ENVIRONMENTAL JUSTICE AND ENVIRONMENTAL QUALITY BENEFITS: THE OLDEST, MOST PERNICIOUS STRUGGLE AND HOPE FOR BURDENED COMMUNITIES

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INTRODUCTION

This Essay argues that environmental quality benefits are a component of the environmental justice struggle that can help mitigate the degradation for burdened communities. Part I argues that the environmental justice movement is not new because people of color sought, or went to court to seek, environmental quality benefits or environmental justice throughout this country's history. The recently resurrected environmental/social justice movement has focused on pollution. While this is appropriate, it is also important to examine environmental benefits. The Native American definition of environmental justice also includes nature and land, land use and management, environmental benefits which flow from proper land management, and of course, sovereignty. Environmental quality benefits always involve land and environmental media.

Part II argues that access to land and land ownership, use and management play a historical role in defining rights, status and quality of life in our society. Analysis of the distribution of environmental quality benefits which flow from access to land, land use and management, maintenance and decision-making about land starkly reflects gross inequities between low income urban communities, communities of color and other communities. Part III examines the role of land in the history of the environmental benefits and environmental quality struggles. Part IV examines the role of land, land access, use and management in the New York area environmental justice movement and concludes that consideration of environmental quality improvements should more frequently include a focus on environmental quality benefits that flow from land. Furthermore, Part IV concludes that environmental quality benefits should be part of the strategy and struggle for environmental justice.

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I. ENVIRONMENTAL JUSTICE IS ABOUT LAND

The most recent incarnation of the social movement for environmental justice or environmental quality improvement focuses primarily on pollution burdens in communities of color.[1] This focus has, of course, been appropriate. However, environmental justice is, at its most basic level, about land. It is about public and private land ownership, land use, access to land, and land management and policy, including the substantive and enforcement decisions affecting land and environmental media. For First Nations or Indigenous People, the environmental justice struggle has always been intimately connected with land and sovereignty.[2] Rather than employing a narrow perspective or definition which only looks at pollution impacts, environmental justice for Native Americans includes the right to control tribal lands, to make environmental planning and policy decisions, and to have those decisions respected.[3] For Native Americans, environmental justice also includes what is described as the "distinctly Native American conception of the environment as the key to a healthy community."[4]

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1. *See* Luke Cole, *The Crisis and Opportunity in Public Interest Law: A Challenge to Law Students to be Rebellious Lawyers in the '90s*, 4 B.U. PUB. INT. L.J. 1 (1994); Colin Crawford, *Strategies for Environmental Justice: Rethinking CERCLA Medical Monitoring Lawsuits*, 74 B.U. L. REV. 267 (1994); Michael Fisher, *Environmental Racism Claims Brought Under Title VI of the Civil Rights Act*, 25 ENVTL. L. 285 (1995); John C. Dernbach, *The Unfocused Regulation of Toxic and Hazardous Pollutants*, 21 HARV. ENVTL. L. REV. 1 (1997); James S. Freeman & Rachel D. Godsil, *The Question of Risk: Incorporating Community Perceptions into Environmental Risk Assessments*, 21 FORDHAM URB. L.J. 547 (1994); Clarice E. Gaylord & Geraldine W. Twitty, *Protecting Endangered Communities*, 21 FORDHAM URB. L.J. 771 (1994); Donald E. Lively, *The Diminishing Relevance of Rights: Racial Disparities in the Distribution of Lead Exposure Risks*, 21 B.C. ENVTL. AFF. L. REV. 309 (1994); A. Dan Tarlock, *Benjamin Davy's Essential Injustice: A Comparative and Philosophical Analysis of the Lulu Siting Mess*, 22 HARV. ENVTL. L. REV. 607 (1998) (book review). The seminal environmental justice studies that have been identified as triggering the recent movement, such as *Toxic Wastes and Race*, focused on land impacts of pollution and their relationship to quality of life. More than 108 law review articles discuss environmental justice and pollution impacts.

2. *See* Sheila Foster, *Justice From the Ground Up: Distributive Inequities, Grassroots Resistance and the Transformative Politics of the Environmental Justice Movement*, 86 CAL. L. REV. 775, 805 (1998) (indicating that a definition of environmental justice which applies to tribes must encompass the notion that tribes have the right to exercise sovereignty and determine policy on tribal land).

3. *See id.*; *see also* Eileen Gauna, *The Environmental Justice Misfit: Public Participation and the Paradigm Paradox*, 17 STAN. ENVTL. L.J. 3, 9 n.18 (1998) (citations omitted) (indicating that some writers have even gone so far as to suggest that the use of the term environmental racism is not appropriate because it obscures Native American sovereignty issues and fails to include a specific analysis resulting from a system of racial subordination).

4. William A. Shutkin, *The Origins of Environmental Justice and a Reconception of Democracy*, 14 VA. ENVTL. L.J. 579, 586 (1995).

> As Michael Delaney, Tribal Judge of the Sovereign Republic of the Abenaki Nation of the Missisaquoi, explains, the political, social and cultural life of Native American communities is inextricably linked to environmental health, because the environment is not something 'out there,' but something deep within each of us, a part of each of us.[5]

In addition to Native Americans, other people of color also understand that land has spiritual values and have close relationships with nature. This relationship is characterized as an "intimate spiritual, cultural and political relationship with the environment [that] . . . is central to their identity as a people and certainly preceded European perspectives on environmentalism."[6] For this reason, even before African Americans challenged segregated education or anti-miscegenation laws, they brought lawsuits to gain access to parks and waterfronts, seeking to enjoy environmental quality benefits and the benefits of nature.[7]

Environmental justice advocates often say that the movement is about the distribution of environmental burdens and benefits,[8] but to date, almost all of the scholarship and advocacy has focused solely upon environmental burdens.[9] Inequitable distribution of environmental benefits is also a stark example of failed democracy, environmental injustice and even environmental racism.[10] Environmental justice demonstrates a belief in democracy in its purest form, which promises that there will be full participation in the kind of decision-making which permits a full enjoyment of life. This enjoyment cannot take place in the absence of healthy nature and a healthy environment.

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5. *Id.* at 586 (describing the breadth of the concept of environmental justice; citing Pre-filed Testimony of Tribal Judge Michael Delaney, The Abenaki Nation, *In re* Champlain Oil Company (Mar. 9, 1995) (No. CUD-94-11)).

6. *Id.* at 584 n.20.

7. *See* Samara F. Swanston, *An Environmental Justice Perspective on Superfund Reauthorization*, 9 ST. JOHN'S J. LEGAL COMMENT. 565 (1994); *see also supra* note 1.

8. *See* Alice Kaswan, *Environmental Justice: Bridging the Gap Between Environmental Laws and "Justice"*, 47 AM. U. L. REV. 221, 237 (1997) (raising the issue of fairness as it pertains to benefits or burdens which result in governmental policy choices); *see also* Gauna, *supra* note 3, at 8 (noting that environmental justice activists argue that "white people systematically receive the benefits of environmental protection while people of color" receive the risks).

9. *See generally supra* note 1; *but see* Regina Austin, *"Not Just For The Fun Of It!": Governmental Restraints On Black Leisure, Social Inequality and the Privatization of Public Space*, 71 S. CAL. L. REV. 667 (1998). Only Regina Austin has examined race as it pertains to recreational activities and leisure by African Americans.

10. *See* Shutkin, *supra* note 4, at 580-81 (arguing democracy in environmental justice is an acknowledgment of equal individual worth and that each individual should and will have his interests met fairly).

Environmental quality benefits always involve land and environmental media. Environmental justice activists have been known to criticize national environmental groups for caring more about trees than people.[11] Mainstream environmental groups are often castigated for being dominated by white middle class males with bourgeois values.[12] Whether or not the criticism is warranted, it should be clear that the Native American perspective, as presented by Judge Delaney, is correct. We cannot have a healthy community without a healthy earth and environment. Therefore, we should care more about trees and vegetation and land if we want a healthy community. It is not a bourgeois value. We can and should care about both people and trees. They are connected.

In urban areas particularly, trees promote environmental health. A recent study found that hospital patients recover from surgery faster if they can see trees from their rooms and that the sight of trees can quickly lower blood pressure and relax muscle tension.[13] Another study found that people whose housing units were surrounded by trees got along better with their families and their neighbors.[14] Trees are "harbingers of environmental health"[15] and an acre of trees can absorb as much carbon dioxide as an automobile gives off in 11,000 miles of driving.[16] Trees also remove soot and dust particles from the air, pervasive components of urban air pollution.[17] Similarly, naturally-occurring bacteria at the tree roots attack unwanted chemicals in the soil.[18] Trees and other vegetation reduce rainwater runoff and erosion which, in turn reduces surface water pollution.[19] Trees also only get better as they get older, doubling their ability to clean the air and improve water quality after thirty-five years.[20] Trees improve property value.[21] Trees are an important environmental quality benefit and an enforcement-free pollution control measure.[22]

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11. *See* Robert D. Bullard, *Unequal Protection: Environmental Justice and Communities of Color*, 108 HARV. L. REV. 477, 478 (1994). Making this type of an accusation is not an indication that these activists do not care about trees.

12. *See id.* at 478.

13. *See* Mark Wexler, *Money Does Grow on Trees—and So Does Better Health and Happiness*, NATION'S CITIES WKLY., May 4, 1998, at 16.

14. *See id.*

15. Deborah Gangloff, *Champions in Size and Value: Trees as Environmental Contributors*, AM. FORESTS, Mar. 22, 1998, at 2.

16. *See* Kathiann M. Kowalski, *Cleaning the Air—With Trees: The Role of Trees in Preventing Air Pollution and Reducing Energy Costs*, CURRENT HEALTH 2, Apr. 1996, at 25.

17. *See id.*

18. *See id.*

19. *See id.*

20. *See* Gangloff, *supra* note 15, at 2.

21. *See* Wexler, *supra* note 13, at 16.

22. *See Auto Parts Company Pays $275,000 to Settle State Air Pollution Charges*, Daily Env't

Environmental quality improvement measures, such as pollution controls, are also environmental quality benefits, but these benefits are difficult to implement and hard to measure.[23] Additionally, improvement measures may not qualify as real benefits because they may already be required to come into regulatory compliance. If a violator polluting the land, air or water undertakes measures to comply with the law, whether voluntarily or due to enforcement measures, it does not necessarily guarantee that the ambient air or surface water will be cleaner. The emissions or discharges may be as clean (or as dirty) as they should be to be released, but the ambient air or surface water, possibly because standards may not be protective enough or because of the cumulative effect of all of the violators and permitees, generally remains unhealthy in urban areas. In order to be meaningful then, true environmental benefits must at least meet, and in most cases exceed that which is required by law.

II. RIGHTS TO LAND AND PROPERTY DEFINE ENVIRONMENTAL QUALITY AND QUALITY OF LIFE

Since the middle ages, and probably before, ownership of land meant status in society.[24] Our first Chief Justice said that the people who own the land should govern it.[25] The benefits of citizenship were linked to land ownership.[26] Since the Egyptians invented government to manage water rights to the Nile,[27] land ownership or power to control land has been connected to authority to govern. If you can govern, you can influence quality of life and environmental quality. A representative government presumes that citizens have the right influence environmental quality, even those who do not own or control land, but that presumption has not been accurate.

History tells us that the rights to own, use, travel across, manage or enjoy land in our country, and, of course, to make decisions related to those rights have been systematically denied to people of color throughout the existence of this country and in the British Colony which preceded it.[28] Since the right

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Rep. (BNA) A3 (Sept. 25, 1998) (indicating that an Ohio auto parts company was allowed to mitigate and settle its air pollution violations through a penalty which included a $20,000 tree-planting project in Washington, Ohio).

23. *See* Samara F. Swanston, *Race, Gender, Age, and Disproportionate Impact: What Can We Do About the Failure to Protect the Most Vulnerable?*, 21 FORDHAM URB. L.J. 577, 578-79 (1994).

24. *See* Patrick A. Randolf, Jr., *The Future of American Real Estate Law: Uniform Foreclosure and Uniform Land Securities Interest Act*, 20 NOVA L. REV. 1110, 1111 (1986).

25. *See* Phyliss Craig-Taylor, *To Be Free: Liberty, Citizenship, Property and Race*, 14 HARV. BLACKLETTER J. 45, 47 (1998).

26. *See id.* (arguing that the ability to obtain full citizenship was linked to land ownership).

27. *See* Bill Fitz-Patrick, *Cairo's Day of the Assassins*, NEWSWEEK, Oct. 18, 1991, at 49.

28. *See generally* Mark B. Rotenburg, *Book Review: Politics, Personality and Judging: The*

to own or use property was linked to governance, the absence of these rights has resulted in limiting the authority of people of color to make decisions regarding environmental quality. Even after legal barriers to property ownership were overcome, discrimination continued to limit the ability of people of color, particularly African Americans, to own property.[29] Since land ownership has always played a significant role in economic status and quality of life, discrimination in land use and ownership has contributed to environmental inequities faced by communities of color.[30]

Even without property ownership, benefits inure to those with access to land or power to control land. While public lands belong to all Americans, and the government holds these lands in trust for everyone, all citizens cannot equally utilize these resources because only some individuals have access to them.[31] Resources such as timber or minerals become the personal property of the groups or individuals who have the power or the means to exploit the resources with the approval of the government.[32] Therefore, all Americans wind up subsidizing the economic interests of just a few.[33] Similarly, grazing livestock on public lands is also subsidized by all Americans, while only three percent of all ranchers in the United States enjoy the benefits of public lands.[34] Merely living near publicly owned lands has resulted in a great economic

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Lessons of Brandeis and the Brandeis/Frankfurter Connection, 83 COLUM. L. REV. 1863, 1868 n.5 (1984) (indicating that the right to vote in many states was limited to white, male landowners). *See also* Dianne Avery, *Institutional Myths, Historical Narratives and Social Science Evidence: Reading the "Record" in the Virginia Military Institute Case*, 5 S. CAL REV. L. & WOMEN'S STUD. 189, 248 (1996); Gabriel Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273, 283 (1996) (discussing U.S. prohibitions against Asians owning property); Reva Siegal, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1116 (1987); Aremona G. Bennett, *Phantom Freedom: Official Acceptance of Violence to Personal Security and Subversion of Proprietary Rights and Ambitions Following Emancipation, 1865-1910*, 70 CHI.-KENT L. REV. 439 (1994); Guadalupe T. Luna, *"Agricultural Underdogs" and International Agreements: The Legal Context of Agricultural Workers Within the Rural Economy*, 26 N.M. L. REV. (1996); *but see* Ellen D. Katz, *African-American Freedom in Antebellum Cumberland County, Virginia*, 70 CHI.-KENT L. REV. 927 (1995).

29. *See* Craig-Taylor, *supra* note 25. *See generally* Regina Austin, *Nest Eggs and Stormy Weather: Law, Culture, and Black Women's Lack of Wealth*, 65 U. CIN. L. REV 767 (1997).

30. Some free-marketeers claim that "environmental quality is a function of land ownership, fences, and resource stewardship." Andrew McFee Thompson, Comment, *Free Market Environmentalism and the Common Law: Confusion, Nostalgia, and Inconsistency*, 45 EMORY L.J. 1329, 1359 n.190 (1996) (quoting Michael C. Blumm, *The Fallacies of the Free Market Environmentalism*, 15 HARV. J.L. & PUB. POL'Y 371, 387 (1992)).

31. *See* Tara K. Weinman, *The Northern Rockies Ecosystem Protection Act: In Support of Enactment*, 5 B.U. PUB. INT. L.J. 287, 304 (1996).

32. *See id.*

33. *See id.*

34. *See* Todd M. Olinger, *Public Rangeland Reform: New Prospects for Collaboration and Local Control Using The Resource Advisory Councils*, 69 U. COLO. L. REV. 633, 634-35 (1998) (noting that the ranchers, few in number but "politically formidable," survive on publicly-subsidized grasslands).

benefit to rural communities because of their unfettered access to vast natural resources and raw materials and because of the quality of life available to those communities.[35] They enjoy fabulous scenic vistas, clean air and water, wildlife, and wild foods.[36] Moreover, the proximity of public lands improves the property values of the land and lowers taxes for the lucky municipality.[37]

For example, in New York State, private lands adjacent to forest preserves are considered "very desirable."[38] Landowners have privacy and feel protected from development.[39] The state lands provide a huge "backyard" with no maintenance costs or taxes, thereby providing them with spectacular and sometimes private access to pristine wilderness areas.[40] In addition, private property appreciates by virtue of its location near state-owned lands, and since the state pays the taxes on forest preserves, the local municipalities receive an important revenue source without any commensurate demand on local services.[41] In New York State, the Office of Parks, Recreation and Historic Preservation maintains two hundred and thirty-eight State Parks and Historic places.[42] Only five State parks are located in the New York City region where more than forty percent of the people in the state live and where the majority of people of color live.[43] None of the five state-operated New York City parks have any camping facilities.[44] In every other region, state parks have trailer sites, campsites, cabins, showers and other amenities, and recreational opportunities which support high-quality, low-cost state subsidized vacations.

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35. *See id.*

36. *See* Raymond Rasker, *A New Look At Old Vistas: The Economic Role of Environmental Quality in Western Public Lands*, 65 U. COLO. L. REV. 369, 379 (1994).

37. *See* DIVISION OF LANDS & FORESTS, NEW YORK STATE DEP'T OF ENVTL. CONSERVATION, SUNDOWN WILD FOREST: DRAFT UNIT MANAGEMENT PLAN 48 (1995) [hereinafter SUNDOWN DRAFT PLAN] (noting that real estate prices of private lands adjacent to the forest preserve have "generally escalated").

38. *Id.* at 48.

39. *See id.*

40. *Id.*

41. *See id.*

42. *See* OFFICE OF PARKS, RECREATION & HISTORIC PRESERVATION, NEW YORK STATE DEP'T OF ENVTL. CONSERVATION, GUIDE TO NEW YORK STATE OPERATED PARKS, HISTORIC SITES AND THEIR PROGRAMS (1993) [hereinafter NEW YORK STATE GUIDE].

43. *See id.* New York City Parks prohibit overnight camping without a permit. According to the Special Events Office of the New York City Parks Department, permits are typically not issued. *See* Dennis Hevesi, *Parks Department Revises Rules to Show Sensitivity to the Homeless*, N.Y. TIMES, May 27, 1989, at A26. In fact, one way to get arrested in New York City is to attempt to camp in city parks. *See Campaign Watch*, S.F. CHRON., July 7, 1992, at A4. The Public Affairs Department of Gateway National Park in Brooklyn indicates that primitive camping facilities are available at the Park if a reservation is made well in advance, and a camper brings everything, including containers for drawing water (which is not available in the campground). There are no shower facilities and the maximum capacity of the campground is 100 people. This is the only camping facility available in the City of New York.

44. *See* NEW YORK STATE GUIDE, *supra* note 42.

Certain activities such as camping, playing tennis, and listening to classical music are considered "white identified leisure activities."[45] Thus, certain places like national and state public parks are "white identified" or "racialized spaces."[46] Whether or not it is legal, those with access to those places may behave in a proprietary manner about the "racialized" spaces, and it is the job of government to assure fair access to public lands and not to condone privatization of public space.[47]

Access to these parks and transportation to them is the key to the ability to enjoy the benefit. Without an automobile or reasonably priced public transportation, full use and enjoyment of the six million acre Adirondack Park, or any of the other 233 state parks and historic places outside the city is severely limited, as is enjoyment of their environmental quality benefits. Therefore, urban residents routinely support a state park system which most will never see or enjoy and where most of the quality of life and environmental quality benefits inure to suburban or rural residents, who already enjoy a better, healthier quality of life. This inequity is also true on a national level. More than eighty percent of people of color in this country live in urban areas and subsidize public lands in suburban or rural areas, although they generally have little access to these public lands or to the previously-discussed benefits of access. In some cases, these are environmental quality benefits that urban residents do not know about. However, this still raises important issues respecting equity in funding and support for these resources and the state's role in assuring that all New Yorkers have their open space and environmental quality needs met, regardless of resources or ability.[48]

Diversity in park use is an environmental justice issue that should not be dismissed. People who live near public land have not been shy about their opposition to having other people enjoy those lands.[49] Since people of color typically do not live in these areas, they are more likely to attract attention and opposition if they attempt to access public lands in remote or rural areas. In fact, according to the State Department of Environmental Conservation, in some cases, the vast majority of actions it takes for just maintenance of public lands are administrative actions needed to confirm and uphold the public right of access.[50] Even when public access is technically available, if access is not

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45. Austin, *supra* note 9, at 695.

46. *Id.*

47. *See id.* at 694.

48. *See* OFFICE OF PARKS, RECREATION & HISTORIC PRESERVATION, NEW YORK STATE DEP'T OF ENVTL. CONSERVATION CONSERVING OPEN SPACE IN NEW YORK 206 (1997).

49. *See* SUNDOWN DRAFT PLAN, *supra* note 37, at 82 (indicating that a number of local landowners have blocked traditional access routes to state lands).

50. *See id.* at 26-28.

clearly marked, people of color may be reluctant to visit public lands or trails because of historical racism and patterns of exclusion.[51] When the government uses the power of the state to facilitate greater access to public lands for some groups, at the expense of people of color, the result is an important environmental justice issue for the disenfranchised communities.[52]

III. THE ROLE OF LAND IN THE HISTORY OF THE ENVIRONMENTAL BENEFITS AND ENVIRONMENTAL QUALITY STRUGGLE

Bear in mind that access to public lands and parks was an important civil right sought early in the social justice movement.[53] The early municipal benefits cases made no distinction between denial of housing opportunities, drainage, sewage and denial of parks for urban children.[54] Access to beaches, pools and golf courses were part of the environmental quality benefits which earlier generations argued should not be denied to people of color.[55] Is it any less inequitable for the state to provide most benefits of state parks only in places largely inaccessible to communities of color?

Park maintenance has also been the source of charges of environmental injustice. In New York more than twenty years ago, a community organization charged in a federal lawsuit that Crotona Park was poorly maintained by the City because the surrounding community's complexion had changed from white to a community of color.[56] However, in the twenty or more years since that lawsuit, most environmental lawsuits brought by communities of color have focused on pollution.[57] These are certainly critical environmental quality concerns, but it remains pertinent to consider not just who is getting the environmental burdens and the associated environmental health problems, but also who is getting the environmental benefits. As noted

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51. *See* Austin, *supra* note 9, at 685.

52. *See id.* at 698.

53. *See* Dep't of Conservation & Dev. of the Commonwealth of Va. v. Tate, 231 F.2d 615 (4th Cir. 1956).

54. *See* Johnson v. City of Arcadia, 450 F. Supp. 1363 (M.D. Fla. 1978).

55. *See* Lawrence v. Hancock, 76 F. Supp. 1004, 1008 (S.D.W. Va. 1948); Simkins v. City of Greensboro, 149 F. Supp. 562 (M.D.N.C. 1957); Bohler v. Lane, 204 F. Supp. 168 (S.D. Fla. 1962); Dawson v. Mayor & City Council of Baltimore City, 220 F.2d 386 (4th Cir. 1955).

56. *See* Beal v. Lindsay, 468 F.2d 287 (2d Cir. 1972).

57. *See generally* Bean v. Southwestern Management Corporation, 482 F. Supp. 673 (S.D. Tex. 1979); New York City Coalition to End Lead Poisoning v. Koch, 524 N.Y.S.2d 314 (Sup. Ct. 1987); East-Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb Planning & Zoning Comm'n, 662 F. Supp. 1465 (D. Ga. 1987). *See also* El Pueblo Para el Aire y Agua Limpio v. County of Kings, [1991] 22 Envtl. L. Rep. (Envtl. L. Inst.) 20,357 (Cal. Super. Ct. Dec. 30, 1991).

earlier, environmental benefits and environmental quality improvements can reduce environmental health risks and disease.[58]

Racism in housing opportunities also results in environmental quality problems and environmental disease. According to some commentators, "[d]iscrimination in housing resulting from environmental racism is allowing the person of color to rent housing but allowing those accommodations to be made unsafe or be left unsafe."[59] Lead paint poisoning is a chief example of the overlap of racism in housing and in environmental quality benefits.[60] The distribution of environmental quality benefits has long escaped the hard environmental racism analysis to which other areas of environmental management have been subjected. However, in New York, environmental justice activists are taking notice of the stark disparities in the distribution of environmental benefits and are organizing to respond to those disparities.[61]

IV. THE NEW YORK EXPERIENCE

The conservation movement was initially concerned with protecting pristine areas,[62] which, by definition, were not in urban areas. This admitted anti-urban bias presently exists.[63] Open space preservation therefore continues to be viewed by some as excluding minorities and the poor from preexisting land uses[64] and not as an environmental benefit which communities of color should seek. Some commentators suggest that development should take place in "growth" areas or inner cities, and open space preservation should protect farmland from suburban encroachment.[65]

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58. *See* Wexler, *supra* note 13; Gangloff, *supra* note 15.

59. Kimberlianne Podlas, *A New Sword to Slay the Dragon: Using New York Law to Combat Racism*, 24 FORDHAM URB. L.J. 1283, 1308 (1996).

60. *See id.* (describing toxic exposure a tenant may encounter due to environmental racism); Donald E. Lively, *The Diminishing Relevance of Rights: Racial Disparities in the Distribution of Lead Exposure Risks*, 21 B.C. ENVTL. AFF. L. REV. 309, 316 (1994) (noting that "the phenomenon of white flight—a significant demographic factor in recent decades in metropolitan areas—has fortified residential segregation and enhanced racial disparity in exposure risks").

61. *See Critics Contend Environmental Plan is Biased*, N.Y. AMSTERDAM NEWS, Apr. 4, 1998, at 10.

62. *See* Kaswan, *supra* note 8, at 257; *see also* Georgette Poindexter, *Addressing Morality in Urban Brownfield Redevelopment: Using Stakeholder Theory to Craft Legal Process*, 15 VA. ENVTL. L.J. 37, 57 (1995) (noting that mainstream environmentalists have historically paid little attention to the distributional effects of environmental protection programs).

63. *See* A. Dan Tarlock, *City Versus Countryside: Environmental Equity in Context*, 21 FORDHAM URB. L.J. 461, 466-67 (1994).

64. *See id.* at 482-83.

65. *See* Dana Clark & David Downes, *What Price Biodiversity? Incentives and Biodiversity Conservation in the United States*, 11 J. ENVTL. L. & LITIG. 9, 86 (1996).

Others have correctly observed that lack of open space is an important environmental justice issue for urban communities of color.[66] The State of New York examined the benefits of open space and prepared a state-wide Open Space Conservation Plan at the direction of the legislature.[67] That plan, which is revised and updated every three years, studies the open space needs of the state's residents and identifies which open space areas and historic sites should be preserved for future generations of New Yorkers.[68] The 1994 Open Space Plan states that a vacant lot or a small marsh can be open space in an urban area.[69] The Open Space Plan includes a Statewide Comprehensive Outdoor Recreation Plan ("SCORP") funded by the Federal Land and Water Conservation Fund.[70] The SCORP evaluates the status of the state's recreational resources and their uses and forecasts demand over a fifteen to twenty year period.[71] Each year that the SCORP has been prepared, only nine counties out of the sixty in the state have been found to be near or at their resource use limits or underserved by open space.[72] Those counties naturally include the five counties in New York City, the counties adjoining New York City, and Erie County, where the city of Buffalo is located.[73] New York City has the lowest open space standards for its citizens of any metropolitan area in the country—only 2.5 acres of open space per 1000 residents.[74] Despite that low standard, two thirds of the community planning districts (primarily communities of color) do not meet that standard.[75] The Open Space Plan identifies substantial social benefits from open space and land, including escape and relaxation, particularly for lower income citizens, for whom outdoor recreation may be the only affordable form of relaxation.[76] The Open Space Plan also notes the importance of accessibility, stating that "if we can succeed in making parks and other public lands accessible to all New Yorkers,

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66. *See* Peggy M. Shepard, *Issues of Community Empowerment*, 21 FORDHAM URB. L.J. 739, 740 (1994) (pointing out that the social integrity of urban communities is undermined by callous land use policies which result in urban bereft of aesthetically developed open space); *see also* Charles P. Lord, *Environmental Justice Law and the Challenges Facing Urban Communities*, 14 VA. ENVTL. L.J. 721 (1994).

67. *See* NEW YORK STATE DEP'T OF ENVTL. CONSERVATION & OFFICE OF PARKS, RECREATION & HISTORIC PRESERVATION, CONSERVING OPEN SPACE IN NEW YORK STATE 1994: DRAFT PLAN & DRAFT GENERIC ENVIRONMENTAL IMPACT STATEMENT 1 (1994) [hereinafter 1994 OPEN SPACE DRAFT PLAN].

68. *See id.*

69. *See id.* at 10.

70. *See id.* at 13.

71. *See id.*

72. *See id.* at 55-57 app. D.

73. *See id.*

74. *See generally* NEW YORK CITY ENVTL. JUSTICE ALLIANCE, LOSS OF EQUITY: NEW YORK STATE'S 1997 DRAFT OPEN SPACE PLAN (1998).

75. *See id.*

76. *See* 1994 OPEN SPACE DRAFT PLAN, *supra* note 67, at 23.

they can provide meeting places which bridge differences among the segments of our society."[77] The 1994 Open Space Plan states that "equity for communities and neighborhoods underserved by open space is an important public policy goal" and that open space in urban areas is as significant to the environmental health of city residents as areas in pristine condition are to people in rural areas.[78] Thus, the Open Space Plan identifies numerous environmental quality benefits which are critical to the environmental quality and health of urban communities of color.

Properties identified as high priority open space areas for acquisition must be listed in the Open Space Plan in order to qualify for acquisition with state funds.[79] Those properties are identified by appointed regional advisory committees, who also maintain regional priority lists.[80] The city's advisory committee is made up of city and state officials and representatives of environmental groups.[81] In a departure from past procedure, the 1997 advisory council did not contain any representatives from communities of color and the vast majority of the sites recommended were in Staten Island, the least diverse borough that contains only five percent of the city's population.[82] A review of the history of acquisitions undertaken as a result of the plan shows that instead of increasing acquisitions in areas identified in the state's own SCORP as desperately underserved by open space, the vast majority of the purchases have been in areas already overserved by open space.[83] These overserved areas will not even reach a median level of resource use in the year 2010.[84]

Not everyone in the underpopulated areas adjacent to state forest preserves welcomes additional purchases of open space. In the upstate town of Moriah, when the Department of Environmental Conservation expressed an interest in purchasing a 340 acre parcel near state land, the town board, reflecting "a long simmering dissatisfaction" with the state's pro-acquisition policies, voted to deny permission for the seller to sell the land to the state.[85] The town Supervisor was quoted as saying "[t]he state has enough land right

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77. *Id.*

78. *Id.* at 71.

79. *See* NEW YORK STATE DEP'T OF ENVTL. CONSERVATION & OFFICE OF PARKS, RECREATION & HISTORIC PRESERVATION, CONSERVING OPEN SPACE IN NEW YORK 206 (1997) [hereinafter 1997 OPEN SPACE PLAN].

80. *See id.* at 24.

81. *See id.* at 65.

82. *See id.* at 73-86.

83. *See id.*

84. *See id.*

85. Fred Lebrun, *There's Irony in Moriah*, THE TIMES UNION (Albany, N.Y.), Feb. 3, 1998, at C1.

now . . . every time the state buys a piece of land for the forever-wild park, that's one less piece a logger can work."[86]

Meanwhile, open space acquisitions have not often occurred in urban areas or communities of color. And since forty percent of the state's population lives in or near New York City, and most of the people of color in the state live in New York City,[87] poor urban communities and communities of color are, unwittingly, subsidizing both tremendous improvements in the quality of life for communities that are far less needy and transferring huge wealth from the urban areas which generate it to far less diverse suburban and rural areas. It is beyond dispute that the "interests of the privileged and the powerful in such things as pristine landscapes and parks" have continued to dominate environmental programs and decision-making to the detriment of communities of color.[88] Inequity in the distribution of environmental benefits is environmental injustice today, just as it was forty years ago.

Another important environmental benefit identified by those who preceded us in the struggle is access to the waterfront. It is undeniable that racism has played an historical role in limiting access to the waterfront and waterfront amenities for people of color in this country.[89] New York City has had nonsegregated public beaches for decades, but its 578 miles of coastal waterfront are managed in a discriminatory manner. Seven years ago, New York City issued the first and most comprehensive analysis of its waterfront, prepared pursuant to the federal Coastal Zone Management Act.[90] That document identified coastal wetlands, fish and wildlife habitat designations, water quality goals, the location of sewage treatment plants, areas in need of combined sewer overflow abatement, areas of existing and proposed public waterfront access, areas of existing and proposed greenways, and it made recommendations for future management and development along the waterfront.[91] While the coastal zone is in all five boroughs, the only Significant Fish and Wildlife Habitat designations are in white communities.[92] Surface water quality goals change dramatically according to the ethnicity and income of the adjoining community.[93] The lowest water quality goals are

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86. *Id.*

87. *See* NEW YORK CITY ENVTL. JUSTICE ALLIANCE, *supra* note 74, at 2.

88. Shutkin, *supra* note 4, at 583.

89. *See, e.g.*, Marc R. Poirier, *Environmental Justice and the Beach Access Movements of the 1970's in Connecticut and New Jersey: Stories of Property and Civil Rights*, 28 CONN. L. REV. 719, 723,763 (1996).

90. *See* NEW YORK CITY DEP'T OF PLANNING, NEW YORK CITY COMPREHENSIVE WATERFRONT PLAN: RECLAIMING THE CITY'S EDGE (1992) [hereinafter RECLAIMING CITY'S EDGE 1992].

91. *See generally id.*

92. *See id.* at 23.

93. *See id.* at 27.

found in the poorest and most diverse communities.[94] For example, in the East River to the Throgs Neck Bridge, the water quality goal for the next century is "fishing" and fish consumption (since fishable waters means that it is safe to eat the fish), but as if an imaginary line was drawn directly through the water east of the Throgs Neck bridge, where the adjoining communities are all white and wealthy, the water quality goal is, amazingly, "bathing."[95] In some areas designated "Special Natural Waterfront Area[s]," where public land acquisitions are planned or have taken place, legal public access is difficult or unavailable.[96] There are also fewer public access points and amenities such as marinas and greenways, existing or planned, in communities of color. In fact, all of the industrially zoned waterfront ("Working Waterfront") is located in communities of color, and there are no residentially zoned or commercially zoned districts or approved redevelopment projects in communities of color.[97] New York City has recently revised its Waterfront Revitalization Plan, intending to update its Comprehensive Waterfront Management Plan.[98] However, instead of addressing existing inequities, this plan makes the inequities worse. It proposes, in violation of the goals of the Coastal Zone Management Act, to limit or prohibit access to the waterfront in industrially zoned areas.[99] It states, "[a]ccess is also not required in connection with industrial development and therefore is not a priority in the working waterfront."[100] Since all of the Working Waterfront is located in communities of color, these communities could be forever cut off from their waterfronts.

By contrast, low and middle income white communities have fared very well in New York City in obtaining residential access to the waterfront. A striking example of just how well they have done is found in the community of Broad Channel, Queens County. According to the 1990 census, Broad Channel is ninety-nine percent white with no African Americans or Asians.[101] Broad Channel was a city-owned island leased to the residents for almost fifty

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94. *See id.*

95. *Id.*

96. *See id.* at 35. Udalls Cove and Ravine, in Little Neck, Queens, "mostly owned" by the City and State, has private property signs posted at access points. Dr. Charles Kidd, President of York College and an African American, is one of the few residents of color in the community of Little Neck. He recently stated to the author that he might be stopped by the police if he should stroll by Udalls Cove and that the "Private Property" signs posted there are illegal.

97. *See* RECLAIMING CITY'S EDGE 1992, *supra* note 90, at 108, 120.

98. NEW YORK CITY DEP'T OF CITY PLANNING, THE NEW WATERFRONT REVITALIZATION PLAN: A PROPOSED 197A PLAN 26 (1997).

99. *See id.* at 26.

100. *Id.*

101. *See* Somini Sengupta, *Criticism is Undeserved, Residents Say*, N.Y. TIMES, Sept. 11, 1998, at B4.

years. In 1982, the residents were allowed to purchase the land on which they had built homes.[102]

Broad Channel is located in and adjoins the designated Jamaica Bay Significant Coastal Wildlife area. In the early 1990s, the state began enforcing its Tidal Wetlands Law which prohibits construction within the buffer zone of tidal wetlands without a permit.[103] The residents of Broad Channel have simply stolen tidal wetlands from the state and city and, of course, city and state residents, by building decks, ramps, floating docks, bulkheads and sometimes even houses in the tidal wetlands adjoining their properties.[104] With possibly half of its homes in violation, no single community in the entire city had as many Tidal Wetlands Law violations as Broad Channel.[105]

Rather than comply with the law and remove the illegal structures, the residents of Broad Channel sued the state, flooded the Governor and state legislators with letters and petitions, and formed political action committees designed to defeat legislators who did not agree with them.[106] After two years of opposing the Tidal Wetlands Law, the state and the residents reached an agreement allowing the residents to keep all the illegal structures built over the legally protected tidal wetlands, and the state agreed to eliminate or reduce most of the fines imposed under the 1974 law.[107] Residents of Broad Channel were still unhappy. Eighty residents continued to resist paying any fines and opposed terms in the prior agreement which allowed construction of new structures in state tidal wetlands only under specific conditions.[108] Again the state capitulated to their demands. Their fines were lowered and their rights broadened.[109] Race certainly played a role in this community's success in gaining more environmental quality benefits while the adjoining communities of color in South Jamaica do not even have access to Jamaica Bay.[110]

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102. *See* Norimitsu Onishi, *Protection vs. Preservation: Wetlands and the Art of the Deal*, N.Y. TIMES, Oct. 23, 1994, at 8

103. *See* Steven Lee Meyers, *A Deck or a Danger to Wetlands?; Broad Channel Residents Fight Albany on the Environment*, N.Y. TIMES, July 3, 1992, at B1.

104. *See id.*

105. *See id.*

106. *See* Steve Schneider, *Breaking the Law? Wildlife Protection at the Heart of DEC, Residents Dispute*, NEWSDAY (New York City), Mar. 7, 1993, at 1.

107. *See An Agreement is Reached Over Jamaica Bay Wetlands*, N.Y. TIMES, June 6, 1993, at 49.

108. *See* Onishi, *supra* note 102.

109. *See id.*

110. Broad Channel recently attracted national attention after firemen with its Volunteer Fire Department and New York City Policemen who were residents of the community, participated in a Labor Day float lampooning the Texas lynching of an African American man who was dragged behind a pickup truck. The Broad Channel float was named "Black to the Future" and suggested the fate of any African Americans who would dare to attempt to live in Broad Channel. *See* Sengupta, *supra* note 101, at B4.

New York City is not the only New York municipality practicing racism in management of its waterfront resources. The Town of Babylon is another example of a municipality granting benefits to the white residents, which are subsidized by residents of color. The Town of Babylon is located on the South Shore of Long Island. The Town owns beachfront lots on the Atlantic Ocean and in the 1950s leased them to private corporations, which in turn subleased them to individuals who built beach homes on the properties.[111] None of the residential lessees were people of color. The corporation's leases required payment of low annual rents plus taxes.[112] The Town never assessed the lands until 1965.[113] When the Town finally sought payment of the taxes pursuant to the leases, the lessees refused to pay the taxes.[114]

During this period, more and more African Americans moved to the Town of Babylon, where they lived in communities which were generally neither at nor near the waterfront. Finally, people of color constituted approximately twenty-five percent of the residents of the town.[115] However, still no people of color were subleasees of beachfront lots from the private corporations. As residents of the town, they subsidized the lifestyles of the often wealthy barrier beach dwellers.

The Town was forced to take its case to court in pursuit of property taxes, where it ultimately reached the New York State Court of Appeals which, in 1966 affirmed the lower court decisions holding that if the lease requires payment of property taxes, lessees are required to pay them.[116]

Disparities also exist in New York City in the location of trees and greening, the environmental quality benefit mentioned in the beginning of this Essay. Communities of color in New York City also have the lowest percentages of tree canopy.[117] This means that in the areas that have some of the highest rates of asthma morbidity and mortality in the nation, such as Community Boards 1 and 2 in the Bronx, the City is missing the opportunity to improve environmental quality and environmental health by planting trees.

Some of the biggest disparities in environmental quality benefits New York City residents have seen in recent years are disparities in "green debts." The first and most striking example of this overt inequity and environmental

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111. *See In re* Oak Island Beach Ass'n v. Mascari, 261 N.Y.S.2d 982 (Sup. Ct. 1965).

112. *See id.*

113. *See id.* at 984.

114. *See id.*

115. According to the Census Department, the Town of Babylon has 202,780 residents. More than 47,700 of those residents are people of color. *See 1990 Census Data, Database: C90STF3A* <http://venus.census.gov/cdrom/lookup/922663703>.

116. *See In re* West Gilgo Beach Ass'n v. Mascari, 276 N.Y.S.2d 116 (1966).

117. *See* NEW YORK CITY ENVTL. JUSTICE ALLIANCE, *supra* note 74.

injustice is Governor Pataki's 1996 Clean Water/Clean Air Bond Act.[118] This $1.7 billion environmental bond act proposed to fund with long term debt what other states were willing pay for with general tax revenues. Almost without exception,[119] environmental groups lined up to support the governor's bill even though, by its terms, most of the $1.7 billion could not be spent in the City of New York.[120] In contrast to previous bond issues, this bond act did not contain a specific list of projects which would be guaranteed funding. Instead, the provisions of the act were left intentionally vague to encourage residents to vote for the act in the hope that specific projects would be funded.[121] Nevertheless, despite the fact that most of the bond act's benefits would be spent upstate, only three upstate counties voted for it.[122] The most populous fourteen counties located downstate, including New York City, assured the passage of the bond act.[123] The big "gift" to New York City was the inclusion of $125 million, statewide, some of which could be used to replace coal-fired burners in New York City Schools.[124] New York City has 200 schools with coal-fired burners and to date, not one coal-fired boiler in a

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118. See N.Y. ENVTL. CONSERV. LAW § 56-0101 (McKinney 1997).

119. The only environmental organizations statewide which opposed the Bond Act were the Minority Environmental Lawyers Association, Inc. and the Clean Air Campaign. The Minority Environmental Lawyers Association opposed the Bond Act on equity grounds. *See* Sarah Metzgar, *Pataki Loses Round to Activists*, THE TIMES UNION (Albany, N.Y.), Nov. 13, 1996, at B2; James J. Carr, *Environmental Bond Act on November 5th Ballot*, THE METROPOLITAN CORP. COUNCIL, Sept. 1996, at 62. The Metropolitan Corporate Council, Inc. erroneously indicated that the New York City Environmental Justice Alliance (the Alliance) said that it would oppose the Bond Act. Of the members of the Alliance, only the Minority Environmental Lawyers Association opposed the Bond Act. The Alliance remained neutral on the Bond Act.

120. Of the money allocated for water quality improvement projects, $200 million is allocated to Long Island Sound, $15 million to Lake Champlain, $75 million to Onondaga Lake, $25 million to the Hudson River Estuary, $25 million to the Great Lakes, $25 million to the Finger Lakes, $25 million to state owned facilities, $50 million to municipalities with a population of 75,000 or less, $30 million for the Peconic and South Shore Estuaries on Long Island, and $30 million for municipalities with a population of less than 1 million. *See* N.Y. ENVTL. CONSERV. LAW § 56-303. Of the money allocated for solid waste projects, $50 million is for municipal landfill closure projects excluding New York City, and $75 million is for the closure of the Fresh Kills Landfill in Staten Island. *See id.* § 56-401. Interestingly, Staten Island is the only New York City Borough which voted for the Governor and has 5% of the City's population. Thirty million dollars is allocated for environmental compliance assistance projects to enhance air quality, but it may only be spent in municipalities with a population of less than 1 million, even though New York City has the second worst air quality in the nation. *See id.* § 56-0611.

121. *See* Jon R. Sorensen, *Lopsided N.Y. City Vote Assures Passage of Environmental Bond Act*, THE BUFFALO NEWS, Nov. 6, 1996, at 14A.

122. *See id.*; *see also* Tom Fox, *Sweep Cleanup Funds Downstate*, DAILY NEWS (N.Y.), Jan. 24, 1997, at 41 (arguing that the 14 downstate counties which assured passage of the bond act should get more of the money because they will pay 75% of the debt service since those areas provide more than 75% of the state's tax base).

123. *See id.*

124. *See* Jacqueline Henry, *How the Money Was Spent in Previous Environmental Bond Acts*, N.Y. TIMES, Oct. 27, 1996, § 13LI, at 12.

New York City School has been converted with Bond Act money. Of the $150 million set aside for open space acquisition, so far New York has acquired more than 178,000 acres of open space, primarily in communities overserved by open space upstate.[125] Not one square inch of the acquisitions has been in underserved communities of color in New York City.[126]

Previous environmental bond acts also disproportionately favored suburban and rural white communities. For example, due to the 1972 and 1986 New York Environmental Bond Acts, $48 million was spent on open space acquisition in Nassau and Suffolk Counties.[127] When initially proposed, some people criticized the bond act as unnecessary "pork."[128] As predicted, in the four weeks after the September 1998 primary, in the weeks before his re-election, the Governor announced spending initiatives totaling more than $817 million, with at least $100 million expected to come from the environmental bond act.[129]

The Watershed Agreement, negotiated by some environmental groups, upstate lawyers, and thirty upstate communities, sometimes in secret meetings, resulted in another overt transfer of wealth from urban to suburban and rural areas.[130] Those negotiating the agreement commented on the city's "disastrous lack of technical expertise" on representing the city and on the city's general negotiating inadequacies at those meetings,[131] but that did not stop them from pushing through the deal. Although New York City may have benefitted for the time being by avoiding the construction of a multi-billion dollar water filtration plant being sought by EPA Region 2, the agreement would cost New York City residents $2.2 billion[132] and a ten percent increase of their water bills.[133] More than $600 million constitute direct payments for

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125. *See* Liam Plevin, *Reclaiming the Wilderness/Latest State Deal to Protect 139,000 Acres*, NEWSDAY, Dec. 10, 1998, at A22; Brendan Lyons, *Rallying Canoeists Hope to Show Power of the Paddle*, THE TIMES UNION (Albany, N.Y.), Aug. 11, 1998, at B4; Jay Jochnowitz, *Pine Bush Preserve to Make Land Purchase*, THE TIMES UNION (Albany, N.Y.), Mar. 20, 1998, at B5.

126. The inequity of the Bond Act money is so blatant that the Brooklyn Borough President Howard Golden wrote the Governor charging that Brooklyn, with 14% of the state's population, had only received 3% of the Bond Act Resources two years after the Bond Act passed. *See* Bill Farrell, *Golden Looks to Gov for Access to Bonds*, DAILY NEWS (N.Y.), Apr. 15, 1998, at 1.

127. *See* Henry, *supra* note 124.

128. *See* Matthew Carolan & Raymond J. Keating, *State Bond Act is Unneeded and Packed With Pork*, NEWSDAY (N.Y.), Oct. 24, 1996, at A55.

129. *See* Tom Precious, *Spending By Pataki Is Raising Eyebrows*, THE BUFFALO NEWS, Oct. 11, 1998, at A1 ("To say it is Christmas in October probably doesn't do the holiday of Christmas any justice").

130. *See* Wayne Barrett, *Dammed Dirty*, THE VILLAGE VOICE, Oct. 28, 1997, at 26.

131. *Id.*

132. *See* David Kaplan, *Comptroller's Report Cites Inadequacies In N.Y. Watershed Pact*, THE BOND BUYER, Apr. 9, 1997, at 3.

133. *See* Andrew C. Revkin, *New York Begins Spending to Save City Reservoirs*, N.Y. TIMES, Jan. 22, 1997, at A1 (stating that more than 13,000 acres have already been offered to the city).

land acquisitions in the upstate watershed areas, and New York City would also pay the taxes on the land.[134] No sooner was the ink dry on the agreement than New York City's comptroller determined that the agreement was seriously deficient.[135] The upstate municipalities immediately began to sue New York City claiming, among other things, lost property values as a result of the regulations embodied in the agreement.[136] Ultimately, the New York City comptroller required fifty-eight changes[137] to the badly deficient Watershed Agreement before he would approve it.[138] According to Eric Goldstein of the Natural Resources Defense Council, if people think the problem is fixed, "[n]othing could be further from the truth."[139] The agreement is rife with loopholes.[140] Incidentally, New York City residents generally knew nothing about the Watershed Agreement, signed on behalf of New York City by the Department of Environmental Protection. There were no public hearings in New York City while the agreement was being negotiated, or after the negotiations were completed. As a result of the agreement, EPA Region 2 issued a five-year waiver on its filtration requirement.[141] However, at the end of the waiver period, New York City may still be required to build a multi-billion dollar filtration plant despite its huge cash transfers to the upstate watershed areas to which it did not consent.

The transfer of wealth for environmental quality benefits from urban areas to suburban and rural areas is fueled by race and anti-urban politics, not need. To underscore that notion, the *New York Daily News* recently ran an editorial about several other New York State measures designed to advantage other communities at the expense of communities of color.[142] The state determined that New York's share of the tobacco settlement should be used to reimburse the upstate communities at 145% of their damages, while New York City would receive just 74% of its damages, even though New York City has 65% of the state's Medicaid recipients.[143] This distribution may ultimately costing New York City $700 million.[144] A bill which would provide $100

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134. *See id.*

135. *See* Kaplan, *supra* note 132, at 3.

136. *See* Elsa Brenner, *Watershed Pact Brings Disputes and Lawsuits*, N.Y. TIMES, July 7, 1997, §13, at 1.

137. *See* Alan G. Hevesi, *Selective Disservice*, VILLAGE VOICE, June 17, 1997, at 6.

138. *See* Eddie Nickens, *A Watershed Paradox: New York City's Water Quality Protection Efforts*, AM. FORESTS, Jan. 1, 1998, at 21.

139. *Id.*

140. *See id.*

141. *Sanitary Surveys, Disinfection Profiling Recommended for Unfiltered Systems*, 28 Env't Rep. Current Dev. (BNA) 2027 (Feb. 6, 1998).

142. *See Gov Slices Big Apple*, Editorial, DAILY NEWS (N.Y.), Jan. 5, 1999, at 26.

143. *See id.*

144. *See id.*

million from the federal government for the uninsured poor at City hospitals with no commitment of state funds, was vetoed by the governor with no rationale.[145] The editorial discussed speculations that the troubling pattern is about political punishment of New York City, because only 24% of the Bronx residents, 27% of Manhattan residents, 33% of Brooklyn residents and 39% of Queens residents voted for the governor in the 1997 election.[146] The ability to go to the hospital and receive treatment is an environmental and social justice issue resonant with environmental health ramifications in the nation's asthma morbidity and mortality capital.

New York State plans for and funds many of its open space initiatives through the use of federal money, including the Intermodal Surface Transportation Efficiency Act (ISTEA), the United States Department of Interior Land and Conservation Fund, the Wildlife Restoration Act, the Sport Fish and Restoration Act, the Forest Legacy program, the Conservation Reserve program, and the Federal Agricultural Improvement and Reform Act.[147] However, the New York State Department of Environmental Conservation apparently has no existing procedures designed to assure compliance with Title VI of the Civil Rights Act of 1964, which requires that federal money be spent in a nondiscriminatory fashion.[148]

An examination of how the federal money has been spent gives us some indication of why it is important for the state to have appropriate and equitable procedures in place to comply with Title VI. For example, with the ISTEA money, the statute's main purposes were to reduce traffic congestion, promote alternative more sustainable transportation methods and reduce air pollution.[149] In other words, there should have been a clear benefit for urban areas and communities of color.

However in New York, 75% of the transportation enhancement funding is slated for trail projects,[150] which have limited potential to reduce pollution. In fact, park activists lament that the reauthorized ISTEA will have to focus more on statewide transportation benefits and not recreation benefits.[151] Needless to say, the recreation benefits and trails were generally not being

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145. *See id.*

146. *See id*

147. *See* 1997 OPEN SPACE PLAN, *supra* note 79, at 281-84.

148. *See* U.S. EPA, WASTE TRANSFER STATION FACT-FINDING MEETING REGULATORY AGENCIES/LOCAL GOVERNMENT PANEL 318 (1997). Paul Gallay, Assistant to the Commissioner of the Department Of Environmental Conservation, stated that "as far as Title VI, per se, is concerned, we are trying to determine where it stands in view of the recent Supreme Court case which I think throws the whole case into some uncertainty." *Id.*

149. *See generally* 23 U.S.C.§ 149 (1994).

150. *See A Sweeter TEA For Trails*, GREENSPACE (New York Parks & Conservation Ass'n, New York, N.Y.), Fall 1999, at 8.

151. *See id.*

created in communities of color, and of course, trails do little to reduce air pollution. Environmental quality benefits should be pursued for their own sake, but in communities of color, already burdened with a wide variety of polluting activities, environmental quality benefits should be part of the equation when looking at the equities.

Environmental quality benefits should also be part of the mitigation measures sought by activists and considered by scholars for these communities. "[G]reen debts" and "green grants" should not escape analysis for compliance with the President's Executive Order on Environmental Justice and Title VI.[152] Urban communities of color are not just shouldering an inequitable share of the burdens, they are subsidizing—if not paying the lion's share of—the cost of the benefits for advantaged communities.

Seeking benefits instead of burdens is a strategy employed in Greenpoint/Williamsburg, Brooklyn. This is a community of color which has one third of the solid waste transfer stations and one half of the permitted capacity for solid waste transfer stations in New York City.[153] Recently, an existing facility sought a huge expansion in its capacity. The site designated for expansion was listed on the New York City Open Space Acquisitions List in the 1997 New York State Open Space Plan as the Eastern District Terminal Site.[154] Working with the Sierra Club, the Minority Environmental Lawyers Association, the Watchperson Project, other community groups and legislative leaders in the Assembly, the community successfully advocated for inclusion of the site in the Environmental Bond Act Open Space Memorandum of Understanding for 1996.[155] There was an alternative use for this beautiful Brooklyn waterfront site in the coastal zone, and it was not storage of garbage. Environmental justice activists are always accused of being against new proposals, development, projects, and even jobs. This time, an environmentally beneficial alternative was proposed. Shortly after the site was named in the Memorandum, it was also allocated funding from New York State's Environmental Protection Fund. There was enough money to purchase the entire site to build a park for the community, which only had three percent tree cover and less than one-half acre of open space per 1000 residents.[156]

In the meantime, the New York City region of the State Department of Environmental Conservation, determined that under the State Environmental Quality Review Act, the waste company's proposal did not even require an

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152. *See* Exec. Order No. 12,898, 59 Fed. Reg. 7629 (1994).

153. *See* Dave Saltonstall, *Down in the Dumps: Greenpoint, Williamsburg Fighting Against Proposed Garbage Site* DAILY NEWS (N.Y.), May 17, 1998, at 22; Paul H. B. Shin, *Waste Probe Launched, Garbage Transfer is Tops on Feds' List*, DAILY NEWS (N.Y.), Mar. 9, 1999 at 1.

154. *See* 1997 OPEN SPACE PLAN, *supra* note 79, at 75.

155. *See* Kemba Johnson, *Green Envy*, CITY LIMITS MAG., Apr. 1998, at 12.

156. *See id.*

environmental impact statement. Incredibly, the State Department of Environmental Compliance was not aware that this was the same site slated for open space acquisition in its Open Space Plan. In response, local legislators proposed a bill requiring the preparation of an environmental impact statement for the site which passed both houses of the legislature. However, New York's governor is notoriously friendly with business and particularly the waste industry. Not to be outdone, he vetoed both the additional funding for the park in the Environmental Protection Fund and the bipartisan bill requiring an environmental impact statement.[157] In a recent analysis of the Governor's record, Environmental Advocates, a state-wide environmental organization, concluded that his

> green successes are, unfortunately, countered by his strategic emphasis on political and corporate saleability. This has meant that large industrial polluters are rarely stung for malfeasance; environmental insults effecting minorities and the poor do not get addressed . . . and the business community is accommodated to the point that New York's environmental quality is seriously jeopardized.[158]

CONCLUSION

At this writing, it is not clear whether Greenpoint/Williamsburg will get any additional open space or the park the community sought. With twenty-three waste transfer stations, it seems unlikely that all of the permits of these facilities will be rescinded or defeated in court, or that a park could balance the garbage burden under which this community suffers, but a park could help mitigate the burden. At a public hearing held on the proposed waste transfer station, the community turned out 1200 strong, indicating that it wanted a park, not more garbage. [159] While there should be continued vigilance about the siting of polluting facilities in urban communities of color, a sharp eye must also be kept on the distribution of environmental benefits. Keep in mind the struggles of those who came before us, so that those who follow can perhaps enjoy the improved environmental quality that they need and deserve.

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157. *See* EPL ENVTL. ADVOCATES, VOTER'S GUIDE, STRATEGICALLY GREEN: THE PATAKI RECORD 1, 6 (1998).

158. *Id.*

159. *See* Jim Yardly, *At Hearing in Brooklyn, Crowd Jeers Proposal for Trash Station*, N.Y. TIMES Apr. 30, 1998, at B4.