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**Fanning the Flames of NIMBY:
A Book Review of
THE PROMISE AND PERIL OF ENVIRONMENTAL JUSTICE¹**

Gary A. Abraham²

For some years local opponents of landfills, waste incinerators, and other potentially toxic facilities have drawn the ire of planners and site developers by pointing out that landfills leak,³ incinerators produce new toxic chemicals not found in the garbage they burn,⁴ and the toxic effects of chronic exposure to common chemicals is unknown.⁵ They therefore say no to such sites, and they don't trust cleanup plans for already polluted sites even when proponents and public agencies say these sites pose no meaningful health risks. Academics and activists have responded to this social movement by urging that "environmental justice" (EJ) be part of national siting policy and site-specific environmental impact review procedures, in

¹ Christopher H. Foreman, Jr., *THE PROMISE AND PERIL OF ENVIRONMENTAL JUSTICE* (Brookings Institution Press 1998).

² J.D. 1998 University at Buffalo School of Law; Ph.D. 1988 University of Pittsburgh (Sociology). Mr. Abraham is President of Concerned Citizens of Cattaraugus County (NY).

³ See Eric Lipton, *As Imported Garbage Piles Up, So Do Worries*, *THE WASHINGTON POST*, Nov. 12, 1998, A15 (reporting that of seven modern landfills in Virginia accepting garbage from the Bronx and Brooklyn, New York, groundwater polluted with heavy metals is linked to two).

⁴ See Lois Marie Gibbs, *DYING FROM DIOXIN: A CITIZENS GUIDE TO RECLAIMING OUR HEALTH AND REBUILDING DEMOCRACY* (South End Press 1995), 53-54, 210-14. The first half of this book is edited summaries and discussions of US-EPA, *HEALTH ASSESSMENT DOCUMENT FOR 2,3,7,8-TETRACHLORODIBENZO-P-DIOXIN (TCDD) AND RELATED COMPOUNDS*, EPA/600/BP-2/00a, b, c (June 1994), and US-EPA, *ESTIMATING EXPOSURE TO DIOXIN-LIKE COMPOUNDS*, EPA/600/6-88/005Ca, b, c (June 1994), prepared by contributing scientists under the direction of toxicologist Stephen Lester.

⁵ See John D. Graham, *Risk-Based Environmental Advocacy*, 6 *RISK IN PERSPECTIVE* No. 7 (August 1998) (noting that "many widely used chemicals are not minimally tested for toxicity"). Graham is Director and Professor of Policy and Decision Science for the Center for Risk Analysis, Harvard School of Public Health, which publishes *RISK IN PERSPECTIVE*.

recognition of the cumulative impact that concentrations of such sites may pose to disadvantaged communities. EJ has, in turn, become a rallying cry of many local siting opponents.

Brookings Institution senior fellow Christopher Foreman, Jr., believes EJ grows out of “antiscientific, even antirational thinking common in academia” and certain “social aspirations and popular emotions that underlie a democratizing focus” but not authentic public health concerns. Attempts to include EJ considerations in federal environmental policy are neither environmental- or health-based but rather a back door way to reassert “the Great Society’s thrust for ‘maximum feasible participation’ by the poor in the community action programs of the 1960s.” Allying himself with Supreme Court Justice Stephen Breyer’s position in *Breaking the Vicious Circle: Toward Effective Risk Regulation*,⁶ Foreman asserts that the issues raised by EJ advocates can be resolved by applying a “rationalizing” approach to the environmental health concerns that ought to be addressed by government agencies. Foreman specifically proposes to replace equity demands with quantitative risk assessment procedures (RA). Such demands, Foreman believes, have up to now been asserted in such a vague and expansive manner as to be unworkable and counterproductive in any effort to improve the health of disadvantaged groups. Regulatory policymakers could improve environmental health if they were free to coordinate available expertise in the assessment of known risks, and freed from the burden of dealing with “popular intuition” about risk and generalized fears about toxics and racism.

Foreman acknowledges that “risk assessment” is the language of regulators and the regulated community, who are “often more powerful” than local stakeholders. While noting the importance of “suspicions of experts who often downplay hazards that residents deem significant,” Foreman insists that local opposition is informed by “environmental justice discourse,” and both are ultimately irresponsible: “both environmental justice and the broader

⁶ Harvard University Press 1993.

phenomenon of environmental populism, sometimes referred to as 'ecopopulism,' are ultimately less concerned with health risks than with advocacy itself -- the elevation of a distinctive *community* voice whenever and wherever possible in the environmental policy process." Local communitarians and their intellectual leaders betray not only the health interests of their communities, but their economic interests as well. This is because the industrial facilities they oppose could bring jobs and economic revitalization to their communities and, with the lifting of standards of living, improvement of public health.

Foreman's proposal is unlikely to gain many adherents beyond those already committed to RA. Nor is it likely to reduce the growth of local siting controversies, a central concern for Foreman. This is partly because Foreman's portrait of what he calls "the EJ movement" is inaccurate. The phenomenon of local equity demands was first noticed over two decades ago in industry and planning literature, which introduced the "NIMBY" label ("not in my backyard"), describing local opponents of siting proposals as primarily selfish and short-sighted, unconcerned about the regional and national economic agenda of planners and polluters. The NIMBY theory was designed to discredit the layman's perspective on siting decisions not for its self-interested aspects, which are not distinctive, but rather because it is at odds with increasingly standardized reliance on technical expertise to meet regulatory standards for safety and risk. Foreman's proposal builds on the NIMBY model, so when we hear from local opponents to new toxic sites and to cleanup plans for old sites proposed by regulators and polluters, it is only their most shrill statements, coming at the end of a process from which they feel excluded. No consideration of an actual siting dispute is included in his book. He also avoids any discussion of when and how risk assessments should be performed and reviewed, giving the impression that there is not a great debate in law and policy on the role of the RA approach. Together these two important lacunae in his presentation severely undermine Foreman's claim to have found a "rationalizing" alternative to environmental justice.

The Nature of Siting Disputes

Siting disputes are by their nature local. The approach siting proponents, polluters, and regulators take to such disputes is to weigh known local burdens against regional and national benefits. This approach almost always results in setting a minimal level of permitted chemical release, since at some point known risks cease to outweigh the costs of preventing chemical releases at the customary level or banning some chemical production or use altogether.

Local stakeholders and the public generally are much more likely to adopt a prudential approach. Prudence may be called for where a high concentration of potentially polluting sites exists or where many of the effects of toxics likely to be released into the environment are unknown. Because it balances the cost of changing current industrial practices against known public health costs the RA approach, unlike the prudence approach, is unlikely to justify any change when health effects are unknown. By contrast, the prudence approach under some circumstances will justify a chemical release level of zero, a result rarely if ever reached by RA.

The perspective of local opponents of potentially toxic facilities is not as restricted as Foreman suggests. Local opponents compare their communities with others not burdened by the risks of accidental and unavoidable discharge of toxics or other specific adverse impacts on the environment, and to this extent local opponents adopt a regional and national perspective. Indeed, *comparison* is at the heart of local judgments that a facility is unwanted, and such comparison prompts the typical questions opponents insist on injecting into siting decisions. Why is a landfill being sited here, far from the source of the waste? Why are there no chemical factories in wealthier suburban communities? Why are such facilities concentrated in working-class communities? Why should we take such a disproportionate burden for hosting such facilities? Are such facilities really necessary? If potentially toxic facilities were sited in wealthier communities, would the likely opposition to such siting decisions increase the costs of production and make producers rethink the way they produce? Such questions are ultimately about the fair distribution of costs and

benefits of development, and local concerned citizens become quite conscious of this aspect of their opposition with little or no help from EJ advocates. However, such questions are not considered in the review process, not because they are irrational but often because they are excluded by the logic and practice of RA.

Foreman is silent about an important aspect of EJ, the inequity in resources required to participate in an environmental site review. The RA approach promotes this sort of inequity. Despite the fact that environmental impact review mandates public participation in most siting decisions, regulators and the regulated community bring a team of attorneys, engineers and science experts to the review proceedings. Without such resources the right to public participation of local citizen stakeholders, as well as most small municipal stakeholders, is little more than a procedural formality, since they have no real access to the data, language and methods of review. The restriction of public participation to a procedural right would be fair if resources for meaningful participation were not so unequal and if environmental review was not restricted to one kind of quantitative method of risk determination. But administrative law judges deciding permit applications and, to an increasing extent, civil and criminal judges adjudicating challenges to cleanup plans, permit approvals, and claims of toxic torts, have accepted the priority given to RA procedures by regulators and the regulated community as a means to facilitate judicial management of disputes.

Their inability to effectively participate leads citizen groups and local officials to insist on a more accessible reasonability standard which they urge be applied to what is not known rather than what is known about risks. Prudence is almost always introduced at this point. However, regulators and judges will instruct small local stakeholders that they bear the burden of showing an unacceptable level of risk, which in the face of the unknown they cannot do. This only elicits opposition to the process.

“Mitigations” are often introduced by the applicant or responsible party to compensate local communities for adverse environmental impacts rather than to reduce the likelihood of those impacts. For example, instead of perpetual care for a commercial

landfill site, adding protections to the local groundwater supply, the applicant will offer to build a park for the local municipality. Instead of reducing the size of an industrial facility or incorporating alternative production processes, the applicant will commit to hiring a certain number of local employees or grant a certain number of local contracts. The contribution the applicant's proposal makes to local and extra-local economic goals is often explicitly cited by the decision-maker among the reasons for approving the proposal. Seeing that environmental protection is less important than balancing local burdens against regional and national economic goals in which local people have little role to play makes local stakeholders cynical about environmental permitting agencies and leads them to experience the decision-making process as fundamentally unfair.

Foreman never attempts to provide an objective description of the spiral of local opposition he criticizes. Instead, he severely narrows the scope of EJ issues. This makes for a highly abstract argument, often quite detached from the real world of environmental decision-making.

For example, Foreman argues that because individual behavior accounts for a large part of blacks' disproportionate health problems, the black community would be better served from a health perspective by addressing obesity and smoking. Extending the theories of Shelby Steele and other black conservatives, Foreman suggests that by ignoring such health problems black NIMBYs have become victims of their own race victimology. These comments are way off the mark if Foreman wants to understand the NIMBY syndrome. The distinctive health problems of minority groups has little to do with opposition to toxic facility siting, which cuts across all groups. If a given community's average individual behavior is distinctive, and if those distinctive features increase the community's health risks, less regard for the likelihood that new facility siting will add to their toxic exposure than in other communities is not particularly rational.

Foreman also seeks to strengthen his case against the EJ movement by distinguishing environmental health impacts from other adverse impacts like noise, smell, truck traffic, and from primarily

aesthetic objections to a concentration of industrial sites. Non-health concerns in this narrow sense are downplayed as “environmental amenities,” which Foreman suggests have no place in environmental impact review.⁷ Concern with such environmental amenities is consistent with research showing that the public evaluates risk in terms of “an array of quality of life concerns, including ‘peace of mind, sense of community, and fairness to future generations,’” suggesting to Foreman that environmental health risks are being ignored. If this is true, and legitimate health concerns do not underlie peace of mind and fairness to future generations, restricting the public’s role in environmental impact review to receiving information from decision-makers should cool out the NIMBY syndrome. The loss of “democracy and issue permeability” in local siting decisions would, Foreman believes, be offset by “stronger guidance and assistance, especially for ever-critical educational and risk communication tasks.”

Finally, quite apart from the questions whether siting inequities are appropriate, or whether the impact of inequitable concentrations of environmentally risky sites should be included in the review of impacts of a proposed new site, Foreman never really considers whether inequitable regional and community concentrations of hazardous facilities exist. His lengthy discussion of federal EJ efforts, especially the Clinton Administration’s EJ initiatives at which Foreman directs some of his strongest criticism, relies on the lack of evidence for a specifically racial distributional bias to discredit all environmental equity arguments. As a result, he devotes much attention to the politics of federal EJ policy but never seriously considers the policy on its own terms.

⁷ Foreman would therefore roll back some state environmental statutes. E.g., New York Environmental Quality Review Act, N.Y. ENVTL. CONSERV. LAW § 8-0105(6) (McKinney’s 1997) (the environment includes “the physical conditions which will be affected by a proposed action, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance, existing patterns of population concentration, distribution or growth, and existing community or neighborhood character).

A considerable amount of research has been generated by claims of "environmental racism" in the siting of toxic facilities, but the results have been inconclusive. The most we can say is that such facilities are disproportionately sited in lower-income, specifically blue-collar communities, either in industrial neighborhoods or in rural, sparsely populated communities.⁸ In western New York, for example, because working-class and rural low-income communities are predominantly white, locational bias by environmental decision makers having a disparate impact on such communities would not be captured by the concept of environmental racism. However, commercial and inactive hazardous waste sites and commercial landfills, which are highly concentrated in the region, are consistently sited in such communities.⁹ "Environmental justice," because of its broader reach, encompasses disparate impacts on these communities as well as on racial minority communities in other regions of the country. EJ is thus the better policy concept for addressing distributional inequities.

In 1994 President Clinton issued Executive Order 12,898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," directing "each federal agency [to] make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income

⁸ Cf. Vicki Been, *Coming to the Nuisance or Going to the Barrios? A Longitudinal Analysis of Environmental Justice Claims*, 24 *ECOLOGY L.Q.* 1 (1997) (reporting results of a US-EPA funded study of demographics of the 544 communities nationwide hosting active commercial hazardous waste treatment storage and disposal facilities in 1994 and discussing literature).

⁹ See R. Nils Olsen, Jr., *The Concentration of Commercial Hazardous Waste Facilities in the Western New York Community*, 39 *BUFFALO L. REV.* 473 (1991); Daniel A. Spitzer, *Maybe in My Backyard: Strategies for Local Regulation of Private Solid Waste Facilities in New York*, 1 *BUFF. ENV'T'L. L.J.* 87 (1993).

populations.”¹⁰ By expanding the reach of disparate impact analysis, for the first time, from race to class, the EJ Executive Order avoids the criticisms that can be leveled at claims of “environmental racism.”

The Order does not create a presumption against distributional inequity. Nor does it provide new substantive rights. Rather, its aim is to expand the public participation approach of existing environmental law. Accordingly, the Order largely leaves untouched the discretion enjoyed by agency decision makers who comply with current law’s procedural mandate to provide an opportunity for public participation in the review process. This reflects the Clinton Administration’s approach to EJ issues, to broaden and strengthen public right-to-know provisions in current law and rely on concerned citizens and groups to put pressure on decision makers to solve purported inequities in siting and clean-up decisions at the local level. This is also consistent with the vast bulk of environmental protection law, which affords the public procedural rights to participation but leaves most environmental decision-making to local authorities and government agencies.

The promise of the federal EJ approach lies in expanding opportunities for the public to show a risk of disparate impacts on a case-by-case basis. Ultimately it is a factual question whether any given community (1) suffers adverse environmental impacts and (2) suffers disparate impacts. Claims brought before the EPA’s Environmental Appeals Board challenging permit decisions under the EJ Executive Order have resulted in holdings requiring true environmental mitigation, up to a denial of the permit, where a

¹⁰ Exec. Order No. 12,989, 59 Fed. Reg. 7629, § 1-101. The Order directs each agency to “ensure greater public participation . . . among minority populations and low-income populations” and to specifically implement the Order’s mission in the areas of enforcement, public participation, and research. 59 Fed. Reg. 7629, 7630, § 1-103. See also US-EPA, *Environmental Justice Strategy: Executive Order 12898*, EPA/200-R-95-002, at 8 (April 1995) (calling for “early and ongoing public participation in permitting and siting decisions”).

showing of these two elements is made.¹¹ The problem of adequate resources discussed above remains unaddressed by these holdings, and further problems are presented by how the area subject to disparate impact analysis is determined in the first place. However, contrary to Foreman's proposal, these holdings in theory embrace all reasonable approaches for determining the risk of adverse impacts, not only the RA approach.

It is hard to understand why Foreman would object to expanding the scope of a determination of actual adverse environmental impacts, which is all the Order does. It is easier to understand Foreman's criticism of the EJ Executive Order as objections to public participation in risk determination and to a more open consideration of the qualitative basis of RA in practice. These two objections are closely related.

Hiding Values With Risk Assessment

The ability to avoid consideration of value judgments, or qualitative decisions, by using a quantitative method and language of analysis is an important part of the attractiveness of RA. Masking the application of value judgments under RA also serves to restrict the

¹¹ See Gary A. Abraham, *Review of Actions Under President Clinton's Executive Order on Environmental Justice*, 5 BUFF. ENV'T'L. L.J. 79 (1997) (discussing cases). The same standard has been applied in a Title VI complaint. US-EPA, Office of Civil Rights (OCR), *Investigative Report for Title VI Administrative Complaint File No. 5R-98-R5 (Select Steel Complaint)*, October 30, 1998 <<http://www.epa.gov:80/reg50opa/pdf/selsteel.pdf>>, p. 26 (air quality impacts). It should be noted, however, that the Select Steel complaint was dismissed on grounds illustrating many of the points made above in the text. For example, with regard to complainants' concern that dioxin emissions should be monitored to guard against a disparate impact, acknowledging that EPA's data was provided by the applicant, (*id.*, p. 6), who asserted that "dioxins are not emitted by steel recycling mini-mills," (*id.*, p. 35), OCR arrived at "a *finding* of no disparate impact associated with [the state environmental agency's] decision not to include monitoring requirements for dioxin in the permit" because "EPA has no emissions data for American mini-mills," nor "regulations or other guidance to direct the review of this issue." *Id.*, pp. 35-36 (emphasis added).

role of public participation in environmental impact review. In a review process dominated by the RA approach it is illegitimate to call attention to the qualitative judgments made by agencies and siting proponents. By rendering qualitative comments coming from the public out-of-bounds, the RA approach becomes one of the most important causes of the NIMBY syndrome.

RA results always reflect prior qualitative judgments about the data subject to analysis. Foreman's neglect of this all too common aspect of RA asks us to believe that siting proponents, who generally provide all the data on which agency decision-making is based, do not have a material interest in the most favorable modeling assumptions and sampling procedures, or that there are no bad actors. Such assumptions and procedures are not reflected in the quantitative presentation of the analysis and often escape critical review. For example, a proposal to clean up a schoolyard contaminated with arsenic was recently supported by RA methods applied to six-inch soil samples taken from the schoolyard. The sampling showed average arsenic levels slightly below background levels (levels that were elevated as a result of historical use of arsenic-bearing pesticide in surrounding orchards). However, three-inch depth samples would have resulted in much more alarming evidence of health risks, six times higher, because arsenic concentrations were highest in the surface soils, but the responsible party's choice of deeper samples diluted the significance of those concentrations. In this case federal and state environment and health agencies, who were parties to the remedial plan, were initially silent about that choice. Had a pro-bono independent expert reviewer not commented on the issue the qualitative value behind the use of RA methods would have gone unnoticed.

On other occasions the application of the RA approach does not reduce the production of pollution but rather encourages toxic facility siting in relatively pristine places. For example, in a rural town where all residents are dependent on well-water and where no chemical contamination of groundwater has been detected, residents asked a commercial landfill developer at a public meeting why he wanted to site the landfill there rather than in a community where alternative

sources of drinking water were available. The developer replied that the town was a better site because it would take much longer for local groundwater to reach state minimum contaminant levels than in other communities. Local residents' strong desire to avoid added risks posed by the site could be legitimately disregarded by regulators and the developer, since it was a relatively easy task to show that minimum levels of permitted chemical release could be met with RA methods.

However, the lack of attention paid to qualitative elements of judgment and the priority given to quantitative elements by agencies and judges may also be inherent in a review process dominated by RA methods. Neglect of qualitative judgment arises from the meaning of "scientific" authority on which the RA approach relies. The comparative or distributional impact of burdens and benefits is clearly subject to quantitative assessment, but in siting disputes because this theme is considered to be a matter of qualitative judgment, "value judgments," little or no authority exists for raising that theme. Statistical or probabilistic methods of risk assessment also involve a combination of quantitative and qualitative calculation. Value judgments are applied, in the RA context, both to the way benefits are selected (e.g., a national, regional, or state-wide average of conventional economic measures) and to the burden of risk subject to calculation (only what is known). However, the more open the recognition that distinctions of value are the basis for specific measures of risk, the less authority will attach to the method of assessment.¹² In order to preserve its authority in environmental decision-making the qualitative basis of RA judgments is therefore rarely acknowledged. The abstract and practical blindness to qualitative judgment that has become part of the review process usually results in the spiral of local opposition described above.

¹² James S. Freeman and Rachel D. Godsil, *The Question of Risk: Incorporating Community Perceptions into Environmental Risk Assessments*, 21 *FORDHAM URB. L.J.* 547, 566 (1994). See also John S. Applegate, *Beyond the Usual Suspects: The Use of Citizens Advisory Boards in Environmental Decisionmaking*, 73 *Indiana L.J.* 903 (1998).

Conclusion

The ability of siting proponents to use the RA approach to avoid engaging the public's insistence on a prudential approach to risk determination has created a practical and policy context in which environmental justice impact review makes sense. It is one way to force action on equity claims, even if this is only the devotion of additional resources to expanded review or specific mitigations directed to specific disparate impacts. It should also stimulate consideration of value questions in the broader debate about environmental policy. Such consideration must include meaningful discussion of how resources necessary to undertake data gathering and risk determination can be provided outside the regulators and the regulated community, who control the review process, to more equitably distribute the opportunity to participate. An effective right to public participation would enhance the debate over methods of risk determination.

Shorn of its largely rhetorical excesses, Foreman has a valid point to make, and to which EJ advocates and NIMBY opposition groups, shorn of their own rhetorical excesses, could make a meaningful contribution. Foreman is right to criticize a siting policy that would embrace a substantive right to distributional equity without regard to actual risks. In specific cases, he insists, the environmental impacts of a potentially toxic facility are likely to be negligible. This contingent, case-specific criticism of EJ as a general approach is unfortunately lost in the polarizing argument to which most of his book is devoted.

Local concerned citizens groups and, to an increasing extent, local municipalities, are calling for technical assistance grants so they can undertake independent review of the hydrogeological, air toxics and other physical science bases supporting siting decisions. But the "guidance and assistance" Foreman calls for seems instead designed to win local stakeholders over to risk assessment methodology reviewed exclusively by agency staff. This is precisely what local stakeholders are reacting to by demanding technical assistance. As a policy proposal, Foreman's advice will surely inflame passions rather

than resolve the NIMBY problem.

However, Foreman's proposal fails on its own terms as well. The priority Foreman gives to known and immediate health-based RA is justified only where there is adequate information on health impacts of potentially toxic substances, and only where adverse environmental impacts difficult to tie directly to physical health are clearly unimportant. There are very few contexts where both of these conditions are met. In most cases our ignorance about the health effects of chemical pollution prevails (as does our ignorance about the likelihood that specific techniques for containing pollution will be effective), and health impacts are only one of a range of legitimate concerns those asked to host an unwanted facility bring to the table. Under such circumstances prudence is a legitimate and rational approach to risk determination, and insistence on RA merely because it results in a quantifiable measure of impacts and thereby facilitates the decision-making process is not more rational.