

# Environmental Justice

## A look at causes and remedies



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# Overview of Discussion

- How is the political decisionmaking regarding environmental risks failing minority and low income populations?
- What steps have the states taken to redress this, on the legislative or programmatic levels?
- What do state and federal court SEPA/NEPA cases reveal about trends in environmental justice claims?

# A Political Marketplace?

The political decisionmaking process may be viewed as a market in itself, with participants (affected communities, regulators and corporations), a product (the decision as to siting/location of various sources of pollution and environmental risk) and societal utility – the environmental health of the area.

Why are so many minority and low-income communities afflicted with high concentrations of LULUs and environmental hazards (as well as being zoned for more intensive uses); why has the political market failed these communities?

# Failure of the Political Market

Markets fail in three major respects

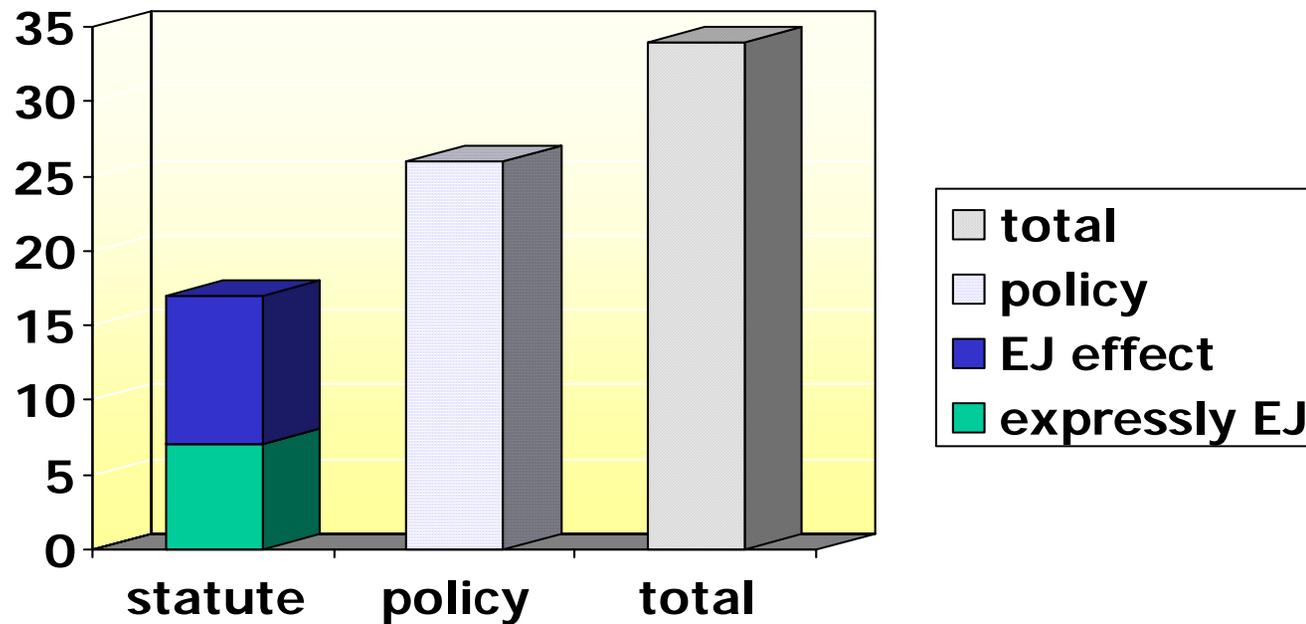
- asymmetrical access to information (in terms of quality, timing of access, even knowledge of system);
- power imbalances (the ability of one participant to dominate a market, pushing social costs above the optimal levels); and,
- externalities (participants' decisions do not reflect the societal costs/benefits of their actions).

# The Role of the States

70-80% of federal environmental law enforced by states, by delegation from U.S. EPA.

The states have produced a variety of laws, policies to further environmental justice concerns, addressing the categories of causes.

# States with EJ laws, policies (2004)



Source: PLRI 2004 survey

# Addressing Informational Asymmetries

## Actively Engaging Communities

- Virginia: notice and public meetings in advance of regulatory action on solid waste facility.
- Rhode Island: agency must create plan for community involvement, with notification, records accessibility for site remediations.
- Wisconsin: innovative tactics for community outreach, including community meetings, workshops, and neighborhood open houses

## Improving the Quality of Information

- Massachusetts provides notices of proposed regulations in translation
- Indiana: GIS mapping enables regulators to correlate EJ communities and environmental risks.

# Reshaping Market Power

Improving the bargaining position of affected communities.

## Anti-concentration laws

- Arizona: presumption against permitting 2<sup>nd</sup> landfill
- Maryland has banned further industrial development in a high-cancer rate county.

## Creating Legal Rights for Communities

- California: appeal of adverse land use decisions on hazardous material may be administratively appealed to the Governor.
- New York: “EJ impacts” found for effects on census block level communities; triggers enhanced public participation requirements to be planned and implemented by the permit applicant.
- State NEPA equivalent laws.

# Managing Externalities

1. Environmental laws not adequately enforced in EJ communities encourages corporations to place facilities amidst low income and minority populations. Supplemental Environmental Projects provide a back-end mechanism for redressing this, through projects bringing environmental benefit back to the community.
2. Public choice theory posits that political careers may not be affected by decisions adverse to EJ communities, given low political empowerment and voter turnouts. Community empowerment and the building of social capital would ameliorate this externality.

# The Courts on “Environmental Justice”



The majority of federal cases referencing environmental justice involve NEPA cases, and the decision whether environmental justice must, must not, or may be woven into impact statements.

In the aftermath of NEPA, 18 states enacted state environmental policy acts (“SEPA”), and some state court actions mirror the federal NEPA litigation.

Trend in state courts is increasing solicitude for community impacts, based on interpretations of state constitutions and environmental statutes.

# Federal NEPA Cases

*Communities Against Runway Expansion v. FAA*, 355 F.3d 678 (D.C. Cir. 2004): upholding environmental justice analysis within EIS as within FAA's discretion to include; moreover, application of analysis held to be not arbitrary and capricious.

*Mid States Coalition for Progress*, 345 F.3d 520 (8<sup>th</sup> Cir. 2003)

Court refused to second guess application of environmental justice analysis within an EIS.

*Citizens Concerned About Jet Noise, Inc. v. Dalton*, 48 F. Supp. 2d 582 (E.D. Va. 1999)

Environmental justice analysis within an EIS is not judicially reviewable.

# State Cases (SEPA)

- *In the Matter of Application of PALUMBO BLOCK COMPANY citing American Marine Rail: State Environmental Quality Review Act (SEQRA) requires consideration of impact on the community.*
- *Mass. Port Authority (Mass. 2003): MEPA allows the inclusion of environmental justice analysis.*
- *Bakersfield Citizens for Local Control v. San Bernadino (Cal. 2005): CEQA requires EIRs for two big box retailers to contain analysis of the projects' ability to cause urban/suburban decay.*

# State Cases (non-SEPA)

- *RHINO* (NM 2005): public non-technical input must be considered in permitting decision.
- *Eagle* (Penn. 2005): State DEP may issue regulations for landfill permits that includes benefits/harms calculus, based in part on state constitutional guarantee of “clean air, pure water.”
- Louisiana: *Save Ourselves, Inc.* as interpreted by *Reduction Credits*, DEQ as public trustee of natural resources, necessitates DEQ to set out conclusions “logical flowing” from findings, in making permitting decisions.

# State Pre-emption

A growing concern, that comprehensive state regulation of specific environmental risks might “occupy the field” and forestall local environmental regulation.

- Recent opinion of California Attorney General suggests local government on strongest footing when land use regulation narrowly tailored around state requirements and based on the local power to regulate nuisances.
- Tony Arnold suggests that state anti-NIMBY laws could impede local efforts to steer LULUs away from EJ communities.