



Healthy Communities: A Human Rights Blueprint for Transforming the System of Environmental Protection in the United States

by

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If America is the sum of its communities, then our nation is shrinking from the loss of communities caused by environmental damage. Numerous communities have disappeared as a consequence of a public health crisis brought on by the close geographic proximity of a hazardous industrial operation to a residential area that warranted the relocation of all residents.¹ Unfortunately, little has been done to effectively avoid a similar fate for communities that are located near polluting facilities or abandoned sites that are contaminated. The level of protection that our government should provide to vulnerable communities can not be found in domestic environmental laws, but is nonetheless required of the United States through the ratification of international treaties.

Ironically, the goal of ensuring healthy communities is in conflict with the Clean Air Act and the Clean Water Act. These environmental laws serve as the gateway through which toxic industrial facilities enter and expand in communities that are disproportionately communities of color.² Both laws authorize the issuance of environmental permits that limit the release or discharge of a specified pollutant to a level that is routinely released or discharged by a certain number or percentage of facilities already in operation.³ The fact that these facilities are harming the environment and the health of people who live nearby is ignored by the Clean Air

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Act and Clean Water Act. Notwithstanding the complexities of the environmental regulatory system, the system in essence relies on polluting industries to set the standard, and the deck is stacked against people of color who struggle to find solutions.

For communities of color, beset by unequal environmental protection based on race, flawed environmental regulatory standards trump civil rights protection. In response to a claim of racial disparities in environmental permitting, the Environmental Protection Agency rendered the following decision, which has been consistently applied by state environmental regulatory agencies to defend permitting decisions that increase environmental hazards in communities of color:

[Environmental standards are] “presumptively protective and emissions of pollutants should not be viewed as ‘adverse’ within the meaning of Title VI.”

Environmental Protection Agency, Office of Civil Rights, Investigative Report of Title VI Administrative Complaint, File No. 5R-98-R5 (Select Steel Complaint)).

By relying on polluting facilities to set the standard for environmental and health protection, the environmental regulatory system makes communities vulnerable to the disastrous effects of toxic exposures and unliveable conditions that have caused the displacement of residents.

The environmental justice movement in the United States has invoked human rights as a remedy for the flaws inherent in the environmental protection system. In 1991, grassroots communities, indigenous peoples, civil rights groups, religious and spiritual organizations, youth advocates, labor coalitions, lawyers, health professionals, and academics developed *The Principles of Environmental Justice*, which recognize environmental injustice as a violation of fundamental human rights.⁴ (It should be noted that *The Principles of Environmental Justice* have been incorporated into the curriculum of colleges and universities that offer environmental courses.) As indicated in the *Principles*, the recognition of a safe and healthy environment as an intrinsic part of human rights is shared by human rights jurists,⁵ legislative bodies in foreign



countries,⁶ treaty monitoring committees of the United Nations,⁷ as well as state parties to international treaties.⁸ Each has contributed to the growing body of environmental human rights law.

The environmental human rights law established internationally and in foreign countries serve as a practical guide for improving the system of environmental protection in the United States. The need for such improvement is clearly demonstrated by the declining environmental conditions in our country and the significant health problems suffered by people living in polluted communities as well as sensitive populations, such as children, the elderly, and persons with disabilities.

The obligation of the United States to protect human rights through the ratification of the International Covenant on Civil and Political Rights and the Convention on the Elimination of Racial Discrimination, as well as our country's membership in the Organization of American States, which requires compliance with the American Declaration of the Rights and Duties of Man,⁹ constitute substantial justification for remedying the inherent flaws in the current system of environmental protection. As demonstrated in other countries and international systems (*see* endnotes 5-8), the application of these human rights laws requires, at minimum, the establishment of the following environmental standards that:

- (1) prohibit racially disproportionate pollution burdens that includes legal remedies for cases of racially disparate pollution burdens;
- (2) require a safe distance between a residential area and a toxic facility or heavy industrial site;
- (3) apply the Precautionary Principle, in lieu of the risk assessment model, to reform environmental permitting decisions and public health assessments so that the multiple, cumulative, and synergistic impacts of pollutants that threaten human health and the environment can be avoided;



- (4) mandate the use of safer alternatives in the design of products and manufacturing processes to eliminate toxic wastes and inputs and promote the sustainable use of renewable energy and materials.

Establishing and implementing these environmental human rights standards require leadership grounded in the belief that the color of one's skin should not determine the quality of one's environment. They also require leadership that values sustainability, promotes healthy communities, and creates new economic opportunities for innovative product design and manufacture that is in harmony with natural ecological cycles. Transforming the environmental regulatory system to protect human rights sets our country on a course of ensuring that communities across America are healthy and sustainable, reviving the American spirit of defending human rights, and recapturing America's place as a world leader in innovative technologies that spur economic opportunities.

ENDNOTES

¹ As of 1999, the Environmental Protection Agency permanently relocated seventeen residential areas pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (Superfund). Additional permanent residential relocations warranted by toxic exposures are documented in the following reports, which are only provided as evidence that people have been displaced by contaminated environments, but are by no means presented as either the full extent of permanent residential relocations that have occurred in the United States or the ongoing demand by communities for permanent relocation away from toxic environments: Louisiana Advisory Committee to the United States Commission of Civil Rights, *The Battle for Environmental Justice in Louisiana . . . Government, Industry, and the People*, pp. 46-50, September 1993, available at www.law.umaryland.edu/marshall/usccr/documents/cr12en8z.pdf (discussing the relocation of three Louisiana communities); David Lerner, *Diamond: A Struggle for Environmental Justice in Louisiana's Chemical Corridor* (MIT Press 2004) (chronicling the relocation of the Diamond community in Norco, Louisiana); Mossville Environmental Action Now, et al., *Industrial Sources of Dioxin Poisoning in Mossville, Louisiana: A Report Based on the Government's Own Data*, p. 7, July 2007, available at www.ehumanrights.org/mossville.html (discussing the relocation of the Bel Air neighborhood in Mossville, Louisiana); Capree



Houston, University of Michigan School of Natural Resources and Environment, *Environmental Justice Case Study: The People of Anniston, Alabama vs. Monsanto*, (n.d.), available at <http://www.umich.edu/~snre492/Jones/anniston.htm> (discussing the relocation of Anniston residents).

² For more than 20 years, governmental and non-governmental organizations have documented the fact that toxic industrial facilities are routinely granted environmental permits to operate near communities that are predominantly populated by African Americans, Latinos, Native Americans, and Asian Americans. See, e.g., U.S. General Accounting Office, *Siting of Hazardous Waste Landfills and Their Correlation with Racial and Economic Status of Surrounding Communities*, GAO/RCED-83-168, B-211461 (June 1, 1983); United Church of Christ Commission for Racial Justice, *Toxic Waste and Race in the United States: A National Report on the Racial and Socioeconomic Characteristics of Communities with Hazardous Waste Sites* (1987); Robert D. Bullard, *Dumping in Dixie: Race, Class, and Environmental Quality* (Westview Press 1990); Benjamin A. Goldman, *The Truth About Where You Live: An Atlas for Action on Toxins and Mortality* (Three Rivers Press 1991); Marianne Lavelle and Marcia Coyle, *Unequal Protection: The Racial Divide in Environmental Law*, THE NATIONAL LAW JOURNAL (Special Issue) (Sept. 21, 1992); *Race and the Incidence of Environmental Hazards: A Time for Discourse* (Bunyan Bryant & Paul Mohai eds. 1992); Rae Zimmerman, *Social Equity and Environmental Risk*, RISK ANALYSIS: AN INTERNATIONAL JOURNAL, vol. 13, no. 6, p. 649 (1993); *Confronting Environmental Racism: Voices from the Grassroots* (Robert D. Bullard ed., South End Press 1993); *Unequal Protection: Environmental Justice and Communities of Color* (Robert D. Bullard ed., Sierra Club Books 1994); David Pace, *Minorities Suffer Most from Industrial Pollution*, ASSOCIATED PRESS, December 14, 2005, available at www.msnbc.msn.com/id/10452037; Robert D. Bullard *et al.*, *Toxic Wastes and Race at Twenty, 1987 – 2007: A Report Prepared for the United Church of Christ* (2007); J. Andrew Horner and Nia Robinson, *A Climate of Change: African Americans, Global Warming, and a Justice Climate Policy for the U.S.* (July 2008).

³ See, e.g., the Clean Air Act, 42 USC 7412(d)(3), requiring the Administrator of the Environmental Protection Agency to establish for categories of polluting facilities that release a listed hazardous air pollutant a regulatory emission standard that is no less than the average of the hazardous air pollutant levels released by the best performing 12 percent of existing facilities (or the best performing 5 facilities when there are less than 30 facilities in the same category). See also the Clean Water Act (33 USC 1311).

Environmental permit writers acknowledge that they lack the legal authority to deny a permit on the basis of a racially disproportionate pollution burden or when that permit otherwise complies with requisite laws and regulations. EPA, National Environmental Justice Advisory Council, *Environmental Justice in the Permitting Process*, EPA/300/R-00-004, p. 9, July 20, 2004, available at www.epa.gov/oecaerth/resources/publications/ej/nejac/permit-recom-report-0700.pdf.

⁴ First National People of Color Environmental Leadership Summit, *Principles of Environmental Justice*, October 21, 1999.

See also Monique Harden, *et al.*, *Acting on Principle: Opportunities & Strategies for Achieving Environmental Justice Through Human Rights Laws and Standards*, BRINGING



HUMAN RIGHTS HOME, vol. 3 (Greenwood Press 2008) (chronicling the history of human rights advocacy by the environmental justice movement in the United States).

⁵ See, e.g., the following judgments rendered by the Inter-American Commission on Human Rights of the Organization of American States finding that governmental decisions created an unhealthy environment in violation of the human rights to life and health: *Report on the Situation of Human Rights in Ecuador*, Inter-Am. C.H.R., OEA/Ser.L/V/II.96, doc. 10 rev. 1 (1997); and *Report on the Situation of Human Rights in Brazil*, Inter-Am. C.H.R., OEA/Ser.L/V/II.97 doc. 29 rev. 1 ch. VI at ¶ 22 (1997). More recently, in the following cases, the Inter-American Commission issued precautionary measures, which are equivalent to a preliminary injunction, in order to protect the lives and health of people suffering from toxic industrial operations: Inter-Am. C.H.R., OEA/Ser.L/V/II.122, doc. 5 rev.1, ch. III.C.1, at ¶ 44 (2004) (pollution from open air mine affecting local residents and children suffering from high levels of lead in their blood); and Inter-Am. C.H.R., OEA/Ser.L/V/II.130, doc. 22 rev. 1, ch. III.C.1, at ¶ 46 (2007) (residents suffering from a series of health problems stemming from high levels of air, soil, and water pollution as a result of local industrial operations).

See also the following judgments by the European Court of Human Rights: *Lopez v. Ostra*, App. No. 16798/90, 20 Eur. H.R. Rep. 277 (1994) (the failure of the national government of Spain to prevent a waste treatment plant from polluting nearby homes violated the human right to privacy of the European Convention); *Fadeyeva v. Russia*, Eur. Ct. H.R., App. No. 55723/00 (2005) (the failure of the national government of Russia to prevent persistent pollution from a nearby steel mill violated the human rights to life and enjoyment of the home of the European Convention).

⁶ There are 109 countries that have constitutions which protect the right to a healthy environment. Earthjustice, *Issue Paper: Human Rights and the Environment* (prepared for the 60th Session of the U.N. Commission on Human Rights, March 15 – April 23, 2004), Appendix, pp. 61-84, available at www.earthjustice.org/library/references/2004UNreport.pdf.

It is pursuant to human rights norms that the European Union has enacted legislation requiring safe distances between residential areas and hazardous facilities, as well as legislation that overhauls permitting systems by requiring that only authorized chemicals that meet health and safety standards be manufactured, which has triggered significant breakthroughs in the market for sustainable technologies. See European Commission of the European Union, *Chemical Accident Prevention, Preparedness & Response* (explaining that the Seveso II Directive, which establishes legal requirements for safe distances between hazardous industrial operations and residential areas, is the “legal and technical instrument to fulfill the obligations of the European Community” arising from a human rights treaty, the Convention on the Transboundary Effects of Industrial Accidents) available at ww.ec.europa.eu/environment/seveso/index.htm. See also European Commission, *The New EU Chemicals Legislation*, available at www.europa.eu.int/comm/enterprise/chemicals/chempol/whitepaper/reach.htm (stating that the legal basis for the legislation is the adoption of the Precautionary Principle derived from human rights norms).

⁷ See, e.g., United Nations Human Rights Committee, *EHP v. Canada*, Communication No. 67/1980, U.N. Doc. CCPR/C/17/D/67/1980 (Oct. 27, 1982) (finding that a complaint against the



Canadian government's storage of nuclear waste near a residential area constituted a *prima facie* case of a violation of the right to life of the International Covenant on Civil and Political Rights).

See also decisions by the United Nations Committee on the Elimination of Racial Discrimination ("CERD") finding that national governments have violated the right to equality and freedom from racial discrimination in the context of environmental protection for groups who are victimized by historical and contemporary forms of discrimination: CERD, *Early Warning and Urgent Action Procedure, Decision 1 (68), United States of America*, U.N. doc. CERD/C/USA/DEC/1 at ¶ 10 (2006) (recommending that the United States Government "[f]reeze any plan to privatize Western Shoshone ancestral lands for transfer to multinational extractive industries and energy developers"); CERD, *Decision 2(54) on Australia*, U.N. doc. A/54/18, para. 21(2) at ¶ 6 (1999) (expressing concern regarding Australian law that appeared to create legal certainty for governments and third parties regarding mining rights at the expense of indigenous title); CERD, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Ecuador*, U.N. doc. A/48/18, paras. 128-146 at ¶ 132 (1993) (requesting information regarding the effect of Ecuadorean governmental programs in protecting the natural resources and environment of indigenous people in the Amazon region); *Report of the Committee on the Elimination of Racial Discrimination (Sessional/Annual Report of Committee)*, U.N. doc. A/54/18 at ¶ 469 (1999) ("Concern is expressed that development and resource exploration programmes on land subject to the property rights of indigenous and Afro-Colombian communities have been pursued without . . . sufficient concern for the environmental and socio-economic impacts of these activities."); and CERD, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Slovakia*, U.N. doc. CERD/C/304/Add.110 at ¶ 14 (2001) (expressing concern over the "high exposure to environmental pollution in Roma settlements" and recommending that Slovakia "take all necessary measures to ensure that the Roma enjoy the full right to health and health care").

⁸ *See* Earthjustice, *Environmental Rights Report, 2008*, available at www.earthjustice.org/library/reports/2008-environmental-rights-report.pdf (surveying international treaties establishing the right to a healthy environment).

⁹ Pursuant to an executive order, federal agencies and departments were mandated to maintain within their offices an awareness of the United States' international human rights obligations that are relevant to the function of the agency of department: review relevant laws, regulations, and policies for their conformity to human rights treaties; and respond to complaints of human rights violations that fall within their area of responsibility, among other responsibilities. Executive Order No. 13,107 *Implementation of Human Rights Treaties* (Dec. 10, 1998).