

## The "environmental racism" hoax

David Friedman

When the U.S. Environmental Protection Agency (EPA) unveiled its heavily criticized environmental justice "guidance" earlier this year, it crowned years of maneuvering to redress an "outrage" that doesn't exist. The agency claims that state and local policies deliberately cluster hazardous economic activities in politically powerless "communities of color." The reality is that the EPA, by exploiting every possible legal ambiguity, skillfully limiting debate, and ignoring even its own science, has enshrined some of the worst excesses of racist rhetoric and environmental advocacy into federal law.

"Environmental justice" entered the activist playbook after a failed 1982 effort to block a hazardous-waste landfill in a predominantly black North Carolina county. One of the protesters was the District of Columbia's congressional representative, who returned to Washington and prodded the General Accounting Office (GAO) to investigate whether noxious environmental risks were disproportionately sited in minority communities.

A year later, the GAO said that they were. Superfund and similar toxic dumps, it appeared, were disproportionately located in non-white neighborhoods. The well-heeled, overwhelmingly white environmentalist lobby christened this alleged phenomenon "environmental racism," and ethnic advocates like Ben Chavis and Robert Bullard built a grievance over the next decade.

Few of the relevant studies were peer-reviewed; all made critical errors. Properly analyzed, the data revealed that waste sites are just as likely to be located in white neighborhoods, or in areas where minorities moved only after permits were granted. Despite sensational charges of racial "genocide" in industrial districts and ghastly "cancer alleys," health data don't show minorities being poisoned by toxic sites. "Though activists have a hard time accepting it," notes Brookings fellow Christopher H. Foreman, Jr., a self-described black liberal Democrat, "racism simply doesn't appear to be a significant factor in our national environmental decision-making."

This reality, and the fact that the most ethnically diverse urban regions were desperately trying to attract employers, not sue them, constrained the environmental racism movement for a while. In 1992, a Democrat-controlled Congress ignored environmental justice legislation introduced by then-Senator Al Gore. Toxic racism made headlines, but not policy.

All of that changed with the Clinton-Gore victory. Vice President Gore got his former staffer Carol Browner appointed head of the EPA and brought Chavis, Bullard, and other activists into the

transition government. The administration touted environmental justice as one of the symbols of its new approach.

Even so, it faced enormous political and legal hurdles. Legislative options, never promising in the first place, evaporated with the 1994 Republican takeover in Congress. Supreme Court decisions did not favor the movement.

So the Clinton administration decided to bypass the legislative and judicial branches entirely. In 1994, it issued an executive order--ironically cast as part of Gore's "reinventing government" initiative to streamline bureaucracy--which directed that every federal agency "make achieving environmental justice part of its mission."

At the same time, executive branch lawyers generated a spate of legal memoranda that ingeniously used a poorly defined section of the Civil Rights Act of 1964 as authority for environmental justice programs. Badly split, confusing Supreme Court decisions seemed to construe the 1964 Act's "nondiscrimination" clause (prohibiting federal funds for states that discriminate racially) in such a way as to allow federal intervention wherever a state policy ended up having "disparate effects" on different ethnic groups.

Even better for the activists, the Civil Rights Act was said to authorize private civil rights lawsuits against state and local officials on the basis of disparate impacts. This was a valuable tool for environmental and race activists, who are experienced at using litigation to achieve their ends.

Its legal game plan in place, the EPA then convened an advocate-laden National Environmental Justice Advisory Council (NEJAC), and seeded activist groups (to the tune of \$3 million in 1995 alone) to promote its policies. Its efforts paid off. From 1993, the agency backlogged over 50 complaints, and environmental justice rhetoric seeped into state and federal land-use decisions.

Congress, industry, and state and local officials were largely unaware of these developments because, as subsequent news reports and congressional hearings established, they were deliberately excluded from much of the agency's planning process. Contrary perspectives, including EPA-commissioned studies highly critical of the research cited by the agency to justify its environmental justice initiative in the first place, were ignored or suppressed.

The EPA began to address a wider audience in September 1997. It issued an "interim final guidance" (bureaucratese for regulation-like rules that agencies can claim are not "final" so as to avoid legal challenge) which mandated that environmental justice be incorporated into all projects that file federal environmental impact statements. The guidance directed that applicants pay

particular attention to potential "disparate impacts" in areas where minorities live in "meaningfully greater" numbers than surrounding regions.

The new rules provoked surprisingly little comment. Many just "saw the guidance as creating yet another section to add to an impact statement" explains Jennifer Hernandez, a San Francisco environmental attorney. In response, companies wanting to build new plants had to start "negotiating with community advocates and federal agencies, offering new computers, job training, school or library improvements, and the like" to grease their projects through.

In December 1997, the Third Circuit Court of Appeals handed the EPA a breathtaking legal victory. It overturned a lower court decision against a group of activists who sued the state of Pennsylvania for granting industrial permits in a town called Chester, and in doing so the appeals court affirmed the EPA'S extension of Civil Rights Act enforcement mechanisms to environmental issues.

(When Pennsylvania later appealed, and the Supreme Court agreed to hear the case, the activists suddenly argued the matter was moot, in order to avoid the Supreme Court's handing down an adverse precedent. This August, the Court agreed, but sent the case back to the Third Circuit with orders to dismiss the ruling. While activists may have dodged a decisive legal bullet, they also wiped from the books the only legal precedent squarely in their favor.)

Two months after the Third Circuit's decision, the EPA issued a second "interim guidance" detailing, for the first time, the formal procedures to be used in environmental justice complaints. To the horror of urban development, business, labor, state, local, and even academic observers, the guidance allows the federal agency to intervene at any time up to six months (subject to extension) after any land-use or environmental permit is issued, modified, or renewed anywhere in the United States. All that's required is a simple allegation that the permit in question was "an act of intentional discrimination or has the effect of discriminating on the basis of race, creed, or national origin."

The EPA will investigate such claims by considering "multiple, cumulative, and synergistic risks." In other words, an individual or company might not itself be in violation, but if, combined with previous (also legal) land-use decisions, the "cumulative impact" on a minority community is "disparate," this could suddenly constitute a federal civil rights offense. The guidance leaves important concepts like "community" and "disparate impact" undefined, leaving them to "case by case" determination. "Mitigations" to appease critics will likewise be negotiated with the EPA case by case.

This "guidance" subjects virtually any state or local land-use decision--made by duly elected or appointed officials scrupulously following validly enacted laws and regulations--to limitless ad hoc

federal review, any time there is the barest allegation of racial grievance. Marrying the most capricious elements of wetlands, endangered species, and similar environmental regulations with the interest-group extortion that so profoundly mars urban ethnic politics, the guidance transforms the EPA into the nation's supreme land-use regulator.

Reaction to the Clinton administration's gambit was swift. A coalition of groups usually receptive to federal interventions, including the U.S. Conference of Mayors, the National Association of Counties, and the National Association of Black County Officials, demanded that the EPA withdraw the guidance. The House amended an appropriations bill to cut off environmental justice enforcement until the guidance was revised. This August, EPA officials were grilled in congressional hearings led by Democratic stalwarts like Michigan's John Dingell.

Of greatest concern is the likelihood the guidance will dramatically increase already-crippling regulatory uncertainties in urban areas where ethnic populations predominate. Rather than risk endless delay and EPA-brokered activist shakedowns, businesses will tacitly "redline" minority communities and shift operations to white, politically conservative, less-developed locations.

Stunningly, this possibility doesn't bother the EPA and its environmentalist allies. "I've heard senior agency officials just dismiss the possibility that their policies might adversely affect urban development," says lawyer Hernandez. Dinsell, a champion of Michigan's industrial revival, was stunned when Ann Goode, the EPA's civil rights director, said her agency never considered the guidance's adverse economic and social effects. "As director of the Office of Civil Rights" she lectured House lawmakers, "local economic development is not something I can help with."

Perhaps it should be. Since 1980, the economies of America's major urban regions, including Cleveland, Chicago, Milwaukee, Detroit, Pittsburgh, New Orleans, San Francisco, Newark, Los Angeles, New York City, Baltimore, and Philadelphia, grew at only one-third the rate of the overall American economy. As the economies of the nation's older cities slumped, 11 million new jobs were created in whiter areas.

Pushing away good industrial jobs hurts the pocketbook of urban minorities, and, ironically, harms their health in the process. In a 1991 Health Physics article, University of Pittsburgh physicist Bernard L. Cohen extensively analyzed mortality data and found that while hazardous waste and air pollution exposure takes from three to 40 days off a life-span, poverty reduces a person's life expectancy by an average of 10 years. Separating minorities from industrial plants is thus not only bad economics, but bad health and welfare policy as well.

Such realities matter little to environmental justice advocates, who are really more interested in radical politics than improving lives. "Most Americans would be horrified if they saw NEJAC [the

EPA's environmental justice advisory council] in action," says Brookings's Foreman, who recalls a council meeting derailed by two Native Americans seeking freedom for an Indian activist incarcerated for killing two FBI officers. "Because the movement's main thrust is toward...`empowerment'..., scientific findings that blunt or conflict with that goal are ignored or ridiculed"

Yet it's far from clear that the Clinton administration's environmental justice genie can be put back in the bottle. Though the Supreme Court's dismissal of the Chester case eliminated much of the EPA'S legal argument for the new rules, it's likely that more lawsuits and bureaucratic rulemaking will keep the program alive. The success of the environmental justice movement over the last six years shows just how much a handful of ideological, motivated bureaucrats and their activist allies can achieve in contemporary America unfettered by fact, consequence, or accountability, if they've got a President on their side.

David Friedman is a writer, an international consultant, and fellow in the MIT Japan program.

COPYRIGHT 1998 American Enterprise Institute for Public Policy Research