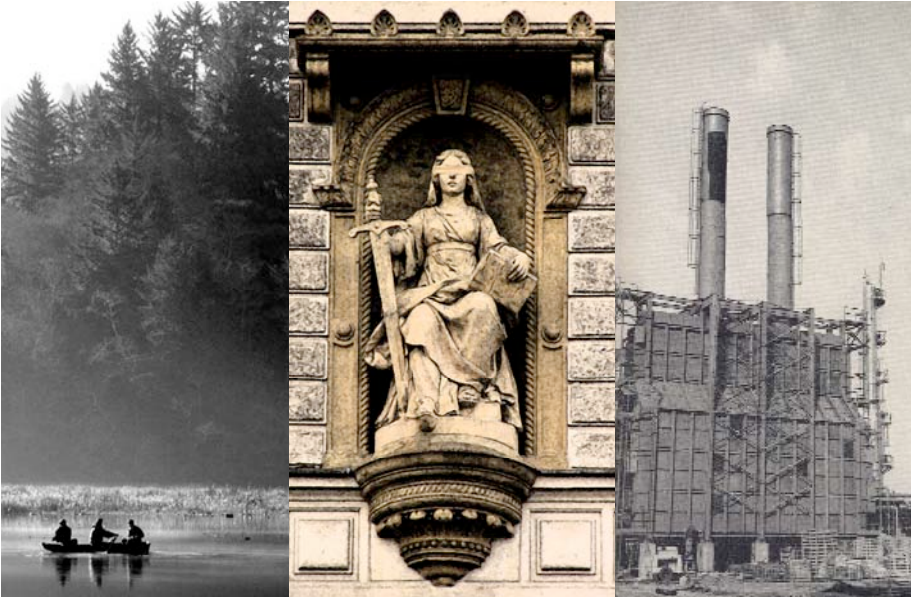


HOW THE CIVIL JUSTICE SYSTEM PROTECTS ENVIRONMENTAL HEALTH





**How the Civil Justice System
Protects Environmental Health**

Written by Amy Widman

Designed by Daniel Albanese

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Dedicated to Susan Birmingham

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The Center for Justice & Democracy is a tax-exempt, non-profit, non-partisan public interest organization that works to educate the public about the importance of the civil justice system. CJ&D fights to protect the right to trial by jury and an independent judiciary for all Americans.

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October, 2007

Table of Contents

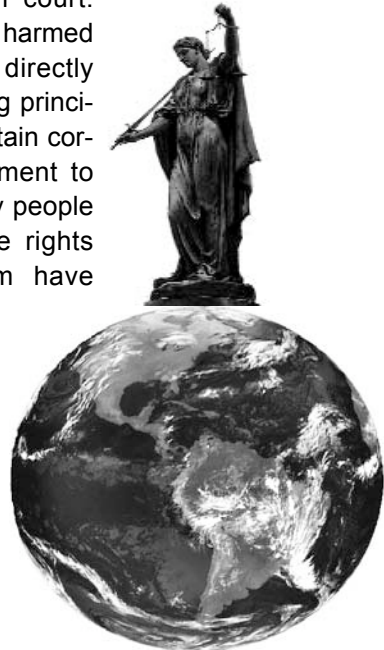
Introduction	1
Principles of Fairness: How Courts Can Provide a Level Playing Field When Citizens Are Harmed by Pollution.....	2
Federal Environmental Protection Laws Should Not Replace Civil Justice: Congress's Best Intentions Can Be Undermined by Politics and Powerful Polluters	17
Some of the Major Environmental Laws - An Overview	23
Executive Order 13422	29
Letting Corporations Off the Hook for the Harm They Cause People: How Some Federal Statues Grant Immunity to Corporations	33
Congressional Attempts to Preempt State and Local Regulation of Environmental Toxins	36
Removal of the Only Level Playing Field: How the Bush Administration Seeks to Block Citizens from Access to the Court.....	38
The Attack on Mass Torts and Class Action	38
Attacks on Class Actions and Mass Torts Can Block Communities From Bringing Environmental Civil Actions to Fight Racial Injustice.....	40
The Future of Environmental Civil Actions: Spurring Action for Change.....	43
Conclusion.....	46
Notes	47

Introduction

Environmental protection is not only about wildlife; it's also about people. Toxic contaminants in the environment threaten human health. Many types of pollution can cause respiratory disease, impair the heart's functions, and weaken the immune system. Some types of pollution can cause brain damage in children; others are hazards to human reproduction.

Given how much is at stake, leaving environmental control solely in the hands of elected officials - who are too often affected by campaign contributions from powerful polluting industries - is unwise. Citizens need the right to take direct action in court when their own health and the welfare of their own communities are at stake, and polluters should be held accountable for the harm they cause to ordinary people.

America's civil justice system allows people who have suffered harm from pollution to confront the polluter in court. There, the person who has been harmed can seek to hold the polluter directly accountable, under long-standing principles of fairness and justice. Certain corporations have lobbied government to limit or deny the right of ordinary people to take such action, and some rights under the civil justice system have already been impaired. This is not in the public interest. To protect public health and environmental quality, people's rights under America's civil justice system must be maintained.



Principles of Fairness: How Courts Can Provide a Level Playing Field When Citizens Are Harmed by Pollution

For hundreds of years, when an individual was harmed by pollution, he or she simply went directly to court and raised a claim against the polluter. The judge would make a decision on the case based on principles of fairness and justice developed by the courts themselves over time. These principles, many of which survive today, are known as the “common law.”

The common law could take into account statutes passed by legislators or royalty, but its fundamental basis was in social values and concepts of justice. The judge would consider these values and also look at “precedents” - decisions made in specific past cases that had some similarity to the case under review. The common law “evolved” as society itself developed, reflecting changes in social values and perceptions of right and wrong. It is still evolving today.

Early pollution cases often used concepts of nuisance (such as the creation of a noxious odor) or trespass (such as the encroachment on someone's property by harmful chemicals).¹ In a 1907 case, for example, the State of Georgia sued copper companies in Tennessee for discharging noxious gases that threatened forests, orchards and crops in five counties of Georgia, successfully getting the court to order that the pollution be reduced.² In 1931, the State of New Jersey sued New York City for dumping garbage into the ocean that polluted New Jersey beaches.³

Today, people still find it necessary to turn to traditional common law when pollution causes them harm. One of the most important advantages of filing lawsuits against corporate polluters is that it allows the injured person to demand documents from the polluter, in a legal process called “discovery.” It was a similar process that forced tobacco companies to admit that they were making cigarettes increasingly addictive. It was the civil justice system that forced asbestos companies to admit that they knew how harmful their product was to human health.

Getting to the truth can take a long time. Dr. David Ozonoff, a toxicologist at Boston University, described the frustrating series of defenses that the asbestos industry used in order to try to escape accountability:

Asbestos doesn't hurt your health.

OK, it does hurt your health, but it doesn't cause cancer.

OK, asbestos can cause cancer, but not our kind of asbestos.

OK, our kind of asbestos can cause cancer, but not the kind this person got.

OK, our kind of asbestos can cause cancer, but not at the doses to which this person was exposed.

OK, asbestos does cause cancer, and at this dosage, but this person got his disease from something else - like smoking.

OK, he was exposed to our asbestos and it did cause his cancer, but we did not know about the danger when we exposed him.

OK, we knew about the danger when we exposed him, but the statute of limitations has run out.

OK, the statute of limitations hasn't run out, but if we're guilty we'll go out of business and everyone will be worse off.

OK, we'll agree to go out of business, but only if you let us keep part of our company intact, and only if you limit our liability for the harms we have caused.⁴

Today, the asbestos industry is lobbying Congress heavily for special interest legislation that would limit their liability for the illnesses that they have caused, an effort that is opposed by the Center for Justice & Democracy, the Sierra Club and other consumer and environmental groups, as well as groups concerned with occupational safety and health.

Of course, the most important function of the civil justice system is to help the people who suffer illness or property damage because of someone else's careless or negligent conduct. While environmental statutes passed by legislatures can help control or stop pollution problems, most of these statutes do not provide a way for people to be compensated when they are harmed by pollution.⁵ Also, many environmental health advocates would argue that the standards are not strict enough to prevent harm, and that the fines imposed for violations of laws in many instances are simply not high enough to force a company to stop harmful but financially lucrative conduct. If companies are not held accountable

for the harm they cause, then the costs of that harm are not figured into their “bottom line.” Instead, the costs are borne by the victims and ordinary taxpayers. So even if a statute is in place to curb a particular kind of pollution, the civil justice system still is needed to compensate people for health impacts and property damage from pollution and to deter egregious conduct. The following cases provide important illustrations.

Love Canal

In the early 1970's, a young mother named Lois Gibbs became concerned by her children's recurring illnesses, including rashes, respiratory difficulties and a serious blood disorder. She began talking to her neighbors about it, and her informal survey suggested that there were a high number of babies with birth defects in homes near Love Canal on the outskirts of the City of Niagara Falls, New York. This spurred the State Department of Health to study the area.



Between 1942 and 1952, Hooker Chemicals & Plastics Corp. buried more than 21,000 tons of hazardous chemical wastes in a 3,000-foot long trough called Love Canal. Over the next 20 years, chemicals from the site seeped into people's basements, contaminating underground sewer pipes and soil, and polluting the indoor air. The Department found an unusually high number of miscarriages among women living near Love Canal, and an elevated number of birth defects - including cleft palate, deformed ears and teeth, and other significant abnormalities.⁶ Approximately 950 families were evacuated from a 10-square block surrounding the landfill.⁷

By February 1982, more than 600 personal injury cases had been filed against Hooker (which was bought by Occidental Chemical Co.). In January 1985, 1,336 residents agreed to a \$20 million settlement with Occidental that established a \$1 million medical trust fund. Thirteen years later, the last of the Love Canal cases

brought by 899 victims settled for \$6.75 million.⁸ Funds from the settlements have helped pay medical expenses of former Love Canal residents who have illnesses that have been linked to the contamination.

This case spurred passage of the Comprehensive Environmental Remediation, Liability and Compensation Act (CERCLA), also known as “the Superfund law,” which mandates cleanup of toxic sites. In March 2004, the federal EPA declared cleanup at the site complete, despite lingering concerns of some community leaders, and removed Love Canal from the “Superfund list” of hazardous waste sites.⁹

PG&E (“the Erin Brockovich case”)

Between 1951 and 1972, Pacific Gas & Electric Company (PG&E) contaminated the groundwater in Hinckley, California, exposing area residents to cancer-causing hexavalent chromium. In 1993, with the assistance of a law firm’s investigator, Erin Brockovich, 650 area victims filed suit against PG&E for poisoning their water supply. The company entered into arbitration and ultimately settled the case in 1996 for \$333 million. In addition to compensating the victims for the harm they had suffered, PG&E agreed to clean up the environment and stop using chromium.

The Harvard School of Public Health presented Erin Brockovich with its highest honor, the Julius B. Richmond Award, in 2005, recognizing her for her work to promote environmental health.¹⁰ The case had a deterrent effect as well. It prompted other utilities to take similar actions to improve environmental safety.¹¹



“Skunkworks” Facility

From the 1940s through the 1990s, workers involved in building top-secret military aircraft at Lockheed's “Skunkworks” facility were exposed to toxic chemicals during the manufacturing process. Employees began to suffer illnesses ranging from cancer and brain damage to rashes and mild congestion, with one-third severely injured or killed. Under the fraud exemption in California's workers' compensation laws, 650 victims were able to sue Lockheed and various chemical manufacturers, eventually reaching a \$33 million settlement with Lockheed in 1992. That same year, failure to warn and wrongful death cases were starting to be tried in groups of 15 to 40 plaintiffs, ultimately resulting in five jury verdicts totaling over \$800 million. The Court of Appeals upheld three of the five judgments, sending two back for retrial because of judicial error.¹²

Stringfellow Acid Pits

Residents of Glen Avon, California suffered chronic headaches, chest pain, respiratory failure and fatigue from dangerous contaminants released from the 17-acre Stringfellow Acid Pits, a hazardous waste dump one mile away. Between 1956 and 1972, nearly 200 companies had loaded the dump's 20 unlined, open, evaporative



ponds with 34 million gallons of toxic materials, which eventually leached into the groundwater. The site was finally capped in 1986. A class action lawsuit was brought by 3,800 residents, ranging in age from 12 to 79, against 13 different parties, including 11 corporations. After various settlements and jury trials, the victims were awarded a total of \$109.6 million.¹³

Waste Treatment Facility

Beginning in 1994, residents of Grand Bois, Louisiana suffered headaches, dizziness, nausea and diarrhea after breathing toxic fumes from oilfield sludge owned by Exxon Corp. and disposed of at a Campbell Wells Corp. waste treatment site adjacent to the community. The sludge contained toluene, benzene, xylene, barium, hydrogen sulfide, arsenic and other hazardous materials. Lawsuits were filed by 301 individuals. Campbell Wells settled. According to press reports, Campbell Wells and its new owner, U.S. Liquids, agreed to pay \$7 million, expand the waste treatment facility's buffer zone and erect screens. In the suit against Exxon by the first 11 victims, a jury awarded \$130,000.¹⁴

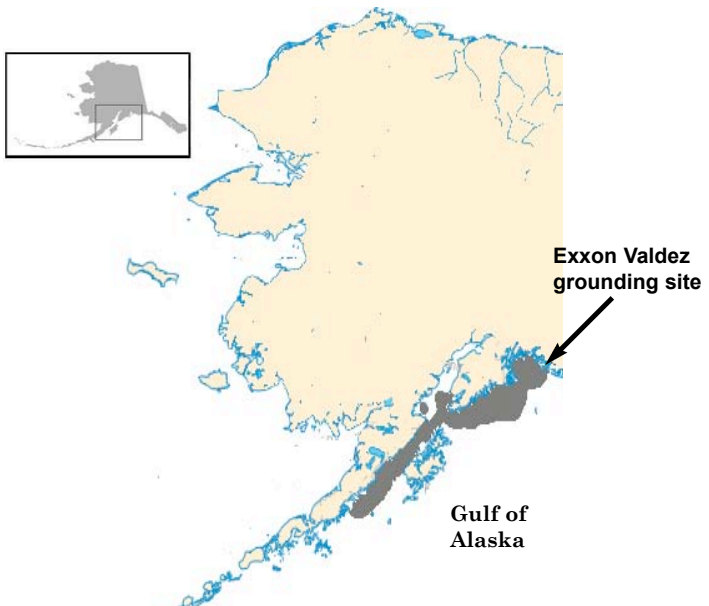


Exxon Valdez Oil Spill

On March 24, 1989, the Exxon Valdez ran aground on Bligh Reef in Alaska's Prince William Sound, spilling 11 million gallons of oil and causing devastating environmental damage to harbor seals, sea otters and other wildlife and natural resources.¹⁵ A class action lawsuit was filed on behalf of fishermen, natives, landowners, and others who were directly damaged by this environmental disaster.



A jury trial awarded \$5 billion in punitive damages¹⁶, which has been appealed repeatedly by defendants.¹⁷ In support of the award, the district judge declared that, "Exxon officials knew that carrying huge volumes of crude oil through Prince William Sound was a dangerous business, yet they knowingly permitted a relapsed alcoholic to direct [this] operation."¹⁸ On January 12, 2007, Exxon filed a petition again challenging the now-reduced punitive damage award of \$2.5 billion.¹⁹ That appeal is still pending.



Benlate

A baby was born without eyes or optic nerves in 1990 after his mother had been sprayed with the fungicide Benlate while taking frequent walks past a farm when she was pregnant. The child's parents filed a products liability suit against E.I. DuPont, Benlate's manufacturer, among others, alleging that the company was negligent in manufacturing an unreasonably dangerous product that caused the boy's birth defects. The jury awarded \$4 million. The Florida Supreme Court upheld the award.²⁰

Asarco, Inc. Refinery

Beginning in the mid-1920s, residents of Globeville, Colorado were subjected to cadmium and arsenic exposure from the nearby Asarco Inc. refinery and smelter, placing citizens at a higher risk for cancer and other life-threatening illnesses. Asarco and the State of Colorado had previously reached a settlement that left dangerous levels of cadmium at the plant site and provided for minimal cleanup.

In 1991, nearly 600 homeowners filed a class action lawsuit, demanding compensation and urging that the agreement's terms were inadequate to protect the public from future harm. The jury awarded over \$28 million in compensation for the people who were harmed by the pollution. Three months later, Asarco agreed to settle the case for \$24 million, plus an additional \$11 million to clean up the contaminated soil.²¹

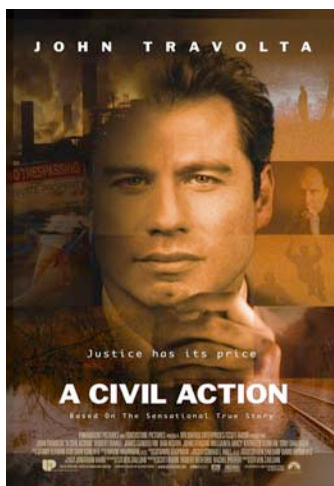
Copper Pipes

A four-year-old boy in Connecticut died from liver failure caused by excessive amounts of copper leaching from pipes into his drinking water. The child's parents filed a products liability and wrongful death suit against the water company, arguing that the water company had been aware of the problem yet failed to fix it until after the boy became ill. Records located in the Department of Health (DPH) archives showed that DPH had ordered the company to evaluate its drinking water nearly three years before the boy's death. The case settled for \$800,000 before trial. Legislation

was later introduced in the Connecticut state legislature to reduce the time in which water companies corrected water quality problems from two years to 150 days.²²

The Woburn Case (portrayed in the film, “A Civil Action”)

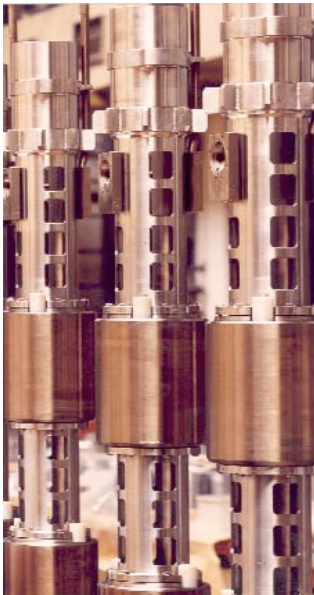
In 1972, Anne Anderson of Woburn, Massachusetts, learned that her three-year-old son Jimmie had leukemia. Suspicious of the local water, which was odorous and appeared to be corrosive, she and a local minister, Reverend Bruce Young, began to investigate. They discovered that many children in the community were suffering from leukemia. The wells were not closed until 1979, after years of pollution, when tests showed that they were polluted with high levels of industrial waste.



In 1982, residents of Woburn, Massachusetts filed a class action lawsuit against W.R. Grace and Beatrice Foods Company for contaminating the city wells with toxic chemicals. As of 1986, five of the nineteen victims identified in their suit had died. The case against W.R. Grace ultimately settled for only \$8 million, and the jury did not find the Beatrice Foods Company liable for polluting the wells. Information gathered from the litigation, however, helped provide more grounds for federal action. The federal Environmental Protection Agency pursued both companies, obtaining approximately \$70 million for remediation.²³

Paducah, Kentucky nuclear site

Joseph Harding worked for 18 years at the United States Department of Energy's Paducah Gaseous Diffusion Plant, a uranium processing facility, in Kentucky. He died of cancer in 1980, at age 58. For nine years before his death, government contractors and Department of Energy officials disputed his claims of radiation exposure. Post-mortem testing found that more than 12 years after he had left the plant, his bones contained uranium at levels up to 133 times the normal level. In August 1999, then U.S. Energy Secretary Bill Richardson finally hailed Harding and other plant workers as heroes of the Cold War.²⁴ Thousands of workers at the Paducah, Kentucky uranium enrichment site were unknowingly exposed to highly toxic radioactive materials while working at the facility between 1952 and 1998. Even their families were exposed, because of the contamination that workers unwittingly brought home on their clothing.

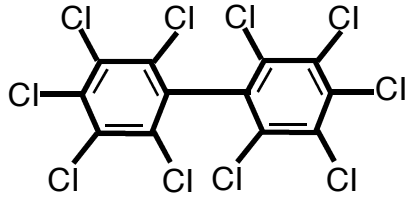




After three courageous employees filed a whistleblower's lawsuit in June 1999, a federal class action was filed on behalf of over 10,000 current and former employees and their families against the plant operators and the producer of the recycled uranium.²⁵ Following an eight-month investigation, the U.S. Department of Energy concluded in February 2000 that workers had been exposed to toxic chemicals. The Clinton/Gore administration successfully convinced Congress to establish a fund of over \$100 million for medical monitoring and treatment, and for environmental cleanup.²⁶ This became part of a broader statute to help ailing energy and defense workers, called the Energy Employees Occupational Illness Act, passed by Congress in 2000.²⁷ While the fund has since provided compensation to over 15,000 workers, tens of thousands of other claims have been denied or delayed, so advocates and elected officials continue to press for proper compensation for all of the workers made ill by these harmful exposures.²⁸

PCBs

In 1974, a Pennsylvania homeowner installed an F.E. Myers, Co. water well pump that, unknown to her, used an oil lubricant containing PCBs. As a result, when the



woman showered and brushed her teeth, she was exposed to oily water containing the chemical. She brought a products liability lawsuit which uncovered documents showing that the company knew from prior trade association memoranda that PCBs had been found in the oil and had previously leaked into pumped water, and that the trade association had recommended such information be kept from the public, customers and employees. The jury awarded \$766,000 in damages, \$750,000 of which were punitive damages.²⁹



Chrome-Plating Facility

In 1963, Chrome Crankshaft Inc. began operating a chrome-plating facility adjacent to two schools and residential homes in Bell Gardens, California. Twenty-two students and six teachers were diagnosed with cancer over a subsequent eight-year period. A number of teachers also reported miscarriages. The victims filed personal injury lawsuits against Chrome Crankshaft and J&S Chrome Plating Co. In January 1999, Communities for a Better Environment, a California environmental group, also filed suit. In exchange for dismissal of both cases, Chrome Crankshaft settled both lawsuits for an undisclosed amount. The company agreed to discontinue the chrome-plating portion of its operations and to contribute \$25,000 to an environmental awareness organization.³⁰

Landfill

Residents of Duval County, Florida suffered cancers and birth defects, as well as reproductive, blood and skin problems, after exposure to hazardous chemicals and industrial sludge emanating from a 17-acre landfill. A lawsuit by 670 victims was filed against WMX Technologies, Inc. and Waste Control, alleging, in part, that their injuries were a direct result of high levels of benzene, vinyl chloride, lead, solvents and other contaminants at the site. The case settled for \$18.5 million. The settlement effectively converted the case into a class action with more residents able to share in the recovery.³¹



Electromagnetic Pulse Radiation

From the early- to mid-1980s, hundreds of employees were continually exposed to high doses of electromagnetic pulse (EMP) radiation while working for the Boeing Corporation. In 1985, one employee was diagnosed with a rare leukemia. After filing a workers' compensation claim, the man uncovered documents showing that Boeing had been using its workers to test the effects of EMP for the Defense Department. In June 1988, he filed a \$7 million class action suit against Boeing and other companies. In August 1990, Boeing settled, paying over \$500,000 to the man and his family (who established a foundation dedicated to funding EMP education and litigation), as well as funding medical exams and monitoring for workers. After the suit, Boeing minimized employee EMP radiation exposure, implemented an employee health-monitoring program and warned employees of possible dangers during medical examinations.³²

Railway Explosion

Over 8,000 residents of the Gentilly section of New Orleans, Louisiana, sued nine corporations, including CSX Transportation Corp. and Phillips Petroleum Co., for injuries caused by a rail tank fire and explosion in September 1987. The tank car was filled with 29,000 tons of the carcinogenic chemical butadiene, which seeped into the sewer system and eventually ignited. A black vapor covered the poor, predominantly minority neighborhood, forcing the evacuation of 1,000 people. Information uncovered in a class action lawsuit filed by residents showed ten previous leaks from sitting railroad tankers in the three years before the explosion. At the first trial, the jury awarded \$2 million in compensatory damages and over \$3.36 billion in punitive damages. The punitive award was later reduced to \$850 million. As of February 2000, six defendants had agreed to pay a total of \$215 million.³³



Childhood Lead Poisoning

For years, landlords in New York State could avoid responsibility for bad management of toxic, brain-damaging lead paint simply by claiming ignorance of the hazard. Young toddlers, who could ingest the toxic dust generated by lead paint through normal hand-to-mouth activity, were the most vulnerable to this permanent brain damage. Lead poisoned children suffered loss of intelligence and problems with attention span, among other health effects.



In 1994, parents James and Sallie Chapman rented an apartment with their three children, including one-year-old Jaquan. Mrs. Chapman became concerned that the paint on the second floor porch and in the window tracks was chipped and peeling. While the landlord admitted to being in

the apartment, he insisted that he did not know that the paint was lead even though he knew that the building was old, and he failed to abate the hazard. About a month after moving in, a blood test from a routine physical examination revealed that Jaquan had elevated levels of lead in his blood. Later tests revealed that the condition had worsened so much that he had to be hospitalized. The family moved out of the apartment by September 1995.

Unfortunately, the only “cure” for the brain-damaging effects of lead poisoning is prevention; the harm cannot be reversed. The family brought a civil action, and in the year 2001, the highest court in New York State rejected the argument that the landlord could escape liability simply by claiming ignorance. It listed several factors that should be considered to determine whether or not a landlord knew or should have known about the presence of toxic lead paint in a dwelling.³⁴

This important decision, which allowed the Chapman family to pursue their claim against their landlord to hold him accountable for his negligence, put all landlords on notice that a “head in the sand” approach to brain-damaging lead paint would no longer protect them from liability. It also helped bolster efforts by children's advocates in New York City to achieve passage of the landmark Childhood Lead Poisoning Prevention Act of 2004, which establishes very specific requirements to ensure that landlords maintain old lead paint properly in homes containing young, vulnerable children



Federal Environmental Protection Laws Should Not Replace Civil Justice: Congress's Best Intentions Can Be Undermined by Politics and Powerful Polluters

While the early 20th century witnessed some important government involvement in pollution control, American environmental regulation as we know it today began in the 1960s and 1970s. During these decades, Congress passed and the President signed several important laws to promote clean air and water. Examples of these major statutes are the National Environmental Policy Act, the Clean Air Act and the Clean Water Act.³⁵ Subsequent laws include the Resource Conservation and Recovery Act (RCRA),³⁶ which governs hazardous materials and solid waste, and the Comprehensive Environmental Responses, Compensation and Liability Act (CERCLA),³⁷ which addresses toxic waste spills and dumping.

Political forces, unfortunately, can undermine the effectiveness of these laws. The President appoints the chief administrators of the agencies that enforce environmental laws, including the Administrator of the powerful Environmental Protection Agency (EPA). Consequently, each such agency is subject to political influence. Over the years, the EPA has been weakened through appointments of people with little environmental background but much loyalty to the President.³⁸ A recent example is Bush's appointment of Linda Fisher to the second-ranking position of Deputy Administrator of the EPA. Ms. Fisher was a former top lobbyist and executive at Monsanto (a leading pesticide producer). She left the EPA in 2003 and took a job at Dupont.³⁹ This revolving door of appointments allows the White House, and the interested corporate parties, to retain more control over environmental actions.



Sometimes the political control is evident in an agency's specific response to an environmental incident. An investigation by the EPA's Inspector General, for example, found that the White House Council on Environmental Quality actually took health warnings out of press releases that the EPA issued in the aftermath



of the September 11, 2001 attack on the World Trade Center, giving the public false assurances of safety.⁴⁰ Not only did the head of the EPA - Bush appointee Christine Todd Whitman - agree to these changes, but she also failed to revoke the agency's assurance of safety after information became publicly available indicating that hazards were present and people were suffering health effects.⁴¹



In a June 25, 2007 hearing, Representative Jerrold Nadler (D-NY), chair of the House Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties, condemned the EPA's World Trade Center response:

These EPA statements, and a series of subsequent EPA misdeeds, lulled Americans affected by 9/11 into a dangerously false sense of safety, and gave other government decision-makers, businesses and employers the cover to take extremely perilous short cuts which did further harm.

...

Six years later, we are just beginning to see the enormous consequences of these actions. Our government has knowingly exposed thousands of American citizens unnecessarily to deadly hazardous materials. And because it has never admitted the truth, Americans remain at grave risk to this day. Thousands of first-responders, residents, area workers and students are sick, and some are dead, and that toll will continue to grow until we get the truth and take appropriate action.

Those false statements continue to the present. Ms. Whitman herself has rationalized the White House's soft-peddling of risk in EPA statements, proclaiming to *Newsweek* in 2003 that she did not object to the White House changing her press releases and that, "the public wasn't harmed by the White House's decision to adopt the more reassuring analysis." Even now, they try to rewrite history, arguing, for example, that their reassuring statements were "only talking about air on the 'pile,' not in the surrounding neighborhoods" or that they were "only talking about outdoor, not indoor air" or that they had "always told residents to get their homes professionally cleaned." The IG [Inspector General] reached a different conclusion, and the statements speak for themselves. Governor Whitman has even gone so far as to blame the victims themselves for their illnesses.⁴²

Political forces, especially the pesticide/toxic substances lobby, are evident in a few recent EPA actions as well. The EPA is now allowing commercial manufacturers of bleach, pesticides and other toxic substances to display promotions for charitable causes and charities on their products' safety labels. Such "cause-marketing" takes up important label space traditionally devoted to consumer safety and usage information. The EPA's new policy "appears to violate the spirit, if not the letter, of its own consumer protection guidelines and risks drowning out critical safety warnings with purely promotional visual clutter," explained Jeff Ruch, Executive Director of Public Employees for Environmental Responsibility. "EPA will be squandering its limited regulatory resources to referee promotional slogans rather than protecting consumer health."⁴³





Also, in 2006, the EPA finalized a human studies rule that allows companies to intentionally dose human beings with pesticides to justify weaker regulation.⁴⁴ Studies show that people with high exposures to pesticides are far more likely to develop genetic mutations linked with cancers, birth defects and neurological disorders.⁴⁵ While the rule prohibits the EPA's use of data collected from pesticide testing on pregnant women, infants and children, it still allows the testing to continue. The rule is the product of a meeting between OMB staff, EPA officials and pesticide industry lobbyists, whose top objective was access to children for experiments.⁴⁶

A coalition of U.S. senators, health and environmental advocates, farmworkers and doctors are challenging the rule in court, arguing that it violates a 2005 congressional law that mandated strict ethical and scientific protections for pesticide testing on humans.⁴⁷ Congress passed such legislation after learning of the EPA's "CHEERS" project, an industry-backed pesticide study that would have offered low-income families in Florida \$970, a camcorder and children's clothing if they would use and record "routine exposure" of their infants and toddlers to household pesticides.⁴⁸

In other instances, political influence can impair an entire regulatory system. For each environmental statute, the EPA or other agency charged with enforcing the law has the responsibility to write detailed rules to carry it out.⁴⁹ Sometimes those rules reflect the intention of Congress, but sometimes they do not. In a case that the United States Supreme Court recently refused to reconsider, a United States appeals court ruled in March 2006 that the Bush Administration's Environmental Protection Agency improperly had adopted rules allowing energy utilities to modify antiquated, polluting power plants without upgrading their pollution controls to meet modern standards. Not only environmental groups but also 14 state attorneys general challenged this rule. The court held that the rule was "contrary to the plain language" of the Clean Air Act.⁵⁰



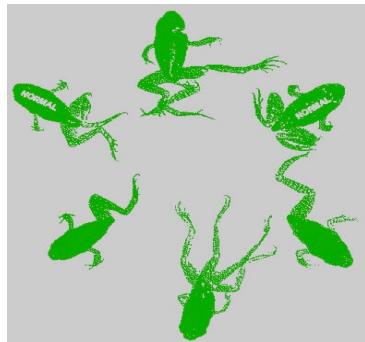
The effectiveness of enforcement against violators can suffer from political interference as well. A report by the Environmental Integrity Project, for example, found that the first three years of the Bush Administration's control over the Environmental Protection Agency caused a 75 percent drop in civil lawsuits filed against polluters who refuse to voluntarily settle air or water pollution violations or fail to clean up pollution caused by their violations, compared to the last three years of the prior administration.⁵¹

Lack of enforcement plus policy changes and political appointments all add up to an aggressive anti-environment agenda that characterizes the Bush Administration.

A 2005 report by the Natural Resources Defense Council details the Administration's "thorough and destructive campaign against America's environmental safeguards" and the results. These results include more toxic releases, fewer hazardous waste cleanups, more mercury contamination, dirtier air and less refinery oversight, amongst other things.⁵²

Another way politics infects environmental regulation is through executive funding decisions. The President and Congress have slashed EPA's budget year after year, for example, and reduced its staff even though its responsibilities have grown.⁵³ The Bush Administration's proposed FY 2008 budget for the EPA included slashing the budget by more than \$400 million. However, in June 2007 the House passed an amendment that would increase the EPA's FY 2008 budget. Other budget cuts affecting environmental enforcement include major job cuts in the Inspector General's office, the watchdog of the EPA and the Administration's push to shut down the network of environmental libraries, which provides invaluable assistance to the public on pollution information and other health and environmental hazards. There is also an internal push within the EPA to cut laboratory staff and close research centers, drastically reducing the amount of monitoring that takes place.

Finally, a statute's strength depends on the integrity of the individuals enforcing it. One prosecutor with the United States Department of Justice was criticized in early 2007 for signing two proposed consent decrees with an oil company delaying a half-billion-dollar pollution cleanup nine months after buying a \$1 million vacation home with the oil company's top lobbyist.⁵⁴ Such cozy connections between governmental enforcement personnel and industry harm the credibility of the agency.



Some of the Major Environmental Laws

The Clean Air Act (CAA):

First floated by President Kennedy and signed into law two years later (1963) and amended in 1970, 1990. In simple terms, the Act requires the EPA to set air quality standards and set emissions limits, and gives great responsibility to the States to allocate their emissions among industries. Until 1990, EPA focused on very few pollutants, mostly by-products of coal and auto emissions. The 1990 amendments expanded the Act to cover more pollutants, most notably: sulfur dioxide and nitrogen oxides (causes of acid rain), CFCs (and other ozone-related chemicals), mercury, and over 189 other chemicals deemed “hazardous or toxic.”

President George W. Bush attempted to weaken the Act immeasurably with the Clear Skies Initiative of 2003. This would have weakened Clean Air Act regulations by allowing existing power plants a loophole around compliance with Clean Air Act provisions, and raising emission levels. A federal court struck it down, however.

The Clean Air Act is plagued by a cost/benefit analysis - and the industries with the greatest air pollution output play a large role in the politics of their regulation. In other words, through intensive lobbying, industry has managed to get an elaborate trading mechanism included in the Act, which allows powerful industries with much pollution to continue to pollute by buying their emissions levels from other industries and other states. The coal industry has been closely involved with the crafting of the Clean Air Act since its inception. Other industries that are heavily regulated and therefore involved in the political process of CAA are the auto industry, the steel industry, power plants, and oil refineries.

The Act is generally enforced by the EPA, although the most recent Administration has seriously cut back on enforcement. Citizens may also use the Act to file citizen suits to enforce provisions of the Act, but not for money damages. However, citizen suits may not work if the regulations are too weak because citizen suits can not strengthen regulations, only enforce them. It is an open question as to whether the Act preempts tort suits under either federal or state tort law. Most commentators believe that courts will follow the rulings on the Clean Water Act, which preempt



federal tort claims and state tort claims from the state that is affected by the pollution.

On auto emissions, California had stricter emissions levels in place at the time the Clean Air Act was enacted and so was granted an exception, however the current EPA is stalling on updating California's current waiver. If the EPA does not grant the waiver, other states may not emulate California's rule (and at least 10 other states are requesting to do just this). Until recently, the EPA had argued that the Clean Air Act does not regulate greenhouse gas emissions, however, the Supreme Court recently ruled that the EPA must address greenhouse gas emissions under the Clean Air Act. It is clear now that the EPA must address California's waiver request, and California has threatened to sue if the EPA continues stalling.

Sources:

Norman J. Vig and Michael E. Kraft, eds., *Environmental Policy: New Directions for the Twenty-First Century*, 6th Edition, CQ Press, 2005, Appendix 1; *Maysonet v. Drillex*, 229 F.Supp.2d 105, 109 (D.P.R. 2002); Sierra Club, "Clear Skies Proposal Weakens the Clean Air Act," available on-line at http://www.sierraclub.org/cleanair/clear_skies.asp; Natural Resources Defense Council, "Dirty Skies: The Bush Administration's Air Pollution Plan," available on-line at <http://www.nrdc.org/air/pollution/qbushplan.asp>; Andrew Jackson Heimert, "Keeping Pigs Out of Parlors: Using Nuisance Law to Affect the Location of Pollution," 27 *Envtl. L.* 403, 474 (1997); *Massachusetts v. EPA*, 549 U.S. ____ (2007); ABC News, "California Urges EPA to Approve Waiver," May 22, 2007, available on-line at <http://abcnews.go.com/Politics/wireStory?id=3200186>

The Endangered Species Act (ESA):

Protects threatened and endangered animals. Allows the Secretary of the Interior or the Secretary of Commerce to issue fines for any violations to the Act that harm one of the threatened or endangered animals. Allows for citizen suits to stop any action that would harm a threatened or endangered animal, or to compel the Secretary to enforce provisions of the Act, so long as the Secretary has not already commenced an action.

Does not preempt any common law actions.

Sources:

Norman J. Vig and Michael E. Kraft, eds., *Environmental Policy: New Directions for the Twenty-First Century*, 6th Edition, CQ Press, 2005, Appendix 1.

The Resource Conservation and Recovery Act (RCRA):

Requires the EPA to set regulations for the treatment, storage, transportation and disposal of hazardous waste.

Citizen suits are allowed against either the polluter or the EPA (for failure to enforce compliance) but these suits only allowed if EPA has not commenced any action. Citizen suits can be brought for violations of permit requirements (§6925); open dumping (§6945); and imminent hazards (§7002(a)(1)(B)).

No suit may be brought to challenge a siting decision or to stop the granting of a permit.

The statute is not clear about what relief may be sought by a private suit, but at least one court has found that a citizen may stop the violation, recover costs for bringing the suit, and have attorney's fees paid. *Environmental Defense Fund, Inc. v. Lamphier*, 714 F.2d 331 (CA 4 Va 1983).

Sources:

Norman J. Vig and Michael E. Kraft, eds., *Environmental Policy: New Directions for the Twenty-First Century*, 6th Edition, CQ Press, 2005, Appendix 1.

The Safe Drinking Water Act (SDWA):

Authorizes EPA to set drinking water quality standards and regulates state programs that protect underground water sources.

As with the Clean Water Act and the Clean Air Act, the Safe Drinking Water Act does not provide for compensatory damages for injuries due to contaminated drinking water. Citizens may only bring suit to compel EPA to follow the statute.

The Safe Drinking Water Act also preempts federal common law nuisance claims.

Sources:

Norman J. Vig and Michael E. Kraft, eds., *Environmental Policy: New Directions for the Twenty-First Century*, 6th Edition, CQ Press, 2005, Appendix 1; *Mattoon v. City of Pittsfield*, 980 F.2d 1 (1st Cir. 1992)

The Comprehensive Environmental Responses, Compensation and Liability Act (CERCLA):

Authorizes the federal government to oversee clean-up of hazardous waste sites and creates a "Superfund" to finance such clean-up. The Superfund has been financed in large part by a tax on the chemical and petroleum industries, and the trade-off for these industries is immunity from liability for pollution. However, this tax (called "the polluter pays principle") has expired and is not being reauthorized by the Bush Administration, which means that Superfund is being entirely financed by taxpayers and is under-financed. The immunity remains.

Besides keeping Superfund underfunded, the Bush Administration is also not cleaning up sites that are listed as hazardous waste sites, in fact clean-up activity has been reduced by over 50% in the past few years. Finally, CERCLA is under attack by both legislation and consent decrees that remove liability for certain owners entirely. The 2002 Small Business Liability Relief and Brownfields Revitalization Act removed all liability for clean-up from a prospective purchaser and limited liability for the polluter. The EPA is also drafting consent decrees that remove liability for polluters and allow certain toxic sites to not be listed (therefore removing regulations on clean-up and citizens' right to sue if clean-up is not done properly).

Citizens may bring suit under CERCLA for limited damages, but they may not receive injunctive relief in other words, they can not bring suit to stop clean-up that is not in compliance with statutory guidelines - only governmental attorneys may do this. Also, there are very strict guidelines as to which hazardous materials are covered by CERCLA, and citizen suits are limited by these lists (so petroleum and chemical plant pollution liability is extremely limited). For these reasons, it is often preferable for a citizen who is harmed by a release from a hazardous waste site to bring a suit under tort. CERCLA does not preempt state tort lawsuits.

Sources:

Norman J. Vig and Michael E. Kraft, eds., *Environmental Policy: New Directions for the Twenty-First Century*, 6th Edition, CQ Press, 2005, Appendix 1; Riverkeeper.org, "Limited Liability for Polluters," available on-line at http://riverkeeper.org/campaign.php/ge_pcb/w_e_are_doing/64; Sierra Club, "Communities at Risk: How the Bush Administration is Failing to Protect People's Health at Superfund Sites," July 27, 2004; Tom Kuhnle, "The Rebirth of Common Law Actions for Addressing Hazardous Waste Contamination", 15 Stan. Envtl. L.J. 187 (1996).



Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA):

Requires EPA to regulate and monitor all pesticides.

Recently the Supreme Court held that the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) preempts state law claims of fraud and failure to warn.

Sources:

Norman J. Vig and Michael E. Kraft, eds., *Environmental Policy: New Directions for the Twenty-First Century*, 6th Edition, CQ Press, 2005, Appendix 1; *Bates v. Dow Agrosciences LLC*, 544 U.S. 431 (2005)

The National Environmental Policy Act (NEPA):

Requires environmental impact statements to be drafted before beginning any development that might affect the environment; and created the Council on Environmental Quality.

Citizens may bring suit to challenge inadequate environmental impact statements and may be granted injunctive relief, that is, may stop the project until the appropriate impact is analyzed.

Sources:

Norman J. Vig and Michael E. Kraft, eds., *Environmental Policy: New Directions for the Twenty-First Century*, 6th Edition, CQ Press, 2005, Appendix 1.

The Clean Water Act (CWA):

Sets national water quality standards and establishes a pollutant discharge permit system. Citizens may bring suit against the EPA for failure to perform mandatory duties under the statute. The only relief would be to compel performance. No damages may be awarded.

The Act preempts citizens from bringing common law suits under the federal nuisance theories and also under tort law of the state affected by the pollution.

Sources:

Norman J. Vig and Michael E. Kraft, eds., *Environmental Policy: New Directions for the Twenty-First Century*, 6th Edition, CQ Press, 2005, Appendix 1.



Executive Order 13422



On January 18, 2007, within weeks of Democrats taking control of Congress, President Bush quietly amended a Clinton-era executive order to give his administration greater control over agencies and their regulatory policies.^a This new directive, Executive Order (E.O.) 13422, shifts regulatory power away from federal agencies - power Congress directly delegates to agencies through legislative enactments - and centralizes it in the White House-controlled Office of Information and Regulatory Affairs (OIRA), the regulatory arm of the Office of Management and Budget (OMB).

Closer examination of E.O. 13422, reveals that the order could undermine a broad range of public health and safety protections, all to the benefit of corporate interests. Among the more alarming changes:

■ **Regulatory Policy Officer**

Every agency will have a Regulatory Policy Officer (RPO) who oversees agency decisions about regulations and coordinates regulatory matters with OIRA. No rulemaking can commence or be included in an agency's regulatory plan without the approval of the RPO unless overruled by the agency head. The RPO is a presidential appointee, giving the White House a gatekeeper in each agency to ensure that the agency's regulatory agenda reflects the administration's priorities regardless of the need for public safeguards. Nothing in E.O. 13422 suggests that the RPO will be subject to Senate confirmation.

■ **Increased Emphasis on “Market Failure” Before Regulating**

Even if agencies identify threats to public health and safety that warrant regulation, OIRA can argue that private markets will correct the social problem on their own, making regulation unnecessary. This approach provides the White House with a pretext for rejecting crucial health and safety rules that clash with the administration's pro-business agenda.

■ **Cost-benefit Analysis**

No rulemaking can commence unless agencies estimate the combined aggregate costs and benefits of all planned regulations for the calendar year. Using economic analysis to assess the value of an agency's entire regulatory agenda and then allowing that analysis, rather than public need, to dictate regulatory decisions ignores the fact that: 1) many benefits of regulation, like health and safety, cannot be quantified in dollars and cents and are therefore likely to be underestimated; and 2) costs are often overestimated since the numbers are based on industry estimates. As Public Citizen recently put it, "This new requirement will make cost/benefit analysis the central factor in setting priorities for needed protections of the public interest. These cost/benefit analyses are notoriously biased against regulation, especially long-term goals such as preventing global warming or cancers that manifest years after exposure to toxic substances."^b

■ **Review of Guidance Documents**

OIRA will have the authority to review and oversee agencies' development, issuance and use of guidance documents - informal, non-binding materials that tell regulated industries how agency rules will be enforced, which often cost businesses millions of dollars to comply with. Guidance documents subject to OIRA review include "interpretive memoranda, policy statements, guidances (sic), manuals, circulars, memoranda, bulletins, advisories, and the like." Given that agencies issue thousands of guidance documents each year relating to hundreds of different types of activities, mandating OIRA oversight can lead to endless regulatory delays and greater White House control over the substantive work of federal agencies, making it more difficult for agencies to protect us from a variety of dangers.

The amendments have prompted concerns in Congress. "This order allows political appointees to dictate decisions out of the shadows on health and safety issues, even if impartial scientific experts decide otherwise," said Representative Brad Miller, chairman of the

House Investigations and Oversight Subcommittee, who is spearheading congressional efforts to learn more about the creation of E.O. 13422 and its potential impact on regulatory procedures.^c The directive is “another avenue for special interests to slow down and prevent agencies from protecting the public,” explained Miller. “It is not good government when agency action is based on economic or political back room deals rather than environmental or public health consequences.”^d

On June 28, 2007, the House voted to block OIRA from implementing E.O. 13422, but it remains in effect is unclear whether this action will have any effect.^e

Sources:

- a. “OMB Memo Fails To Alleviate Critics’ Regulatory Review Concerns,” *Defense Environment Alert*, May 15, 2007; “Democrats Turn Up The Heat In Inquiry On Bush Reg Review Order,” *Clean Air Report*, May 3, 2007; OMB Watch, “White House Tightens Grip on Regulatory Power Grab,” May 1, 2007, found at <http://www.ombwatch.org/article/articleview/3817>; Memorandum from OIRA Administrator Susan E. Dudley to Regulatory Policy Officers, “Implementation of the OMB Bulletin on Good Guidance Practices and Executive Order 13422 (amending Executive Order 12866),” April 25, 2007, found at <http://www.whitehouse.gov/omb/memoranda/fy2007/m07-13.pdf>; OMB Watch, *A Failure to Govern: Bush’s Attack on the Regulatory Process* (March 2007), found at <http://www.ombwatch.org/article/articleview/3774/1/432?TopicID=3>; Frank O’Donnell, “A New Bush Power-Grab,” February 22, 2007, found at http://www.tompaine.com/articles/2007/02/22/a_new_bush_powergrab.php; Testimony of David C. Vladeck, Director of the Institute for Public Presentation and Associate Professor of Law at Georgetown University Law Center, before the House Subcommittee On Investigations and Oversight, February 13, 2007, found at <http://gop.science.house.gov/hearings/oversight07/February%2013/vladeck.pdf>; Public Citizen fact sheet, “Overview of Exec. Order No. 13,422 and the Final Bulletin on Guidance Practices,” February 9, 2007, found at <http://www.citizen.org/autosafety/regs/whitehouse/guidance2007/index.cfm?ID=16155&relatedpages=1&catID=106&seclD=2622>; Public Citizen, “Guidance: Definitions and New Burdens, February 9, 2007, found at <http://www.citizen.org/autosafety/regs/whitehouse/guidance2007/index.cfm?ID=16155&relatedpages=1&catID=106&seclD=2622>; OMB Watch, “Media, Congress Begin to Examine Bush’s Executive Order on Regulatory Process,” February 6, 2007, found at <http://www.ombwatch.org/article/articleview/3709/1/476>; Robert Pear, “Bush Directive Increases Sway Over Regulation,” *New York Times*, January 30, 2007, found at <http://www.nytimes.com/2007/01/30/washington/30rules.html?ex=1181793600&en=e060aaf609909a4a&ei=5070>; Cindy Skrzycki, “Bush Order Limits Agencies’ Guidance,” *Washington Post*, January 30, 2007, found at http://www.washingtonpost.com/wp-dyn/content/article/2007/01/29/AR200701290181818_pf.html; OMB Watch, “President Bush Amends Federal Regulatory Process,” January 23, 2007, found at <http://www.ombwatch.org/article/articleview/3688/1/85?TopicID=2>; OMB Watch, “Undermining Public Protections: Preliminary Analysis of the Amendments to Executive Order 12866,” January 18, 2007, found at [http://www.ombwatch.org/article/articleview/3685/1/%7Bcategory_id%7D: “Executive Order: Further Amendment to Executive Order 12866 on Regulatory Planning and Review,” released January 18, 2007, found at <http://www.whitehouse.gov/news/releases/2007/01/20070118.html>.](http://www.ombwatch.org/article/articleview/3685/1/%7Bcategory_id%7D: “Executive Order: Further Amendment to Executive Order 12866 on Regulatory Planning and Review,” released January 18, 2007, found at http://www.whitehouse.gov/news/releases/2007/01/20070118.html)
- b. Public Citizen fact sheet, “Overview of Exec. Order No. 13,422 and the Final Bulletin on Guidance Practices,” February 9, 2007, found at <http://www.citizen.org/autosafety/regs/whitehouse/guidance2007/index.cfm?ID=16155&relatedpages=1&catID=106&seclD=2622>.
- c. “OMB Memo Fails To Alleviate Critics’ Regulatory Review Concerns,” *Defense Environment Alert*, May 15, 2007; “Democrats Turn Up The Heat In Inquiry On Bush Reg Review Order,” *Clean Air Report*, May 3, 2007; Press release from the office of Representative Brad Miller, “Chairman Miller Leads Science Subcommittee Hearing Into White House Executive Order That Gives More Political Control Over Public Health, Safety Regulations,” February 13, 2007, found at <http://www.house.gov/bradmiller/prpr20070213.html>.
- d. Press release from the office of Representative Brad Miller, “Chairman Miller Leads Science Subcommittee Hearing Into White House Executive Order That Gives More Political Control Over Public Health, Safety Regulations,” February 13, 2007, found at <http://www.house.gov/bradmiller/prpr20070213.html>.
- e. “House Votes To Block Controversial White House Rule Review Order,” *Risk Policy Report*, July 3, 2007.



Letting Corporations Off the Hook for the Harm They Cause People: How Some Federal Statutes Grant Immunity to Corporations

While traditional common law still plays an important role in the response to harmful pollution, it does so today with limitations. Some federal laws “cap,” or limit, a corporation’s responsibility to pay for the harm that it causes. Under the controversial Price-Anderson Act, for example, the owners of nuclear power plants are only required to pay up to a certain amount for the human health impacts and property damage that a nuclear plant disaster would cause.⁵⁵ Beyond that amount, the victims themselves, or else American taxpayers, would be forced to bear the burden. Normally, businesses that engage in activities with high liability risks are financially accountable for the harm that could result. This law removes that market-based incentive for safety, leaving nuclear industry corporations free to engage in highly risky enterprises - and to reap enormous profits from them - without being fully responsible for the disastrous consequences that could result from their actions.

In the wake of the September 11, 2001 terrorist attacks, the federal government acted to shield the airlines from liability for failing to adopt measures to protect against the use of aircraft by terrorists, but they went far beyond that initial motivation in their legislative action. They provided a shield for any entity that failed to ensure proper protection for rescue and recovery workers from 9/11 toxic exposures. They did so by establishing a fund that would compensate the families that had lost loved ones as a result of the atrocity and also families that had lost loved





ones as a result of the atrocity and also the people who were injured by the attack, but required that all those who participated in the fund must give up their right to bring a civil action against anyone other than the perpetrators of the attack itself.⁵⁶

Unfortunately for the many thousands of Ground Zero workers who are now ill from exposure to the 9/11 pollution, the fund only covered medical care related to physical conditions that had already been identified, and the deadline for applying to the program was December 22, 2003.⁵⁷ Many Ground Zero workers were not provided with proper respiratory protection or were misled about the safety of conditions at the site.⁵⁸ It is well known that cancer and other illnesses triggered by exposure to toxic chemicals can take several years to become manifest and be diagnosed.⁵⁹

Courts, in turn, have impaired individual rights by ruling that specific federal statutes have replaced - or, “pre-empted” - some aspects of common law in addressing certain types of pollution. In some cases, this preemption of common law means that a person who becomes injured by a toxic release cannot hold the polluter accountable for the harm at all.



The U.S. Supreme Court has held, for example, that the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) preempts certain claims of fraud and failure to warn of a hazard that are related to labeling requirements.⁶⁰ FIFRA does not preempt all claims, such as those for defective design or manufacture.⁶¹ But FIFRA, like most environmental statutes, only establishes requirements to control the pollution itself. It does not force the polluter to compensate people who are injured by the pollution.

In other situations, the statute only replaces federal common law, which applies to pollution that crosses state borders, not state common law. In such instances, an injured person cannot bring a civil action in federal court, but is free to pursue one in state court.⁶²

In some cases, the federal statute does not wipe out the ability to sue, but sets up an alternative system of compensation funded by taxes on the industry. The Oil Pollution Act,⁶³ for example, which holds the owner, operator or charterer of the polluting ship or facility strictly liable for the cleanup costs and damages that occur to natural resources and personal property from the oil spill,⁶⁴ caps federal liability according to a formula, depending on the type of facility or vessel involved in the spill,⁶⁵ but does not pre-empt state common law or statutes.⁶⁶

Congressional Attempts to Preempt State and Local Regulation of Environmental Toxins

MTBE:

MTBE is a gasoline additive considered to be a human carcinogen. According to a GAO report from May, 2002, most states' groundwater shows signs of contamination by MTBE. Lawsuits have been filed to hold the polluters responsible, but Congress repeatedly attempts to grant immunity to these polluters through legislation. Most recently, the Energy Policy Act of 2005 as it passed the House included a "safe harbor" for producers of MTBE from lawsuits holding them accountable for pollution. This immunity provision did not make it into the final bill, but is expected to continue surfacing in future bills.

Sources:

House of Representatives, Government Reform Minority Office, "Energy Policy Act of 2005"; Thomas O. McGarity, "MTBE and the Need for Effective Tort Law," A Center for Progressive Regulation White Paper, March 2005.

California Emissions Standards:

In an effort to fight global warming, California adopted stringent greenhouse gas emissions standards for new cars and trucks. The National Highway Transportation and Safety Administration then targeted these higher standards in a preamble to rule on fuel economy standards, writing, "We reaffirm our view that a state may not impose a legal requirement relating to fuel economy, whether by statute, regulation or otherwise, that conflicts with this rule. A state law that seeks to reduce motor vehicle carbon dioxide emissions is both expressly and impliedly preempted."

This is a prime example of an agency quietly working to preempt a state law, without any accountability.

Sources:

PIRG, Preemption Alert, April 2005; Bill Lockyer, Office of the Attorney General, News Release, "Attorney General Lockyer Criticizes Federal Fuel Economy Standards That Attack California Curbs on Global Warming Emissions: NHTSA Rules Seek to Preempt Landmark State Restrictions on Vehicle Emissions," March 29, 2006.



Courts have so far consistently held that the Comprehensive Environmental Remediation, Compensation and Liability Act (CERCLA),⁶⁷ also known as “the Superfund Law,” which focuses on toxic dumps and spills, does not preempt state civil justice claims so long as such court actions do not interfere with CERCLA’s cleanup standards or methods for apportioning liability among polluters of a site.⁶⁸ The Superfund Law was passed in response to strong media coverage of the impacts of hazardous waste dumping on communities, including at Love Canal in New York and Times Beach in Missouri. These news stories began to change public opinion about the dangers of hazardous waste, and passage of the Superfund Law helped give legitimacy to that concern.⁶⁹ Interestingly, after the Superfund Law was passed, the frequency with which ordinary citizens brought their own cases to court under the common law against polluters for harms caused by hazardous waste dumping increased.⁷⁰ Such civil actions are becoming more and more important now, given reports that the Bush Administration is failing to support CERCLA policies and enforcement.⁷¹

Removal of the Only Level Playing Field: How the Bush Administration Seeks to Block Citizens from Access to the Court

Corporate wrongdoers benefit when government restricts the ability of injured people to bring arguments to court for compensation of their injuries. Some of their lobbying efforts to restrict common law claims - misleadingly dubbed “tort reform” - target individual rights that are very important for cases of environmental harm.



The Attack on Mass Torts and Class Actions

When harmful pollution is released, it usually causes exposure to a group of people, rather than just one person. Also, the evidence needed to prove the existence of harm to human health from the exposure is hard to document on the basis of a single injury. Usually, courts need to examine trends and statistics or “clusters” of injury to determine the likelihood of damage from toxic exposure. Finally, given the amount of scientific detail and discovery needed to prove such cases, it is usually not practical for plaintiffs' attorneys to litigate such cases one at a time, and it is certainly highly inefficient for courts to hear such cases one at a time. It simply makes no sense to “reinvent the wheel” for each case arising from a similar group of facts. For these reasons, environmental injury cases often are particularly well suited to be brought together for more efficient and effective resolution.

The two methods for managing large groups of plaintiffs injured by a pollution incident or practice are the “class action” and the “mass tort.” The Federal Rules of Civil Procedure established the “class action” to handle large groups of plaintiffs collectively suing over a similar harmful activity.⁷² The plaintiffs are grouped together in a single case, with unified legal representation. This

method is not always practical for toxic exposure cases, however, because illnesses can emerge at different times in different people. The “mass tort” method is better suited to address such circumstances.⁷³ The main difference between a class action and a mass tort is that mass torts are consolidations of many individual lawsuits with individual attorneys that are grouped together for effective pre-trial management. Some important mass tort actions for toxic exposures include *In re Agent Orange*⁷⁴ and *In re Three Mile Island*.⁷⁵



Sometimes a class action mechanism is applied to parts of a mass tort action in order to simplify or clarify certain arguments. For example, a particular issue may be certified as a class action, decided once, and then applied throughout the mass tort. Or a settlement might be certified a “futures” class action, to protect the rights of exposed people whose injury had not yet become apparent at the time of settlement from being without remedy if the injury appears later.⁷⁶

While self-titled “tort reformers” attack class actions and mass torts relentlessly,⁷⁷ their political agenda is not in the public’s best interest. Without these civil justice mechanisms, many injured people would be left without a remedy because lawyers simply would not be able to represent one plaintiff at a time in such complex cases. Public interest environmental advocates recognize this. They strongly opposed the Class Action Fairness Act of 2005 (“CAFA”) because it would be “patently unfair to citizens harmed by toxic spills, contaminated drinking water, polluted air and other environmental hazards involved in class action cases based on state environmental or public health laws.”⁷⁸

Attacks on Class Actions and Mass Torts Can Block Communities From Bringing Environmental Civil Actions to Fight Racial Injustice

“Environmental justice” is a specialized field of environmental law in which concerned members of a community challenge a polluting activity on the grounds that the effects unfairly harm a certain group more than others. “Environmental racism” is another term used by advocates to describe more specifically any “policy, practice or directive that, intentionally or unintentionally, differentially impacts or disadvantages individuals, groups, or communities based on race or color.”⁷⁹ Environmental justice lawsuits argue that a particular minority or community is unfairly disadvantaged by an action that results in their exposure or increased risk of exposure to pollution. Such actions could include, for examples, the siting of a garbage facility, the failure to manage hazardous materials safely, or a decision to allow only partial cleanup of a toxic site.⁸⁰

An important early environmental justice case was brought by activists in Warren County, North Carolina, who fought an EPA decision to site a toxic chemical landfill in a poor, predominately black community. Their lawsuit alleged discriminatory intent. While the lawsuit itself did not succeed, the legal action spurred debate over the issue of environmental racism.⁸¹ The events in Warren County also helped spark empirical studies providing evidence of racial inequalities in toxic waste management policies.⁸² Several studies concluded that minority communities bear a larger environmental burden than non-minority communities and that race was the best predictor of siting decisions of hazardous waste facilities.⁸³





Minority communities that shoulder such environmental burdens have very few remedies. Executive and legislative declarations against environmental racism have been weak and under-utilized.⁸⁴ A 2006 report by the EPA Inspector General charged that, “senior EPA officials have not required regional offices and department heads to conduct environmental justice review despite a requirement for such reviews dating back to 1994.”⁸⁵ The civil justice system often provides the only available remedy and, recently, injured residents have turned to it for redress.

The residents of Anniston, Alabama used the courts to hold the Monsanto corporation accountable for knowingly polluting this small town with dangerous levels of PCBs. The legal actions started when Andrew Bowie, a deacon at the Mars Hill Missionary Baptist Church, asked a former state legislator for help. A representative of Monsanto had offered to buy the church property, but for a low price. The attorney, Donald Stewart, learned that Monsanto wanted to buy the property because it was planning a cleanup of PCB contamination in the area. Soon he was flooded by calls from ailing residents of the mostly poor African American community. The result was a class action on behalf of 3,500 Anniston residents, many of which were children.⁸⁶ The first lawsuit, brought in state court, went to trial and the jury found Monsanto and other companies liable under several state common law principles, including negligence, nuisance and trespass.⁸⁷ Because a similar federal class action had been brought on behalf of other residents,⁸⁸ a United States District Court judge

instructed the parties to negotiate a “global” settlement for all concerned. The result was a settlement in 2003 requiring the companies to pay \$600 million for personal injuries and \$104 million for property damage.⁸⁹

Another recent example of a mass tort action arguing environmental racism is pending in New Jersey. There, over 700 members of the Ramapough Indian Tribe are suing Ford Motor Company in state court under state tort law claims, like negligence, for years of dumping of toxic chemicals.⁹⁰ For over 25 years, Ford produced cars and trucks at a large plant in Mahwah, New Jersey. But the plant, which closed in 1980, also produced paint sludge and other wastes, contaminating the Ramapo River and area soils in Ringwood, where a company acting on behalf of Ford had deposited its industrial wastes in abandoned iron mines. Although EPA had placed the site on the Superfund list in 1983, and had declared it cleaned up in 1994, more contamination was discovered.⁹¹ Plaintiffs claim that the contamination has sickened residents and they are asking for medical monitoring, compensatory and punitive damages, and attorney fees.⁹²

Restrictions that limit access to mass civil justice remedies would erect yet another unfair barrier for these communities in their effort to achieve justice.



The Future of Environmental Civil Actions: Spurring Action for Change

An emerging area of environmental concern that has not yet been addressed by any federal regulatory system is global warming.⁹³ Despite an onslaught of bills offered by Congressmembers to tackle global



warming,⁹⁴ the Bush Administration proposed instead the Clear Skies Act of 2003. The President's bill did not establish controls on carbon dioxide, the major greenhouse gas.⁹⁵ While Congress rejected this bill, no major new law to address global warming has yet been enacted. The President also rejected the international treaty known as the "Kyoto Protocol," which requires participating countries to reduce greenhouse gas emissions under certain deadlines.⁹⁶ Currently, efforts are underway to bring lawsuits under common law against polluters who release carbon dioxide - a chemical that is not considered toxic to human health but has harmful effects on global warming.

Since coal-burning power plants are among the largest producers of such gases, and such emissions cross state boundaries, some legal analysts assert that federal common law nuisance principles should allow litigation to force the responsible companies to take action to curb their emissions. This was the theory behind the first global warming civil justice suit, which was filed in federal court in 2004 by the attorneys general of several states, in combination



with the City of New York and three land trusts.⁹⁷ They charged that defendants, owners and operators of approximately 174 fossil-fuel-fired power plants in twenty states, are a public nuisance. The parties who brought this litigation did not ask for compensation for personal harm; they requested that companies be required to reduce their emissions.

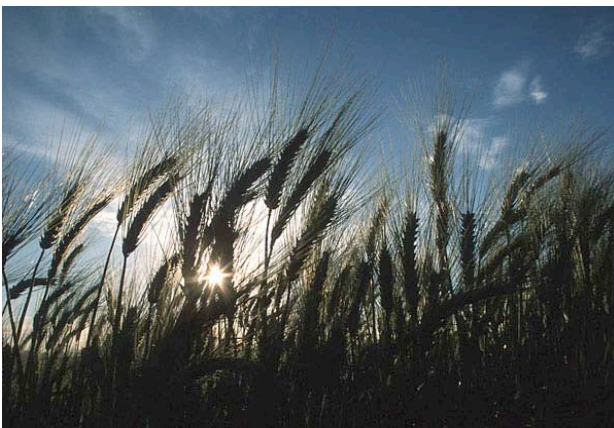
The case was dismissed on the grounds that it raised a “political question” (i.e., an issue best resolved through the political process); the court did not evaluate the merits of the nuisance claim.⁹⁸ The plaintiffs' appeal is pending before the federal Second Circuit Court of Appeals; oral argument was held in 2006.⁹⁹

California State Attorney General Bill Lockyer filed a case against the auto industry, claiming that the world's six largest automakers have created a public nuisance by manufacturing automobiles that emit a large amount of the nation's carbon dioxide and directly cause harm through global warming.¹⁰⁰ The lawsuit seeks money damages for “past, current and future contributions to air pollution, beach erosion and reduced water supplies.”¹⁰¹ The suit was dismissed by the U.S. District Court for the Northern District of California; however an appeal has been filed.¹⁰²



Private lawyers have filed a federal class action in Louisiana, arguing that oil and coal companies' greenhouse gas emissions, by adding to the impact of global warming, contributed to the destruction caused by Hurricane Katrina.¹⁰³ The parties bringing this lawsuit seek compensatory and punitive damages.¹⁰⁴ The case is currently pending in the U.S. District Court for the Southern District of Mississippi.

All of these cases depend in part on the question of whether or not the Clean Air Act preempts traditional federal common law with regard to greenhouse gas emissions. The U.S. Supreme Court recently ruled that the federal EPA already has the authority and responsibility to regulate carbon dioxide emissions from vehicles under the Clean Air Act.¹⁰⁵ If EPA takes action to regulate greenhouse gases from vehicles and from other sources as well, then the statute may eventually preempt cases such as these, which are brought under traditional federal common law. (In order to preempt, Congress must regulate the conduct at issue *and also provide a remedy*.¹⁰⁶) If not, then it will be possible for such traditional common law cases to be decided on their merits, providing relief where the political and legislative systems have failed and Americans are being harmed.¹⁰⁷



Conclusion



As more information surfaces about the connections between pollution and harm to public health or environmental quality, the American civil justice system will continue to have an important role to play in protecting the public.

This is especially true in recent years, as lawmakers appear to be falling further and further behind in providing proper protection to the public. Federal Judge Jack B. Weinstein wrote, "In recent years it is in toxic tort litigation that we can most clearly see equity at work in its traditional roles of adjusting legal rules that do not work well, providing a moral force, and shaping new substantive law."¹⁰⁸ Public access to the courts is indeed often the final safety net, the "third branch" of government to which people turn when elected officials in the executive and legislative branches of government have become too lax or affected by corporate campaign contributions and fail to protect human health and safety. In an April 2007 editorial responding to several recent U.S. Supreme Court rulings overturning the Bush Administration's rollbacks of environmental protection and failure to address global warming, the *New York Times* stated:



When the history of this Administration's endless tussles with environmental law and practice is written, the various advocacy groups that challenged the administration in court at nearly every step of the way will occupy a major role. . . . Nothing inspires litigation like environmental regulation, so these cases are hardly the end of the struggle. But so far - given the administration's determination to roll back the law and the acquiescence, until recently, of Congress - we can be grateful for the existence of the "third branch."

Environmental statutes, when carried out properly, can play a critical role in preventing harm, but the American civil justice system remains crucially necessary to provide protection where government fails, and to help the ordinary people who are harmed by irresponsible polluters.

Notes

1. Nuisance was historically the environmental remedy of choice under common law. See, e.g., *Seifried v. Hays*, 81 Ky. 377 (1883). Courts in the United States developed a federal common law of nuisance to address claims of pollution that cross state boundaries (as air and water pollution often do). See, e.g., *Milwaukee v. Illinois*, 451 U.S. 304 (1981).
2. *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907).
3. *New Jersey v. New York City*, 283 U.S. 473 (1931). Courts also used traditional principles governing the rights of landowners adjacent to bodies of water, called “riparian” rights. A Texas court, for example, declared in 1965 that, “any corruption of water which prevents its use for any of its reasonable purposes is an infringement of rights of riparian owners.” *Garland Grain Co. v. D-C Home Owners Improvement Ass’n*, 393 SW2d 635 (Tex. Civ. App. 1965). Although such civil actions did not always include a claim for monetary compensation for the harm caused by the pollution, this began to change in the latter half of the twentieth century. See, e.g., *Boomer v. Atlantic Cement Co., Inc.*, 309 N.Y.S.2d 312 (Ct. of App. 1970).
4. Statement of David Ozonoff, M.D., M.P.H., Professor, Boston University School of Public Health, in Robert Proctor, *Cancer Wars: How Politics Shapes What We Know and Don’t Know About Cancer* (New York: Basic Books, 1995), 117n; also in Dan Fagin, Marianne Lavelle and the Center for Public Integrity, *Toxic Deception: How the Chemical Industry Manipulates Science, Bends the Law, and Endangers Your Health* (Secaucus, NJ: Birch Lane Press, 1996), pp. 68-69.
5. The Clean Water Act and the Clean Air Act, for examples, do contain provisions allowing citizens to sue polluters directly, but only to force the polluter to come into compliance with the law. These “citizen suit provisions” do not allow plaintiffs to seek compensation for any harm that they may have suffered from the pollution. See, 33 U.S.C. § 1365(d); 42 U.S.C. § 7604. See also, *Maysonet v. Drilllex*, 229 F.Supp.2d 105, 109 (D.P.R. 2002) (“It is thus established that both the Clean Air Act and, consequently, the Clean Water Act, are limited to seek abatement of violation of standards established administratively under the act, and expressly exclude damage actions.”).
6. New York State Office of Public Health and Governor’s Love Canal Interagency Task Force, *Love Canal: Public Health Time Bomb* (1978) (<www.health.state.ny.us/environmental/investigations/love_canal/lctimbmb.htm>).
7. U.S.E.P.A. Region 2, Love Canal, New York, EPA ID# NYC000606947 – NPL Listing History (Sept. 30, 2004). For other documentation of health impacts, see Lynn R. Goldman, et al., “Low Birth Weight, Prematurity and Birth Defects in Children Living near the Hazardous Waste Site, Love Canal,” *Hazardous Waste & Hazardous Materials*, 2(2):209-23 (1985); Beverly Paigen, et al., “Growth of

Children Living Near the Hazardous Waste Site, Love Canal,” *Human Biology* 59:489-508 (June 1987); Nicholas Vianna and Adele Polan, “Incidence of Low Birth Weight Among Love Canal Residents,” *Science* 226 (4679):1217-19 (Dec. 7, 1984).

8. See Center for Justice & Democracy, Mythbuster, “Environmental Tort Lawsuits: Holding Polluters Accountable,” available on-line at <www.centerjd.org> (citing Kwiatkowski, Jane, “Ex-Love Canal Residents To Get Paid,” *Buffalo News*, February 21, 1998; Campbell, Tom, “Love Canal Claimants Accept \$1.51 Million Offer,” *Business First-Buffalo*, August 24, 1987; *United Press International*, January 1, 1985; McFadden, Robert, “Love Canal: A Look Back,” *New York Times*, October 30, 1984; Macbeth, Angus, “Tort Law, Environmental Law Share Common Ground,” *Legal Times*, February 15, 1982; *Snyder et al. v. Hooker Chemicals & Plastics Corp. et al.*, 429 N.Y.S.2d 153 (1980).).

9. Bill Michelmore, “Love Canal Edges Toward Normalcy,” *Buffalo News* (Mar. 20, 2004).

10. Harvard School of Public Health, Press Release, “Activist Erin Brockovich and Former Institute Director Kenneth Olden Receive Richmond Awards for Their Promotion of Public Health” (Oct. 18, 2005).

11. See Center for Justice & Democracy, Mythbuster, “Environmental Tort Lawsuits: Holding Polluters Accountable,” available on-line at <www.centerjd.org> (citing “Proving and Stopping Toxic Water Pollution,” *Trial Lawyers Doing Public Justice 1997*; *Anderson et al. v. Pacific Gas & Electric*, No. BCV-00822 (San Bernardino County Super. Ct., settlement July 2, 1996).

12. Horvitz, Ellis and Stephanie Rae Williams, “Unpublished State Toxic Tort Ruling Offers Valuable Guidance,” *Legal Backgrounder*, October 6, 2000; “The Big Numbers of 1998,” *National Law Journal*, February 22, 1999; “Winning Justice for Poisoned Workers,” *Trial Lawyers Doing Public Justice 1996*.

13. *Newman et al. v. Stringfellow et al.*, No. 165994MF (Riverside County Super. Ct., Cal., settlement November 22, 1994); Polakovic, Gary, “Uncertainty is toxic element in pollution lawsuits,” *Press-Enterprise*, February 24, 1993

14. *Frilout v. Campbell Wells*, No. 75,524 (17th Judicial Dist. Ct., Lafourche Parish, La., verdict August 9, 1998); Dunne, Mike, “Grand Bois defendant settles with plaintiffs; Exxon now stands alone against allegations,” *The Advocate*, August 8, 1998.

15. Stefan Lovgren, “Exxon Valdez Spill, 15 Years Later: Damage Lingers,” *National Geographic News*, (Mar. 22, 2004).

16. *Baker v. Hazelwood (In re the Exxon Valdez)*, 270 F.3d 1215 (9th Cir. 2001).

17. See, *In re the Exxon Valdez*, 296 F.Supp.2d 1071 (D. Alaska 2004); Keith Schneider, “Exxon is Ordered to Pay \$5 billion for Alaska Spill,”

New York Times (Sept. 17, 1994).

18. *In re the Exxon Valdez*, 296 F.Supp.2d 1071, 2077 (D. Alaska 2004).

19. See, *In re the Exxon Valdez*, No. 04-35183/D.C. No. CV-89-00095-HR-11 (slip. Op., Dec. 22, 2006); see also Faegre & Benson LLP, "Exxon Litigation Update" (<www.faegre.com/articles/article_751.aspx>).

20. *Castillo v. E.I. DuPont De Nemours & Co., Inc. et al.*, 770 So. 2d 156 (2000), upheld by 854 So.2d 1264 (July 10, 2003); "Holding Chemical Companies Responsible," *Trial Lawyers Doing Public Justice* 1997; *Castillo v. E.I. DuPont De Nemours & Co., Inc. et al.*, No. 93-14199-CA23 (Dade County Cir. Ct., Fla., verdict June 7, 1996).

21. See Center for Justice & Democracy, Mythbuster, "Environmental Tort Lawsuits: Holding Polluters Accountable," available on-line at <www.centerjd.org> (citing, "Some Big Judgments Were Settled After Trial," *National Law Journal*, January 17, 1994; "Cleaning Up Contaminated Neighborhoods," *Trial Lawyers Doing Public Justice* 1993, citing *Escamilla v. Asarco Inc.*, No. 91-CV-5716, Denver County Dist. Ct., Colo., verdict March 12, 1993. Asarco has since become embroiled in over 95,000 asbestos-related claims and other toxic cleanup orders, and has filed for reorganization under bankruptcy proceedings. Steve Raabe, "Asarco Closure Plan Cheers Globeville," *Denver Post* (July 13, 2006).

22. "Counsel Advocates on Water Quality Before Court, Legislature for Parents Whose Child Died of Liver Failure," 43 *ATLA Law Reporter* 113 (April 2000); *Avery v. S.D.C. Water Company et al.*, CV97-0544217S (New London Judicial Dist. Ct., Conn., settlement September 17, 1999).

23. See Center for Justice & Democracy, Mythbuster, "Environmental Tort Lawsuits: Holding Polluters Accountable," available on-line at <www.centerjd.org> (citing, Gabriel, Frederick P., "His Life After 'A Civil Action'," *National Law Journal*, December 8, 1997; Cook, Alberta, "Did Dumping Cause Cancer?" *National Law Journal*, May 5, 1986; Blodgett, Nancy, "Toxic wells: Mass. Firms sued over water," 71 *A.B.A.J.*, 21 (April 1985).; Jonathan Harr, *A Civil Action* (Vintage Books, 1995). The toxic chemicals at issue in the lawsuit included trichloroethylene and tetrachloroethylene.

24. Joby Warrick, "Evidence Mounts in Paducah," *Washington Post* (Aug. 22, 1999).

25. Joby Warrick, "Paducah Workers Sue Firms: Class Action Cites Radiation Exposure, Seeks \$10 Billion," *Washington Post* (Sept. 4, 1999).

26. See U.S. Dept. of Energy, Press Release, "Secretary Richardson Announces Proposal to Compensate Thousands of Sick Workers" (Apr. 21, 2000), available online at <www.lanl.gov/orgs/pr/News/DOE041200release.html>; see also Center for Justice & Democracy, Mythbuster, "Environmental Tort Lawsuits: Holding Polluters Accountable," available on-line at <www.centerjd.org>

- (citing Zuckerbrod, Nancy, "DOE Admits Toxic Leaks At Nuke Site," *Dayton Daily News*, February 11, 2000; Nighswonger, Todd, "Paducah Workers Seek The Truth," *Occupational Hazards*, December 1, 1999; "Former KY Uranium Plant Workers Lodge \$10B Radioactivity Exposure Suit," *Toxic Chemicals Litigation Reporter*, October 4, 1999).
27. U.S. Department of Labor, Press Release, "Chao Opens Resource Center for Energy Workers: Paducah, Ky. Center Is First of 10 to Be Opened Across the U.S." (July 2, 2001).
28. Michael Alison Chandler and Joby Warrick, "Thousands of Nuclear Arms Workers See Cancer Claims Denied or Delayed," *Washington Post* (May 12, 2007).
29. *Friedman et al. v. F.E. Myers Co. et al.*, 710 F. Supp. 118, 125 (1989); *Friedman et al. v. F.E. Myers, Co. et al.*, No. 88-3033 (E.D. Pa., verdict February 2, 1989).
30. Center for Justice & Democracy, Mythbuster, "Environmental Tort Lawsuits: Holding Polluters Accountable," available on-line at <www.centerjrd.org> (citing Olivio Antonio, "Families' Lawsuit Targeting Factory's Contamination Is Settled," *Los Angeles Times*, August 7, 2000; "California Environmental Group Sues for Water Contamination At School," *Mealey's Emerging Toxic Torts*, February 19, 1999; "CA Suit Says Chrome-Plating Facilities Tainted Schools' Water Supply," *Toxic Chemicals Litigation Reporter*, February 16, 1999.)
31. *Taylor v. WMX Technologies, Inc. et al.*, No. 93-03674 (Duval County Ct., Fla., verdict December 1995); *Florida Jury Verdict Review and Analysis*, Vol. 6, Issue 8 (August 1996.)
32. Center for Justice & Democracy, Mythbuster, "Environmental Tort Lawsuits: Holding Polluters Accountable," available on-line at <www.centerjrd.org> (citing "Safeguarding Employee Health," *Trial Lawyers Doing Public Justice* (August 1991), citing *Strom v. Boeing*, No. 88-2-10752-1 (King County Super. Ct., Wash., settlement August 15, 1990); Conklin, Ellis, "His Last Ounce Of Courage," *Seattle Post-Intelligencer*, September 6, 1990; Greenwald, Judy, "Boeing settles radiation experiment suit," *Business Insurance*, August 27, 1990.)
33. "Chemical leak caused neighborhood disruption," *National Law Journal*, February 28, 2000; "La. Trial Court Reduces Punitive Damages Award," *Mealey's Emerging Toxic Torts*, December 8, 1999; "The Big Numbers of 1997: Environmental," *National Law Journal*, February 23, 1998; *Adams v. CSX*, No. 87-16374 (New Orleans Parish District Ct., La., verdict September 9, 1997).
34. *Chapman v. Silber*, 97 N.Y.2d 9 (2001).
35. See National Environmental Policy Act, 42 U.S.C. §§ 4321-4335; Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*, and Clean Air Act, 33 U.S.C.A. §§1251 *et seq.*
36. 42 U.S.C. §§ 6901-6992(k).
37. 42 U.S.C. §§ 9601-9675.
38. Norman J. Vig, Michael E. Kraft, eds., *Environmental Policy: New*

- Directions for the Twenty-First Century*, 6th Ed., CQ Press, 2005. President Reagan, for example, appointed EPA Administrator Ann Gorsuch Burford, who “came from large corporations, and . . . had been associated with conservative legal foundations and firms that had fought environmental regulations for years. . . .” See Carolyn Long, Michael Cabral, and Brooks Vandivort, “The Chief Environmental Diplomat: An Evolving Arena of Foreign Policy,” in *The Environmental Presidency*, Dennis L. Soden, ed., (SUNY Press, 1999).
39. Revolving Door Working Group, *A Matter of Trust* (October 2005), found at www.revolvingdoor.info; OMB Watch, *Beating Around The Buses*, January 16, 2002, found at <http://www.ombwatch.org/article/articleview/392/1/68/#epa>.
40. Office of Inspector General, U.S.E.P.A., *EPA’s Response to the World Trade Center Collapse: Challenges, Successes and Areas for Improvement* (Aug. 21, 2003).
41. Sierra Club, *Pollution and Deception at Ground Zero: How the Bush Administration’s Reckless Disregard of 9/11 Toxic Hazards Poses Long-term Threats for New York City and the Nation* (Aug. 18, 2004); Office of Inspector General, *supra.*; Juan Gonzalez, *Fallout: The Environmental Consequences of the World Trade Center Collapse* (New York: The New Press, 2002).
42. “Democrats grill ex-EPA chief about air quality remarks,” *Charleston Daily Mail*, June 26, 2007; Office of Representative Jerrold Nadler (D-NY), “Nadler Chairs First Comprehensive Hearing on Federal Environmental Response at WTC,” June 25, 2007, found at http://www.house.gov/list/press/ny08_nadler/FedEnvironRespWTCWhitman062507.html
43. Public Employees for Environmental Responsibility, “Cause-Marketing for Poisons,” *PEERreview* (Spring 2007), found at <http://www.peer.org/pubs/index.php>.
44. See 40 CFR 06-1045 (2/3/06). See also, “Environmentalists Cite Ethical Flaws In Lawsuit Over Human Studies Rule,” *Water Policy Report*, January 22, 2007; Jonathan R. Pegg, “Human testing rule lawsuit sparks further debate,” *Pesticide & Toxic Chemical News*, September 11, 2006; Public Employees for Environmental Responsibility news release, “Pesticide Industry Plotted Bush Human Testing Policy,” May 30, 2006, found at http://www.peer.org/news/news_id.php?row_id=692; National Resources Defense Council press release, “Groups Sue EPA For Approving Unethical, Illegal Human Pesticide Testing, February 23, 2006, found at <http://www.nrdc.org/media/pressreleases/060223.asp>; Juliet Eilperin, “New Rules Govern Use of Data From Testing Pesticides on People,” *Washington Post*, January 27, 2006. See also, Public Employees for Environmental Responsibility, “EPA and Human Testing – Home,” found at <http://www.peer.org/campaigns/publichealth/testing/index.php>.

45. "EPA's Latest Human Pesticide Testing Rule Called Illegal, Immoral," *Environmental News Service*, January 25, 2006, found at <http://www.ens-newswire.com/ens/jan2006/2006-01-25-05.asp>; National Cancer Institute, U.S. National Institutes of Health, *Cancer Trends Progress Report -2005 Update* (December 2005), found at http://progressreport.cancer.gov/doc_detail.asp?pid=1&did=2005&chid=21&coid=213&mid=.
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48. Public Employees for Environmental Responsibility, "Art Imitating Life," *PEERreview* (Spring 2007), found at <http://www.peer.org/pubs/index.php>; "Democrats challenge EPA ruling on human testing of pesticides," *CBC News*, October 12, 2006, found at <http://www.cbc.ca/cp/health/061012/x101238.html>
49. The Department of the Interior, Department of Transportation, Department of Commerce, Department of Energy, Federal Emergency Management Agency, Nuclear Regulatory Commission and Council on Environmental Quality, for examples, have statutory authority over certain environmental matters.
50. *State of New York v. Environmental Protection Agency*, No. 03-1380 (D.C. Cir., Mar. 17, 2006); Reuters, "Supreme Court Won't Hear Power Plant Pollution Rule: Defeat for Administration, Electric Companies," *ABC News* (May 1, 2007), available at www.abcnews.go.com/print?id=3100739.
51. Environmental Integrity Project, *EPA Taking 75% Fewer Polluters to Court, Major Polluter Cases Down 90%* (Oct. 2004).
52. National Resources Defense Council, "Executive Overview," *Rewriting The Rules* (2005), found at <http://www.nrdc.org/legislation/rollbacks/execsum.asp>.
53. Norman J. Vig, Michael E. Kraft, eds., *Environmental Policy: New*

Directions for the Twenty-First Century, 6th Ed., CQ Press, 2005. The Reagan Administration began weakening the EPA by slashing both the budget and personnel of the agency. See Carolyn Long, Michael Cabral, and Brooks Vandivort, "The Chief Environmental Diplomat: An Evolving Arena of Foreign Policy," in *The Environmental Presidency*, Dennis L. Soden, ed., (SUNY Press, 1999). Recent suggested budget cuts to EPA would result in less public access to information (by closing down the EPA libraries) and a reorganization that would weaken any environmental justice programs. See e.g., U.S. House of Representatives, Committee on Government Reform, Minority Office, Press Release, "Rep. Waxman Requests GAO Study on EPA Budget Cuts," September 19, 2006; Lisa Stiffler, "EPA budget reduction could expose more minorities, poor to pollution," *Seattle Post Intelligencer* (Seattlepi.com, Oct. 16, 2006).

54. John Heilprin, "She Bought Home with Lobbyist, Boyfriend," *Associated Press* (Feb. 15, 2007).

55. Originally enacted in 1957 as a temporary, ten-year program to help get the fledgling nuclear industry off the ground, the Price-Anderson Act was extended for another 20 years by the Energy Policy Act of 2005, Pub. L. 109-58 (2005). The Price-Anderson Act requires nuclear plant operators to purchase their own primary level of coverage – currently available at a level up to \$300 million, which is unlikely to be sufficient to cover claims arising from a major nuclear power plant disaster. The companies then make contributions of \$15 million per year (a figure that will be adjusted for inflation in future years) – up to a limit of \$95,800,000 – to a fund that provides a secondary level of coverage. See 70 *Fed. Reg.* 61885 (Oct. 27, 2004), amending 10 CFR §§ 2, 50, 52 and 140. Because the Act covers over 100 reactors, the total amount available for compensation in the event of a major nuclear accident is approximately \$10.2 billion. Payment of any damages above this combined primary and secondary cap would require congressional action.

56. See Air Transportation Safety & System Stabilization Act of 2001, § 405(c)(3)(B)(i). The September 11 Victim Compensation Fund was created by the Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 405(b)(2), 115 Stat. 230, 239-40, codified at 49 U.S.C. § 40101 (2001). Rules were published in 67 *Fed. Reg.* 11233 (2002) and codified at 28 C.F.R. § 104.2 (Mar. 13, 2002). The law was passed 12 days after the attack. Congressional Research Service, *Homeland Security: 9/11 Victim Relief Funds* (updated Mar. 27, 2003), p. 1.

57. 67 *Fed. Reg.* 11233 (2002).

58. See, Office of Inspector General, U.S.E.P.A., *EPA's Response to the World Trade Center Collapse*, *supra*; and, Sierra Club, *Pollution and Deception at Ground Zero*, *supra*.

59. For claims that were not eliminated by the injured person's participation in the fund, the federal statute limited the liability of the airlines,

New York City and persons with property interests in the World Trade Center against claims arising out of the crashes. See Air Transportation Safety & System Stabilization Act of 2001, §408(a); *In re WTC Disaster Site*, 414 F.3d 352, 373-74 (2d Cir. 2005). The City of New York's liability, under §408(a)(3), is limited to the greater of the City's insurance coverage or \$350,000,000. The liability of air carriers, aircraft manufacturers, airport sponsors or persons with a property interest in the World Trade Center on September 11, 2001, under § 408(a)(1), is restricted to the limits of liability insurance coverage maintained by the entity.

60. See, *Bates v. Dow Agrosciences LLC*, 544 U.S. 431 (2005).

61. *Id.*

62. The U.S. Supreme Court, for example, declared in a 1981 case that the federal Clean Water Act, 33 U.S.C. §§ 1251, *et seq.*, preempts a lawsuit brought against a wastewater discharge as a public nuisance under federal common law because the statute "speaks directly" to the issue of wastewater discharge and creates an "all-encompassing program" of water pollution regulation. *Milwaukee v. Illinois*, 451 U.S. 304, 315, n.8 (1981)(often referred to as *Milwaukee II*). The Safe Drinking Water Act, similarly preempts federal common law nuisance claims. See, *Matoon v. City of Pittsfield*, 980 F.2d 1 (1st Cir. 1992). A later case clarified that the Clean Water Act does not preempt state common law, and that the law of the state in which the pollution originates (rather than where the injured person resides) governs an interstate case. *Intl. Paper Co. v. Ouellette*, 479 U.S. 481 (1987). The court reasoned that the state in which the pollution originated had the authority to pass laws and rules to regulate the polluter, and it was fair for the polluter to have to abide only by that same state's principles of common law. In other words, if a New York resident is injured by a New Jersey corporation's toxic discharge into a waterway, for example, the resident may not sue the corporation under New York common law, but may bring a civil action under New Jersey common law. The U.S. Supreme Court has yet to rule on the issue of common law preemption under the Clean Air Act, but lower federal courts have concluded that the Clean Air Act similarly replaces federal common law for the air pollutants that it now regulates. See, e.g., *New England Legal Foundation v. Costle*, 666 F.2d 30,31 (2d Cir. 1981)(relying on *Milwaukee II* and finding that the Clean Air Act preempts a federal nuisance claim). Lower federal court cases have also ruled that an interstate air pollution case brought under traditional common law is governed by the common law of the state in which the pollution originates rather than the state in which the injured person resides. See *Ontario v. City of Detroit*, 874 F.2d 332, 343 (6th Cir. 1989) and *Ouellette v. Int'l Paper Co.*, 666 F. Supp. 58, 62 (D. Vt. 1987). *But see*, Andrew Jackson Heimert, "Keeping Pigs Out of Parlors: Using Nuisance Law to Affect the Location of Pollution," 27 *Env'tl. L.* 403, 474 (1997)(arguing that

amendments to the Clean Air Act addressing interstate air pollution such as acid rain, and CFCs indicate Congress's intent to preempt the entire field).

63. 33 U.S.C. § 2701, *et seq.*; 26 U.S.C. § 9509.

64. 33 U.S.C. § 2702.

65. The highest cap is \$350 million for an onshore facility or deepwater port; tank vessels greater than 3,000 gross tons are capped at \$1,200 per gross ton or \$10 million, whichever is greater. 33 U.S.C. §§ 2702 and 2074.

66. 33 U.S.C. § 2718(a)(2).

67. 42 U.S.C. §§ 9601 *et seq.*

68. One reason for the different treatment of CERCLA is the statute's explicit language allowing for state remedies. *See, e.g., Stanton Road Ass'n v. Lohrey Enterprises*, 984 F.2d 1015 (9th Cir. 1993). For cases asserting that the application of state law must not interfere with CERCLA's method for apportioning clean-up liability costs among polluters, *see, e.g., XDP, Inc. v. Watumull Properties*, 2004 WL 1103023 (D. Or. 2004)(common law claims among polluters for restitution, indemnity and contribution would conflict with CERCLA's system for apportioning liability); *Fireman's Fund Insurance Co. v. City of Lodi*, 303 F.3d 928 (9th Cir. 2002)(CERCLA preempted a local law that insulated the city of Lodi from liability as a potentially responsible party for a polluted site). *See, e.g., State of New Mexico v. General Electric*, 467 F.3d 1223 (10th Cir. 2006)(a state's common law public nuisance claim for compensation for natural resources damages was rejected where a CERCLA cleanup was already underway).

69. *See* Tom Kuhnle, The Rebirth of Common Law Actions for Addressing Hazardous Waste Contamination, 15 *Stan. Envtl. L.J.* 187-189 (1996); *see also* Alexandra Klass, "From Reservoirs to Remediation: The Impact of CERCLA on Common Law Strict Liability Environmental Claims," 39 *Wake Forest L. Rev.* 903 (Winter 2004).

70. Kuhnle at 191.

71. U.S. General Accounting Office, *Superfund Program: Breakdown of Appropriations Data* (May 14, 2004); *See also*, Sierra Club, "Communities at Risk: How the Bush Administration is Failing to Protect People's Health at Superfund Sites," July 27, 2004. The report notes that over 111 Superfund sites are not under control and continue to threaten the health of those living and working nearby. The Sierra Club asserts that this is due to lack of funding for clean-up because the Bush Administration opposes the polluter-pays principle, and has failed to support reinstatement of the tax on polluting industries that previously financed the Superfund.

72. *See* Rule 23 of the Fed. R. Civ. Pro.; *see also*, Jack B. Weinstein & Eileen B. Hershenov, "The Effect of Equity on Mass Tort Law," 1991 *U. Ill. L. Rev.* 269 (1991)(explaining that "Where mass torts have been certified as a class it is usually under [Rule 23\(b\)\(3\)](#) since it permits multi-

ple claims for money damages.”). For a recent attack on the class action, see the Class Action Fairness Act of 2005 (“CAFA”), Pub. L. 109-2, 119 Stat. 4 (2005), which modified Rule 23 and made it harder for litigants to become certified as a class. Senator Patrick Leahy (D-VT), the ranking Democrat on the U.S. Senate Judiciary Committee at the time, stated that CAFA would “make it harder for American citizens to protect themselves against violations of state civil rights, consumer, health, and environmental protection laws by forcing these cases out of their local state courts.” Statement of Senator Patrick Leahy, Class Action Fairness Act, S. 5, Feb. 7, 2005.

73. Although no formal definition of a mass toxic tort exists, Judge Jack B. Weinstein summed up his definition in *In Re DES Cases* (“Genuine mass torts possess some or all of the following features: (1) geographically widespread exposure to potentially harmful agents that (2) affects a large or indeterminate number of plaintiffs, (3) possibly over long time periods, even generations, (4) in different ways such that (5) there is difficulty in establishing a general theory of causation and (6) an inability to link a particular defendant’s actions to a particular plaintiff’s injuries, as well as (7) difficulty in determining the number of potentially responsible defendants and (8) in determining their relative culpability, if any, which often results in (9) multiple litigations that burden the courts and cause huge transactional costs, including heavy legal fees, and (10) which threatens the financial ability of many companies or of whole industries to respond to traditional damage awards.” 789 F. Supp. 552, 562 (E.D.N.Y. 1992). Judge Weinstein also wrote, around the same time, “In recent years it is in toxic tort litigation that we can most clearly see equity at work in “its traditional roles of adjusting legal rules that do not work well, providing a moral force, and shaping new substantive law.” See, Jack B. Weinstein & Eileen B. Hershenov, “The Effect of Equity on Mass Tort Law,” 1991 *U. Ill. L. Rev.* 269 (1991)

74. *In re “Agent Orange” Product Liability Litigation*, 344 F.Supp.2d 873 (E.D.N.Y. 2004).

75. *In Re Three Mile Island Litig.*, 87 F.R.D. 433 (M.D. Penn 1980).

76. This has become more common as mass tort class actions involving long-term exposure have arisen. The Supreme Court weighed in on this practice in the 1997 decision of *Anchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997). A recent change in the bankruptcy code provides shelter for asbestos defendants who fear more injured plaintiffs and highlights the importance of providing a means for those injured by toxic releases or pollutants to be compensated upon presentation of their injury. See, e.g., 11 U.S.C. § 524(g).

77. Another tort reform measure, the elimination of joint and several liability, especially harms those injured in toxic exposure cases.

According to Judge Weinstein, “Although it has been legislatively curtailed in a majority of states over the past five years, joint and several liability remains crucial to ensuring full recoveries in toxic tort cases

brought against many defendants, particularly where some defendants are bankrupt or cannot be located. In the absence of joint and several liability, the plaintiff would have to bear the burden of establishing apportionment to collect from any given defendant, and thus might never receive a full award." See Jack B. Weinstein & Eileen B. Hershenov, "The Effect of Equity on Mass Tort Law," 1991 *U. Ill. L. Rev.* 269, 308 (1991).

78. See Letter to Congress, "Environmental Harm Cases Do Not Belong in Class Action Bill" (July 7, 2004), signed by over 15 environmental organizations (available online at <http://www.citizen.org/congress/civjus/class_action/articles.cfm?ID=11940>.

79. Robert D. Bullard, "Environmental Equity: Examining the Evidence of Environmental Racism," 2 *CEB. LAND USE F.*, 6 (Winter 1993).

80. Some important environmental justice lawsuits include: *Bean v. Southwestern Waste Management*, 482 F. Supp. 673 (1979); *East Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb County Planning & Zoning Comm'n*, 706 F. Supp. 880 (M.D. Ga. 1989), *aff'd* 896 F.2d 1264 (11th Cir. 1989); *El Pueblo para el Aire y Agua Limpio v. County of Kings*, 22 Env'tl L. Rep. 20357 (Cal. Super. Ct. 1991); *In Re Shintech & its Affiliates*, 734 So. 2d 772 (La. App. Ct. 1999), *writ denied* 746 So. 2d 601 (La. 1999); *South Camden Citizens in Action v. N.J. Dept. of Env'tl. Protection*, 274 F.3d 771 (3d Cir. 2001), *cert denied*, 153 L. Ed. 2d 804, 122 S. Ct. 2621, 2002 U.S. Lexis 4706 (2002). These cases were mostly unsuccessful attempts to challenge permitting or siting decisions under statutory, administrative or Constitutional law.

81. See, Robert W. Collin, "Review of the Legal Literature on Environmental Racism, Environmental Equity, and Environmental Justice," 9 *J. Env'tl. L. & Litig.* 121, 132 (1994).

82. Robert D. Bullard, *Dumping in Dixie: Race, Class, and Environmental Quality*, (Westview Press 1990); United Church of Christ Commission for Racial Justice, "Toxic Wastes and Race in the United States: A National Report on the Racial & Socioeconomic Characteristics of Communities with Hazardous Waste Sites," New York: United Church of Christ (1987); Marianne Lavelle & Marcia Coyle, "The Federal Government, in its Cleanup of Hazardous Sites & its Pursuit of Polluters, Favors White Communities Over Minority Communities Under Environmental Laws Meant to Provide Equal Protection for All its Citizens, A National Law Journal Investigation has Found." *Nat. L. J.*, Sept. 21, 1992; U.S. General Accounting office, "Siting of Hazardous Waste Landfills and Their Correlation with Racial and Economic Status of Surrounding Communities" (1983).

83. Matthew B. Leveridge, "Should Environmental Justice be a National Concern? A Review and Analysis of Environmental Justice Theories and Remedies," 15 *J. Nat. Resources & Env'tl. L.* 107, 108-109 (1999-2000). See also Willie G. Hernandez, Comment, "Environmental Justice: Looking Beyond Executive Order No. 12, 898, 14 *UCLA J.*

Envtl. L. & Pol'y 181, 200-201 (1996)(“Because industries take the path of least resistance, minority communities are likely targets for siting proposals.”); Hope Babcock, “Environmental Justice Clinics: Visible Models of Justice, 14 *Stan. Envtl. L. J.* 3, 8 (1995)(“Minority and poor communities generally lack the political power to be well represented in government, particularly at the national level.”).

84. President Clinton signed Executive Order 12, 898 directing agencies to evaluate the social impact of its decisions. This executive order, however, is not directly enforceable by citizen lawsuits and does not create a remedy. Also, many suspect that its viability is questionable under subsequent Administrations.

85. H. Josef Hebert, “EPA inspector criticizes agency reviews,” *Seattle Post Intelligencer* (Sept. 19, 2006).

86. Nancy Beiles, “What Monsanto Knew,” *The Nation* (May 29, 2000); Elizabeth Amon, “Fast Rise to the Top,” *The American Lawyer* (Aug. 2004).

87. *Abernathy v. Monsanto*, CV-2001-832, verdict rendered (Ala. Cir. Ct., Etowah County Feb. 22, 2002); see also, Michael Grunwald, “Jury Finds Monsanto Liable for Releasing Tons of PCBs,” *Washington Post*, Feb. 23, 2002.

88. *Owens v. Monsanto*, 96-CV-440 (N.D. Ala.)(2001).

89. Nancy Beiles, “What Monsanto Knew,” *The Nation* (May 29, 2000); Elizabeth Amon, “Fast Rise to the Top,” *The American Lawyer* (Aug. 2004).

90. *Wayne Mann, et. al. v. Ford Motor Co., et. al.*, filed on Jan. 18, 2006, in Superior Court, Passaic County (Jan. 2006), removed to federal court and renamed *Morgan v. Ford Motor Co.*, 06-CV-1080.

91. “Ramapough Mountain Indians Sue Ford Over Toxic Contamination,” *Environmental News Service* (Jan. 21, 2006); Jan Berry, *et al.*, “Toxic Legacy,” *The Berlin County Record* (<www.toxiclegacy.com>); Barbara Williams and Jan Barry, “Shoddy Cleanup at Ford Toxic Site,” *The North Jersey Record* (April 13, 2007).

92. Mary Gallagher, “Plaintiffs Seek \$2 Billion in Massive Toxic Tort Suit Against Ford,” *New Jersey Law Journal* (June 1, 2006).

93. For more information on legal remedies for global warming, see David A. Grossman, “Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation” 28 *Colum. J. Envtl. L.* 1 (2003); Matthew F. Pawa, “Global Warming as a Public Nuisance: Connecticut v. American Electric Power,” 16 *Fordham Envtl. L. Rev.* 407 (2005); James R. Drabick, “‘Private’ Public Nuisance and Climate Change: Working Within, and Around, the Special Injury Rule,” 16 *Fordham Envtl. L. Rev.* 503 (2005); Benjamin P. Harper, “Climate Change Litigation: The Federal Common Law of Interstate Nuisance and Federalism Concerns,” 40 *Ga. L. Rev.* 661 (2006).

94. See, e.g., the Climate Stewardship Act, S. 139, 108th Cong. (2003); see also, J. Kevin Healy & Jeffrey M. Tapick, “Climate Change:

It's Not Just a Policy Issue for Corporate Counsel – It's a Legal Problem,” 29 *Colum. J. Envtl. L.* 89, 97-98 (2004)(“more than 50 bills and provisions relating to climate change were introduced in the 107th Congress).

95. For a summary of the bill's provisions, see U.S.E.P.A., “Statement of EPA Administrator Christie Whitman on Introduction of Clear Skies Legislation” (Feb. 27, 2003) and U.S.E.P.A. factsheet, “Clear Skies,” available at <www.epa.gov/clearskies>.

96. See Letter from George W. Bush, President to Senators Hagel, Helms, Craig and Roberts (Mar. 14, 2001) (<www.whitehouse.gov/news/releases/2001/03/20010314.html>); “Bush Rebuffs Kyoto Outcry,” *Cnn.com* (Mar. 29, 2001)(<<http://archives.cnn.com/2001/WORLD/europe/italy/03/29/01/ind ex.html>>).

97. *Connecticut v. American Elec. Power Co.*, 406 F. Supp.2d 265 (S.D.N.Y. 2005). This case is currently pending on appeal to the Second Circuit (Docket No. 05-5104cv).

98. *Id.*

99. Michael Gerrard, Ed., “Updates for Global Climate Change and U.S. Law” (April 30, 2007), update for Chapter 11 in *Global Climate Change and the Law* (American Bar Association, 2007).

100. *California v. General Motors Corp.*, No. 3:06-cv-05755 (N.D. Cal. Filed Sept. 20, 2006); See Office of the Attorney General, Press Release, “Attorney General Lockyer Files Lawsuit Against ‘Big Six’ Automakers for Global Warming Damages in California” (Sept. 20, 2006) (<http://ag.ca.gov/newsalerts/release.php?id=1338>) (includes link to Complaint). Incoming AG Brown has continued fighting this lawsuit.

101. Nick Bunckley, “California Sues 6 Automakers Over Global Warming,” *New York Times*, Sept. 6, 2006.

102. *People of State of California v. General Motors Corp.*, 2007 WL 2726871 (N.D.Cal., 2007). Appeal filed in the 9th Circuit on October 16, 2007. (docket number pending).

103. See *Comer, et. al. v. Murphy Oil, et. al., Third Amended Class Action Complaint*, Case No. 05-cv-00436, filed April 19, 2006 (S.D. Miss.).

104. *Id.*

105. *Massachusetts v. EPA*, 549 U.S. ____ (2007).

106. See *County of Oneida v. Oneida Indian Nation of New York State*, 470 U.S. 226, 238 (1985); *Illinois v. City of Milwaukee*, 406 U.S. 91, 107 (1972) (“*Millwaukee I*”); *City of Milwaukee v. Illinois*, 451 U.S. 304, 314 (1981) (“*Millwaukee II*”).

107. See, e.g., David A. Grossman, “Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation,” 28 *Colum. J. of Envtl. L.* 1 (2003); Matthew F. Pawa, “Global Warming as a Public Nuisance: Connecticut v. American Electric Power,” 16 *Fordham Envtl. L. Rev.* 407 (2005); James R. Drabick, “‘Private’ Public Nuisance and Climate

Change: Working Within, and Around, the Special Injury Rule,” 16 *Fordham Envtl. L. rev.* 503 (2005); Benjamin P. Harper, “Climate Change Litigation: The Federal Common Law of Interstate Nuisance and Federalism Concerns,” 40 *Ga. L. Rev.* 661 (2006). These cases also depend in part on the science of global warming, which is being attacked through massive misinformation campaigns sponsored by the largest polluters. See, Gillian Wong, “Gore: Polluters manipulate climate info,” Associated Press, August 7, 2007 (available on-line at http://news.yahoo.com/s/ap/20070807/ap_on_sc/gore_climate_change_2).

108. See, Jack B. Weinstein & Eileen B. Hershenov, “The Effect of Equity on Mass Tort Law,” 1991 *U. Ill. L. Rev.* 269 (1991).