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## The Federal Advisory Committee's Proposal for Justice

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# THE FEDERAL ADVISORY COMMITTEE'S PROPOSAL FOR JUSTICE

*Peggy Shepard\**

## INTRODUCTION

I am going to begin with some comments on the role of communities in environmental decision-making, and then discuss some of the consensus principles of the Title VI Federal Advisory Committee<sup>1</sup> (the "Committee") that just ended its work and presented its staff report to the Environmental Protection Agency ("EPA") on March 1, 1999 (the "FAC Report").<sup>2</sup>

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1. Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000(d) (1964) [hereinafter "Title VI"] (prohibiting discrimination "on the ground of race . . . under any program or activity receiving federal financial assistance"). The Title VI Advisory Committee was convened on April 14, 1998 by EPA Administrator Carol M. Browner. See National Advisory Council for Environmental Policy and Technology, *Report of the Title VI Implementation Advisory Committee* 1 (visited February 4, 2000) <<http://www.epa.gov/ocempage/nacept/titleVI/titlerpt.html>> [hereinafter *FAC Report*].

2. See *FAC Report*, *supra* note 1.

## I. THE COMMUNITY

On the community level, it is apparent that the use of chemicals, hazardous wastes and pollution all have a human face. This human face manifests itself in terms of the health of community residents, like those in West Harlem. The impact is not just limited to land, air and water. These impacts are cultural, psychological and aesthetic. These are impacts that the EPA is not quite sure they are going to take into consideration when looking at disparate impacts.

Part of the problem for communities is that law has developed a media by media approach to regulation and enforcement. For example, public health policy avoids the complex questions of environmental causation, while the impacts on labor are further isolated from public health and environmental concerns. Communities are where public health, the environment, and labor come together and are inseparable, because these are the places where people work, live, and play. In communities, the interaction between the environment and human health are inescapably intertwined; yet, communities and their residents are often the least involved in making environmental decisions that affect their immediate well being.

Now, because of concerns about the cumulative impact of public health, more and more communities are demanding meaningful participation in the decisions that they perceive really affect them.<sup>3</sup> Urban environments are very complex. They are intertwined with issues of economic development, community development, sustainable development, and racial politics.

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3. See, e.g., Frances A. Dubrowski, *Environmental Justice in the Permitting Process: A Report on Stakeholder's Views* (visited February 4, 2000) <<http://www.epa.gov/oo-ajeag/stakeholders/public/nejac.html>>; NEJAC, *Report on the NEJAC Public Dialogues on Urban Revitalization and Brownfields* (visited Feb. 4, 2000) <<http://www.epa.gov/swerosps/ej/html-doc/pub05.html>>.

There has been decisive industrialism for years, before there was any government regulation, and the sites for human habitat were established before we had any real knowledge about human health risks. The legislative histories of the early environmental laws, beginning with National Environmental Policy Act,<sup>4</sup> the Clean Air Act,<sup>5</sup> and the Clean Water Act,<sup>6</sup> really show a media by media development of environmental law, rather than a holistic approach, which is the way community residents approach their environment. There does not appear to be an integrated approach based upon biosystems, bioregions, or a facility-by-facility impact. There is a commitment to public health, labor health and welfare, and environmental problems, but the commitment is to different federal agencies. This greatly limits the government's ability to comprehensively look at the complete picture of environmental and community health indicators together.

The distribution of regulatory authority has introduced agency turf distinctions in competition for the basic activities of gathering data and making risk management decisions. These distinctions result in very fragmented data. This same disconnection between public health and environmental indicators is repeated at all levels of government, whether it is federal, state, or local.

We all know that more research on the cumulative impacts and synergistic affects of pollution is needed. Levels of emissions are important to know, but are useless without exposure data. Yet few in environmental regulation take part in meetings to set the national research agenda. Community residents, more than any other group, feel the first impacts of the failure to adequately enforce environmental laws. One of the first re-

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4. 42 U.S.C. §§ 4321 - 4370d (1994).

5. 42 U.S.C. §§ 7401 - 4671q (1994).

6. 33 U.S.C. §§ 1251 - 1387 (1994).

actions of a community when environmental concerns are raised is to seek enforcement of existing laws.

How effective is this enforcement? People with the greatest exposure to pollution suffer the most when risk assessment does not take into account all of the affects of exposure. We know that most of the chemicals in commerce have never been fully tested for health effects.<sup>7</sup> According to Robert Shinn Jr., Commissioner of the New Jersey Department of Environmental Protection ("NJDEP") we need a more comprehensive approach to environmental management, where we bring energy, recycling and solid waste innovative technologies, and pollution prevention into one solid program.<sup>8</sup>

How do communities look at Title VI? I was recently at a meeting in Dallas with about thirty community organizations that had been brought together by the EPA to take a look at the agency's Interim Guidance ("Interim Guidance"), to comment on the draft report from the Committee, and to simply be able to comment on the process.<sup>9</sup> Of course, those comments were wide ranging. I must say that many community organizations felt that if the Committee was going to put out a product that was going to set a bad precedent, then they would

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7. See, e.g., John Murphy, *Risky Business*, THE AMICUS JOURNAL, April 1, 1998, available in 1998 WL 14850928 (discussing the results of a report published by the Environmental Defense Fund in August of 1997 which stated that approximately 75% of the top-level chemicals in commercial use have not even undergone the most basic toxicity test).

8. See *New Jersey's Environment 1998* 1-26 (visited March 3, 2000) <<http://www.state.nj.us/dep/dsr/soe/SOEREPO.PDF>>.

9. See *FAC Report*, supra note 1. For a general discussion on the Brownfields 99 Conference held in Dallas, Texas see Alliances for 21st Century Livability, *Environmental Challenges and Solutions*, December 6-8, 1999 (visited March 3, 2000) <<http://www.epa.gov/brownfields>>. See also *infra* note 12.

really prefer there not be a product at all.<sup>10</sup> When some of the community and environmental groups on the FAC Committee met in Washington two days ago,<sup>11</sup> we took those comments into strong consideration, and we have supported the release of that draft report to the EPA, but with certain provisos, because we realize that the draft FAC Report is not a consensus report.

I think the FAC Report accurately presents the views, comments, and perspectives of the different levels and varieties of stakeholders – industry, municipalities, government regulators, and community-based organizations. I feel that the draft report has done a good job in laying out those perspectives, and it is really going to be up to the EPA to decide what recommendations they are going to accept, and how the EPA is going to finalize the Interim Guidance.<sup>12</sup>

Communities see the Interim Guidance as a first step in a long-awaited effort to provide redress to those who have suffered injustice. When we look at the lack of

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10. See, generally, *Alliances for 21st Century Livability, Environmental Challenges and Solutions: Brownfields 1999*, December 6-8, 1999 (visited March 3, 2000) <<http://www.epa.gov/brownfields>> (providing information on the schedule of the Conference and registration materials). For a list of participants at the Brownfields 1999 Conference, see United States Environmental Protection Agency, *Participants List* (visited March 3, 2000) <<http://www.epa.gov/swerosps/bf/bf99/addendum.1>>.

11. A two-day public meeting of the Title VI Implementation Advisory Committee of the National Advisory Council for Environmental Policy and Technology was held in Alexandria, Virginia on March 1, 1999. See National Advisory Council for Environmental Policy and Technology, *Title VI Implementation Advisory Committee*, 64 Fed. Reg. 7191 (Feb. 12, 1999).

12. See United States Environmental Protection Agency, *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits* (1998) [hereinafter *Interim Guidance*].

enforcement of existing regulations, the nearly total absence of public involvement or participation in environmental decision-making, we have to ask what options are really left to community residents who are facing egregious assaults. For example, what options are available to residents of my community in West Harlem, where we have a sewage treatment plant across the street from people's homes, where the property values along Riverside Drive have decreased, where cooperative apartments that have been converted cannot be sold, where people cannot enjoy the use of their property by using their balcony or opening their windows? What options are left to community residents when the only aesthetic benefit that we have in our community, the Hudson River, has been exploited and degraded, when we have ten blocks of concrete that lie in front of us? When instead of a wonderful multi-million dollar park being erected on our waterfront, we have the city allowing a request for proposals for a developer to put up a thirty-story hotel that further privatizes the waterfront? What options do these communities have?

I would like to speak about a couple of issues that have been raised in terms of the EPA Title VI Interim Guidance. For instance, some critics argue the Interim Guidance hinders local economic development efforts.<sup>13</sup> My organization, WE ACT, finds that this is a red herring alleged by those who want to ignore the provisions of law and continue to develop land in the ways they chose, instead of the ways that most benefit communities. A very good example could be found in East Harlem, with the old Washburn Wire Factory which is being redeveloped by developers as a Home Depot and a

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13. See, e.g., Roy Whitehead, Jr. & Richard O. Merritt, *Managing Environmental Risks*, THE CPA JOURNAL, Aug. 1, 1999, available in 1999 WL 11840435; *Environmental Justice: Bliley Asks EPA to Publicly Disclose Title VI Implementation Policy*, SOLID WASTE REPORT, Nov. 19, 1998 available in 1998 WL 10097682.

Costco, essentially a big box mall.<sup>14</sup> This is across the street from brownstones and at least two public schools.<sup>15</sup> It is evident that the proposed development will entirely change the character of the neighborhood, a neighborhood that has one of the highest asthma rates in New York City.<sup>16</sup>

Is this development really a beneficial reuse for this community, a community that is opposing the project? Everyday there are rallies and demonstrations of people who are protesting Home Depot because now all of the traffic is being diverted onto their residential streets.<sup>17</sup> So what options do the residents of the community have? They could go to court and sue, since their protests are not being heard. In fact, a draft environmental impact statement came out recently for the East River Plaza project,<sup>18</sup> and it is a 20-page document, instead of a 200 page document, and all it talks about in terms of air quality and asthma is that asthma rates are really being propelled by indoor air pollution and cockroaches.<sup>19</sup> The report suggests ambient air pollution does have some impact, but the study projects that

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14. Recently, a proposal that includes building a Home Depot and Costco in East Harlem, located along Franklin D. Roosevelt Drive between 116th and 119th Street, passed the zoning review process. See *Shopping Center Approved in Harlem*, N.Y. TIMES, Oct. 28, 1999, at B11.

15. See Terry Pristin, *\$150 Million Shopping Center in Harlem Moving Forward*, N.Y. TIMES, June 15, 1990, at B1 (discussing the residential quality of the neighborhood where the Home Depot would be built).

16. See Nina Siegal, *Water Filtration Project Raises Fears About Asthma*, N.Y. TIMES, Dec. 12, 1999, at B12.

17. See Pristin, *supra* note 15 (discussing the concerns of community members and concerned citizen groups).

18. *Empire State Development, Final Environmental Impact Statement, East River Plaza*, August 19, 1999.

19. See *id.*



the project will have no impact on air pollution in East Harlem.<sup>20</sup> So, again, where is the redress?

Some argue that living near facilities will insure economic opportunity or employment. However, while developers claim the megastores will create approximately 2,000 jobs,<sup>21</sup> how will the elected officials be able to mandate that those 2,000 jobs will go to neighborhood residents? To answer this, we only need to look at past examples. For instance, in Convent, Louisiana, there is 60% unemployment rate,<sup>22</sup> in spite of the fact that the community is surrounded by huge oil refineries and other chemical facilities.<sup>23</sup> The people should be able to be employed, but they are not.

My organization has had a series of meetings, including the first stakeholder meeting between business regulators and community, and the prospects for compromise have potential. Nevertheless, many community based organizations feel that they really are being offered too little too late. But again, what are our options? Our options are to work hard, to make sure that the process is effective, and to be sure it provides opportunity and a vehicle for community residents to be heard. We hope that Title VI represents a stick that will continue to push our states and our municipalities to do the right thing.

## II. THE FAC PRINCIPLES

Now, I would like to talk about a few areas on the Title VI FAC Committee Report where the FAC Committee was able to actually achieve consensus. The FAC Com-

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20. *See id.*

21. *See, e.g.,* Anthony Ramirez, *Guarantees Sought for Jobs at Mall*, N.Y. TIMES, Aug. 16, 1998, at B6.

22. *See, e.g.,* Interview with Dr. Robert Bullard, Head of the Environmental Justice Resource Center at Clark Atlanta University, E-THE ENVIRONMENTAL MAGAZINE, July 17, 1998.

23. *See id.*

mittee was able to achieve consensus with respect to eight principles.<sup>24</sup> The first principle was that the FAC Committee unanimously endorsed the concept of environmental justice. While this may sound really basic and mild, the FAC Committee was not sure that this was going to happen. The FAC Committee was united in the belief that discrimination on the basis of race, color, or national origin is illegal and unjust, but the provision about the historical discrimination against African-Americans and others in this society was so controversial that it was deleted from the original principle.<sup>25</sup> Members of the FAC Committee were unanimous in their conviction that early proactive intervention is necessary in order to deter Title VI violations and complaints.

Proactive intervention has been strongly supported by industry. Whether preventive steps are implemented under the auspices of state and local governments, in the context of voluntary initiatives by industry, or at the initiative of community advocates, opportunities for potential protagonists to really sit down and discuss their true needs before those positions harden is truly invaluable. In many cases, municipalities and states were not sure that they had the resources to truly implement proactive initiatives. However, the FAC Committee unanimously agreed that the affected community, as an actual or potential victim of the discrimination that Title VI seeks to prohibit, should not be treated by the EPA and other regulatory agencies as merely another stakeholder group.<sup>26</sup> Therefore, for state and local environmental justice programs to really be proactive, they

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24. For a list of the Eight Consensus Principles see *FAC Report*, *supra* note 1, at 11-12.

25. See NATIONAL ADVISORY COUNCIL FOR ENVIRONMENTAL POLICY AND TECHNOLOGY, SUMMARY OF THE TITLE VI IMPLEMENTATION ADVISORY COMMITTEE MEETING IN ALEXANDRIA, Virginia, Jan. 11-12, 1999, at 12-13.

26. See *FAC Report*, *supra* note 1, at 11-12.

must purposely promote and insure meaningful participation by these communities.

The FAC Committee believed that the EPA must develop transparent and comprehensive standards and decision-making processes that would be accessible to the community.<sup>27</sup> These standards would be used to evaluate Title VI complaints, so that communities, industry, and state and local officials could understand their prospects if a negotiated solution is impossible, and so that the EPA could decide the merits of a formal complaint. Although FAC Committee members strongly disagreed about the substance of those standards, they agreed that such standards were necessary, and they recognized that uncertainty harms everybody by wasting limited resources that could be better spent.<sup>28</sup>

The FAC Committee recognized, most importantly, that community concerns about cumulative impacts are truly at the heart of most Title VI disputes.<sup>29</sup> To really address the community's fundamental concerns effectively, appropriate authorities would have to recognize the cumulative nature of such impacts, and attempt to take action to reduce and ultimately eliminate those impacts. I was very surprised that this principle was agreed upon, because the states were in effect agreeing to take action to reduce, and ultimately eliminate, the impacts. To me, that is revolutionary, and I hope that we can assemble the resources and the political will to actually make that happen.

The FAC Committee acknowledged that cumulative exposure to pollution and synergistic effects are important concerns raised in the Title VI context, and they admitted that there is a dearth of reliable scientific resources, as well as monitoring and modeling data.<sup>30</sup> As

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27. See NATIONAL ADVISORY COUNCIL FOR ENVIRONMENTAL POLICY AND TECHNOLOGY, *supra* note 25, at 12.

28. See *id.*

29. See *id.*

30. See *id.* at 13.

a result, it frequently makes it difficult to address such concerns. The FAC Committee urged the EPA and the states to make concerted, well-supported efforts to really research the nature and existence of cumulative exposures and synergistic effects and the risks they pose.<sup>31</sup> The EPA has already begun this crucial work, and the FAC Committee recommended that it significantly expand that effort.<sup>32</sup>

The final principle of the FAC Committee was to urge the EPA to conduct meaningful consultations with all affected stakeholders, including community groups and local governments.<sup>33</sup> Community groups felt that they needed to be named as affected stakeholders, and local governments felt that they too needed to be specifically named as affected stakeholders. The FAC Committee discovered during its deliberations that preconceptions about the positions that various stakeholders will take are often erroneous, and that it is always possible for people of good faith to gain a deeper understanding of the issues from each other.<sup>34</sup>

Lastly, I want to summarize the issues that we felt were central to Title VI complaints, and really needed to be answered:

*Defining and evaluating effects.* Should disproportionate adverse effects be defined to include health effects only, or should that definition include cultural, religious, economic, social, or environmental harm?

*How do we identify the community of concern?* How should communities affected by permitting or other decisions be identified? Should modeling and monitoring be used to identify people exposed to the facilities omissions, or should regulators concentrate on those living within a given distance from the facility?

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31. *See id.*

32. *See FAC Report, supra note 1, at 11-12.*

33. *See FAC Report, supra note 1, at 13.*

34. *See id.*

*How do we determine disparity?* What degree of disproportionate adverse effect is covered by Title VI? Must the effect be substantial, above generally-accepted norms, significant, statistically, in excess of the risk or rate in the general population, or subject to some other standard? There are widely divergent perspectives on that issue. Some people say, if there is one more unit of harm, that is disparate impact; yet, others feel that it has to achieve some other sort of percentage threshold. That is a key issue at the heart of Title VI.

*What is the role of existing standards?* If permitting a facility will result in a disproportionate adverse impact on a community of color but will otherwise comply with the applicable regulatory requirements, is the decision illegal under Title VI? This is also a key question, because many people feel that if they are not violating the air permit, they are not violating the water permit, and so on. Again, this is the media by media approach that ignores the cumulative impact and makes it difficult to measure the disparate impacts.

*Agency jurisdiction.* Must federal, state, and local regulators go beyond the legal and geographic constraints imposed by agency jurisdiction in defining disproportionate adverse effects, or in responding to Title VI complaints? How should environmental justice programs address the local land use decisions that often play such a crucial role in creating, and resolving, Title VI disputes? For instance, can New York State really address local land use decisions that are impacting communities in New York City? This is a key question, because municipalities are keeping a very tight hold on those local land use decision-making authorities.

*How do we resolve the issue of new versus renewal permits?* Should the EPA and state and local governments apply different standards in processing Title VI complaints that deal with permit renewals or modifications, as opposed to application for new permits? Obviously industry does not want to be faced with the possi-

bility that after their facility is up and running and they have made a capital investment, in five or ten years, their permit renewal may be denied. At the same time, if that facility has been a bad actor, then it may be the only opportunity for a community to begin to reopen the process, and to begin to have participation and involvement in the decision-making. There are equities on both sides to be weighed.

*Mitigation.* What standards should apply in determining the acceptability of the mitigation being proposed?<sup>35</sup> How closely must the mitigation relate to the disparate impact that is discriminatory under Title VI? If mitigation is difficult or impossible, what standards should apply in determining the validity of justifications offered by respondents to a Title VI complaint? During the FAC Committee meeting in Dallas, community members felt that justification should come before mitigation and they did not want to see mitigation measures going forth until that had occurred.<sup>36</sup>

*Justification.* If mitigation is difficult or impossible, what standards should apply in determining the validity of justifications offered by respondents to a Title VI complaint? In the community meeting in Dallas, community members felt that justification should come before mitigation, and they did not want to see mitigation measures going forth until that had occurred.<sup>37</sup>

#### CONCLUSION

I would like to conclude by saying that communities have demanded a greater role in environmental deci-

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35. For a spectrum of mitigation alternatives see *FAC Report*, *supra* note 1, at 80-88. Mitigation refers to remedies that will reduce or eliminate the disparate impact of environmental justice.

36. See NATIONAL ADVISORY COUNCIL FOR ENVIRONMENTAL POLICY AND TECHNOLOGY, *supra* note 25, at 12.

37. See *id.*

sion-making. We have done it in the courts, we have done in the legislatures, and we have done it in federal agencies. We deserve full and equal protection of the law, and as one of the community members from California said in Dallas, let us hope that Title VI is a big stick and not a feather.