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RECENT JUDICIAL DEVELOPMENTS ON ENVIRONMENTAL JUSTICE

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There have been two recent reported decisions involving questions of environmental justice. One decision reviewed the siting of a landfill and the other was on a petition for review of a Clean Air Act permit issued to a waste wood-fired electric generating station. The cases are examined below, followed by a brief analysis of their larger implication.

I. AIELLO V. BROWNING-FERRIS, INC.

In Aiello v. Browning-Ferris, Inc.,1 a federal district court held that a “taking” challenge to a landfill siting decision should have been raised first in the state court. The court also dismissed statutory civil rights claims as barred by the applicable limitations period. In January of 1987, Contra Costa County (“County”), California appointed a task force to recommend future landfill sites for the County. According to the plaintiffs, in June of 1987, the appointed task force ranked the Keller Canyon site last among thirteen potential sites, in substantial measure because Keller Canyon’s proximity to residential and commercial areas. At least one of the areas that ranked higher on the list of potential sites was in a section of the County near neighborhoods that are predominately white. The Keller Canyon site was the closest of all the potential hosts to the residential areas and was predominately populated by minorities.

Despite the recommendation of the task force against utilization of Keller Canyon, on November 10, 1988, the County’s Board of Supervisors voted to endorse the siting of the landfill at Keller Canyon. Construction of the landfill began in November of 1991, and the landfill commenced commercial operation in May of 1992.

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Almost immediately following commencement of construction, there was a large volume of complaints from nearby residents. Commencement of operation of the landfill only intensified the complaints. According to the nearby residents, the landfill caused dust, toxic substances, trash, and odors to be blown into their neighborhoods. Further, according to the residents, they were disturbed by the sound of heavy equipment and trucks entering and leaving the landfill.²

On February 8, 1993, a class of residents filed claims against the County of Contra Costa and its Board of Supervisors under 42 U.S.C. sections 1983 and 1985.³ The claims alleged that Contra Costa County violated the residents' constitutional rights by making a racially discriminatory decision to locate and approve the landfill in a part of the County where a high proportion of the County's minorities reside. The residents' lawsuit also named the landfill operator, Browning-Ferris, Inc. ("BFI"), as a defendant. The charges against BFI included an alleged taking of property without compensation in violation of the Fifth and Fourteenth Amendments of the Constitution.⁴ Finally, the residents raised various state law claims against BFI and the County under a pendant jurisdiction theory. BFI moved to dismiss the residents' taking claim and the County moved to dismiss the civil rights claims under Federal Rule of Civil Procedure Rule 12(b)(6)⁵ for failure to state a claim upon which relief could be granted.

The court held the residents' civil rights claim was time barred.⁶ The court first addressed the County's motion to dismiss the residents' complaint as time barred. Because neither section 1983 nor section 1985 provide for explicit time limitations, the court looked to analogous state law. The court found that the statute of limitations under the state rule was one year. As noted above, the residents' complaint was filed on February 8, 1993. The residents argued that under the "continuing wrong" doctrine, a cause of action does not accrue until the time of the final wrongful act. Further, the statute of limitations should not begin running until after an

² *Id.* at 20,771.
⁴ U.S. Const. amends. V, XIV.
The aggrieved party has had a reasonable period to assess the full extent of its losses. The County disagreed and argued that the relevant activity (and the only decision challenged as discriminatory by the residents) was the siting decision itself. That decision was made in 1988, but in no event later than July of 1990. Even if the siting decision did not trigger the limitations period, the County argued that the statute of limitations began running in November of 1991 when construction of the landfill commenced.

The district court rejected the residents' arguments and accepted those of the County. The crux of the court's decision was that "the gravamen of plaintiffs' complaint is that the decision to site the landfill was discriminatory." The district court clearly was convinced that the siting decision was the only potential racially discriminatory act alleged by the residents, and that all of the adverse environmental consequences sketched out in the residents' complaint flowed from that single act. Since the County formally approved the landfill plan in 1989, under the district court's analysis, the statute of limitations began running then, and expired in 1990. Thus, the civil rights claims were timed barred substantially before the commencement of suit on February 8, 1993.

As a last ditch effort, the residents invoked "the well-established rule that a civil rights cause of action accrues when the plaintiff 'knows or has reason to know of the injury which is the basis of the action.'" The district court responded that this exception was inapplicable because it was designed to keep injured parties out of a catch-22: barred from bringing an action at the time of injury because damages would be too speculative, and then later barred by the statute of limitations from bringing an action when damages are accrued. In the district court's view, there was "certainly sufficient injury" by the time the landfill construction

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7 Id. at 20,773.
8 Id.
9 Id.
10 The district court took pains to emphasize that the analysis affected only the residents' civil rights claim. "Plaintiffs' claims that they continue to be exposed to noise and harmful wind-borne substances may constitute continuing torts, and may be the effect of a § 1983 or § 1985 violation, but such injury does not constitute a continuing civil rights violation." Aiello v. Browning Ferris, Inc., 24 Envtl. L. Rep. (Envtl. L. Inst.) 20,771, 20,773 (N.D. Cal. Nov. 2, 1993).
11 Id. at 20,774.
began to trigger the commencement of the statute of limitations. Although the court conceded that "the nature and extent of plaintiff's damages might not have been known with precision by February 1992," the fact that there would certainly be some injury was sufficient to commence the limitations period. The district court therefore rejected the residents' invocation of the exception and dismissed the federal civil rights claims.12

The court also found that the plaintiffs' unconstitutional "taking" claim lacked a valid basis.13 The residents conceded that they had not brought any state claim seeking compensation for a taking, under the administrative procedures enacted pursuant to the California State Constitution. The residents argued that California's Constitution did not provide for a takings claim against a private party, like BFI, and therefore they were excluded from using the state administrative process to seek relief. The district court was not so certain and held neither the California constitution nor the California inverse condemnation statute specifically rule out the possibility that a private party "acting under color of state law" could be responsible for a compensatory payment. Before a federal takings claim would be cognizable, the residents would be forced to sue under state theories and be denied relief. Because they concededly had not yet done so, the district court also dismissed the takings claim against BFI. Since the court found no basis to proceed under the federal law causes of action, it also dismissed the pendant state law claims. However, the district court granted leave to the residents to replead the federal takings claim, if and when the residents had exhausted an attempt to pursue compensation through state administrative processes.15

II. In re Genesee Power Station Limited Partnership

In In re Genesee Power Station Limited Partnership,16 the EPA Environmental Appeals Board ("the Board") denied review of a claim of environmental racism in connection with Prevention of

12 Id.
13 Id. at 20,772.
14 CAL. CIV. PROC. CODE § 1245.260(a) (West Supp. 1994).
Significant Deterioration ("PSD") permit.\textsuperscript{17} Holding that Clean Air Act ("CAA") section 131\textsuperscript{18} does not authorize review of "local land use" decisions, the Board refused to grant review.\textsuperscript{19} The decision was later reissued, as explained below, in a way that undercuts the precedential significance of the environmental racism holding.

The Genesee Power Station Limited Partnership ("Genesee") applied for a permit to install and operate a 35-megawatt steam generating electric plant. The cogeneration plant would combust several types of wood waste, including demolition debris, palettes, dunnage, construction waste, tree trimmings, and saw mill residue. The plant would be located northeast of Flint, Michigan, in an industrial park located not far from residential areas. The Flint, Michigan area is classified as "nonattainment" under the CAA for ozone. Thus, the Genesee plant was obligated to obtain a PSD permit under section 165 of the CAA, and a nonattainment new source review permit under section 173.\textsuperscript{20} The PSD permit was the subject of the appeal and issued by the Michigan Pollution Control Commission ("the Commission") under a delegation of authority from EPA.

The PSD permit application was filed on June 8, 1992. A forty-two-day public comment period and two public hearings were held prior to issuance on December 7, 1992 of the final PSD permit. Pursuant to 40 C.F.R. section 124.19, several groups and individuals petitioned the Board for review of the permit. The petitioners included the American Lung Association of Michigan; the Flint Michigan NAACP; the Society of Afro-American People; the Flint/Genesee Neighborhood Association; the Genesee County Medical Society; and several individuals.\textsuperscript{21}

The Board initially ruled that claims of environmental racism were nonreviewable pursuant to section 131 of the CAA. The Society of Afro-American People in Michigan (the "Society") asserted

\textsuperscript{17} The Environmental Appeals Board is an administrative creation of the EPA administrator. The Board hears and decides the kinds of appeals formerly delegated to the Agency's judicial officers. The matters within the Board's jurisdiction include most administrative enforcement cases and a wide range of federally issued environmental permits. See Changes to Regulations to Reflect the Role of the New Environmental Appeals Board in Agency Adjudications, 57 Fed. Reg. 5320 (1992).


\textsuperscript{19} Genesee, PSD Appeal Nos. 93-1 to 93-7, 1993 P.S.D. LEXIS 1, at *91 to *92 (Env'tl. Appeals Bd. 1993).

\textsuperscript{20} Id. at *4 to *6.

\textsuperscript{21} Id. at *10 to *11.
that the Commission’s issuance of the PSD permit to Genesee “represents an instance of ‘governmental environmental racism,’ because the facility will be near the predominantly African-American Flint/Genesee neighborhood.” In other words, the Society’s position was that “the inability of people of color and other residents of the economically deprived area” to be involved in the public process associated with permit issuance—particularly as compared to the opportunities afforded to white opponents of other similar projects—demonstrated illegal “racially discriminatory intent.”

Figuring most prominently in the Society’s analysis was a comparison of the treatment of a proposed project that had been slated for construction in a predominately white area and certain allegedly disrespectful conduct towards black attendees at a meeting of the Commission to take comment on the draft PSD permit. First, the Society pointed to a project proposed for Marquette, Michigan. According to the Society’s position, while listening to the opposition by white residents to a proposed project that would have been located near a predominately white area, a member of the Commission announced opposition to the project and the PSD permit was denied. Second, with respect to the conduct at the Genesee hearing, the petitioners claimed that some project opponents waited sixteen hours to receive a chance to speak, and only then were allowed to do so very late at night. Further, there was “talking” and “laughing” by Commissioners during the presentations. According to the implication of the Society’s petition, this indicated that the Commission already reached a racially discriminat-
ing conclusion prior to holding the public meeting.

The Board declined to grant review of the issue and concluded that neither the Clean Air Act, nor the PSD regulations promulgated pursuant to the CAA authorized the Board to consider community opposition to the “location” of a proposed facility. Specifically, the Board cited section 131, which provides that “nothing in the [Clean Air Act] constitutes an infringement on the existing authority of counties and cities to plan or control land use.”

22 Id. at *12 to *26.

The legislative history of the above-quoted provision reveals that its "purpose is to preclude any inference that the Clean Air Act by its terms, as amended by this bill, authorizes air pollution control agencies to override individual project-specific land use decisions made by a city or county.

* * *

Under the Clean Air Act, therefore, the inquiry of the state agency acting in its capacity as a PSD issuing authority under a federal delegation is limited to determining whether the facility at the proposed site would meet federal air quality requirements.24

Thus, a project permit may not be reviewed by the Board or denied by the permitting authority, assuming consistency with air quality requirements, "from a local land use perspective." Although "mindful" that the permitting authority must consider non-air quality environmental impacts and "other costs" in making a Best Available Control Technology ("BACT") determination, the Board pronounced that these provisions were not availing to the Society. The obligation to consider "non-air quality environmental impacts and other costs" is primarily intended to act "as a safety valve whenever unusual circumstances specific to the facility make it appropriate to use less than the most effective technology."25 Although such non-air quality impacts must be considered as part of a BACT determination, "this consideration does not extend to generalized community opposition to the proposed site of the facility."26

The Board subsequently modified the basis for its decision on environmental racism. Reportedly, the Genesee decision set off a firestorm of debate and criticism within the Environmental Protection Agency. Almost immediately, the EPA Office of General

24 Id.
25 Id. at *21; see In re Columbia Gulf Transmission Co., 1989 P.S.D. LEXIS 4, PSD Appeal No. 88-11 (June 21, 1989) (Reilly, Adm'r).
26 The Board noted, however, that if the Commission was also exercising some state authority in issuing the permit, then it could have concluded pursuant to state law that the permitting decision was motivated by a racially discriminatory intent. As an example of such a circumstance, it cited issuance of a permit over "intense" opposition from the local Afro-American community. The Board concluded that it was not clear from the record whether there was such racially discriminatory intent and that in any event it was unclear whether any state authority was being exercised in connection with issuance of a delegated federal permit. Genesee, PSD Appeal Nos. 93-1 to 93-7, 1993 P.S.D. LEXIS 1, at *21 (Envtl. Appeals Bd. 1993).
Counsel filed a "Motion for Clarification" ("Motion").27 The Motion challenged the legal theory underpinning the environmental racism aspect of the Genesee decision. The Motion stressed that the PSD provisions of the CAA called for a "comprehensive review" of all air quality related issues prior to issuance of a PSD permit. The legislative history of the Clean Air Act Amendments of 1977 stress that the public hearing on a proposed permit should allow for consideration, among other things, of possible alternatives to the project. According to the Motion, this would "plainly" include the authority to consider requiring that the plant be sited elsewhere "if the permitting authority decides to do so based on consideration of community views."

The legislative history, according to the Motion, also demonstrated the intent of Congress that the "character of a community" be taken into account in the PSD permitting process. Specifically, the motion papers stated:

When analysis of energy, economic, or environmental considerations indicates that the impact of the major facility would alter the character of that community, then the state could, after considering those impact[s], reject the application or condition it within the desires of the state or local community.28

Consistent with this broad view of the permitting authority's scope of review is the increment consumption analysis. Permitting authorities explicitly are authorized under section 165(a)(3) of the CAA to reject a proposed application where the project consumes excess consumption of "increment"—even where there exists no violation of National Ambient Air Standard and Quality Standards.29 According to the Motion, this demonstrated the Board's error in asserting that "a permitting authority may deny a permit in the proposed location only if its air quality impact would violate minimum air quality requirements."

The Board, at least in part, was persuaded by the Motion. Moving swiftly, on October 22, 1993, the Board issued an "Order On

28 See id. at *1.
Motion for Clarification."\(^{30}\) In the order, the Board, noting that it was able to decide the environmental racism issue against the petitioners on purely factual grounds, withdrew its previous legal analysis. It reissued the Genesee opinion without the reference to whether the Clean Air Act authorized review of claims of environmental racism in citing decisions. The Board stated:

Genesee Power Station Limited Partnership, the permittee in this case, opposes [Office of General Counsel's ("OGC") Motion for Clarification] on the merits, although it has no objection to excising the portions of the Board decision for which OGC finds fault. Genesee asserts that the issue raised by the Motion for Clarification is of national importance and should be decided with the full benefit of the adversary process but are not so presented here, for the issues raised do not, as OGC acknowledges, affect the outcome of the case. For that reason, Genesee proposes that the Motion be resolved by simply excising the appropriate portion of the decision.\(^{31}\)

Therefore, the Board denied review of the environmental racism claim on the purely factual ground that the petition failed to state facts that established that MDNR'S judgment on the racism question was clearly erroneous.

III. THE IMPLICATIONS FOR THE FUTURE

The Aiello and Genesee decisions share some common characteristics and implications. The decisions are important because, taken together, they probably represent the fact patterns that will, in the future, most frequently produce legal challenges on environmental justice grounds. The Aiello case will be the most common: the siting or expansion of a landfill near residential areas that are disproportionately minority. Because of business conditions in the waste disposal industry, however, it is likely that there will be fewer cases than many observers expect involving new or expanded landfills. The Genesee situation, in contrast, may be the forerunner of more frequent challenges to air pollutant sources than may be expected. This is due to many factors, including the increasing tendency to build more (but smaller) power


\(^{31}\) Id. at *1.
plants than in the past; the effect of the Clean Air Act Title V operating permit program which is expected to cause hundreds or thousands of sources to file PSD permit applications; and the general tendency to more closely enforce existing preconstruction permit rules.32

The most obvious consistency between Aiello and Genesee is that neither the Aiello plaintiffs nor the Genesee petitioners obtained any relief. This is not terribly surprising since, in the development of the law, it often takes several attempts for relatively novel theories to gain credence. There are relatively few “overnight successes” for plaintiff’s lawyers.

CONCLUSION

In retrospect, the greatest mistake made by the claimants in Aiello and Genesee may have been failing to prepare for litigation at an earlier stage in the process. The implication of the district court’s decision in Aiello is that the plaintiffs would have been more successful if they had brought suit for declaratory judgment as soon as Contra Costa County finalized the landfill siting decision. Once a declaratory judgment was obtained, the court could have retained continuing jurisdiction over the matter to assess an award of damages. Likewise, the Genesee petitioners may have benefited from earlier efforts to shape the administrative record. For example, had detailed studies been prepared of the disparate impact of the siting decision, the Environmental Appeals Board decision may have been different. Of course, early and visible preparation for litigation in many instances can be expected to produce a more favorable settlement for those injured by discriminating actions—without the delay, expense, and uncertainty associated with recourse to the courts.

32 The majority of these permits will be issued by state air quality agencies and thus, appeal will be to the state agencies’ governing bodies and, after that, to the state courts, rather than to the Board and then the federal courts.