

10-2014

Environmental Law and Justice Clinic Fall 2014 Report

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Recommended Citation

Kang, Helen H., "Environmental Law and Justice Clinic Fall 2014 Report" (2014). *Environmental Law and Justice Clinic*. Paper 24.
<http://digitalcommons.law.ggu.edu/eljc/24>

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GOLDEN GATE UNIVERSITY SCHOOL OF LAW

ENVIRONMENTAL LAW AND JUSTICE CLINIC
FALL 2014 REPORT

The Clinic provides legal and technical assistance to communities that bear a disproportionate pollution burden while enjoying fewer of the benefits and basic amenities such as clean drinking water and open space. We focus on communities in California, although some projects address pollution reduction at the national level. Three core areas continued to dominate our efforts in the last year: clean drinking water for low-income communities, clean energy for California, and air pollution reduction. We also provided legal consulting to numerous organizations that sought our specialized expertise in the areas of clean air, energy, and environmental justice strategy.

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. And 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; these orders cause residents to expend their limited resources on bottled water for their everyday 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, and who lack access to health information or care. The Clinic has been working to advocate for clean drinking water in East Palo Alto and in the Central Coast.

East Palo Alto Well Contamination

The Clinic continued its collaboration with Community Legal Services in East Palo Alto (CLSEPA) and Youth United for Community Action (YUCA) to address two contaminated groundwater wells in East Palo Alto. The work is being done on behalf of low-income residents of apartment buildings. These wells, which have elevated levels of manganese, supply 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 can periodically render it undrinkable and unusable because of its dark brown color, offensive odor, and unpleasant taste.

In addition to affecting the utility of the water, manganese at high levels can also be a neurotoxin that is particularly harmful to children and the elderly. Studies suggest that manganese pollution in drinking water can be associated with cognitive deficits. The United States, however, has

yet to regulate manganese based on health impacts. The outdated standards regulate manganese based only on impacts on taste and odor.

The wells at issue are owned by a private cooperative, with the board of directors and voting members of the cooperative comprised of single family homeowners. It appears that single family homeowners and apartment residents have different experiences with the well water. Single family homes pay a flat fee for water, whereas apartment building owners pay for water based on usage. The rate structure appears to influence how manganese in the plumbing accumulates. Residents of single family homes regularly appear to flush the system by using the water for landscaping and washing cars, and the residents apparently have not complained about the water quality at the tap. Apartment residents who came to CLSEPA, on the other hand, noticed that their problems became worse when the landlord prohibited them from using the hose bib outside the building, which would have had the effect of flushing the pipes.

Over the years, Clinic students with Spanish fluency have assisted CLSEPA and YUCA by holding community meetings, informing water consumers of their short and long-term legal options, and working toward ensuring that apartment residents are notified and represented in decisions affecting their water quality in the same manner as single family homeowners. Students assisted CLSEPA in securing a settlement with the landlord, a large S&P 500 company, to resolve claims of water quality in a rent board proceeding. The student also took the lead role in representing several tenants in their habitability claims in an administrative trial. CLSEPA is still awaiting a decision in those cases. The student counseled clients, gathered evidence, prepared clients for trial, and conducted the examinations.

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 in 2012 to address agricultural pollution. In November 2013, we joined CRLA and 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 Manzo. Ms. Manzo subsists on a fixed income in Monterey County and, like so many in her situation, 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 largely 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 consider relevant scientific evidence and to comply with environmental review requirements in issuing the standards.

The waiver challenged in the petition applies to irrigated agriculture in the Central Coast, which includes areas that are among the nation's most productive and intensively farmed agricultural regions, including Monterey County. This multi-billion dollar industry is the predominant cause of

widespread and severe nitrate pollution in the region. Nitrates are regulated at both the national and state level because of their potential health impacts. Aside from their potential to cause blue baby syndrome, from which infants can die but is fortunately rare, nitrates have been linked to thyroid problems, reduced cognitive function, spontaneous abortions, and a variety of cancers. County residents who have been exposed to nitrates in drinking and domestic use water have also reported symptoms such as persistent skin and eye irritation and hair loss.

The Salinas Valley, which is within the Central Coast area, has problems so severe that the California Legislature required the State Board to study the contamination. According to the Legislature-mandated study, one in ten people living in the study area – Salinas Valley and another region, Tulare Lake Basin – is at risk of exposure to harmful levels of nitrates. Further, the study estimated that 96% of the nitrate contamination to the region’s groundwater comes from irrigated agriculture. Despite the highly relevant and timely nature of the data produced and presented in this study, the State Water Board explicitly refused to include it in its considerations when it made its decision to impose lenient standards on farms.

The nitrate contamination problem will worsen, unless effectively addressed, because nitrates from historic and continued application of fertilizers will leach into groundwater. If current practices remain unchanged, a staggering number of people in the Salinas Valley are expected to be exposed to unhealthful levels of nitrates from drinking water. (Data for the Salinas Valley alone are not available, but 80% of the residents in the valley and Tulare Lake Basin are expected to be affected by 2050.) Population increases in California, including in the Central Coast region, are further expected to exacerbate the contamination.

The Clinic is actively working with co-counsel to present a compelling case to the superior court that demonstrates the dire need for more meaningful and stringent regulation.

Reducing Health Risks of Pollution from Power Plants – 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) levels in the air that adversely impact health. A typical plant annually produces hundreds of tons of these pollutants and millions of tons of greenhouse gases. Without exaggeration, reducing greenhouse gases is the greatest global challenge of this decade with enormous consequences to human health and 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 higher 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 fine soot, it causes cardiovascular and respiratory problems and higher premature 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 for Caucasian children. Asthma is the leading cause of school absenteeism for children in that county.

In recognition that California can do 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 been focusing on energy policy work. The Clinic has been at the vanguard and helm of this critical work since 2009. The Clinic now performs this work through its representation of the 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.

The Clinic has been lead counsel in the 2012 and 2014 Long Term Procurement Proceedings, which shape the “energyscape” of California and, indirectly, the nation as a whole since other states look to California for innovation and leadership. These proceedings, which occur approximately every two years before the California Public Utilities Commission, decide how many power plants will be built by determining the amount of energy that utility companies must procure for ten years into the future for about 80% of the state. The proceedings also establish policies relating to integration of renewable energy into the grid and storing energy so that energy from such sources can be used even when the sun is not shining and the wind is not blowing. Highly technical and fast-paced, these proceedings historically saw little participation from environmental justice groups until the Clinic stepped in.

The 2012 case was divided into four proceedings. One of those proceedings concerned whether the Los Angeles Basin and San Diego needed to construct more energy resources to replace the San Onofre Nuclear Generating Station, which was shut down last year. The utilities and the influential California Independent System Operator presented extensive expert testimony, arguing for a higher energy need. To counter these arguments, we submitted robust evidence that the state’s energy needs can be fully met, without building new fossil-fuel power plants, with energy conservation, efficiency measures, renewables, and energy storage technologies.

Following the hearing, in March 2014, the Public Utility Commission issued its decision. Consistent with our evidence, the Commission found that all of the need could be filled with energy conservation, efficiency, renewables, and storage. The Commission also found that the state did not have an energy need as high as that sought by the utilities and the California Independent System Operator. In making this decision, the Commission relied on evidence the Clinic submitted, citing it throughout the decision.

While some hailed the decision as unprecedented because it determined that all of the needs could be met with “green” alternatives, it unfortunately leaves open the potential for meeting the need through construction of new power plants fueled by natural gas. Since that decision, our client and its allies have been working to prevent such scenarios from becoming a reality. In particular, we are concerned that the current bidding process does not fairly value and evaluate renewables, energy efficiency, and energy storage for meeting needs. We also successfully worked with allies to ensure that the utilities’ process for examining bids was available to the public. We anticipate continuing our work on these issues as they are critical for transitioning to green energy.

In another proceeding, the Public Utilities Commission issued a decision in February 2014 that agreed with our advocacy – that the procurement process, which has traditionally occurred behind closed doors, needed to be more transparent to the public. The Commission thus ordered a process that will make the utilities’ quarterly reports more accessible to the public. The Commission, however, did not fully adopt our proposals, and we will continue to advocate for increased transparency in other proceedings before the Commission, in addition to advocating for increased consideration of environmental justice and greenhouse gas impacts in future procurement processes and decisions.

Another critical aspect of the Clinic’s work is ensuring that the Public Utilities Commission actually achieves the state’s long-term climate goals. This fall, we submitted extensive evidence arguing that the Commission must require a robust evaluation of how the utilities will reduce greenhouse gases to attain long-term goals for reduction. That evaluation has not been done, and the State of California is not currently on target to meet its reduction goals.

Ensuring that Energy Policy Benefits Disadvantaged Communities

Without financial assistance, many low-income residents have to choose between different necessities such as utilities and food. A large percentage of low-income households pay more for energy as a percentage of their income. Our clients believe that, under a recent California statute that requires development of energy programs for disadvantaged communities, the Public Utilities Commission should increase green development such as distributed generation in such communities and reduce their high energy burdens.

Again representing CEJA in front of the California Public Utilities Commission, the Clinic is participating in a proceeding that will determine who comprises a disadvantaged community. CEJA is the only party in the proceeding that represents such communities. The Clinic’s advocacy is focused on ensuring that the term encompasses communities with a high environmental and socioeconomic burden, and that energy policies that are developed consider the needs of these communities.

Ensuring the Integrity of Pollution Trades

In the face of longstanding federal inaction on climate change, California adopted a cap and trade system for reducing greenhouse gases. Under this system, the state sets a cap for the maximum amount of pollution that can be emitted from major industries, and each company receives an allowance to emit pollution; those emitting less can sell the “credit” to other companies that find the credits cheaper than other means of reducing the pollution. The environmental justice community has been long concerned with the integrity of California’s cap and trade plan for reducing greenhouse gas emissions.

Recently, the Clinic represented the Environmental Defense Fund in exposing these concerns with credits issued to long-shuttered cotton gins and sugar beet processing plants in the San Joaquin Valley Air Pollution Control District. Over a million tons-worth of greenhouse gas credits were issued to companies that closed in the region for economic reasons and were listed on a “Greenhouse Gas Reduction Exchange,” a registry operated by the California Air Pollution Control Officers Association. The registry explains that it is “a trusted source of locally generated credits from projects within California” to facilitate trades, and that the credits are “designed specifically to benefit the state of California.” See <http://www.capcoa.org/>.

The Clinic's legal and factual research resulted in a letter to the California Air Pollution Control Officers Association advocating for "real" reductions. The letter was joined by NRDC, The Nature Conservancy, Sierra Club California, Union of Concerned Scientists, and Planning and Conservation League.

Assistance to Communities with Air Pollution Problems

Bayview Hunters Point Community's Exposure to Particulate Matter

The historic residential segregation pooled low-income people of color – mostly African Americans – in the Bayview Hunters Point neighborhood, which became the most polluted and economically depressed place in famously progressive San Francisco. Despite the closure of the two most polluting power plants in the area – an accomplishment to which the Clinic and its students over two decades contributed – this community remains heavily polluted. Most of San Francisco's industrial pollution sources are located there, and it is along major roadways and abuts the Port of San Francisco. The Bay Area Air Quality Air District has in fact recognized that the air in the neighborhood is particularly toxic, designating the area a Community Air Risk Evaluation area, deserving of special regulatory focus. According to the air district, the highest cancer risk levels from ambient toxic air contaminants in the Bay Area tend to occur in areas like Bayview Hunters Point that are near a port and roadways.

The neighborhood has also borne the brunt of San Francisco's construction boom in recent years. The Port of San Francisco has developed an "Eco-Industrial Park," where aggregate and concrete intended for recycling is brought into the port and then processed at the port. These activities generate significant amounts of fugitive PM and are a concern for this community. The Clinic is working with Community First Coalition Education Fund to address this PM problem using an array of tools. The Clinic is also working with that group and Greenaction for Health and Environmental Justice to address PM pollution from an expected demolition of Candlestick Stadium. The Clinic has already been successful in getting a concession from the City's Planning Department that it issued prematurely an environmental addendum concluding that health risks from the demolition would be the same even if the demolition method changed, from mechanical demolition to partial implosion.

Odor Complaint Resolution

Odor is an everyday problem in many communities with which the Clinic has relationships. It is an aspect of the environment that often has a pervasive influence on an individual's enjoyment of their neighborhood and can influence their ability to enjoy their own backyards and outdoors, including the choice to send children outside to play. Odors from nearby industrial facilities can even intrude into homes, forcing residents to keep their windows shut much of the time. Odors can also indicate the presence of extremely harmful substances such as hazardous air pollutants, and persistent strong odors can have both adverse psychological and physiological impacts on individuals. In combination with other indicators of environmental degradation in a neighborhood, odors have a potential to adversely affect a larger community.

The Clinic is working with Leadership Counsel for Justice and Accountability, a Fresno-based non-profit, to address the communities' dissatisfaction with the procedures that the San Joaquin Valley Air Pollution Control District follows to resolve odor complaints from residents. The

Clinic has been analyzing air district policies to recommend ways to improve them. This work can potentially help other communities that have similar problems.

Northern California Communities Near Railroad Operations

We continue to co-counsel with a solo practitioner in representing Californians for Alternatives to Toxics in litigation under the California Environmental Quality Act to push for improved environmental analysis concerning the proposed massive reconstruction and 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. The merits of the case have not yet been heard. An appellate court recently dismissed the case on federal preemption grounds.

National Cases with Health Consequences for Californians

Reducing Lead Pollution

Lead's dangers are now better known than when it first began to be regulated. 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.

We have been working for nearly a decade to tackle the largest source of airborne lead. In April of this year, we submitted a petition for reconsideration to EPA, along with signatures of over 24,000 concerned citizens urging EPA to find that lead emitted from aviation gasoline endangers human health. We represented Friends of the Earth, Physicians for Social Responsibility, and Oregon Aviation Watch in this effort. In connection with this effort, we submitted two Freedom of Information Act requests to EPA seeking information on its recent study of the harmful impacts of lead from aviation gasoline, and we successfully obtained a fee waiver for our request as a result of pursuing an administrative appeal.

Our client, Friends of the Earth, has also begun working with local communities impacted by lead pollution from airports. Monitors near two California airports detected unhealthy levels of lead in the air. Friends of the Earth has also begun working with one of these airports to help them offer an unleaded alternative. The Federal Aviation Administration has estimated that over 75% of planes can currently use this alternative. The client is taking the lead in this work.

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 their 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 of this year as a result of our advocacy on behalf of Greenpeace and Port Townsend Airwatchers led to EPA's revision of the rules governing pollution from these mills for the first time since 1978. These rules govern about 100 kraft pulp mills in the nation.

EPA's rule revisions were disappointingly weak. Jointly with Center for Biological Diversity, the Clinic hired a technical expert and submitted comments in June of last year, urging EPA to strengthen the rules and protect community health. Despite these comments, EPA's final rules remain weak, failing to address greenhouse gas emissions. The rule, however, incorporates pollution reduction measures that apply during high-pollution events such as during startup, shutdown, and malfunction of a facility. The rule also sets the floor for pollution control technology that applies in some cases where facilities are modified or newly built.

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Financial Support

We were generously supported in this work by Golden Gate University School of Law,
a grant from the Clarence E. Heller Foundation,
and donations from generous individuals.