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Environmental Law and Justice Clinic Fall 2013 Report

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GOLDEN GATE UNIVERSITY SCHOOL OF LAW
ENVIRONMENTAL LAW AND JUSTICE CLINIC
FALL 2013 REPORT

The Environmental Law and Justice Clinic at Golden Gate University School of Law provides legal and technical assistance to communities that suffer the most from pollution. We focus on communities in California, although some projects address pollution reduction at the national level. Three core areas dominated our efforts this year: clean drinking water for low-income communities, clean energy for California, and air pollution reduction. In addition, we provided legal consulting to numerous organizations that sought our specialized expertise in clean air, energy, and environmental justice strategy.

For our work, we were honored in August with the American Bar Association's prestigious [Dedication to Diversity and Justice Award from the Section of Environment, Energy, and Resources](#). The Section boasts 11,000 members nationwide.

Safe Drinking Water for Communities Reliant on Contaminated Water

Access to clean drinking water is a basic human necessity and a mark of a developed society such as ours. Yet over 20 million California residents rely on contaminated water for their daily needs. Contaminated water poses serious public health concerns and imposes economic burdens on communities throughout California. If left untreated, contaminated water can lead to “do not drink” orders from health agencies, which then cause residents to expend their limited funds on purchasing bottled water for their everyday drinking and washing needs. When the water is treated, the expensive cost of the treatment is often passed on to consumers. These burdens fall significantly on communities that are already vulnerable – those who struggle with poverty, existing health conditions, and exposure to other environmental toxins while lacking access to health information or care. The Clinic has been working to advocate for clean drinking water in East Palo Alto and the Central Coast.

East Palo Alto Well Contamination

The Clinic has been collaborating with Community Legal Services in East Palo Alto (CLSEPA) and Youth United for Community Action (YUCA) to address two groundwater wells in East Palo Alto with elevated levels of manganese that supply drinking water to thousands of residents. East Palo Alto is more than 60% Latino, and 35% of the city's population (more than twice the national average) has achieved less

than a high school diploma. Elevated manganese in the water renders it at times undrinkable and unusable because of its dark brown color, offensive odor, and unpleasant taste.

Agricultural Pollution of Water in the Salinas Valley and Beyond

This effort grows out of our work with the legal aid group California Rural Legal Assistance (CRLA) and the Environmental Justice Coalition for Water that began last year to address agricultural pollution. In November, we joined CRLA and the lead counsel, the Stanford Environmental Clinic, as co-counsel and filed a petition in the Sacramento County Superior Court seeking to enhance state regulation of irrigated agriculture.

The clients are a diverse coalition of environmental justice, conservation, and fishing protection organizations (Santa Barbara Channelkeeper, The Otter Project, Environmental Justice Coalition for Water, Pacific Coast Federation of Fishermen's Associations, and California Sportfishing Protection Alliance) and an elderly woman, Antonia Manza, on a fixed income in Monterey County who has not been able to drink water from her tap for a decade because it is contaminated with agricultural waste. The petition challenges an order from the California State Water Resources Control Board, which waives state law requirements for discharge of waste from irrigated agricultural lands. These state law requirements are intended to protect water quality. Despite the State Board's explicit acknowledgement that agricultural discharges continue to pose a severe threat to water quality, the agency weakened previously adopted standards and also failed to require sufficient monitoring and enforcement to ensure the effectiveness of the standards. The petition also challenges the State Board's failure to comply with environmental review requirements in issuing the standards.

Reducing Health Risks of Pollution from Power Plants, Including Greenhouse Gases, Soot, and Smog

Environmental justice communities suffer the most from fossil-fuel based energy generation. In addition to being harmed from the impacts of resource extraction, communities living near power plants suffer when these plants combust fossil fuels to generate power. Burning fossil fuels produces greenhouse gases that are responsible for climate change and air pollution such as nitrous oxides and particulate matter (soot). A typical plant annually produces hundreds of tons of these pollutants and two million tons of greenhouse gases. Without exaggeration, reducing greenhouse gases is the greatest global challenge of this decade with enormous consequences for human health and, indeed, civilization. Aside from causing climate change at the global level, increased greenhouse gases exacerbate soot and smog pollution because of increased incidence of wildfires and high temperatures. The warming planet also has significant health consequences such as heat strokes for those who work outdoors, including many low-wage and farm workers.

As for exposure to fine soot, it causes cardiovascular and respiratory problems and higher death rates. Nitrous oxides and soot also have been linked to asthma attacks and increased hospital visits. In Contra Costa County, for example, where many power

plants are located, the prevalence of asthma in 5 to 17 year olds is about 24%, ten percent higher than the national figure; and the hospitalization rates for asthma for African American children in the county is four times higher than that of Caucasian children. Asthma is the leading cause of school absenteeism for children in that county.

In recognition that California can do much more to reduce pollution from energy generation and that toxic pollution and climate change disproportionately affect low-income communities and people of color, a broad coalition of community advocates has embarked on energy policy work. The Clinic has been at the forefront of this critical work since 2009 when it first represented Pacific Environment.

The Clinic now performs this work through its representation of California Environmental Justice Alliance (CEJA). CEJA is comprised of leading environmental justice organizations throughout the state: Asian Pacific Environmental Network, Center for Community Action and Environmental Justice, Center on Race, Poverty, and the Environment, Environmental Health Coalition, Communities for a Better Environment, and People Organizing to Demand Environmental & Economic Rights.

Currently, the Clinic is lead counsel in the 2012 Long Term Procurement Proceeding (scheduled to end in early 2014), which will shape the “energyscape” of California, and – indirectly – the nation as a whole as it looks to California for innovation and leadership. These proceedings occur approximately every two years before the California Public Utilities Commission and determine in effect how many power plants will be built and in which communities by determining the amount of energy that utility companies must procure. The proceedings also determine policies relating to integration of renewable energy into the grid and storing energy from renewable sources so that energy from sources such as solar and wind can be used even when the sun is not shining or the wind is not blowing. These proceedings historically saw little participation from environmental justice groups because of their highly technical and fast-paced nature until the Clinic stepped in.

The purpose of the 2012 Long Term Procurement Proceeding is to determine the energy procurement needs for ten years into the future for 80% of the state. This proceeding is divided into four sub-proceedings. One of those proceedings concerned whether the Los Angeles Basin and Big Creek Ventura regions needed to build more energy resources to meet need in 2022 concluded in February of 2013. Based on our advocacy, the Commission agreed to cut the proposed energy need from the Los Angeles Basin by half (about two power plants’ worth) and mandated that a substantial portion of the approved procurement come from renewables. This achievement was made possible in part because of the decisions we contributed to last year, in which the Commission had decided that energy conservation and efficiency must first be considered before determining the need.

Also significant was the Commission’s order, based on our advocacy, that the utility meet some of the need with energy storage. This was the first time the Commission required a utility to meet needs through energy storage. Energy storage is an important way to ensure that renewable energy is available (*i.e.*, through storage) whether it is day

or night, windy or calm. Utilities typically rely on fossil fuel plants to back up renewable energy; thus this decision will lead to reductions in future harmful emissions of air pollution. The Commission's order is also expected to encourage development of technology in this area.

In another significant decision in March 2013, the Commission agreed with us and rejected San Diego Gas & Electric's request to build two new power plants in the San Diego area. These decisions are important steps to ensure that California's future energy supply comes from renewable resources, energy efficiency, and conservation.

We continue to expend significant staff resources in these proceedings, with two full-time staff largely devoted to these efforts that have proven effective in reducing power plant pollution. Decisions are expected in the remaining sub-proceedings in 2014; and we will participate in the 2014 Long Term Procurement Plan proceedings on behalf of CEJA as well.

Encouraging Renewable Energy Development on Navajo and Hopi Lands

Since 2006, the Clinic has been lead counsel in a California Public Utilities Commission proceeding for Just Transitions Coalition, a geographically broad coalition supporting the members of the Navajo and Hopi Tribes. The Tribes were injured by decades of coal extraction on their lands. The coal was transported hundreds of miles using water from the lands, leaving the area's aquifer significantly depleted; and the energy generated through burning the coal was used in part by Californians. Just Transitions Coalition sought to use the proceeds from the sale of pollution credits (that were allocated to a California utility, but are currently unused due to the closure of a coal power plant) for incentivizing renewable energy development on tribal lands. The utility opposed this approach, instead advocating for distributing the proceeds to ratepayers, amounting to a few cents to each.

In February 2013, the Commission handed down an unprecedented decision, agreeing with us that the pollution credit proceeds from the now-shuttered plant should be used to encourage renewable development that benefits the Tribes. This significant victory may provide a way for these communities to begin to recover from the devastation caused by the coal extraction from their lands. This decision is the first of its kind that we know of. In many ways, not only did this case achieve real results, but also filled a critical symbolic role – that justice indeed can be achieved for the Tribes.

Assistance to Communities with Their Right to Know and Right to Speak

We continue to co-counsel with other attorneys in representing Californians for Alternatives to Toxics in litigation under the California Environmental Quality Act to push for improved environmental analysis concerning the proposed reopening of a defunct rail line. The rail line, which is between Lombard and Willits, is within 500 feet of nine schools, some of which serve low-income families. Concerns include toxic substances present in the rail corridor infrastructure, potential impacts from disturbing the contaminated soils and rail ties during reconstruction, and use of toxics such as fumigants and herbicides for vegetation control. The potential for exposing the nearby communities

is a significant health concern because some of the same vulnerable populations already suffer from pollution from highway traffic.

After an adverse ruling from the Marin Superior Court on preemption, our client filed an appeal. Briefing in the case has already begun. Our brief argues that federal preemption does not apply to bar environmental review here because a California public agency (North Coast Railroad Authority) voluntarily agreed to conduct environmental analysis in exchange for state funds.

This preemption issue is a significant environmental justice issue because rail carriers rely on federal preemption to argue that they do not need to comply with environmental laws.

The Clinic was also brought in to counsel Silicon Valley Toxics Coalition, when it received a subpoena from a company, which claimed that the Coalition had information about a lawsuit that the company was defending. The subpoena would have required the Coalition to reveal information about its members and staff and to search extensively through its files. With the help of outside counsel, the Clinic was able to protect the Coalition's right to speak without fear that it would have to produce its extensive files that did not even touch on anything related to the lawsuit. The Coalition even received monetary sanctions against the party who issued the subpoena.

Environmental Justice Coalitions

Over the past decade, we have provided significant technical and policy support to several coalitions in the Bay Area. In 2013, we provided analysis to the Bay Area Environmental Health Collaborative and West Berkeley Alliance for Clean Air & Safe Jobs of the public participation plan from the Bay Area Air Quality Management District. In December, the Board of Directors of the air district approved a final plan that is a significant step in the right direction. We also provided comments to the same air district on behalf of the West Berkeley Alliance on its draft metal melting rule. We also provided consulting to California Environmental Justice Alliance in its law reform effort to address industrial facilities.

National Work with Impacts on the Health of Californians

Reducing Lead Pollution

The Clinic sued the U.S. Environmental Protection Agency (EPA) in March 2012 because it had failed to respond to our 2006 petition asking the agency to determine that lead from aviation gasoline poses health hazards and to regulate its use. The lawsuit, filed on behalf of Friends of the Earth, asked the federal court in the District of Columbia to determine EPA's responsibility. Aviation gasoline used in propeller planes is now the largest source of airborne lead in the nation, and harms people living near general aviation airports. (There are seven such airports located on or near the shores of the San Francisco Bay and numerous others in the state.) This effort originated with the Clinic's research, and Earthjustice joined as co-counsel when we filed the lawsuit.

Lead's dangers are now better known than when the EPA first began regulating it. It has no known threshold of safety, according to EPA. Increased levels of lead in blood can cause a variety of adverse health impacts, including the risk of permanent, severe, neurological damage or even death. The toxicity of lead is a special concern for children: exposure to lead is associated with cognitive deficits and behavioral impairments.

As a result of the lawsuit, EPA began to study the effects of lead pollution from aircraft, which the agency contends is a prerequisite to finding that lead from this source poses health hazards. In March 2013, however, we received an adverse ruling from the court that the Clean Air Act does not obligate EPA to make a health hazard determination. The decision was based on the particular way the court read the statute. Despite the ruling, we are continuing our work with Friends of the Earth to tackle this largest source of airborne lead. The Clinic's former Graduate Fellow, Marcie Keever, is at the helm of this effort at Friends of the Earth.

Comments to EPA to Reduce Greenhouse Gases and Toxics from Pulp Mills

Kraft pulp mills use wood products and chemicals to produce pulp. The mills have long been recognized as a significant source of air pollution. They emit soot, nitrous oxides, sulfur compounds that are highly malodorous (including hydrogen sulfide, methyl mercaptan, and dimethyl sulfide), acetone, and acetaldehyde. Some of these compounds are known carcinogens, while others, like the pollutants associated with power plants, have adverse impacts on cardiovascular and respiratory health. Residents living near these mills have reported persistent headaches and breathing problems as well as an inability to use the outdoors for recreation and exercise. The mills also consume energy generated on-site and off-site from fossil fuels, including by burning wood waste. Such energy generation produces significant amounts of greenhouse gases.

A consent decree entered in January 2013 as a result of our advocacy on behalf of Greenpeace and Port Townsend Airwatchers led to EPA's proposal to update rules governing pollution from these mills for the first time since 1986. These rules govern about 120 kraft pulp mills in the nation.

EPA's proposed rules released last May were disappointingly weak. Our clients submitted comments last June urging EPA to strengthen the rules and protect community health.

Thank You

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