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THE ROLE OF EXISTING ENVIRONMENTAL LAWS IN THE ENVIRONMENTAL JUSTICE MOVEMENT

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I will focus on what can and cannot be done under the existing statutory and regulatory structures and the common law to protect minority communities from environmental hazards. I will highlight some of the current holes in the legal system to suggest areas where statutory reform might be useful. Fights against these facilities break down between future unbuilt facilities, on the one hand, and existing facilities on the other hand.

A broad array of statutes regulates future facilities, such as landfills, incinerators, interstate highways, and polluting factories. Some of these laws are aimed at providing information and requiring the decisionmakers to think about environmental issues. The most prominent of these is, of course the National Environmental Policy Act ("NEPA").¹ Here in New York, we have its analog, the State Environmental Quality Review Act ("SEQRA").²

Under these statutes some consideration is given to social and economic factors. However, these are not substantive statutes. They do not compel any particular results, only consideration.

The new Presidential Executive Order on Environmental Justice³ is in this tradition of compelling consideration but without

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¹ 42 U.S.C. §§ 4321-4347 (1988) (declaring national policy to encourage harmony between man and environment, establishing Council on Environmental Quality, and requiring the preparation of environmental impact statements).

² N.Y. ENVTL. CONSERV. LAW §§ 8-0101 to 8-0117 (McKinney 1984 & Supp. 1994).

³ Exec. Order No. 12,898, 59 Fed. Reg. 7629 (1994).

mandating an outcome. These kinds of laws provide ammunition but no trigger. They often furnish information that is very useful in fighting a project but they themselves seldom provide the actual legal basis for reaching a particular conclusion.

A number of statutes protect particular kinds of resources. At the federal level, these include the Clean Air Act;⁴ the Clean Water Act,⁵ in particular, the very important Section 404 Program under the Clean Water Act aimed at protecting wetlands; the Endangered Species Act;⁶ section 4(f) of the Department of Transportation Act, which makes it difficult to build a highway or an airport in an historic area; the Superfund Law, the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA");⁷ and a number of others.

There are, additionally, state and local analogs to most of these federal laws. Most of these statutes were enacted in the early 1970's, in what can be seen, in retrospect, as the golden age of environmental statutory development, oddly enough, under the Nixon and Ford administrations. These laws tend to say that one cannot site, or can site only with great difficulty, a facility in a wetland or in a navigable waterway or in the habitat of an endangered species or in some other area that enjoys the particular protections of these statutes.

However, there is no overall "People Protection Act." There is no statute that says one cannot build a landfill or an incinerator near where numerous people live. Instead, the protection for people is implicit in such statutes as the portion of the Clean Air Act that prohibits exceeding emissions standards that are designed to protect human health.

In order to persuade a court or an administrative body that a proposed facility will be unhealthy, a facility opponent must generally establish that there will be exposure and that a significant

⁴ Clean Air Act, 42 U.S.C. §§ 7401-7671q (1994) (creating scheme to protect and enhance quality of nation's air resources).

⁵ Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (1988) (declaring objective to restore and maintain chemical, physical, and biological integrity of nation's waters, and establishing regulatory program).

⁶ 16 U.S.C. §§ 1531-1544 (1988) (providing means whereby ecosystems upon which endangered species thrive may be preserved).

⁷ Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9675 (1988 & Supp. IV 1992). The "Superfund" establishes a means of payment for cleanups resulting from various violations. *Id.* § 9611; see also I.R.C. § 9507 (1994). The Internal Revenue Code provides a trust fund to serve as a source for the "Superfund." *Id.*

risk will flow from that exposure. In order to do that, the basic information is generally in the permit application and environmental impact statement, which are typically prepared by the project applicant. It should come as no great surprise that relatively few project applications will say that the incinerator they are proposing, for example, will cause multiple cases of cancer or respiratory disease. Therefore, protection of health under these statutes is indirect and often difficult.

As a result of this disparity in the way the statutes are written, it is easier legally to put a hazardous facility, such as an incinerator in the middle of a city, than to put it in a remote wetland or in the habitat of an endangered species. That is not to say it is easier politically, but it is certainly easier legally.

Several statutes regulate particular kinds of facilities or activities. Very prominent is the Resource Conservation and Recovery Act ("RCRA"),⁸ which in one subtitle regulates hazardous waste facilities and in another subtitle regulates ordinary solid waste facilities. Many other complicated command and control statutes govern other kinds of activities: the Hazardous Materials Transportation Act;⁹ the Federal Insecticide, Fungicide, and Rodenticide Act;¹⁰ the Oil Pollution Act,¹¹ which has many provisions for oil tankers, and so on.

These are very rigorous command and control requirements, but they tend to have relatively little to do with siting issues. Using the array of statutes, the information statutes, the resource-based statutes, and the facility-oriented statutes, it is often very possible to kill, or at least to delay severely, waste disposal or industrial projects. This is particularly so for waste disposal projects, especially if the opponents are well organized, well financed and have the support of their local government.

⁸ Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6907 (1988) (providing performance guidelines for various solid waste management practices in order to protect public health).

⁹ 49 U.S.C. §§ 1801-1819 (1988 & Supp. II 1990) (declaring congressional policy of granting regulatory authority to Secretary of Transportation in order to protect against risks inherent in shipping hazardous materials).

¹⁰ See The Pesticide Control Act, 7 U.S.C. § 136 (1988) (providing definitions and giving guidelines for use of pesticides).

¹¹ Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484 (codified as amended at 33 U.S.C. §§ 2701-2761 (Supp. IV 1993)) (stating intent to reduce oil spills and to force cleanup by parties responsible).

I have been practicing environmental law since 1978 and have frequently represented community organizations and municipalities fighting waste disposal projects. Of those kinds of projects, I think we have won ten, lost one and we have about a half a dozen that are still ongoing. That is an indication that there really are meaningful legal remedies available to people who want to block incinerators, landfills, and that sort of thing. But to do that requires an organized community with sufficient resources, and preferably one which has the support of its local municipal government.

One particular difficulty that often arises is that a community only learns very late that a project proposal is pending. A good example of that in this region is the medical waste incinerator at the Bronx Lebanon Hospital, where most members of the community did not learn of the proposal until after the permits had been granted, and they thus lost most of the meaningful opportunities to participate.

This very high success rate applies particularly to waste disposal projects where the statutes have established a near-zero discharge standard. There is very little legal tolerance for water or air emissions from these facilities. These facilities are also not very labor intensive. They do not create many jobs. They often do not have very much political support. Polluting industries tend to be a somewhat different story. There is greater tolerance for air and water emissions from industrial operations. They tend to create more jobs, have greater positive economic impacts, and are somewhat harder to fight. They also do not have the same psychological association as do waste disposal facilities.

The high success rate for opponents applies not at all to people who are fighting social service facilities and low income housing projects. Those tend to be projects that are not the subject of many of the facility-specific construction laws. They tend not to have much of an environmental impact unless they happen to be sited in a wetland or a similar environmentally-sensitive area. I believe that this disparity is one positive aspect of the legal system, because I think that fighting waste disposal facilities is often a socially useful thing, while fighting low income housing and social service facilities is destructive. But that is a different topic.

There are also liability-imposing laws. The most prominent of those is CERCLA, which essentially states that anybody who gen-

erated, transported, stored, or disposed of hazardous waste can be potentially liable for cleaning it up. CERCLA has had a very positive impact in so frightening people that they greatly reduce their creation of hazardous waste. As a result, hazardous waste generation rates in this country are way down over the last three or four years. As a direct result of that phenomenon, many of the proposed hazardous waste disposal facility projects have been abandoned in recent years. These laws can also be very helpful in fighting proposed projects if the proposed site is itself already contaminated with hazardous waste.

Where the communities are able to participate in the legal process to fight facilities, often they are required to focus on objections that are peripheral to their substantive concerns. If the only tool that you have is a hammer, then the only things you can deal with are nails. If the only laws that you have are laws that say you cannot site facilities in endangered species' habitats or in wetlands, then that is what you look for.

A classic example of that is opposition to the Westway Highway in Manhattan.¹² The opponents, including myself, originally fought the highway on air pollution and traffic grounds. We ultimately lost on those grounds and began looking around for something else. Someone suggested that there might actually be fish in the part of the Hudson River where they wanted to build a landfill with the highway running through it. It seemed like a counterintuitive proposition. Fish in the lower Hudson River? It turned out that they really were there in abundance. That was the basis for the ultimate defeat of Westway—the amazing discovery of the habitat for striped bass.

There have been efforts to more directly address the concerns of communities in fighting projects, but those have enjoyed far less success, as you have heard discussed today. There have been a number of attempts to utilize the Equal Protection Clause of the Constitution to fight projects.

Those lawsuits under Equal Protection, under section 1983,¹³ and under various other civil rights laws, have been so far uniformly unsuccessful. Every one of those that has gone to decision

¹² See *Sierra Club v. Hennessy*, 695 F.2d 643, 644 (2d Cir. 1982) (concerning proposed highway replacement program which contemplated creating landfill).

¹³ 42 U.S.C. § 1983 (1988) (recognizing cause of action for governmental violation of civil rights).

has lost overwhelmingly. The courts have found that disparate impact is not enough; one must also prove racially discriminatory intent, and no one has been able to prove such intent in one of these cases.¹⁴ If someone were to find in a filing cabinet a memo to the mayor from the planning commissioner saying, "Let's put this landfill in this neighborhood because there are only a bunch of blacks living there, and we do not care about that," that would be a terrific predicate for such a lawsuit, but such a smoking memo has not emerged in any of these cases, and so far the cases have been unsuccessful.

The bringing of this litigation is often important politically. It often mobilizes the community. It highlights the political structure and the nature of what people are trying to do. It brings out a lot of the useful information. But these are not the sorts of cases that are going to lead to a high success rate in stopping particular projects.

The New York City Fair Share Law¹⁵ has some promise of developing into something useful. The common law has not been at all helpful in fighting future projects. People have tried to construct notions of anticipatory nuisance, but those do not get anywhere, especially since in these cases there is usually a finding by an expert regulatory agency that the project will be safe, and so the courts are not about to say, "No, EPA is wrong; I, a judge, think that this is going to be lousy and you cannot build it because it will someday be a nuisance."

So far I have been speaking about future facilities. Let me now turn briefly to existing facilities, which often pose real hazards. The situation here is almost the inverse of what it is for future projects. For future facilities the statutes are very helpful, but the common law usually is not. For existing facilities the statutes have not been very helpful, but the common law has been. A major reason why the statutes are not especially helpful in protecting communities from the dangers caused by existing facilities that are harming them today is an element that is pervasive through-

¹⁴ See *Guardians Ass'n v. Civil Serv. Comm'n of New York*, 463 U.S. 582, 584 (1983); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 20 (1979); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 287 (1978).

¹⁵ *Criteria for the Location of City Facilities*, New York, N.Y., Rules of the City of New York, ch. 62, app. A (1991) (proposing to improve neighborhood stability by enforcing fair distribution of city facilities).

out the environmental regulatory structure and system of land use law. That is the concept of grandfathering.

We all know that the word grandfathering arose from the old laws in the deep south that unless your grandfather voted, you could not either. Those laws had a discriminatory intent as well as effect, and were ruled unconstitutional. Today the grandfather law says that if a facility already has a permit, it can keep it. It essentially says that once a facility is up and running, it has a vested property right in its continued existence, and it takes a great deal to dislodge those rights. It is extraordinarily difficult to shut down an existing facility. A major example of that in New York is in Williamsburg, Brooklyn, where there is a hazardous and radioactive waste storage facility known as Radiac.¹⁶

It is inconceivable that one could today site a radioactive and hazardous waste storage facility in Brooklyn, yet this facility has been operating for about fifteen or twenty years. When the opponents tried to shut it down a few years ago, the court said: "No, grandfathered, go away. Keep on operating." It now appears that beginning in July of 1994, when New York State loses its access to the Barnwell radioactive waste disposal facility in South Carolina, an even larger volume of radioactive waste is going to Brooklyn, because this Brooklyn facility is grandfathered. Many of the important federal laws have grandfathering provisions. Most prominent is the interim status provision of RCRA,¹⁷ but there are many others.

There are some opportunities, if not to shut down, at least to help influence some existing facilities. To cite one example under the Clean Water Act, facilities with pollution discharge permits must file monthly discharge monitoring reports, and if those reports reveal that a facility is emitting pollution in excess of what the permit allows, one can go into court with a citizen's suit and seek imposition of significant monetary penalties. When the time comes for renewal of the permit, a request for an expansion or a significant modification of the permit will sometimes provide an opportunity to raise issues.

¹⁶ See *Hameline v. New York State Dep't of Env'tl. Conserv.*, 175 A.D.2d 206, 206, 572 N.Y.S.2d 347, 347 (2d Dep't 1991).

¹⁷ 42 U.S.C. § 6907 (1988).

Permits also very often incorporate, by reference, the operating and maintenance manuals and other obscure documents that apply to a facility. If someone can establish a violation of those requirements, that might also be the subject of a citizen's suit. Under RCRA, corrective action is required—cleanup of existing contamination for lawful hazardous waste disposal facilities. Water pollution control facility construction grants sometimes have conditions attached that can be helpful. Additionally, the Emergency Planning Community Right to Know Act¹⁸ requires the disclosure of a great deal of public information about the emissions from a facility, and these can be useful politically in trying to fight the facility.

As I said, even though the statutes are of limited use in fighting existing facilities, the common law often does provide a meaningful remedy because one does not have to argue an anticipatory nuisance. There is sometimes a genuine current nuisance, and common law remedies and other related doctrines, such as trespass, sometimes do provide remedies. In some states, including New York, the courts have backed off from the prior common law rule that if there was a nuisance, the facility automatically had to shut down. In the case of *Boomer v. Atlantic Cement*,¹⁹ decided by the New York Court of Appeals about twenty-five years ago, the court refused to shut an existing cement plant, because the plant was socially useful. There should be monetary damages awarded to the neighbors, but they were not going to shut down the facility. There is a balancing of the equities; the social utility of the facility is balanced against the damage that it causes.

One of the great difficulties is trying to compel the cleanup of existing contaminated sites. Regardless of the debate on whether current siting of facilities creates disproportionate impacts, there is relatively little debate that old contaminated sites, such as Superfund sites, are disproportionately located in low income and minority communities. But under the federal law aimed at addressing this issue, the Superfund Law, it takes an average of fourteen years between the time when a facility is first discovered and the time that it is finally cleaned up—a very long time. It

¹⁸ 42 U.S.C. § 11,023 (1988) (mandating completion of Toxic Chemical Release Form whenever certain chemicals are manufactured beyond minimum threshold).

¹⁹ *Boomer v. Atlantic Cement Co., Inc.*, 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970) (evaluating utility of plant with regard to nuisance created).

largely is a result of what I like to call the paralysis of sequential indecision. In this process, a whole series of decisions have to be made concerning whether the site is contaminated enough to worry about and then how to clean it up. At each stage, there is much difficulty in making the decision, so the whole process can go on almost limitlessly.

Let me conclude by suggesting a couple of areas where I think statutory reform would be useful. For the kinds of projects that are most likely to have adverse health effects, such as incinerators and landfills, I think that when making siting decisions, the proximity to a densely populated area should be elevated to equal significance to the presence of a wetland or an endangered species habitat or some other protected natural area. It is important to protect wetlands and habitat, but it should be at least equally important to protect people.

In doing risk assessments, there should be a required assumption that pollution control equipment will malfunction and that enforcement will be weak. I think those assumptions will more closely reflect reality and give a better taste of what the actual impacts of the facility are likely to be. Assistance should be provided to minority and low income communities to allow them to participate, so that they can be equal players in the siting process. Waste prevention laws should be enacted so that there will be less demand for waste disposal facilities in the first place. The grandfather provisions should be weakened to the extent that is constitutionally permissible.

Finally, with regard to the cleanup of hazardous waste sites, there should be less control of the process by the potentially responsible parties and more control and more direct action by the government. It is a travesty that throughout the country there are thousands of identified hazardous waste sites which continue to leak and emit air and water pollution because of bureaucratic paralysis and that are known to pose a significant threat to health and the environment and are disproportionately located in the minority and low income communities.