

# APPROACHES TO ENVIRONMENTAL JUSTICE: A CASE STUDY OF ONE COMMUNITY'S VICTORY

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## I. INTRODUCTION

Environmental law encompasses many different areas. One aspect of environmental law is environmental justice. The United States Environmental Protection Agency (EPA) defines environmental justice as “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.”<sup>1</sup> While others use related definitions and alternative terminology,

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<sup>1</sup> *Environmental Justice*, U.S. EPA, <http://www.epa.gov/environmentaljustice/> (last modified Mar. 17, 2011). Working for environmental justice is one of EPA's seven priorities for 2010. Memorandum from Lisa P. Jackson, Adm'r, U.S. Env'tl. Prot. Agency, to All EPA Employees (Jan. 12, 2010), available at <http://blog.epa.gov/administrator/2010/01/12/seven->

such as “environmental injustice” or “environmental racism,”<sup>2</sup> the basic premise is the same: that, in an industrialized society, the environmental burdens should not be disproportionately borne by low-income and of-color communities.<sup>3</sup> Extensive research on this subject has demonstrated that both race and income play a role in determining how these environmental burdens are allocated.<sup>4</sup>

Lawyers hoping to address these areas of injustice must rely on legal and non-legal tools in order to bring sustainable change to low-income and of-color communities. This article examines an environmental justice case in Ocala, Florida, where attorneys serving a low-income, of-color community utilized a multi-disciplinary strategy to end thirty years of pollution from a nearby charcoal factory.<sup>5</sup> By examining the facts and law of this case, this Article hopes to encourage other environmental justice attorneys to broaden the scope of their services, recognize the benefit of performing non-legal services, commit to fully involving their clients in the process, and encourage collaborations with non-lawyer professionals.

Part I of this Article will summarize the history of the environmental justice movement. Part II will examine the historical application of law to environmental justice cases and discuss limitations to environmental justice legal practice. While the environmental justice movement continues to win significant legal victories, the purpose of this Article is to analyze the limitations of working solely within the legal arena. Therefore, each legal tool’s worth is cursorily addressed but its limitations are more fully considered. This is not to take away from the good work being done by attorneys from various sectors in combating environmental injustices. With this background established, Part III of this Article will detail the Ocala case, show the attorneys’ evaluation of pure legal strategies versus mixed law and policy strategies, identify the choices made by the clients, and critically analyze those choices.

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<sup>2</sup> See LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT 15–17 (2001) (discussing the nuances of these different terms).

<sup>3</sup> See, e.g., *id.* at 16–17.

<sup>4</sup> *Id.* at 16.

<sup>5</sup> See RONNIE GREENE, NIGHT FIRE: BIG OIL, POISON AIR, AND MARGIE RICHARD’S FIGHT TO SAVE HER TOWN (2008).

## II. HISTORY OF ENVIRONMENTAL JUSTICE

During the 1970s and 1980s, several pivotal incidences of environmental injustice, or racism, began receiving national attention. In 1982, in response to a legal case in Warren County, North Carolina, where an African American community protested the nearby siting of a polychlorinated biphenyl (PCB) landfill,<sup>6</sup> two senators asked the United States General Accounting Office (GAO) to conduct a study of “the correlation between the location of hazardous waste landfills and the racial and economic status of the surrounding communities.”<sup>7</sup> The subsequent report concluded that the environmental burdens of living in an industrialized society are disproportionately borne by people of color and low-income communities.<sup>8</sup> Following that report, the United Church of Christ did its own analysis, releasing a report in 1987 that echoed the findings of the GAO and expounded upon the fact that race seemed to be an even more dominant factor than class in determining disparate environmental burdens.<sup>9</sup> In essence, if a person was poor, that person was more likely to live closer to environmental hazards than if he or she were rich.<sup>10</sup> Further, if that person was poor and of color, he or she was even more likely to live closer to environmental hazards than if he or she was poor and white.<sup>11</sup> And as people moved up the socioeconomic scale, whites escaped these hazards at a lower income level than people of color.<sup>12</sup>

The federal government responded to these reports by creating the Environmental Equity Workgroup under the EPA in 1990,<sup>13</sup> which, in

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<sup>6</sup> ROBERT D. BULLARD, *DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY* 31 (3d ed. 2000) [hereinafter BULLARD, *DUMPING IN DIXIE*]. More than 400 protestors were arrested during the demonstrations, “the first time anyone in the United States had been jailed trying to halt a toxic waste landfill.” *Id.*

<sup>7</sup> Letter from J. Dexter Peach, Dir., U.S. Gen. Accounting Office, to James J. Florio, Chairman, Subcomm. on Commerce, Transp. and Tourism, Comm. on Energy and Commerce, House of Representatives, and Walter E. Fauntroy, House of Representatives (June 1, 1983), available at <http://archive.gao.gov/d48t13/121648.pdf>.

<sup>8</sup> *Id.*

<sup>9</sup> COMM’N FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, *TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIOECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES* 15 (1987).

<sup>10</sup> *Id.* at 2.

<sup>11</sup> *Id.* at 15.

<sup>12</sup> *Id.* at 13–14.

<sup>13</sup> *Basic Information*, U.S. EPA, <http://www.epa.gov/environmentaljustice/basics/ejbackground.html> (last modified Mar. 15, 2011). The Environmental Equity Workgroup was set up by the EPA when the congressional Black Caucus met with the EPA to address environmental impact on low-income and minority populations that the Caucus members believed were not being

1992, released its own report on environmental injustice in the United States.<sup>14</sup> That same year, the *National Law Journal* released another report documenting the disparate enforcement of environmental laws.<sup>15</sup> This report showed that Superfund clean ups were handled more quickly and thoroughly in white communities than in communities of color.<sup>16</sup> Throughout the 1990s and the first decade of the 2000s, a number of additional reports evaluated the correlation between environmental exposures and race, ethnicity, and socioeconomics.<sup>17</sup> Overwhelmingly, these reports continued to conclude that all three—race, ethnicity, and socioeconomics—were indicators of disparate exposure to environmental hazards.<sup>18</sup>

#### A. THE FEDERAL RESPONSE TO ENVIRONMENTAL INJUSTICE

Responding to the findings of these reports,<sup>19</sup> the federal government stepped in when President Clinton signed Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, calling for federal agencies to consider environmental justice when making decisions.<sup>20</sup> The EPA also established the

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thoroughly handled. *Id.* The EPA then came out with a report on the higher environmental risk to minority and low-income communities compared to the general population. *Id.*

<sup>14</sup> ENVTL. EQUITY WORKGROUP, U.S. ENVTL. PROTECTION AGENCY, ENVIRONMENTAL EQUITY: REDUCING RISK FOR ALL COMMUNITIES (1992), available at <http://www.epa.gov/history/topics/justice/01.html>.

<sup>15</sup> Marianne Lavelle & Marcia Coyle, *Unequal Protection: The Racial Divide in Environmental Law*, NAT'L L.J. (Sept. 21, 1992).

<sup>16</sup> *Id.* at 3. The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), commonly known as "Superfund," was enacted by Congress in 1980 and provides broad federal authority to respond to and clean up hazardous waste sites. *See, e.g.*, 42 U.S.C. § 9601 (2006).

<sup>17</sup> ROBERT D. BULLARD, ET AL., UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE AT TWENTY: 1987–2007: GRASSROOTS STRUGGLES TO DISMANTLE ENVIRONMENTAL RACISM IN THE UNITED STATES (2007) [hereinafter BULLARD, UNITED CHURCH OF CHRIST], available at <http://www.ucc.org/justice/environmental-justice/pdfs/toxic-wastes-and-race-at-twenty-1987-2007.pdf>; CLIFFORD RECHTSCHAFFEN & EILEEN P. GAUNA, ENVIRONMENTAL JUSTICE: LAW, POLICY & REGULATION 71–74 (1st ed. 2002) (quoting John A. Hird & Michael Reese, *The Distribution of Environmental Quality: An Empirical Analysis*, 79 SOC. SCI. Q. 693 (1998); Evan Ringquist, *Equity and the Distribution of Environmental Risk: The Case of TRI Facilities*, 78 SOC. SCI. Q. 811 (1997); Rachel Morello-Frosch, Manuel Pastor, Jr., & James Saad, *Environmental Justice and Southern California's Riskscape: The Distribution of Air Toxics Exposures and Health Risks Among Diverse Communities*, 36 URB. AFF. REV. 551 (2001)).

<sup>18</sup> BULLARD, UNITED CHURCH OF CHRIST, *supra* note 17, at 155–56; RECHTSCHAFFEN & GAUNA, *supra* note 17, at 71–74.

<sup>19</sup> *See* BULLARD, DUMPING IN DIXIE, *supra* note 6, at 117.

<sup>20</sup> Exec. Order No. 12,898, 3 C.F.R. 859 (Feb. 11, 1994), reprinted as amended in 42 U.S.C. § 4321 (2006). The executive order states that "each Federal agency shall make achiev-

Office of Environmental Justice, the National Environmental Justice Advisory Commission,<sup>21</sup> and an administrative process to handle environmental justice grievances.<sup>22</sup>

## B. LIMITATIONS OF THE FEDERAL RESPONSE

The success of federal environmental justice activities has not been as widespread as was initially hoped. For example, the EPA Office of Inspector General (OIG)<sup>23</sup> has performed two audits on the application and impact of Executive Order 12898.<sup>24</sup> The 2004 audit found that, in the absence of guidance from the EPA, environmental justice programs in different regions were implemented inconsistently.<sup>25</sup> The report pointed out that “the implementation of environmental justice actions is dependent not only on minority and income status but on the EPA region in which the person resides.”<sup>26</sup>

In order to gather information for the 2006 audit, the OIG sent sur-

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ing 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.” *Id.* at 7629.

<sup>21</sup> The National Environmental Justice Advisory Commission was established by charter on September 30, 1993. U.S. ENVTL. PROT. AGENCY, ENVIRONMENTAL JUSTICE FACT SHEET: NATIONAL ENVIRONMENTAL JUSTICE ADVISORY COUNCIL (2010), *available at* <http://www.epa.gov/environmentaljustice/resources/publications/factsheets/fact-sheet-nejac-2009.pdf>.

<sup>22</sup> Nondiscrimination in Programs or Activities Receiving Federal Assistance from the Environmental Protection Agency, 40 C.F.R. § 7.90 (2009); *see also* Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs and Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits, 65 Fed. Reg. 39,650 (proposed Jun. 27, 2000).

<sup>23</sup> The Inspector General Act of 1978 established Offices of the Inspector General (OIG) for a wide variety of federal administrative agencies, including the Environmental Protection Agency. *See* 5 U.S.C. app. §§ 2, 12(2) (2006). The Act included a complete list of the agencies subject to the Act. *See* 5 U.S.C. app. §§ 8(A)–(I), 12(2) (2006). Congress intended the EPA’s OIG to be an independent and objective unit. 5 U.S.C. app. 3 § 2 (2006). Under the statute, the OIG can recommend policies and provide policy direction to the EPA. 5 U.S.C. app. 3 §§ 4(a)(1), (3), (4) (2006). The OIG submits biannual reports to Congress and the head of the EPA can cover “serious problems . . . relating to the administration of programs,” including recommended corrective actions. 5 U.S.C. app. §§ 4(a)(5), 5(a) (West 2008).

<sup>24</sup> OFF. OF INSPECTOR GEN., REP. NO. 2004-P-00007, EPA NEEDS TO CONSISTENTLY IMPLEMENT THE INTENT OF THE EXECUTIVE ORDER ON ENVIRONMENTAL JUSTICE (2004), *available at* <http://www.epa.gov/oig/reports/2004/20040301-2004-P-00007.pdf>; OFF. OF INSPECTOR GEN., REP. NO. 2006-P-00034, EPA NEEDS TO CONDUCT ENVIRONMENTAL JUSTICE REVIEWS OF ITS PROGRAMS, POLICIES, AND ACTIVITIES 3 (2006), *available at* <http://www.epa.gov/oig/reports/2006/20060918-2006-P-00034.pdf>.

<sup>25</sup> OFF. OF INSPECTOR GEN., REP. NO. 2006-P-00034, *supra* note 24, at i.

<sup>26</sup> *Id.*

veys to all of the EPA regions and program offices.<sup>27</sup> Only five of the ten regions responded to the survey.<sup>28</sup> The OIG found that the majority of respondents had not performed a review of their environmental justice programs.<sup>29</sup> The OIG concluded that “[u]ntil these program and regional offices perform environmental justice reviews, the Agency cannot determine whether its programs cause disproportionately high and adverse human health or environmental effects on minority and low-income populations.”<sup>30</sup>

Finally, at the request of three members of New Jersey’s congressional delegation,<sup>31</sup> the OIG conducted a 2007 audit of environmental justice claims at a Superfund site in New Jersey.<sup>32</sup> The audit found that while there was no evidence of discrimination, the EPA’s communication with the community was lacking.<sup>33</sup>

Additionally, the EPA’s administrative process to address environmental justice grievances has been unremarkable. Under its regulations, an impacted citizen can bring a complaint alleging that a federally funded activity or program results in discrimination based on race, color or national origin, or that a facility was sited where it would have a discriminatory impact.<sup>34</sup> As of June 2010, however, the EPA has never found an instance of discrimination. Further, the process has significant flaws, including: no public right to participation, no required timeline for decisions, only one remedy—the withdrawal of federal funding—no provision for damages to plaintiffs even if they prevail, and no right of appeal for plaintiffs (although defendants can appeal).<sup>35</sup> Recognizing these limitations, in 2009, EPA Administrator Lisa Jackson appointed a Senior Counsel for External Civil Rights to “focus on resolving the Agency’s backlog of pending Title

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<sup>27</sup> *Id.* at 3.

<sup>28</sup> *Id.* at 10.

<sup>29</sup> *Id.* at 5.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> OFF. OF INSPECTOR GEN., REP. NO. 2007-P-00016, ENVIRONMENTAL JUSTICE CONCERNS AND COMMUNICATION PROBLEMS COMPLICATED CLEANING UP RINGWOOD MINES/LANDFILL SITE (2007), available at <http://www.epa.gov/oig/reports/2007/20070402-2007-P-00016.pdf>.

<sup>33</sup> *Id.* at 5–7.

<sup>34</sup> 40 C.F.R. § 7.35(b)–(c) (2009).

<sup>35</sup> Kyle W. La Londe, *Who Wants to Be an Environmental Justice Advocate?: Options for Bringing an Environmental Justice Complaint in the Wake of Alexander v. Sandoval*, 31 B.C. ENVTL. AFF. L. REV. 27, 38 (2004).

VI complaints” and “evaluate and reform the Title VI program.”<sup>36</sup>

### III. ENVIRONMENTAL JUSTICE PRACTICE: YESTERDAY AND TODAY

Throughout the 1970s, 1980s, and 1990s, as environmental justice issues were gaining greater public attention, attorneys representing environmental justice communities relied on traditional environmental, civil rights, constitutional, and tort law claims to combat environmental injustices. As indicated below, some of these causes of action enjoyed early success while others were successful in the court of public opinion but not in actual courts.

#### A. CONSTITUTIONAL EQUAL PROTECTION AND CIVIL RIGHTS LAW

Early on, environmental justice claims brought under the Equal Protection Clause and Title VI, section 601 of the Civil Rights Act of 1964,<sup>37</sup> had varied success, in part because both require a showing of discriminatory intent.<sup>38</sup> Because of this challenge, some hoped to use civil rights laws to address the disparate enforcement of environmental laws, as claims brought under Title VI, section 602, require a showing of discriminatory effect rather than discriminatory intent.<sup>39</sup>

Unfortunately, in the twenty-first century, the Supreme Court obliterated any hope environmental justice advocates had of using civil rights

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<sup>36</sup> Memorandum from Lisa P. Jackson, Adm’r, U.S. Env’tl. Prot. Agency, to All EPA Employees (Nov. 12, 2009), *available at* <http://blog.epa.gov/administrator/2009/11/12/memo-to-employees-next-steps-environmental-justice-and-civil-rights/> (last modified Apr. 1, 2011). “Title VI of the Civil Rights Act of 1964 is a federal law that prohibits discrimination on the basis of race, color, or national origin in all programs or activities receiving federal financial assistance.” *EPA’s Program to Implement Title VI of the Civil Rights Act of 1964*, U.S. EPA, <http://www.epa.gov/civilrights/t6home.htm> (last modified Nov. 10, 2011). The Supreme Court has authorized federal agencies to set up regulations that prohibit intentional discrimination. *Id.* One of the effects of Title VI is that it allows persons to file administrative complaints with federal departments alleging discrimination. *Id.*

<sup>37</sup> Civil Rights Act of 1964, § 601, 42 U.S.C. § 2000d (2006). Title VI, § 601, states that no person, regardless of race, gender or origin shall be excluded or discriminated against by any federally funded program. *Id.*

<sup>38</sup> *See, e.g.,* R.I.S.E. v. Kay, Inc., 768 F. Supp. 1144, 1150 (E.D. Va. 1991); East Bibb Twiggs Neighborhood Ass’n v. Macon-Bibb Cnty. Planning & Zoning Comm’n, 706 F. Supp. 880 (M.D. Ga. 1989), *aff’d*, 896 F.2d 1264 (11th Cir. 1989); Bean v. Sw. Waste Mgmt. Corp., 482 F. Supp. 673 (S.D. Tex. 1979) *aff’d without opinion*, 782 F.2d 1038 (5th Cir. 1986).

<sup>39</sup> Civil Rights Act of 1964, § 602, 42 U.S.C. § 2000d-1 (2006).

laws to address environmental injustices.<sup>40</sup> In *Alexander v. Sandoval*, the Supreme Court reversed all previous decisions regarding Title VI, section 602, and held that the statute did not provide for a private cause of action.<sup>41</sup> The Court relied on a strict interpretation of the law, stating that because it did not articulate a private right of action on its face, none could be implied.<sup>42</sup> In his dissent, Justice Stephens stated that future plaintiffs could still rely on § 1983 of the Civil Rights Act,<sup>43</sup> in conjunction with section 602, to bring a private action.<sup>44</sup> Shortly thereafter, in *Gonzaga University v. Doe*, the Supreme Court made clear that § 1983 could not be used to create a private right of action under Title VI, section 602, because it, too, relied on an express private right of action in the law in question.<sup>45</sup> These two cases together foreclosed future private rights of action under section 602, whether invoked directly or coupled with § 1983.

## B. FEDERAL ENVIRONMENTAL LAW

Other than civil rights laws, the dominant claims in environmental justice cases have been brought under federal environmental law.<sup>46</sup> For years, attorneys have used federal environmental law to win victories in environmental justice communities. Specifically, citizen suits under the Federal Water Pollution Control Act (“Clean Water Act”), the Clean Air Act, and the Resource Conservation and Recovery Act (RCRA) have been utilized to abate pollution impacting environmental justice communities through either court victory or settlement.<sup>47</sup> Some of these same environmental laws have been used to prevent the siting of polluting facilities, often by successfully arguing against required permits.<sup>48</sup>

While these remain viable options for serving environmental justice communities, recent legal rulings have restricted environmental justice clients by, inter alia, creating limitations on plaintiffs’ ability to prove

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<sup>40</sup> See *Alexander v. Sandoval*, 532 U.S. 275, 278–79 (2001).

<sup>41</sup> *Id.* at 293.

<sup>42</sup> *Id.*

<sup>43</sup> 42 U.S.C. § 1983 (2006).

<sup>44</sup> *Alexander*, 532 U.S. at 299 (Stephens, J. dissenting).

<sup>45</sup> *Gonzaga Univ. v. Doe*, 532 U.S. 273, 276 (2002).

<sup>46</sup> *E.g.*, 33 U.S.C. § 1251 (2006); 42 U.S.C. § 7401 (2006); 42 U.S.C. § 6901 (2006).

<sup>47</sup> For example, section 402 of the Clean Water Act allows the EPA or relevant State to issue National Pollutant Discharge Elimination System (NPDES) permits containing the substantive requirements for polluting. 33 U.S.C. § 1342 (2006).

<sup>48</sup> See *id.* For example, the Clean Water Act regulates water pollution through NPDES, a permit program that regulates pollution discharge by point sources. *Id.*



standing in environmental cases and through restrictions placed on the ability to recoup attorney's fees in civil cases.

The Supreme Court has long held that standing is an essential part of the Constitution's "case or controversy" requirement.<sup>49</sup> Historically, however, standing—which is the ability to bring a lawsuit—has not been a significant barrier to citizen groups that sought to enforce federal environmental laws through litigation.<sup>50</sup> But in the early 1990s, the Supreme Court began to restrict standing, and thus, the ability of citizen groups to utilize citizen suit provisions found in the federal environmental laws.

This movement towards stricter standing requirements started with *Lujan v. National Wildlife Federation*, in which the Supreme Court held that the plaintiffs, who enjoyed the use of property "in the vicinity" of the public land in question, did not have standing to bring a lawsuit.<sup>51</sup> Later, in *Lujan v. Defenders of Wildlife*, the Court held that the plaintiffs could not challenge a federal agency's ruling regarding the Endangered Species Act, even though various members of the plaintiff organization submitted affidavits indicating that they had visited the area that was the subject of the suit and were interested in the conservation of endangered species there, because the individuals could not specify when they would again return to those areas.<sup>52</sup> On this basis, the Supreme Court concluded that the plaintiffs had not demonstrated standing to prosecute the lawsuit.<sup>53</sup>

While these rulings elevated the bar, citizen access to enforce environmental laws was still quite good because much of the original standing requirements remained intact.<sup>54</sup> However, in 1998, the Supreme Court went even further in *Steel Co. v. Citizens for a Better Environment*.<sup>55</sup> In *Steel Co.*, an environmental group sought to enforce a section of the Emergency Planning and Community Right to Know Act (EPCRA), which requires companies to inventory and report toxic and hazardous

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<sup>49</sup> See, e.g., *United States v. Richardson*, 418 U.S. 166 (1974).

<sup>50</sup> The doctrine of standing is based on Article III of the U.S. Constitution, which limits the jurisdiction of the federal courts to "cases" and "controversies." See *Sierra Club v. Morton*, 405 U.S. 727, 734–36, (1972) (holding that generalized harm to the environment that affects recreational or even esthetic interests of the plaintiff can meet the concrete and particularized injury prong of the Article III standing test).

<sup>51</sup> *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 898–99 (1990).

<sup>52</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563–64 (1992).

<sup>53</sup> *Id.* at 578.

<sup>54</sup> *Sierra Club*, 405 U.S. at 734 ("[Activity that impaired enjoyment of the environment] may amount to an 'injury in fact' sufficient to lay the basis for standing.").

<sup>55</sup> *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998).

substances that are maintained on site.<sup>56</sup> Defendant Steel Company initially failed to comply with this law, but did comply after the citizens group sent notice of the failure to the company, the EPA Administrator, and the state authorities.<sup>57</sup> After the company eventually came into compliance, the environmental group sued and asked that penalties, allowed under the law, be assessed against the company.<sup>58</sup> The Court denied the penalties and held that the plaintiffs could not satisfy the “redressability” prong of the standing test.<sup>59</sup> Plaintiffs had made a demand for penalties and asserted that such penalties would deter both Steel Company and other wrongdoers, yet this was not considered enough to meet this standing requirement because the penalties would not go directly to the plaintiffs.<sup>60</sup>

As a result of *Steel Co.*, a chronic polluter can continue to poison a neighborhood without fear of penalty. If a citizen group does try to enforce the law against a chronic polluter, the polluter can then come into compliance, often with little fear of having to pay any penalties for its past misdeeds. This allows polluters to violate the law until they get caught and only then fix their systems and still avoid liability. This can save a polluting company millions of dollars over the years until it is made to comply with the law.

Further, the majority of citizen enforcement actions in environmental cases are brought by individuals or community groups, which are represented by public interest attorneys. In environmental justice cases both the clients and the attorneys tend to be of limited financial resources. A prevailing party’s ability to recoup costs in environmental cases has been a driving force in allowing many environmental justice cases to be brought. In 2001, the Supreme Court chipped away at this possibility for recompense in *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, in which the Court overturned legal precedent and snubbed legislative history by holding that a plaintiff in a civil suit was not able to collect attorney’s fees where the case was dismissed on mootness grounds due to a change in the law.<sup>61</sup> In *Buckhannon*, the state legislature amended the contested statute after the suit was initiated, thus correcting the constitutional problems and avoiding

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<sup>56</sup> *Id.* at 86–87.

<sup>57</sup> *Id.* at 87–88.

<sup>58</sup> *Id.* at 88.

<sup>59</sup> *Id.* at 109–10.

<sup>60</sup> *Id.* at 106.

<sup>61</sup> *Buckhannon Bd. & Care Home v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598 (2001).

defeat in court.<sup>62</sup> Under the “catalyst theory,”<sup>63</sup> the plaintiffs’ attorney in *Buckhannon* would have been able to recoup attorney’s fees because the lawsuit produced the change in the law that they were contesting. The Supreme Court rejected the “catalyst theory” as a means of obtaining attorneys fees and left the plaintiffs without an award of attorneys’ fees even though the lawsuit had achieved the plaintiffs’ desired result—a change in the underlying statute.<sup>64</sup>

The *Buckhannon* holding has created a legal environment in which the state and federal government are free to step on the toes of constitutional protections, await the rare occurrence of a legal challenge, and, if one does come, correct the problem and render the lawsuit moot. In other words, the system is one that allows the government to rely on poor people and public interest attorneys to foot the bill for the enforcement of the law. As one might expect, this limitation has had a chilling effect on the ability to bring civil suits in the environmental justice context.

Despite these limitations, environmental justice attorneys continue with claims under traditional federal environmental laws with some success. But success in the context of environmental justice cases is sometimes defined narrowly. For instance, even where statutes provide remedies, those remedies may be limited in nature<sup>65</sup> because of the extensive regulatory framework in environmental law and the great deference given by courts to government-created environmental agencies in interpreting

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<sup>62</sup> *Id.* at 601.

<sup>63</sup> The statutes at issue in *Buckhannon* allowed reasonable attorney’s fees and costs to “the prevailing party.” *Id.* (citing the Fair Housing Amendments Act of 1988, 42 U.S.C. § 3601, and the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101). Since the case was dismissed for mootness, no judgment was made on the merits. *Id.* Under the catalyst theory, a plaintiff is considered a prevailing party, “if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct.” *Id.* Before *Buckhannon*, the circuit courts were split on whether the catalyst theory was acceptable, with a majority recognizing the theory. *Id.* at 602.

<sup>64</sup> *Id.* at 605.

<sup>65</sup> The Administrative Procedure Act states that courts may review agency actions to determine if they are contrary to a statute, arbitrary, or capricious; however, this does not give courts authority to change those actions, only the authority to send it back to the agency to be fixed. 5 U.S.C. § 706(2) (2006). Another example of a remedy limitation is when a community succeeds in getting a finding that a polluting facility is in violation, but the fine is so inconsequential that the facility would rather repeat the mistake than spend the money to improve the facility. For example, between 1999 and 2004, half of all air quality violations in California were settled for \$2,000 or less. *Still Above the Law: How California’s Major Air Polluters Get Away with It*, ENV’T’L WORKING GROUP (2004), <http://www.ewg.org/reports/stillabovethelaw> (last visited Apr. 1, 2011).

and enforcing environmental laws.<sup>66</sup> It is not uncommon for environmental plaintiffs who bring an action challenging a regulation to prevail in court, just to have the court give the regulation back to the agency to re-write, and then to have the same parties back in court one to three years later arguing over the new version of the regulation.

Additionally, while the 1970s saw the passage of our bedrock federal environmental protections,<sup>67</sup> over time legislators have waged attacks to dismantle and water down these environmental laws.<sup>68</sup> Unfortunately, under the George W. Bush administration, these attacks were more successful than ever, making it even more difficult for environmental justice communities to find adequate remedies in the law.<sup>69</sup>

### C. STATE AND LOCAL LAW

In addition to federal environmental law, there may be tools created by state and local environmental law that attorneys representing environmental justice clients should consider using.<sup>70</sup> In February 2010, the American Bar Association and the University of California, Hastings College of the Law, published a new edition of *Environmental Justice for All: A Fifty State Survey of Legislation, Policies and Cases* (“EJA report”), which compiles survey results from the fifty states and the District of Co-

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<sup>66</sup> *Chevron, U.S.A., Inc. v. Nat’l Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984) (“If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.”).

<sup>67</sup> In 1969 the National Environmental Policy Act (NEPA) was established, which was quickly followed by the Clean Air Act in 1970 and the Federal Water Pollution Control Act (Clean Water Act) in 1972.

<sup>68</sup> Nat’l Res. Def. Council, *The Bush Record*, <http://www.nrdc.org/bushrecord> (last visited Apr. 1, 2011). This website follows a timeline between 2001 and 2008 in which many environmental laws were being ignored and safeguards were being dismantled.

<sup>69</sup> During his first three years in office, President George W. Bush initiated more than 300 rollbacks of environmental laws. ROBERT F. KENNEDY, JR., *CRIMES AGAINST NATURE: HOW GEORGE W. BUSH AND HIS CORPORATE PALS ARE PLUNDERING THE COUNTRY AND HIJACKING OUR DEMOCRACY* 3 (2004). The trend continued throughout Bush’s two-term presidency; the National Resource Defense Council has created an interactive timeline and database of articles reporting on this full-on attack of environmental protections. The Bush Record, NAT’L RES. DEF. COUNCIL, <http://www.nrdc.org/bushrecord/> (last visited Apr. 1, 2011). See also, Richard Toshiyuki Drury, *Rousing the Restless Majority: The Need for a Blue-Green-Brown Alliance*, 19 J. ENVTL. L. & LITIG. 5 (2004).

<sup>70</sup> Due to the disparities among states, this Article will not discuss specific state environmental laws except in the *Ocala* case analysis and here, to briefly mention that some states have laws directly related to environmental justice issues.

lumbia regarding their implementation of environmental justice law and policy.<sup>71</sup> This latest edition is the lengthiest yet; this is likely due to the continuing maturation of this area of law and policy.<sup>72</sup> The EJA report notes that community participation and education mechanisms remain “the most prevalent techniques of addressing environmental justice concerns” and that other areas of environmental justice policy and law include permitting and siting, as well as land use planning programs.<sup>73</sup> The report’s summary details ten original and ongoing areas of environmental justice concerns, nine emerging themes, and five participation and process areas.<sup>74</sup> Five of the original and ongoing concerns are relevant to the case discussed in this Article: air pollutant emissions reductions, anti-concentration laws and policies, brownfields, communities of color and environmental racism, and siting of facilities.<sup>75</sup>

#### D. FLORIDA ENVIRONMENTAL JUSTICE LAW

As this Article deals specifically with a case study in the State of Florida, it will include a discussion of state environmental law and environmental justice law in Florida. The Florida section of the EJA report indicates four areas where the state is addressing environmental justice through law or policy: “General Environmental Justice Activities,” “Promoting Public Health,” “Equitable Development,” and “Pollution Clean-up.”<sup>76</sup> In the General Environmental Justice Activities category, the report cites two state academic programs on environmental justice<sup>77</sup> and one academic and state-agency partnership research project on environmental justice issues and transportation planning.<sup>78</sup>

In the Promoting Public Health category, the EJA report makes refer-

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<sup>71</sup> A.B.A. & HASTINGS COLL. OF THE LAW, ENVIRONMENTAL JUSTICE FOR ALL: A FIFTY STATE SURVEY OF LEGISLATION, POLICIES AND CASES (Steven Bonorris ed., 4th ed. 2010) [hereinafter ENVIRONMENTAL JUSTICE FOR ALL], available at <http://www.uchastings.edu/centers/public-law/ejreport-fourthedition.pdf>.

<sup>72</sup> *Id.* at iv.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at viii–xvii.

<sup>75</sup> *Id.* at xv–xvii.

<sup>76</sup> *Id.* at 61–64.

<sup>77</sup> *Id.* at 61. These programs are the Center for Environmental Equity and Justice at Florida Agricultural and Mechanical University (“FAMU”), and the state’s birth-defects registry, which is maintained jointly by FAMU, the University of Florida, and University of South Florida. *Id.*

<sup>78</sup> *Id.* at 61–62.

ence to the state's Community Health Protection Act, enacted in 1999.<sup>79</sup> This Act created a Community Environmental Health Program at the Florida Department of Health (DOH) and the Community Environmental Health Advisory Board (CEHAB), composed of health professionals, elected officials, and members of low-income communities, to advise the DOH.<sup>80</sup>

The Equitable Development category identifies a state-law requirement that local governments and affected communities be notified of applications to construct a hazardous waste facility in their area.<sup>81</sup> Also in this area, the report references a 1999 case in which the siting of a proposed electrical power plant was challenged as inconsistent with Executive Order 12898.<sup>82</sup> The Florida Division of Administrative Hearings (DOAH) rejected the claim, indicating that it was beyond the scope of the state's permit-review proceedings.<sup>83</sup>

Further, under the Pollution Cleanup category, the report discusses the Florida Brownfield Redevelopment Act and provisions therein that make statements regarding environmental justice issues and that contain the substantive requirement that local governments responsible for brownfields redevelopment use advisory committees for "the purpose of improving public participation and receiving public comments on rehabilitation and redevelopment of the brownfield area . . . and environmental justice."<sup>84</sup> Also under this category is the Accidental Release Prevention and Risk Management Planning Act, which provides the framework for the EPA's delegation of authority to the State of Florida under the Clean Air Act.<sup>85</sup> This framework authorizes the Florida Department of Community

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<sup>79</sup> *Id.* at 62 n.404 (2003). The Community Health Protection Act is found at Fla. Stat. § 381.1015 (2009).

<sup>80</sup> ENVIRONMENTAL JUSTICE FOR ALL, *supra* note 71, at 62. The author of this Article is a former CEHAB member. *Environmental Justice for All* implies that the CEHAB was unfunded and stopped meeting in 2002 but resumed meeting in 2006 and continues today. This is inaccurate: funding for the CEHAB was in the state budget for all but one year between 2002 and 2009; however, the DOH did not operate it during some of those years.

<sup>81</sup> *Id.* at 62–63.

<sup>82</sup> *Id.* at 63 (citing *Rowe v. Oleander Power Project, L.P.*, 1999 Fla. Env. Lexis 296 (Fla. Dep't of Env'tl. Protection Nov. 10, 1999)).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 63 (citing FLA. STAT. § 376.80(4) (2005)).

<sup>85</sup> *Id.* at 64 (citing FLA. STAT. § 252.934 (2005)). Certain programs of the Clean Air Act can be delegated to states. Most notable in the *Ocala* case is the Title V Program. *See* 42 U.S.C. § 7661a(d)(1) (2006).

Affairs (DCA) to offer and accept Supplemental Environmental Projects<sup>86</sup> (SEPs) as a means of compliance with or enforcement of certain actions under the Clean Air Act.<sup>87</sup>

In sum, the above laws and policies provide education about environmental justice issues, notice of certain pollution actions to environmental justice communities, advisory opportunities for impacted communities, and potential access to funding for environmental projects. However, the report contains no documentation of Florida statutes, regulations, or policies that have any substantive requirements to avoid disproportionate environmental burdens on environmental justice communities.<sup>88</sup>

Additionally, as cases such as *Rowe v. Oleander Power Project*<sup>89</sup> demonstrate, while the developments in federal agency environmental justice law are important, it is vital to remember that the EPA delegates many environmental programs (such as permitting of water and air pollution and siting of sources of hazardous waste) to the environmental agencies of the various states.<sup>90</sup> Thus, the requirements of federal environmental justice law, such as President Clinton's Executive Order, are sometimes neatly sidestepped by merely letting the states handle the issue instead of requiring that the EPA do the job. States may also supplement federal laws. For instance, in addition to state codification of delegated federal environmental law, Florida does have some of its own environmental laws.<sup>91</sup>

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<sup>86</sup> SEPs are supplemental environmental projects funded by regulated entities for compliance or enforcement obligations. The EPA's SEP Guidelines include a goal of encouraging "SEPs in communities where environmental justice concerns are present." *Id.* at 64 (citing FLA. STAT. § 252.940(d)(3) and USEPA Final EPA Supplemental Environmental Projects Policy Issued, 63 Fed Reg. 24796 (May 5, 1998)).

<sup>87</sup> The State-delegated-authority of the Clean Air Act rests predominately with the Department of Environmental Protection. FLA. STAT. § 252.937(1)(a)1 (1998). However, DCA includes the Division of Emergency Management, "which directs and coordinates state, federal, and local efforts to deal with" natural and man-made disasters and accidents. Fla. Dep't. of Cmty. Affairs, *About Us*, <http://www.dca.state.fl.us/AboutUs.cfm>. This provision seems to relate to that program.

<sup>88</sup> See generally ENVIRONMENTAL JUSTICE FOR ALL, *supra* note 71.

<sup>89</sup> *Rowe v. Oleander Power Project, L.P.*, 1999 Fla. Env. Lexis 296, \*37 (Nov. 10, 1999) (Finding that state environmental agencies did not have jurisdiction to consider provisions of a federal executive order regarding environmental justice) ("[Rather, the issue in the proceeding was] whether the Project complies with state requirements for the issuance of an air construction permit.").

<sup>90</sup> 33 U.S.C. § 1251(b) (2006).

<sup>91</sup> In the Ocala case, there were no state-specific clean air laws to work with, but ultimately state contaminated-site law did come into play, albeit after the fact. See *infra* Part III; see also FLA. ADMIN. CODE ANN. r. 62-780 (West 2011). While the consent order between DEP and Royal Oak addressed violations under Chapter 403 of the Florida Statutes, it also required plans

## E. CIVIL ACTIONS: TORTS

Another area of state law that can be a good legal tool to address environmental justice issues is tort law. This is perhaps the one legal tool used in environmental cases that has not decreased in use despite recent changes in the law. For decades, attorneys have brought a variety of tort claims to address environmental harms, including nuisance, trespass, strict liability, and negligence theories for actions like personal injury, wrongful death, and medical monitoring.<sup>92</sup> While there has been a somewhat successful movement to cap civil awards for some of these actions,<sup>93</sup> these remain viable claims in many environmental cases. However, these cases tend to rely on extensive scientific information and expert testimony to prove causation, which frequently make the cases not economically viable.<sup>94</sup> While there is a significant amount of private bar attorneys that will take such cases, environmental justice clients who are unable to afford extensive litigation frequently have difficulties obtaining legal counsel, particularly in communities where the number of people affected is small. Even where clients do succeed in getting an attorney to pursue such an action, victory is far from guaranteed.

In the event the plaintiffs do succeed, either in obtaining a settlement or a court order, the remedies are predominantly monetary in nature,<sup>95</sup> which is not necessarily the desired outcome for residents dealing with ongoing pollution. Additionally, in the case of settlements, which are frequently encouraged by attorneys because of the costs and risks associated with going to trial, most defendants will offer money in exchange for no further legal action, non-disclosure, and the right to make no admission of wrongdoing. For environmental justice communities, all three of these terms can be heavy burdens. When a community has watched its loved ones get sick or even die from environmental exposure, community survivors frequently want an apology and an explanation. Most settlements

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for closure at the site, which included sampling and monitoring. These sampling results indicated contamination, which Royal Oak then had to clean up pursuant to this rule.

<sup>92</sup> See Kenneth S. Abraham, *The Relation Between Civil Liability and Environmental Regulation: An Analytical Overview*, 41 WASHBURN L.J. 379 (2002), Allan Kanner, *Tort Remedies and Litigation Strategies*, in THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS 667, 669–70 (Michael B. Gerrard & Sheila R. Foster eds., 2d ed. 2008) [*hereinafter* Kanner, *Tort Remedies*].

<sup>93</sup> Kanner *Tort Remedies*, *supra* note 92, at 667–670.

<sup>94</sup> Allan Kanner, *Environmental Justice, Torts and Causation*, 34 Washburn L.J. 505, 510 [*hereinafter* Kanner, *Environmental Justice*].

<sup>95</sup> Abraham, *supra* note 92, at 388–89.



preclude the community from understanding the whole truth and from ever getting the apology they so desperately desire.

Another concern with settlements in environmental torts cases is the administration of settlements. Tort lawyers are typically not environmental justice experts. While many may take cases because they want to see justice served for the community, for them the definition of justice is frequently monetary compensation for the clients' loss. Challenges come not just from differing goals or personal experiences but also from the system itself, which largely relies on monetary remedies, and ties the incentive to take these cases to money through contingency-fee arrangements often used in tort cases. For example, there are no specific laws and remedies for a factory that has a groundwater plume<sup>96</sup> extending under someone's property. There is no law that provides that the neighbor must be relocated or given meaningful input in cleanup strategies. Instead, the cause of action is often based on tort theories of negligent or intentional behavior that resulted in harm. In some instances the act is of such hazardous character that it gives rise to strict liability;<sup>97</sup> in most cases, however, the harmed neighbor must prove the harm, the industry's intent, and the damages, which are often high and extensive burdens to bear.

Sometimes the monetary award is large, but often in mass class-action cases, a large monetary settlement may not be significant for each individual plaintiff.<sup>98</sup> Even large settlements may not be enough to address the health and quality-of-life issues associated with living near a contaminated site for years, or even decades.

Further, sometimes the publicity of the legal victory diminishes the sympathy, understanding, and concern for the community's suffering. When the general public hears about a \$70 million verdict or settlement for a community, the public often overlooks the fact that, after costs and

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<sup>96</sup> A groundwater plume is when contamination exists below land surface in groundwater and extends out, creating an underground pool. The Groundwater Foundation, *Groundwater Glossary*, <http://www.groundwater.org/gi/gwglossary.html> (last visited Apr. 1, 2011).

<sup>97</sup> Kanner *Tort Remedies*, *supra* note 92, at 640–42. Strict liability may be imposed for abnormally dangerous activities. Kanner's article also notes that the elements of this liability vary from jurisdiction to jurisdiction but revolve around foreseeability of risk, the care exercised, and sometimes whether the activity is common usage. *Id.*

<sup>98</sup> Anton Caputo, *Residents Clamor for Conoco Settlement: Eligibility Questions Frequent in Pollution Case*, PENSACOLA NEWS J. (June 21, 2004) (explaining how a \$70 million class action settlement in Pensacola results in individual property payouts between \$6,000 and \$60,000, and that such payouts may be divided between multiple historical owners over a period of approximately fifty years).

fees, each person receives only \$6,000 and the pollution remains.<sup>99</sup> Similarly, when people hear that \$4 million is set aside for medical monitoring, they do not understand that the plaintiffs do not see a dime of that money, and that they can only be tested for the presence of diseases associated with the contaminants of concern, only to be told after a positive test that no money has been set aside to provide care for the ill.<sup>100</sup>

#### IV. THE CASE STUDY: NORTHWEST OCALA CHARCOAL FACTORY

##### A. THE ENVIRONMENTAL ISSUE

Residents in Northwest Ocala lived among a number of polluting facilities for decades. Their chief complaints, however, centered on a charcoal factory built in 1972 and owned by Royal Oak.<sup>101</sup> Many of the residents in the community had lived with pollution from this facility their whole lives; in fact, many remember when the facility began operating within their community.<sup>102</sup> Closest to the facility were small “company”-type homes once occupied by workers at the plant. For many years, these homes had been operated as rentals for low-income residents. These homes were so close to the smokestacks of the charcoal factory that they seemed to sit on the plant site itself. It was not uncommon to see young children playing a stone’s throw from the plant. Just beyond the two streets adjacent to the plant sit several low to middle-class neighborhoods: Richmond Heights, Bunche Heights, and Happiness Homes.

##### B. THE CLIENTS/COMMUNITY

###### 1. Neighborhood Citizens of Northwest Ocala (NCNWO)

In Ocala, citizens concerned about pollution from surrounding indus-

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<sup>99</sup> *Id.*

<sup>100</sup> *Id.* “It is simply a detection process where you look for signs of diseases that are caused by the contaminants,” he said. “It does not provide for actual treatment for anything that is found.” *Id.* (quoting the President of Class Action Administration regarding the \$3.6 million settlement for medical monitoring).

<sup>101</sup> GREENE, *supra* note 5, at 244.

<sup>102</sup> See Christopher Curry, *Coat of Charcoal: Residents Concerned with Soot from Royal Oak*, OCALA STAR BANNER, Aug. 24, 2005, available at <http://www.ocala.com/article/20050824/NEWS/208240349> [hereinafter *Coat of Charcoal*].

try formed a community-based organization called Neighborhood Citizens of Northwest Ocala, Inc. (NCNWO).<sup>103</sup> NCNWO is based out of Ocala, Florida, the county seat of Marion County,<sup>104</sup> in Central Florida.

The population of Ocala is approximately 51,800 people.<sup>105</sup> The city is approximately 71% Caucasian and 24% African American.<sup>106</sup> The median household income is \$35,600 per year and the median home value is \$135,800.<sup>107</sup> The median age in Ocala is thirty-nine.<sup>108</sup> Approximately 83% of Ocala residents over the age of twenty-five are high school graduates and nearly 19% of Ocala residents in that age group have a Bachelor's degree or higher.<sup>109</sup>

West Ocala is the most highly segregated area of Marion County.<sup>110</sup> Of the twenty-six low-income census block groups in Marion County, only three have a minority population of more than 50%—census tracts fifteen, seventeen, and eighteen.<sup>111</sup> In the 2000 census, the population of census tract fifteen was 61% African American, the population of census tract seventeen was 83% African American, and the population of census tract eighteen was 97% African American.<sup>112</sup> The Royal Oak facility was located in census tract seventeen.<sup>113</sup> Since the 1970s, soot from the charcoal-

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<sup>103</sup> Neighborhood Citizens of Northwest Ocala, *Tests Prove Threatening Chemicals in Particulate Pollution in Community* (Feb. 17, 2006), <http://www.gcmonitor.org/section.php?id=42>.

<sup>104</sup> The population of Marion County, Florida, is approximately 306,000. The county is approximately 83% Caucasian and 11% African American. The median household income is \$39,000; the median home value is \$142,900. The median age in Marion County is 43.4. Approximately 84% of Marion County residents over the age of 25 are high school graduates and nearly 16% have a Bachelor's degree or higher. U.S. Census Bureau, Fact Sheet: Marion County, Florida, 2006–2008 American Community Survey 3-Year Estimates, Data Profile Highlights, <http://factfinder.census.gov/> (under “Fast Access to Information,” input “Marion County, Florida”) (last visited Apr. 1, 2011).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> MARION COUNTY, FLORIDA, CONSORTIUM: ANALYSIS OF IMPEDIMENTS TO FAIR HOUSING CHOICE 4 (2009), available at <http://www.marioncountyfl.org/CommunityServices/Updates/FinalAI.pdf>

<sup>111</sup> *Id.* at 5.

<sup>112</sup> *Id.*

<sup>113</sup> U.S. DEP'T OF COMMERCE ECON. AND STATISTICS ADMIN. U.S. CENSUS BUREAU, Census Tract Outline Map of Marion County (2000), available at [http://www2.census.gov/plmap/pl\\_trt/st12\\_Florida/c12083\\_Marion/CT12083\\_003.pdf](http://www2.census.gov/plmap/pl_trt/st12_Florida/c12083_Marion/CT12083_003.pdf). (Martin Luther King, Jr. Avenue forms the boundary between tracts 17 and 18. The Royal Oak facility was located a block or so west of Martin Luther King, Jr. Avenue, putting it in tract 17. See *id.*

producing plant has rained down on neighborhoods surrounding the plant.<sup>114</sup> Property values in the area have been stagnant.<sup>115</sup>

### C. THE ATTORNEYS

NCNWO was represented by three different legal entities during the Royal Oak case.<sup>116</sup> Originally, NCNWO had an informal arrangement for assistance with the Legal Advocacy Center of Central Florida (LACCF).<sup>117</sup> Residents in Northwest Ocala had worked with LACCF attorneys previously on affordable housing issues and approached them about assistance with environmental justice issues. Because this was beyond the focus and expertise of LACCF,<sup>118</sup> LACCF facilitated a relationship between nonprofit environmental attorneys and NCNWO.<sup>119</sup>

The Legal Environmental Assistance Foundation (LEAF) worked on the Royal Oak case from 2003 to 2004. Founded, and led for twenty-five years, by B. Suzi Ruhl, an attorney with a Masters of Public Health degree, LEAF's focus was historically on environmental health and justice issues. For years, LEAF was the only entity offering legal assistance specifically to environmental justice communities in Florida.<sup>120</sup> Such assistance also included non-legal or legally related services.<sup>121</sup> After LEAF

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<sup>114</sup> Christopher Curry, *Royal Oak to Close Its Ocala Plant: Plant to Shut Down in Face of Inquiry, Resident Complaints*, OCALA STAR BANNER (Dec. 2, 2005) [hereinafter *Royal Oak to Close*], available at <http://www.ocala.com/article/20051202/NEWS/212020362>.

<sup>115</sup> MARION COUNTY, FLORIDA CONSORTIUM, *supra* note 110, at 21.

<sup>116</sup> Those three legal entities were LACCF, LEAF, and WildLaw.

<sup>117</sup> LEGAL ADVOCACY CENTER OF CENTRAL FLORIDA, INC., <http://www.lacsf.org/> (last visited Apr. 1, 2011).

<sup>118</sup> LACCF describes itself as "a non-profit non-Legal Services Corporation restricted law firm [sic] dedicated to enforcing the legal rights of eligible low-income clients and disabled persons in Florida Legal Services Region III by providing advice and counsel, legal representation on 'impact matters' and class action lawsuits, community education and outreach, and legislative advocacy." *Id.*

<sup>119</sup> However, LACCF did remain involved with the Royal Oak case for many years, providing peripheral assistance. Also, a former LACCF attorney who went into private practice continued to counsel the community.

<sup>120</sup> LEAF is a nonprofit environmental organization, incorporated in Alabama and licensed to do business in Florida since 1984. See *Legal Environmental Assistance Foundation, Inc., CHILDREN'S ENVIRONMENTAL HEALTH NETWORK*, [www.cehn.org/legal\\_environmental\\_assistance\\_foundation\\_inc](http://www.cehn.org/legal_environmental_assistance_foundation_inc) (last visited May 18, 2011).

<sup>121</sup> Here, the term "non-legal services" is used to mean services such as community organizing and education. Legally related services are those that are not the practice of law but which are often performed by attorneys and utilize their legal knowledge and background, such as legislative advocacy, rulemaking comments, and so on.

ceased its relationship with NCNWO in 2004, NCNWO requested assistance from WildLaw.

WildLaw is a nonprofit environmental law firm with offices in Alabama, Florida, and North Carolina.<sup>122</sup> Through its Assisting Communities with Environmental Solutions (ACES) Program, which is coordinated through the Florida office, WildLaw works with communities faced with extensive environmental burdens.<sup>123</sup> While legal services are a part of the solution to these problems, WildLaw's practices recognize that litigation is not always successful, and even if it is, the legal solution might not be enough.<sup>124</sup> Therefore, WildLaw works to complement its legal services with other services in order to increase the potential for improved conditions in the community.<sup>125</sup> These services include legal, regulatory, and legislative assistance; community education; limited community organizing, including capacity building for community organizations.<sup>126</sup> WildLaw has represented NCNWO on the Royal Oak case since late 2004. At LEAF and then at WildLaw, until 2008, the lead attorney on this case was the author of this article; therefore, much of the information contained herein is based on firsthand knowledge.

#### D. THE CASE

For years, residents of Ocala contacted city, county, and even state officials to complain about the smoke, fire, and soot from the nearby charcoal factory.<sup>127</sup> The local government entities informed the residents that they had no authority over the environmental actions of the plant and that the authority resided with the State of Florida's Department of Environmental Protection (DEP).<sup>128</sup> The governing district office of DEP for this

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<sup>122</sup> WILD LAW, <http://www.WildLaw.org/offices.htm> (last visited May 21, 2010). WildLaw's mission is "to defend the environmental integrity of human and natural communities through education, administrative actions, community capacity building, and litigation." *About Us*, WILD LAW, <http://www.WildLaw.org/about.htm> (last visited Apr. 1, 2010). WildLaw recognizes that the environmental and health burdens of our society are disproportionately placed on communities of color and sometimes on low-income white communities. *Assisting Communities with Environmental Solutions*, WILD LAW, <http://www.WildLaw.org/aces.htm> (last visited Apr. 1, 2011).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Where There is Soot, There Is Pollution*, OCALA STAR BANNER, Aug. 25, 2005, <http://www.ocala.com/article/20050825/NEWS/50825003>.

<sup>128</sup> Cara Buckley, *Air of Suspicion*, MIAMI HERALD, May 19, 2006 [hereinafter *Air of Sus-*

facility was located in Orlando, more than an hour away. Sometimes complaints from residents or local government authorities would make it to DEP, but the complaints produced no change in industry behavior from the community's perspective. Then, after years of unanswered concerns, NCNWO contacted an attorney at the local legal services office, the Legal Advocacy Center of Central Florida (LACCF), with whom it had worked on fair housing projects. While LACCF had not worked on environmental issues, one staff member recalled attending a training hosted by someone from the Legal Environmental Assistance Foundation, Inc. (LEAF), a nonprofit environmental law firm in Tallahassee. LACCF made contact with a LEAF staff attorney who specialized in community pollution and environmental justice issues. LEAF began working with LACCF and spoke with residents and members of NCNWO to hear their story. The story was consistent; for more than thirty years, this community had been blanketed by black, gray, and white ash and soot. Community members described how they hid indoors, how their plants suffered and would not grow, how they would wake to find their cars covered with the substance, and how, no matter how hard they washed their homes, they never came clean. They talked about extensive respiratory concerns and what they felt were a disproportionate number of people in the community with severe respiratory ailments, cancers, and other rare illnesses.<sup>129</sup>

LEAF agreed to investigate the state's environmental files to further evaluate the community's concerns. Through Florida's public records laws,<sup>130</sup> LEAF requested information from DEP on three facilities in

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*picion*], [http://www.doh.state.fl.us/Environment/programs/PACE-EH/Marion/Marion\\_15.pdf](http://www.doh.state.fl.us/Environment/programs/PACE-EH/Marion/Marion_15.pdf).

<sup>129</sup> NCNWO also spoke of pollution concerns from a few other troublesome industries in the area. For instance, NCNWO also told of one industry neighbor, Wood Resource and Recovery, who attempted to expand its operations but met with NCNWO's resistance at local zoning hearings and ultimately decided against expanding this site, closed down, and moved. By and large, however, the community's main concern was the charcoal factory.

<sup>130</sup> FLA. CONST. art. I, § 24(a) ("[Florida's Constitution provides that e]very person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution."). Florida Statutes section 286.011 implements this section of the Florida Constitution and provides specific requirements, such as adequate notice for public meetings and fines for public officers who violate the requirements. FLA. STAT. § 286.011 (2009). As a result, "[i]n Florida, disclosure is the standard." FLA. ATT'Y GEN., 2010 GOV'T IN THE SUNSHINE MANUAL (ABRIDGED) 1 (2010), *available at* [http://myfloridalegal.com/webfiles.nsf/WF/KGRG-844HMA/\\$file/2010SunshineManual.pdf](http://myfloridalegal.com/webfiles.nsf/WF/KGRG-844HMA/$file/2010SunshineManual.pdf).

Northwest Ocala: Royal Oak, Florida Express Shavings, and Watson Lumber. The response from DEP indicated that there were files on Royal Oak, and that there had been no recent significant compliance issues with that facility; there were no state files on the other two entities. Upon reviewing the files, I found years of files indicating that Royal Oak had largely been in compliance with environmental laws, and I also found several complaints from residents over the years. Where investigations had been conducted, some of the investigation notes indicated that the DEP's observations of the site occurred hours or even days after the complaints and that sometimes the DEP investigator informed the plant manager in advance that he intended to come to the site to investigate a citizen complaint. On at least one occasion, the DEP employee took the plant manager to the home of a complaining citizen to explain why the pollution was not from the Royal Oak plant. On another occasion, a DEP inspector observed and recorded thick black smoke emanating from the plant, but still marked the facility in compliance.<sup>131</sup> Having reviewed many similar files, I was not surprised or deterred by the apparent "compliance" of the plant, but was appalled by the investigation tactics.

I next decided to visit the community, see the plant in operation, and talk further with residents. During an hour tour of the community, I witnessed firsthand the white, gray, and black smoke flowing from the smokestacks; fine particles falling down on the nearby residences; and flares from the smokestacks that appeared to be up to a dozen feet high. Additionally, as an asthmatic, I experienced chest tightness and coughing during the tour. Residents also took me to their homes and showed me the soot-like substance attached to plants, lawn furniture, house siding, and other objects. While speaking with the residents, I asked them about some notes in the DEP files indicating that, a number of years back, DEP had performed particulate monitoring in the area in response to citizen complaints, but had found no serious concerns. The residents showed me the location of the air-monitoring device and commented that the location, a park more than five blocks away, was not an area where winds prevailed, and therefore, was not as affected by the particulates.

While the public records requests were being made and the records reviewed, I also employed the help of a masters of public health (MPH) intern from Florida Agricultural & Mechanical University (FAMU) to perform scientific and health research regarding the charcoal manufacturing process, the chemicals used and produced at charcoal factories, and the

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<sup>131</sup> *Air of Suspicion*, *supra* note 128.

health effects related to these chemicals and processes. This information was utilized to develop a fact sheet for NCNWO members to help them and others understand what they were being exposed to.

Determined to assist NCNWO with their concerns, I informed them of what I found in the DEP files, but promised that I would do some research to further evaluate if there was a way to change the behavior of the facility. I believed that NCNWO needed more allies in the fight, and despite the fact that environmental authority rested with the State, I thought that the cooperation and support of the local governments could be an important tool, so I suggested that NCNWO use a concentric circle approach to their public education efforts.<sup>132</sup> Such an approach begins by educating and galvanizing those most affected by the pollution and works outward, eventually reaching the broader community and its government institutions. To begin this process, I encouraged NCNWO to start using the fact sheets and their personal experiences to educate people throughout the community.

Around this time, I relocated to WildLaw,<sup>133</sup> which engaged additional public health students in aspects of the case. Specifically, WildLaw assisted NCNWO in securing an MPH intern from FAMU to work directly with the WildLaw attorneys in the Ocala community. The MPH intern performed a number of tasks that were beneficial to NCNWO's case.

With regard to the concentric circle education approach, NCNWO needed more educational and organizational documentation. To this end, WildLaw helped NCNWO to become a Florida nonprofit corporation, and the MPH intern helped NCNWO develop a brochure, a newsletter template, several editions of the newsletter, and other environmental and health fact sheets. Beyond just developing these documents, the MPH stu-

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<sup>132</sup> "Concentric" is a geometric term denoting circles within other circles, with each subsequent circle getting bigger. See Webster's Third New International Dictionary 469 (2002). In this context, I was defining an educational approach that starts with those closest to the issues and then works its way out to other groups of people. In this case, the suggestion was to start with those who formed NCNWO (this was largely done at this point); then the affected community (their neighbors) to draw in more informed members; then the broader community including groups, organizations, and institutions that might support their concerns, including city government; and finally approaching county, state, and federal officials. At each level, my goal was to introduce new people to the issues, educate them on NCNWO's situation, and seek support in whatever way possible.

<sup>133</sup> Shortly after I relocated to WildLaw, LEAF indicated that it could not continue its relationship with NCNWO, and the LACCF attorney working with NCNWO contacted WildLaw with an update on the community and requested WildLaw's assistance. I then began working on the case again, further researching the legal areas, updating the public records review, and gathering new information from the community.



dent also trained NCNWO members on creating and maintaining such documents for themselves.

The intern also assisted NCNWO and the local county health department in conducting a cursory survey of community member health concerns. The MPH student helped tally the results of this survey and draw conclusions. Chief among the concerns was the air pollution associated with the nearby industry.

Since the community evidenced significant respiratory issues and difficulty accessing health care, the MPH student also helped organize a community health fair. The goal of the fair was to bring community residents together with local health providers, both government and private, to foster collaboration and cooperation to address these issues. The fair resulted in a sharing of information regarding both available health services and the health risks posed by the community's exposure to the emissions. It also included basic health screenings, such as blood pressure checks.

Also, as part of the education campaign, WildLaw suggested that NCNWO members begin collecting data on the levels of pollution experienced by the community. NCNWO members used white sheets and paper plates to collect the soot and ash that rained down on their community. While researching data-collection techniques like this one, I was introduced to the "bucket brigade," a grassroots air-monitoring program employed by other polluted communities.<sup>134</sup> Using strategies from the National Bucket Brigade Coalition (NBBC), the community also began keeping pollution logs that detailed times when they saw or smelled emissions.

Through my research, I determined that much of the regulation in the Clean Air Act depends on industry-specific regulations and noted that states in the Midwest had charcoal-industry-specific regulations. In particular, I reviewed the EPA Region 7 actions, and most notably, efforts undertaken by the State of Missouri.<sup>135</sup> I spoke with various government of-

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<sup>134</sup> Bucket Brigade is a grassroots air-monitoring program. Global Community Monitor, *About Us*, <http://www.gcmonitor.org/article.php?list=type&type=3> (last visited Apr. 1, 2011). "The 'bucket' is a low cost \$75 version of the \$2,000 Suma canister used by government and industry" to collect air samples for testing. *History*, LOUISIANA BUCKET BRIGADE, <http://www.labucketbrigade.org/article.php?list=type&type=137> (last visited Apr. 1, 2011). Inside the bucket is a bag, which is sealed and sent to a laboratory for analysis with a gas chromatograph mass spectrometer. *Id.* The buckets are portable, easy to use, reusable (except for the bag), significantly less expensive than hiring someone to take samples, and approved by the EPA. *Id.* WildLaw was in the process of becoming part of the National Bucket Brigade Coalition (NBBC), so this was a fruitful inclusion into the campaign.

<sup>135</sup> At the time, Missouri was the United States' leading charcoal-producing state and Roy-

ficials and air quality specialists who worked on charcoal industry regulations and each time, after describing what I had witnessed in Ocala, I was met with comments about opacity limits,<sup>136</sup> which were a significant part of the regulatory regime in EPA Region 7. After hearing my description of the pollution in Ocala, an employee at the Missouri Department of Natural Resources stated that it sounded as though there was no afterburner<sup>137</sup> or the afterburner was malfunctioning, either of which could mean noncompliance with air quality regulations in their area.

Armed with this information, WildLaw began discussing opacity, charcoal industry regulations, and afterburners with various DEP staff. Each time, WildLaw was assured that Royal Oak had not exceeded the opacity limit in its permit and that an afterburner was in place as required by the EPA. Additionally, it was acknowledged that there were no federal charcoal-industry-specific regulations and that the State of Florida did not have any such regulations of its own. This was due to the fact that, unlike Missouri and other states, Florida did not have significant charcoal production. In fact, it appeared that the Royal Oak plant was the only operating charcoal plant in Florida.

Noting that opacity compliance, like many terms in Clean Air Act permits, was largely self-reported, WildLaw and NCNWO pressured DEP to do further monitoring in the community. An ally in this battle was the City of Ocala, which, after being further educated by NCNWO about what was going on at Royal Oak, unanimously passed a city council resolution to support NCNWO in its request to get DEP to do further air monitoring in their neighborhoods. The city even committed to funding some of these efforts. Afterwards, communications ensued between the city, DEP, the

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al Oak was the largest charcoal operator in Missouri. *Air of Suspicion*, *supra* note 128. In 1997, the EPA cited Royal Oak for failing to properly report pollution from their Missouri plants. Jim Stratton, *Concerns Linger About Charcoal Plant: The Ocala Facility's Recent Closure Leaves Residents Asking What Its Chimneys Spewed*, ORLANDO SENTINEL, Mar. 4, 2006, at A1. The violations carried a \$750,000 fine, but Royal Oak agreed to settle the charges by installing emissions controls. *Air of Suspicion*, *supra* note 128. Royal Oak facilities in Virginia have also been cited by the EPA; in 1999, Royal Oak paid a \$10,000 fine, and in 2000, it paid another \$450,000 fine. Stratton, *supra*.

<sup>136</sup> "Opacity" refers to the thickness of air emissions and how opaque they are. *Frequently Asked Questions*, FLORIDA DEP'T OF ENVTL. PROT., <http://www.dep.state.fl.us/southeast/air/faq.htm> (last visited Apr. 2, 2011).

<sup>137</sup> An afterburner is an emission control device that helps reduce the amount of emissions. See, e.g., *In re Multidistrict Vehicle Air Pollution*, 591 F.2d 68, 69 (9th Cir. 1979) ("Afterburners reduce emissions by further combustion of exhaust gasses."); see also Peter Yronwode, *From the Hills to the Grills*, MO. RES. MAG. 7-8 (2000), available at <http://www.dnr.mo.gov/magazine/2000-spring.pdf> ("Although many of the chemicals in charcoal smoke are toxic or carcinogenic, all are also highly flammable. A simple afterburner could destroy them easily.").

U.S. EPA, NCNWO, and WildLaw about how to perform this testing. NCNWO submitted a detailed outline, developed by WildLaw with the assistance of scientific experts and members of the National Bucket Brigade Coalition, which detailed the testing for particulate matter (PM) as well as volatile organic chemicals (VOCs) and polycyclic aromatic hydrocarbons (PAHs)—all commonly associated with charcoal production.

DEP committed to the testing for particulate matter<sup>138</sup> and began discussions with NCNWO, WildLaw, and the city about what types of monitors and testing protocols were necessary. DEP indicated that it did not have the equipment or expertise to do the testing for the chemical compounds, so WildLaw located the equipment and expertise at the EPA and private companies, but was ultimately told that the EPA could not deploy the equipment because of its use in Louisiana post-Hurricane Katrina, and that DEP was not able to fund a private consultant to do the work.

Additionally, after repeated requests by WildLaw and NCNWO for DEP to conduct unannounced inspections of the facility, a DEP monitoring employee noted problems at the facility resulting in a Notice of Violation (NOV)<sup>139</sup> for numerous violations, including opacity limits. As is common, after the issuance of the NOV, DEP and Royal Oak began discussions to see if the violations could be resolved voluntarily through a consent order. NCNWO and WildLaw were not invited to participate in these conversations but remained informed after the fact by requesting information from DEP through the state public records law. Ultimately, in July 2006, Royal Oak and DEP signed a consent order fining Royal Oak \$50,000 and requiring various improvements.<sup>140</sup> On behalf of NCNWO, WildLaw reviewed the file leading up to the Consent Order and considered challenging it for being too lenient. After making comments and

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<sup>138</sup> DEP agreed to test for both PM 2.5 and PM 10 fine and superfine particulates.

<sup>139</sup> A notice of violation is an official document indicating what legal violations the entity is being charged with by the DEP. *See* FLA. STAT. § 120.695 2(a) (2010) (“Each agency shall issue a notice of noncompliance as a first response to a minor violation of a rule. A ‘notice of noncompliance’ is a notification by the agency charged with enforcing the rule issued to the person or business subject to the rule.”).

<sup>140</sup> Consent Order, Fla. Dept. of Envtl. Prot. v. Royal Oak Enterprises, Inc., OGC File No. 05-2882. Documents from 2006 to the present may be accessed by the public through DEP’s OCULUS site. OCULUS, <http://dwmedms.dep.state.fl.us/Oculus/servlet/login> (click on “Public Oculus Login;” once signed in, select “Waste Cleanup” in the box labeled “Catalog” and select all options in the box labeled “Profile;” Royal Oak is in Marion County and the Facility ID is COM 271736. The 2006 Consent Order is the first document available in electronic format. Earlier documents, including facility investigations and correspondence between DEP and Royal Oak, are available only by contacting DEP’s Central District Office in Orlando) (last visited Apr. 2, 2011).

getting DEP to incorporate some of the community's concerns, no challenge was filed.

Interestingly, during the investigation of the violations it was determined that Royal Oak did not have an afterburner in place—in fact, it had never had one in place—despite officials saying that the permit was conditioned on the afterburner.<sup>141</sup>

While the Consent Order was pending, Royal Oak announced that it would be closing its Ocala plant.<sup>142</sup> This abrupt closure, compounded by difficulties between DEP and NCNWO on where to locate the equipment,<sup>143</sup> resulted in no additional particulate monitoring by government officials.<sup>144</sup>

Unhappy about the government's response, and with a great desire to understand what they had been inhaling for the last three decades, community members decided to take matters into their own hands. Working with WildLaw and other members of the National Bucket Brigade Coalition, they conducted their own sampling. Although the testing was hampered because Royal Oak essentially shut down production upon announcing its plans to close, the community members were able to focus their sampling on the chemical composition of the residues deposited throughout the community.

At first, they did independent testing using a “wipe sample”<sup>145</sup> because it was one way to find past emissions' residue and was relatively affordable.<sup>146</sup> Scientific advisors to the community informed the community members that this method was not the best way to detect the presence of PAHs, but was potentially possible under the circumstances because of the

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<sup>141</sup> See Consent Order, *supra* note 140, at 3.

<sup>142</sup> *Royal Oak to Close*, *supra* note 114.

<sup>143</sup> DEP wanted to pass all liabilities for the equipment on to homeowners willing to have the monitors on their properties. See Christopher Curry, *Pollution Concerns Royal Oak Neighbors*, Ocala Star Banner (Feb. 21, 2006), [http://www.doh.state.fl.us/Environment/programs/PACE-EH/Marion/Marion\\_14.pdf](http://www.doh.state.fl.us/Environment/programs/PACE-EH/Marion/Marion_14.pdf). Interestingly, DEP offered to release the City from any liability but would not do the same for the residents. *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> A wipe or swipe sample is performed with special laboratory analytical equipment that utilizes special material to swab an area, and then the swab or wipe is tested for its chemical composition. See OFFICE OF RESEARCH AND DEVELOPMENT, NAT'L HOMELAND SEC. RESEARCH CTR., SAMPLE COLLECTION PROCEDURES FOR RADIOACTIVE ANALYTES IN ENVIRONMENTAL MATRICES I-11 to I-12 (Dec. 2006) [hereinafter SAMPLE COLLECTION], available at <http://www.epa.gov/nhsrcc/pubs/600s07001.pdf>.

<sup>146</sup> See *id.*; see also U.S. ENVIRONMENTAL PROTECTION AGENCY, CHIP, WIPE, AND SWEEP SAMPLING (Nov. 16, 1994), available at <http://www.dem.ri.gov/pubs/sops/wmsr2011.pdf>.

extent of emissions there. Other bucket brigade air sampling could not be done because there were no longer air emissions from the smokestacks.<sup>147</sup> Despite the lack of sensitivity of the wipe sampling, the results demonstrated extremely high concentrations of many dangerous particulates, including known carcinogens.<sup>148</sup> These results led the community to believe that the area was a hotspot for these chemical particulates and that further testing needed to be done to ascertain the full extent of the pollution. The community continued to pressure DEP to have Royal Oak do testing both on and off-site before it closed the plant.

At WildLaw and the community's urging, DEP included requirements for on-site soil and water sampling in their 2006 Consent Order.<sup>149</sup> As the community suspected, these samples were found to be contaminated and DEP ordered that the site be cleaned up.<sup>150</sup> WildLaw continued to advise NCNWO on the status of the enforcement order at Royal Oak.

In late 2007, after several series of soil tests conducted in accordance with the Consent Order, DEP reviewed and concurred with a Royal Oak plan to excavate soil<sup>151</sup> from several areas of the former charcoal-plant property. Those contaminated soils were removed in March 2008.<sup>152</sup> During the site cleanup process, DEP and Royal Oak agreed that institutional controls would be utilized in the cleanup process, which essentially meant that DEP agreed to allow Royal Oak to clean the western portion of the site in accordance with state regulatory levels that were previously determined to be appropriate for residential properties, while the eastern portion of the site would be cleaned to industrial standards. Such institutional controls are required to be documented in a covenant on the deed to the property;<sup>153</sup> originally, Royal Oak was to submit that required covenant on

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<sup>147</sup> See Stratton, *supra* note 135.

<sup>148</sup> Several polycyclic aromatic hydrocarbons (PAHs) were found in the wipe samples.

<sup>149</sup> See Consent Order, *supra* note 140, at 5.

<sup>150</sup> Interoffice Memorandum from Tracy Jewsbury, Project Manager, Fla. Dep't of Env'tl. Prot., Draft Declaration of Restrictive Covenant of Groundwater and Soil Contamination (March 4, 2010). OCULUS, <http://dwmedms.dep.state.fl.us/Oculus/servlet/login> (click on "Public Oculus Login;" once signed in, select "Waste Cleanup" in the box labeled "Catalog" and select all options in the box labeled "Profile;" Royal Oak is in Marion County and the Facility ID is COM\_271736; the Memorandum is the last file located on page 2 of the results; website contains documents from 2006 to the present) (last visited Apr. 2, 2011).

<sup>151</sup> Soil excavation is a process by which contaminated soil is dug up and removed from the site. Depending on the amount of soil excavated, clean soil may be brought to the property to replace it. SAMPLE COLLECTION, *supra* note 145, at I-7 to I-10.

<sup>152</sup> Interoffice Memorandum, *supra* note 150.

<sup>153</sup> See Letter from Tracy Jewsbury, Fla. Dep't of Env'tl. Prot., to Paul McAllister, Royal Oak Enter., Proposed Control for SRCO with Conditions Approval (July, 2008). OCULUS,

September 22, 2008.<sup>154</sup> Royal Oak found numerous issues with the title to the land in question and initially requested a thirty-day extension. When it became apparent that the title issues could not be rectified in thirty days, Royal Oak asked for an extension until April 2009.

As of June 2010, that extension continues and title issues with the Royal Oak property have not been rectified.<sup>155</sup> WildLaw has taken this opportunity to remind DEP that it is precisely these types of title issues and related problems that led WildLaw to argue against institutional controls<sup>156</sup> and in favor of a complete cleanup to residential levels. WildLaw and NCNWO continue to monitor the covenant issue to determine whether it will be appropriately completed. There is also ongoing testing of one groundwater well, which has not tested to acceptable cleanup target levels for two consecutive quarters, as is required under the Consent Order. Only after groundwater testing is concluded and a legally proper covenant is submitted and approved can the DEP issue a “No Further Action” ruling declaring that the site is clean. Royal Oak continues to monitor the site, and WildLaw and NCNWO continue their roles as watchdogs over the activities, monitoring, and testing results at the site.

## V. LESSONS LEARNED: OCALA AND OTHER ENVIRONMENTAL JUSTICE COMMUNITIES

### A. OCALA LEGAL ANALYSIS

During the Ocala case, there were many instances where the attorneys provided legal advice to their clients. This section discusses some of the key crossroads of the case where the community could have resorted to certain legal actions—most notably litigation—and the pros and cons of those actions. Also addressed are the routes the clients chose to take, as identified above in the case study, and reasoning behind those choices.

Based on the difficulties of bringing civil rights and constitutional

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<http://dwmedms.dep.state.fl.us/Oculus/servlet/login>. (click on “Public Oculus Login;” once signed in, select “Waste Cleanup” in the box labeled “Catalog” and select all options in the box labeled “Profile.” Royal Oak is in Marion County; the Facility ID is COM\_271736) (last visited Apr. 2, 2011).

<sup>154</sup> *Id.*

<sup>155</sup> See Interoffice Memorandum, *supra* note 150.

<sup>156</sup> Institutional controls are legal instruments or actions that reduce exposure to contamination (e.g. a deed restriction prohibiting drilling on a property with groundwater contamination). *Institutional Controls (ICs), Superfund*, U.S. EPA, <http://www.epa.gov/sudefund/policy/ic/index.htm> (last visited May 18, 2011).

law claims in environmental justice cases, there was no interest in pursuing these actions in this case. The three areas of law that were identified as being potentially successful were traditional federal environmental law, the Clean Air Act in particular; local land use law, including zoning, planning, and business regulations; and tort actions such as nuisance, trespass, property value diminution, personal injury, wrongful death, and medical monitoring.

## B. FEDERAL ENVIRONMENTAL LAW

WildLaw undertook extensive research of state and federal clean air laws, including the Clean Air Act. The goal of the Clean Air Act is to “encourage or otherwise promote reasonable Federal, State, and local governmental actions for pollution prevention.”<sup>157</sup> The Clean Air Act seeks to do this from three basic premises: (1) control ambient air quality,<sup>158</sup> (2) regulate sources of air pollution, and (3) regulate specifically problematic pollutants.<sup>159</sup> Ambient air quality is generally addressed by requiring states to be at or below certain pollution levels for criteria air pollutants.<sup>160</sup> The Clean Air Act regulates stationary sources of air pollution through technology and performance based standards.<sup>161</sup> Often these standards are industry-specific.<sup>162</sup> Additionally, the Clean Air Act calls for the identification and regulation of hazardous air pollutants (HAPs).<sup>163</sup> In the 1990 amendments to the Clean Air Act, Congress established an initial list of 189 HAPs, provided for EPA to add additional pollutants to the list, and required the EPA to publish a list of “categories and subcategories” of “major sources,” and some “area sources,” that emit these pollutants and to promulgate emission standards for these sources.<sup>164</sup>

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<sup>157</sup> 42 U.S.C. § 7401(c) (2006).

<sup>158</sup> Ambient air quality refers to the quality of air generally, not specific air emissions. *See National Ambient Air Quality Standards (NAAQS)*, U.S. EPA, <http://www.epa.gov/air/criteria.html> (last visited May 18, 2011).

<sup>159</sup> 42 U.S.C. § 7401(b) (2006).

<sup>160</sup> This is done through the National Ambient Air Quality Standards Program (NAAQS). 42 U.S.C. § 7408(a)(1) (2006). There are five criteria air pollutants: sulfur dioxide, particulates, carbon monoxide, ozone, and nitrogen oxide. 40 C.F.R. § 50.4, 50.5, 50.6, 50.8, 50.10, 50.11 (2002).

<sup>161</sup> 42 U.S.C. § 7411 (2006).

<sup>162</sup> *Id.*; *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375 (1973) (recognizing that industry specific regulation is consistent with the goals of the Clean Air Act).

<sup>163</sup> 42 U.S.C. § 7412 (2006).

<sup>164</sup> *Id.* § 7412(c)–(d).

Certain parts of the Clean Air Act can be delegated to the states, including the Title V Program, which permits major stationary sources of air pollution.<sup>165</sup> The Title V Program does not establish new requirements for these sources but establishes a program by which all requirements for a specific source can be consolidated.<sup>166</sup> Once a state has gained the authority to implement its Title V Program, it processes and approves or denies all Title V permits within the state. The EPA retains the right to review all permits but cannot substitute its judgment for the state's on an individual permit; however, if it determines that the state is not adequately administering and enforcing the program, the EPA can rescind the state's authorization.<sup>167</sup>

Royal Oak did have a Title V permit and yet appeared to be significantly impacting the community through its air emissions, so careful evaluation was given to claims regarding this issue. Some of the potential legal claims were to challenge Royal Oak's compliance with its permit, to challenge the authorization of the permit (although such an approach would have been difficult because a new permit had been issued within a year of the case being brought to the nonprofit attorneys), and to challenge the state's administration of the Title V Program. Unfortunately, the extensive amount of DEP reports that continually found the plant substantially in compliance created a presumptive burden that would have had to be overcome to successfully challenge Royal Oak's compliance with its permit. This would have required extensive scientific counsel and testimony, which would not only have had to be solid, but which would also have had to demonstrate that the science relied on by DEP was "arbitrary and capricious," because the DEP is afforded significant deference. The clients determined that this strategy was too costly and too speculative for them to proceed with at the beginning of the case. However, many of the non-legal activities they chose to undertake—collection of their own data, documentation of what was happening at the plant and in the community, community education on how to file complaints with the DEP, and their own sampling—were aimed at trying to correct some of these deficiencies. Further, extensive pressure was put on DEP to inspect the plant more closely and more frequently in the hope that inspectors would see a disconnect between what the compliance files said and the reality of the plant's operation. Additionally, the current permit was past the timeframe in which it

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<sup>165</sup> *Id.* § 7661–7661(f).

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* § 7661(a)(i)(1).



could have been challenged directly, and a new permit would not issue for close to five years. So although the community did not provide comment regarding the parameters of the permit, their education campaign included information on the permitting process and the terms of Royal Oak's permit so that the community could engage in the permit-renewal process.

Another issue involved whether or not the Royal Oak permit issued by DEP demonstrated the State of Florida's failure to administer its Title V permit process in compliance with the Clean Air Act. Most concerning was the reliance on visible emission readings for opacity purposes. In other states, opacity is measured by Continuous Opacity Monitoring (COM), which is a set of opacity readings recorded via laser technology as emissions leave the smokestacks.<sup>168</sup> The State of Florida does not require COM for any facilities not specifically required to have it under the Clean Air Act. Instead, as mentioned above, Royal Oak's compliance with its opacity limits in its permit was determined by self-reporting or an occasional DEP inspection. In either case, the Royal Oak or DEP official would literally "read the smoke's opacity" through viewing and comparing to the background sky. The permit allowed this technique to be used during both day and night. The attorneys spoke with scientific experts who strongly questioned the appropriateness of this methodology in evaluating opacity during nighttime hours. Also troubling were statements by community members that factory production and emissions seemed to increase during nighttime hours. The attorneys prepared for legal action on this issue, but, at the clients' request, also tried to persuade DEP to evaluate this policy, not just for Royal Oak, but also for other Title V facilities in Florida that operate during nighttime hours. DEP was not persuaded, but before the attorneys determined whether or not to move forward with legal action on this issue, the plant was closed and the clients no longer had a desire to pursue this action.

### C. LOCAL LAW

The attorneys also evaluated whether land use and growth management laws,<sup>169</sup> such as zoning and comprehensive planning statutes, could be used to address the clients' concerns. However, due to the length

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<sup>168</sup> See, e.g., COMPLIANCE SUPPORT UNIT, AIR QUALITY DIV., MICH. DEP'T OF ENVTL. QUALITY, CONTINUOUS OPACITY AND CONTINUOUS EMISSION MONITORING SYSTEMS (1998) available at [http://www.michigan.gov/deq/deq-ead-caap-cems-cems\\_315946\\_7.pdf](http://www.michigan.gov/deq/deq-ead-caap-cems-cems_315946_7.pdf).

<sup>169</sup> This evaluation included state growth-management law as it interplayed with local requirements.

of time that the facility had been operating, these were not viable avenues. Even so, these laws were used to address siting and expansion issues for other facilities adjacent to Royal Oak.

The other area of local law considered was business regulation. Attorneys reviewed local business licensing requirements and general business restrictions such as hours of operation. Although this did not prove fruitful in the Royal Oak case, these statutes were utilized in addressing other nearby polluting facilities that were not properly licensed or were operating outside local regulations.

None of the nonprofit entities involved were in a position to pursue civil damages or tort claims, and this was immediately explained to the clients. However, believing that this was an action the clients should pursue, the attorneys tried to help the clients locate attorneys to advise them further. The clients contacted at least six plaintiffs' attorneys but were not successful in obtaining representation. The main reasons for declining the case were evidentiary and causation issues, concerns that the cost of litigation would outweigh the potential recovery, and later, specific challenges associated with the cessation of operations.

#### D. FEDERAL ENVIRONMENTAL/STATE ADMINISTRATIVE LAW HYBRID

Upon issuance of the draft Consent Order, the clients and attorneys evaluated the possibility of challenging the Consent Order through the state administrative process. This approach would have essentially used state administrative law to challenge the state's administration of the federal environmental law program (the Clean Air Act). The clients objected to the number of Royal Oak's violations, the penalty calculation for these violations, and the closure requirements. The attorneys raised these issues with the DEP both before the draft consent order and after its issuance. Many of the community recommendations were included in the consent order; those that were not were left out because they presented evidentiary difficulties and high costs. The one area of the consent order that most dissatisfied the community was the lack of any off-site testing by Royal Oak to determine the full impact of their pollution. However, there is no clear enforcement nexus for this activity. Challenging the Consent Order on these grounds would have been difficult due to deference to the DEP; thus, instead of challenging the Consent Order, the attorneys continued to monitor implementation of the Order as well as subsequent DEP orders addressing site cleanup and post-closure monitoring and sampling.

### E. OTHER LEGAL ROUTES

Beyond the litigation counseling services described above, the attorneys also provided other legal counseling and assistance. For instance, NCNWO had questions early on about corporate existence and operation. This led to extensive legal counseling on the community-based organization's corporate options and state and federal nonprofit issues. NCNWO decided that it wanted to be a Florida nonprofit corporation and to seek federal 501(c)(3) status from the IRS. The attorneys helped with all of these tasks. Additionally, the attorneys provided assistance with operational issues, including employment, contract and grant management, and fundraising concerns.

### VI. RECOMMENDATIONS FOR ATTORNEYS SERVING ENVIRONMENTAL JUSTICE CLIENTS

For the reasons listed above, it should be clear that some of the legal tools traditionally used to address environmental injustices have been significantly curtailed and provide limited remedies to environmental justice communities. Based on the experience in Ocala, often, the best approach to solving environmental justice problems includes legal assistance that goes beyond the traditional public interest representation in litigation. As the Ocala case demonstrates, non-legal strategies, such as community education, community organizing, media campaigns, lobbying, and regulatory reform actions, can improve the health and environment of a community. Most environmental justice attorneys will tell you that when communities request their assistance, the community often wants answers to the following questions. What is happening to me? Why? What can be done to stop, prevent, or abate the consequences for my community? A good environmental justice attorney will utilize both legal and non-legal tools and strategies to answer these questions for his or her client and the community.

Additionally, a good environmental justice attorney will ask the most important question early on: what is it the community wants? Too often, attorneys think they know *the* solution—and although it may be *a* solution, it may not necessarily be the one the community wants. A community may come to an attorney because of pollution from a nearby facility. The attorney may immediately assume that the community wants the facility to be shut down. Upon further discussion, however, it may turn out that the whole community depends on that facility for its economic wellbeing, and that the community wants to keep the facility but institute environmental protections. A community may come to an attorney because of a nearby

Superfund site.<sup>170</sup> The attorney may assume that the community wants the contamination removed. The removal may mean nothing, however, if community members continue to become ill or die at an alarming rate because of inadequate access to health care and education. An environmental attorney should not forsake the general environment for the desires of the community, but a good environmental justice attorney should realize that the community is the client, not the environment itself. In other words, communities do not normally seek a result that is harmful to the environment, but the priority of a speedy clean up may take a back seat to the community's need for access to health care. A good environmental justice attorney will figure out how to achieve both access to health care and a speedy clean up, not because it is what the attorney desires, but because, once the health care issue is addressed, the community will also want the clean up. Environmental justice communities know the value of a clean and healthy environment better than most, and given the right tools, they will help create it for themselves.

Once an attorney knows what the community wants, he or she can better craft strategies and determine what tools and tactics are necessary to achieve the community's goals. As stated above, the best approach to environmental justice cases is one that utilizes many different tools: a multi-service approach, or multi-prong attack, works best. Common services an environmental justice attorney can provide include community education, community organizing, media campaigns, lobbying, and regulatory reform actions.

Additionally, organizational-capacity building, general community support, and sustainability are required to equip the community for the long battle ahead of it. The strength of the community undertaking the case is directly related to the success of any environmental justice strategy. For this reason, a good environmental justice attorney will provide services that build, strengthen, and protect the community, not just those that directly further environmental justice goals. This can include legal counsel on employment, incorporation, assistance with fundraising, organizational administrative support, and more.

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<sup>170</sup> A superfund site refers to a contaminated site on the National Priority Listing, which is eligible for clean up under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA). *See* 42 U.S.C. §§ 9601–75 (2006).