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A NEW YORKER'S TAKE

LARRY SHAPIRO*

I primarily want to talk about the Brooklyn Navy Yard, which would be, under this proposal, a brownfield, having been an industrial facility, at least since the 1780's.

The New York Public Interest Research Group ("NYPIRG") has been working on solid waste issues for many years. We have really been the leading group in the state trying to promote waste reduction, recycling, and trying to stop garbage incineration. One of the things we found is that when looking at environmental justice issues, it is very important to use whatever weapons are available. It is very often the case that equal justice arguments simply are not available, but there are other arguments that are available in the legal process. It is even more important to make sure that the legal strategy being attempted, in order to stop a destructive project, is a part of a much larger political/media/organizing/lobbying strategy. When you get right down to it, whether it be incinerators, landfills, or many of the other kinds of facilities that people are trying to build that might be destructive, these projects are legal. It is perfectly legal to build an incinerator, as the people of Onondaga County, where Syracuse is located, have found out, because they really did not get themselves together to oppose that project until it was too late. It is perfectly legal to build a medical waste incinerator, which has unfortunately happened in the South Bronx, because the information that was happening with that project was really not publicized by either the project sponsors or the regulatory agencies, and by the time the people in the community found out about it, there just was not much left to do.

I think it is also important to realize that you just cannot trust the process, whether it's the state regulatory agencies or the New

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York Department of Environmental Conservation ("DEC"). I think Samara Swanston is an exception to this, but the Department of Environmental Conservation is not an agency that can be trusted to do the right thing. They are not an agency that can be trusted to make intelligent decisions; they are not an agency that can be trusted to tell the truth; they are not an agency that can be trusted to follow their own procedural rules, and we have seen this time and time again. I have had somewhat less experience with the Environmental Protection Agency ("EPA"), so this may or may not be the case with EPA, but it would not surprise me if EPA has followed essentially the same model. I think that this is probably true with other regulatory agencies as well.

So, if you are representing a community group that is trying to fight a destructive project, you are on your own. You are not likely to be helped by the regulatory agency, which, in fact, will often act as a coconspirator in favor of the project. But I think there are many things that can be done. I think that what Mike Gerrard indicated earlier is accurate, that a great deal of the time people beat these projects. This is because they are clever, they are quick, and because they are well-organized. Usually, they are not well financed. I just wanted to talk about how I think this comes to pass.

I think the Brooklyn Navy Yard incinerator will never be built despite the fact that it is at least a \$500 million project, and despite the fact that some of the most connected law firms, investment bond underwriting firms, and so on are behind it. The approach that those of us who have been opposing this project, NYPIRG, the Hasidic community in Williamsburg, the Latino community in Williamsburg, and the African-American community in Fort Greene, have been taking has been to try to do what we can to raise more and more issues within the formal regulatory process so that the process becomes hopelessly complicated and slows down.

This project was first proposed in one form or another in the 1960's and 1970's. In its current form, the contract for the incinerator was signed in 1985 by the City. When this contract was proposed long ago, there was not a lot of opposition, and the opposition was disorganized and divided. I suspect that part of the reason why this was supposed to be the first incinerator of five to eight new giant incinerators around the city was because the land

was free. My hope is that once the new fair share provisions of the City Charter are given some teeth through various court decisions, that will no longer be a criteria for choosing sites. Another important reason is that the community was not a powerful community, and because the community was in many ways bitterly divided over a whole range of issues.

Williamsburg is largely divided between a Latino and Hasidic community that historically have not been on speaking terms. Early on, we got involved at NYPIRG because we were interested in solid waste policy, and we looked at this. We thought air emissions are a big problem; it is ridiculously expensive and it will compete with recycling for the same resources, so we thought we should oppose it, and we looked around for allies.

While the Hasidic community is a poor community, it is well organized because everybody is part of the same religious sect, and they operate in tandem with one another. Most other communities, whether rich, poor, white, black or Latino, just are not organized that way. So the Hasidic community really put a lot of resources from the beginning in this fight in a pretty well-organized way. Portions of the Latino community did as well. Fort Greene is a little further away. Fort Greene is primarily African-American, and it took a little longer before the leadership of the Fort Greene community got involved in this.

One of the things that happened over time is the leadership, especially of the Latino and Hasidic communities, got together in their opposition to this project. I remember being told by Luis Gardna Acosta, the executive director of El Puente, which is a leading community organization in Williamsburg, that Rabbi David Niederman, who is the head of United States Jewish Organizations of Williamsburg, which is actually represented by Mike Gerrard in the permit proceeding on the incinerator, decided it made sense for his organization to get involved in the fight to try to shut down Radiac, the radioactive waste facility, even though Radiac is really in the Latino portion of Williamsburg. When Rabbi Niederman went to a meeting about Radiac, Luis described it as being like when Nixon went to China, and I think that was probably true. What we have had since then, against some odds, are the Latino and Hasidic communities of Williamsburg, and then more recently, through the leadership of Reverend Mark Taylor, a major portion of the African-American community of

Fort Greene really working together to fight this project. It has been very impressive to see.

It is important to remember that the approval process for an incinerator project or a landfill project is complicated. They have to go through the State Environmental Quality Review Act ("SEQRA")¹ at the state level, which is the New York analog to the National Environmental Policy Act ("NEPA").² That does not necessarily mean the nature of the decision is going to change, but it does require a fairly elaborate review of the project. They have to make sure that quite a few "i's" are dotted and "t's" are crossed, as far as engineering standards for incinerators are concerned. In order to get a state permit, there has to be a place to dispose of incinerator ash; there are air quality issues that have to be looked at and in addition to the state permit proceeding, which is probably the most complicated, there are two federal permits that also need to be obtained, including a dredging permit from the Army Corps of Engineers.

The company that is planning to build this incinerator is not even at step one. The permit application was deemed complete in 1986, and one of the things that we discovered shortly after that was that the administrative law judge who was hearing the case on behalf of the Department of Environmental Conservation had a conflict of interest, so we challenged him, and through litigation that took about a year, he was disqualified.³ The permit process had to start again from the beginning, so what we tried to do and what the community tried to do was organize to make sure that the political opposition to the project developed more and more.

Over the years, those kinds of tactics have been used. We tried to make sure that it would just be politically unacceptable on Staten Island for the toxic incinerator ash to be dumped on Staten Island. You cannot get a permit to build an incinerator unless you have a place to dump the ash, so that delayed things for a number of years. When they wanted to dump the ash in Pennsylvania, we actually went to the community where they wanted to dump it and said, "Do you guys want to be a national sacrifice area for incinerator ash?" They said "no," and within a week that proposal

¹ N.Y. ENVTL. CONSERV. LAW §§ 8-0101 to -0117 (McKinney 1984).

² 42 U.S.C. §§ 4321-4370 (1988 & Supp. II 1990).

³ New York Pub. Interest Research Group, Inc. v. Williams, 133 Misc. 2d 116, 506 N.Y.S.2d 509 (Sup. Ct. New York County 1986).

was dead, because they were no longer going to be able to dump the ash in Pennsylvania. Meanwhile, through all these twists and turns, more and more political opposition developed to this incinerator. We are now on our third mayor and I think we are on our fourth Commissioner of the Department of Sanitation. After a while, I have lost track.

A number of other things that would be impossible to predict have taken place and have become tremendously important. In the intervening time since the incinerator was proposed, the Clean Air Act⁴ was amended, which arguably says that there are some new air requirements that must be met. Once the DEC rejected that argument, we went to the state legislature and asked the state legislature to impose by law some new air requirements. During the years that the proceeding was pending, the man who is now the speaker of the Assembly, Sheldon Silver, has moved up through the ranks. A year ago, he was the Chairman of the Ways and Means Committee in the Assembly, which is probably the second most important post there, and he was able to push through this law. At the point at which the incinerator was initially proposed, Sheldon Silver, who represents the district right across the river from the Navy Yard in Manhattan, was not even a committee chairman. So early opponents of the incinerator have moved on to influential jobs.

Two other things have happened in the intervening time. One is we found out through a man named Robert Patterson, who is a historian in Brooklyn, that it is very likely that thousands and thousands of Revolutionary war soldiers were buried right at the site of the incinerator.⁵ There are both state and federal laws that address historic preservation issues that arguably would require protection of that site, and at the very least, there is more substantial review of what would happen to the historic resources there. So I do not think I ever would have expected through my work as an environmental lawyer to suddenly be involved in knowing the in's and out's of the battle of Brooklyn in 1776. But I live in Brooklyn, and the in's and out's of the battle of Brooklyn in

⁴ Air Pollution Prevention and Control Act, 42 U.S.C. §§ 7401-7642 (1988).

⁵ See Raymond Hernandez, *Grave Site May Be Under Proposed Incinerator*, N.Y. TIMES, Dec. 27, 1992, § 1, at 32.

1776 actually turned out to be kind of interesting, and that has become an issue.

Something else that has taken place recently, which probably should come as no surprise since the Brooklyn Navy Yard has been an industrial site for so long, is that as a result of having worked on this and having had more and more people get involved, information comes our way from various sources. It was recently discovered that there is hazardous waste contamination—initially it was hazardous waste contamination at the Brooklyn Navy Yard site a couple of blocks away from the incinerator site, but then it came out that there was hazardous waste contamination right at the proposed site of the incinerator. This information was discovered by the City in 1988 and apparently withheld for six years from the Department of Environmental Conservation. This has now resulted in some additional delays. It cuts another way, because it means that we are going to have to make sure that the best investigation and cleanup in the world is done there as quickly as possible.

And while the Latino, African-American, and Hasidic communities do not necessarily agree on everything, all of them seem to be quite interested in making sure that there is housing developed at various places on the Navy Yard site. Depending on what happens with the legislation in Congress and depending on what happens as far as the investigation of the hazardous contamination, it is possible that that site would be cleaned up to a so-called industrial standard, which would preclude choices from being made properly down the road as to what the actual use of that site ought to be. Many people think it ought to be for residential purposes. Also, 3,000 people are there every day and perhaps getting contaminated every day since it is an industrial park right now.

So I think our involvement in the Navy Yard site certainly did not start as an issue of looking at hazardous waste rules; it has become that in part. In conclusion, when it comes to environmental justice, a lot of times the opportunities just are not there when you think of Equal Protection Clause or something else. There are many legal opportunities that are there to make sure more time is taken for review; to make things more complicated so that the organizing activities in the community can happen long enough and effectively enough so that ultimately the project can be killed. I

think that is what we are going to see in this case, and I think the incinerator is never going to be built.

