuses more on white communities than on polluted communities.

Researchers at the Department of Energy's Argonne National Laboratory found that a greater percentage of the U.S. black and Hispanic population than white population live in areas where pollution levels are high enough to violate the standards of the Clean Air Act. But the population that has benefited from the 352 Clean Air Act cases in the last seven years, the Law Journal found, is 78.7 percent white, 14.2 percent black and 8.2 percent Hispanic. (See chart, "A Clean Air Enforcement Gap," Page 12.)

### *Superfund Delays*

Community activism gave birth to the most ambitious environmental program in the world, Superfund, and many believe that progress in this 12- year-old program still requires the political access and financial resources so scarce in minority communities.

The Law Journal's investigation of the EPA's Superfund program shows that for the sites with the most minorities, it took an average of 5.6 years from the date a toxic dump was discovered to place it on a Superfund list. That's 20 percent longer than the 4.7 years it took for the sites with the highest white population.

EPA officials respond that the pace of action in the Superfund program depends upon how long it takes to study the hazards and assess the risk to people at hazardous waste sites. Urban sites may have a more complex mix of pollutants that therefore take longer to study. On the other hand, the officials say, a rural site

may be many miles wide and therefore may take a much longer time to assess.

Richard J. Guimond, deputy assistant administrator of the EPA's office of solid waste and emergency response, which manages Superfund, says he cannot draw conclusions from the Law Journal's analysis. He says the EPA is attempting to study whether there is a disparate impact on minority communities in Superfund by comparing toxic sites that are similar in makeup. "We realize in some cases we don't have all the information that would enable us to fully conclude whether there are inequities as an artifact of the way things operate in society, what might be the reasons, and the best ways to deal with them," he says. (See "Examining EPA's Scoring System," Page 6.)

Latinos who live near a lead smelter site in West Dallas are suing the EPA, charging environmental racism was the reason they could not gain Superfund status for their toxic sites. Similar complaints arise among blacks who live near abandoned steel plants in Chicago and from an Hispanic community near an Air Force plant in Tucson, who saw no action or slow action on their problems in the Superfund program. All three of these communities complained of a high incidence of cancer, lupus, nerve damage and birth defects, but lacking money and expertise, they feel saddled with the burden of proving the link between disease and the toxics.

"It's almost as if they have to convince the powers that be that these are problems, whereas other communities can use elected representatives, zoning boards, and commissioners to cut through that particular process," says Professor Bullard.

The Law Journal's investigation shows, however, that once a site is placed on the Superfund list, the pace of action speeds up for minority sites. By the time the comprehensive cleanup of a site begins, minority sites are 4 percent behind the white sites, 10.4 years compared to 9.9 years.

But the pattern is quite uneven across the country. In six of the EPA's 10 regional field offices across the country, where most Superfund decisions are made, the pace from the discovery of a site to the beginning of

cleanup is from 8 percent to 42 percent faster at white sites than at minority sites. The greatest disparity was in Midwestern Region 5, with the most sites at 257, where the pace from discovery to cleanup was 13.8 years for minority sites compared to 9.7 years for white sites. In one area, Mid-Atlantic Region 3, the pace for minority and white sites is dead even.

In three regions, cleanup begins more quickly at minority sites than white sites: in the Deep South, Region 4, by 8 percent; in New York/New Jersey, Region 2, by 11 percent; and in the Pacific Northwest, Region 10, by 36 percent.

One indication of how successfully residents have lobbied for permanent and complete cleanup of Superfund waste is in the "remedial decisions" arrived at by the EPA, polluters, state authorities and other interested parties through negotiation. The EPA categorizes these decisions each year as "treatment" or "containment," in response to Congress' order in 1986 to make treatment the preferred choice.

The more intensive treatment choice was chosen 22 percent more frequently than containment at the white sites. At minority sites, containment was chosen 7 percent more frequently.

### *Political Clout Helps*

The EPA says it is a simplification to judge its decisions at sites strictly by whether containment or treatment is chosen, (although many studies by industry, environmental groups and the government itself have done so). Mr. Guimond says that the EPA acts immediately at every site to remove unstable canisters and other materials that are considered an imminent threat to health.

In the Superfund decision-making realm, the EPA argues that its decisions are based on the science of particular sites, not on race.

But in a program as massive and costly as Superfund, political clout certainly does help a community to get solutions. Unfortunately, environmental justice activists argue, white communities usually have been better able

to wield this access than minority communities. A classic illustration is the difference in the treatment of two heavily polluted neighborhoods whose plights won the attention of Congress: a black middle-class neighborhood of homeowners in Texarkana, Texas, and a white trailer park in Globe, Ariz.

One scholar, Prof. Paul Mohai of the University of Michigan School of Natural Resources, says that this difference stems from the classic effects of racism in U.S. society. Minorities continue to be underrepresented at every level of government and on the boards of polluting companies, he points out. And housing discrimination prohibits minorities from escaping their pollution problems, he says. Classic social science studies have shown that minorities, especially blacks, live in segregated enclaves in the United States, even as their level of income and education increases.

That's why activists like Ms. Ferris of the National Wildlife Federation are asking the EPA to begin to take into account disparate racial impact in addition to the scientific analysis the agency makes in its decisions. This would be analogous to the Reagan-era directives that now require federal agencies to consider the cost to industry with every decision.

The Rev. Ben Chavis, executive director of the United Church of Christ's Commission on Racial Justice and a founder of the environmental justice movement, agrees that the EPA needs to rethink how it does business. "So much of the methodology of the last 12 years in environmental protection has been risk-assessment and therefore risk-management, and too little attention has been paid to equal enforcement of the law," he says.

EPA officials, without concluding that racist results flow from their current methods, have begun to study how to do their job more "equitably."

But the Rev. Chavis says that through litigation and organization, minority communities that are suffering the heavy costs of industrial pollution are not waiting for the EPA to do more studies.

"Cancer Alleys serve as a reminder that the issue of the environment for us is an issue of life and death," he

says. "There is a sense of urgency and wanting to ensure there will be no more Cancer Alleys, or Columbia, Mississippi, or South Side Chicagos.

"In each one of these areas," he says, "people are fighting back. Even in the worst situations, glimmers of hope emerge, because people are uniting - uniting across racial lines and socio-economic lines - and the common demand is for environmental justice."

9/21/92 NLJ S2, (col. 1)

END OF DOCUMENT