Journal of Civil Rights and Economic Development

Volume 9
Issue 2 *Volume 9, Spring 1994, Issue 2*

Article 18

March 1994

An Environmental Justice Perspective on Superfund Reauthorization

Samara F. Swanston

AN ENVIRONMENTAL JUSTICE PERSPECTIVE ON SUPERFUND REAUTHORIZATION

SAMARA F. SWANSTON*

I would like to make two comments in response to Dr. Greve's comments this morning.[1] He said there was no relationship between the environmental movement and the civil rights movement. I want to state that I believe the first environmental lawsuits were brought by people of color who were trying to get access to segregated parks, playgrounds, and other municipal facilities, and they brought civil rights lawsuits. They brought them in the 1940's and the 1950's[2] before the National Resources Defense Council ("NRDC") or the Environmental Defense Fund ("EDF") got in the environmental protection business. I think that they demonstrated not only the relationship between civil rights and the environment, but that they were committed to environmental concerns and that they wanted to enjoy environmental benefits.

In response to his second comment that hazardous waste sites do not pose any risks, let me say that Dr. Greve is not a medical doctor, and I have to read risk assessments every day. There is ample evidence that hazardous waste sites do pose human health risks. The Surgeon General has found that proximity to hazardous waste sites is correlated with birth defects and cancers and neurotoxic defects, as well as other scientific studies, which Dr. Greve apparently is not familiar with, so I want to take issue with what he said.

* Eastern Field Unit Chief, New York State Department of Environmental Conservation, Division of Environmental Enforcement; Co-Chair, New York State Bar Association Committee on Environmental Justice; Adjunct Professor, Pace University School of Law. Ms. Swanston served on the EPA's national and regional workgroups on Environmental Equity and was awarded a Gold Medal for exceptional service for her work with the EPA by former Administrator William Reilly.

[1] Dr. Michael S. Greve, *Environmental Justice or Political Opportunism ?*, 9 ST. JOHN'S J. LEGAL COMMENT. 475 (1994).

[2] *See, e.g.*, Clark v. Flory, 237 F.2d 597 (4th Cir. 1956); Virginia v. Tate, 231 F.2d 615 (4th Cir. 1956); Lawrence v. Hancock, 76 F. Supp. 1004 (S.D. W. Va. 1948).

I want to address my comments to the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA" or "Superfund")[3] Reauthorization, and I really want to question whether there is any environmental justice in the proposed reauthorization cleanup standards. Superfund Reauthorization has important environmental justice consequences because communities of color and poor communities are disproportionately burdened with hazardous waste sites and Superfund is the law that addresses hazardous waste site cleanups. Superfund Reauthorization is also important to all residents of urban areas for reasons I will discuss shortly. A number of proposals about how Superfund should be changed are being discussed. The National Superfund Commission has one,[4] the NAACP has one,[5] and the President has one.[6] In order to understand whether changes proposed in the administration's or the NAACP's reauthorization bill are good, it is important to know how the statute currently works and is implemented. Since it is implemented and managed by regulation and internal guidance documents, it would also be important to know the regulations and internal guidance documents.

Maybe some of the bill drafters and proposal floaters know and understand how Superfund works and maybe some do not, but reauthorization of a statute should not fix what is not broken. The provisions of Superfund which currently work should not be rewritten to the specifications of any special interest group, at least not without discussion.

To properly evaluate Superfund Reauthorization proposals, they should also be viewed in their proper context. Reauthorization comes after the more prominent studies, such as United Church of Christ's "Toxic Waste and Race" study,[7] identified minorities and the poor as the groups disproportionately exposed to hazardous waste sites. By contrast, when Superfund was passed,

[3] 42 U.S.C. §§ 9601-9675 (1988) (establishing means of payment for environmental cleanups).

[4] NATIONAL COMM'N ON SUPERFUND, FINAL CONSENSUS REPORT (pre-publication draft) (Dec. 21 1993).

[5] ALLIANCE FOR SUPERFUND ACTION PARTNERSHIP, EIGHT POINT PLAN FOR ACTION (1994).

[6] H.R. 3800, 103d Cong., 2d Sess. (1994).

[7] UNITED CHURCH OF CHRIST, COMMISSION FOR RACIAL JUSTICE, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES (1987).

largely in response to Love Canal, the faces of the victims of pollution were white.

Superfund comes after the Environmental Protection Agency's ("EPA") Science Advisory Board issued its report, "Reducing Risk: Setting Priorities For Environmental Protection," which concluded that hazardous waste sites do not pose a high risk and recommended prioritization of EPA's resources in areas which do not pose a high risk to minorities, such as global warming and stratospheric ozone depletion.[8]

Superfund Reauthorization comes after senior managers, including the former Administrator of the EPA, have been publicly quoted as saying, "Hazardous waste does not pose a real risk." Most importantly, Reauthorization comes after a multimillion dollar public relations campaign launched by polluting industries and their insurance companies in hopes of establishing the terms of the debate.[9] With the context of Superfund Reauthorization debate set, my comments will focus primarily on the cleanup standards proposed in the President's bill, because the cleanup standard is a very good example of something that is not broken.

There is a surprising similarity between the cleanup standards proposed in the President's bill and the ones described in the November/December issue of *Sierra* magazine as being "industry's idea of Superfund reform."[10] According to the article, industry wants cleanups of contaminated property tied to the future intended use of the property, and furthermore, industry does not want to have to do such thorough cleanups. Superfund currently provides that the selected remedy shall be protective of public health and the environment, cost effective, utilize permanent solutions and alternative treatment technologies to the maximum extent practicable, and the cleanup levels must attain legally applicable or relevant and appropriate federal and state standards, requirements, criteria, or limitations, which we refer to as ARARs.

State ARARs can be waived if the state has not consistently applied the ARAR or has not demonstrated the intention not to apply it. The President's bill calls for setting national goals and ge-

[8] SCIENCE ADVISORY BOARD, U.S. E.P.A., REDUCING RISKS, SETTING PRIORITIES FOR ENVIRONMENTAL PROTECTION 20 (1990).

[9] Paul Rauber, *Corporate Crybabies: U.S. Industry Tries to Pass the Buck on Superfund*, SIERRA, Nov./Dec., 1993, at 54, 56.

[10] *Id.*

neric cleanup standards for specific hazardous substances and having cleanups tied to the reasonably anticipated future land uses. The National Superfund Commission also wants national goals and standards developed and land uses considered.

Nancy Newkirk, a vice president of Clean Sites and a member of the National Superfund Commission, said recently, while describing their proposal, that an industrial use should always remain industrial. The Department of Defense, which is the biggest polluter in the country and possibly the world, has welcomed the Administration's land use and cleanup standards and has been described as generally very pleased with them—and that is scary. Industry was pleased, too. Linking cleanup levels to reasonably anticipated future uses, especially where you have industrial property—or as in New York City where you have residential and industrial uses which developed together without any zoning—gets industry what it wants, less stringent cleanup levels, but it also gets urban residents a more polluted environment.

Land uses change over time, and in the next century, it is likely that population in urban areas will increase and the need for huge industrial facilities may decrease as we get on the information highway. We may need those lands for residential dwellings. Tying cleanup levels to land uses, at least when they are industrial, is also irresponsible and selfish much in the same way that generating a huge national debt for future generations to repay is unfair. Except here we are not only postponing our environmental debt to the next century, we are also leaving it in place, a little gift, if you would. When we select containment as a remedy, we are leaving our hazardous waste in place for subsequent generations.

One problem with national goals and national risk protocols for conducting risk assessments based on realistic assumptions is that generic, inflexible risk assessments and national goals are not protective of sensitive subgroups and do not consider such factors as age, gender, race, or ethnic susceptibility. According to the EPA, risk assessments supporting national regulatory initiatives focus on an average person who might be expected to have an average susceptibility to exposure to toxic contaminants in the environment. Since minority communities contain disproportionate numbers of vulnerable populations, national standards and risk assessments would not benefit them. In fact, according to the

EPA Environmental Equity Report, when EPA interviewed its regional staff, it found that many believe the Agency's activities are generally equitable, because its mission statement is focused on the environment, not a particular group. This perception, founded on the assumption that national standards and a focus on resources protects all communities equally is, in part, what has allowed instances of disproportionate distribution of pollution to continue unaddressed.[11]

Another problem with national risk protocols for a risk assessment is that under the Administration's bill, site specific risk assessments are discretionary.[12] Since Superfund currently requires site specific risk assessments in all remedial investigations, the Administration's bill eliminates existing site specific health protection measures and replaces them with generic and less protective risk assessments.

This is another example of reauthorization giving industry exactly what it wants. For years, the responsible parties have wanted to conduct the risk assessments themselves, and EPA has resisted that initiative in order to assure that less-protective or self-serving baseline risk assessments did not reduce public health protection. The Administration's bill will also facilitate the selection of less-protective remedies than are available under the current law. Currently, the lead agencies are required to identify in a timely manner the applicable ARARs that are promulgated, as well as substantive requirements of environmental law. More stringent state standards are now applicable. However, under the Administration's bill, state ARARs will be applicable only if they were promulgated under a state environmental law specifically addressing remedial action adopted for the purpose of protecting public health and the environment with the best available scientific evidence through a public process.[13]

These narrow conditions for applicability of state standards, which are stricter, would virtually eliminate state ARARs, thereby depriving states of their right to apply stricter standards, because most state ARARs were not enacted specifically for remedial actions. Under the aforementioned circumstances, only the

[11] 1 U.S. E.P.A., ENVIRONMENTAL EQUITY: REDUCING RISKS FOR ALL COMMUNITIES (1992).
[12] *See* H.R. 3800, *supra* note 6.
[13] *Id.*

federal requirements or national standards would determine the degree of cleanup required.

Finally, the Administration's bill departs radically from the concept that sites should be completely cleaned up. Under CERCLA, the President is required to select permanent, rather than temporary remedies.[14] There is also a statutory preference for treatment or remedies which reduce the volume, toxicity, or mobility of hazardous substances, pollutants, or contaminants. However, the Administration's bill abandons the preference for permanent remedies and views less protective containment remedies with equal favor as long as they are protective of public health and the environment, assuming they could be.[15]

While containment, such as fencing or capping, may be more protective than no remedy at all, it is clearly not as protective as the remedies currently required under the Superfund Program. The Administration's bill retains the preference for treatment at a site only for "hot spots" which are discrete highly contaminated areas that can not be reliably contained.

Nonpermanent remedies may prove to be "penny wise and pound foolish" if interim remedies continually fail and need regular restoration and maintenance. Minority and poor communities who live near hazardous waste sites will not be better served by the reauthorization cleanup standards inasmuch as the standards proposed are far less protective than what we have under the current law. There may be problems with Superfund in terms of taking a long time, but the cleanup standards were never a problem, except for industry.

Even though acceptability of the remedy to the affected community is one of the six factors which would be taken into account in selecting the remedy, the final decision for the remedy selection still belongs to the government. The Administration's bill creates additional opportunities for environmental regulators to exercise discretion in the sites they select for remediation from the Superfund, with no accountability to the public.[16] This situation creates the opportunity for disparate allocation of remedial resources by governmental regulators, behavior that the EPA has

[14] *See* Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9621(b)(1) (1988).
[15] *See* H.R. 3800, *supra* note 6.
[16] *Id.*

already been accused of in the *National Law Journal* article on Unequal Protection in September of 1992.[17] The Administration's bill does not bode well for remediations in urban areas.

The *National Law Journal* article mentioned found that only eighteen percent of Superfund sites are located in urban areas, where minorities overwhelmingly live.[18] This means that seventy two percent of the sites being cleaned up are in suburban or rural areas. There is a similar pattern of exceedingly few sites being listed and cleaned up in cities at the state level. Urban areas are already plagued by overlapping jurisdictions and a resistance by the responsible parties to remediating anything higher than the background level of pollution.

The existing bias in favor of suburban or rural cleanups is expected to be exacerbated by the Administration's bill, which combines lower cleanup standards tied to existing and future land uses with generic remedies and national standards. As a result, urban areas which did not receive adequate attention in the past can be assured of not being really remediated under the Administration's planned cleanup standards.

In conclusion, I want to say that not too long ago I was appointed co-chair of the State Bar Environmental Justice Committee. Just a few minutes after I was appointed, a lawyer came rushing up to me with a new environmental justice problem. He told me that pristine land was being consumed for the development of industrial facilities, presumably in the suburbs, because it was just too costly to remediate urban areas. It is an environmental justice problem, he told me, because those jobs are being lost by urban areas. I said, "Well, gee, it sounds like you need better mass transportation to those areas." And he said, "Oh, no, there is not enough volume to support mass transit." The very next week an article appeared in a law journal describing the state voluntary cleanup program, another feature of the Administration's bill, which will also link land use to cleanup levels. The article described the concept of brownfields and greenfields. The brownfields are described as slightly contaminated land in urban areas. Apparently, certain organizations which build homeless

[17] Marianne Lavelle & Marcia Coyle, *A Special Investigation—Unequal Protection: The Racial Divide in Environmental Law*, NAT'L L. J., Sept. 21, 1992, at S2.
[18] *Id.* at S6.

housing have been frustrated in their attempt to build in urban areas because they might have to clean up hazardous wastes on the property. The greenfields are undeveloped land near suburban communities. The article approved the idea of having urban areas receive all future industrial development without being fully cleaned up so that suburban areas can remain pristine.

Under the cleanup standards proposed by the Administration's bill, many urban areas would be condemned forever as brownfields, and then all urban area residents would be burdened with worse environmental quality, not just the minorities and poor. The Administration's proposed cleanup standards linked with future land uses should be opposed by minorities and the poor and residents of urban areas. The scientific evidence suggests that instead of having less protective cleanup standards, cleanup standards should be more protective. Proximity to hazardous waste sites does pose human health risks, and has been associated with adverse human health effects in New York State. The New York State Department of Health did a study and found a statistically significant increase in birth defects correlated with maternal residence near hazardous waste sites. Hazardous waste sites have also been associated with breast cancer and with neurotoxic defects, so these risks are not significantly reduced by containment measures like fencing. The remediation costs were not prohibitive when we believed that white children were being exposed to cancers at places like Love Canal. That was when the public gave us a mandate to clean up hazardous waste sites. I believe that minorities and the poor and residents of urban areas should receive equivalent protection.