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Environmental Law and Justice Clinic 2015-2016 Report

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ENVIRONMENTAL LAW AND JUSTICE CLINIC

Fall 2015- Spring 2016 Report

Founded in 1994 in consultation with community leaders, the Clinic serves as a training ground for the next generation of social justice advocates and provides critical legal services to underserved communities throughout California and beyond. As one of the first law clinics in the United States to prioritize environmental justice, the Clinic has been widely recognized as a provider of high-quality *pro bono* legal support to communities suffering the most from pollution.

In its third decade of service, the Clinic has focused particular attention on clean drinking water for low-income communities and clean energy for California, while continuing its celebrated work in air pollution reduction. Another area in which the Clinic has been active this past year is Title VI of the Civil Rights Act of 1964: working to ensure that protected groups are fairly treated is both exciting to our students and critical to our clients who have long made the connection between civil rights and environmental benefits and harms. In addition to delivering direct services in these core areas, we provided consulting services to numerous organizations fighting to create a better environment.

Student and Staff of the Clinic
Back Row: Jeramy Stone, Laurie Cross, Danielle Rathje, Khaleelah Ahmad, Tovah Trimming, Nina Robertson
Front Row: Regina Feliciano, Priscilla "Ren" Vuong, Fe Gonzalez, Helen Kang, Linh-Phuong Ho
Missing in Action: Joseph Baskin, Christine Claveria, Nicholas Dahl, Andrew Graf, Elizabeth Marroquin, Phoebe Moshfegh, Collin McCarthy, Aaron Robles, Shireen Seif, Stephanie Smith

Safe Drinking Water for Communities Reliant on Contaminated Water

Access to clean drinking water is a basic human need and requisite to a developed society. Drinking water safety became big news when the story of Flint, Michigan broke last year. Residents of Flint, a predominantly African-American community, had been drinking poisonous water for more than a year before being told it was unsafe.. Many other stories about unsafe drinking water, although not quite as shocking as that of the Flint tragedy, are still yet to be widely told.

Here in California , over 20 million residents rely on contaminated water for their daily needs. Contaminated water poses serious public health concerns and imposes economic burdens on affected communities. If left untreated, contaminated water can lead to "do not drink" orders from health agencies; residents are then forced to spend their limited resources on bottled water for everyday water needs. Even when treatment becomes an option, the high cost of treatment is often passed on to consumers. These burdens are particularly significant in 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.

In November 2013, we joined California Rural Legal Assistance and the Stanford Environmental Clinic as co-counsel and filed a case in the Sacramento County Superior Court seeking more stringent regulation of irrigated agriculture in the Central Coast region. Among our 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. We also represent Antonia Manzo, a resident of a labor camp who has limited income and has not been able to drink water from her tap for a decade because it is contaminated with agricultural waste.

The Central Coast includes areas that are among the nation's most productive and intensively farmed agricultural regions, including Monterey County. A multi-billion dollar industry, irrigated agriculture is the predominant cause of widespread and severe nitrate pollution in the region. Aside from their potential to cause blue baby syndrome, a rare but deadly condition, 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 – the Salinas Valley and the Tulare Lake Basin – is at risk of exposure to harmful levels of nitrates. If current agricultural practices of over-applying nitrates continue, a large percentage of the Salinas Valley population is expected to be exposed to unhealthful levels of nitrates from drinking water. Population increases in California, including in the Central Coast region, are further expected to exacerbate the contamination.

Over several semesters, our students pored through technical and legal documents and conducted extensive research. Students also worked on significant briefings for the case. A hearing was finally held in May 2015, and the court issued a 44-page decision in August 2015, vindicating our clients' position: the court remanded the case to the State Board to reconsider its weak regulation of pollution. The court concluded that the State Board order lacked sufficiently specific, enforceable measures needed to meet the state's own plan for achieving cleaner water. The court also concluded

that the order lacked means to detect problem sources fundamental to reducing further degradation of water quality.

The State Board and agricultural industry groups have now appealed the decision. We will be working on our appellate brief next semester.

In the meantime, other water boards in California are also drafting orders to control agricultural pollution, and we have advised some of the groups pushing for more stringent regulation to protect one of the most precious resources of the state – our water. Other regions are also looking to the court order we obtained in setting standards. We are making a difference by continuing to assist advocates in this water-strapped state.


Some of our legal team after the merits hearing

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 harmful air pollution such as nitrous oxides and particulate matter (soot). A typical power plant annually produces hundreds of tons of these pollutants and millions of tons of greenhouse gases.

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 for those who work outdoors and are thus susceptible to heat strokes, 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 have also been linked to asthma attacks and increased hospital visits. In Contra Costa County, for example, where many of the San Francisco Bay Area 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.

Recognizing 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 helm of providing legal support for this critical work since 2009, most recently 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 was lead counsel in the 2014 Long Term Procurement Proceeding, which wrapped up in the fall of 2015. These procurement proceedings shape the "energyscape" of California and, indirectly, the nation as a whole as other states look to California for innovation and leadership. These proceedings, which occur approximately every two years before the California Public Utilities Commission (the 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 energy storage. Energy storage enables usage of renewable resources 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.

In 2014 and 2015, the Clinic worked with an expert to submit extensive evidence describing why the Commission should not authorize new electrical generation resources to meet future demand. Other parties argued that there was a need for new resources. The Commission agreed with the Clinic's position – that new electrical generation resources were not needed. This victory means no new power plants at least until the next procurement proceeding.

Ensuring that California Energy Policy Takes into Account Disadvantaged Communities

Although California has seen unprecedented levels of solar development in recent years, California's most disadvantaged communities have not benefited from this trend. These communities often face numerous barriers that prevent development of solar energy in their neighborhood, including financial, linguistic and marketing barriers. Without financial assistance, many low-income residents simply cannot afford to choose renewable energy over basic necessities. Low-income residents – some of whom are renters – also find it difficult to finance installation of rooftop solar panels. Specific programs targeted to benefit these communities are necessary to overcome these many barriers. California legislation (Assembly Bill 327) provides an opportunity for these communities. It requires the California Public Utilities Commission (the Commission) to develop programs that will lead to renewable energy growth in disadvantaged communities.

To ensure that disadvantaged communities can benefit from these programs designed to increase renewable energy generation, the Clinic is representing CEJA in a Commission proceeding, called the Rulemaking to Develop a Successor to Existing Net Energy Metering (NEM) Tariffs proceeding. Net energy metering, which is currently in place in California, allows rooftop solar generators to sell excess energy back to the grid. In January 2016, the Commission determined the shape of a new NEM program. Utilities advocating for higher fees for rooftop solar customers largely lost to solar advocates who called for the fees to stay the same so that rooftop solar remains a viable and attractive option for customers.

The same proceeding will also determine which communities are "disadvantaged" within the meaning of Assembly Bill 327 and the kinds of programs that should be designed for growth of renewables in these communities. Programs being considered include a clean energy program that was created by California Assembly Bill 693 for low-income tenants residing in multifamily housing.

The Clinic's work in the next year will focus on the disadvantaged communities aspect of the proceeding.

Civil Rights and Hazardous Waste Disposal

Many environmental justice communities suffering from pollution also confront civil rights violations. The Civil Rights Act of 1964 can be a useful tool in combating environmental injustice.

Kettleman City in the Central Valley of California is a small farming community of roughly 1,200 residents. Approximately ninety percent of residents are Latino, with a significant percentage being monolingual Spanish-speakers. In the 1980s, Kettleman City became the site of one the country's largest hazardous waste disposal facilities. Since then, the community has struggled to ensure that the health, safety, and civil rights of its people are protected and respected.

In 2014, the California Department of Toxic Substances Control granted Chemical Waste Management, Inc. (the operator of the facility) a permit to expand the waste dump. In response, two groups filed a complaint with the U.S. EPA's Office of Civil Rights (OCR) alleging violations of civil rights during the permitting process. OCR accepted the complaint, and the case is now in mediation. The Clinic is representing Greenaction for Health and Environmental Justice in the mediation, and California Rural Legal Assistance (CRLA) is representing the other plaintiff group, El Pueblo para el Aire y Agua Limpia. The Clinic and CRLA are closely collaborating to achieve justice.

Ensuring Government Accountability in Rail Developments

As increasingly more crude oil and coal are shipped by rail to California refineries and ports, an important question rising to the fore is whether state and local governments can protect the health and safety of their citizenry through California's bedrock environmental statute, the California Environmental Quality Act (CEQA).

Our high courts, both the U.S. Supreme Court and the California Supreme Court, have articulated that Congress must "clearly and manifestly" intend to nullify state or local law. The required clarity is out of respect for state sovereignty. A careful look at the legislative history and the language of the federal statute that regulates rail transportation reveals that Congress meant only to centralize in the federal government economic regulation of the rail industry: train classifications, expansion of rail routes, services, rail mergers and acquisitions, and carrier obligations that require fair treatment of customers and reasonable and just rates. There is not a shred of evidence that Congress meant to undo background laws like CEQA.

Yet rail companies, refineries, and coal exporters are aggressively campaigning to bar local governments from doing their job: protecting their citizenry through CEQA. Phillips 66, in oneproject that would allow crude oil to be carried through the East Bay, is even arguing to San Luis Obispo County that imposing "a burden on a customer for accessing the interstate rail network" is preempted. Local governments should not be bullied by these attempts to prevent our governments from taking a hard look before giving stamps of approval to projects that may harm our environment.

Our high courts have rejected broad application of the federal preemption doctrine in numerous contexts to allow states to protect their citizenry. Nor should the federal law regulating the rail industry carve out a regulatory no man's land for rail carriers. Our governments have a duty to protect our beautiful state and the local communities that dot the rail lines through a proper review performed under CEQA. As President Obama stated in his 2009 Presidential Memorandum Regarding Preemption, "State law and national law often operate concurrently to provide independent safeguards for the public." As he recognized, "[t]hroughout our history, State and local governments have frequently protected health, safety, and the environment more aggressively than has the national Government."

The Clinic has provided legal analysis and advocacy in a number of cases, some of which are discussed further below, to ensure that federal preemption is not unjustifiably used to prevent local citizenry from participating in decisions that affect their health and welfare.

Coal Export from West Oakland?

With an active port and industry all around, the area of West Oakland has been the site of many polluting activities for decades. It also has very high rates of poverty and asthma. For the past few years, the city has been working to facilitate the redevelopment of the now-shuttered Oakland Army Base just west of Interstate 80, at the foot of the Bay Bridge. The redevelopment plan includes building new export terminals that, according to the developers, will generate much-needed jobs and economic activity in the area. While most West Oakland residents have been in favor of the redevelopment plan, things took a turn when the developer revealed that it had entered into contracts to export coal from Utah through the new terminal. Local and national groups oppose such exports. Transporting coal threatens local air quality from emissions of coal dust; coal, when burned abroad, will generate greenhouse gases that affect the globe even as California moves toward renewables. A coalition of residents and environmental and grassroots groups is calling on the City of Oakland to stop the development of a terminal that would allow coal exports.

Representing Greenaction for Health and Environmental Justice, the Clinic submitted comments to the City of Oakland in the fall of 2015, explaining why the developer is wrong when it argues that federal law preempts environmental review of the facility. In addition, we are advising another local community group on its advocacy strategy as well as providing legal support to No Coal in Oakland as these groups fight to keep coal in the ground and out of Oakland.

Northern California Communities Along the Rail Line

We continue to co-counsel with two long-time environmental practitioners and the Stanford Environmental Clinic in representing Californians for Alternatives to Toxics in litigation under the California Environmental Quality Act. Our client is pushing for improved environmental analysis concerning the proposed massive reconstruction and reopening of a defunct rail line. The rail line, which traverses several counties in northern California, 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 to toxins is a significant concern because some of the same vulnerable populations already suffer from roadway pollution.

The merits of the case (that is, whether the environmental review that has been done is inadequate as we claim) have not yet been heard. An appellate court dismissed the case on federal preemption grounds, and the case is now pending before the California Supreme Court. Briefing has been completed; oral argument is expected to be scheduled soon. We argue that the Interstate Commerce Commission Termination Act does not preempt environmental review that a public rail agency imposed on itself before it approved its massive rail repair project.

In November 2015, the proposed rail operator filed a petition before the Surface Transportation Board for a declaration that the case pending before the California Supreme Court is preempted. The Board is a federal agency that oversees rail transportation. We filed a brief in December 2015, arguing that the Board should dismiss the petition because it does not have authority over the rail project; and, in any event, the federal statute does not preempt environmental review. In April 2016, the Board issued its decision, declining to issue a declaratory order but referring the parties to a decision that it issued in December 2014 in another case. In that earlier decision, the Board broadly declared that CEQA is preempted. That decision is under review by a federal appellate court (see below).

Ensuring that Preemption Does Not Wrest Environmental Considerations Away from Communities

As discussed above, the Surface Transportation Board issued a declaratory order in December 2014 in which it decided that, when the California Environmental Quality Act requires environmental review before construction of a rail project, federal law preempts such review. This decision is under review before the Ninth Circuit. Together with the Stanford Environmental Clinic, our Clinic submitted a motion to file a friend of the court brief on behalf of the Center for Biological Diversity. The proposed *amicus* brief takes the position that the Board lacked authority to issue such an order, and that the Ninth Circuit lacks authority to review the order. Essentially, the brief explains that the court would be issuing an advisory opinion, which Article III of the U.S. Constitution prohibits, because the Board order does not adjudicate any rights and responsibilities: it simply sets forth the Board's position on preemption. The brief additionally explains that, if the court were to reach the preemption issue, the Interstate Commerce Commission Termination Act should not preempt California's bedrock statute aimed at government accountability.

In answering the *amicus* brief, the Board appears to concede that the court indeed lacks jurisdiction to review the decision. In its brief filed in March 2016, the Board agrees with our brief that the court "could find" that the declaratory order has had no legal or practical effect on any party. Dismissal of the case would be significant as these declaratory orders from the Board have largely overreached in finding preemption.

Protecting Local Community Health

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 its challenges, the neighborhood is located in a beautiful part of the city and is a traditional African-American enclave with one of the highest rates of homeownership in the city.

Even with 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 Management 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 to and processed at the port. These activities generate significant amounts of fugitive particulate matter (PM) and are a concern for this community. The Clinic is working with community groups, including Clean Air Health Alliance and Greenaction for Health and Environmental Justice, to address this PM problem using an array of tools.

Bayview-Hunters Point neighborhood:
some sources of PM

In 2014, the city's Planning Department approved, without proper notice to nearby neighbors, a plan to implode Candlestick Park Stadium, which would have sent a plume of intense dust clouds into the neighborhood. The Clinic's students met with the Planning Department, testified at hearings before city agencies, and threatened to sue; and along with our client, we wrote an op-ed piece for a local paper. In February 2015, the developer in charge of the demolition of the stadium finally agreed to abandon implosion in favor of mechanical demolition. This work garnered much press for our clients and the Clinic.

Following this work, Clinic students investigated other sources of PM in the neighborhood. Extensive student research has revealed permitting irregularities – a source that may be operating without a permit and another source that is processing more PM-generating material than allowed. More work will be done to resolve these problems.

Students

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