

## Pursuing Environmental Justice: Obstacles and Opportunities—Lessons from the Field<sup>†</sup>

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### INTRODUCTION

When I was invited to participate in the Access to Equal Justice: Critical Perspectives on Court and Law Reform Colloquium, our panel was slated to discuss Pursuing Environmental Justice: Obstacles and Opportunities. Before our panel convened, Professor Jane Spinak delivered the keynote address for the colloquium. I attended Professor Spinak's speech mostly out of collegial respect; I did not think that family law had anything to contribute to environmental justice. But as I listened to the talk, I was struck by how pertinent some of the questions Professor Spinak raised about family court reform are to environmental justice.

Professor Spinak's talk challenged me to consider some fundamental questions about my own work in environmental justice. Why do our clients at the Environmental Law and Justice Clinic ("the clinic") end up in court at all? What do these clients and the nature of their cases have to say about environmental law? What do the answers to these questions suggest about law reform? These questions are important to the environmental justice movement. Just as epidemiologists study clinical cases to learn about the etiology of

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<sup>†</sup> I take inspiration from the title of Luke W. Cole's Correspondence, *Remedies for Environmental Racism: A View from the Field*, 90 MICH. L. REV. 1991 (1992).

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disease, law practitioners can study judicial cases to learn about the environment and the state of environmental regulation.

In response to these questions, I argue that the clinic's clients and similarly situated grassroots groups pursue litigation because the laws do not adequately protect them from pollution at the neighborhood level. Environmental lawsuits filed by such groups result from the conclusion that there is "too much" pollution in the neighborhood—there is elevated background pollution, violations of environmental laws contribute to excess pollution, and litigation is one of the few ways to redress the distributive injustice resulting from pollution created by multiple sources.

Addressing neighborhood-level pollution through legislation and regulation should be a priority for communities and governments at all levels because environmental justice is a larger societal concern. Even beyond the potential health impacts pollution can cause, it worsens vulnerabilities that already exist in poor and minority neighborhoods. Without change, even communities that are organized and resourceful enough to pursue litigation will be able to seek only case-by-case redress in the courts. They will not be able to effect the system-wide reform that is needed to address cumulative pollution and pollution hot spots. Courts will remain the only fora in which these communities can seek procedural and corrective—if not distributive and social—justice.<sup>1</sup>

Reforms to address neighborhood pollution are possible, but only if governments and citizens make a serious commitment. There are many reform possibilities, including moving quickly to implement specific regulatory programs to instill confidence in the government's resolve to address such pollution, identifying vulnerable communities, and providing for procedural and substantive protections specific to high-impact areas. This Article focuses on air pollution because of the well-documented impacts of air quality disparities and environmental justice groups' efforts to address them through litigation.

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1. See Robert Kuehn, *A Taxonomy of Environmental Justice*, 30 ENVTL. L. REP. 10681 (2000) (explaining the different conceptions of justice relevant to environmental justice: distributive, procedural, corrective, and social justice).

### I. WHAT IS AN ENVIRONMENTAL JUSTICE COMMUNITY?

In *Dreams from My Father*, President Obama describes Altgeld, one of the communities in Chicago in which he worked as a community organizer. Altgeld painfully resembles the neighborhoods our clinic attempts to protect:

The Altgeld Gardens public housing project sat at Chicago's southernmost edge . . . .

To the east, on the other side of the expressway, was the Lake Calumet landfill, the largest in the Midwest.

And to the north, directly across the street, was the Metropolitan Sanitary District's sewage treatment plant. . . .

The stench, the toxins, the empty uninhabited landscape. For close to a century, the few square miles surrounding Altgeld had taken in the offal of scores of factories, the price people had paid for their high-wage jobs. Now that the jobs were gone, and those people that could had already left, it seemed only natural to use the land as a dump.

A dump—and a place to house poor blacks.

Still, everything about the Gardens seemed in a perpetual state of disrepair. Ceilings crumbled. Pipes burst. Toilets backed up. . . . So that most children in Altgeld grew up without ever having seen a garden. Children who could see only that things were used up, and that there was a certain pleasure in speeding up the decay.<sup>2</sup>

At the clinic, we define environmental justice (“EJ”) communities as low-income communities and communities with a majority population who are people of color. While we couple this demographic description with another modifier that is typically used to describe EJ communities—populations that bear disproportionate pollution burdens and enjoy fewer environmental amenities—this

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2. BARACK OBAMA, *DREAMS FROM MY FATHER: A STORY OF RACE AND INHERITANCE* 164–66 (2004 ed.).

second modifier tends to be redundant. When cases come to us from low-income or people-of-color communities, disproportionate environmental benefits and burdens are always present. Pollution mapping and academic studies suggest that our experience is not unique.

Indeed, EJ communities are too easily found in many places.<sup>3</sup> Perhaps the definition that EJ communities and their advocates use is similar to Justice Potter Stewart's test for obscenity: "I know it when I see it."<sup>4</sup> In the San Francisco Bay Area alone, several communities are low-income, with majority people of color; these communities are burdened disproportionately by pollution and enjoy fewer environmental amenities: West Oakland; the Hunters Point Bayview community in San Francisco; Richmond; East Palo Alto; parts of San Jose and Redwood City; and communities in transition, such as Antioch and Pittsburg in Contra Costa County, which are home to many families displaced by economic development in the central part of the San Francisco Bay Area.<sup>5</sup> These Bay Area communities, in addition to being viscerally recognizable as EJ communities, are well-documented pollution hot spots. Pollution maps using

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3. For descriptions of many EJ communities and the issues they face, see Charles Lee, *Warren County's Legacy for the Quest to Eliminate Health Disparities*, 1 GOLDEN GATE U. ENVTL. L.J. 53, 59–60 (2007). See also *Miller v. City of Dallas*, No. Civ.A. 3:98-CV-2955-D, 2002 WL 230834, at \*1, \*7 (N.D. Tex. 2002) (describing the EJ community of Cadillac Heights, Texas); Emily L. Dawson, *Lessons Learned from Flint, Michigan: Managing Multiple Source Pollution in Urban Communities*, 26 WM. & MARY ENVTL. L. & POL'Y REV. 367, 379–82 (2001) (describing the EJ community of Flint, Michigan).

4. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Potter, J., concurring).

5. The Bay Area Environmental Health Collaborative's website hosts pollution maps with information on racial demographics and accumulation of pollution sources. See Bay Area Environmental Health Collaborative, Cumulative Impact Maps and Powerpoints, <http://www.baehc.org/poped.html> (last visited Dec. 2, 2009); see also MANUEL PASTOR, JAMES SAAD & RACHEL MORELLO-FROSCH, CTR. FOR JUSTICE, TOLERANCE, & CMTY., UNIV. OF CAL., SANTA CRUZ, STILL TOXIC AFTER ALL THESE YEARS: AIR QUALITY AND ENVIRONMENTAL JUSTICE IN THE SAN FRANCISCO BAY AREA 6 (2007), [http://www2.ucsc.edu/cjtc/docs/bay\\_final.pdf](http://www2.ucsc.edu/cjtc/docs/bay_final.pdf) [hereinafter PASTOR ET AL., STILL TOXIC] (utilizing such a map). The STILL TOXIC report exemplifies community-based research in which academics conduct research that communities request. This report was prepared by the University of California, Santa Cruz's Center for Justice, Tolerance & Community, for the Bay Area Environmental Health Collaborative, a community advocacy group comprised of several coalitions and about twenty environmental advocacy groups and grassroots organizations. The Environmental Law and Justice Clinic is part of this collaborative.

Geographic Information System show that race and pollution correlate uncomfortably well in those areas.<sup>6</sup>

## II. WHY DOES THE PURSUIT OF ENVIRONMENTAL JUSTICE REMAIN IMPORTANT?

Since President Clinton issued his executive order on environmental justice fifteen years ago,<sup>7</sup> government agencies have developed environmental justice policies.<sup>8</sup> Many agencies have also

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6. The Geographic Information Systems ("GIS") maps that show the relationship between race and pollution are accessible online. See Bay Area Environmental Health Collaborative Maps, <http://www.baehc.org> (follow hyperlinks to various GIS maps) (last visited Dec. 2, 2009). GIS mapping allows pictorial representations of data for particular locations and often is used as a social justice tool. See GIS/Mapping, Kirwan Inst. for the Study of Race and Ethnicity, The Ohio State Univ., <http://kirwaninstitute.org/research/gismapping/> (last visited Dec. 2, 2009) ("[R]esearchers recognize that inequality has a geographic footprint, and have pioneered the use of maps to communicate the history and presence of discriminatory and exclusionary policies that spatially segregate people."). For another example of GIS mapping, see TOTAL AIRBORNE LEAD EMISSIONS BY UNITED STATES COUNTY, NATURAL RES. DEF. COUNCIL, [http://www.nrdc.org/health/effects/lead/lead\\_emitters\\_county\\_map.pdf](http://www.nrdc.org/health/effects/lead/lead_emitters_county_map.pdf). At the Association of American Law Schools' May 2009 Annual Conference, I saw a foreclosure map of Cleveland, Ohio, most likely generated using GIS. I thought that it would be useful to overlay that map against pollution mapping to see how well they match up.

One of the limitations of GIS mapping is that it is very resource intensive to create GIS maps and make them user-friendly. Our clinic's experience is that producing GIS maps requires substantial time, first to acquire and understand the underlying data, and then to refine and reduce obvious errors in the data. GIS mapping also requires collaboration among different experts, including a graphic artist.

7. Executive Order 12898 states that to the "extent practicable and permitted by law . . . each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States." Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 16, 1994). Bradley Angel of Greenaction for Health & Environmental Justice points out that the EPA and other government agencies systematically violate their own Environmental Justice policies, Title VI of the Civil Rights Act of 1964, and the Executive Order. E-mail from Bradley Angel, Executive Director of Greenaction, to Helen Kang (Sept. 9, 2009) (on file with author).

8. For a survey of federal agency responses, see Denis Binder et al., *A Survey of Federal Agency Response to President Clinton's Executive Order 12898 on Environmental Justice*, 31 ENVTL. L. REP. 11133 (2001). States have also enacted legislation directed at promoting environmental justice. See, e.g., Antonette Benita Cordero & Carol J. Monahan, *Environmental Justice Grows Up*, ENVTL. L. NEWS, Fall 2003, at 15 (discussing California's environmental justice legislation). The South Coast Air Quality Management District was among the first government agencies to formally adopt guiding principles and initiatives to ensure environmental justice. See S. COAST AIR QUALITY MGMT. DIST., ENVIRONMENTAL JUSTICE INITIATIVES (1997), [http://www.aqmd.gov/ej/ej\\_original10.htm](http://www.aqmd.gov/ej/ej_original10.htm); S. COAST AIR QUALITY

provided funding opportunities for grassroots groups that work on environmental issues.<sup>9</sup> Some agencies have sponsored seminal studies of pollution hot spots as a result of consistent and organized demands from communities and growing health research on disproportionate exposure to pollution and cumulative risk.<sup>10</sup>

But government agencies have not pursued these environmental justice goals with a sustained effort. Thus, to date, environmental justice considerations have failed to affect environmental decision making.<sup>11</sup> Similarly, and perhaps consequentially, there does not appear to be evidence that environmental justice considerations have changed the behavior of polluters in any significant way.

Meanwhile, evidence of environmental injustice has become more compelling. This evidence shows that minority and low-income communities continue to suffer disproportionate environmental impacts, while enjoying fewer benefits.<sup>12</sup> Studies also demonstrate

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MGMT. DIST., GUIDING PRINCIPLES OF ECONOMIC JUSTICE (1997), [http://www.aqmd.gov/ej/EJ\\_guiding\\_principles.htm](http://www.aqmd.gov/ej/EJ_guiding_principles.htm).

9. For a description of the Environmental Protection Agency's ("EPA") grant program aimed at reducing community exposure to toxics, see U.S. Environmental Protection Agency, Community Action for a Renewed Environment (CARE), <http://www.epa.gov/care/> (last visited Dec. 2, 2009).

10. In 1999, the California Air Resources Board established a Neighborhood Assessment Program to evaluate cumulative air pollution on the neighborhood scale; the Bay Area Air Quality Management District launched its Community Air Risk Evaluation initiative in 2004. See KEN KLOC, ENVTL. LAW & JUSTICE CLINIC, GOLDEN GATE UNIV. SCH. OF LAW, ZONES OF INEQUITY: CUMULATIVE AIR POLLUTION AND HOT SPOTS IN THE SAN FRANCISCO BAY AREA 11, 20 (2009), [http://www.ggu.edu/school\\_of\\_law/academic\\_law\\_program/environmental\\_law/environmental\\_law\\_justice\\_clinic/attachment/Zones+of+Inequity.pdf](http://www.ggu.edu/school_of_law/academic_law_program/environmental_law/environmental_law_justice_clinic/attachment/Zones+of+Inequity.pdf).

Dr. Kloc recommends that regulators adopt a broad definition of cumulative risk, such as that adopted by the EPA Risk Assessment Forum in 2003 in its *Framework for Cumulative Risk Assessment*; he defines cumulative risk as "the combined risks from aggregate exposures to multiple agents or stressors." KLOC, *supra*, at 7 (quoting EPA RISK ASSESSMENT FORUM, FRAMEWORK FOR CUMULATIVE RISK ASSESSMENT (2003)). Aggregate exposure in turn is defined as the total exposure to a stressor by "relevant routes, pathways, and sources"; stressors may be chemical, biological, or physical agents, or activities that alter or cause the loss of a necessity, whether through direct or Adopt enforceable measures to evaluate, limit and reduce cumulative health risks. KLOC, *supra*, at 7-8 (quoting EPA RISK ASSESSMENT FORUM, FRAMEWORK FOR CUMULATIVE RISK ASSESSMENT (2003)).

11. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 05-289, EPA SHOULD DEVOTE MORE ATTENTION TO ENVIRONMENTAL JUSTICE WHEN DEVELOPING CLEAN AIR RULES 3-6 (2005) (discussing the limited attention given to environmental justice by the EPA).

12. See Clifford Rechtschaffen, *The Evidence of Environmental Injustice*, ENVTL. L. NEWS, Fall 2003, at 3 [hereinafter Rechtschaffen, *Evidence of Environmental Injustice*]; see also MICHAEL ASH ET AL., JUSTICE IN THE AIR: TRACKING TOXIC POLLUTION FROM

that race is more strongly correlated with this disparity than is any other variable, including income.<sup>13</sup> The significant disparity in benefits and burdens raises more than legal and policy questions; it raises questions about who we are as a society. These moral questions are especially pressing because environmental vulnerability is but one of the many challenges that minority and low-income communities

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AMERICA'S INDUSTRIES AND COMPANIES TO OUR STATES, CITIES, AND NEIGHBORHOODS 6–8 (2009), [http://college.usc.edu/geography/ESPE/documents/justice\\_air\\_web.pdf](http://college.usc.edu/geography/ESPE/documents/justice_air_web.pdf); PASTOR ET AL., STILL TOXIC, *supra* note 5; Jayajit Chakraborty & Marc P. Armstrong, *Using Geographic Plume Analysis to Assess Community Vulnerability to Hazardous Accidents*, 19 COMPUTERS, ENVTL. & URB. SYS. 341 (1995) (showing that minorities and low-income households are disproportionately exposed to toxic substances released in truck accidents); Robert B. Gunier et al., *Traffic Density in California: Socioeconomic and Ethnic Differences among Potentially Exposed Children*, 13 J. EXPOSURE ANALYSIS & ENVTL. EPIDEMIOLOGY 240–46 (2003) (noting that in California, the proportion of children of color living on blocks with high traffic density is inversely related to median family income, and that children of color are three times more likely to live in high-traffic areas than are white children); Lee, *supra* note 3, at 60–66; Clifford Rechtschaffen, *Strategies for Implementing the Environmental Justice Vision*, 1 GOLDEN GATE U. ENVTL. L.J. 321, 323 (2007) [hereinafter Rechtschaffen, *Strategies*].

13. Rechtschaffen, *Evidence of Environmental Injustice*, *supra* note 12, at 5–7; see also PASTOR ET AL., STILL TOXIC, *supra* note 5, at 8. The authors of the STILL TOXIC report explain the evidence this way:

The land use perspective suggests that hazards are located where complementary land uses, such as industrial facilities or traffic arteries, are clustered; therefore, any correlation of environmental “bads” with race is viewed as an unfortunate byproduct of economic geography. The income view sees the role of property values as key: more hazardous land uses tend to be where income levels and property values are low, and co-location of the poor and toxics simply reflects the normal workings of the market system. In both perspectives, while health impacts could remain significant, environmental disparities are basically benign in intent . . . .

The power perspective suggests that hazard location and poor air quality depends on a community's ability—or inability—to resist placement of undesirable land uses in their neighborhood. In this view, discriminatory practices and/or power differentials are largely responsible for the patterns of environmental disparity that are frequently observed. And since race and power are so highly intertwined in our society, patterns of difference by race are suggestive of patterns of difference by power.

In the real world, all three of these factors—land use, income and power— are inextricably linked. Communities with less political voice may be less able to contest incompatible land uses, and income is not just a reflection of a market system but also a marker of influence in the decision-making process. Yet, if race still matters once land use and income levels are accounted for, this suggests that differential access to political power and policy voice may be important to consider and address in the regulatory process.

PASTOR ET AL., STILL TOXIC, *supra* note 5, at 3.

face.<sup>14</sup> Communities that are burdened with pollution and have less access to environmental benefits also suffer from crime, violence, chronic stress,<sup>15</sup> lack of access to open space,<sup>16</sup> minimal economic opportunities, inadequate public schools, and insufficient access to healthy foods.<sup>17</sup>

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14. See Unnatural Causes . . . Is Inequality Making Us Sick?, Backgrounders from the Unnatural Causes Health Equity Database (2008), <http://www.unnaturalcauses.org/assets/uploads/file/primers.pdf> [hereinafter Backgrounders]. In the United States, where you live is a good predictor of health. *Id.* at 11. You could even say that where you live can kill you:

Studies have shown, for example, that living in a disadvantaged neighborhood leads to a 50–80% increase in risk for heart disease—the number one killer in America. One reason is chronic stress. Worrying about violence, lousy schools, and unpaid bills; living in substandard housing or a polluted environment; not having good access to fresh food, reliable transportation, or safe public spaces—all of these have a negative, even toxic effect on health.

Unnatural Causes . . . Is Inequality Making Us Sick?: Place Matters (California Newsreel 2008) (episode transcript available at [http://www.unnaturalcauses.org/assets/uploads/file/UC\\_Description\\_All.pdf](http://www.unnaturalcauses.org/assets/uploads/file/UC_Description_All.pdf)).

15. Researchers now have substantial evidence that chronic stress early in life correlates negatively to a human being's ability to cope later in life by affecting brain development. See Backgrounders, *supra* note 14, at 3.

16. See generally CHRISTOPHER H. FOREMAN, JR., THE PROMISE AND PERIL OF ENVIRONMENTAL JUSTICE 132–33 (1998). For recent studies on the distribution of benefits, see PAUL STANTON KIBEL, GOLDEN GATE UNIV. SCH. OF LAW CITY PARKS PROJECT, ACCESS TO PARKLAND: ENVIRONMENTAL JUSTICE AT EAST BAY PARKS (2007) (observing that the largest park system in the San Francisco Bay Area has most of its holdings in hillside areas, near affluent, white communities); see also Robert Garcia & Aubrey White, *Warren County's Legacy for Healthy Parks, Schools & Urban Communities: Park Victories from the Cornfield to El Congreso and Beyond*, 1 GOLDEN GATE U. ENVTL. L.J. 127, 129–31 (2007). For an analysis linking the decline of Klamath River Salmon due to dam and water mismanagement to rates of heart disease and diabetes in Karuk tribal members, see KARI MARIE NORGAARD, THE EFFECTS OF ALTERED DIET ON THE HEALTH OF THE KARUK PEOPLE: A PRELIMINARY REPORT 26–31 (2004) (on file with author). At the same time that the dams deprived the Karuk and other tribes, including the Yurok, of their connection to the river, the power from the dams did not serve the tribes:

It is a cruel irony that the hydropower facilities on the Klamath River do not provide power to most of the Yurok Reservation downstream of the dams. Nearly 80% of the Yurok Reservation is without a connection to the electric grid. Residents rely upon modest solar panels and portable generators for power; and otherwise, they live much as they did in the 19<sup>th</sup> century. The public elementary school located there relies upon noisy, polluting diesel generators for power.

Scott W. Williams, *The Boundaries of Winters—When the Courts Alone Are Not Enough to Protect Indian Reserved Rights*, in THE FUTURE OF RESERVED WATER RIGHTS (Barbara Cosens & Judith Royster eds.) (forthcoming 2009) (manuscript at 20, n.12, on file with author).

17. See generally Dawson, *supra* note 3, at 368–71 (describing common characteristics of EJ communities).



Given these disparities, it is even more important to raise environmental justice as a societal concern, not simply as an issue for vulnerable communities.<sup>18</sup> Just as civil rights became a quest for all Americans, so too should environmental justice. How the most vulnerable segment of our society lives ultimately reflects on all of us.

### III. WHICH CASES DO ENVIRONMENTAL JUSTICE COMMUNITIES LITIGATE?

Getting to Professor Spinak's question, why do our clients end up in court? Short of a comprehensive or systematic study of EJ litigation, I offer an impressionistic answer based on my experiences in EJ litigation and collaborations with EJ groups, as well as on cases discussed in the media.

Despite the difficulties that judicial enforcement poses for citizens, which I discuss later in this Article, EJ advocates continue to have a sizeable litigation docket against polluters and regulators. This robust docket represents only a small fraction of meritorious cases: many are turned away because the few firms that represent EJ groups

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18. The EPA's current Administrator, Lisa Jackson, recognizes the societal costs of pollution on the neighborhood level:

Environmental justice can also be a "force multiplier" for other issues.

The people that get sick at two and three times the average rate because of pollution in their neighborhoods are the same people that predominantly get their health care in emergency rooms. That drives up costs system-wide, and hurts both the local and the nationwide economy.

In our schools, when children are repeatedly missing class with asthma or allergies, it affects educational outcomes and long-term economic potential. . . .

Or in the neighborhood, visible environmental degradation can compound problems. Businesses won't invest in that community and economic possibilities are limited. As a result crime is higher, violence is higher—often times drugs use is rampant—and the vicious cycle continues.

Lisa P. Jackson, Administrator, U.S. EPA, Remarks to the National Environmental Justice Advisory Council (July 21, 2009) (transcript available at <http://yosemite.epa.gov/opa/admpress.nsf/8d49f7ad4bbcf4ef852573590040b7f6/313ec9a2bc80d677852575fa007b3c42!OpenDocument>). In addition to the cumulative effects of socioeconomic vulnerabilities and pollution, socioeconomic vulnerabilities are thought to increase susceptibility to pollution. *See Lee, supra* note 3, at 61–64.

have limited litigation capacity. Most EJ litigation falls into one of several identifiable categories.

*A. Cases Challenging Siting of New Sources of Pollution or  
Expansion of Existing Sources*

Archetypal EJ litigation involves fighting off new sources of pollution. Indeed, many view the struggle of the predominantly African-American community in Warren County, North Carolina, to fight off a toxic dump as the case that spawned the environmental justice movement.<sup>19</sup> The struggle that began in Warren County continues in communities throughout the nation. In most of these cases, residents are motivated by an overwhelming sense of fear and worry for their own health and for the health of their families and communities.<sup>20</sup>

Recent cases from California illustrate this type of litigation. In the San Francisco Bay Area, when a Chevron refinery proposed to expand, several EJ groups sued the City of Richmond, which had conducted an environmental review of the project under California's equivalent of the National Environmental Policy Act. The EJ groups were successful, and the trial court set aside the project approval for, among other reasons, the city's failure to describe whether the project will process heavier crude slate than the refinery currently is processing and improper deferral of greenhouse gas mitigation measures.<sup>21</sup>

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19. See, e.g., Dollie Burwell & Luke W. Cole, *Environmental Justice Comes Full Circle: Warren County Before and After* 1 GOLDEN GATE U. ENVTL. L.J. 9, 10 (2007).

20. These feelings are common in people living near pollution that is "involuntarily imposed, or regarded as beyond individual control." Theresa A. Satterfield, *Risk, Remediation and the Stigma of a Technological Accident in an African-American Community*, 7 HUM. ECOLOGY REV. 1, 2 (2000); see also LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT 80-81 (2001) (describing the devastation and anger felt by community members and organizer Lupe Martinez, in reaction to incidents of death and disease in Buttonwillow, California, a host to a toxic dump). The standing declarations in the clinic's cases against repeat violators reflect similar emotions of fear, anger, and worry.

21. *Cmtys. for a Better Env't v. City of Richmond*, No. N08-1429 (Cal. Super. Ct, June 4, 2009) (unreported minute order).

The City of Richmond has been described as a “long-neglected urban neighborhood” in which

Segregation and lack of access to jobs, nutritious foods, and safe, affordable housing have been harmful to the health of long-time African American residents . . . .

. . . Richmond has higher than average rates of asthma hospitalization, higher rates of diabetes, and lower life expectancy. . . . Tobacco, liquor and fast food are everywhere, but fresh produce isn’t. Quality affordable housing is hard to find, and so are safe places to play and exercise.<sup>22</sup>

A city of about 100,000 residents, 80 percent of whom are people of color, Richmond is home to the Chevron refinery, as well as General Chemical Corporation, a sanitary landfill, and a Superfund site resulting from a former DDT formulation plant.<sup>23</sup>

In Bayview Hunters-Point, also located in the San Francisco Bay Area, a local community group successfully stopped the City of San Francisco from exempting from environmental review a major expansion of a rendering plant into a plant that would produce ten million gallons of biodiesel annually.<sup>24</sup> As described earlier, the Bayview Hunters-Point community is a recognized EJ community.

In Southern California, an EJ group, in collaboration with a national environmental group, successfully stopped eleven power plant projects that were proposed for the Los Angeles area by prohibiting the regional air quality district from dispensing emissions

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22. Unnatural Causes . . . Is Inequality Making Us Sick?: Place Matters, *supra* note 14.

23. See U.S. EPA, TOXIC RELEASE INVENTORY: 2007 CALIFORNIA REPORT, available at <http://www.epa.gov/region/toxic/tri/report/07/CalStateReport-2007.pdf>; Region 9: Superfund, United Heckathorn Co., <http://yosemite.epa.gov/r9/sfund/r9sfdocw.nsf/vwsoalphabetic/United+Heckathorn+Co.?OpenDocument> (last visited Dec. 2, 2009) (EPA information about the United Heckathorn Superfund site in Richmond). According to the most recent report available, the Chevron refinery in Richmond was one of the top ten facilities in California for on-site and off-site releases of chemicals reported on the Toxics Release Inventory forms. U.S. EPA, TOXICS RELEASE INVENTORY: 2007 CALIFORNIA REPORT, *supra*.

24. See Robert Selna, *Environmentalists Delay S.F. Biodiesel Plans*, S.F. CHRON., April 3, 2009, at B-1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/04/02/BAQ516RSCV.DTL>.

credits to these plants that originally had been reserved for essential public services such as hospitals and schools.<sup>25</sup>

### *B. Cases Challenging Rulemaking*

Typically, EJ groups do not directly become involved in national rulemaking.<sup>26</sup> Rather, EJ groups bring cases against regulators that involve environmental laws with particularized local or regional impacts. For example, a coalition of former residents of Herculaneum, Missouri, who had been exposed to high levels of airborne lead filed a lawsuit to compel review of the National Ambient Air Quality Standards for lead, which had not been changed in three decades. The lawsuit resulted in more stringent national standards.<sup>27</sup> Similarly, to ensure that pollution is minimized to the greatest extent allowed by law, EJ groups have challenged State Implementation Plans that are designed to achieve the National Ambient Air Quality Standards.<sup>28</sup> Some EJ groups have filed suits

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25. See SoCal Power Plants on Hold, <http://latimesblogs.latimes.com/greenspace/2008/07/socal-power-pla.html> (July 29, 2008, 18:59 PST).

26. I do not believe that the EJ groups' lack of participation in national rulemaking indicates a lack of interest. For example, a local community group in San Francisco shared common interests with large environmental groups that challenged EPA's Phase II rules governing cooling water intake structures from large, existing power plants. The local community group, Bayview Hunters Point Community Advocates, was interested in the rule because it was concerned with harm to marine organisms: many of the group's constituents fish in the San Francisco Bay for subsistence. But the group did not have the resources to participate in the litigation, and the large environmental groups provided excellent representation.

An exception to the general trend of EJ groups' lack of participation on national rulemaking challenges, however, may be in the greenhouse gases arena. Because of expected impacts on minority and low-income neighborhoods, some EJ groups have been actively involved in litigation involving greenhouse gases. See, e.g., *Ass'n of Irrigated Residents v. U.S. Env'tl. Protection Agency*, 423 F.3d 989 (9th Cir. 2005). It is not surprising to see EJ groups litigating in this area because there is considerable disagreement between EJ groups and traditional environmental groups on how greenhouse gases should be regulated, mostly notably as to cap and trade. EJ groups oppose cap and trade. See, e.g., CLIFFORD RECHTSCHAFFEN, EILEEN GAUNA & CATHERINE A. O'NEILL, ENVIRONMENTAL JUSTICE: LAW, POLICY AND REGULATION 424–25 (2d ed. 2009) [hereinafter RECHTSCHAFFEN ET AL., ENVIRONMENTAL JUSTICE LAW] (quoting Alice Kaswan, *Environmental Justice and Domestic Climate Change Policy*, 38 ENVTL. L. REP. NEWS & ANALYSIS 10287 (2008)).

27. Felicity Barringer, *E.P.A. Toughens Standard on Lead Emissions; Change Is the First in 3 Decades*, N.Y. TIMES, Oct. 16, 2008, at 15, available at <http://www.nytimes.com/2008/10/17/washington/17epa.html>.

28. Docket information from law school clinics that represent EJ groups in California refer to such cases. See Golden Gate University Environmental Law and Justice Clinic,

challenging specific air pollution regulation promulgated by regional air quality agencies, such as regulations applicable to open-air composting of sewage sludge.<sup>29</sup>

Recent EJ lawsuits also include litigation against regulators for failing to take into consideration the particularized impacts of climate change that EJ communities are expected to suffer, including exacerbation of existing air pollution problems.<sup>30</sup>

### *C. Cases against Pollution Sources*

Another category of cases EJ advocates typically litigate exhibits what Professors Eileen Gauna, Catherine O'Neill, and Clifford and Rechtschaffen call the "straw that breaks the camel's back" phenomenon.<sup>31</sup> These cases emerge when burdened communities say that they "cannot take it anymore" upon discovering yet another assault on their environment. As Lucy Ramos, president of Mothers of East Los Angeles, proclaimed in the context of a power plant her community is fighting: "Our community is not a dumping ground."<sup>32</sup>

While the cases challenging new or expanding pollution sources fall into this "straw that breaks the camel's back" category, cases

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[http://www.ggu.edu/school\\_of\\_law/academic\\_law\\_programs/jd\\_program/environmental\\_law/environmental\\_law\\_justice\\_clinic/cases\\_and\\_clients](http://www.ggu.edu/school_of_law/academic_law_programs/jd_program/environmental_law/environmental_law_justice_clinic/cases_and_clients) (last visited Dec. 2, 2009); Tulane Law School Environmental Law Clinic, <http://www.tulane.edu/~telc/assets/pdfs/lawsuits.pdf> (last visited Dec. 2, 2009); Washington University School of Law, Interdisciplinary Environmental Clinic News, <http://law.wustl.edu/interv/index.asp?id=431> (last visited Dec. 2, 2009).

29. See, e.g., *Helphinkley.org v. Mojave Desert Air Quality Mgmt. Dist.*, No. CIVBS 800976 (Cal. Super. Ct. Aug. 21, 2009) (challenging a rule governing composting facilities that process green waste and sewage sludge). The trial court determined that the air district violated the California Environmental Quality Act by failing to conduct environmental review of the composting rule. *Id.* at 6-7. The court determined that, because nearby air districts had more stringent rulings governing composting, including requiring an enclosure with an aeration system, there could be adverse environmental impacts from promulgating a less stringent rule, which could encourage additional siting of composting facilities in the region. *Id.* at 6.

30. See *Ass'n of Irrigated Residents*, 423 F.3d at 995-97. Plaintiffs in these types of cases include local and regional EJ groups such as California Communities Against Toxics, Coalition for a Safe Environment and West County Toxics Coalition. See, e.g., Complaint at 1, *Ass'n of Irrigated Residents v. Cal. Air Res. Bd.*, No. CPF-09-509 562 (Cal. Super. Ct. June 10, 2009).

31. See, e.g., Eileen Gauna, Catherine A. O'Neill & Clifford Rechtschaffen, *Environmental Justice 7* (Ctr. for Progressive Regulation, White Paper No. 505, 2005).

32. Judge's Ruling Throws Southern California Power Plants into Disarray, <http://cbenewsarchives.blogspot.com/2009/01/judges-ruling-throws-southern.html> (Jan. 14, 2009, 15:14 PST).

against existing pollution sources fit the category as well. A local EJ group's case against a San Francisco power plant illustrates this type of litigation. In the midst of a claimed energy crisis in California in 2001, the regional air quality district, the EPA, and Mirant Potrero (the operator of the power plant) entered into a Compliance and Mitigation Agreement, which allowed Mirant to exceed the permitted number of hours that its peaker plants could operate in a given year; in exchange, Mirant paid a penalty.<sup>33</sup> The purpose of the agreement was to increase energy production by using peaker plants that had been designed for use only during periods of peak energy demand. The problem, from the community's perspective, was that these peaker plants burned diesel fuel, the combustion of which results in dirtier emissions than from natural gas.

When the government's Compliance and Mitigation Agreement with the power plant became public in 2001, there were two power plants in the Bayview Hunters Point neighborhood, although one of the plants in the neighborhood has since closed through persistent and organized efforts of a coalition of community groups working together with the City of San Francisco. In addition to being home to the two power plants, the neighborhood also hosted a large sewage treatment plant and a number of maritime industries,<sup>34</sup> including a fat-rendering plant and cement and aggregate plants. When the leaders of the Bayview Hunters Point Community Advocates group found out about the agreement, they were enraged that the

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33. Compliance and Mitigation Agreement between Mirant Potrero, LLC and the Bay Area Air Quality Mgmt. Dist. (Mar. 29, 2001) (on file with the Environmental Law and Justice Clinic). The regulators were not settling past violations and requiring a plan for the power plant to come into compliance, in effect assisting the company's plan for future intentional violations. In a similar fashion, the same air district recently entered into an agreement with another power plant, forbearing from issuing a notice of violation or filing an enforcement action, even though the power plant did not have a valid permit to construct or operate its 530-megawatt plant. See Compliance Agreement between Pacific Gas & Electric Co. and Bay Area Air Quality Mgmt. Dist. (May 1, 2009) (on file with the Environmental Law and Justice Clinic); Letter from Deborah Jordan, Director, Air Division, EPA Region IX, to Randy S. Livingston, Vice President, Pacific Gas and Electric Co. (Aug. 13, 2009) (on file with the clinic) (accompanying EPA's notice of violation to Pacific Gas & Electric, which alleges that the company did not have a valid pre-construction permit under the Clean Air Act).

34. Leslie Fulbright, *Big Victory for Hunters Point Activists*, S.F. CHRON., May 15, 2006, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/05/15/MNGE4IRVT91.DTL>.

government agencies charged with protecting their health had allowed future violations of the power plant's air permit. They sued both the air district and the power plant under the Clean Air Act's citizen suit provision,<sup>35</sup> and successfully stopped the power plant from continuing the violation.<sup>36</sup>

The same local group also successfully filed litigation against the city's transportation agency, which runs the municipal bus system, when it reneged on its obligation under an ordinance to retire the oldest and dirtiest diesel buses, which resulted in excess diesel emissions.<sup>37</sup>

Clients also commonly ask the clinic to file claims against pollution sources that cause a nuisance. These suits typically allege that facilities emit intense and persistent odors or contaminated dust. Our clinic has received requests to investigate or file lawsuits against a yeast manufacturing company, a Kraft pulp mill, a steel foundry, and a large construction project disturbing naturally occurring asbestos-laden rocks. The clients in these cases describe odors or dust that interrupt their lives and prevent them from fully enjoying their homes, schools, and neighborhoods. The odors and dust deter them from leaving windows open, sitting in their backyards, gardening, walking, biking, and relaxing after work. Like residents living near other sources of pollution, residents who live near a nuisance are burdened with persistent worries about their families' and their own health.<sup>38</sup> Unfortunately, nuisances are not well regulated by state or federal pollution control laws.<sup>39</sup>

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35. The citizen suit provision of the Clean Air Act is codified at 42 U.S.C. § 7604 (2006).

36. Bayview Hunters Point Cmty. Advocates v. Mirant Potrero, LLC, No. C-01-2348-PJH (N.D. Cal.) (consent decree entered Oct. 30, 2001).

37. Bayview Hunters Point Cmty. Advocates v. S.F. Mun. Transp. Agency, No. CPF-07-507960 (Cal. Super. Ct., filed Dec. 28, 2007); Bayview Hunters Point Cmty. Advocates v. S.F. Mun. Transp. Agency, Settlement Agreement and Release (July 15, 2008).

38. See, e.g., Satterfield, *supra* note 20, at 3–6 (studying the emotional impact of a toxic dust nuisance).

39. See NOGA MORAG-LEVINE, CHASING THE WIND: REGULATING AIR POLLUTION IN THE COMMON LAW STATE 24–26 (2003).

#### *D. The Common Thread in EJ Litigation*

This informal sampling of EJ litigation shows that litigation results from the EJ groups' decision that the level of pollution in their neighborhood is "too much," or that the pollution significantly interferes with their quality of life.<sup>40</sup> EJ lawsuits thus address governments' failures to enforce regulations that would improve the environment; the siting or expansion of additional pollution sources; and violations of permit limits by either large sources that dominate the "pollution-scape" of the neighborhood or by sources that cause a nuisance.<sup>41</sup>

EJ clients pursue litigation because it may be the only way to get a seat at the table with the regulators and sources of pollution. Litigation is uniquely successful in motivating pollution sources to

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40. There are also EJ groups, including Native American tribes, that file litigation for benefits denied. *See, e.g.*, *Darensburg v. Metro. Transp. Comm'n*, 611 F. Supp. 2d 994 (N.D. Cal. 2009); Williams, *supra* note 16. They are an important species of EJ litigation but are beyond the scope of this Article.

41. The conclusion that that EJ litigation results from neighborhood pollution is unsurprising because EJ groups typically are formed to address that particular problem. For example, Bayview Hunters Point Community Advocates was formed "to ensure environmental justice, to promote economic alternatives that contribute to the development of environmentally safe neighborhoods and livelihoods and to secure the political, economic, cultural and social liberation of this community." *See* Complaint at 4, *Bayview Hunters Point Cmty. Advocates v. Mirant Potrero, LLC*, No. C-01-2348-PJH (N.D. Cal. June 15, 2001). Communities for a Better Environment states that its mission is "to achieve environmental health and justice by building grassroots power in and with communities of color and working-class communities." Communities for a Better Environment Mission, <http://www.cbecal.org/about/mission.html> (last visited Dec. 2, 2009). The mission of national environmental groups, on the other hand, is to improve the environment in general. *See, e.g.*, Natural Resource Defense Council (NRDC), <http://www.nrdc.org/about/mission.asp> (last visited Dec. 2, 2009) (NRDC's mission is "to safeguard the Earth: its people, its plants and animals and the natural systems on which all life depends"). It would also be safe to say that national environmental groups have followed the public interest litigation model, focusing on "policy-oriented cases, where a decision will affect large numbers of people or advance a major law reform objective." GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 5 n.3 (1991) (quoting a 1976 Council for Public Interest Law study). When large environmental groups work on neighborhood pollution as an issue apart from a campaign that they might have, they appear to work in collaboration with community groups. For example, NRDC assisted a group in a community which is 98 percent people of color, sue a foam manufacturer in South Los Angeles, after regulators failed to enforce longstanding violations of air quality laws. *See* MICHAEL E. WALL, MIRIAM ROTKIN-ELLMAN & GINA SOLOMON, *NATURAL RES. DEFENSE COUNCIL, AN UNEVEN SHIELD: THE RECORD OF ENFORCEMENT AND VIOLATIONS UNDER CALIFORNIA'S ENVIRONMENTAL, HEALTH, AND WORKPLACE SAFETY LAWS* 24 (2008).



negotiate with community groups. Lawsuits force corporate decision makers to consider the merits and practicalities of their position at every stage of the case—from answering the complaint, to deciding whether to file motions to dismiss or for summary judgment, and eventually to devising positions for mandatory settlement conferences. The same is true when the lawsuit is filed against a regulator. Lawsuits force regulators to retract decisions that are without basis. In addition, where judicial decisions are necessary for statutory or regulatory interpretations, litigation is the only available recourse.

#### IV. IS EJ LITIGATION THE BEST STRATEGY FOR SOLVING NEIGHBORHOOD POLLUTION PROBLEMS?

Before I consider whether litigation is the best strategy for solving neighborhood pollution problems, I must first emphasize that I do not question EJ groups' place in the court system. EJ advocates undoubtedly agree that citizens' ability to enforce laws is a positive jurisprudential development, and we passionately decry decisions that erode our access to the courts. We do so for good reason. Without private enforcement, federal environmental statutes might merely be laws on the books rather than effective cleanup or pollution prevention tools. Without access to courts, our clients' communities undoubtedly would have dirtier air, water, and soil. Without the ability to go to court, our clinic's clients would not have any legal recourse against polluters who exceed permit limits without censure—and sometimes with explicit permission—from the very regulators who are tasked with enforcement. The clients would still have attempted political and possibly legislative fixes, but one important tool—judicial enforcement—would be missing from their arsenal.

It is still useful, however, to examine whether litigation necessarily is the best strategy for solving neighborhood pollution problems. I argue that litigation is insufficient to address cumulative pollution or nuisance sources because, in addition to being resource intensive and difficult to pursue, it does not have the potential to cure the root cause of the problem of cumulative pollution. In addition, while litigation may be successful in addressing particular nuisance

sources, they tend to cause a nuisance wherever they operate, which suggests that broader national regulation, rather than individual litigation, is necessary to address the problems that they create.

*A. Problems Inherent in Private Enforcement and EJ Litigation*

As Professor Spinak notes in the context of family court, courts and indigent clients will always have few resources, and courts are not always the best fora for problem solving. EJ advocates agree.

First, private environmental enforcement presents many challenges. Judicial fora are not often favorable to our clients because court cases require extensive investment of both time and money. Environmental plaintiffs must secure funds to hire experts and be ready to pay other costs of litigation. Once in court, there are other obstacles; for example, a union may seek to intervene on behalf of the defendant that you have sued, or the defendant may claim that it has a settlement that is imminent with the government.<sup>42</sup> Legislation enacted after a litigation victory may upset the result the plaintiffs achieve in litigation. And, court cases can take a long time.

Moreover, even when it is possible to prove that a polluter is violating its permit limits, courts rarely shut down facilities. It is often incomprehensible to lay clients that a facility whose pollution control equipment is insufficient to comply with the law nonetheless will be allowed to operate. One's driver's license may be revoked for driving under the influence, but not so with air pollution permits. Additionally, litigation outcomes are never certain. Cases involving technical determinations pose different and additional challenges. For example, few engineers, air quality modelers, and health experts are available to community groups, and Clean Air Act cases may require one or more of these experts.<sup>43</sup>

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42. In one case, even though the defendant asked the court on April 11, 2006, to stay discovery and set a later trial date because it was discussing settlement with the U.S. EPA, the consent decree between the government and the defendant was not lodged until October 2, 2007. Joint Case Management Statement and Proposed Case Management Order at 10, *Californians for Alternatives to Toxics v. Evergreen Pulp, Inc.*, No. CIV 06-00002 (N.D. Cal. Apr. 11, 2006); *Californians for Alternatives to Toxics v. Evergreen Pulp, Inc.*, No. CIV 06-00002 (N.D. Cal.) (consent decree entered Oct. 2, 2007).

43. For a discussion of the practical limitations of private enforcement, see generally Eileen Gauna, *Federal Enforcement of Citizen Provisions: Obstacles and Incentives on the*

Statutory environmental cases also present narrative challenges—environmental stories are not easy to tell, and in some instances they encounter uncomprehending audiences. For example, in a case involving a permit violation, the statutorily created proof structure enables enforcers to move for summary judgment on liability by presenting evidence that the defendant has a permit limit and, according to the defendant’s own information, has exceeded the permit limit. That narrative reflects the evidence, and yet it lacks emotional appeal. This narrative challenge exists not only for environmental justice advocates, but also for government enforcers and large environmental groups that act as citizen enforcers.

Sometimes the narrative is more complicated. The Bayview Hunters Point compliance and mitigation agreement case referred to earlier illustrates the complex narrative challenges that environmental justice advocates face. In that case, the two agencies charged with enforcing the Clean Air Act, the regional air district and the EPA, documented their decision not to enforce permit violations in a Compliance and Mitigation Agreement, in which the regulators explicitly allowed future violations of the power plant’s permit limits.<sup>44</sup> When government agencies actively condone violations, either through variance agreements or so-called compliance agreements, it presents a particularly difficult narrative challenge for citizen enforcers.<sup>45</sup>

Likewise, regulators’ election of remedies can present narrative challenges. Sometimes, regulators do not push for the remedy that the community believes is appropriate and just. In one Environmental Law and Justice Clinic case, for example, the community groups believed, based on expert reports and the company’s past compliance history, that a paper mill should install a specific piece of pollution control equipment to cure recurring permit violations for particulate

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*Road to Environmental Justice*, 22 *ECOLOGY L.Q.* 1 (1995), and Jim Hecker, *The Difficulty of Citizen Enforcement of the Clean Air Act*, 10 *WIDENER L. REV.* 303 (2004).

44. See Compliance and Mitigation Agreement between Mirant Potrero, LLC and the Bay Area Air Quality Mgmt. Dist. (Mar. 29, 2001) (on file with the Environmental Law and Justice Clinic).

45. Unfortunately, such agreements are not uncommon for the air districts in California, whose hearing boards have authority to grant variances. This authority has a statutory basis. See CAL. HEALTH & SAFETY CODE §§ 42350–42364 (2006).

matter. This equipment was more expensive to install and operate than that which the EPA required. In that case, the EPA was only willing to push for less expensive retrofits because the agency expected those changes to resolve the Clean Air Act violations. While the citizens ultimately were able to obtain the more stringent pollution controls in settlement, the difference in the positions of the EPA and the citizens created a challenge in the case.

These challenges exist because, where governments' positions are inconsonant with those of citizens, courts tend to view governments as the primary enforcers of environmental laws and regulations, despite the important role that Congress contemplated for citizens.<sup>46</sup> Thus, citizens are adversaries not only to polluters, but also to government. While some courts view citizens in the role in which Congress envisioned them when it enacted citizens' provisions into our national environmental laws, others view citizens as interfering with the sovereign's prosecutorial or environmental decision making.

In addition to these challenges, many of which are also applicable to environmental litigation generally (and not just to EJ litigation), EJ advocates have pointed out that litigation can have the effect of disempowering communities because lawyers, not community members themselves, lead the representation.<sup>47</sup>

#### *B. EJ Litigation's Potential to Get at the Root Cause of Such Litigation*

Despite the many difficulties inherent in private enforcement by EJ groups, a substantial number of these groups end up in court to enforce environmental laws. The existence of this active docket, however, does not speak to its ability to resolve the underlying problem of cumulative pollution or nuisance sources. One way to test the efficacy of EJ litigation is to ask the three questions that activist-scholar Luke Cole used in his advocacy, which is rooted in the community empowerment model: Will the strategy educate people, including clients, policymakers, decision makers, and the public?

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46. See Robin Kundis Craig, *Should There Be a Constitutional Right to a Clean and Healthy Environment?*, 34 ENVTL. L. REP. 11013, 11014-17 (2004).

47. See, e.g., RECHTSCHAFFEN ET AL., ENVIRONMENTAL JUSTICE, *supra* note 26, at 433.

Will the advocacy build a movement? Does the strategy address the cause rather than the symptoms of a problem?<sup>48</sup>

1. Will Litigation Educate People about Neighborhood Pollution?

Litigation probably will not educate people about cumulative pollution. EJ groups who bring the litigation already are acutely aware of the general problem, whether they articulate it as a problem of cumulative pollution or, as Lucy Ramos does, as “enough is enough.”<sup>49</sup> Indeed, the focus on the need to address cumulative pollution from the point of view of the receptor, the community that breathes the pollution and, more broadly, is exposed to the soil and drinks polluted water or eats contaminated fish, is among the most important contributions of the environmental justice movement to environmental regulation.<sup>50</sup> That is, “straw on the camel’s back” litigation comes precisely from what the community already knows to be multiple assaults on its system from the environment.<sup>51</sup> The public at large probably already has heard groups complain that they have “had enough” of their share of pollution.

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48. Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 *ECOLOGY L.Q.* 619, 668 (1992).

49. See *supra* note 32 and accompanying text.

50. To be sure, the Clean Air Act sets caps on cumulative air pollution in the sense that it requires the EPA Administrator to publish National Ambient Air Quality Standards for each criteria pollutant. 42 U.S.C. § 7409 (2006). But these caps are specific for each criteria pollutant and are not set at a neighborhood level. In addition, the Prevention of Significant Deterioration provisions of the Act require proposed sources in attainment areas to demonstrate the impact of the emissions on air quality. See 42 U.S.C. §§ 7470–7492. But again, the relevant geographical area is the air quality region, which can be quite large—at times the entire state. In addition, the analysis of impacts is performed one pollutant at a time. Human beings obviously do not breathe one pollutant at a time. For an excellent analysis of how existing statutory and regulatory schemes do not address cumulative pollution, see Annise Katherine Maguire, Note, *Permitting under the Clean Air Act: How Current Standards Impose Obstacles to Achieving Environmental Justice*, 14 *MICH. J. RACE & L.* 255 (2009). Maguire’s Note points out that:

[The Toxic Air Contaminants] Summary [in Marathon’s permit application] identifies ninety-one different pollutants that will be emitted, including many chemicals known to have acute, and often carcinogenic and/or chronic effects . . . However, because Marathon’s application states that all ninety-one chemicals individually satisfy the health-based screening levels, Marathon need not undertake any additional analysis.

*Id.* at 274.

51. See Gauna et al., *supra* note 31, at 7.

Policymakers and decision makers are unlikely to be educated by litigation. When such parties are sued about particular rulemaking—say under the National Ambient Air Quality Standards that deal with lead, which I discussed earlier<sup>52</sup>—the pleadings in the lawsuit are unlikely to raise cumulative pollution as an issue because they tend to be narrowly framed around the statutory violation. “[F]raming issues in legally sounds ways robs them of ‘political and purposive appeal . . .’ [T]he technical nature of legal arguments can denude issues of emotional, widespread appeal.”<sup>53</sup> Even if litigation can educate people about cumulative pollution, it is an oblique way to do so.

As to neighborhood nuisances, litigation certainly will generate press about the particular source of the nuisance and thus educate members of the public who otherwise had not known about the problem, but media attention generally does not focus on the source for long. In addition, long before there is litigation about a nuisance source, regulators are likely to know about the source through community complaints of odor or dust; litigation therefore does not necessarily add any educational value.<sup>54</sup>

## 2. Will Litigation Build a Movement?

In my experience, litigation about a new or expanding source or an environmental bad actor in the neighborhood rarely builds a movement. Litigation may result from a movement to clean up the neighborhood, but not the other way around. The potential for movement building in a suit against a regulator is even less bright. Much of the action occurs in the lawyers’ offices, not in the streets or

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52. See *supra* notes 27 and 28 and accompanying text.

53. ROSENBERG, *supra* note 41, at 121 (quoting JOEL F. HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE* (1978)).

54. Surrounding the period when a Clean Air Act enforcement action was filed against the nation’s third largest foundry in *Communities for a Better Environment v. Pacific Steel Co.*, community members made 549 odor complaints in a seven month period to the regional air district. Memorandum of Points and Authorities in Support of Plaintiff CBE’s Motion for Preliminary Injunction, *Cmtys. for a Better Env’t v. Pacific Steel Casting Co.*, No. C 06 4184 BZ, 2006 WL 2703351 (N.D. Cal., filed Aug. 16, 2006); see also Website of Councilmember Linda Maio, City of Berkeley, <http://www.ci.berkeley.ca.us/ContentDisplay.aspx?id=37072> (last visited Dec. 2, 2009). The foundry’s odor problem was well known to the air district, which had issued an abatement order in 1983. See MORAG-LEVINE, *supra* note 39, at 159–60.

community halls.<sup>55</sup> “[L]egal tactics not only absorb scarce resources that could be used for popular mobilization . . . [but also] make it difficult to develop broadly based, multiissue grassroots associations of sustained citizen allegiance.”<sup>56</sup>

### 3. Will Litigation at Least Address the Cause of the Problem and Not Just the Symptoms?

Litigation does have the potential to offer case-specific solutions to additional pollution or wrongheaded regulations that EJ groups are attempting to fight. This is the primary reason to bring EJ litigation. However, litigation does not have the potential to address the cause of cumulative pollution. Elevated background pollution will exist in EJ communities, even if particular litigation is successful in fighting off a proposed new or expanded facility.<sup>57</sup> The Bayview Hunters Point community, for example, has successfully fought off a proposed expansion of the Potrero power plant, but the community remains concerned about the pollution that already exists.<sup>58</sup>

Litigation has the potential to address aspects of nuisance problems. But tort litigation is difficult at best, and, even in successful cases, abatement of the problem is not a guaranteed remedy.<sup>59</sup> Moreover, litigation under statutory environmental provisions can only produce relief that incidentally addresses the nuisance. For example, community members may privately enforce permit limits on volatile organic compounds and thereby reduce odors, but the limits may not be set low enough to eliminate the

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55. See Richard Toshiyuki Drury, *Rousing the Restless Majority: The Need for a Blue-Green-Brown Alliance*, 19 J. ENVTL. L. & LITIG. 1 (2004) (discussing the challenges of building a more cohesive and inclusive environmental movement). As Bradley Angel states, “if not careful and if not complementing a community organizing strategy, litigation can disempower a movement.” E-mail from Bradley Angel, *supra* note 7.

56. ROSENBERG, *supra* note 42, at 12 (quoting MICHAEL MCCANN, *TAKING REFORM SERIOUSLY: PERSPECTIVES ON PUBLIC INTEREST LIBERALISM* (1986)).

57. See Maguire, *supra* note 50, at 264–67.

58. Conversations with Karen Pierce, President, Bayview Hunters Point Community Advocates (July 1, 2009).

59. See Melissa Toffolon-Weiss & J. Timmons Roberts, *Toxic Torts, Public Interest Law, and Environmental Justice: Evidence from Louisiana*, 26 LAW & POL’Y 259, 280–84 (2004) (discussing remedial limitations as one of many challenges in bringing complex environmental justice cases).

nuisance.<sup>60</sup> In addition, there may be sources of odors other than volatile organic compounds, and a lawsuit to enforce limits on specific chemicals will not address those alternative sources. Professor Morag-Levine has also painstakingly documented that nuisance-based odor regulations administered by regional air quality districts rarely work.<sup>61</sup> Such regimes rely on detection and confirmation of the complaints by government inspectors, who often cannot show up in time to make a confirmation.<sup>62</sup>

In short, piecemeal litigation directed at a problem source or regulation fails the test of the community empowerment model. Looking at the same issue from another vantage point, environmental problems are systemic problems,<sup>63</sup> and such issues can rarely be addressed solely through litigation.<sup>64</sup>

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60. This situation occurred with Pacific Steel Casting, the third largest foundry in the nation, which is located in West Berkeley, California. The company's installation of a carbon adsorption system in 2006 reduced the number of odor complaints from the community, but strong odor is still a problem for residents who live or work nearby. Carbon adsorption takes out a certain percentage of volatile organic compounds, which are responsible for the odor, before the foundry emissions are released to the outside air. *Cmtys. for a Better Env't v. Pacific Steel Casting Co.*, No. C06-4184-BZ (N.D. Cal Mar. 16, 2007) (consent decree entered). Professor Morag-Levine describes the residents' struggle with the same company in the 1980s in her book, *CHASING THE WIND*. See MORAG-LEVINE, *supra* note 39, at ix–xi, 154–61.

61. MORAG-LEVINE, *supra* note 39, at 143–78.

62. Professor Morag-Levine describes her personal experience with the complaint process:

[W]e often were unable to have our complaints confirmed. In the interval between our phone call and the arrival of the inspector, the odor often disappeared as a result of shifts in wind direction or in the foundry's production processes. The inspector would arrive and sniff the air but neither she nor I could detect any trace of the smell. . . . Even our hard-won successes in confirmation did not usually trigger action, because five separate confirmations during a twenty-four hour period were required before the Air District would issue a citation to the foundry.

*Id.* at ix–x.

63. See, e.g., Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 *ECOLOGY L. Q.* 619, 642 (1992) (“Environmental laws are not designed by or for poor people. The theory and ideology behind environmental laws ignores the systemic genesis of pollution.”).

64. Some would say that litigation has failed to produce social reform in “education, voting, transportation, accommodations and public places, and housing.” ROSENBERG, *supra* note 41, at 70–71. Rosenberg concludes that “a closer examination reveals that before Congress and the executive branch acted, courts had virtually *no direct effect* on ending discrimination” in those areas. *Id.* at 70. “Only when Congress and the executive branch acted in tandem with the courts did change occur in these fields. In terms of judicial effects, then, *Brown v. Board of Education*] and its progeny stand for the proposition that courts are impotent to produce



If litigation targeting a specific problem does not achieve reform, could there be impact litigation directed at neighborhood pollution, such as cumulative pollution? A plausible cause of action for such impact litigation would be against government agencies involved in permitting pollution facilities, but these types of cases have proved to be very difficult.<sup>65</sup> Practically speaking, then, impact litigation to address neighborhood pollution, even in its limited form—i.e., against recipients of government funding—is unlikely to effect reform.

## V. REFORMS TO ADDRESS NEIGHBORHOOD POLLUTION

Government agencies regulating pollution have not implemented meaningful reforms to address environmental justice. This gap speaks more to the lack of political will than to the lack of good ideas. Because EJ groups have unique knowledge of the problem of neighborhood pollution, recommendations on regulation of cumulative exposure or risks and nuisance sources already are part of the recommendations to achieve environmental justice in general.

### *A. Specific Recommendations to Improve Cumulative Air Pollution in EJ Communities*

In this part, I will discuss some recommendations for achieving environmental justice at the neighborhood level.<sup>66</sup> Although many of

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significant social reform.” *Id.* at 71.

65. See Bradford C. Mank, *Title VI*, in *THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS* 35 (Michael B. Gerrard ed., 1999); Philip Weinberg, *Equal Protection*, in *THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS*, *supra*, at 12–15. But exceptions are bound to exist, and *Miller v. City of Dallas*, No. Civ. A. 3:98-CV-2955 D, 2002 WL 230834 (N.D. Tex. 2002), may be worth studying to determine whether the plaintiffs obtained any city-wide injunctive relief. In denying the city’s motion for summary judgment on plaintiff’s claim that Dallas engaged in race-based discrimination in zoning, the *Miller* court found that the effect of the city’s practices along with its “sordid history of . . . racially-segregated zoning and related policies . . . offers substantial circumstantial evidence of discriminatory intent.” *Miller*, 2002 WL 230834, at \*7. The case settled after this decision. However, a recent case involving allegations of racially discriminatory transit funding, *Darensburg v. Metropolitan Transportation Commission*, 611 F. Supp. 2d 994 (N.D. Cal. 2009), illustrates that it is still difficult to prove disparate impact claims.

66. One of the most difficult challenges to achieving environmental justice at the

these recommendations do not directly address cumulative pollution, their implementation would at least lessen the existing disparities.

### 1. Ending the Exemption of Old Facilities from Requirements to Update Pollution Controls

Citing in part EJ communities' concern about the oldest and dirtiest facilities that typically are present in their communities, a panel of the National Academy of Public Administration recommended that Congress end grandfathering of existing facilities and instead require them to install state-of-the-art pollution controls within ten years, if they had not previously undergone such a process.<sup>67</sup> The panel pointed out that, in enacting the new source

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neighborhood level is that equitable solutions necessarily involve land use decisions: site selection for locally unwanted uses, the process for making that decision, and the ability of communities to participate in that decision. *See Lee, supra* note 3, at 67. While it is not my intent to address land use reforms, thoughtful recommendations worthy of mention include the following:

- a. Incorporate environmental justice concerns as a factor to consider and discuss in local comprehensive plans. Patricia Salkin, *Zoning and Land Use Planning*, 32 REAL EST. L.J. 429, 432–33 (2004).
- b. Ensure meaningful public participation of EJ communities in the development of zoning, rezoning and planning laws and local comprehensive plans. *See Salkin, supra*, at 435–37.
- c. Survey grandfathered uses that do not conform to local zoning laws to determine whether those uses pose environmental disparities and target them for closure. Salkin, *supra*, at 440 (citing Michael B. Gerrard, *Environmental Justice and Local Land Use Decisionmaking*, in *TRENDS IN LAND USE LAW FROM A TO Z: ADULT USES TO ZONING* 148 (Patricia E. Salkin ed., 2001)). Local amortization laws can facilitate the closure. Salkin, *supra*, at 440.
- d. Impose restrictions on uses that impact EJ. Salkin, *supra*, at 429–30.
- e. Impose additional requirements on pollution sources in EJ communities. Salkin, *supra*, at 443.
- f. Provide standards to limit certain nuisance-like activities. Salkin, *supra*, at 443–44.
- g. Establish a buffer between incompatible land uses. Salkin, *supra*, at 443.

*See also* RECHTSCHAFFEN ET AL., ENVIRONMENTAL JUSTICE, *supra* note 26, at 360 (discussing an Alabama law that prohibits more than one commercial hazardous waste treatment facility per county). These land use reform ideas, however, compete with political forces calling for economic development. *See Dawson, supra* note 3, at 399, 401–02. In this regard, Joe Lyou of California Environmental Rights Alliance has an interesting idea. He believes that a local ordinance that mimics red-light district ordinances would serve EJ communities well.

67. NAT'L ACAD. OF PUB. ADMIN., BREATH OF FRESH AIR: REVIVING THE NEW SOURCE

(“NSR”) provisions of the Clean Air Act,<sup>68</sup> Congress did not envision that these old facilities would continue operating beyond twenty-five years, but many old factories are still operating and have not upgraded their pollution controls.<sup>69</sup> This proposal is now more than six years old, and nothing has been done to advance it. It is one of the most important proposals for national regulation because it would have a significant impact on neighborhood pollution.

## 2. Capping (but Not Trading) Air Pollution

The Bay Area Environmental Health Collaborative (“BAEHC”), which was formed to address neighborhood cumulative air pollution, has developed a detailed air pollution reduction protocol. The protocol asks the regional air district to “prohibit new point sources and air emission increases at existing sources” in EJ communities that are highly impacted by such pollution.<sup>70</sup> To implement the prohibition, the air district would be required to designate high-impact areas based on a calculation of risk-weighted air emissions.<sup>71</sup>

Existing schemes, such as NSR requirements to offset new pollution in areas that fail to attain the National Ambient Air Quality Standards, also offer a potential structure for limiting the total level of neighborhood air pollution.<sup>72</sup> Under what are known as nonattainment new source review provisions, the Clean Air Act

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REVIEW PROGRAM 21–22 (2003). *See also* Gauna et al., *supra* note 31, at 6.

68. The Clean Air Act sets “standards of performance” for new sources of pollution. 42 U.S.C. § 7411 (2006).

69. NAT’L ACAD. OF PUB. ADMIN., *supra* note 67, at 14, 23.

70. BAY AREA ENVIRONMENTAL HEALTH COLLABORATION, PROPOSED BAY AREA AIR POLLUTION REDUCTION PROTOCOL 1 (2009), [http://baehc.org/downloadables/BAEHC\\_PollutionReductionProtocol\\_March2009.pdf](http://baehc.org/downloadables/BAEHC_PollutionReductionProtocol_March2009.pdf) [hereinafter PROTOCOL]. Some also call these high-impact or EJ communities “sacrifice zones.” *See* Dayna Nadine Scott, *Confronting Chronic Pollution: A Socio-Legal Analysis of Risk and Precaution*, 46 OSGOODE HALL L.J. 293, 318–19 (2008).

71. PROTOCOL, *supra* note 70, at 1, 3.

72. At the local level, there have been two ordinances that address mitigation or offset of emissions. Huntington Park, California, has a zoning ordinance that requires mitigation and reduction of adverse environmental impacts. Chester, Pennsylvania, has adopted an ordinance that prohibits new facilities from increasing pollution. *See* RECHTSCHAFFEN ET AL., ENVIRONMENTAL JUSTICE, *supra* note 26, at 360 (citing NAT’L ACAD. PUB. ADMIN., ADDRESSING COMMUNITY CONCERNS: HOW ENVIRONMENTAL JUSTICE RELATES TO LAND USE PLANNING AND ZONING (2003)).

requires large new or modification of sources, called major sources or major modifications, to offset certain kinds of new air pollution.<sup>73</sup> In addition to regulating major sources of pollution, regulators can require new sources—regardless of size—to offset air pollutants that cause neighborhood impacts, so that there is no net increase in EJ communities. For capping to work effectively to address cumulative pollution in the neighborhood, however, offsets must occur for new pollution at the same facility. Grant programs to small sources could be established to assist these sources in complying with new regulations to counter the argument that this type of regulation is too burdensome.

### 3. Eliminating the Use of Emission Reduction Credits in EJ Communities

One of the greatest injustices of air pollution regulation and enforcement is that sources violating air quality laws rarely are required to offset the excess emissions that result from their violations. On the other hand, these sources routinely request emission reduction credits and bank them for future expansion projects or use them in lieu of required pollution reduction projects. This imbalance should be fixed by prohibiting the use of emission reduction credits in EJ communities. Without these credits, sources operating old, dirty facilities will be forced to upgrade their pollution controls.

In addition, when sources in EJ communities violate air quality laws, enforcers should attempt to require cancellation of emission reduction credits owned by such sources in an amount equal to or exceeding the excess emissions resulting from their violations.

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73. See 42 U.S.C. § 7503(a)(1)(A) (2006). The new source review provisions govern criteria air pollutants. See *id.* §§ 7407(d), 7501(2) (2006); ARNOLD W. REITZE, JR., AIR POLLUTION CONTROL LAW: COMPLIANCE AND ENFORCEMENT 33 (2001).

#### 4. Building on Measures Already Implemented by Other Air Quality Regulators

EJ communities are awaiting real changes that address cumulative pollution and are tired of government regulators paying lip service to environmental justice while proceeding with business as usual. To counter this perception, regulators must take specific steps to address cumulative pollution at the neighborhood level.

Having taken bolder steps than most agencies in setting a regulatory agenda for environmental justice under the leadership of its current Governing Board, the South Coast Air Quality Management District (“SCAQMD”) established a multi-year plan to address environmental justice concerns.<sup>74</sup> Under this program, the air district enacted fleet rules, which are both historic and remarkable. The fleet rules target diesel exhaust from transit buses, trash trucks, street sweepers, airport taxis, school buses, and other fleets. SCAQMD adopted the rules after an extensive study, which found diesel exhaust responsible for approximately 70 percent of the total cancer risk from air pollution and emissions from mobile sources responsible for 90 percent of the cancer risk. The study also found that the highest cancer risk occurs in areas near ports and along major freeways.<sup>75</sup>

In the San Francisco Bay Area, as a result of BAEHC’s advocacy, the air district has designated six “priority zones,” and has proposed to limit risks from emissions of toxic air contaminants from new and modified sources in these zones.<sup>76</sup> The district’s proposal, however, does not account for risks from existing sources, and thus, while a step in the right direction, is still an incomplete effort.

Other regulators can follow and build on these approaches. First, committing to a multi-year plan, as SCAQMD has done, will ensure that a program enjoys consistency from year to year; it reflects the commitment of the governing board; and it is not simply an afterthought. Second, other regulators can move relatively quickly to

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74. See SCAQMD, History of Environmental Justice, <http://www.aqmd.gov/ej/history.htm> (last visited Dec. 2, 2009).

75. See AQMD Launches Major Study of Toxic Air Pollution in Southland, Feb. 5, 2004, <http://www.aqmd.gov/news1/2004/matesiiipr.html>.

76. KLOC, *supra* note 10, at 4.

implement specific regulatory programs, such as enacting similar fleet rules and establishing priority zones, to instill confidence in the government's resolve to address components of cumulative pollution.

5. Starting with the Definitional Challenge: Lack of Data Is an Opportunity for Collaboration with Community Groups

Despite EJ groups' ability to define and identify an EJ community, regulators struggle to define EJ communities. Collaborative work with community groups would help regulators to identify the areas where cumulative pollution is a problem and focus their attention accordingly.

*B. Limitations of the Recommendations to Address Cumulative Pollution and Suggestion for Government Commitment and Citizen Involvement*

One of the limitations to both the elimination of grandfathering and the requirement for capping pollution in EJ communities is that not all air pollutants can be effectively eliminated with technology, and not all air pollutants are regulated. Moreover, EJ communities would have to monitor new sources going in to ensure that no net pollution increases are occurring. EJ groups currently do not have the resources to routinely monitor new source permitting, and many major new sources and modifications evade community review. Thus, it is difficult to see how EJ groups could effectively monitor the caps without significant funding from the government or foundations.

Aside from the capacity issue, the biggest stumbling block to capping proposals is that regulators lack the political will to implement caps. Caps necessarily mean that new sources may not be built if offsetting new pollution is infeasible, and regulators have shown very little willingness to deny permits. As an advocate once said, it is not unusual for regulators to think of pollution sources as their clients<sup>77</sup> and accordingly believe that they do not have authority

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77. Thomas Alan Linzey, Executive Dir., Cmty. Envtl. Legal Def. Fund, Lecture at the University of Pittsburgh School of Law, *Sins of the Fathers: How Corporations Use the*

to deny a permit, despite the existence of scholarly works and an EPA memorandum stating otherwise.<sup>78</sup> BAAQMD in particular has stated that caps involve land use decisions, which the agency does not believe it has the authority to make.<sup>79</sup> Indeed, because of this lack of will, no permit has been denied on cumulative impacts grounds, in spite of overwhelming evidence that EJ communities suffer from cumulative pollution.<sup>80</sup>

Unquestionably, what is delaying reform is not a lack of good ideas—there are plenty of those. What we need is for our representatives to summon the courage and political will to do the right thing and protect vulnerable Americans, not just the ones who give the most money to political campaigns.<sup>81</sup> Given that the lack of will is a political reality, it is incumbent on communities to mobilize in favor of protective state, regional, and local environmental and land use laws and regulations.

Environmental leaders such as Robert F. Kennedy, Jr. and Green Party advocate Thomas Alan Linzey assert that we need a movement

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Constitution and Environmental Law to Plunder Communities and Nature (Mar. 4, 2004).

78. See, e.g., Richard J. Lazarus & Stephanie Tai, *Integrating Environmental Justice into EPA Permitting Authority*, 26 *ECOLOGY L.Q.* 617 (1999); Memorandum from Gary Guzy, Gen. Counsel, to certain EPA Assistant Adm'rs, EPA Statutory and Regulatory Authorities Under Which Environmental Justice Issues May Be Addressed in Permitting (Dec. 1, 2000) (available at [http://www.epa.gov/R5water/uic/uic\\_ej.htm](http://www.epa.gov/R5water/uic/uic_ej.htm)). Perhaps the Attorney General's offices at the federal and state level should confirm the authority these regulators already possess to take cumulative impacts account in permitting.

79. Conversations with Amy Cohen, Program Director, BAEHC (May 20, 2009).

80. In the nine years that I have been with the Environmental Law and Justice Clinic, I know of no permits that the regional air district has denied. Although permit denials are rare, they do occur. In 2007, EPA denied Romic Environmental Technologies Corporation a permit required under the Resource Conservation and Recovery Act for hazardous waste facilities, following a resolution passed by the landowner, Gila River Indian Community Council, not to sign Romic's permit application. Because the landowner's signature and certification were missing from the permit application, the EPA denied the permit. See William H. Carlie, *EPA Denies Hazardous Waste Permit, Orders Firm to Investigate TCE Releases*, 39 *BNA ENV'T REP.* 79 (2008). In 2008, Roderick L. Bremby, Secretary of the Kansas Department of Health and Environment, became the first air quality regulator to deny a permit to a coal-fired power plant solely because of health risks associated with carbon dioxide emissions. In response to this denial, the power plant sued the regulator. State politicians then got involved to allow the power plant to build. See Tim Carpenter, *Sunflower Condemns Lawsuit Attempts to Halt Coal Expansion*, *TOPEKA CAP. J.* Aug. 4, 2009, available at [http://cjonline.com/news/state\\_government/2009-08-03/sunflower\\_condemns\\_lawsuit](http://cjonline.com/news/state_government/2009-08-03/sunflower_condemns_lawsuit).

81. Rechtschaffen, *Strategies*, *supra* note 12, at 321.

to reclaim America from corporate power.<sup>82</sup> BAEHC's work on cumulative pollution indeed has required a movement on a regional level. First, activists frustrated with the lack of regulation and enforcement decided that they needed to work on the regional air district; second, they created a broad new coalition of several existing coalitions and grassroots groups; and third, they met with each other and with the regional air district to make demands. They made public statements of their purpose, and they earned respect by demonstrating their persistence, expertise, and commitment.<sup>83</sup> Importantly, in order to be successful in its efforts, the group secured sufficient startup funding, which was first provided by the San Francisco Foundation. As a result of the persistent work of BAEHC, the Bay Area Air Quality Management District is beginning to take notice of the group and is laying the groundwork to tackle the serious challenge of cumulative risk.

*C. Specific Recommendations to Nuisance Pollution in EJ  
Communities*

Traditional common law means of addressing nuisances like odor and dust are insufficient for EJ clients like ours. Our clinic's clients are generally uninterested in the traditional tort remedy of monetary compensation; rather, the clients want nuisances to be abated. But abatement is extremely difficult to obtain under common law. It is thus important to consider strategies for preventing the odor nuisance in the first place, rather than addressing the nuisance after the fact.<sup>84</sup>

In considering approaches to preventing emissions of odorous substances from industries, regulators should seriously consider federal regulation as a strategy. The substances that are responsible for odor often result from emissions of hazardous air pollutants as Professor Morag-Levine has described.<sup>85</sup> The Clean Air Act already

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82. ROBERT F. KENNEDY, JR., *CRIMES AGAINST NATURE* (2004); Linzey, *supra* note 77.

83. Late sociology professor Charles Tilly characterized social movements in exactly this way. See CHARLES TILLY, *SOCIAL MOVEMENTS, 1768–2004* (2004).

84. MORAG-LEVINE, *supra* note 39, at 128–42.

85. The South Coast Air Quality Management District, in announcing its effort to improve odor identification, stated that:



has a mechanism for regulating hazardous air pollutants, and their emissions can be reduced through application of control technology and practices.

The first step of identifying nuisance sources should not be difficult since most nuisance sources are readily known to regulators, as SCAQMD's experience demonstrates.<sup>86</sup> Nuisance sources are generally known to be steel foundries; waste transfer and recycling stations; wastewater treatment plants; landfills; composting operations; petroleum operations; food and byproduct processes, such as rendering facilities and yeast manufacturing facilities; and agricultural activities, such as livestock operations.<sup>87</sup>

Federal regulations should be considered seriously also because they can be enforced by citizens through the citizen suit provision, unlike local or state laws, which may not provide citizens with a right of private enforcement.

While some existing regulations take odor into account in setting compliance standards,<sup>88</sup> more can be done. The EPA, for example, can identify nuisance sources, begin a process to understand the air

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The [district] receives thousands of complaints about odor from the public each year. Odors are the single largest source of complaints reported by residents of the South Coast Air Basin and comprise almost half of the total air quality complaints received annually. *Of these, the vast majority (approximately 85%) are linked to an identifiable source.*

South Coast Air Quality Management District, *AQMD Staff to Enhance Odor Identification*, May 1, 2009, <http://www.aqmd.gov/news1/2009/odoridentification.html>.

86. See, e.g., South Coast Air Quality Management District, *supra* note 85.

87. Morag-Levine, *supra* note 39, at 128–42.

88. See Standards of Performance for New Stationary Sources: Kraft Pulp Mills, 43 Fed. Reg. 7568, 7569 (Feb. 23, 1978); see also Approval and Promulgation of State Plans for Designated Facilities and Pollutants; Oklahoma; Plan for Controlling Total Reduced Sulfur from Existing Kraft Pulp Mills, 54 Fed. Reg. 24,903, 24,904 (June 12, 1989) (approving Oklahoma's plan for controlling TRS emissions from a kraft pulp mill under the New Source Performance Standards provision of the Clean Air Act, 42 U.S.C. § 11–1 and explaining that “TRS emission have a distinctly unpleasant odor which may adversely affect property values and economic development in the vicinity of kraft pulp mills”). The EPA later characterized its 1978 regulation as a “welfare related” control, rather than a health-based control. 54 Fed. Reg. at 24,904. The EPA, however, makes a distinction between regulation of odor under the New Source Performance Standards and the State Implementation Plan. See Commonwealth of Pennsylvania; Approval of Revision to the Pennsylvania State Implementation Plan, 51 Fed. Reg. 18,438 (May 20, 1986) (withdrawing former approval of a state and local odor control regulation, which had been part of a State Implementation Plan, because it bore “no significant relation to attainment and maintenance of the National Ambient Air Quality Standards”).

pollution components of the nuisance problem, and fund research to address it. The process could even follow the recommendation of the National Environmental Justice Advisory Council that the EPA “convene, support, and promote a series of workshops, focus groups, stakeholder meetings, scientific symposia, conferences, and other dialogue to promote greater understanding and consensus around” the problem.<sup>89</sup>

In addition to regulations that limit hazardous air pollutants, State Implementation Plan (“SIP”) rules can be considered for addressing odor because volatile organic compounds, which are ozone precursors and therefore regulated through the SIP,<sup>90</sup> are also responsible for odors. Nationwide regulation, rather than the SIP mechanism, however, is superior because the EPA can coordinate the effort.

Interestingly, even though it is easy to identify categories of odorous facilities, and it is well known that stench from such facilities severely interferes with quality of life, regulators appear unwilling to set technology standards to abate the nuisance without first documenting that there is a certain level of community complaints. As Professor Morag-Levine has argued, this wait-and-see approach to addressing odor is steeped in the common law regime and is inconsistent with the purpose and intent of the Clean Air Act.<sup>91</sup> Even the most forward-looking air district, SCAQMD, is at most willing to refine the methods to detect odor so that prosecution can be improved, which may eventually result in an abatement order. All of these steps take time. It would be far better for communities living near nuisance facilities if the air district skipped the community odor detection stage and set the technology standards first. As anyone who

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89. NAT’L ENVTL. JUSTICE ADVISORY COUNCIL, ENSURING RISK REDUCTION IN COMMUNITIES WITH MULTIPLE STRESSORS: ENVIRONMENTAL JUSTICE AND CUMULATIVE RISKS/IMPACTS, at vii (2004).

90. Emissions of volatile organic compounds (“VOCs”) are regulated under the Clean Air Act because VOCs (found in chemicals, such as solvents, gasoline, and other petroleum products) react in the presence of sunlight with NO<sub>x</sub> to form ground-level ozone, and ozone is a criteria pollutant. 69 Fed. Reg. 23858, at 23859 (Apr. 30, 2004) ARNOLD W. REITZE, JR., AIR POLLUTION CONTROL LAW: COMPLIANCE AND ENFORCEMENT, *supra* note 73, at 33.

91. MORAG-LEVINE, *supra* note 39, at xi.

has lived near such a facility knows, these facilities emit odor even if the inspectors cannot be around to detect the stench.<sup>92</sup>

Despite the limited and perhaps backward nature of SCAQMD's effort to deal with environmental nuisances, it is still noteworthy as the first step that any air district has taken in considering the environmental justice aspect of the nuisance problem. SCAQMD recently announced a pilot program that could improve prosecution efforts under the agency's existing nuisance regulation.<sup>93</sup> The agency is recognizing that its current nuisance regulation insufficiently addresses the impacts on communities from odorous sources.<sup>94</sup> The chair of the air district's governing board recognizes, for example, that "[f]oul odors can severely impact a person's quality of life or even their health."<sup>95</sup> According to the district, an odor science expert who has developed an odor identification device will "review the agency's complaint database, which includes the number and type of complaints reported, the types of facilities suspected or confirmed as sources of the odor and other relevant information."<sup>96</sup> The expert will then recommend steps for enhancing odor detection for the purpose of issuing notices of violation to facilities.

In short, although SCAQMD's approach is not ideal, it is a step in the right direction. A better approach would be a national effort at identifying nuisance sources and beginning the lengthy process of regulating them.

#### CONCLUSION

The pursuit of environmental justice has not moved much beyond the rhetorical sphere, although the consistent efforts of communities

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92. For an account of the difficulties in making formal complaints and having them accurately recorded, see Janice Schroeder, Comments at a Community Meeting Organized by the West Berkeley Alliance for Clean Air and Safe Jobs (Feb. 7, 2007) (statement on file with author).

93. South Coast Air Quality Management District, *supra* note 85.

94. The text of the agency's nuisance rule, which was adopted in 1976, is available on its website, South Coast Air Quality Management District, Rule 402, <http://www.aqmd.gov/rules/reg/reg04/r402.pdf>

95. South Coast Air Quality Management District, *supra* note 85 (quoting William A. Burke).

96. *Id.*

have resulted in some hopeful signs from government leadership. The fact remains, however, that thirty years after environmental justice became a rallying cry, we still cannot point to a single regulation that takes into account cumulative air pollution at a neighborhood level. To take cumulative risk seriously, governments at all levels must commit to addressing the problem with actual regulation. As a society, we must ask ourselves how we can live in a world where poor and historically oppressed people bear the brunt of our luxuries. It is incumbent on us as citizens to build an effective movement that encourages our government to better protect its people.