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**Promoting Community Building Through Collaborative Environmental  
Justice Legal Strategies and Funding Approaches  
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# Promoting Community Building Through Collaborative Environmental Justice Legal Strategies and Funding Approaches

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## Abstract

The author provides an overview and reports on the principal legal tools and strategies currently in use, examines new approaches, and explores the interests and needs of communities and their lawyers. The author also provides discussion on views elicited from leading organizations and experts in the field that can assist communities in their quest for environmental justice and assistance in defining the Environmental Justice Movement for the 21<sup>st</sup> century. There are preliminary recommendations on environmental justice legal strategies and next steps on informing the Ford Foundation on grant making ideas that can help enhance funding equity and promote critical areas of work in environmental justice communities.

## Introduction

This white paper is excerpted from a report prepared for the Ford Foundation entitled “Promoting Community Building Through Funding Approaches and Collaborative Environmental Justice Legal Strategies.1” This report, a core element of an historic project initiated by the Ford Foundation, promotes community building in environmental justice communities.

The project reflects a commitment by the Foundation to: (i) reassess and explore legal tools and strategies used by communities and their allies; (ii) create capacity for collective work and partnerships between environmental justice activists, environmental and civil rights groups; (iii) promote strategies in law and public policy that advance the Environmental Justice Movement; and (iv) encourage expansion of environmental justice grant making in this area by foundations.

This paper provides an overview and reports on the principal legal tools and strategies currently in use, examines new approaches, and explores the interests and needs of communities and their lawyers. The objective is to promote community building through funding approaches and collaborative environmental justice legal strategies. This paper is augmented by views elicited from leading organizations and experts in the field that can assist communities in their quest for environmental justice and help further define the Movement for the 21<sup>st</sup> century.

## The Environmental Justice Movement

The Environmental and Economic Justice Movement<sup>2</sup> has forged a new environmentalism in a social movement that emerges from the growing recognition that people of color and people with low incomes, more often than other segments of the population, live and work in areas where environmental risks are high. In addition to indoor and occupational hazards, these populations are often unwilling recipients of pollution sources such as hazardous waste sites, garbage dumps, incinerators, industrial production, pesticides and radiation exposures.<sup>3</sup>

Over the past two decades of activism, a coherent vision has materialized from the Environmental Justice Movement, which addresses the health and vitality of a community. This vision recognizes the significance of meeting community needs and aspirations, and positions those who live within it as integral partners in decision making.

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1 This report is at [www.law.gwu.edu/csg/Sandoval/Sandovalhome.htm](http://www.law.gwu.edu/csg/Sandoval/Sandovalhome.htm)

2 Hereafter, the Environmental Justice Movement

3 See e.g., “Transforming a Movement,” *Race, Poverty and The Environment*, Alston, D., (Fall 1991/Winter 1992); “Environmental Racism: Reviewing the Evidence,” in *Race and the Incidence of Environmental Hazards: A Time for Discourse*, Mohai, P., Bryant, B., (Bryant & Mohai, eds., 1992); “A Broad Environmental Agenda: Mandating Change Begins at the Federal Level,” *Maryland Journal of Contemporary Legal Issues*, Ferris, D., (Vol.5, Issue 1, 1993-94); “Leveling the Playing Field Through Environmental Justice,” Bullard, R., 23 *Vermont Law Review* 453 (Spring 1999)

Environmental justice is the junction of civil rights and the environment. It's focused on creating a new environmental paradigm centered on community health and quality of life, democratic inclusion of affected communities in environmental decisions, mobilizing resources to assist and protect them, and producing sustainable results.<sup>4</sup>

Since 1967, regional and national studies in the U.S. have demonstrated race and class disparities in the treatment of pollution risks. Scholars, attorneys, scientists, journalists and communities have produced evidence, which demonstrates that, while income is highly relevant, consequent to a historical legacy of slavery and racial intolerance, race is the most significant determining factor in terms of who is exposed to higher levels of environmental contaminants.

People of color represented in communities experiencing elevated pollution exposures span the spectrum to include African Americans, Latinos, Asian Americans, Pacific Islanders, Native Americans and immigrants from developing countries. Disproportionate exposures posed by pollution occur in both rural and urban areas.

Disproportionate exposure to environmental hazards results in disproportionate exposure to health threats. At a rate greater than the general population, the health of people of color (many of whom are also low income) is threatened by perils in the workplace, surface and ground water contamination, noxious air pollutants, lead poisoning and food poisoning due to contamination of subsistence food sources such as vegetation, fish and other wildlife.

For example, urban communities commonly face elevated health hazards in combination such as air pollution from motor vehicle traffic and proximity to freeways, water pollution and odors associated with sewage treatment plants, and risks posed by living next to hazardous waste dumps and incinerators. Threats to Native American communities include overexposure to toxic chemical runoff from coal strip mining and radiation due to uranium mining operations, which is linked to organ cancer at astounding rates compared to the general population. Migrant farm workers (most often Latinos and Blacks) in rural communities suffer from poisoning by dangerous pesticides.

Studies have also revealed that state and local government has failed to equitably enforce environmental laws and regulations intended to protect human health and the environment. One groundbreaking study by *The National Law Journal* (1992) entitled "Unequal Protection: The Racial Divide in Environmental Law," revealed disparities in the enforcement of laws and assessment of penalties in communities of color compared to white communities.

According to the report, disparities occur across-the-board in the enforcement of air, waste and water statutes. The report also revealed disparities in the rate at which Superfund sites are cleaned up. In some regions, communities of color waited longer than white communities for site remediation and hazard removal.

Since the genesis of environmental and health risks is intrinsically local, the Environmental Justice Movement is the progeny of and led by grassroots community activists who are working to redress these hazards, first, in their own neighborhoods and towns, next in the states, and at the federal level (and increasingly internationally). Grassroots activists and their allies working on issues from civil and human rights, to the peace movement, housing and tenant's rights, worker protection and a living wage, evolved into a common understanding that all of these issues impact the human environment. Thus, advocates of this view began organizing around them under a new environmental agenda.

This agenda, linking social justice and quality of life, expands the conventional definition of environment from a wildlife conservation/ ecosystem preservation ethic and incorporates the human environment. In other words, the environment doesn't stop at the door of the workplace or at the door of the home. Under this holistic approach, the environment is also where people live, work, learn and play.

Since inception of the Environmental Justice Movement, grassroots activists, their partners and allies have engaged the legal system and employed the law to leverage greater social equity and environmental justice. There have been impressive gains, for example, Executive Order 12898, the Presidential Executive Order on Environmental Justice, signed in 1994 during the Clinton Administration, formation of a federal National Environmental Justice Advisory

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4 D. Ferris, Address to the U.S. Department of Transportation Community Preservation Pilot Program Conference, September 13-14, 2000

Council, federal governmental policies, guidance and staff and state programs.

In September 2001, the Congressional Black Caucus culminated the year long National Environmental Policy Commission which assessed environmental communities through five Listening Sessions and evaluated policy options. Industry trade groups such as the National Association of Manufacturers and the American Chemistry Council have established committees focused on environmental justice. States are establishing environmental justice programs, convening advisory groups and issuing responsive policies.

Most important, communities around the U.S. are working on environmental impacts, land use, community health, wages and worker protection. Activists have influenced cleanups, permitting and economic development decisions. Communities have positively shaped decisions in their neighborhoods and regions and have also defeated local proposals to site or expand all types of facilities ranging from medical waste and garbage incinerators to low-level radiation dumps and chemical plants.

### **Partisanship and the Public Interest**

Political shifts are threatening to truncate these successes. The shifts are reflected in the election of George W. Bush to the Presidency as well as political successes achieved by conservatives in Congress and the state houses. The increasing influence of the corporate sector on the electoral process, and in state and federal agencies is another factor. In what, until this year, has been a Republican majority Congress, environmental justice activists, civil rights advocates and environmentalists continue to battle over legislative proposals to rollback environmental and civil rights laws.

Since election to the White House, under the guise of a domestic energy plan, President Bush is attempting to open critical wilderness areas to drilling. The Bush Administration has also proposed weakening important environmental protection standards and shifting national environmental enforcement responsibilities from the federal government to the states, shrunk funding in key programs, and retreated from implementing new standards that took (in some cases) decades to develop.

Not only are environmental standards and protected areas under attack, this summer, a coalition including the Alliance for Justice, the Natural Resources Defense Counsel and Earthjustice (among other groups) released a report entitled "Hostile Environment: How Activist Federal Judges Threaten Our Air, Water and Land." The report showcases how anti-environmental activism on the federal bench is curtailing protection of America's natural resources.

Although not noted in the report, a recent pivotal U.S. Supreme Court decision in [Alexander v Sandoval](#) (see below) also damages the immediate prospect that communities will be able to deploy at least one key civil rights law to redress disparate environmental impacts. The Supreme Court held that plaintiffs do not have a private right to sue under Title VI of the 1964 Civil Rights Act, which prohibits discrimination on the basis of race, color and national origin by recipients of federal financial assistance.

For the past twenty years, civil rights activists have fought rollbacks in civil rights laws in the courts and legislatures. Courts and legislatures have rejected programs that would enable minorities denied equal opportunity the right to compete on a level playing field in government contracting, hiring and employment and access to higher education. The slow pace of judicial appointments compounded by ongoing efforts by conservatives to stymie the federal judicial selection process in the Senate and pack the courts, have had a negative impact on civil rights.

The tragic events of the September 11 terrorist attack on the U.S. compound these trends. The prominence of domestic security concerns, funding the war on terrorism and economic stimulus efforts have eclipsed both the environment and civil liberties as priorities on the national agenda. The key question is whether public and Congressional attention on these issues is temporary or will there be strong general public acceptance that substantially changes the political terrain for the long-term.

## **Forging Alliances**

These events herald significant retrenchment in public policy. Further, there is urgency on the part of progressives about providing balance on these issues in the political conversation. In view of the nexus between environmental justice, civil rights and the environment, the timing presents a matchless opportunity for these interest groups to aggregate, build relations and strategize collectively to both reverse the negative momentum and achieve gains.

Recognizing (pre-9/11/01) the setbacks experienced by the environmental justice, civil rights and environmental communities and the potential for success if groups could find common ground, this spring, the Ford Foundation's Environmental Justice Program launched this project to develop environmental justice legal strategies and approaches to grant making. Heretofore, a handful of environmental justice communities have teamed on legal strategies with either an environmental or civil rights group, sometimes both. In some instances, solid relationships developed and successes were achieved. Overwhelmingly, however, communities are on their own without legal resources to pursue remedies or advance change.

To help coalesce these interests in a broader vision, support communities and further the goals of the Environmental Justice Movement, this paper captures the creativity of and collaboration among grassroots activists and organizers, civil rights and environmental experts, legal practitioners, scholars and academicians. These pages explore several key facets of strategic goal-setting including:

- identifying overlapping areas of interest;
- trust building and coalitions;
- forging a complementary legal and public policy agenda;
- mapping legal strategies including litigation and policy advocacy; and
- potential foundation approaches to promote community-driven legal strategies.

## **Background**

The Ford Foundation's Environmental Justice Program Officer, Vernice Miller-Travis, conceptualized this project on developing and funding environmental justice legal strategies in consultation with Deeohn Ferris<sup>5</sup>, an environmental justice and public policy expert, and Jonathan Weiss, Director of the George Washington University Center for Sustainability & Regional Growth (GWU Sustainability Center). They comprised the planning team that shaped this initiative and determined the preparatory objectives prior to the broader consultation and strategic goal setting with instrumental environmental justice activists, environmental and civil rights groups.

This is a groundbreaking endeavor. Largely, despite obvious affinities, the environmental justice community has been unaided in the quest for equal protection. Although a handful of alliances and a few coalitions have formed, in the main, the intersection of environmental justice, environmental and civil rights has not been fully explored as a launching point for progressive strategies and tactics.

This era of political and judicial retreat provides a unique and compelling opportunity for these groups to work together, develop multifaceted legal and other strategies and refocus the attention of decision makers and the public. International events, the World Conference Against Racism in September 2001, the World Social Forum in February 2002, and the World Summit on Sustainable Development in August 2002, highlight the importance of building global linkages as well.

Strategic grant making is an essential ingredient of successful strategizing, planning, goal setting and follow through. The Ford Foundation has committed resources specifically to environmental justice. Funding is requisite in a multi-pronged strategy to deliver resources to this constituency and further their work. However, funding equity is a larger issue. More resources are needed to help communities in this struggle. Expanding the percentage of foundations that can help fund partnerships, advance legal strategies and public policy advocacy is paramount.

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<sup>5</sup> The author of this paper and the full report, she heads Global Environmental Resources Inc., an environmental and public health consulting firm.

At the core of this historic project is a commitment by the Foundation to: (i) reassess and explore legal tools and strategies used by communities and their allies; (ii) create capacity for collective work and partnerships between environmental justice activists, environmental and civil rights groups; (iii) promote strategies in law and public policy that advance the Environmental Justice Movement; and (iv) encourage expansion of environmental justice grant making in this area by foundations.

To promote these objectives, the project plan is divided into six sequential segments. These are:

1. a legal forum on Sandoval and implications for Title VI and environmental justice advocacy<sup>6</sup>;
2. interviews and research on current strategies, approaches and partnerships;
3. a national meeting of constituencies to discuss legal strategies<sup>7</sup>;
4. a report on the constituencies' preliminary recommendations;
5. a follow-up national meeting and four regional meetings on strategies, approaches and partnerships; and
6. a final report on conclusions.

The perspectives and expertise of a broad cross-section of communities and legal practitioners, nonprofit public interest organizations, racial and ethnic-based legal groups, local, statewide and regional community based environmental justice groups, civil rights and environmental groups, and Indian Tribes contributed significantly to this paper (and the report). The commonality: All the contributors are experienced in legal strategies incorporating litigation or policy advocacy or both.

The two-day national gathering, which set the stage for this project, involved presentations and dialogue on relationship building, strategic goal-setting, collaboration and funding. Panelists, speakers and participants demonstrated the range, breadth, depth and complexity of issues at the intersection of environmental justice, civil rights and the environment. Four panels were convened:

1. Community-Based Lawyering: Overview and A New Mexico Model
2. The Camden Case and the Post-Sandoval Landscape
3. Los Angeles and Local Coalition Building: Lessons and Implications
4. Federal/State/Tribal Policy Issues

Since communities are principal leaders in the Environmental Justice Movement, and to emphasize the significance of bottom-up community driven strategies, the opening session centered the group on the tenets of community lawyering. Bottom-up democratic decision-making is fundamental in the Environmental Justice Movement. In this social justice movement, as in others, tensions exist around grassroots leadership.

For example, lawyers are trained to be leaders and chief problem solvers. These skills can strain client relationships with communities. Also, it's common for litigation to debilitate community organizing and local leadership when communities relinquish the fight to the lawyers after a lawsuit is filed. Experiences with unscrupulous tort lawyers, who have left plaintiffs unsatisfied while reaping legal fees, make communities wary of legal professionals. Surmounting these obstacles is critical in order to stimulate multi-faceted legal strategies.

The panelists provided guidance in key areas and instigated conversations about existing interdisciplinary, regional and local models that advance environmental justice. Breakout sessions following the panels focused on (but were not limited to) generating recommendations in three specific areas:

- Legal and Policy Strategies;

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<sup>6</sup> July 2001, Washington, DC. The transcript for this forum and selected news articles are available at the following website: [www.law.gwu.edu/csrg/Sandoval](http://www.law.gwu.edu/csrg/Sandoval).

<sup>7</sup> November 2001, Washington, DC

- Coalition Building and Message; and
- How Foundations Can Support Environmental Justice Legal Strategies.

Participants in this national meeting (civil rights and environmental legal practitioners, academicians, organizers and community experts) shared lessons learned, recommendations, techniques, and new ideas.

Ideally, to maximize the potential for success, future strategies and models will incorporate organizing, legislative and regulatory approaches and litigation. In an integrated approach, a targeted multidisciplinary legal strategy should encompass lawyering in the courts (the civil judicial and administrative processes); public policy advocacy (the legislative and regulatory processes); and general legal support (advice and counsel on community concerns).

### **Overview of Key Legal Issues**

Traditionally, environmental justice activists have explored and used a variety of legal tools under environmental and civil rights laws including litigation. Impediments to broader use of these tools exist. Foremost, there is a paucity of lawyers dedicated to these fields in the public interest context. Comparatively, there are a high percentage of affected communities nationwide and, largely, they are inadequately resourced. Environmental and civil rights litigation is complex requiring considerable expertise.

Impediments to creating partnerships among environmental justice, environmental and civil rights groups including until now, opportunities to engage in collective thinking, have inhibited deploying this expertise to assist communities through lawsuits or pursuit of other options. Further, litigation is usually long-term, experts are required and, in a trend that is affecting even the private sector, costs can be high. This project on developing legal strategies presents for the first time, a convening of the leadership from a spectrum of influential organizations and the opportunity for constructive engagement.

On a limited basis and with some degree of success, environmental justice activists and their lawyers have explored and filed litigation under environmental and civil rights laws. However, recent judicial and administrative decisions and actions by Congress imperil these modest achievements. This section is a brief overview of environmental and civil rights tools and litigation approaches utilized in community struggles. While an objective of this project is to work with experts on developing a comprehensive inventory of available legal tools, those reviewed below are limited to ones currently used most prominently and frequently.

### **Environmental Tools**

With moderate success, communities have employed local, state and federal statutes and regulations as tools to redress discriminatory environmental decisions. Commonly, claims are made involving procedures, public participation or the technical or scientific bases of a governmental decision. Environmental statutes provide civil remedies<sup>8</sup> in the courts and administrative remedies through administrative law judges. Some statutes authorize citizens to sue agencies to enforce environmental standards.

In general, with respect to procedure, the issue is whether government performed all legally required steps in the decision process. On public participation, broadly stated, did notice and opportunity to comment comply with legal requirements? Regarding the technical or scientific basis for the decision, the underlying concern is sufficiency of the action or the data and analyses to support it. In environmental justice terms, discrimination can occur at each of these levels resulting in decisions adverse to communities. Moreover, accretion of hazards, disproportionate impacts in overburdened neighborhoods, must be a decisive factor.

Environmental governance is a framework of federal, state and local directives usually under statutes and regulations. One such statute, the National Environmental Policy Act (NEPA), mandates that federal agencies incorporate protection and enhancement of the environment into decisions and actions. NEPA requires preparation of Environmental Impact Statements (EIS) and public involvement on federally funded projects that will have a significant effect on the environment. If proven, unacceptable health, social and economic impacts or serious

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<sup>8</sup> And criminal penalties.

community disruptions can halt a project. Many states have enacted derivative laws and regulations that mirror NEPA.

Other federal statutes establish programs that protect public health and the environment by targeting media or regulating chemicals and wastes such as the Clean Air Act, the Clean Water Act, the Resource Conservation and Recovery Act, and the Safe Drinking Water Act. Similar to state-NEPAs, states have enacted parallel laws and the U.S. Environmental Protection Agency (EPA) issues grants to states to operate and enforce key aspects of those environmental programs (although EPA retains certain federal program and enforcement functions and the right to take action that supercedes states).

Other non-environmental statutes also impact these issues. For instance, the National Historic Preservation Act can be a means for affected communities to participate in federal decisions that impact resources in historically significant neighborhoods, buildings and traditional, cultural properties. Local governments may also have counterparts.

Although not explored here in detail, other concerns worth noting include standing to sue and sovereign immunity; two areas under assault in the Courts that affect the rights of plaintiffs to sue at all. Judicial decisions are imperiling the rights of parties to sue by limiting whether the litigant is the proper party to fight the issue and constraining suits against government.

### **Civil Rights Tools**

Environmental justice activists have explored and used civil rights laws to address disproportionate impacts. Overarching both environmental and civil rights laws is the Executive Order (EO) 12898 “Federal Actions to Address Environmental Justice in Minority and Low-Income Populations.” The Order, signed by President Clinton in 1994, requires:

*Each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of programs, policies, and activities on minority and low-income populations.*

The EO confers no new rights but requires federal agencies to take specific actions to address environmental justice such as issuing action strategies, research priorities and community and Tribal involvement. The EO’s Presidential Memorandum underscores the applicability of civil rights to environmental decisions.<sup>9</sup> Principally, civil rights are claimed by communities under the Equal Protection Clause of the Constitution and Title VI of the Civil Rights Act of 1964.

### **The Equal Protection Clause:**

Constitutional claims against discriminatory environmental decisions have proven unsuccessful. Courts have ruled that plaintiffs must prove the governmental decision is a result of intentional discrimination against the community. Although attempted by groups around the country, due to the sizable burden of proving intent in this era of institutionalized and, frequently, more subtle discrimination, the Constitutional strategy has proven ineffective.

In one important case, R.I.S.E., Inc. v. Kay,<sup>10</sup> a federal court found that the Equal Protection Clause doesn’t confer a duty to ensure equality in a government decision to site a landfill but only prohibits intentional racial discrimination. This decision was rendered despite the fact that the population near three other existing landfills was nearly totally African American.

### **Title VI of the 1964 Civil Rights Act:**

Historically, Title VI has been considered promising for environmental justice. Suits have been brought by private

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<sup>9</sup> EO 12898 remains in effect. Although issued by President Clinton, the Bush Administration has not rescinded it. 10 768 F. Supp. 1144 (E.D. VA 1991), aff’d., 977 F.2d 573 (4<sup>th</sup> Cir. 1992)

parties in the courts and, administratively, in federal agencies. For example, one hundred twenty one administrative complaints have been filed at EPA alone since 1993. While the legal success of Title VI is uncertain, there are other measures of success. As part of an overall strategy, arguably, Title VI has been effective in terms of galvanizing communities and applying pressure on decision makers.

A brief history of the use of Title VI by communities is helpful to understand the magnitude of recent negative legal developments on the environmental justice and civil rights arenas. According to Title VI:

*No person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.*

To implement Title VI, most federal agencies have issued regulations. Under these regulations, generally, instead of requiring proof of intentional discrimination, discriminatory or disparate impact is sufficient to demonstrate an unlawful act. Given the problems of proving intent, Title VI has provided putative recourse.

One successful claim involved an administrative complaint filed in 1978 with the U.S. Department of Transportation (DOT) against the North Carolina DOT. The Crest Street Community Council teamed with legal services lawyers and alleged a disproportionate share of the impact of a proposed freeway project because the percentage of African Americans displaced was higher than the overall percentage of African Americans in the city. The complaint also alleged a tainted decision process due to the exclusion of African Americans from positions at NCDOT and made a showing that the selection of projects was not made by a properly representative body using current data.

The Labor Community Strategy Center and the NAACP Legal Defense and Education Fund filed another landmark transportation action involving Title VI on behalf of 350,000 low-income minority bus riders. Covered in more detail later in the report, in Labor Community Strategy Center v. Los Angeles County Metropolitan Transportation Authority,<sup>11</sup> bus riders amassed extensive documentation asserting intentional discrimination and disparate impact over 30 years.

The Consent Decree favorably settled the class action suit requiring the Los Angeles Metropolitan Transportation Authority to provide greater service equity for the transit dependent rider ship and committed the agency to specific improvements and expenditures. The Bus Riders Union has been able to defeat repeated MTA appeals including a recent favorable decision by the Ninth Circuit.

Even under the disparate impact standard, Title VI claims have not been altogether successful. Sixty-six claims have been pending at EPA since 1996. In that time period, 45 cases remain under review while 21 are under investigation. Since 1993, only one such claim has been reviewed on the merits. It was decided in favor of the permittee.<sup>12</sup>

In 1998, Title VI was dealt a blow in Chester Residents Concerned for Quality Living v. Seif.<sup>13</sup> In this case, the complaint alleged that the Pennsylvania Department of Environmental Protection (DEP) discriminated via a decision to permit five of seven landfills in a predominantly white county in the African American (and low income) community of Chester. An incinerator<sup>14</sup> was the subject of the federal complaint. The District Court rejected the claim on the ground that the community didn't have a private right to sue in court under Title VI. On appeal to the Third Circuit, the court ruled that plaintiffs did have a right. The State appealed to the Supreme Court and it took the case but ruled it moot after the facility failed to secure local permits and the project was abandoned.

More recent cases are causing activists to consider a legislative strategy urging Congress to shore up Title VI by confirming the private right to sue and applicability of the disparate impact standard. In South Camden Citizens in

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11 263 F.3d 1041 (9<sup>th</sup> Cir. 2001) (referring to the most recent Ninth Circuit decision)

12 In re Select Steel Corporation of America, PSD Appeal No. 98-21 (EAB, September 11, 1998), <[www.epa.gov/eab/orders/select.pdf](http://www.epa.gov/eab/orders/select.pdf)> (visited January 3, 2002)

13 132 F.2d 925 (3<sup>rd</sup> Cir. 1997), *cert. granted*, 524 U.S. 915 (1998)

14 To review incinerator health impacts, see generally, "Burning Injustice: An Overview of Federal Incinerator Policy in the United States," Ferris, D., Clearinghouse Review Journal of Poverty Law, Vol. 29, No.4, (Summer 1995)

Action v. New Jersey Department of Environmental Protection,<sup>15</sup> the community, through Camden Regional Legal Services (with the advice of a supporting cast of attorneys), charged the state agency with intentional discrimination, disparate impacts and a Fair Housing Act violation.

The cause is a decision to allow St. Lawrence Cement Co. to site a \$55 million plant that would grind and process granulated slag in an area already inundated with hazards. These assaults include a sewage treatment plant that serves 35 towns, a cogeneration plant, a trash-to-steam plant, two Superfund sites (one contaminated with radioactive thorium, one with hazardous wastes); and 15 other known contaminated sites.<sup>16</sup>

While this case will be explored in more detail later in this report, it's important to briefly note its implications. In a detailed decision, the District Court Judge ruled in favor of the Title VI claim and the private right to sue and issued a preliminary injunction against construction of the new facility. Within a week, the U.S Supreme Court issued a ruling in a separate case, Alexander v. Sandoval,<sup>17</sup> a decision that undermined the remarkable decision in Camden holding that private suits are not available under Title VI. Sandoval involved the issue whether Spanish-speaking individuals could sue the State of Alabama for discrimination under Title VI for requiring English-only drivers licensing.

Damaging the immediate prospects for Title VI and thoroughly undermining the decision in Camden, the majority opinion (5-4) by Justice Scalia found that (notwithstanding 35 years of civil right law to the contrary) neither the statute nor the regulations confer a private right to sue. A vigorous dissent by Justice Stevens rebuked the decision calling it "unfounded in our precedent and hostile to decades of settled expectations." Justice Stevens also suggested availability of an alternative remedy for plaintiffs under 42 U.S.C. Section 1983.

Shortly after Sandoval, the District Court Judge in Camden issued a supplementary opinion skirting the Supreme Court decision by holding for the first time that plaintiffs could sue under Section 1983 to redress discriminatory impacts. The DEP conducted a disparate impact analysis on the cement plant and found none. In September 2001, an appeal was filed in the Third Circuit.<sup>18</sup>

In December 2001, the Third Circuit decided the case against the community holding that Title VI regulations alone do not create an enforceable right under Section 1983 if that right is not found in the enforcing statute. The Court held that in the light of Sandoval, Congress did not intend to create a federal right under Title VI to be free from disparate impact discrimination and that while federal EPA's regulations on the point may be valid, they do not create rights enforceable under Section 1983.

Although no decisive cases are documented, communities have attempted to use another civil rights law to address environmental justice concerns, the Fair Housing Act which prohibits discrimination:

*against any person in the ... sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, religion, sex, familial status or national origin.*

Some scholars view it a tool for redressing land use and zoning decisions that perpetuate residential racial segregation.<sup>19</sup>

Currently, Title VI is a tenuous tool for addressing environmental justice due to these developments. In this newly initiated Ford Foundation-sponsored environmental justice legal strategies project, communities and their allies are participating in a process that enables them to examine Title VI, refocus on strengthening existing civil rights and environmental laws and expand collective work on legal strategies including regulatory and policy approaches, and litigation.

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15 145 F.Supp. 2d 446 (D. N.J. 2001), rev'd, Nos. 01-2224 and 01-2226, 2001 U.S. App. LEXIS 26822 (3d Cir. Dec. 17, 2001)

16 "Backyard Blues," The National Law Journal, Vol. 24, No. 8 (October 15, 2001)  
17 532 U.S. 275 (2001)

18 "Environmental Justice Rises from the Ashes of Title VI," Taterka, B., Natural Resources and Environment, American Bar Association (Summer 2001)

19 See e.g., From the Ground Up: Environmental Racism and the Rise of the Environmental Justice Movement, Cole, L., and Foster, S., New York University Press (2001)

## **Indian Tribes and Tribal Governments**

Federally recognized Tribes have a unique legal status that distinguishes their relationship with federal and state governments. They are nations with inherent sovereign powers and jurisdiction over their land, peoples and territory. They have separate laws and rights. Through laws and treaties, there is a government-to-government relationship with the United States. Tribes must be consulted by federal and state agencies on actions that could affect Indian rights, customs, traditions and culture.

Instead of viewing issues as civil rights or environmental, Indian peoples view them as interrelated with a deep sense of spirituality. Indians seek to preserve culture, language and religion, in sum, a way of life. Here, too, environmental justice means protecting against disparate environmental and health impacts. It is also protecting cultural resources and sacred areas, subsistence fish and wildlife, habitat and vegetation, such as grasses for traditional uses.

Executive Order 13084 “Consultation and Coordination With Indian Tribal Governments,” imposes the duty on federal agencies to reach out to Tribes.

Tribal representation should be sought in public outreach efforts such as meetings, negotiations, rulemaking efforts and advisory committees. Individual members of Tribes and Tribal officials can participate in these fora. In addition to these opportunities, agencies must recognize the rights of Tribal governments to represent their interests as governments. This is an important distinction between Tribal involvement and outreach to other minority populations affected by Title VI.

## **Community Based Legal Strategies**

Community-building and collaborative environmental justice legal strategies pose a roster of issues and challenges such as:

1. What various legal and policy strategies and tools deserve greater emphasis by the Environmental Justice Movement? Are there other laws at the federal and state level that need to be explored?
2. How can community lawyering be part of a broader approach and coalition for change, and what ought to be the message to the public, other stakeholders and the media about the need for such change?
3. How can foundations play a more supportive role in advancing these efforts and in assisting communities at the local level?

### **1. Community Lawyering**

Communities are at the intersection of race, class, the environment, politics and government. The best community lawyering is achieved when the people say we did it ourselves. Lawyers partner with the people resisting on the ground. Lawyers don't start the fight or live with it or the consequences. Environmental justice is at a difficult crossroads given the legal assaults underway. The community is integral to putting together the legal and theoretical bases for advancing equal protection strategies.

In the development of partnerships and legal strategies, collaborators are guided by a seminal outcome of the 1991 First National People of Color Environmental Leadership Summit, to wit, a directive on bottom-up democratic decision-making.

Strong communication between lawyer and client and technical experts in environmental justice cases is critical. Community workers and residents are experts on facts and circumstances and their involvement in all aspects is an advantage to the case. As clients, communities can expect to understand the process and what is required to win, determine remedies and what a lawsuit should accomplish. Communities must commit to the legal strategy, take responsibility for being informed and involved, and share the lessons.

## **A New Mexico Collaborative Model:**

The New Mexico model is a partnership between a nonprofit legal group, the New Mexico Environmental Law Center (NMELC) and a community-based statewide organization, Southwest Organizing Project (SWOP). SWOP is either the client of NMELC or NMELC partners with SWOP, which assists by helping to organize a community that is the client. They have worked together on Title VI and environmental issues over several years.

A classic case teaming SWOP and NMELC is the Sunland Park struggle over expansion of a landfill and medical incinerator. The lawyers, community group and technical experts worked together and built a relationship and action plan that prevailed.

This highly involved community became organized and sophisticated in the legal and political process, fully comprehended the crosswalk of legal, economic and technical issues and defeated a well-financed siting initiative. In addition to consistent, large community turnout and effective organizing, the victory was aided by the decision of the head of New Mexico's environmental agency, who was named to the post in the wake of a successful earlier community political strategy that resulted in her appointment.

The community's case was built on good facts, the law, organizing and a good lawyer-client relationship. After the incinerator, the community defeated a prison proposal. NMELC lawyers learned how to work with communities inexperienced with lawsuits. SWOP learned about the level of investment that is needed to deal with judicial and administrative legal actions.

Everyone learned that this formula works: A community can win if they can match the opposition with sound legal and technical support coupled with credible and factual data and information, and can drive the political momentum with a good strategy. The ideal foundation for success is solid community infrastructure supported by legal and technical advantages.

SWOP has built an infrastructure over twenty years of organizing and has created capacity to develop and implement a broad progressive public policy agenda. To implement their agenda, the group is running candidates and campaigns for electoral office. One clear advantage of holding office is that it's another way to establish accountability to the community.

The electoral process is the most familiar political process for most people in the community. The strategy and tactics of running a political campaign can strengthen organizing. Electoral campaigns facilitate understanding political and community networks. Doors open when a community can deliver votes.

## **2. The Camden Case and The Post Sandoval Landscape**

The community legal strategy resulted in ominous judicial fencing on the discrimination claims in this notorious cement plant case. The community was vital but had few resources and no funding. They have stayed the course despite the disheartening blow when the \$50 million plant opened and started operating in the midst of legal proceedings to stop it. On appeal, the private sector has focused on an issue not even raised by the state, the validity of the Title VI regulations. Industry and conservative forces lined up to oppose the community in amicus briefs. Civil rights and environmental lawyers lined up on the public interest side against sizable resources of the opposition.

The principal lesson for the community is that winning through the courts is not easy. The posture of judges is difficult to assess and then there may be Supreme Court review of any favorable decision by the Third Circuit. It is difficult to place confidence in the Supreme Court.

On a hopeful note, regardless of the outcome of the litigation it will further environmental justice and advocacy. The case puts the spotlight on the state environmental agency. Lots of people are talking about the issues and a citywide activist coalition has formed. The great publicity locally and nationally inspires energy. Camden is a compelling story, a classic David and Goliath struggle: no resources and a volunteer staff versus enormous resources. The District Court decision gave credibility to people's struggle, validated what they knew to be true and infused a sense of purpose. The case illustrates the impacts of locally undesirable land uses experienced by communities around the

nation.

### **3. Los Angeles and Local Coalition Building: Lessons & Implications**

#### **The Los Angeles Urban Parks Coalition**

This model is a partnership among communities, lawyers working in nonprofit environmental and civil rights groups, tenants groups, historic preservationists, Chinatown businesses and religious leaders. Three main tools are being used in the Los Angeles urban parks movement:

- (1) Coalition building;
- (2) Strategic advocacy including media campaigns; and
- (3) Impact litigation.

In Los Angeles, parks are a civil rights issue. There are .3 acres of parks per person in urban areas versus 1.7 acres per person in the suburbs, fewer acres per person than the national average. In the urban parks campaign, the issues are centered on the environment, civil rights and community vitality. In the coalition's strategic analysis, they follow the money and connect the dots to document who is benefited, who is left behind and the history of discrimination.

In terms of the evolution of the Environmental Justice Movement, broadening alliances should be part of the process. The coalition in Los Angeles is the reason success in creating urban parks is achieved. The Los Angeles coalition is broadening collective issues to prisons, highways, lead screenings and facility siting.

The Chinatown Cornfields, a brownfields revitalization project that caused community uproar, is a remarkable coalition victory. The developer wanted an industrial district, while coalition members wanted green spaces preserved in a park. Government agencies were lining up resources to finance the deal with no environmental review. Every two weeks, the coalition met, strategized and managed interplay of elements, including cutting off federal HUD funding, a civil rights complaint, a legal challenge on the lack of environmental review, and weighing in on candidates in the mayoral election. Every mayoral candidate opposed the project after being briefed on the merits of the issue.

The coalition drove the developer to the table and then secured a state appropriation to purchase the land from the developer and create a state park. The courts couldn't have ordered the park as remedy. The problem solving transactional approach by the coalition won this park.

Another successful parks struggle occurred in the Baldwin Hills community. In the midst of the California energy crisis a privately financed power plan proposal threatened a 1000-acre state park in the already park-starved city. The coalition worked with the community resulting in a huge outpour of opposition to this unwanted, polluting land use in the neighborhood park. Ultimately, the state Energy Commission rejected the power plant (on environmental grounds) to avoid an environmental justice debacle.

The coalition learned the value of filing alternative and complementary claims such as environmental, civil rights and accessibility of bike paths. Alternative claims can lead to victory by using the strength of one body of law to reinforce weaknesses of other laws. There was no federal civil rights claim since the plant was privately financed but clearly any claim on which the community wins is a victory.

The next project for the coalition involves restoring more of the Los Angeles River greenway by creating a park in Taylor Yard, another industrial area. In the Taylor Yard case, the coalition will build on successful approaches used in the Chinatown Cornfields and Baldwin Hills cases.

#### **The Bus Riders Union**

The Bus Riders model is an environmental justice and civil rights partnership between the Labor/Community Strategy Center, the Los Angeles Bus Riders Union and NAACP/LDF, a national civil rights legal group.

Environmental and transportation problems are manifold. There are eight million autos in the Los Angeles area. Because there are far too many cars and toxic loadings, rather than clean fuels, the most viable alternative is public transport. The Bus Riders concluded a lawsuit was a workable option based on explicit environmental theory about protecting public health and limiting criteria air pollutants.

The civil rights issues are also clear. The Rapid Transit District (the bus system) is the regional workhorse. The Union sees it as a 3<sup>rd</sup> class system for working class Black and Latino peoples. In contrast, the Los Angeles County Transportation Commission, the suburban commuter system, is highly capitalized construction, where whites are over-represented and the mentality is nothing is too good.

The campaign is built on transportation as a human right. Their slogan, Fight Transit Racism, is predicated on issues of affordability, access and segregation. Tactics used by the transit system resulted in setback after setback, stalling improvements to the buses. Most recently, the Bus Riders Union beat back yet another challenge in the Ninth Circuit and the agency may vote to take the case to the Supreme Court rather than honor the agreement to make improvements.

A problem faced by the Bus Riders Union is corporate-ization of the regulatory and electoral process (for example, the takeover by industry of the California Air Quality Management District). Pro-corporate state agencies and plebiscites such as Proposition 87 and anti-immigration measures are frustrating community efforts on quality of life issues.

The Union's dialectical relationship is no different in litigation than in organizing. Members are involved in all aspects of the case with Labor/Community Strategy Center and NAACP/LDF, and documented disproportionate impact and racial subsidies. It's easy for everyone to understand that if a system spends \$15 per rider to the suburbs in a half empty car versus .3 cents per rider on an overcrowded polluting diesel bus there is discrimination. In fact, there is a legacy of profound disparate impacts and a history of intentional racism in this case.

One advantage provided by the lawsuit is the consent decree objectives are capable of monitoring by groups other than attorneys. There is an active role for communities and accountability to them built into the ten-year consent decree. This institutionalization of plaintiff's rights promotes enthusiasm and reinforces the long-term commitment by the community.

The Union won 3000 dues-paying members and continues to expand membership. There are 1200 new clean fuel buses in the fleet. The community refused to broker improved air quality and improved health despite the critical need for buses. They rejected diesel-powered vehicles when the agency offered to make a deal and trade more of them in lieu of clean fuel buses.

#### **4. Federal/State/Tribal Policy Issues**

##### **EPA Region 1 Environmental Justice Approach**

EPA Region 1 has issued an Environmental Justice Action Plan. Strategies are developed around six themes:

- (1) developing environmental justice guidance on compliance and enforcement;
- (2) training EPA regional staff;
- (3) engaging stakeholders and identifying issues and concerns;
- (4) including environmental justice in strategic plans;
- (5) increasing communication; and
- (6) creating an inventory of programs and activities.

##### **Legislative Landscape and Civil Rights in Congress**

It's an unusual time on Capitol Hill. Politically, the watchword is bipartisanship but there is lots of partisanship surfacing, particularly in domestic spending, as evidenced by the economic stimulus package and anti-terrorism measures. Access to staff and members is limited as a result of terrorism-related concerns.

In addition to electoral politics, there continues to be substantial partisan contention on four issues:

- (1) spending bills
- (2) judicial nominees
- (3) economic stimulus package which is heavily weighted to corporate relief
- (4) anti-terrorism responses including Afghanistan, Iraq, airport security and immigration.

The anti-terrorism bill is a harbinger. A broad Right-Left coalition has been unable to affect the civil liberties side of the bill in the legislative process. The political climate is tricky and the coalition's setback is a warning sign that breakthrough will be difficult. Generally, these are tough times.

### **A State Environmental Justice Program<sup>20</sup>**

In Massachusetts, pressure by community groups resulted in establishment of a state environmental justice position. The position is a combination of outreach responsibilities and working with communities and other agencies.

A draft environmental justice policy is being readied. The guidance requires environmental justice analysis to address air, water, and solid waste issues. Regulatory revisions may be required to comply with new policy. Language, definitions (e.g., environmental justice, minority community) and quantifying discriminatory impacts are difficult for state regulators.

The state is inventorying brownfields sites, prioritizing environmental justice areas for redevelopment, and providing incentives to promote clean technologies and green businesses. There is strong industry lobbying in opposition to a pending bill that would impose a duty to achieve environmental justice in the state and comparatively little community presence in the legislative debate.

### **Tribes and Tribal Government**

Currently, the public view of Indians is focused on casinos, gambling and the perception that all Tribes are enjoying a revenue boom, which is not the general case. States are making moves to take jurisdiction on Tribal lands and much land is being sold into fee status to non-Indians. There is an Administration-led energy push to take resources from public lands with little environmental controls, open wilderness to drilling and mining and gut protective laws. Funding to build Tribal environmental infrastructure is nearly nonexistent.

Indians don't view issues as civil rights or environmental but as interrelated with a deep sense of spirituality. Indians concentrate on culture, language, religion and preserving a way of life. It's a different way of organizing and communicating Tribal values; for example, translating water spirits in the Indian culture into concepts like guaranteed minimum stream flows, which is language that is understandable to a regulatory agency.

Indians need to build capacity and prepare for these tough times. Increasingly Tribes are seeing the value in engaging in the electoral process, building political empowerment, making input felt and getting involved in state, county and city agencies that obtain government funds based on population formulas that use Indian numbers.

### **Consensus Issues and Preliminary Recommendations**

In terms of strategic planning and goal setting, consensus issues and preliminary recommendations on environmental justice legal strategies reported on in this paper can be grouped under 11 categories. These are:

1. Building Community Capacity is Fundamental to Advancing Community Legal Strategies.
2. Complementary Organizing and Lawyering is Indispensable to Advancement of Community Legal Strategies.
3. Broadening and Strengthening the Legal Pool Will Increase the Use of Community Legal Strategies.

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<sup>20</sup> States are developing programs. The Environmental Council of States (ECOS) has formed a committee comprised of state agency heads.

4. Groups Must Monitor, Influence and Surmount Legal Trends in the Courts and the Administrative Fora.
5. Public Policy Advocacy and Research Should Be Components of Community Legal Strategies.
6. Building Coalitions at the National and Local Level Can Expand Community Capacity.
7. Building Coalitions to Advance Strategic Collaboration is Critical on Tribal Lands.
8. Community Legal Strategies Should Investigate and Plead Available Legal Alternatives.
9. Link Political, Media and Message Development to Community Legal Strategies.
10. Technical and Analytical Support are Key Elements of Community Legal Strategies.
11. Additional, Regular Meetings of Grassroots Leaders and Legal Practitioners Will Enhance Legal Strategy Development.

Broadening foundation support is critical to addressing the consensus issues and accomplishing the recommended actions. The supporting discussion and rationale are summarized in more detail below.

### **1. Building Community Capacity is Fundamental to Advancing Community Legal Strategies:**

Environmental justice communities have few resources to support their work. Capacity is a fundamental issue and funding equity is a serious concern. The economy and redirection of resources to post-September 11 repercussions compound funding inequities. Adding to these challenges, progressives are losing ground in the current political climate.

Leadership training would facilitate building community capacity. Similarly, capacity would be enhanced by regular opportunities for communities to share success stories, strategies and local best practices. An effort should be undertaken to catalogue and distribute community best practices including the range of viable legal options.

Coalitions combine resources and expertise and enhance community capacity by providing organizing, legal and technical assistance. The complex community struggle in Convent, LA to halt siting of a chemical megaplex by the Shintech Corporation, in an area already saturated with plants and refineries, epitomizes this approach. This coalition is an impressive cross-section of skills: the Convent community, Greenpeace, Tulane University's environmental law clinic, Earth Justice and NRDC.

While the coalition was able to creatively resource the fight, even organizations with clout like these faced financial constraints including an effort by the Louisiana Governor and the State legislature to eliminate the tax-exempt status of Tulane University (and the law clinic) as a result of their role in the struggle. The solution is a war chest that can finance community organizing, coalition building and legal and political strategies.

### **2. Complementary Organizing and Lawyering is Indispensable to Advancement of Community Legal Strategies:**

The strength of the community and its organizing capabilities are core concerns. At the essence of developing relationships with communities and legal strategies is shoring up the strength of community groups, building the social movement from the bottom up. Information exchanges and sharing knowledge among communities will foster a stronger movement. The capabilities of communities can be fortified by working on legal issues.

Anti-racism, dismantling the apparatus of racism, must continue to be at the forefront of social justice conversation and action. In the context of community lawyering and building legal strategies, a key query is how legal, policy and technical approaches can promote an anti-racism progressive coalition.

Ideology frames the struggle: environmental justice consists of an anti-racist, progressive, civil rights, urban/rural transformation. The struggle encompasses a panoply of challenges and negatives. It is an intellectual as well as practical process. The battle is long-term; activists must weather periodic wins or losses.

The Camden case has so much portent for environmental justice and civil rights. The case typifies difficulties faced by struggling communities: people, in a neighborhood with few to zero resources and no funding whose environment and health are threatened and their quality of life is at stake. On the opposite side is arrayed the budgets and skills of a sophisticated, moneyed corporation and the regulatory agency that made the decision.

Increasingly, buying advocacy is a dangerous trend. Knowing where the money is has taken on new significance and must become a facet of strategic analysis by the community and lawyers. The Right is well funded and knowing where its resources and support come from is key.

### **3. Broadening and Strengthening the Legal Pool Will Increase the Use of Community Legal Strategies:**

In successful cases, there is an organic relationship between the legal work and the organizing. One informs, incorporates and builds on the other. There are several models for delivering legal support that can expand community and legal capacity including:

- legal organization represents community
- legal organization teams with organizers and represents community
- legal organization staffed by in-house organizer(s) represents community
- community group staffed by in-house lawyer(s) represents community

Community lawyering is atypical and legal resources dedicated to environmental justice are sparse. These difficulties are not just a matter of philosophy. Recruiting lawyers to progressive causes is challenging. One option is expanding efforts to attract the private bar where resources may be more readily available. The obstacles are:

- discomfort with the community lawyering role;
- high costs of litigation;
- conflicts of interest posed by a firm's corporate practice; and
- small firms concentrated on revenue stream/cash flow can't spare the hours.

Lawyers in nonprofit environmental and legal organizations also face hurdles such as:

- difficulties fundraising to support litigation;
- discomfort with the community lawyering role;
- small, overtaxed legal staffs; and
- organizational challenges of competing with the private bar in the attorney pool.

On funding challenges, some support can be accessed through statutes that provide recovery of attorney's fees. However, these provisions are limited to the civil judicial forum (the courts). In general, there is no allowable recovery of attorney's fees in the administrative forum where challenges filed by communities based on agency decisions are handled by administrative law judges.

Beyond the model in which lawyers serve as outside counsel, there are in-house counsel models of legal/community partnerships. In an emerging trend, where resources allow, environmental justice groups are employing attorneys on staff. There are distinct advantages to in-house legal expertise: specialized capacity and expertise to focus on statutory and regulatory concerns, accountability to the community, control and hands-on management of the legal process. Most notably, there are no conflicts with the community group in this model. The in-house model should be a strategy for building community capacity in addition to outside counsel models.

The posture of the environmental justice field and its lawyers is analogous to employment discrimination and the employment bar. By the late '80s, the employment bar had contracted to near zero with disastrous consequences for plaintiffs. Advocates initiated a successful concerted advocacy campaign around the Civil Rights Act of 1991 with the goal of providing recovery of legal fees. The victory also produced a clear downside: Tort lawyers jumped in en masse and the fight against discrimination deteriorated into one in which lawyers were perceived to be in it solely for the money.

Counter trending this result, plaintiff's lawyers formed the National Employment Lawyers Association (NELA), a philosophical and ideologically driven organization that provides coherency and discipline to the field. NELA has created a place for annual gatherings, dialogue and cross-pollination of ideas, opportunities to learn and exchange

ideas, develop case strategies and legal literature.

The Environmental Justice Movement has no such group. Communities and their lawyers are lucky when they know what each other are doing. Creating capacity by building a support structure analogous to NELA for environmental justice lawyers could help ensure coherence and ongoing strategies.

#### **4. Groups Must Monitor, Influence and Surmount Legal Trends in the Courts and the Administrative Fora:**

EPA's inaction on Title VI demonstrates that environmental justice is not an agency priority. Recently, the agency abandoned its controversial proposed Title VI guidance. Furthermore, between 1996 and 2001, delays on pending Title VI cases has become profound. Although EPA has formed another new task force to address the cases, activists don't give much credence to this recent overture or statements by EPA Administrator, Christine Whitman, supporting environmental justice. It's an interesting political note that Administrator Whitman, Governor at the time, participated in the groundbreaking for the St. Lawrence Cement Co. plant in Camden.

Activists must expand their focus on agencies, in addition to EPA, that have significant environmental jurisdiction<sup>21</sup> and impacts on communities and worker protection measures including, for example, the Departments of Defense, Interior, Energy, Labor and Transportation.

Activists view the Supreme Court as a fixed game due to the generalized roll back of civil rights.

Since federal courts are where major environmental and civil rights cases are decided, the significance of nominations and the U.S. Senate judicial selection process is tremendous. Environmental justice activists need capacity to work in coalition with other groups in ongoing efforts that include monitoring hearings and court cases, and educating Congress and the nominees.

#### **5. Public Policy Advocacy and Research Should Be Components of Community Legal Strategies:**

Environmental justice public policy advocacy at the national level is currently a missing link. Helping communities to develop public policy strategies must be an ingredient of a strategic approach. Groups could consider working together on drafting model federal and state bills, Congressional briefings, member meetings in the Districts and Capitol Hill visits.<sup>22</sup> One potential legislative strategy could involve developing a collective position and legislation to create a private right of action against disparate impacts under Title VI. Another approach could involve influencing state actions through legislative campaigns in the state houses and regulatory campaigns in state agencies.

Between 1992-1997, environmental justice activists worked on a collective agenda in Congress, the Executive Branch and federal agencies. In the 104<sup>th</sup> Congress, members of the Congressional Black Caucus along with other environmental and civil rights leaders in both houses introduced environmental justice bills and a score of southern states introduced bills (leading eventually to a small number of formal programs).<sup>23</sup> Communities have not had an active public policy presence in the nation's capitol since the Washington Office on Environmental Justice, a nonprofit coalition, closed doors in 1998.<sup>24</sup>

Parallel with legal strategies, there is urgency about building strong community driven research and strategic analysis across the spectrum of issues affecting communities (e.g., transportation, housing, education, health, economic development and the environment). All these areas are significantly affected by civil rights rollbacks.

#### **6. Building Coalitions at the National and Local Level Can Expand Community Capacity:**

Lack of resources and the need for a winning political coalition drive the need to build broad-based alliances. There

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21 E.g., the Executive Order names seventeen federal agencies

22 Within I.R.S. limits and philanthropic constraints

23 One such program was enacted in the bellwether State of California

24 See e.g., "New Public Policy Tools in the Grassroots Movement: The Washington Office on Environmental Justice, D. Ferris, Virginia Environmental Law Journal, Vol. 14, No.4 (1995)

are barriers such as lack of coalition members' knowledge about each other's issues or common interests. Another is unwillingness of members' to take a back seat on leadership. Coalitions should not be prioritized over building internal community infrastructure, including legal and scientific tools. The interests of coalitions can diverge, i.e., there is no longer mutual interest or a group's usual allies are on another side of an issue. Groups without infrastructure can be left defenseless. Communities need to have the capacity to go it alone in any case. Further, communities must be prepared and have the capacity to go it alone when coalitions break down or dissolve.

Nonetheless, the power of coalitions is considerable. They can work and should be pursued as a mechanism for moving issues forward. Creating alliances outside of immediate environmental justice interests can broaden community support. The Sandoval case has wide implications for the environment, civil rights, women's groups and the disabled. This augurs a major campaign such as the one waged against the death penalty or the fight against breast cancer.

Coalitions work in situations when there is collective self-interest at stake. In other words, can environmental justice activists, civil rights groups and environmentalists find mutual self-interest in distributional impacts of environmental policies? The urban parks initiative in LA demonstrates that broadening alliances can help win the fight. The parks coalition is regional, multi-issue, multi-racial and spans income strata.

Counterpoint: What about when environmental justice is the core issue? The following questions are inevitable and, to date, have evaded answer: How do communities convince other groups about the significance of their struggle? How do communities break through to civil rights groups, environmentalists and other interests and encourage their involvement?

There is another way to examine coalition building. In cities, people of color are either in the majority or in a significantly strategic position so coalitions can be comprised of and led by them. For people of color, racial justice is a winning strategy in a war against racism. To facilitate building multi-racial coalitions and racial justice strategy, groups must concentrate on understanding each other's issues and ensure cross-cultural communication. Translation services and organizers who speak more than one language are also instrumental.

## **7. Building Coalitions to Advance Strategic Collaboration is Critical on Tribal Lands:**

Indian land is the reservation and like the grizzly, Indian peoples have no place else to go. Culture, language and perpetuation of the native nations are at stake. Comparatively, Indians have no resources and Tribes have no or limited environmental protection infrastructure. Environmental threats span issues such as depleted groundwater, chemical runoff and other legacies of giant coal strip mines. Reservation lands are being deeded to non-Indians affecting jurisdiction over Tribal lands.

Coalition building in Indian country is challenging. For example, in Montana, coalitions built around preserving Yellowstone Park have eclipsed the organizations working on preserving the quality of life of Indian Tribes. Yellowstone is viewed as the sexy issue and resources are pouring in to the detriment of fundraising by Indian nonprofits. Race appears to drive who gets the resources and attention. Equally important, Indian groups have joined coalitions and had their most fundamental interests sacrificed by others in the coalition.

There is a sense of urgency about the issues and lack of resources to address myriad needs. Indians want to grow leaders and need allies, funding, training and campaigns to increase public awareness. Similar to other environmental justice communities, these are troublesome times and Indians are scrambling. Capacity building at the organizational level is crucial.

Events around the launch of President Bush's major domestic energy plan are demonstrative. In Indian country, the plan to drill and mine threatens the land and the environment, Indian resources and way of life. Coal, natural gas and oil sources are often either on the reservations or public lands next to them. It's crucial to get the message to the public about how Indians, whose lands are an important domestic source of fuels for household electricity and heat, suffer consequences.

## **8. Community Legal Strategies Should Investigate and Plead Available Legal Alternatives:**

Given the assaults on Title VI and disparate impact claims, it's prudent to plead alternatives. Where possible, intentional discrimination claims should be pled alongside disparate impact claims. It's a matter of both following the money and connecting the dots. For example, trace the history of discrimination and labor exploitation of the Chinese in the U.S. since the 1800s and events surrounding the Chinatown Cornfield.

Chinatown was the only place the dominant culture would let the Chinese live. In the 20<sup>th</sup> century experience, the government subsidized development (e.g., mortgages and infrastructure investments) solely in racially homogeneous neighborhoods, which explains why people of color, like the Chinese in this case, are systematically denied the benefits of public works projects such as parks and are located where environmental degradation exists. These discriminatory actions can be documented.

Intent as a legal basis to prove a case can be separated from using intent in ways that promote advocacy because environmental justice is more than a legal issue. In the advocacy context, communities can emphasize building the right moral and ethical arguments to substantiate their position and the case. Remember, once slavery was legal but it was neither ethical nor moral. It's a distance race, not a sprint; the legal arguments will follow and ultimately catch up to the moral ones.

Pleading statutory alternatives supplements legal remedies available to communities. The Fair Housing Act is one such alternative. Lawyers should examine housing law and other alternatives to support environmental justice.

## **9. Link Political, Media and Message Development to Community Legal Strategies:**

The Environmental Justice Movement must develop a solid consistent message that communicates the urgency and consequence and implications of the issues. A clear message is essential to balance the political debate on the environment and civil rights. The objective is formulation of strategies linking communities and their allies aimed at aligning forces to change the tenor of the political conversation.

Developing this message is contingent upon (i) resources (ii) coordination among local community organizations and organizers, regional environmental justice networks, environmental, environmental justice and civil rights experts and legal practitioners, and (iii) a collective approach to decision making. Consensus on framing the message is important and may involve emphasizing, for example, key issues such as the importance of community and community health.

## **10. Technical and Analytical Support are Key Elements of Community Legal Strategies:**

Environmental justice work is interdisciplinary. The availability of technical experts must be factored into any holistic approach for building community capacity and legal strategies. Frequently, environmental justice cases turn on technical issues engendering a battle of experts.

Industry can afford high priced experts and governments employ experts in setting and defending standards and permits. On the community side, when affordable experts can be found, they often face overuse. Experts can be expensive and, generally, fees for experts can't be recovered under environmental statutes, posing additional resource and funding issues.

An important trend, beyond the legitimacy of disparate impact regulations, is the increasing dominance of risk assessment in the environmental regulatory framework. Examination of the Shintech<sup>25</sup> case illuminates this trend. The record shows that the methodology for investigating disparate impact involved a relative burden analysis or a quantitative risk analysis that compares risks to each other.

Comparative risk opens the door to arguments that discount a community's health or environmental claims. For example, the risk of unemployment posed by failure to site and operate a plant can be interpreted as exceeding any conceivable damage that could result for exposure to air particulates emitted by the plant. The fight for environmental justice has additional dimensions, i.e., who determines the standards and the extent of health and

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<sup>25</sup> In re Shintech, 734 So.2d 772 (La.Ct.App. 1999)

environmental protection?

### **11. Additional, Regular Meetings of Grassroots Leaders and Legal Practitioners Will Enhance Legal Strategy Development:**

Additional regional and national meetings of grassroots leaders in the environmental justice, civil rights and environmental communities will provide, currently otherwise unavailable, opportunities to coalesce, build relations, develop a broader vision of working together, consider options and strategize to assist community struggles.

### **V. Next Steps**

This white paper is based on the report entitled “Promoting Community Building Through Funding Approaches and Collaborative Environmental Justice Legal Strategies,” which has helped inform programming and grant making at the Ford Foundation. The full report was shared with other foundations that can help enhance funding equity and promote these critical areas of work. The Ford Foundation is helping by providing opportunities for dialogue between grant makers and constituencies on these issues.

The report was also shared with participants in the November 2001 meeting and other key leaders in the environmental justice, civil rights and environmental communities. The Ford Foundation’s Environmental Justice Program (EJP) continues to work with organizations to support development and implementation of environmental justice legal strategies. In addition to reconvening the national group of leaders, regional meetings will be organized to further promote relationships, and solicit and exchange ideas.

In 2003, the EJP anticipates expanding the breadth of input into development of the preliminary recommendations reported on in this paper. Additionally, in view of the increasing expansion of the global Environmental Justice Movement as well as international events, such as the World Conference Against Racism, the World Social Forum and the World Summit on Sustainable Development, the initiative will focus on international environmental justice and broadening global linkages.