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Fighting Back Against a Power Plant: Some Lessons From the Legal and Organizing Efforts of the Bayview~Hunters Point Community

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I. Introduction

Although the environmental justice movement catapulted into national consciousness during the 1990s, as reflected most notably in President Clinton's 1994 Executive Order on Environmental Justice,[1] communities of color still face an uphill struggle fighting specific siting decisions. One community in the midst of such a battle is Bayview-Hunters Point, a low and middle-income community in San Francisco, overwhelmingly comprised of people of color. It is home to San Francisco's two existing power plants, and is burdened with a very high concentration of the City's dirty industries. In 1994, the San Francisco Energy Company proposed siting yet another power plant in the area. If the plant is built, the neighborhood would have more power plants than any area its size in the nation.[2] Community residents have responded with a vigorous legal and organizational campaign to stop the project.

This article describes several strategies employed by the community and its legal representatives in this high profile case. These include developing a community toxics profile and working with city officials to initiate a community health assessment, presenting environmental justice testimony at evidentiary hearings before the California Energy Commission, and seeking a temporary moratorium on the siting of new polluting facilities to allow government agencies time to evaluate the disproportionate health problems in the community. Although the case is ongoing, the community's innovative approaches can provide important lessons for other environmental justice advocates.

II. Overview of the Bayview-Hunters Point Community and the Proposed Power Plant

A. The Bayview-Hunters Point Community

Bayview-Hunters Point is a relatively small neighborhood located in southeast San Francisco, bordering San Francisco Bay. Just over 28,000 people live there, roughly four percent of San Francisco's population.[3] The community consists largely of people of color: it is sixty two percent

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1. Exec. Order No. 12,898, 59 Fed. Reg. 7629 (1994).

2. Clarence Johnson, *Disputed S.F. Power Plant Expected to Get 1st OK, Neighbors Worry About Health Issues*, S.F. CHRON., Mar. 4, 1996, at A13.

3. SAN FRANCISCO ENERGY CO. COGENERATION PROJECT, FINAL STAFF ASSESSMENT, APPLICATION FOR CERTIFICATION (94-AFC-1), City and County of San Francisco 385 (June 1995) [hereinafter FSA].

African American, twenty two percent Asian, eleven percent white, and four percent members of other racial or ethnic groups.[4] It also is a poor community relative to the city as a whole; more than thirty percent of families live in poverty,[5] and the neighborhood's median income is approximately $20,000 less than that of residents citywide.

For many decades, the Bayview district has been the dumping ground for noxious and unwanted land uses in San Francisco. Prior to World War II, the city designated it as the area for slaughterhouses and related meat-processing industries.[6] After the war, the area came to be dominated by wrecking yards, junk yards, steel manufacturing, materials recycling, and power generation facilities, as well as the massive Hunters Point Naval Shipyard.[7] Following construction of Candlestick Park in the 1960s, large areas of shoreline were haphazardly filled, "turn[ing] the shoreline into an uninviting wasteland of junkyards and dump sites."[8] Bayview also has long had high concentrations of public housing—in some periods over one fourth of all public housing units in San Francisco. The steering of unwanted land uses to the district has continued to the present; within the past decade, San Francisco has directed industrial uses away from areas that were historically industrial but now are shifting to more upscale residential and mixed use development (i.e. South Market and Mission Bay) into Bayview-Hunters Point.[9]

As in many other California cities, African Americans first came into the area in large numbers during World War II, primarily to take advantage of employment at the Hunters Point Naval Shipyard. Many have since been forced there by historic residential segregation, and poverty.[10] Since the 1950s, high poverty rates have persisted in the area, and current unemployment levels are high. In 1990, the official unemployment rate was 14.1 percent overall and 17 7 percent among African Americans (a figure many residents believe is actually much higher).[11] The area was very hard hit by the closure of the Naval Shipyard in 1974, which resulted in the direct loss of nearly 10,000 jobs and a consequent decline in local commercial activity dependent on the shipyard. It also was impacted by the loss of manufacturing jobs citywide.[12] As jobs left and wartime public housing units were torn down, the population declined during the 1970s.

The economic decline abated somewhat in the 1980s, as a substantial amount of new private housing was built in the area.[13] The community now has one of the highest rates of private home ownership in San Francisco.[14] More recently, the community has been engaged in a major effort to promote economic redevelopment, but of a type more compatible with its desires and needs. Current efforts are underway to develop a major shoreline park and open space in the area, to expand light rail along 3rd Avenue (the main transportation corridor in the area), to convert the old Naval Shipyard from military to commercial uses, and to gain designation as a federal Enterprise Community. [15] For now, however, the area remains dominated by industrial uses; in the entire district, for instance, there are no clothing stores, movie theaters, book stores, coffee shops, copy centers, or other retail uses that draw on pedestrian traffic and make neighborhoods livable.[16]

4. *Id.* at 385.

5. *Id.*

6. Peter LaBrie, Testimony before the California Energy Commission 4–5 (July 6, 1995).

7. FSA, *supra* note 3, at 465. A wide variety of toxic contaminants have been found on sites throughout the property, including waste oil, solvents, PCBs, cyanide wastes, sand-blast wastes contaminated with heavy metals, radium dials, and other chemical wastes. THE COMMISSION ON SAN FRANCISCO'S ENVIRONMENT, ENVIRONMENTAL STATE OF THE CITY REPORT 3–14 (July 1994).

8. JUDY QUAN, U.S. EPA REGION IX, TOXIC INVENTORY OF THE BAYVIEW/HUNTERS POINT COMMUNITY 2 (1995) (quoting study of San Francisco Planning Department).

9. LaBrie, *supra* note 6, at 5. Disproportionate siting of unwanted facilities in low income communities and communities of color has occurred for a variety of reasons, including intentional discrimination by decisionmakers, segregation in housing and jobs, and exclusionary zoning. These communities often lack the money, organization, and political voice to oppose sitings, have historically been under-represented on local decisionmaking bodies, and have often been targeted for unwanted development. *See* Clarice Gaylord & Geraldine Twitty, *Protecting Endangered Communities*, 21 FORDHAM URB. L.J. 771 (1994). *See generally* ROBERT BULLARD, DUMPING IN DIXIE: RACE, CLASS AND ENVIRONMENTAL QUALITY (1990); *but see* Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 YALE L.J. 1383, 1386, 1404–05 (1994) (arguing that market forces in combination with housing discrimination, rather than racism by decisionmakers, better explain the unequal distribution of environmental hazards in minority neighborhoods)

10. LaBrie, *supra* note 6, at 6.

11. In San Francisco as a whole in 1990, unemployment was 6.2 percent, and 13.2 percent for African Americans. FSA, *supra* note 3, at 387–388.

12. *Id.* at 388.

13. *Id.* at 384.

14. The rate of home ownership in Bayview Hunters Point is forty-six percent, compared to a citywide average of thirty-four percent. *Id.* at 386. This is in part due to the relative affordability of housing compared to other parts of the city. The median price of homes in Bayview Hunters Point is $205,000, approximately 1/3 lower than the average home in the city.

15. *Id.*, at 465.

16. LaBrie, *supra* note 6, at 7.

B. The Proposed Power Plant

In July, 1994, San Francisco Energy Company (SF Energy) applied to the California Energy Commission (CEC) for permission to site and develop a natural gas-fired cogeneration facility in Bayview-Hunters Point. The proposed facility will produce up to 240 megawatts of electricity and up to 100,000 pounds of steam per hour.[17] It includes a natural gas pipeline to connect with other gas distribution pipelines. If built, the plant will be one of the largest fossil-fuel facilities in California. It will also be within a mile of two other large power plants operated by Pacific Gas and Electric (PG&E) (Hunters Point and Potrero), neither of which will cease operation.[18] The need for the plant is very much in dispute.[19]

In California, the CEC has jurisdiction over the siting of power plants, like SF Energy's project, that generate more than 50 megawatts of electricity. Under state law, the Commission typically provides "one-stop licensing" to applicants, providing all needed approvals without the need for separate local land use and environmental review. The siting process is lengthy and involved.[20] After the proponent submits an application, the CEC's siting committee and technical staff conducts an environmental review process, which serves as the functional equivalent of environmental review under the California Environmental Quality Act (CEQA),[21] and which also evaluates issues of power generation and reliability. The Commission holds informational hearings on the project, and the parties are allowed to submit discovery requests to each other. CEC staff is required to participate in each case as an independent party, ostensibly representing the public interest. Other interested parties, including community groups, may participate as intervenors. Commission staff prepare a Preliminary Staff Assessment (PSA) and then a Final Staff Assessment (FSA), which is the subject of an adjudicatory hearing before a committee of Energy Commissioners. Following these hearings, the committee issues a Proposed Decision, which is ultimately voted on by the full Commission.

In this case, two sites were proposed by SF Energy, both in Bayview Hunters Point. The first site, located at the intersection of Innes Ave and Fitch Street (Innes Avenue Site) and along the shoreline, is directly across from a residential neighborhood and adjacent to public housing and numerous condominiums constructed within the last several years specifically to take advantage of the view of the Bay.[22] A power plant at this location conflicted with numerous land use plans for the area, and following public comment on the PSA, SF Energy withdrew this site from consideration. The second site, and the only one currently being considered, is located on part of a parcel created from Bay fill and owned by the San Francisco Port Authority (Port Site), slightly more than one-third of a mile from the nearest homes.[23] Unlike the Innes Avenue site, development on this property requires approval by the City Port Commission and the San Francisco Board of Supervisors, to lease the Port's property to SF Energy.

The Port Site is situated on artificial fill 11 to 40 feet in depth consisting of debris, silt, clay and sand; beneath the fill lies young bay muds.[24] Its location in bay mud raises serious questions of vulnerability in the event of an earthquake, during

17. SAN FRANCISCO ENERGY COMPANY, APPLICATION FOR CERTIFICATION 1-4, 3-19 – 3-20 (July, 1994).

18. FSA, *supra* note 3, at Fig. ALT-3. There is no dispute that Potrero 3 & Hunters Point 4 will continue operating regardless of the project. There is disagreement over whether or not Hunters Point 2 & 3 will be shut down; PG&E has refused to give up its option to use these facilities in the future. *See* COMMENTS OF PACIFIC GAS AND ELECTRIC COMPANY ON REVISED PRESIDING MEMBER'S PROPOSED DECISION ON APPLICATION FOR CERTIFICATION OF SAN FRANCISCO ENERGY COMPANY'S COGENERATION PROJECT 2 (Feb. 27, 1996) (commending Energy Commission for withdrawing its recommendation that PG&E be ordered to shut down Units 2 & 3 "since PG&E should be allowed to preserve its options for the future"); In the Matter of San Francisco Energy Co. Cogeneration Facility, Intervenors' Post-Hearing Brief 3 (filed Aug. 21, 1995).

19. The need for a new plant derives from PG&E's argument that power use in the San Francisco area will increase significantly and that a significant portion of the required generating capacity must be located on the San Francisco Peninsula to deal with certain contingencies, like a major earthquake. But those assumptions are very much in dispute, and alternatives such as upgrades to existing transmission lines, adding several smaller generating facilities dispersed throughout San Francisco, or conservation measures may be sufficient to meet projected demand.

20. The process is actually preceded by the CEC's determination of statewide and areawide electric power demands. The CEC's forecasts are adopted by the California Public Utilities Commission (PUC), which carries out a bidding process (the "Biennial Resource Planning Update process," or "BRPU") to select the applicant that can supply the necessary power most efficiently. SF Energy was chosen in this instance to meet a need identified in the 1992 Electricity Report. Subsequently, however, the Federal Energy Regulatory Commission (FERC) invalidated the PUC's BRPU bid process, and the parties involved in this case strenuously disagree about whether the selection of SF Energy remains valid.

21. *See* CAL. PUB. RES. CODE § 21080.5 (West 1986).

22. FSA, *supra* note 3, at 468.

23. Across the street is a U.S. Postal Service mail processing center and a number of industrial warehouses. Other uses on the parcel include two grain storage silos, a radio tower, and a rail yard that serves as an intermodal transfer facility. FSA, *supra* note 3, at 414.

24. Peter Strauss, Testimony before the California Energy Commission 8 (June 20, 1995).

which there could be significant settling of soil.[25] It also sits adjacent to a solid waste landfill that is currently being closed by the Regional Water Quality Control Board (RWQCB), at which metals, polyaromatic hydrocarbons, and other hazardous wastes are found.[26] There is some groundwater contamination on site, raising concerns that the project could cause additional migration of hazardous wastes to groundwater or San Francisco Bay.

The project will be certified to emit up to 300 tons of air pollutants per year, including over 49 tons of PM_{10} emissions (particulate matter less than 10 microns in size).[27] PM_{10} emissions are a growing public health concern because of the range and severity of their health effects.[28] They cause illness and death from asthma, chronic bronchitis, and cardiovascular disease, and are of special concern to the Bayview community because it currently suffers higher levels of asthma, respiratory ailments and other health problems than other Bay Area communities.[29] The project also is likely to contribute to existing violation of the State's 24-hour PM_{10} standard[30] (which itself may be insufficiently protective of public health),[31] and increased respiratory mortality and incidence of asthma.[32]

The project will emit 500 pounds per day of nitrogen oxide[33] and cause increased emissions of volatile organic compounds (VOC),[34] possibly contributing to the Bay Area's existing violations of the Clean Air Act's ozone standard. The plant will also emit benzene, formaldehyde and other carcinogens. It will require the transport of sizeable amounts of hazardous materials to and from the facility, potentially adding to the risks from the numerous existing facilities in the area that have hazardous materials shipped to them in significant amounts. The plant also will handle numerous hazardous materials that could result in serious consequences in the event of an uncontrolled spill, such as aqueous ammonia. The project will also lead to cumulative traffic impacts, noise impacts, and solid and hazardous waste impacts.

After the CEC issued its FSA, a committee of the Commission held two weeks of evidentiary hearings on the project during July, 1995. Following additional staff review and public comment, the full Commission voted to approve the project in early March, 1996. It delayed the effective date of the approval, however, until the San Francisco Board of Supervisors determines whether to lease the Port site to SF Energy.

C. Community Reaction

The project generated a torrent of community opposition. Residents reacted to the fundamental unfairness of siting a third power plant in the same

25. Ironically, although the plant is in part being constructed to provide electricity in the event of an earthquake, the CEC did not require that the facility be designed to survive the maximum credible earthquake and generate electricity. PG&E's two existing power plants are located in the same area and pose the same seismic concerns. (Both plants were forced to shut down during the 1989 Loma Prieta earthquake).

26. FSA, *supra* note 3, at 215–217.

27. *Id.* at 119.

28. Paul Cotton, *"Best Data Yet" Say Air Pollution Kills Below Levels Currently Considered Safe*, 269 JAMA 3087 (June 23, 1993); Philip Hilts, *Studies Say Soot Kills Up to 60,000 in U.S. Each Year*, N.Y. TIMES, July 19, 1993, at A2; Philip Hilts, *Study Pinpoints Death Risks From Small Particle Pollution*, N.Y. TIMES, March 9, 1995, at A20.

29. African Americans, especially at lower income levels, generally suffer from asthma at rates greater than the population as a whole. *See* 2 PLANNING, POLICY AND EVALUATION, U.S. ENVIRONMENTAL PROTECTION AGENCY, ENVIRONMENTAL EQUITY: REDUCING RISK FOR ALL COMMUNITIES 21 (1992) [hereinafter REDUCING RISK].

30. San Francisco Energy Co. Cogeneration Project, Preliminary Staff Assessment, Application for Certification (94-AFC-1) City and County of SanFrancisco 104 (April 1995).

31. Medical evidence suggests that health effects from PM_{10} emissions occur at levels lower than the state standard of 50 micrograms per cubic meter (μ/m3), and that there may be no safe threshold for exposure. Dr. Deborah Gilliss, Testimony before California Energy Commission 19–25 (July 21, 1995). *See also* Philip Hilts, *Fine Pollutants in Air Cause Many Deaths, Study Suggests*, NY TIMES, May 9, 1996, at A8 (estimating that in San Francisco-Oakland area, 1,270 annual deaths are attributable to PM_{10} emissions).

32. Dr. David Fairley, Testimony before the California Energy Commission 6 (Sept. 12, 1995). The PSA originally concluded that the project's PM_{10} emissions were significant and would cause the project to violate state air quality standards. In one of the more bizarre mitigation proposals, SF Energy then offered to mitigate most of the particulate emissions by planting grass at two playgrounds within a mile of the facility at which the grass cover had worn down. Together, the company estimated, "restoring" these two playgrounds would result in a reduction of PM10 emissions of 51.3 tons per year. Keith Golden, Supplemental Air Quality Testimony before the California Energy Commission 2 (July 1995). The CEC accepted these findings as valid, although it ultimately concluded that the particulate emissions would not be significant and that the resodding was not required as a mitigation measure. SAN FRANCISCO ENERGY CO. COGENERATION PROJECT, CALIFORNIA ENERGY COMMISSION, REVISED PRESIDING MEMBERS' PROPOSED DECISION 284–85 (Feb. 1996). In fact, expert evidence presented by community groups demonstrates that PM_{10} emissions from playground dust are not as harmful as power plant emissions, and that the assumptions underlying how much dust is generated by the playgrounds (and how much mitigation credit should go to resodding them) were unreasonable. Dr. David Fairley, Supplemental Testimony before California Energy Commission (Sept. 8, 1995). Dr. Fairley of the Bay Area Air Quality Management District testified that using reasonable assumptions, at least 170 playgrounds would have to be resodded to mitigate the particulate impacts of the project.

33. FSA, *supra* note 3, at 99. Nitrogen oxide and ammonia are also precursors of atmospheric ammonia nitrite (a major component of secondary PM_{10} pollution). *Id.* at 120.

34. PSA, *supra* note 30 at 85, 92, 103.

area that already contains the City's only two existing plants. The neighborhood is already burdened with a disproportionate share of polluting facilities in the city, and experiences high rates of health problems. One long-time resident captured the feelings of many:

> The air pollution in Hunter's Point is so bad I can't hang my laundry outside. I've tried and it gets so filthy that I have to wash it again. ... I have breast cancer. ... How many little girls who go to school across the street ... from me will grow up and become victims of breast cancer because of the filthy air they breathe? If filth sticks to my sheets as they dry in the "fresh" air, think about the filth that adheres to the lungs. I can wash my sheets but I can't wash my lungs.[35]

The project also comes at a time when the community is struggling to overcome years of environmental degradation and heavy industrialization. Residents see their community as primarily residential, with supporting commercial, retail and light industrial uses; they view their community as one with the best weather and views in San Francisco, and see quality of life diminishing with increased industrialization.[36] Many residents believe that the project threatens the economic progress resulting from the development of new housing in the 1980s, the most positive economic development in the district in decades. This sparked hope and an influx of new residents, who moved to the area to take advantage of the affordable prices and views of the Bay.[37] To these residents, the project's perceived noise, traffic, and land use impacts, and health and safety hazards, will detract from the desirability of the community as a place to live, cause property values to decrease, and discourage the development of additional affordable housing.[38] The project may also interfere with efforts to attract additional housing and smaller scale retail and commercial activity to the neighborhood, by swallowing up a large chunk of publicly owned land.[39]

To many people in the community, the proposal represents a betrayal and a return to years of neglect. As Francine Carter explained:

> When I bought my property, I was told by my realtor that there were plans to build a marina in the area of the proposed power plant. ... I expected boats, yachts, a boardwalk, commercial buildings, ferries, and parks. I believed that it would someday be similar to Fisherman's Wharf, but without so many tourists. I thought there would be ownership of companies and businesses by people from the community along the boardwalk. I never expected another power plant.
>
> If this power plant is built, I envision my community becoming a heavy industrial beltway.[40]

Community residents are by no means uniformly opposed to the project, and SF Energy has exploited these divisions. Project supporters have been attracted by the prospect of employment opportunities and money for the community.[41] The project is

35. Letter from Imogene F. Hubbard to Louise Renne, City Attorney (Jan. 5, 1995) (on file with author).

36. FSA, *supra* note 3, at 409.

37. Between 1980 and 1990, the population increased by thirty percent from 20,600 to 26,700, more than four times the rate in the city as a whole. *See* Claude Wilson, Remarks at the Hastings College of the Law, Symposium on Urban Environmental Issues in the Bay Area (March 23, 1996) ("I feel like I have a million dollar view from my home ... we think of Bayview-Hunters Point as an oasis in the middle of San Francisco").

38. FSA, *supra* note 3, at 410. As the authors of a recent article conclude:

> Owners of residential property located near, and at risk from, a source of contamination, like owners of property that has actually been contaminated, often find it difficult, if not impossible to sell their property and usually cannot sell it at a fair market price. From the point of view of perspective buyers, both kinds of property, whether actually contaminated or at risk of contamination, are undesirable. Owners of both types of property witness a decline in their property value and suffer the stress and anxiety that naturally accompanies injury to one's most significant economic asset.

Anthony Roisman & Gary Mason, *Nuisance and the Recovery of "Stigma" Damages: Eliminating the Confusions*, 24 ENV.L.REP. 10070 (Feb. 1996).

39. LaBrie, *supra* note 6, at 7. The City's draft South Bayshore Plan contemplates new housing growth as a means to stimulate economic growth and change the industrial character of the area:

> Housing growth, rather than being an obstacle to attracting business growth, can be a means for such attraction. This housing growth, resulting from the shortage of housing in San Francisco and the Bay Area, can be guided into areas such as the Third Street corridor and Hunters Point Shipyard to help attract new commercial and industrial uses.

SOUTH BAYSHORE PLAN: AN AREA PLAN OF THE MASTER PLAN OF THE CITY AND COUNTY OF SAN FRANCISCO, PROPOSAL FOR ADOPTION, at II.9.4 (April 1995).

40. Francine Carter, Testimony before the California Energy Commission 3 (July 5, 1995).

41. For an argument about why areas like Bayview-Hunters Point should welcome polluting industries, see Christopher Boerner & Thomas Lambert, *Environmental Injustice*, THE PUBLIC INTEREST 61, 74–76 (Winter 1995) (arguing that prohibitions or limitations on siting polluting industries in minority and low-income neighborhoods harms communities by denying them the economic benefits associated with hosting industrial and waste plants, and that community residents may find it in their best interest to endure "nuisances and minimal health risks" associated with facilities in exchange for substantial economic benefits).

expected to generate approximately 195 construction jobs[42] and twenty to twenty five permanent jobs. SF Energy announced that it expected to fill fifty percent of all construction and operation jobs from the community (a pledge viewed with great skepticism by project opponents).[43] It also promised to pay $259,000 per year to the community for the life of the project, a total of roughly $13 million.[44]

As in other situations, the lure of potential employment in a community desperate for work is powerful. Wendy Brummer-Kocks, Director of the Innes Avenue Coalition (one of the community groups fighting the plant), recounted one experience:

> At a CEC hearing I was talking with a man who is a proponent of the plant because he thinks it will bring jobs to him and his friends. When I brought up the fact that this plant is going to dirty the air here even more he told me he didn't really care. He said young men were "dying a fast death on the streets everyday and that's a whole lot worse than dying a slow death from the pollution" of the new plant. This has stuck with me. Not because I'm surprised he said that, but rather than companies like [SF Energy] take advantage of people in his state. They know the plant would create more pollution but they understand a certain segment of the population is desperate enough to compromise the air everyone breathes for a few jobs for themselves.[45]

Other residents rejected the vision of economic development promised by SF Energy:

> "I believe that there are other "heavy industries" that can use the land in a more beneficial fashion than the power plant ... [which] will not even be a source of stable jobs. ... At a maximum, the power plant will bring 25 permanent jobs and some portion of 200 temporary construction jobs. The unemployment rate here is extremely high. 25 permanent jobs will not revitalize the community. Temporary jobs will not revitalize the community.
>
> "Jobs" by itself is not the issue. What this community really needs is career/job training. ...
>
> Healthy, clean businesses are a good use of land in this community, not power plants. The good industries are not coming here because our leaders allow power plants and sewage treatment plants to be built here.[46]

III. Organizational and Legal Strategies

A. Introduction

The Energy Commission traditionally evaluates the environmental impacts of a power plant from a fairly narrow perspective, focusing on the incremental effects of the specific projects before it, rather than on the broader socio-economic or racial implications of its decisions.

From the perspective of community residents, however, the power plant's impacts cannot be considered outside the context of historical conditions in the community. They believe that decisionmakers should give significant attention to the community's existing environmental burdens and health problems. Decisionmakers should also consider the fundamental social and economic issues underlying the project. As Professor Robert Bullard argues, an environmental justice framework "brings to the surface the ethical and political questions of 'who gets what, why and in what amount?' Who pays for, and who benefits from, technological expansion?"[47]

Moreover, from the community's view, a project's impacts on the community cannot be reduced to numerical risks.[48] The presence of polluting facil-

42. PSA, *supra* note 30, at 395–398.

43. SF Energy reached an agreement with labor unions to try and hire local residents for the short-term construction jobs, but according to community residents, these unions have traditionally excluded minority applicants. *See* Willie Ratcliff, Vanessa Young, Harry Sanders, Testimony before the California Energy Commission, 182 (June, 14, 1995).

44. FSA, *supra* note 3, at 397. The money will go to a "Community Enhancement Fund" that will support projects and activities that focus on "assisting community residents, stimulating economic development in the community, and helping improve the quality of life for all residents." SAN FRANCISCO ENERGY COMPANY'S COGENERATION PROJECT, CALIFORNIA ENERGY COMMISSION, REVISED PRESIDING MEMBERS' PROPOSED DECISION (Feb. 1996) [hereinafter PROPOSED DECISION].

45. Wendy Brummer-Kocks, Testimony before the California Energy Commission (July 11, 1995).

46. Theresa Coleman, Testimony before the California Energy Commission 2–3 (July 5, 1995).

47. Robert Bullard, *Environmental Justice For All* in UNEQUAL PROTECTION: ENVIRONMENTAL JUSTICE AND COMMUNITIES OF COLOR 11 (Robert Bullard ed., 1994).

48. Numerical characterizations of risks fail to capture the qualitative dimensions of risks from the project that affect how *acceptable* the risks are to a community—such as whether the risks are involuntary, outside of an individual's control, benefit a particular company while imposing costs on a large community, and affect children and future generations. *See* Paul Slovic, *Perception of Risk*, 236 SCIENCE 280, 282–283 (1987); Mary L. Lyndon, *Risk Assessment, Risk Communication and Legitimacy: An Introduction to the Symposium*, 14 COLUM. J. ENVTL. L. 289, 299 (1989) (risks have more physical and social characteristics than mortality or morbidity numbers; they have dimensions that are emotional, moral, political and economic).

ities harms a community in emotional, psychological, financial and other ways.[49] Community residents must live with the threat of accidental releases or spills, as well as the uncertainty and anxiety about harm to their families from exposure to pollutants.[50] They must regularly deal with the noise, industrial traffic, unsightliness and other disruptions that shake the fabric of their neighborhoods, and interfere with their aspirations for neighborhood revitalization.

Thus, community activists sought means by which to enlarge the focus of the Commission's analysis, as well as enlist the interest and support of other government agencies in the battle against the plant. This section discusses three strategies successfully employed by community advocates. First, activists developed a profile of toxic sites in the community. This prompted government agencies to also inventory the concentration of polluting facilities, and to initiate a community-wide health assessment. Second, the community introduced extensive testimony about the principles of environmental justice in the adjudicatory hearings before the CEC. Third, the community has pressed for a moratorium on the siting of new polluting facilities in Bayview-Hunters Point until the causes of its health problems can be determined. Community groups have been assisted in these efforts by legal representatives from Golden Gate University's Environmental Law & Justice Clinic (ELJC), the Environmental Law Community Clinic (ELCC), and the San Francisco Lawyers Committee for Civil Rights Under Law.[51]

B. Developing a Community Toxics Profile and Obtaining a Community Health Assessment

1. *The Toxics Profile*

Community residents knew from living in the area that their neighborhood was burdened with many noxious land uses and polluting industries. Although of central concern to the community, and highly relevant to the question of the project's cumulative environmental impacts[52] the CEC's voluminous PSA did not catalogue the concentration of facilities in the area.

Recognizing how powerful this information could be, community activists, working with their legal representatives, set out to develop a toxics profile of the area. Using existing government records and on-line environmental databases, students in Golden Gate's ELJC prepared a preliminary profile showing the heavy concentration of environmentally harmful facilities in the area. They presented these findings on an oversized, poster board map to the San Francisco Board of Supervisors and its committee that focuses on public safety, health and the environment. The map was simple but visually compelling testimony, and captured the attention of local legislators. It has proven to be an extremely effective media graphic; later versions of it, in color, have appeared on the front page of the San Francisco Examiner and San Francisco Independent.[53]

Importantly, the toxics profile also galvanized other government agencies to examine conditions in the community. The U.S. Environmental Protection Agency (EPA) carried out its own toxic inventory. In

49. *See generally* MICHAEL EDELSTEIN, CONTAMINATED COMMUNITIES: THE SOCIAL PSYCHOLOGICAL IMPACTS OF RESIDENTIAL TOXIC EXPOSURE (1988); PHIL BROWN & EDWIN MIKKELSEN, NO SAFE PLACE: TOXIC WASTE, LEUKEMIA, AND COMMUNITY ACTION (1990). According to Edelstein, "[e]xposure to toxic materials not only changes what people do, it also profoundly affects how they think about themselves, their families, and their worlds. In short, it represents a fundamental challenge to prior life assumptions." EDELSTEIN, *supra*. These "lifescape" changes include increased worries about health concerns, feelings of loss of control over the present and future, the inversion of home as a secure place, and a loss of trust in others. *Id.* at 43–82. Exposure to toxic materials also stigmatizes affected individuals and results in increased stress and individual and family mental health problems. *Id.* at 14, 84–117. Brown and Mikkelsen argue that communities affected by toxic waste contamination show higher levels of mistrust, depression, anxiety, demoralization, and fear of future disease. BROWN & MIKKELSEN, *supra*, at 66, 81–101, 118–120.

50. Henry Clark, Executive Director of the West County Toxics Coalition captured the anxieties of people in Richmond (CA) this way: "When people see fog rolling in [over San Francisco Bay], they wonder if it's the next chemical spill." Henry Clark, Remarks at the Hastings College of the Law, Symposium on Urban Environmental Issues in the Bay Area (March 23, 1996). *See* Roisman & Mason, *supra* note 38, at 10070 ("[t]he intrusion of invisible contaminants beneath the soil in a neighborhood also brings feelings of injury and vulnerability from which it is often difficult to recover.") The authors point out that "[i]n most cases of environmental contamination, there is simply no scientific certainty of safety, at least not for many years. *Id.* at 10073.

51. Community advocates have used multiple other approaches in opposing the project—pressing for hearings before the San Francisco Board of Supervisors and Commission on the Environment; injecting the project as an issue in San Francisco's 1995 mayoral election (three of the four leading candidates, including current Mayor Willie Brown, came out in opposition to the project); gaining considerable media coverage; and forming a new community wide environmental justice advocacy group, the Southeast Alliance for Environmental Justice (SAEJ), that meets biweekly to strategize about the project as well as other issues facing the community.

52. CEQA requires that agencies analyze significant cumulative environmental impacts in an EIR (or its functionally equivalent document). CAL. PUB. RES. CODE § 21100(a)–(g) (West 1986).

53. *See* Jane Kay, *Pollution Fears Stir Activists in Hunters Point*, S.F. EXAMINER, Feb. 26, 1996, at A1; Bill Eisele, *City's Toxic Neighborhood*, S.F. INDEPENDENT, Dec. 12, 1995, at A1.

addition, this evidence spurred the San Francisco Department of Public Health (Health Department) to initiate a community-wide environmental and health assessment project (Environmental Assessment Project), designed to create a toxic profile of the community, assess the potential health risks and cumulative effects associated with each of the toxic sites, and identify and analyze selected indicators of health status that may be affected by exposure to the identified toxics.[54] The Health Department has gone to significant lengths to involve the community in planning and designing the project.[55] To date, it has completed an initial toxics profile and analyzed community cancer rates;[56] its work on the community health assessment is ongoing.[57]

Collectively, the ELJC preliminary study, EPA analysis, and Health Department profile reveal an intense concentration of toxic sites in the area (defined here to include sites at which contamination has occurred or which are sources of actual or potential releases of toxic chemicals). The community has at least 280 such sites, and possibly considerably more.[58] This includes the city's only federal "Superfund" site, the huge (522-acre) and highly contaminated Hunters Point Naval Shipyard;[59] the city's only state "superfund" site, Bay Area Drum; one of the city's three sewage treatment plants, which under excess capacity conditions, deposits raw sewage into the Bay, making it one of the Bay Area's twelve largest dischargers of toxic water pollutants; and the large Candlestick Park Recreation Area, a 120-acre site where unregulated hazardous waste disposal occurred over a period of many years.[60] (An additional sixteen facilities were listed on federal or state databases as having known or potential hazardous waste contamination.)[61] There are sixty-five identified leaking underground storage tank sites, including at least twenty-eight at which groundwater or surface water is affected or threatened, 108 air emitters, 160 hazardous waste generators, and 340 businesses that reported handling hazardous materials.[62]

The Health Department's analysis further documents the disproportionate share of toxic sites located in Bayview-Hunters Point. On a per capita basis, compared to the city as a whole Bayview-Hunters Point has roughly four times as many permitted air emitters; three times as many hazardous waste complaints; five times the number of businesses which store acutely hazardous materials; four times as many registered hazardous materials facilities; three times as many hazardous waste generators; three times as many sites known to be contaminated with petroleum from leaking underground storage tanks (as well as three times the number of active underground storage tanks); four times the number of sites known to be contaminated from past industrial or commercial use; and ten times the number of sites with waste discharge permits under the Clean Water Act.[63]

54. Bayview-Hunter's Point Environmental Assessment Project, Mission Statement.

55. The Health Department and community participants jointly developed a mission statement and set of project objectives. The mission statement directed city staff to reflect critically on the concerns expressed by members of the community and the genesis of those concerns, and to specifically consider the oral history of community members and perceptions they have about their health status. Since the start of the project, monthly community meetings have been held. One of the community leaders, Francine Carter, was named co-chair of the project, to "more accurately reflect the relationship between [the Department] and the community as partners in collaborating [sic] in this project." Bayview Hunter's Point Community Assessment Team, Minutes of Meeting for July 20, 1995.

56. *See infra* pp. 418–419.

57. The health assessment is discussed below at notes 69–87 and accompanying text. A few other local governments also have attempted to determine the concentration of noxious industries in their communities. For instance, the City of Atlanta recently prepared a citywide profile of sources and potential sources of toxic pollution (which demonstrated that more routine releases of toxic substances occur in neighborhoods which are poorer, and to a lesser but still significant extent had larger percentages of African-American populations). *See* CITY OF ATLANTA DEPARTMENT OF PLANNING AND DEVELOPMENT, ENVIRONMENTAL JUSTICE—AROUND THE ISSUE OF HAZARDOUS WASTE, 49–50 (1995) (Report prepared for the Atlanta Environmental Priorities Project).

58. Heidi Gewertz, Testimony before California Energy Commission (July 13, 1995).

59. From 1941 to 1974, the Navy dumped "massive quantities of various hazardous wastes" at the site. Triple A Machine Shop, which conducted commercial and naval ship repair there from 1976 to 1987, was convicted of hazardous waste disposal violations at the site. People v. Triple A Machine Shop, No. A059887, slip op. at 1 (Cal. Ct. App. June 30, 1995). Fifty two remedial investigation sites have been identified at the shipyard, some of which are beyond remediation. The Navy estimates clean-up costs to be $335 million. CAL. OFFICE OF PLANNING AND RESEARCH, CALIFORNIA MILITARY BASE CLOSURES CURRENT STATUS OF REUSE EFFORTS 22 (April 3, 1995).

60. *Id*; QUAN, *supra* note 8, at 14.

61. QUAN, *supra* note 8, 5–8.

62. BUREAU OF ENVIRONMENTAL HEALTH MANAGEMENT, PARTIAL INVENTORY OF TOXIC SITES/FACTORS IN SAN FRANCISCO, SURVEY OF AVAILABLE DATA REPORTED TO THE SAN FRANCISCO DEPARTMENT OF PUBLIC HEALTH 2-1,2 (Jan. 23, 1996); QUAN, *supra* note 8, at 14.

63. When the immediately adjacent neighborhoods of Potrero Hill and the Mission are included in this analysis (which may more accurately reflect actual exposures experienced by residents in the community), it shows that forty-four percent of the City's businesses which store acutely hazardous materials, thirty percent of the hazardous waste complaints, thirty-four percent of the permitted air emitters, and thirty two percent of the hazardous waste generators are located in and around Bayview-Hunters Point, even though they contain only fifteen percent of the city's population.

EPA's analysis also documents the substantial contamination in the neighborhood. For example, the bay near Hunters Point is highly contaminated, due to years of uncontrolled hazardous waste disposal. It is estimated that close to 730,000 tons of metal-laden wastes from the sandblasting of ships was disposed of as fill along the southern shoreline of Bayview-Hunters Point from 1945 to 1986.[64] Today, concentrations of toxic metals, PCBs, and tributyltin (an extremely toxic pesticide) in bay sediments near Hunters Point pose a threat to aquatic life. At a slough near the Port Site, fourteen toxic chemicals are present at potentially hazardous levels, and the amount of nickel measured in mussels is among the highest levels ever reported in the world.[65] This contamination is particularly harmful to area residents given that extensive fishing takes place in the area, including for purposes of food consumption (the area provides one of the few recreational fishing opportunities along the highly developed South Bay shoreline), and that persons of color eat fish and shellfish more frequently and in greater amounts than the general population.[66]

These various toxic inventories are not dispositive evidence that community residents suffer disproportionate harms from pollution. Proximity to sources of pollution is not the same as actual exposure to pollutants.[67] Not all potential sources actually release contaminants into the environment. As for those that do, numerous factors influence how pollution is dispersed and where and at what levels exposures occur. Moreover, different substances have varying degrees of toxicity. Nonetheless, the profiles present a compelling snapshot of a community that is already under siege from toxics, particularly in relationship to other San Francisco neighborhoods. One resident noted: "I almost died when I found out how bad it was. I invested every nickel and dime we had in this place. If I'd known then what I know now, I never would have bought it. Now I'm stuck."[68]

The toxics profiles have been a key organizing tool for mobilizing community response to the proposed plant. Activists are also using the profiles for larger community organizing and educational efforts.[69]

2. *Community Health Assessment*

The CEC concluded that the project would not result in any significant incremental health risks to nearby residents. Regardless of the accuracy of this specific conclusion, the CEC's analysis slights the special vulnerability of community members to increased pollution from the facility,[70] as well as the broader backdrop of community health concerns.

To community residents, a critical starting point in evaluating the project should be the serious, existing health problems in the community.

64. QUAN, *supra* note 8, at 3.

65. *Id.*

66. *See, e.g.*, REDUCING RISK, *supra* note 29, at 12.

67. *See* LOUISIANA ADVISORY COMMITTEE TO THE U.S. COMMISSION ON CIVIL RIGHTS, THE BATTLE FOR ENVIRONMENTAL JUSTICE IN LOUISIANA ... GOVERNMENT, INDUSTRY, AND THE PEOPLE 34 (1993) (epidemiology studies have failed to prove definitively that residential proximity to specific industries is associated with significant health risks) [hereinafter LOUISIANNA ADVISORY COMMITTEE].

68. Tegan McLane, *Fighting Mad*, GOLDEN GATE U. CONNECTIONS (Fall, 1995) (quoting Linda Richardson). The situation in Bayview-Hunters Point is replicated in hundreds of poor communities and communities of color in the U.S. *See* CALIFORNIA COMPARATIVE RISK PROJECT, TOWARD THE 21ST CENTURY: PLANNING FOR THE PROTECTION OF CALIFORNIA'S ENVIRONMENT (1994) (African-Americans and Hispanics in California live disproportionately in areas near manufacturing facilities and in areas receiving the largest emissions of air toxic pollutants); Lauretta Burke, *Race and Environmental Equity: A Geographic Analysis in Los Angeles*, GEO INFO SYSTEMS (1993) (on file with author) (race and income levels were important predictors of where manufacturing facilities located in Los Angeles County); Richard Rogers, *New York City's Fair Share Criteria and the Courts: An Attempt to Equitably Redistribute the Benefits and Burdens Associated With Municipal Facilities*, 12 N.Y.L. SCH. J. HUM RTS. 193 (1994) (in New York City, most homeless shelters, incinerators, sewage treatment plants and other undesirable facilities located in poor and minority neighborhoods); Rachel Godsil & James Freeman, *Jobs, Trees and Autonomy*, 5 MD. J. CONT. L. ISSUES 25, 26 (1993-94) (Williamsburg-Greenpoint section of Brooklyn, home to numerous dirty industries and where residents are exposed to toxic chemicals at estimated 60 times the national average, chosen as site for large new municipal incinerator); Michel Gelobter, *The Meaning of Urban Environmental Justice*, 21 FORDHAM URB. L.J. 841, 849–850 (1994) (people of color and low-income groups have strikingly higher incidences of environmental disease than their white, richer urban counterparts); UNITED CHURCH OF CHRIST COMMISSION FOR RACIAL JUSTICE, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIOECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES (1987) (three of out of every five African Americans and Latinos live in communities with one or more uncontrolled hazardous waste sites; *see generally* Paul Mohai & Bunyan Bryant, *Environmental Injustice: Weighing Race and Class as Factors in the Distribution of Environmental Hazards*, 63 U.COLO. L. REV. 921 (1992); BULLARD, *supra* note 9; CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS (R. Bullard ed., 1993).

69. For instance, the Southeast Alliance for Environmental Justice has proposed creating a community-wide toxics hotline, toxics informational flyer, community notification network, and campaign for site remediation, using data from the toxic profiles. *See* SOUTHEAST ALLIANCE FOR ENVIRONMENTAL JUSTICE, ENVIRONMENTAL JUSTICE GRANT WORKPLAN (1995).

70. The CEC's conclusions are based on traditional risk assessment methodology, which fails to adequately consider factors that may increase the risks from chemical exposures for persons in low-income communities and communities of color. These persons face multiple exposures in the community and workplace, and these may be exacerbated by social and economic factors, such as poverty, lack of adequate medial care, poor nutrition, and other health problems. *See* Bnan D. Israel, *An Environmental Justice Critique of Risk Assessment*, 3 N.Y.U. ENVTL. L. J. 469, 495–508 (1994).

Evidence shows that residents in the area experience a higher incidence of bronchitis and asthma than people elsewhere in San Francisco or in California.[71] Many residents also believe, often from personal experience, that the community suffers from higher rates of cancer, lead poisoning, and other health problems as well, and that this is in part directly attributable to existing industry in the area. As one local leader argued:

> We have a high rate of cancer, asthma, bronchitis and emphysema in this community. I believe that this is mainly the result of our being continuously exposed to chemicals dumped in the air. Living 1/4 mile from the PG&E plant, I hear, see and taste the chemicals every day. ... In the morning the air is so thick with emissions that I can taste it. To think of another plant being built here is unbelievable. My 7 year old daughter developed asthma just after we moved here. She is the first one in the family to have asthma and she spent two weeks in the hospital. My daughter has said to me that it is hard for her to breathe after playing outside. There is a lot of dust blowing around all of the time. ... My brother-in-law's baby died from asthma when she was only 4 months old. The baby was born in and lived here in the community. ... My wife has ulcers that started when we moved here and my mother-in-law, who also lived here, had cancer. I have noticed that community members in their early 40's have many ailments. I don't know of anyone without an ailment of some kind. ... I believe that the existing plant is the cause of these illnesses. We don't know what chemicals we are being exposed to every day.[72]

Thus, prior to any project approval, community residents wanted government decision-makers to examine the incidence of their existing health problems and determine whether they were being caused by environmental exposures.

The community's push reflects a wider demand for community health information by communities engaged in environmental justice struggles. For example, West Harlem Environmental Action leader Peggy Shepard has explained that her community "needs a health risk assessment and a community environmental health clinic to address the community's significant health concerns. It is imperative to determine whether the cumulative impact of exposure to multiple toxins increases health risks."[73] Likewise, communities have expressed growing interest in using popular epidemiology to evaluate community health conditions, epidemiological analyses which combine socio-demographic and historical research with community health surveys.[74]

As noted above, community residents were successful in persuading the San Francisco Health Department to initiate a community health risk assessment. Community representatives have helped the Health Department identify health conditions for evaluation, including asthma, bronchitis, cancer, other respiratory diseases, lead poisoning, and mercury exposure.[75]

The Health Department's first study examined cancer rates in the community.[76] The survey's striking results show that the rate of breast cancer is double that of San Francisco or the Bay Area.[77] This elevated rate is explained by the high rate of breast cancer among African American women in Bayview-Hunters Point. These findings are even more disturbing given recent studies showing that the rate of breast cancer rate among women in the Bay Area generally is higher than that reported anywhere in the world.[78] The incidence of cervical cancer is near-

71. FSA, *supra* note 3, at 238–240, 248.

72. Reverend Willie F. Carter, Jr., Community Tabernacle Church of God in Christ, Testimony before the California Energy Commission (July 12, 1995).

73. Peggy Shepard, *Issues of Community Empowerment*, 21 FORDHAM URB. L.J. 739, 749 (1994); *see* Nancy Anderson, *Notes from the Front Line*, 21 FORDHAM URB. L.J. 757, 766 (1994) (New York City Health Department conducted first of its kind community based health study examining mortality and morbidity in Greenpoint/Williamsburg section of Brooklyn as part of Environmental Benefits Program set up by New York City in response to community lawsuits over sewage treatment plant violations).

74. *See* Patrick Novotny, *Popular Epidemiology and the Struggle for Community Health: Alternative Perspectives from the Environmental Justice Movement*, 5 CAPITALISM NATURE SOCIALISM 29 (1994). Community health surveys are citizen-led studies of the incidence and concentration of health disorders suspected to be linked with environmental and workplace hazards. The surveys allow residents to detail the hazards they face in terms that are comprehensible to them, and provide a strong stimulus to political mobilization. *Id.* at 33. *See also* BROWN & MIKKELSEN, *supra* note 49 at 125–163.

75. The Health Department also designed a focus group to obtain data about how residents perceive health conditions, pollution problems, and other needs in the community, and sought input from the community to make the survey more responsive.

76. This was in response to community concerns that it was experiencing elevated incidences of cancer due to multiple environmental exposures.

77. SAN FRANCISCO BUREAU OF EPIDEMIOLOGY, DISEASE CONTROL, AND AIDS, COMPARISON OF INCIDENCE OF CANCER IN SELECTED SITES BETWEEN BAYVIEW/HUNTERS POINT AND SAN FRANCISCO AND THE BAY AREA, (1995).

78. Jane Kay, *High Cancer Rates in Bayview Women*, S.F. EXAMINER, Aug. 18, 1995.

ly twice that in San Francisco or the Bay Area.[79] The study also found elevated rates of other cancers in the district, including childhood and bladder cancer in males, and non-Hodgkin's lymphoma, leukemia, lung and brain cancer in females.[80]

With respect to cervical cancer, the study concluded that high rates of sexual activity, cigarette smoking, and lack of access to medical care are risk factors associated with higher cancer rates.[81] With respect to breast cancer, after initially discounting the role of environmental factors, the Health Department revised its findings and included environmental contaminants as one possible source of the elevated cancer rates (citing literature suggesting that these contaminants may act like estrogens in stimulating breast cancer).[82] The Health Department is now reviewing breast cancer rates in the community over the past twenty-five years, and is investigating the causes of the elevated cancer rates. It is also continuing to examine other indicators of health status in the community as part of the health assessment process.

The initial survey results provided validation to the claims of community members who "are frequently unable to document their circumstances in ways that health and government authorities consider significant."[83] Although confirming what many had long suspected, the results nonetheless stunned community residents. The findings have served to further mobilize community opposition to the power plant and generate support for a temporary siting moratorium.[84] The survey results additionally have been the catalyst for residents and the Health Department to look more broadly at the environmental and public health problems in the community.[85] The proposed plant has "served as a lightning rod for focusing attention on environmental factors in health," says Larry Meredith, deputy director of the Health Department.[86] Community activists recently formed a subcommittee to organize and educate the community about breast cancer issues.[87]

C. Presenting Environmental Justice Testimony to the Energy Commission

As the Energy Commission's review of the project went forward, community activists faced an important strategic choice: to what degree should they participate in the Commission's evidentiary hearings on the project, and if they did, how could they inject environmental justice issues into the process? The Commission's administrative process is not a familiar or comfortable place for activists, since it focuses on complex, highly technical issues of energy regulation. Environmental justice has never been on the Commission's agenda; indeed, Commission staff was uncomfortable with the very

79. The study concluded that it was unlikely that the elevated rates of breast and cervical cancer stem from a single problem because the two cancers have very different risk factors. *Id* at 1. The study found no evidence of significantly elevated incidence of other cancers, including lung and bronchus, prostate, colorectal, pancreas, leukemia, or childhood cancers.

80. The study was based on data reported to the California Cancer Registry and the Northern California Cancer Center, and the Health Department was careful to explain its limitations. These include the quality of data (the number of cancer cases reported to the Cancer Registry may vary by geographic region and by time), relatively small sample size (the study only looked at five years of data), choice of appropriate comparison group, latency period of cancer (persons developing cancer may have been exposed in a neighborhood where they previously lived), and other factors that may cause cancer (diet, smoking, genetic factors).

81. COMPARISON OF INCIDENCE OF CANCER, *supra* note 77, at 4.

82. There is a significant vacuum in the health science community about the degree to which environmental contaminants cause cancer and other diseases. The etiology of many cancers and other diseases is not fully understood. Cancers have numerous possible causes, and most persons are regularly exposed to a large number of environmental pollutants. Environmental pollutants may cause multiple health effects. Moreover, the latency period for chronic health effects like cancer may be 20 years or more. Finally, relatively little research has examined the relationship between environmental factors and various diseases. REDUCING RISK, *supra* note 29, at 14. *See also* BROWN & MIKKELSEN, *supra* note 49, at 58 (toxic waste health effects are particularly difficult to diagnose—they present "diagnostic ambiguity").

Likewise, the degree to which environmental factors (as opposed to differences in nutritional status, access to health care, lifestyle choice, and other factors) are responsible for the greater health problems observed among people of color and poor people generally is subject to significant uncertainty. *But see* Michel Gelobter, *The Meaning of Urban Environmental Justice*, 21 FORDHAM URB. L.J. 841, 849–850 (1994) (citing detailed epidemiological study of Oakland, CA residents that controlled for nearly all known risk factors and found 50% difference in mortality among low income and wealthier communities, providing strong evidence that disparities due to environmental factors).

83. LOUISIANA ADVISORY COMMITTEE, *supra* note 67, at 34

84. *See infra* pp. 422–427.

85. Heidi Gewertz, *Community-Based Environmental Justice Work in Bayview-Hunter's Point*, 10 PUB. INTEREST ADVOC. 5–6 (Dec. 1995/Jan. 96).

86. Kay, *supra* note 53. As a result of the health assessment, the City's neighborhood health clinic in Bayview-Hunters Point plans to review its patients' records and raise funds to go door-to-door in search of asthma cases. *Id.*

87. The subcommittee's goals include broadening community outreach and education about breast cancer, writing scientific papers about breast cancer in the community, serving as a clearinghouse of information, and actively participating in the planning, design and implementation of breast cancer research targeted at the Bayview-Hunters Point community. Bayview-Hunters Point Environmental Health Committee, Cancer Subcommittee, Summary of Meeting Discussion, Jan. 11, 1996.

language of the subject.[88] Ultimately, the community decided to fully participate in the CEC's hearings and engage the Commission about environmental justice.

The CEC's PSA and original FSA, although each close to nine hundred pages, did not include *any discussion* of the environmental justice implications of the project. It did not, for instance, examine whether the project would contribute to the existing disproportionate environmental burdens in Bayview-Hunters Point, whether the proposed sites were fair in light of the district's historic status as a dumping ground for the city, or whether siting a plant in the district would have discriminatory impacts on a community of color.

During the next phase of the process, the CEC's evidentiary hearings, CEC staff presented two pages of supplemental testimony (for the FSA) on environmental justice.[89] The staff offered two conclusions. First, the Commission's own siting process is fair and non-discriminatory because it is open and responsive to public participation and comments, and because staff strives to ensure that no power plant approved will cause any adverse environmental impacts. As evidence of the fairness of the process, staff pointed out that the CEC has sited facilities in regions as diverse as the Mojave Desert, Kern County, as well as facilities near residential areas in towns and cities. Second, it was beyond the staff's purview to analyze the broader social justice issues underlying the unfair societal allocation of environmental harms.[90] Staff admitted that it was unaware that it might be subject to Title VI of the Civil Rights Act of 1964,[91] and that it had not analyzed compliance with the statute or the possible racially disparate impacts of siting the facility as proposed.[92]

Community advocates responded to the staff's very narrow focus by broadening the subject matter of testimony offered during the CEC's hearings. Their legal representatives called expert witnesses to testify about the theory and background of environmental justice. Community members also provided their own direct, powerful testimony about the project's harms.

Carl Anthony, executive director of the Urban Habitat Program of Earth Island Institute, testified that the desired community decisionmaking process when considering the siting of a new facility would be one in which the local community is "recognized as an equal partner and sitting at the decision-making table,"[93] and one in which a project is evaluated based on who bears the costs, who reaps the benefits, and whether the project promotes sustainable economic opportunities in the community. He argued that community residents have a right to review the project's proposed mitigation measures and "decide whether [they are] adequate and acceptable."[94]

Anthony and Henry Holmes, also of the Urban Habitat Program, attempted to place the project in a larger socio-economic context, in which the societal costs and benefits of the project and other energy projects are considered. Viewed from that perspective, he testified, the externalities of energy production using fossil fuels affect poor people and people of color the most (in terms of air pollution, noise, increased fear of cancer), while more affluent residents reap the benefits.[95] Holmes also testified about the divisive nature of the CEC's planning process, which had resulted in a division among community residents framed in terms of a "jobs versus the environment" debate.[96] He explained that if the Commission employed a broader set of evalua-

88. The CEC's staff testified to Commission members that the divergent terms "environmental equity," "environmental justice," and "environmental racism" mean the same thing. *See* Robert Therkelsen, Environmental Equity Testimony before the California Energy Commission 1 (June 1995).

89. Staff also presented additional testimony about the project's health effects.

90. *See* Therkelsen Testimony, *supra* note 88; FSA *supra* note 3, at 407–409.

91. 42 U.S.C. § 2000d. Because the CEC receives federal assistance, it must comply with Title VI and its relevant implementing regulations.

92. Therkelsen Testimony, *supra* note 88, at 27–30, 33–35.

93. Carl Anthony, Direct Testimony before the California Energy Commission Testimony 4–5 (July 7, 1995).

94. *Id.* at 9.

95. Holmes and Anthony have detailed their argument in an energy policy report published by the Urban Habitat Program. As outlined in the report, residents in poor communities and communities of color suffer more from toxic air emissions because they live closer to urban freeway networks and high density traffic, and suffer from freeway blight in their communities. They are more frequently exposed to hazardous chemicals in the process of extracting and refining oil, and refineries, power plants, and other locally unwanted land uses needed to power the current system are disproportionately sited in inner city neighborhoods. At the same time, freeways benefit those who waste energy by commuting from the inner city to low-density, suburban housing. Many communities in the Bay Area are not well served by public transit; for instance, the San Francisco Municipal Railway has no surface train or subway train service to Bayview Hunters Point, and bus service can be sporadic and unreliable, particularly at night and early morning. Low-income households also bear a disproportionate economic burden, paying a higher share of their budget (1/3) for basic energy services. Moreover, wealthier households tend to use (and waste) far more energy than poorer homes. CARL ANTHONY & HENRY HOLMES, URBAN HABITAT PROGRAM, ENERGY POLICY AND COMMUNITY ECONOMIC DEVELOPMENT, DRAFT REPORT 5-24 (Feb. 1992).

96. Henry Holmes, Direct Testimony before the California Energy Commission (July 5, 1995).

tion criteria, one that included social justice, economic development, and ecological sustainability, this dichotomy would not exist.[97] He also cautioned that the project had to be viewed in its larger, socioeconomic and historical context, one in which prior decisions by industry and government had resulted in significant adverse impacts on the community. [98] He presented as a more desirable model the development of the Bayview-Hunters Point Social and Ecological Justice Transportation Plan, a community-oriented transportation plan featuring development of a light rail system along the community's main artery, Third Street. The plan includes among its criteria optimizing community economic development and improving social and environmental quality in the community.[99]

Luke Cole, a lawyer with California Rural Legal Assistance, testified about some overarching themes of environmental justice, including literature documenting the disproportionate burden of air pollution and other environmental harms experienced by low-income communities and communities of color.[100] Cole also summarized some of the reasons that undesirable land uses have historically been sited in disadvantaged communities, including targeting, residential segregation, expulsive zoning, and discrimination.

In addition, numerous residents testified in forceful terms about the environmental devastation in their community, the widespread health problems affecting them, their hopes for the future, and the disruption in the neighborhood that would be caused by another unwanted facility.[101] And they spoke about the pain that comes from knowing that their community is the dumping ground for society's unwanted uses.[102] As Osceola Washington, a fifty-year resident of Hunters Point, testified:

> It is a dump yard out here. This is the dump yard of San Francisco. Everything they don't want, they send here. . . . They would never build this plant in Pacific Heights or the Marina District. ... I keep wondering why they're going to continue making Hunters Point a dumping yard when we were [sic] just beginning to clean up."[103]

The extensive testimony by the community educated the Commission about environmental justice, and as a result, the Commission greatly expanded its treatment of the subject in its decision approving the project. That decision accepts as a starting point some of the goals of the environmental justice movement, and tests the CEC's process against these norms.[104] While its analysis is flawed, the fact that the CEC acknowledges the legitimacy of environmental justice goals and analyzes its compliance with them is a significant victory for the community. The Commission conceded that this is not a subject it usually analyzes.[105]

The Commission's discussion largely equates an environmental justice analysis with evaluating project impacts under CEQA and insuring project compliance with all relevant existing standards and laws. According to the Commission, CEQA includes a cumulative impacts analysis that considers impacts from existing pollution sources. Moreover, existing regulatory standards, including air quality standards, already protect for populations especially sensitive to pollutants.[106] The short answer to these arguments is that adherence to existing environmental laws has not stopped the disproportionate siting of unwanted facilities or the disproportionate environmental harms suffered by poor communities and communities of color. Indeed, these laws have produced this exact result.[107]

97. *Id.* at 9.

98. *Id.* at 7 (citing FSA, *supra* note 3).

99. Holmes Testimony, *supra* note 96, at 3–4.

100. Luke Cole, Testimony before the California Energy Commission (July 12, 1995).

101. Several members of the community also testified in support of the project, arguing that the project's economic benefits to the community outweigh what they described as subjective fears about environmental impacts or diminished property values. *See* PROPOSED DECISION, *supra* note 44, at 80 n.45 (summarizing testimony). *See also* George W. Davis, *Planned Power Plant Offers Many Benefits*, S.F. CHRON., Nov. 16, 1995 ("There is no doubt that S.F. Energy will be contributing to environmental improvement in an area that has become the Rust Belt of San Francisco.").

102. *See generally* EDELSTEIN, *supra* note 49; BROWN & MIKKELSEN, *supra* note 49.

103. Osceola Washington, Testimony before the California Energy Commission 2–3 (July 4, 1995).

104. It stated: "The Commission regards the goals of environmental justice to include avoiding (and in some cases counteracting) decisions or policies that result in disproportionately high pollution or health risk exposure to minorities or persons of low income. The Commission also recognizes a goal of promoting a significant measure of community self-determination in shaping future development. PROPOSED DECISION, *supra* note 44, at 170.

105. *Id.* at 170.

106. *Id* at 181–182.

107. *See* Luke Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L. Q. 619, 642–647 (1992) (arguing that application of environmental laws is what has resulted in poor people and people of color bearing a disproportionate share of environmental burdens); Richard Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 Nw. U. L. REV. 787, 811–815 (1993) (suggesting that much environmental legislation did not focus on environmental problems of greatest concern to minority communities).

The Commission's decision also emphasizes the openness of CEC's process and opportunities for public access and participation,[108] argues that it applies a single standard to judge impacts in all communities, and points out that it has sited facilities in all types of communities.[109] An open and fair process, however, no matter how well-designed, does not address the substantive claims of injustice raised by a community. Nor does the purported lack of animus by the Commission, to which it consistently alludes, prove the lack of discriminatory impact of its actions on the community.[110]

The Commission congratulates itself for the elimination of an alternative site, the Innes Avenue site, early in its review process, and cites this as evidence of the soundness of its process from an environmental justice perspective.[111] But basic land use planning rules rather than any special sensitivity toward environmental justice concerns explains this result; the CEC eliminated a site that conflicted with a half dozen local and city land use plans.

The decision also makes repeated note of the community divisions concerning the power plant, using them to show that there is nothing environmentally unjust about the project.[112] Diversity in community opinion, however, is not probative of the "fairness" of a project; more perniciously, this line of thinking encourages the already existing tendency of project applicants to foster community splits, through economic blandishments or otherwise. SF Energy has pursued this strategy, in subtle and not-so-subtle ways. At a Port of San Francisco hearing about the plant, for instance, the company paid seventy-five homeless people ten dollars each to come to the hearing and support the project.[113]

Finally, the CEC decision devotes only a couple of paragraphs to its Title VI compliance, stating in conclusory fashion that siting the project will not violate Title VI.[114]

Fully participating in the CEC's hearings involved a major commitment of time and resources for the community and its legal representatives. Although the CEC rejected all of the community's environmental justice arguments, the effort nonetheless was worthwhile. The community's participation helped fuel its organizing efforts, gave voice to affected residents, created a record for later legal challenges, and educated the CEC—quite clearly for the first time—about the principles of environmental justice.

D. Seeking a Temporary Moratorium on the Siting of Polluting Facilities

With the Energy Commission's conditional approval of the project, the battle has shifted to the local decisionmaking arena. As noted above, the San Francisco Board of Supervisors will eventually determine whether to approve a lease with SF Energy for the Port Site. In addition, community activists initiated a call for San Francisco to impose a temporary moratorium on the siting of new pollution-producing facilities in Bayview-Hunters Point until the city can investigate the causes of disproportionate health problems and propose land use policies to help address them. While moratoria based on environmental justice concerns have been introduced in a few other jurisdictions, few have been adopted to date.[115]

108. PROPOSED DECISION, *supra* note 44, at 172.

109. *Id.* at 181.

110. As Professor Gerald Torres explains, "[e]nvironmental regulations, like other regulations, gain no immunity by claiming color-blindness where a demonstrable impact on subordinated racial groups exists." Gerald Torres, *Introduction: Understanding Environmental Racism*, 63 U. COLO. L. REV. 839–841 (1992).

111. PROPOSED DECISION, *supra* note 44, at 182–184.

112. *Id.* at 180, 195. In its draft decision, the Commission argued that an environmental justice framework is not appropriate if there is not unanimous opposition to a project, and presented this case as one of competing "environmental justice visions"—between those who viewed the project as another undesirable, polluting facility, and those who viewed it as an environmentally and economically beneficial redevelopment project that would avoid the further economic decline of the community. *Id.* at 173–177.

113. Jane Kay, *Energy Firm Paid Ringers at Hearing; Port Commission Wasn't Impressed*, S.F. EXAMINER, Feb. 1, 1995. The effort blew up in the company's face when some members of the group hijacked a bus chartered by the company to a bar, and the police had to be called in. SF Energy later apologized, calling the stunt "dumb, naive, and stupid." *Id.*

114. PROPOSED DECISION, *supra* note 44, at 192. It further concludes that Title VI is not sufficiently related to the design, construction, or operation of a power plant to require that it be considered an applicable "law, ordinance, regulation and standard" which the Commission must evaluate. *Id.*

115. One successful effort has been in Chester, Pennsylvania, where in 1994 the City Council amended the local zoning ordinance to prohibit any waste facilities from being constructed or operated unless an applicant can demonstrate by convincing evidence that the construction or operation of a facility will not produce a net increase in environmental pollution. *See* City of Chester Ordinances § 1365.02(f). In Georgia, legislation authored by Representative Bob Holmes would have imposed a moratorium on locating hazardous waste facilities in areas which already have concentrations of hazardous facilities. *See* Georgia H.B. 368 (1993). *See also* Environmental Justice Act of 1992, H.R. 5326, 102d Cong., 2d Sess. (1992) (introduced by Representative John Lewis) and S. 2806, 102d Cong., 2d Sess. (1992) (introduced by Senator Al Gore) (requiring moratorium on new hazardous waste facilities in the nation's 100 worst environmental high-impact areas); Environmental Equal Rights Act of 1993, H.R. 1924, 103rd Cong., 1st Sess (1993), introduced by Representative Cardiss Collins (restricting siting of new hazardous waste facilities in "environmentally disadvantaged communities").

In a related vein, two commentators have proposed a model local ordinance that would require proponents of hazardous waste facilities to develop baseline data about community expo-

As proposed by community advocates, the moratorium would apply to industrial facilities in most manufacturing categories. It would prohibit San Francisco, for a period of eighteen months, from permitting any new or expanded facility in Bayview-Hunters Point that discharges or may potentially discharge air, water, or hazardous pollutants. During this time, the city will investigate the elevated rates of cancer, respiratory illness, and other health conditions in the community, and plan for and adopt changes in land use regulations based on the findings of its investigation.[116] A facility can be exempted from the freeze if the City determines that its operations will not pose a significant or cumulative impact to public health and safety, and that the facility will be harmed by the moratorium.[117]

The idea of a moratorium proposal quickly won support from the Department of Public Health and several supervisors.[118] In early March, 1996, Supervisor Angela Alioto introduced a moratorium proposal, although one considerably less detailed than that advocated by the community. Alioto explained the need for such a measure by noting that "[t]he incidence of breast cancer in African American women is out of control, and that has to be investigated before any plant that emits anything is allowed. The last thing they need is another power plant. It would never happen in the Marina, the Sunset, or the Richmond [more affluent San Francisco neighborhoods], period."[119]

A temporary moratorium of the type promoted by the community raises several legal issues, although none pose a serious obstacle to its enactment. These issues are discussed below.

1. *Local Authority To Enact a Moratorium*

Local governments have broad authority under their police power to adopt zoning regulations,[120] which are valid so long as they are reasonably related to promoting the public health, safety, morals, or general welfare.[121] Interim development controls like moratoria are a well-established feature of land use regulation. They are generally promoted as a means to freeze development activity while a locality studies a problem within its jurisdiction and engages in a planning process to correct it. Such controls have grown in popularity in recent years, having been used to freeze development of T-shirt shops, video arcades, mobile homes, and billboards.[122]

In California, state zoning law provides specific authority for local governments to adopt interim development ordinances.[123] In San Francisco (a charter city not limited by the provisions of state zoning law) such measures are authorized by municipal statute when they are necessary to further the public health, safety, peace and general

sures and health conditions before receiving local land use approvals. The authors argue that this data would help the government better evaluate the environmental and health effects of these facilities and help the public's efforts to document the casual relationship between exposure to environmental contaminants and subsequent health effects. *See* B. Suzi Ruhl & Jeffrey Roseman, *Locking in Environmental Risk: A Model Environmental and Health Assessment Baseline Ordinance*, 9 J. LAND USE & ENVTL. L. 307 (1995).

116. *See* MORGAN HEIGHTS HOMEOWNERS ASSOCIATION AND GOLDEN GATE UNIVERSITY'S ENVIRONMENTAL LAW AND JUSTICE CLINIC, DRAFT PROPOSED MORATORIUM PROHIBITING LOCAL APPROVAL OF NEW MAJOR INDUSTRIAL FACILITIES IN THE BAYVIEW-HUNTERS POINT COMMUNITY (Jan. 22, 1996).

117. *Id.* at 3.

118. It also has triggered some of the same divisions underlying the project itself. *See, e.g.*, George W. Davis, *Planned Power Plant Offers Many Benefits*, S.F. CHRON., Nov. 16, 1995 ("While we are quite concerned about [the findings showing that women in our community have higher than expected levels of breast and cervical cancer], pointing fingers at industrial facilities that have not yet been built is a red herring. We do know that the health of our community will improve as we increase the wealth of our community. Banning the environmental benefits reaped from replacing outdated technology and environmental cleanup associated with new development keeps us shackled to the problems of the past"); *see also* Kay, *supra* note 53 (quoting community leader Espinola Jackson that neighborhood health problems have nothing to do with proposed plant).

119. Clarence Johnson, *Disputed S.F. Power Plant Expected to Get 1st OK, Neighbors Worry About Health Issues*, S.F. CHRON., Mar. 4, 1996, at A13; *see* Kay, *supra* note 53.

120. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Berman v. Parker, 75 S.Ct. 98 (1954). In California, the general police power to enforce and enact land use regulations is contained in Article XI, § 7 of the Constitution, which provides that "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."

121. *Euclid*, 272 U.S. at 395. Under California law, where an ordinance significantly affects residents outside the city that has enacted it, the ordinance must be reasonably related to the welfare of the affected region. Associated Home Builders, Inc. v. City of Livermore, 18 Cal.3d 582, 607–610 (1976).

122. *See generally* Thomas Roberts, *Interim Development Controls* in ZONING AND LAND USE CONTROLS (Patrick Rohan ed., 1995).

123. CAL. GOV'T CODE § 65858. The ordinances must be based on a legislative finding that additional development would result in a "current and immediate threat to the public health, safety or welfare." *Id.* State law authorizes local governments to adopt these controls as urgency measures, i.e. measures that do not require a public hearing or more than one reading, and become effective immediately. CAL. GOV'T. CODE § 6585. The ordinances require a four-fifths vote of a legislative body for adoption, and can last no more than two years, including extensions. A recent court of appeal decision holds that in enacting §65858, the Legislature intended to occupy entire field of interim zoning moratoria, and therefore that a locality cannot enact a zoning moratorium by following regular zoning procedures. Bank of the Orient v. Town of Tiburon, 220 Cal. App. 992, 1004–1005 (1990).

welfare.[124] As with other land use restrictions, courts have upheld moratoriums as within the police power so long as their purpose is reasonably related to promoting the public welfare.[125] For example, in the leading case of *Miller v. Board of Public Works*,[126] the court held:

> It is a matter of common knowledge that a zoning plan of the extent contemplated in the instant case cannot be made in a day. Therefore, we may take judicial notice of the fact that it will take much time to work out the details of such a plan and that obviously it would be destructive of the plan if, during the period of its incubation, parties seeking to evade the operation thereof should be permitted to enter upon a course of construction which might progress so far as to defeat in whole or in part the ultimate execution of the plan.[127]

Thus, courts in California have upheld freezes on subdivisions pending completion of a countywide water development and conservation plan,[128] freezes on permits pending preparation and adoption of a redevelopment plan,[129] a moratorium on the issuance of building permits in an area pending full zoning study,[130] and a ban on electronic "reader boards" pending development of regulations for their size and location.[131]

On the other hand, courts have invalidated moratoriums that are unreasonable in time or scope.[132] In a few cases, courts have invalidated moratoriums that have an insufficient connection to protecting public health or safety.[133]

The proposed moratorium is clearly related to promoting the public health and welfare of city residents. Studies have documented serious, disproportionate health problems in Bayview-Hunters Point, and the Health Department has indicated that environmental contaminants may be one source of these problems. The moratorium would freeze the siting of facilities that might exacerbate these health conditions, and allow the City to determine if there is a connection between health effects

124. S.F. PLAN. CODE § 306.7 (1987). As a charter city, San Francisco is free to adopt its own moratorium procedures. CONTINUING EDUCATION OF THE BAR, CALIFORNIA ZONING PRACTICE §4.30 (1969 & 1995 Supp.); LONGTIN'S CALIFORNIA LAND USELAW § 3.26(4) (2d ed. & 1995 Supp.); Hunter v. Adams, 180 Cal. App.2d 511 (1960). Under San Francisco law, a moratorium can be adopted by a majority vote of the Board of Supervisors. S.F. PLAN. CODE § 306.7(c). Where the controls are initiated by the City Planning Commission, they can be overturned only by a 2/3 vote of the Board of Supervisors. *Id.* § 306.7(f). The controls are limited to an initial term of 18 months, and may be extended to last for a total of 2 years *Id.* § 306.7(h). The City Department of Planning is required to conduct a study of the contemplated zoning proposal triggering the moratorium, and report to the Board or Planning Commission every six months about its progress. *Id.* § 306.7(i).

125. *See, e.g.* Almquist v. Marshan, 308 Minn. 52 (1976) (upholding moratorium until new zoning ordinance adopted, based on need to insure orderly development of township); Brazos Land Inc. v. Bd. County Commissioners of Rio Arriba County, 115 N.M. 168 (1993) (upholding moratorium to develop more restrictive county subdivision regulations addressing issues of density control and groundwater contamination); Jackson Court Condominiums v. City of New Orleans, 874 F.2d 1070, 1077 (5th Cir. 1989) (upholding moratorium pending zoning study of time-sharing and transient vacation rentals to protect integrity of residential neighborhoods); *see also* Pro Eco v. Bd. of Commissioners, 57 F.3d 505 (7th Cir. 1995) (in rejecting takings claim based on moratorium on landfills, court notes that concern for public health from operation of commercial sanitary landfills is sufficient basis for ordinance). *But see* Lockary v. Kayfetz, 917 F.2d 1150, 1154-55 (9th Cir. 1990) (moratorium on water hookups could be irrational if stated reason for denying hookups, a water shortage, was pretextual).

126. 195 Cal. 477 (1925).

127. *Id.* at 496.

128. Metro Realty v. County of El Dorado, 222 Cal. App. 2d 508 (1963).

129. *See* Hunter v. Adams, 180 Cal. App. 2d 511, 522–23 (1960).

130. Ogo Associates v. City of Torrance, 37 Cal. App. 3d 830 (1974).

131. Crown Motors v. City of Redding, 232 Cal. App. 3d 173 (1991). In this case, the court concluded that the city's desire to eliminate visual blight justified the ban, emphasizing the broad powers of local governments to enact ordinances to maintain the public health, defined as "the wholesome condition of the community at large." *Id.* at 178. *See generally* LONGTIN'S CALIFORNIA LAND USE LAW, *supra* note 124.

132. Some statutes specifically limit the duration of interim controls; in California, for instance, the limit is two years, and it is strictly adhered to. *See* Martin v. Superior Court, 234 Cal. App. 3d 1765 (1991). Absent such statutory limits, controls of three years or less have generally been upheld, while those lasting four years or longer may be invalidated. The courts look to the needs of the community in enacting the ordinance and whether the local government is acting diligently to study the problems at hand and engage in planning efforts. Interim Development Controls, *supra* note 122, at §22.02; *see* LONGTIN'S CALIFORNIA LAND USE, *supra* note 124.

133. In one recent case, for instance, a town in New York enacted a moratorium on approvals for using property to enhance cellular telephone service based on the need for additional time to study the effects of electromagnetic fields (EMFs), as well as public concerns about the effects of EMFs. The court found that there was no evidence that the installation of antennas poses a health risk to residents and that a moratorium based solely on unreasonable public fears of health risks was not valid. (It also noted that awaiting future studies on the subject might necessitate a lengthy moratorium.) Cellular Telephone Co. v. Village of Tarrytown, 624 N.Y.S. 2d 170 (1995). Cases like this are distinguishable on their facts from San Francisco's proposed freeze, in which there are well documented community health problems in the affected area, as well as some evidence of a potential relationship between these problems and discharges from industrial facilities. These cases also ignore the extensive social-psychological, financial and emotional burdens that polluting facilities impose on community residents. *See discussion supra* note 49

and the concentration of industry and what zoning changes in the area would be necessary to address the situation. It thus would be well within the city's authority to adopt the moratorium.

2. *Possible Takings Claims*

Since the Supreme Court's decision in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*[134] (*First English*), it is clear that in some circumstances a regulatory taking may occur even where the regulation is only temporary in nature. In *First English*, the Court held that once a taking is found to have occurred, the state must pay just compensation for the period of the taking, even if it is only temporary. Thus, even though only temporary, the proposed moratorium raises takings concerns.

The relevant test for whether a "temporary taking" has occurred appears to be the same as the one for permanent takings.[135] The Supreme Court has held that a zoning ordinance may constitute a taking if it does not substantially advance legitimate state interests or denies an owner economically viable use of his land.[136]

As discussed above, the interest that the moratorium seeks to advance is legitimate, and the ordinance substantially advances this interest.[137] Nor does the moratorium deny property owners of economically viable use of their property.[138] The moratorium restricts the ability of property owners to obtain permits for a limited class of manufacturing facilities that result in certain types of actual or potential pollution. It does not even completely prohibit these activities, moreover, since it allows exceptions if a facility can demonstrate hardship from the moratorium and that its operations will not significantly affect public health.[139] Property owners are free to proceed with alternate and less harmful uses of the property—such as warehouses, storage facilities, or nonpolluting, green industries.[140]

Moreover, cases following *First English* have rejected claims based on development delays or moratoria for a reasonable time period.[141] On remand from the Supreme Court in *First English* itself, for example, the California court of appeal concluded that an interim construction moratorium of close to two and a half years was a reasonable period to allow the county to

134. 482 U.S. 304 (1987).

135. Katherine Stone and Philip Seymour, *Regulating the Timing of Development: Takings Clause and Substantive Due Process Challenges to Growth Control Regulations*, 24 Loy. L.A. L. Rev. 1205, 1215 (1991).

136. Agins v. Tiburon, 447 U.S. 255 (1980); Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886 (1992).

137. *See supra* text accompanying notes 133–134. Regardless of whether this test is identical to the test for determining whether a legislative enactment is rationally related to the general welfare, the analysis under the two tests is extremely similar. *See* Stone & Seymour, *supra* note 135, at 1229–1233.

138. As the Ninth Circuit recently explained, the term "economically viable use" "has yet to be defined with much precision. However, 'the existence of permissible uses generally determines whether a development restriction denies a property owner the economically viable use of its property.'" Suitum v. Tahoe Regional Planning Agency, 80 F.3d 359; 1996 U.S. App. LEXIS 6057, at *3 (9th Cir. 1996) (citations omitted); *see* Stone & Seymour, *supra* note 135, at 1213 (in *First English*, "the Supreme Court appears to have accepted the standard that "all use" must be denied, at least for temporary takings.")

139. *See* Hodel v. Virginia Surface Min. & Recl. Assn., 452 U.S. 264, 297 (1981) (plaintiffs cannot establish that statute effects taking because they may be able to obtain relief from its provisions through variance or waiver).

140. *See* First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 212 Cal. App. 3d 1353, 1367–71 (1989) (no taking had been alleged by complaint because the ordinances allowed at least some minimal recreational use of the plaintiff's property); Tabb Lakes v. U.S., 10 F.3d 796, 800–801 (D.C. Cir. 1993) (Corps of Engineers' cease and desist order that stopped filling of wetlands for three years did not constitute taking because other viable uses of property were available to owner, through permit or otherwise); Jackson Court Condominiums v. City of New Orleans, 874 F.2d 1070, 1080 (5th Cir. 1989) (moratorium on establishment of time-share condominiums in residential areas did not deprive owner of all economically viable use of property; constitutional prohibition against taking without compensation does not guarantee the most profitable use of property). *See* Edward Ziegler, *Interim Zoning and Building Moratoria: Temporary Takings After First English*, 12 Zoning & Plan L. Rep. 97, 102 (Feb. 1989) ("Interim controls which allow some use of land, either on the face of the ordinance of by administrative relief provision, put a landowner in a difficult position when attempting to assert a temporary taking claim.")

141. The Supreme Court in *First English* did not articulate a test for when delay would constitute a taking. It assumed that a denial of all use of plaintiffs' property for close to six years would require compensation. 482 U.S. at 319–322. On the other hand, it found that "quite different questions" would arise in "the case of normal delays in obtaining building permits, changes in zoning ordinances, variances and the like." *Id.* at 321.; *See Tabb Lakes*, 10 F.3d at 801 (depreciation in value of property during 3 year process of governmental decisionmaking not a temporary taking); Zilber v. Town of Moraga, 692 F. Supp. 1195, 1202–07 (N.D. Cal. 1988) (moratorium on subdivisions pending study of general plan regarding ridge and hillside open space is not taking because it advances town's interest in health and safety of residents and does not categorically prohibit development but merely restricts it; a one-and-a-half year development moratorium is neither unreasonable or sufficiently burdensome to require compensation); Guinnane v. City & County of San Francisco, 197 Cal. App. 3d 864, 869–870 (1987), *cert denied*, 109 S.Ct. 70 (1988) (delay caused by normal government decision-making process (in this case 1 and 1/2 years for processing building application) does not constitute temporary taking); *c.f.* Kawaoka v. City of Arroyo Grande, 17 F.3d 1227, 1237 (9th Cir), *cert denied*, 115 S.Ct. 193 (1994) (even if water moratorium delayed development for a year, it would not rise to consitutional dimensions). *See* Roberts, *supra* note 122, at 22.03[3] (1995 Supp.) (collecting cases); Zigler, *supra* note 140, at 103 (interim ordinances of short duration enacted in support of a pending zoning change would seem to be appropriately characterized as normal delays in rezoning process).

study what structures could be safely developed in the area, and that therefore no temporary taking had occurred.[142] This is consistent with the jurisprudence before *First English*, in which courts found that temporary development moratoria do not require compensation, at least where the delay is limited in duration and justified by legitimate planning concerns.[143] Here, the length of the moratorium is well within the time periods endorsed as reasonable by the courts.

Because the moratorium advances a legitimate governmental interest, allows for continued economic use of property, and will be effective for a reasonable, eighteen month time period, a successful takings challenge would be unlikely.

3. *Hazardous Waste Preemption Issues*

Some of the facilities potentially affected by the moratorium are regulated by state and federal hazardous waste law, raising issues of possible state and federal preemption. Under California's Hazardous Waste Control Act (HWCA), local governments are barred from prohibiting or unreasonably regulating the disposal, treatment or recovery of waste at existing hazardous waste facilities unless the facility presents an imminent and substantial endangerment.[144] The legislative intent underlying this provision, however, was to enact a narrow preemption provision, preventing localities from closing existing hazardous waste facilities.[145] The Legislature did not intend to preempt local regulation which does not prohibit disposal and treatment of hazardous waste,[146] including local zoning and land use regulations.[147] Thus, a temporary ban on the permitting of new or expanded facilities, in a very limited area of San Francisco, which does not regulate or prohibit the activities of existing facilities, would not be preempted by state law.

The federal counterpart to the HWCA, the Resource Conservation and Recovery Act[148] (RCRA), specifically authorizes states to impose more stringent hazardous waste management requirements, including site selection criteria, than those mandated by federal law.[149] In some instances, however, overly stringent state criteria may be preempted by RCRA if they conflict with the congressional goals underlying the statute.[150] A temporary moratorium

142. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 212 Cal. App. 3d 1353, 1372 (1989). The court also found that the regulations substantially advanced the state interest in public safety and did not deny plaintiff all use of its property. *Id.* at 1365–1372.

143. *See* Hunter v. Adams, 180 Cal. App. 2d 511, 522-23 (1960) (freezing of permits for one year pending preparation of redevelopment plan reasonably necessary to promote general welfare and did not deprive plaintiff of his property); Hollister Park Inv. Co. v. Goleta County Water Dist., 82 Cal. App. 3d 290 (1978) (restriction on new water service connections during drought conditions until a plan for expansion of water sources developed not compensable taking); *see also* Peacock v. County of Sacramento, 271 Cal. App. 2d 845 (1969) (interim ordinance that effectively froze development of plaintiff's land for three years pending county's study of how much land it needed for airport project was reasonable; continuation of freeze beyond that period was unreasonable and constituted a taking); *Metro Realty*, 22 Cal. App. 2d at 516–518 (temporary depression in value of lands pending adoption of water development plan does not require compensation; this is type of hardship properly borne by individuals as price of living in a modern enlightened and progressive community); *see* Zigler, *supra* note 140, at 98; Stone & Seymour, *supra* note 135, at 1209–1210 (federal courts generally decline to find that temporary local development moratoria amount to a taking of property, at least where delay is limited in duration and justified by legitimate planning concerns (citing cases)).

144 CAL. HEALTH & SAF. CODE § 25149. *See also* CAL. HEALTH & SAF. CODE § 25199.9 (local land use decisions denying approval for new hazardous waste facilities can be appealed to the Governor, who can reverse the decision if it is inconsistent with local planning requirements and the facility has obtained other necessary permits).

145. IT v. Solano County, 1 Cal. 4th 81, 94, 98–100 (1991) (Legislature concerned that local restrictions on existing hazardous waste disposal might accelerate a developing reduction in statewide disposal capacity and interfere with the functioning of existing, state permitted hazardous waste facilities; it sought to preempt local land use restrictions on existing facilities to minimum extent necessary to serve these concerns); Casmalia Resources, Ltd. v. County of Santa Barbara, 195 Cal. App. 3d 827, 834-36 (1987).

146. *Id.*

147. CAL. HEALTH & SAF. CODE § 25105 (Hazardous Waste Control Act law does not limit local agencies in enforcement of law) § 25147 (stating that it is not intent of law to preempt local land use regulation of existing hazardous waste facilities); IT, 195 Cal. App. 3d at 93. In IT, the California Supreme Court held that enforcement of a local permit condition requiring that all treatment and storage of hazardous waste be set back at least 200 feet from the perimeter of the property was not preempted by the Hazardous Waste Control Act. *See also* Comment, *Tanner Hazardous Waste Streams—Controversy Over "Fair Share" Responsibility*," 23 U.C. DAVIS L. REV. 923, 934 (1990) (explaining that purpose of Hazardous Waste Control Act was not to promote siting of new facilities; rather "legislature intended to discourage siting of new hazardous waste land disposal facilities" while simultaneously improving programs of source reduction).

148. 42 U.S.C. §§ 6901–6992k (1994).

149. 42 U.S.C. § 6929.

150. Thus, statutes that amount to explicit or de facto bans on activities that are encouraged by RCRA are likely to be preempted. Other local measures are likely to be upheld if they are reasonably related to a legitimate local concern for safety or welfare. *See* ENSCO, Inc. v. Dumas, 807 F.2d 743, 745 (8th Cir. 1986) (ordinance prohibiting treatment or disposal of acute hazardous waste in county conflicts with RCRA goal of safe disposal and treatment of hazardous waste); Ogden Environmental Services v. City of San Diego, 687 F. Supp. 1436 (S.D. Cal. 1988) (City of San Diego's denial of a conditional use permit for a demonstration hazardous waste treatment unit where the U.S. Environmental Protection Agency had already granted a RCRA permit to the facility conflicted with RCRA's goals of facilitating treatment of hazardous waste); *see also* Blue Circle Cement v. County of Rogers, 27 F.3d 1499 (10th Cir. 1994) (permit requirement for burning of hazardous waste fuels preempted if amounts to de facto ban since it would interfere with Congressional goal of promoting recycling and recovery and minimizing land disposal of hazardous waste); *but c.f.* Hazardous Waste Treatment Council v. Reilly, 938 F.2d 1390, 1395 (D.C. Cir. 1991) (upholding state limit on new commercial hazardous waste treatment facility which did not amount to ban on any particular waste treatment technology as consistent with RCRA); *see generally* Patrick O'Hara, *The NIMBY Syndrome Meets the Preemption Doctrine: Federal Preemption of State and Local Restrictions on the Siting of Hazardous Waste Disposal Facilities*, 53 LOUISIANA L. REV. 229 (1992).

would not conflict with RCRA's objectives, since the moratorium does not attempt to substantively limit hazardous waste management activities promoted by federal law, or permanently prohibit their siting.[151] Thus, neither the HWCA nor RCRA preempt the moratorium as applied to facilities handling hazardous waste.

4. Summary

San Francisco has authority to adopt the proposed temporary siting moratorium in Bayview-Hunters Point. Such a moratorium would not constitute a taking of any private property, nor be preempted by state or federal hazardous waste law.

IV. Conclusion

The fate of SF Energy's proposed power plant remains uncertain. Regardless of the outcome of the dispute, however, the community's legal and organizing efforts provide important lessons for other similarly situated communities. Using three imaginative strategies, project opponents have effectively organized against the plant and coalesced around broader community health and environmental concerns. These strategies have allowed them to fight the siting battle on terms more accessible and empowering to the community.

One simple but potent strategy is to document the disparate concentration of polluting facilities and the disproportionate health problems in the community. In the Bayview Hunters Point dispute, developing this profile, particularly in graphic form, has galvanized the local populace and focused its attention on longstanding environmental inequities in the area. Of equal importance, this information has provided credibility with local government health officials and the media. The city's health department has become an active partner in investigating community health and environmental conditions, and actively supported the community's call for a temporary siting moratorium.

A second approach is to directly engage governmental decision makers about environmental justice issues. Many decision makers remain uninformed about environmental justice principles or consider them outside their purview, and thus slight the broader health, environmental, and socio/economic concerns of affected communities when evaluating projects. As demonstrated in this case, the administrative review process can be used creatively to educate decision makers and broaden the scope of their analysis; here, the community's extensive testimony prompted the Energy Commission to carry out its first (if highly truncated) environmental justice project analysis.

Finally, when faced with an immediate siting decision, a community may lack data about past disparate siting decisions or current environmental harms in their community. A temporary siting moratorium is a viable land use tool that can give municipalities the opportunity to examine inequitable environmental conditions and develop land use policies that address these imbalances. These policies may include the development of "fair share" criteria to insure a more equitable distribution of unwanted facilities,[152] the adoption of new land use elements in a locality's general plan that explicitly address environmental justice concerns,[153] or other innovative measures.

Collectively, the strategies of the Bayview-Hunters Point community have resulted in more than just an energetic campaign in opposition to the power plant. They have also led to a better informed and more assertive community, highly focused on tackling a range of existing community health and environmental problems. These efforts are likely to produce important benefits that last far beyond this particular siting controversy.

151. *See* LaFarge Corp v. Campbell, 813 F. Supp. 501 (W.D. Texas 1993) (state requirement that hazardous waste incinerators cannot be sited within one half mile of established residences not preempted by RCRA; requirement does not absolutely prohibit incinerators and provides reasonable response to safety concerns from spills); North Haven Planning & Zoning Comm'n v. Upjohn Co., 753 F. Supp. 423, 430–431 (1994), *aff'd* 921 F.2d 27 (2d Cir. 1990), *cert denied*, 50 U.S. 918 (1991) (local regulation requiring removal of waste unless stored in enclosed structure or site plan approved by government based on health, safety, sanitation and aesthetics does not conflict with RCRA goals).

152. One example of this is New York City's "Fair Share Criteria," adopted in 1990. N.Y.C. CHARTER § 203. The criteria require city agencies, before siting any municipal facilities, to consider the extent to which the neighborhood character would be adversely affected by a concentration of facilities, the distribution of similar facilities throughout the city, and the location of other facilities having similar environmental impacts within a one-hale mile radius of the project. RCNY Appendix A to Title 62, § 6.42. *See* Silver v. Dinkins, 601 N.Y.S. 2d 366, 370-71 (Sup. Ct. 1993) (holding that city violated the criteria by not engaging in a meaningful search for alternative sites where a neighborhood already has a high concentration of facilities and rejecting the city's analysis that since one neighborhood already had a large concentration of undesirable facilities, it would not be adversely affected by two more). *See generally* Richard Rogers, *New York City's Fair Share Criteria and the Courts: An Attempt to Equitably Redistribute the Benefits and Burdens Associated With Municipal Facilities*, 12 N.Y.L. SCH. J. HUM. RTS. 193 (1994).

153. *See* D. Dwight Worden, *Environmental Equity: Using California Laws in a New Way*, 3 LAND USE FORUM 18, 21 (Winter 1993). Worden argues that localities could adopt a new "Land Use Equity Element" in their general plans. This element could include standards on how undesirable or desirable land uses will be distributed in the community, how close to residences toxic and hazardous facilities will be permitted, or standards on what the community considers acceptable levels of pollution or other environmental impacts. As an element of the general plan, these standards would govern future land use decisions in the locality.

V. Postscript

On June 18, 1996 the San Francisco Board of Supervisors unanimously adopted a resolution urging Mayor Willie Brown to instruct all city agencies not to take any action that would permit construction of the proposed power plant.[154] Mayor Brown supported the measure. In practical terms, the resolution means that the City will turn down any attempt to site the plant on City-owned land, such as the Port site. Board supervisors cited health concerns in voting against the plant, in particular the elevated breast cancer rates and disproportionate concentration of toxic industries in the community.[155] The unanimous vote represents a stunning victory for the community, after two years of intense struggle. The fight, however, is not necessarily over; the company may still seek to site the plant on privately-owned land, which would not require City approval of any lease or land use permit. For the moment, though, as one community leader stated, "[t]his is a historic event ... [v]arious communities have come together and defeated a multinational company with millions of dollars."[156]

154. Edward Epstein, S.F. Rebuffs Controversial Plan For Power Plant in Bayview, S.F. CHRON., June 18, 1996, at A.

155. Barbara Nanney, *City Ready to Dump Power Plant*, S.F. INDEPENDENT, June 18, 1996.

156. Barbara Nanney, *No Power Plant*, S.F. INDEPENDENT, June 18, 1996.