

Environmental Justice: Issues, History & Outlook
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Knowledge=Justice: Access to information and public awareness of environmental activity

An open society, wherein information is shared with the populace and access to information is paramount, requires mechanisms, systems and laws for the collection and the actual access to information. Who has access? What information is accessible? Is the freedom of information tantamount to a right to know? If one has a right-to-know, must a government entity then disseminate information or merely make it available? Is there an element of ease or convenience with which the info must be accessible lest there be constructive blocking of access? How does one get the information they seek?

These are questions and situations which an open democratic society addresses and readdresses. A government which derives its power from an electorate must respond to the people's request for information. An involved electorate must be informed and access to information has been a key element to citizen participation in government. In the environmental arena, it is imperative for an informed public to be able to access information on polluters and pollution that affects their lives, their communities and public health. Citizens groups and public entities which collect information must have mechanisms for access. Laws must be in place to ensure the public's access to important information.

The need for open and easy access to information is tempered by the realities of terrorism and criminal activity. Right-to-know laws are increasingly subject to restrictions. The need to protect the public from potential sources of pollution such as hazardous waste must be weighed against the need to protect the public from environmental terrorism. Attorney General Holder recently rescinded Attorney General Ashcroft's 2001 guidelines for sharing information, shifting the balance more in favor of "openness." The following is a survey of the right to information, the availability and mechanisms of access to information and a sampling of citizen's group action to obtain and use information.

Information gathering in the environmental sphere:

The right to information and access thereto are derived from various sources. There is the Common law right to petition and receive information, the Freedom of Information and Privacy Act of 1974, the Emergency Planning and Community Right to Know Act (EPCRA) in the environmental field and the nuclear option- discovery during litigation. One construct for differentiating the methods of public information gathering is to examine where the preponderance of responsibility lies. At common law, which one still may assert in a court of law, the onus is on the citizen seeking information to express the interest in the information. Freedom of information laws provide mechanisms for access to information and steps the government must take to make information accessible, usually through written requests with some minimal fees to the requestor who also may bear the burden of receiving authorization where there is a privacy concern. Right-to-know laws seemingly require affirmative action on the part of a government entity to disseminate information. There are avenues of access and information disseminated through Federal and State Digests and even municipal records available at agencies, federal depository libraries and on line.

Methods of obtaining information:- Common Law Right to Know – FOIA – EPCRA - Discovery in litigation

At common law, some records are public and the right to them is rooted in expectations, where the public or personal interest is involved. A public record is a writing made by a public official that is authorized by law. Right-to-know laws apply only to those records required by law to be made, maintained, or kept, on file. Therefore not all writings by public officials may be subject to disclosure or release. Decisions in the 2nd and 3rd Circuit Court of Appeals have dealt with what must be made public. In order to receive the information, the common law dictated that a citizen must establish a ‘personal’ or ‘particular’ interest in acquiring desired information. An example is that in New Jersey, audio recordings of a State agency’s executive sessions that are used by the agency as an aid in drafting official written minutes of the session constitute a common law record and are subject to balanced public disclosure.ⁱ However, courts have held that right-to-know legislation holds no requirement for a showing of interest. Citizens need make no showing of interest to exercise their rights under the law (in New Jersey-NJSA 47:1A2).ⁱⁱ

FREEDOM OF INFORMATION ACT and FOILS

At common law, one may petition the government or the courts for information a laborious and inhibiting prospect. The federal government and State governments passed Freedom of Information legislation (FOIA or FOIL) which are remedial and should be liberally construed in favor of disclosure.

The New York Appellate Division stated the purpose and breadth of the New York FOIL in 1986 in Lucas v. Pastorⁱⁱⁱ, holding the purpose of freedom of information law [McKinney's Public Officers Law § 84 et seq.] is to promote people's right to know the process of governmental decision making and the law must be liberally construed to grant maximum public access to governmental records. The court laid the burden on governmental agency to establish that material requested pursuant to freedom of information law [McKinney's Public Officers Law § 84 et seq.] is exempt under McKinney's Public Officers Law § 87

The same public policy, limitations and burdens exist in New Jersey (NJSA 47:1A2) and in Connecticut (C.G.S.A. 1-210 public records) to wit the general rule under a Freedom of Information Act favors disclosure; (and the) burden of establishing applicability of an exemption to this rule rests squarely on party claiming the exemption.^{iv}

The U.S. Federal government provides information within the constructs of the Freedom of Information Act (1964 and thereafter amended) and the Privacy Act (of 1974) 5 USC 552(a)(1). New York and other States and even municipalities have additional Freedom of Information laws making information, including environmental impact statements and other information, available to the public. The laws provide for a certain amount of free access or photocopies – usually up to \$25 or 25 pages or so of material, after which the requester must pay for copies. There are also restrictions having to do with privacy as well as national security. Some material will be redacted or withheld for reasons including national security, internal administrative references and for personal privacy and national security reasons. We have seen this happen in the immigration context where an investigation may be underway.

A common problem with FOIA and FOIL laws is the significant backlog in requests and therefore delay in fulfilling such requests. However there are instances in which timely government reporting or posting is required, but it is the responsibility of individuals to obtain such information.

EPCRA and TRI

Pursuant to the Emergency Planning and Community Right-To-Know Act (EPCRA) the U.S. Environmental Protection Agency (EPA) established a right-to-know program known as the Toxic Release Inventory (TRI). It is an annual collection of data on toxic emissions in air, water, and land. The TRI is accessible at government offices and at government depository libraries as well as online at www.epa.gov/tri.

EPCRA was enacted in 1986 with CERCLA – the Superfund Amendments Reauthorization Act of 1986.^v in response to the chemical release in Bhopal, India as well as a West Virginia toxic release. The Act was amended in 1997.^{vi} The Act lists hazardous substances. –Section 313 of EPCRA requires plants to maintain a Material Safety Data Sheet for OSHA and to report releases to the States and to the EPA. Information is then placed in the Toxic Release Inventory (TRI) – a publicly accessible database. The EPA puts out a newsletter “Enforcement Alert.” Section 304 requires facilities that produce, use, or store any of 356 hazardous chemicals notify the local emergency planning committee, the State emergency response commission, and the U.S. Coast Guard national Response Center. Interestingly, transportation vessels are exempt from this requirement. There is an EPCRA hotline 1-800-535-0202.

States have enacted their own similar legislation and cooperative efforts on a TRI Exchange network. The following are the contacts for the IEC member states:

NY – see DEC website – contact Susanne Wither, Div. of Env. Remediation – 625 Bdwy, 11Fl, Albany, NY 12233-8010 [Tel: 518-402-9553](tel:518-402-9553), fax: 518-402-9020, smwither@gw.dec.state.ny.us.
NJ- Andrew Opperman- DEP EPCRA Section 313 Office of Pollution Prevention and Right-to-know – P.O. Box 443, Trenton, NJ 08625-0443 tel: 609- 777-0518, fax: 609-292-1816, email: andy.opperman@dep.state.nj.us.
CT –DEP, Attn: SERC – 79 Elm Street, 4th Floor, Hartford, CT 06106-5127, Tel: 860-424-3373, fax: 860-424-4061; email: dep.ctepcra.cpr.

The TRI Lawsuit- defining scope of information available affects citizen access

There are hazardous material threshold amounts that trigger reporting requirements and determine which forms a facility must utilize in providing the government and public notice of pollutants present. Penalties for violations of EPCRA and CERCLA may be \$27,000 per day. The threshold amounts are expressed in ranges. Therefore the form that is used, and the threshold range reflected, affect the amount of information the public has as well as the pressure to reduce such toxic chemical use, storage or production. If you can use a short form that reflects a lower range or that makes the amount of the chemical ambiguous, public information is clouded or diminished.

The EPA recently reduced the reporting requirements for the TRI, making use of a short form the norm where certain amounts of toxins are present. Many considered the change by EPA to be ill-advised as the new reporting requirements provided a greater range of toxins possible and were a disincentive to reducing said toxins. NYS joined a lawsuit against EPA. One of the bases was that the change in reporting requirements resulted in restrictions on public access to TRI and a lack of transparency. The civil complaint was filed in civil court in U.S. Dist. Ct – SDNY.^{vii} The current administration has rescinded the changes in reporting requirements. This is a victory, not only for those involved in the lawsuit, but also for the public and communities in which there are facilities.

Other reporting requirements for the public and for worker protection:

Reporting requirements at treatment plants are meant to protect the public and the workers therein. OSHA has workplace safety requirements and reporting requirements. In this instance federal law trumps State protections. EPCRA states it does not preempt community right-to-know laws enacted by States, but it does preempt State worker right-to-know laws.

Getting the information and your right-to-know:

Some information requires diligence and attention from those concerned. One must follow congressional activity and reports to Congress. The right-to-know is met with the responsibility of sections of government to report to Congress. There are few direct notifications to the

neighborhoods where there are toxins. States have had their own laws. New York State and New York City may have their own right-to-know and community access laws.

There is also recourse in the courts. In New York, one may bring an Article 78 proceeding to compel the release of or access to information. One may petition the district court as well. There have been a number of suits under the Freedom of Information Act due to untimely responses by federal government departments or agencies.

There is also an inherent tension in providing public information and addressing national security. Martha A Churchill, an attorney and reporter, observed:

By enacting a freedom of information **law**, a legislature may extend the permissible disclosure of governmental proceedings well beyond what it had been before either under common **law** or the discovery rules. On the other hand, a public-records **law** may represent an embodiment of the common **law**, in which case common-**law** principles—such as that the harm done to the public interest may be weighed against the right to access—may apply.^{viii}

Other legislation has included sections relating to public information and reporting. The Clean Air Act and Clean Water Act, ground-breaking legislation that many want to revisit, provide for reports to Congress from the EPA. EPA websites are a good source of information as well. I have included sections of laws that require public reporting and access. These sections supplement that which is available under the Freedom of Information Act (5 USC 552 and 552a)

Sections of law requiring reports are as follows:

The Clean Air Act 42 USC Sec 7401-7671g

Section 103- requires reports to Congress every 5 years concerning air pollution monitoring

Section 108(b) – Issuance by administrator of information on air pollution control techniques

and **108(d)** – “The issuance of air quality criteria and information on air pollution control techniques shall be announced in the Federal Register and copies shall be made available to the general public.”

Section 114 — inspection and record keeping shall be available to the public, except that which would divulge trade secrets

Section 127 (42 USC 7427)

§ 7427. Public notification

(a) Warning signs; television, radio, or press notices or information

Each State plan shall contain measures which will be effective to notify the public during any calendar on a regular basis of instances or areas in which any national primary ambient air quality standard is exceeded or was exceeded during any portion of the preceding calendar year to advise the public of the health hazards associated with such pollution, and to enhance public awareness of the measures which can be taken to prevent such standards from being exceeded and the ways in which the public can participate in regulatory and other efforts to improve air quality. Such measures may include the posting of warning signs on interstate highway access points to metropolitan areas or television, radio, or press notices or information.

(b) Grants

The Administrator is authorized to make grants to States to assist in carrying out the requirements of subsection (a) of this section.

The Clean Water Act (the Federal Water pollution Control Act) 33 USC 1251-1387

Section 308 requires the owner or operator of any point source to establish and maintain records and make them available to the EPA administrator but also requires the information be available to the public with restrictions.

Section 308(b)B - (b) Availability to public; trade secrets exception; penalty for disclosure of confidential information:

Any records, reports, or information obtained under this section (1) shall, in the case of effluent data, be related to any applicable effluent limitations, toxic, pretreatment, or new source performance standards, and (2) shall be available to the public, except that upon a showing satisfactory to the Administrator by any person that records, reports, or information, or particular part thereof (other than effluent data), to which the Administrator has access under this section, if made public would divulge methods or processes entitled to protection as trade secrets of such person, the Administrator shall consider such record, report, or information, or particular portion thereof confidential in accordance with the purposes of [section 1905 of Title 18](#). Any authorized representative of the Administrator (including an authorized contractor acting as a representative

of the Administrator) who knowingly or willfully publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information which is required to be considered confidential under this subsection shall be fined not more than \$1,000 or imprisoned not more than 1 year, or both. Nothing in this subsection shall prohibit the Administrator or an authorized representative of the Administrator (including any authorized contractor acting as a representative of the Administrator) from disclosing records, reports, or information to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter or when relevant in any proceeding under this chapter.

Section 402 established the procedure of the National Polluter Discharge Elimination System (NPDES), which is the permitting scheme largely undertaken by states unless the EPA denies approval of the State's program. In New York the permits are referred to as SPDES permits for discharges into navigable waters. The definition of navigable waters is the subject of litigation for which we will not delve into in this context. The permit scheme does require notification of permit applications and modification to interested parties as well as publication. The permits include applicable law as well as in some cases narrative descriptive of requirements and in others at least a graphed reference with footnotes to applicable regulations including the Clean Water Act, State laws and the regulations of the Interstate Environmental Commission.

Section 404(n) requires that permits and permit applications for dredging be available to the public and available for reproduction.

Safe Water Drinking Act 42 USC 300(h) requires publication of proposed regulations, amendments, permits regarding the protection of underground sources of drinking water.

Additional efforts to enhance community right-to-know legislation:

The laws listed above are a sampling of relevant statutes in the environmental field which interested parties may rely on as a basis for access to information and processes affecting the environment. Many of these laws were passed in the 1970s and some believe they need to be readdressed. There are additional pieces of legislation that have been considered in recent years.

There are currently legislative efforts to expand community preparedness and information. Currently under consideration during federal appropriations are proposals to alert communities when there are sewage overflows. This effort is carried over from the last Congress from a bill sponsored by New Jersey Senator Frank Lautenberg **S.2080 (HR 2452)**, and now sponsored in the House of Representatives by Rep. Timothy Bishop of New York (**HR 753**). The “Sewage Overflow Community Right-to-know Act” provides that owners and operators of publicly owned treatment works (POTWs) must, among other things, notify the public of sewer overflows within 24 hours in any area that has potential to affect human health, as well as report sewer overflows in a calendar year “including sewer overflows that do not reach any waters of the United States.” Sewage overflow is but one of the concerns in our environmental district and an example of an area where government would proactively communicate with the public.

Community Organizations as Secondary Sources of Information and Advocacy.

The following are a few organizations involved in environmental matters. There are others that may be able to be of assistance or guidance. The inclusion of these groups herein is by no means an indication of support, endorsement or even a comment about them by any of the participants or sponsors of this program. Independent judgment and evaluation of issues is encouraged.

The Natural Resource Defense Council (NRDC) is involved a number of cases and causes in the environmental arena. Through information campaigns, legislative lobbying and legal action the NRDC is relatively active. Regardless of political considerations, NRDC can serve as an important avenue for information.

Other organizations also seek “empowerment” through actions which include gaining information and securing access thereto.

WEACT- West Harlem Environmental Action is an organization which monitors the environment in Northern Manhattan and in its own words works to “inform, educate, train and mobilize the predominantly African-American and Latino residents of Northern Manhattan on issues that impact their quality of life – air, water, indoor pollution, toxins, land use and open space, waterfront development and usage, sanitation, transportation, historic preservation, regulatory enforcement, and citizen participation in public policy making.”^{ix} WEACT helped

close the North River Sewage treatment plant that had emitted noxious odors. The plant was originally to be built in the West 70's but was built in Harlem in an area which had a marine transfer station for garbage, bus depots, an Amtrak train and had running overhead the now defunct Westway. WEACTION swung into action to inform their community and to organize opposition. They gathered available information, shared it, and coordinated with groups such as the NRDC to formulate an agenda. WEACTION collaborated with City College, held fora, and used litigation as leverage and as a discovery tool for information. The result was a consent order establishing a fund and a community task force to follow-up on projects to "ameliorate the environmental degradation of West Harlem,"^x

UPROSE – United Puerto Rican Organization of Sunset Park is a youth oriented community organization whose stated goal is to "heighten community awareness, develop environmental strategies and participatory community planning practices, and promote sustainable development, waterfront development, land use, brownfields, transportation, air quality, open space, alternative energy and environmental health."^{xi} UPROSE was founded in 1966 in Sunset Park, Brooklyn. UPROSE actually purchased hybrid vehicles for use in their community and sponsors intergenerational leadership and civic involvement. UPROSE also undertakes legal action such as an Article 78 proceeding against the New York Power Authority challenging the siting of electric generators in Brooklyn. While the siting was deemed within the scope of legitimate power, UPROSE succeeded in having the Appellate Division find that the Power Authority erred in issuing a negative declaration by failing to take adequate account of potential hazards arising from particulate matter in the air, in any concentrations, within the meaning of the Clean Air Act Sec 108, 42 USC 7408, McKinneys 8-0101 et seq.^{xiii} Executive Director Elizabeth Yeampierre spoke at the 2009 New York State Bar Association Annual Meeting. She invited all to contact UPROSE for information about the organization and its project as well as the data it collects and disseminates.

Conclusions

There are avenues for a motivated person to access information. Public policy and law supports unencumbered access to government documents and information, with some exception for personnel records and notes. Information can be accessed through government and from

secondary sources including organizations. In some scenarios, court action may obtain release of needed information. In the end, any effort for justice requires knowledge and the material proof to support a cause. In the environmental field, people must know what pollutants or toxins are present in their neighborhoods and at what levels. People need to know what their governments are doing and what other organizations may be supporting. In the search for environmental justice, the fundamental information must be accessible to support communities of interest affected by government and private actors. The citations included herein should give anyone an opportunity to inform themselves and move forward. Some examples of groups making use of information in the pursuit of environmental justice will be shared by our other speakers.

ⁱ -ATLANTIC CITY CONVENTION CENTER AUTH. v. SOUTH JERSEY PUBLISHING CO., INC., 135 N.J. 53, 637 A.2D 1261 (1994). (see David P. Kalm , “Survey of Recent Development in Third Circuit Law,” 24 Seton Hall L. Rev. 2339,1994).

ⁱⁱ Higg-A-Rella, Inc. V. County of Essex, 141 NJ 35, 660 A.2d 1163 (1995)

ⁱⁱⁱ 117 A.D.2d736, 498 N.Y.S.2d 461 (1986)

^{iv} Town Council of Town of Rocky Hill v. Freedom of Information Com'n, 569 A.2d 1149, 20 Conn.App. 671. (1990)

^v 42 USC 9601 et. seq.

^{vi} 42 USC 11001 et. Seq.

^{vii} The petition heading was 12 States State of New York et al. v. Stephen L. Johnson, as EPA Administrator. 07 cv-10632

^{viii} Martha A. Churchill, The Freedom of Information Act—Carry a Big Stick, 79 Mich. B.J. 836 (2000)

^{ix} See <http://www.weact.org/AboutUs/tabid/180/Default.aspx>

^x Shepard, Peggy M., “Issues of Community Empowerment,” 21 Fordham Urban Law Review, 739 Spring 1994

^{xi} See http://uprose.org/index.php?doc_id=143

^{xii} UPROSE et al. v. Power Authority of the State of New York, 285 A.D. 603, 729 N.Y.S.2d 42, July 23, 2001

Additional Resources

New York City Community Right-to-Know Laws and Regulations – Local Law No. 26 – from NYCDEP at www.nyc.gov/dep.

N.J.S.A. 34:5A-7- Completion and return of surveys by employer; identification of hazardous substance

“Effect of Federal Safe Drinking Water Act, Clean Water Act and Emergency Planning and Community Right-to-Know Act.” NYS DEC.

www.dec.ny.gov/energy/46445.html?showprintstyles.

“EPCRA Statute, Regulations & Enforcement” at U.S. EPA website,

www.epa.gov/compliance/civil/epcra/epcraenfstareq.html.

EPA website page for TRI State Programs – Toxic Release Inventory (TRI) Program at

www.epa.gov/tri/stateprograms/state_programs.htm

“Attorney General Cuomo Sues EPA for Denying the Public Access to Information on Toxic Chemicals in their Neighborhoods,” at

www.oag.state.ny.us/media_center/2007/nov/nov28a_07.html

Complaint filed Nov 28, 2007 07 CV 10632 –

“Making Sense of ‘Right-to-Know’ Reports, (sometimes called ‘Consumer Confidence Reports’ or ‘Water Quality Reports’)” – Fall 2002, from Campaign for Safe Drinking Water at www.safe-drinking-water.org.

“Court Strikes Down Bush Administration Pollution Monitoring Loophole Upholds Public’s Right to Know” NRDC Press Release, Aug, 19, 2008