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Air of Equality: An Analysis of Florida's Environmental Equity and Justice Act

Environmental equity issues have permeated the mainstream level of consciousness as a result of several studies. In 1987, a United Church of Christ study reported that three in five African Americans and Latinos live near uncontrolled toxic waste sites.¹ The *National Law Journal* conducted a computer-assisted analysis of census data, the civil court case docket of the U.S. Environmental Protection Agency (EPA), and EPA's own record of performance at 1,177 Superfund toxic waste sites, and reported in 1992 that: For all federal environmental laws aimed at protecting citizens from air, water, and waste pollution, penalties in white communities were 46 percent greater than in minority communities; in more than half of the 10 autonomous regions that administer the EPA's programs around the country, action on cleanup at Superfund sites begins from 12 percent to 42 percent later at minority sites than at white sites; and at the minority sites EPA chooses "containment," the capping or walling off of a toxic dump site, seven percent more frequently than the cleanup method preferred under the law, permanent "treatment," to eliminate the waste or rid it of its toxins. At white sites, the EPA orders treatment 22 percent more often than containment.² Later in 1992, the EPA's environmental equity working group issued a two-volume report which acknowledged that the agency should improve its policies and enforcement procedures to take into account environmental equity issues.

This year, President Bill Clinton signed an executive order creating a federal interagency working group to assess environmental equity and justice issues in federal agency enforce-

The Environmental Equity and Justice Commission will determine whether minority and poor communities are exposed to a disproportionate amount of environmental pollution

by Maribel N. Nicholson and Ralph A. DeMeo

ment, siting, and policy decisions, and directing federal agencies to adopt regulations, if needed, to prohibit racial discrimination in federal environmental programs.³ The term "environmental racism" was coined by Rev. Benjamin Chavis in describing the findings of the 1987 United Church of Christ study, which is the best known study on the subject.⁴ The study reported that the racial composition of a community hosting a commercial hazardous waste facility determined whether such a facility would be located in that community. Recently, the environmental equity and justice debate has been coined "the environmental equity movement," which has been described as "an expansion of the civil rights movement" bringing with it "all of the moral force, compelling emotion, dedication, activism, sympathetic response and

relentless commitment to the pursuit of rights that have characterized the civil rights movement."⁵

Undeniably inspired by the national momentum, the 1993 Florida Legislature decided that it would be in the best interest of the state to collect data to determine whether minority and poor communities in Florida are subjected similarly to unequal enforcement of state environmental laws. With *National Law Journal* findings in mind, Rep. Josephus Eggelletion, Jr., (D-Broward County) sponsored CS/HB 1369, which created the Florida Environmental Equity and Justice Act (hereinafter referred to as the act) and established the Florida Environmental Equity and Justice Commission (hereinafter referred to as the study commission). When asked to define "environmental equity and justice," Rep. Eggelletion said, "It is a debate about everyone having equal access to environmental protection—not environmental pollution." Overall, the Florida Legislature intends the study commission to develop and maintain information to provide the state with an objective basis for assessing the correlation, if any, between environmental risks, income, and race in Florida, so that the legislature may properly adopt legislation, if needed, to address racial discrimination in state environmental programs.

All interested parties agree that environmental equity and justice are among the most important environmental issues currently facing the United States. For that reason, at the beginning of the 1994 legislative session, Rep. Eggelletion created a working group composed of Florida businesses, regulators, and environmental groups interested in the proposed act. The working group met periodically

during the legislative session and discussed all aspects of the act. Several local businesses played a major role in negotiating and revising various aspects of the act in an effort to create an unbiased framework for studying the impact of environmental pollution on minority and low-income communities in Florida. A section-by-section analysis and summary of the discussion surrounding each section of the act follows.

Study Commission Membership

Section 1 of the act creates the "Florida Environmental Equity and Justice Commission," which is composed of 17 members to be appointed by Gov. Lawton Chiles by September 1994. The membership includes a representative of the House of Representatives and the Senate. It is expected that Rep. Eggleston will serve as chair of the study commission, since both environmental groups and private industry representatives support his leadership. The Florida Department of Environmental Protection (DEP) and the Florida Department of Health and Rehabilitative Services will each be represented, along with county and local governments, which amount to four regulatory representatives. The civil rights, environmental, and university communities will each be represented by two commission members. Private industries will be represented by a total of four commission members. The remaining member, an environmental risk assessment professional,⁶ is expected to lend scientific expertise to the study commission. Additionally, since rural communities are often hosts of undesirable land uses, at least two of the study commission members will be from rural communities. In regard to study commission candidates, Gov. Chiles is required to seek input from the President of the Senate, the Speaker of the House of Representatives, the chair of the State Conference of Black Legislators, and the chair of the Hispanic Caucus. Gov. Chiles will also seek input regarding nominees from a statewide business association.

Study Commission's Reporting Schedule

All interested parties agree that the study commission should be on a fast track; therefore, §1 of the act requires

the study commission to meet and make study assignments by November 30, 1994. The study commission's preliminary written report will be due by June 30, 1995, and its final written report to the legislature will be due by December 31, 1995. The study commission also is authorized to draft model legislation, if needed, which will be considered by the legislature in 1996.

Scope of the Study

Section 1 of the act requires that the study commission consider, at a minimum, a list of 10 issues. The two most difficult issues which faced the working group were how to define the neighborhoods and facilities to be studied. The act requires the study commission to collect a representative sample of "targeted sites" in minority, low-income, and other socio-economic neighborhoods. The working group agreed that the study commission should identify the subject neighborhoods based on redistricting information available from the legislature, rather than examining the zip codes of hosting communities. Currently, Dr. M. Elliot Vittes of the University of Central Florida in Orlando is conducting a local study which identified the neighborhoods to be studied by using 825 zip codes which purportedly include a higher proportion of minority residents with incomes less than \$14,000. However, the methodology of the Vittes study has been scrutinized because the percentage of minority residents in the subject neighborhoods are reportedly as low as 40 percent, thereby including neighborhoods composed of a seemingly greater number of white residents.⁷ The methodology contemplated by the working group is expected to identify readily those neighborhoods with the highest number of minority residents.

After the neighborhoods to be studied have been identified, the study commission will make a list of all the "targeted sites" located within those neighborhoods. The working group agreed to take an all-inclusive approach, rather than selective approach, in defining "targeted sites" under the act. Otherwise, the act would target a particular industry based on the premature conclusion that the selected industry is an inherent and exclusive environmental threat to the communities in which they are located. Certainly, the selective approach would

not incorporate the cumulative environmental impact associated with multiple-type facilities located within certain communities. Therefore, the term "targeted site" is broadly defined under the act as any business or facility regulated by DEP, including those facilities regulated by DEP through delegation to local governments and the water management districts, and those sites on the Superfund National Priority List.

All interested parties agree that the study commission should consider the economic factors which influence siting decisions. Generally, both public and commercial facilities favor those sites where property is the least expensive. Although these sites are often near poor communities, the siting decision is based primarily on economic reasons. Furthermore, these siting decisions often provide mutual benefits to hosting communities by creating local employment opportunities with minimal environmental impact. Since these siting decisions are distinguishable from intentional acts of discrimination, the working group agreed that economic factors should be included in the study. Furthermore, many facilities are initially placed in uninhabited areas, but then low-income housing developments migrate to the facilities. Certainly, under these circumstances, there is no racial component to the initial siting decision. As originally drafted, the act did not require the study commission to review historical demographic information about the targeted sites. Instead, the act proposed to take current "snapshots" in time, which would not have shown whether a housing development migrated to a targeted site. Consequently, the act was revised so that both historical and current demographic information about the targeted sites will be included in the study.

The next several study items require the study commission to review state agency and local government actions, policies, and rules to determine whether there is more lenient enforcement of environmental laws in low-income and minority communities, as compared to other socio-economic communities. The *National Law Journal* investigation reported: "There is a racial divide in the way the U.S. government cleans up toxic waste sites and punishes polluters. White communities see faster

results and stiffer penalties than communities where blacks, Hispanics, and other minorities live. This unequal protection often occurs whether the community is wealthy or poor.⁸ The study commission will determine whether these findings are true in Florida. The act also directs the study commission to review state statutes and rules, such as the Florida Administrative Procedure Act, to determine whether these laws sufficiently allow for public participation. Finally, the study commission will consider new approaches to ensure that minorities are apprised of career opportunities in the environmental arena, including with DEP, and to ensure that DEP is "user friendly" to minorities.

Public Hearings

Section 2 of the act authorizes the study commission to conduct at least five public hearings for the purpose of collecting case studies and other information from the public. The timing of the public hearings is an important issue. As a matter of objective analysis, many businesses felt that the public

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hearings should follow the completion of a fact-gathering process, primarily to ensure that the study commission defines the relevant issues prior to being exposed to public testimony and the media. On the other hand, it is equally important that the testimony of witnesses gathered at the public hearings be incorporated into the final report to the legislature. In a compromise, the working group agreed that a preliminary written report would be compiled prior to the commencement of public hearings and that the study

commission's final report would incorporate selected public testimony. It follows that these public hearings will be scheduled within the period beginning in July and ending in November 1995.

Access to Records

Section 3 of the act provides that the study commission may review all non-confidential records. The legislature does not intend to provide the study commission with records protected by law from public disclosure, including trade secrets. The study commission will have access to only those public records within the custody of DEP. The act further provides that the study commission may not conduct on-site inspections or subpoena records from targeted sites. Under current law, DEP must follow guidelines to conduct on-site inspections and to collect records from regulated facilities. The act is not intended to relieve DEP of any of these duties or to circumvent the law by empowering the study commission to act irrespective of current regulations. Therefore, the act specifically limits the investigative powers of the study commission to avoid it running afoul of current law.

Judicial and Administrative Review

Section 4 of the act provides administrative and legal protection for targeted sites and governmental entities subject to the study. All interested parties agreed that the goal of the study commission is to ensure equitable regulation and enforcement of environmental laws and rules. Therefore, the act expressly states that it is not intended "to create any right, benefit, or trust responsibility (substantive or procedural) enforceable at law or equity by any party against the state, local governments, or the businesses studied." Furthermore, the act is not intended to create any "right to administrative or judicial review involving the compliance or noncompliance of the state, local governments, or the businesses studied." Section 4 is almost identical to a provision contained in President Clinton's February 11 executive order.⁹ The act is distinct from the executive order in that the act additionally protects the businesses studied and the state, including local governments, from administrative actions.

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Appropriation and Effective Date

The study commission is assigned to Florida Agricultural and Mechanical University (FAMU) in Tallahassee for administrative support. Section 5 of the act appropriates \$100,000 to DEP from the Pollution Recovery Trust Fund as a grant-in-aid to FAMU to fund the activities of the study commission and to provide assistance to the study commission. The act encourages private contributions to finance the travel expenses for low-income and minority individuals who wish to participate in the public hearings. The working group anticipated twice as much funding for the study. However, due to the expenditure of state funds to finance the Everglades cleanup, it was a significant accomplishment to retain the amount which was actually appropriated. Finally, by creating the study commission this year, Florida may be eligible for future federal funding for related environmental projects. Finally, under §6, the act will take effect upon becoming law.

Conclusion

Environmental equity issues have permeated both governmental and corporate levels of consciousness throughout the United States as a result of public debate over a series of studies conducted since 1987 meant to document the impact of environmental pollution on minority and poor communities. The results of these and ongoing studies have the potential for permanently influencing future governmental and corporate operations to ensure that minority and poor communities are protected from potential health and social impacts resulting from the siting and monitoring of industrial facilities. This year, President Clinton signed an executive order creating a federal interagency working group to determine whether environmental discrimination occurs in federal programs and, if so, to adopt a procedure to prohibit such discrimination.

The 1993 Florida Legislature followed the national momentum to address environmental equity and justice concerns by adopting CS/HB 1369, which establishes the Florida Environmental Equity and Justice Commission. The study commission will determine by scientific analysis and case studies whether minority and poor

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communities in Florida are exposed to a disproportionate amount of environmental pollution. The compelling nature of environmental equity and justice issues has motivated a diverse group of individuals to participate in defining the scope of the local study. The study commission will be composed of businesses, regulators, environmental groups, and other interested individuals. If the local study proves affirmative, the Florida Legislature hopes that the study commission's final report and recommendations will provide the legislature in 1996 with a valuable basis for enacting legislation to provide equal protection and enforcement of state environmental laws for minority and poor communities in Florida. □

¹ COMMISSION FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES, A NATIONAL REPORT ON THE RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES, (1987).

² *Unequal Protection*, NAT'L L.J. S1-12 (Sept. 21, 1992).

³ THE BUREAU OF NATIONAL AFFAIRS, BNA DAILY ENVIRONMENTAL REPORT at d-34 (Feb. 14, 1994).

⁴ COMMISSION FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, *supra* note 1.

⁵ *Environmental Justice, Race, and Poverty as Factors in Siting, Operations, and Remediation*, ENVTL. COMPLIANCE & LITIG. STRATEGY, Vol. 9, No. 10 (March 1994).

⁶ Comparative risk assessment is a process designed and promoted by the U.S. Environmental Protection Agency to more efficiently develop environmental public policy and to allocate public resources. Environmental programs often reflect environmental issues with high political content and public visibility, rather than those issues which are true environmental risks to the ecology and human health. As a result, distorted environmental programs create a misallocation of public resources.

The environmental risk assessment professional on the study commission will provide the study commission with risk-based analysis and a ranking of critical environmental issues according to the "true" risks they pose to human health and the ecology. Therefore, the study commission's final report should provide the legislature with a valuable basis for making decisions about environmental issues that is based on a balance of scientific information and public values. See, e.g., *What Is the Florida Comparison Environmental Risks Project?*, FLA. COMPARISON OF ENVTL. RISKS BULL., Vol. 1, No. 1 (Jan.-Feb. 1994).

⁷ M. ELLIOT VITTES, POVERTY, POLLUTION AND SOLID AND HAZARDOUS WASTE SITING: HOW STRONG ARE THE LINKS?

⁸ *Unequal Protection*, NAT'L L.J. S1-12 (Sept. 21, 1992).

⁹ THE BUREAU OF NATIONAL AFFAIRS, BNA DAILY ENVIRONMENTAL REPORT at d-34 (Feb. 14, 1994).

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This column is submitted on behalf of the Environmental and Land Use Law Section, David S. Dee, chair, and Sid F. Ansbacher, editor.