



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

by

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December 5, 2008

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 and membership in human rights organizations.

Ironically, the goal of ensuring healthy communities is in conflict with provisions of the Clean Air Act and the Clean Water Act, which authorize the issuance of environmental permits that limit pollution to levels released by certain facilities already in operation, even though these facilities are harming the environment and the health of people who live nearby.² Notwithstanding the complexities of the environmental regulatory system, the system relies on polluting industries to set the standard, and the deck is stacked against communities that struggle to find solutions.

For communities of color, beset by racially disproportionate pollution burdens,³ flawed environmental regulatory standards trump civil rights protection. In 1998, the Environmental Protection

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Agency rendered the following decision regarding the claim of racial disparities in environmental permitting, which has been consistently applied by state environmental regulatory agencies:

[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 that have caused the displacement of residents.

The environmental justice movement in the United States has invoked human rights as a solution to correcting 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 concept of a safe and healthy environment as an intrinsic part of human rights is shared in other parts of the world by human rights jurists,⁵ legislative bodies,⁶ treaty monitoring committees of the United Nations,⁷ as well as state parties to international treaties,⁸ which have developed a body of environmental human rights law that serves 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, constitutes substantial justification for remedying the inherent flaws in the current system of environmental protection. As demonstrated in other countries (*see* endnotes 5-8), the application of these human rights laws requires, at minimum, the establishment of the following environmental standards that require:

- (1) a prohibition against racially disproportionate pollution burdens that includes legal remedies for cases of racially disparate pollution burdens;
- (2) the application of the Precautionary Principle to reform environmental permitting decisions and public health assessments in order to protect against the multiple, cumulative, and synergistic impacts of pollutants that threaten human health and the environment;
- (3) a safe distance between a residential area and a toxic facility or heavy industrial site; and
- (4) 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 standards requires 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 Pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act, the Environmental Protection Agency has permanently relocated seventeen residential areas. Additional permanent residential relocations warranted by toxic exposures are documented in the following reports: 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 unincorporated 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, School of Natural Resources and Environment, University of Michigan, *Environmental Justice Case Study: The People of Anniston, Alabama vs. Monsanto*, (n.d.) (discussing residential relocation).

² 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 that otherwise complies with requisite laws and regulations based on racially disproportionate pollution burdens or claims of potential health threats. 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.

³ Extensive research prepared by both governmental agencies and non-governmental organizations document the fact that toxic industrial facilities are routinely granted environmental permits to operate near communities that are predominantly populated by African American, Latino, Native American, and Asian American people. 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).

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 the Inter-American Commission issued in the following cases 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).