



Environmental Justice in Louisiana

By Adam Babich

*If you want to
be a frontline
soldier on
environmental
protection,
social justice or
environmental
racism, come to
Louisiana.
— Gary Groesch,
2002¹*

The phrase “environmental justice” has the power to inspire, anger, unify or polarize. On one hand, how can anyone be against environmental justice? The idea that no one should shoulder more than a fair share of pollution and environmental risk, without regard to race or income level, is hardly more controversial than motherhood or apple pie. On the other hand, the embrace of environmental justice as a goal implies that, to at least some extent, injustice and racism now infect environmental decisions. Facing up to the racial and economic inequities in Louisiana’s allocation of pollution burdens raises questions with no easy answers. How equal must environmental burdens be? Is greater attention to fairness worth the possible costs of making the system more just? It may be tempting to turn away from such hard questions, but to work toward solutions we must put the issues on the table and talk about them.

Releasing pollution into public air, waters and lands is a way for companies to “externalize” waste-disposal costs. In other words, instead of

paying the full price of conducting their businesses, polluting companies transfer some costs to surrounding communities in the form of environmental degradation.² A permit to pollute is, therefore, a type of subsidy.³ But unlike some subsidies — such as Louisiana’s 10-year industrial tax exemption⁴ — the costs of pollution permits are not spread among taxpayers at large. Instead, facilities’ neighbors bear these costs by living with excess environmental burdens. Of course, pollution can never be entirely eliminated, and few of us wish to give up the amenities of living in an industrial age. But residents of the communities that neighbor pollution sources — who subsidize our enjoyment of those amenities — should be treated with respect, invited to participate fully in permit decisions, and offered the assurance that facilities near their communities will, at a minimum, install state-of-the-art pollution controls. And no community should be saddled with a disproportionate share of pollution because of its racial composition or the income level of its residents.

Is environmental injustice really a problem in Louisiana? In a word: yes. We cannot let the privi-

We will lose economic opportunities if we fail to overcome Louisiana's reputation for environmental degradation and political corruption.

lege of living in a great nation and a great state blind us to society's shortcomings. Racism was built into the U.S. and Louisiana Constitutions and has been a shaping force in our history.⁵ As wonderful as it would be if the legacy of slavery and racism had ended with the stroke of a pen or a handshake, the reality is that overcoming this aspect of our heritage remains a fundamental challenge for all Americans.⁶ Racism's legacy persists in almost every aspect of our society and economy, including education, employment, income, housing and incarceration.⁷ Despite well-meaning attempts to be color-blind, economic and government institutions distribute benefits disproportionately to white and upper-income or middle-class people, and allocate burdens disproportionately to racial minorities and the poor. It has become painfully clear that conscious discrimination "is not required to produce a disproportionate result."⁸ In fact, given the pervasive unequal distribution of benefits and burdens in our society, it would be a surprising stroke of luck if environmental burdens were distributed fairly.

One reason for racial disparities in society's allocation of benefits and burdens is that African-American communities suffer disadvantages rooted in historical racism. For example, many industrial facilities in Louisiana were built bordering pre-existing communities that freed slaves had established on the margins of plantations. At the time many of these facilities were established, neighboring residents had little ability to protect the rural character of their communities because African-Americans were effectively excluded from voting. Areas in and around many of these communities were zoned for industrial use.⁹ Now, as huge, polluting facilities neighboring these communities expand, it may seem easy to dismiss environmental justice concerns with the statement that it is

"unfortunate" that a predominately African-American community is "in an industrially zoned area."¹⁰ But it is more than unfortunate; it is part of racism's legacy.

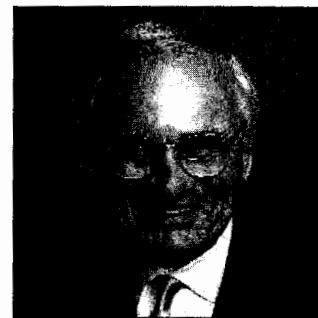
Regardless of whether government officials intend to discriminate by race, environmental decisions in Louisiana reflect disturbing contrasts. For example, the I-10 expressway destroyed "the main avenue of a thriving black neighborhood" in New Orleans, circa 1968, while another proposed location "was effectively fought off by residents of more affluent white areas of the city."¹¹ When Whole Foods recently proposed opening a huge grocery store in a mostly white New Orleans neighborhood, government officials responded to local activists' concerns, first with community meetings and finally by insisting on a smaller store more in keeping with the neighborhood's character.¹² In contrast, earlier this year, the Department of Environmental Quality (DEQ) refused to hold a public hearing before granting ExxonMobil permission to increase emissions at its refinery near the predominately African-American community of Alsen, La. — where the air already violates the federal health-protection standard for ozone pollution.¹³ Further, DEQ allows facilities neighboring such communities to avoid installing state-of-the-art pollution controls by purchasing "credits" from pollution reductions in other communities.¹⁴

Does environmental justice become a non-issue whenever pollution meets government standards? Of course not. Only six pollutants are governed by the Environmental Protection Agency's (EPA) "National Ambient Air Quality Standards," which regulate pollutant concentrations in outdoor air.¹⁵ Of those six standards, EPA is under court order to reconsider one, since it threatens asthmatics with "substantial physical effects."¹⁶ There are no federal ambient standards for most dangerous chemicals,

PERRY, WATTS AND ASSOCIATES, LLC

A Professional Mediation Firm

*We are dedicated to providing
the highest quality mediation services*



JAMES A. GEORGE
Mediator

- *Experienced mediator*
- *40 years of practice in Admiralty and Maritime Law, Personal Injury and Insurance*
- *Past National President of the American Board of Trial Advocates*
- *Member, Board of Trustees, American Inns of Court Foundation (Past National Vice-President)*
- *Co-Founder, Dean Henry George McMahon American Inn of Court in Baton Rouge*
- *Past Chair, Professionalism and Quality of Life Committee, Louisiana State Bar Association*

**SERVING LOUISIANA
AND THE GULF SOUTH**

533 Europe Street
Baton Rouge, Louisiana
(225) 769-1890

www.perrywatts.com

including benzene, mercury, dioxin, hydrogen sulfide and methyl isocyanate — the chemical “which killed more than 3,000 [people] in Bhopal, India” after leaking from a Union Carbide factory in 1984.¹⁷ To protect people from “hazardous air pollutants,” the Clean Air Act requires EPA to set emission limits.¹⁸ But EPA has missed legal deadlines for publishing many of these standards.¹⁹ And existing emission limits are not designed to guard against “multiple toxic pollutants emitted by multiple sources.”²⁰

Louisiana residents cannot rely on DEQ to protect them. The state’s legislative auditor has reported that:

- ▶ DEQ “may not be fully protecting the health and environmental resources of the state because of deficiencies in its monitoring [and enforcement] activities;”
- ▶ many requisite monitoring reports due to DEQ “were either not submitted or could not be located;” and

▶ DEQ had “not collected nearly 75 percent of monetary penalties assessed [in] 1999-2001.”²¹

EPA’s inspector general has found that:

- ▶ DEQ “records were often unorganized, incomplete, missing or inaccessible;”
- ▶ DEQ “issued multiple permits without providing complete information to the public;”²² and
- ▶ EPA “could not assure the public that Louisiana was protecting the environment.”²³ Recently, EPA demanded that DEQ show progress “in restoring program integrity” to its water discharge permitting system, threatening “withdrawal of program authorization.”²⁴ This situation is bad for business and the environment. In a state with a dysfunctional regulatory system, responsible companies — which invest in compliance — operate at a competitive disadvantage.

What is the danger to residents of predominantly minority and lower-income communities from chemical exposures? The short answer is that we do not know. We know that those most vulnerable to environmental toxins include children, fetuses, the elderly, asthmatics and smokers. But we do not have enough scientific knowledge to determine how many extra deaths or illnesses result from exposures to chemicals in the environment.²⁵ By allowing exposures to a wide array of chemicals in the environment despite this lack of knowledge, the government is conducting an experiment of sorts. But nobody does enough monitoring of emissions or exposures to allow us to learn much from this experiment. And without accurate emission and exposure data, governmental assurances that community residents enjoy adequate protection are based more on wishful thinking than on scientific fact.²⁶

What about the jobs and revenue lost to communities if facilities go elsewhere because of environmental justice concerns? Granted, it is painful to forgo opportunities for economic development and profit. But we should assess those opportunities in light of their effects on our neighbors and future generations, including damage to public health, the character of our communities, and Louisiana’s unique and productive environment. A healthful, attractive environment can help draw and retain the educated work force that modern businesses need. Although insisting on health protection and fairness may cause some companies to locate elsewhere, we will also lose economic opportunities if we fail to overcome Louisiana’s reputation for environmental degradation and political corruption. A stable regulatory system — governed by transparent, effective and competently administered regulations — will be better in the long run for business than a reputation for shoddy permit reviews, lost files and lax enforcement. Steady insistence on the rule of law creates a level playing field on which responsible businesses can compete fairly.

So how do we reach a solution? Nobody really knows. But we must none-

MANAGE Your Firm BETTER

How?

- Ensure the work is profitable before you accept the file.
- Design a firm-wide program to get more work for higher fees.
- Create new financial measurements for a new financial age.
- Evaluate firm efficiencies that drive the bottom line.
- Review Information Systems (IS) such as security issues, EDP policies, disaster recovery, etc.
- Consult with the leaders in Law Firm Practice Management, LaPorte, Sehart, Romig & Hand.

Why?

The simple fact is that the gap between law firms and successful, profitable law firms is widening. It’s not about yesterday’s successes, but setting the pace for tomorrow’s competitors. It’s about planning, positioning, and profitability.



LaPorte Sehart Romig & Hand
Law Firm Practice Management Group

Phone.504.835.5522 | www.laporte.com
110 Veterans Blvd. | Suite 200 | Metairie, LA 70005

theless try, even without a road map or any guarantee of success. This means treating all people with a stake in environmental decisions with respect, as "welcomed participants" in decision-making processes.²⁷ It means considering public comments as valuable input to difficult decisions, not as threats to presumptively done deals. It means informing people about risks in their communities, even when we fear their reactions.²⁸ And it means affording all stakeholders full access to the legal system, so that government decisions reflect serious consideration of the diverse — if sometimes inconvenient — views that animate our society.²⁹ In other words, we must continue and intensify an open dialogue about environmental justice. That dialogue will likely include demonstrations, lawsuits and negotiations, since those are all ways we work through disagreements in this society. But more importantly, the dialogue must include patience, mutual respect and civility. With luck, and with competent representation and a modicum of good will on all sides, we will eventually reach compromises that — although far from perfect from any one perspective — will help us move forward as one people.

If all racial discrimination were to vanish tomorrow, the historical complicity of our nation and state in slavery and racism would still be a wrong we could never make right. Further, the wisdom to know precisely where to strike the balance between commerce and concern for health and welfare may be always beyond our reach. But when we fail to pursue justice and balance, and instead indulge our inclinations toward expedience and greed, we betray our most basic values. In contrast, by striving toward an environmental and economic future that protects even the most disadvantaged Louisiana citizen, we can begin to envision a society that is worthy of our better natures and our children's dreams.

FOOTNOTES

1. "One Last Battle Cry," *Gambit Weekly*, Nov. 26, 2002, at 7.
2. Pollution can also cause damage far from its source, or have global impacts.

3. Abraham Bell and Gideon Parchomovsky, "Givings," 111 *Yale L.J.* 547 (2001).

4. La. Const. art. VII, § 21(F).

5. See Robert M. Cover, *Justice Accused* (1975).

6. Richard J. Lazarus, "The Meaning and Promotion of Environmental Justice," 5 *Md. J. Contemp. Legal Issues* 1, 4 (1993/1994) ("[V]estiges of decades of de jure racist policies in this country, while now unlawful, are self-perpetuating.").

7. See Kimberly Blanton, "Jobless Rate Rises Among Black Americans," *Times-Picayune*, May 23, 2003, at A-8 ("In every recession, job losses among African-Americans have been disproportionate to those of white Americans"); Fox Butterfield, "Prison Rates Among Blacks Reach a Peak, Report Finds," *N.Y. Times*, April 7, 2003, at A11 (About "12 percent of African-American men ages 20-34 are in jail or prison"); Alan Jenkins, "Losing the Race," *Am. Law.*, Oct. 2001, at 91 (only "1.4 percent of partners in the nation's 250 largest law firms" were African-Americans in 2000).

8. Lazarus, *supra* note 6, at 5.

9. J. Timmons Roberts and Melissa M. Toffolon-Weiss, "Chronicles from the Environmental Justice Frontline" 21, 32-34 (2001); see also Emily Bazelon, "Bad Neighbors," *Legal Affairs*, May/June 2003, at 53, 54.

10. See *North Baton Rouge Envtl. Ass'n v. DEQ*, 2000-1878, p. 12 (La. App. 1 Cir. 11/14/01); 805 So.2d 255, 263.

11. Peirce F. Lewis, *New Orleans: The Making of an Urban Landscape*, 98 & Fig. 61 (2d ed. 2003); see also Tom Lewis, *Divided Highways*, 187-89 (1997).

12. Greg Thomas, "New Barn on the Way," *Times-Picayune*, Oct. 23, 2002, at C-1.

13. Letter from DEQ to President, *North Baton Rouge Envtl. Ass'n* (Feb. 5, 2003). DEQ's refusal conflicts with 40 C.F.R. § 70.7(h), which requires "an opportunity for . . . a hearing."

14. See Adam Babich, "The Sting: How Louisiana's Emission Credit Trading System Dirties the Air," Second Generation Issues Comm. Newsl., May 2003, at 11.

15. 67 Fed. Reg. 55,726 (Aug. 30, 2002).

16. *American Lung Ass'n v. EPA*, 134 F.3d 388 (D.C. Cir. 1999).

17. See Jacob M. Schlesinger and Thaddeus Herrick, "Chemical Manufacturers Elude Crackdown on Toxic Materials," *Wall St. J.*, May 21, 2003, at A1.

18. 42 U.S.C. § 7412(d)(2). Also, Louisiana has promulgated standards for "8-hour" and "annual" average concentrations of toxics in ambient air. LAC 33:III, table 51.2. But DEQ does not require sufficient monitoring to assure compliance with those standards.

19. Steve Cook, "EPA Proposes to Settle Sierra Club Lawsuit by Agreeing to Deadlines for Air Standards," *Daily Env't Rep.*, March 28, 2003, at A-7.

20. 63 Fed. Reg. 49,240, 49,242 (Sept. 14, 1998).

21. Louisiana Legislative Auditor, Performance Audit, DEQ 6, 19, 5, 28 (March 2002).

22. EPA Office of Inspector General (OIG), Public Participation in Louisiana's Air Permitting Program and EPA Oversight 6, 10 (Aug. 7, 2002).

23. EPA OIG, EPA, "Region 6 Needs to Improve Oversight of Louisiana's Environmental Programs," 3 (Feb. 3, 2003).

24. Letter from EPA to Louisiana Governor 2 (Feb. 14, 2003).

25. Presidential/Congressional Comm'n on Risk Assessment and Risk Management 23 (vol. 1 1997).

26. See Wendy E. Wagner, "The Science Chastise in Toxic Risk Regulation," 95 *Colum. L. Rev.* 1613 (1995).

27. See *Friends of the Earth v. Carey*, 535 F.2d 165, 172 (2 Cir. 1976) (Congress saw citizen groups as "welcomed participants in the vindication of environmental interests").

28. See Rick Bragg, "Toxic Water Numbers Days of a Trailer Park," *N.Y. Times*, May 5, 2003, at A1 ("For years, state inspectors knew of [drinking water] contamination [at the Myrtle Grove park in Iberville Parish], and never said a word."); "Feds Probing DEQ's Actions on Gas Facility," *Baton Rouge Advoc.*, Aug. 24, 2001, at 1-B (DEQ withheld information about ground water contamination in Bossier Parish "to give the company time to buy the surrounding, possibly contaminated property.").

29. See Model Rules of Prof'l Conduct, R. 1.2 cmt. 3 ("Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval").

ABOUT THE AUTHOR

Professor Adam Babich directs the Tulane Environmental Law Clinic. The clinic's 26 student attorneys provide environmental legal services to clients who otherwise would go unrepresented. Before joining the Tulane Law School faculty, Babich was a Chicago-based litigator whose practice emphasized environmental and insurance-related disputes. He has also served as an environmental enforcement lawyer for the Colorado attorney general, as editor-in-chief of the *Environmental Law Reporter* and as a judicial law clerk for the Colorado Supreme Court. He has taught at Georgetown University Law Center, American University and the University of Denver. He received his JD from Yale Law School in 1983. (Tulane Environmental Law Clinic, 6329 Freret St., New Orleans, LA 70118)

