INSIDE

The Role of Civil Legal Services
Race and Health
Housing, Poverty, and Racial Justice
Racism in the New Welfare System
Employment
Consumer Law
Education
The Role and Responsibility of LSC-Funded Programs
Race-Based Advocacy
Environmental Justice
Language, Culture, and Race in Legal Services Practice
Special Education and Minority Students
Racially Biased Discipline in Schools
Building-Trade Careers and Low-Income People of Color
Long Winding Road to Better Bus Service in Los Angeles
Legal Needs of Monolingual Latinos and Pacific Islanders

Pursuing Racial Justice
Poor people bear a disproportionate share of pollution. Poor peoples' advocates for years have been at the forefront of attacking this unfair burden, and legal services attorneys have been pioneers in fashioning the legal piece of the environmental justice movement. A recent environmental justice case unfolding in Camden, New Jersey, illustrates both the high degree of inequality in the distribution of environmental hazards and the ways legal services lawyers can help low-income communities fight pollution. After a brief overview of the environmental justice movement, we focus on the South Camden case to demonstrate the opportunities and obstacles facing legal services advocates taking on environmental justice cases as well as the lessons from the case. We conclude by drawing general lessons for environmental justice legal advocacy from our observations of such litigation in the past thirty years.

I. The Environmental Justice Movement and Legal Services Attorneys' Role

Since its inception, the environmental justice movement has emphasized grassroots, community-based organizing while using legal tools to protect the rights of community residents and to advance policies and laws that eliminate discriminatory practices. The combined efforts of community activists, civil rights leaders, academics, and lawyers have raised public awareness, created new law, and helped shape public policy. As described below, these efforts advanced environmental justice and supplied the historical background and legal framework for the South Camden litigation.

A. The Birth of the Movement

Poor people are not alone in experiencing an unfair burden of pollution. Communities of color are exposed to a far greater level of environmental hazards in the United States than white communities, and poor people of color bear the greatest burden. However, residents of neighborhoods facing these toxic intrusions have not been idle bystanders to the assaults on their communities, and for more than twenty years they have fought back in local struggles. People of color named the discriminatory burden they

---


experienced: environmental racism.

In the late 1980s, as a result of studies that revealed a national pattern of discriminatory siting of toxic facilities, many local activists became aware of similar struggles in other communities and built ties among communities; those ties resulted in the broad, national social movement now called the environmental justice movement. The movement emerged out of earlier social movements such as the civil rights movement, the labor movement, the grass-roots antitoxics movement, the farmworker movement, and the American Indian movement and involved activism in a diverse array of low-income communities and communities of color.

The environmental justice movement reached a high point in the mid-1990s, when local activists knit themselves together into regional environmental justice networks, forced the U.S. Environmental Protection Agency, or EPA, to establish an Office of Environmental Justice and empanel a National Environmental Justice Advisory Council, and succeeded in getting President Bill Clinton to issue an executive order on environmental justice. Local activism broadened beyond the first locus of the environmental justice struggle, the siting of facilities, to include challenges to unequal enforcement of environmental laws, disparity in the speed and effectiveness of cleanup efforts, transportation equity, and market-based pollution control schemes.

B. Early Legal Strategies

From its earliest days the movement was able to attract creative lawyers to local struggles. The first wave of environmental justice cases, beginning in the late 1970s, relied on constitutional challenges under the equal protection clause. These suits allowed plaintiffs to describe the legal violations as they experienced them: discrimination based on race in violation of constitutional rights to equal protection under the law. Although each of the equal protection cases described environmental assaults on communities of color, each foundered on the shoals of the intent standard: under U.S. Supreme Court jurisprudence, plaintiffs in equal protection cases must prove discriminatory intent, not simply discriminatory impact. Proving discriminatory intent in an era of subtle and structural racism has proved very difficult for civil rights plaintiffs, and thus far no environmental justice case has cleared the hurdle.

As the movement’s legal response matured, advocates realized that the most successful legal approaches were those based on environmental laws rather than civil rights statutes. Indeed, almost every legal victory in the environmental justice struggle has been based on violations of environmental law, a body of statutes with which judges are familiar and that “generally supports credible challenges to improperly permitted facilities.”

---

3 See generally id.


C. Title VI as a Tool for Challenging Discriminatory Impact

As environmental justice struggles received more attention, the movement's lawyers cast about for other legal strategies. Creative lawyers at the Tulane Environmental Law Clinic and the Sierra Club Legal Defense Fund office in New Orleans hit on using Title VI of the Civil Rights Act as a tool for environmental justice. Title VI prohibits discrimination by entities receiving federal financial assistance.10 Almost every federal agency has implemented Title VI through regulations that prohibit the use of policies and administration methods that cause discriminatory effects.

Using a disparate impact approach to sidestep the evidentiary problems posed by proving discriminatory intent, these lawyers filed two administrative complaints with the EPA in September 1993; the complaints accused the states of Louisiana and Mississippi of violating Title VI by issuing permits to toxic waste facilities in African American communities.11 These complaints sparked a wave of similar administrative complaints based on discriminatory impact, so that by the end of the decade more than 100 such complaints had been filed.12 Unfortunately this strategy brought little relief to the affected communities because the EPA failed to take action on the complaints; by 2002 it had decided only one on its merits.

Advocates also began using Title VI as a cause of action in litigation, although the law was not clearly established as to whether private plaintiffs could enforce the disparate impact regulations. A case out of Chester, Pennsylvania—an impoverished, predominantly African American industrial town on the Delaware River south of Philadelphia—brought the issue to the forefront. A community group, Chester Residents Concerned for Quality Living, working with Jerome Balter of the Public Interest Law Center of Philadelphia, sued the state of Pennsylvania under a discriminatory impact theory because the state had permitted a grossly disproportionate amount of the predominantly white county’s waste treatment operations to be sited in Chester.

The federal district court threw out the suit on the grounds that plaintiffs did not have a right to sue under the EPA’s disparate impact regulations.13 Deciding the case on appeal, the Third Circuit Court of Appeals reversed the district court and held that private plaintiffs did have the right to sue under the regulations.14 However, plaintiffs’ procedural victory was short-lived when the U.S. Supreme Court declared the case moot and vacated the Third Circuit’s decision.15 Nevertheless,

12See EPA, supra note 11.
14Chester Residents Concerned for Quality Living, 132 F.3d at 929–37.
15Id., 524 U.S. 974. The community’s struggle was successful, however, as the developer withdrew the application for a waste disposal permit while the appeal was pending. Subsequent developments in the area have featured renovation of former industrial polluting facilities into nonpolluting office facilities. Dan Hardy, Synygy First to Sign on as Tenant at Chester Site, PHILA. INQUIRER, May 19, 2001, at C1.
other circuit court decisions, in the Third Circuit and elsewhere, convinced advocates that causes of action under Title VI regulations were viable.16

D. Legal Services' Role in the Environmental Justice Movement

From the earliest environmental organizing in poor communities and communities of color, legal services lawyers have been key allies of local activists. For example, in the late 1960s California Rural Legal Assistance lawyers represented farmworkers in challenges to pesticide application, challenges that ultimately resulted in the banning of DDT (dichlorodiphenyltrichloroethane).17 In the 1980s legal services advocates helped Native Americans clean up uncontrolled dump sites on reservations and block strip mining in Appalachian communities. In the 1990s Bronx Legal Services and the National Health Law Program spearheaded the fight against lead poisoning and brought successful cases to force the testing of low-income children.18

By the early 1990s environmental justice cases were very much on the radar screen of the legal services community, and advocates around the country were bringing such lawsuits. The California-based Center on Race, Poverty, and the Environment, publishing materials and training poor peoples' lawyers across the United States, served as an informal support center for the legal services community. The Environmental Poverty Law Working Group—a loose-knit group of legal services attorneys working on environmental justice cases—boasted more than 200 members. CLEARINGHOUSE REVIEW devoted an entire issue to environmental justice in 1995, with articles on using civil rights laws, fighting lead poisoning, protecting farmworkers from pesticide poisoning, cleaning up contaminated water, and stopping incinerators, among others.19

The popularity of environmental justice cases among legal services advocates was, unfortunately, ephemeral. When legal services programs began to feel the combination of budget cuts and pernicious restrictions of the Gingrich years, they refocused on their traditional core areas of representation. In this period of aspirational myopia, new and controversial practice areas like environmental justice fell by the wayside.

However, a new wave of environmental justice cases brought by legal services lawyers is building, and the South Camden case chronicled in this article is among the most exciting examples of this growing trend.

II. Camden, New Jersey: A Case Study of Environmental Racism

Litigation is usually a tool of last resort in environmental justice struggles and a blunt tool at that. As the South Camden case illustrates, situations of discriminatory impact that cry out for redress may no longer have a place in court. In this section, we examine the Camden struggle, and then in the last section we draw lessons that should be useful to legal services advocates.

A. The Community

Camden, New Jersey, is a struggling city of 87,000 residents, who persevere in their efforts to maintain a decent quality

16 See, e.g., Powell v. Ridge, 189 F.3d 387 (3d Cir. 1999) (Clearinghouse No. 52,628); N.Y. Urban League v. New York, 71 F.3d 1031 (2d Cir. 1995) (Clearinghouse No. 51,026); Loschiavo v. City of Dearborn, 33 F.3d 548 (6th Cir. 1994) (Clearinghouse No. 54,495); Larry P. v. Riles, 793 F.2d 969 (9th Cir. 1984) (Clearinghouse No. 54,494).
18 For articles listing these cases, see generally 29 CLEARINGHOUSE REV. 343–463 (Special Issue 1995) (theme issue on environmental justice).
19 Id. The issue includes Ralph Santiago Abascal, Tools for Combating Environmental Injustice in the 'Hood: Title VIII of the Civil Rights Act of 1968, id. at 345; Keith Harley, Demystifying Environmental Legal Services, id. at 371; Helen Gonzales, Increasing Water and Sewer Rates: A New Crisis for the Poor, id. at 409; Enrique Valdivia, How Legal Services Clients Became Neighborhood Activists: Three Tales of Texas Environmental Justice, id. at 418; Melany Earnhardt, Using the National Environmental Policy Act to Address Environmental Justice Issues, id. at 436.
Fruitful Collaboration for Environmental Justice: Leveraging Legal Services’ Limited Resources

Because of their limited resources, lack of expertise in environmental justice issues, and competing priorities, many legal services programs cannot take the lead role in complex civil rights and environmental litigation. Legal services advocates nevertheless can advance environmental justice advocacy, both through collaboration with other law firms and by assisting community groups in a variety of ways in addition to filing lawsuits.

Legal services programs can serve as a bridge between experienced civil rights and environmental lawyers and client communities that have no access to legal and technical resources. Assistance from a legal services attorney can range from helping a client group find and select pro bono counsel to serving as an active member of the legal team. Collaborative efforts can include both public interest and private law firms, involving both civil rights and environmental specialists, as well as law school clinics.

For example, the legal work in South Camden Citizens in Action v. New Jersey Department of Environmental Protection (145 F. Supp. 2d 446 (D. N.J.), supplemented by 145 F. Supp. 2d 505 (D. N.J.), rev’d, 274 F.3d 771 (3d Cir. 2001), petition for cert. filed, No. 01-1547 (U.S. Apr. 15, 2002) (Clearinghouse No. 53,759)), is the result of a fruitful collaboration among three different public interest law firms. Olga Pomar of Camden Regional Legal Services, the local legal services office, was the lead counsel and primary contact with the plaintiffs. Pomar represented the plaintiff group in the New Jersey Department of Environmental Protection’s permit-review procedure, had represented community residents for years, and brought an in-depth knowledge of Camden City and local community development issues.

Jerome Balter of the Public Interest Law Center of Philadelphia had represented South Camden residents in a successful suit to stop the odors from the local sewer plant and also assisted the community during the permit-review procedure of the South Camden case. Michael Churchill, the center’s chief counsel, brought years of experience in civil rights litigation to the team. The center represented the plaintiff in Chester Residents Concerned for Quality Living v. Seif (944 F. Supp. 413 (E.D. Pa. 1996), 132 F.3d 925 (3d Cir. 1997), vacated as moot, 524 U.S. 974 (1998) (Clearinghouse No. 54,496)), and Powell v. Ridge (189 F.3d 387 (3d Cir. 1999) (Clearinghouse No. 52,628)—important Third Circuit decisions that counsel believed offered Camden residents a chance for victory under a Title VI theory.

Luke W. Cole, director of the Center on Race, Poverty, and the Environment in San Francisco, brought a deep knowledge of environmental justice litigation to the team. Law professors with expertise in civil rights, environmental law, and constitutional issues were invaluable in supplying the litigation team with research, legal analysis, and strategy.

As the South Camden case illustrates, legal services programs can greatly expand the legal resources available to client communities engaged in environmental justice struggles through this type of collaboration with legal experts.

of life and sense of community in the face of severe adversity.20 Camden is infamous in the region largely for its indicted mayors (three out of the last five) and its many indicators of urban blight. As in many former industrial centers, the manufacturing businesses that provided well-paying jobs left town but left behind severely polluted land and abandoned factories. Camden is now the poorest city in the state and one of the poorest in the nation.21 Per capita income is less than $8,000.22 The citywide poverty rate is well over 30 percent.23 Infant mortality rates equal those of undeveloped nations.24 The murder rate is the highest in the state. Virtually

21 See id.
22 See id.
23 See id.
every block in the city contains some abandoned houses. After decades of “white flight,” the city is home to an almost exclusively African American and Latino population.25

Waterfront South is a particularly devastated and environmentally degraded neighborhood in the southern part of the city. Extending east to west one-half mile from an interstate highway to the Delaware River, it encompasses most of the South Jersey Port, the former base for a major shipbuilding company. Waterfront South also contains a small historic residential core, a deteriorated commercial corridor, and numerous industries close to schools, homes, and churches. Within this small area, less than one square mile, one can find two federal Superfund sites and thirteen other known contaminated sites.26 The area also has four junkyards, a petroleum coke transfer station, a scrap metal recycler, several auto body shops, a paint and varnish company, a chemical company, three food processing plants, and numerous other heavy industrial uses. Just north of the neighborhood is the large U.S. Gypsum plant.

This proliferation of polluting businesses has not stopped the elected officials of the mostly affluent, white suburban county in which Camden City is located from continuing to dump unwanted and dangerous facilities into Waterfront South. In the early 1980s, when required to upgrade its sewage treatment system, Camden County decision makers selected the small city sewage plant in Waterfront South for expansion so that it could process all of the sewage from thirty-five municipalities. The county then decided to construct an open-air sewage-sludge-composting facility next to the treatment plant. Next came the regional trash-to-steam incinerator, one of the largest in the state. In the early 1990s Waterfront South was chosen as the site for a cogeneration power plant.

Despite strong community opposition, the New Jersey Department of Environmental Protection freely granted permits for all of these facilities. For years, Waterfront South residents endured horrific sewage odors, diesel truck fumes, dust, and noise. The rates for asthma and other respiratory problems rose dramatically.27 At the same time the area became

25 See U.S. Census Bureau, supra note 20.
26 “Superfund” refers to a federal initiative for cleaning up abandoned or uncontrolled hazardous waste sites authorized by the Comprehensive Environmental Response, Compensation, and Liability Act, commonly known as Superfund, enacted by Congress on December 11, 1980. 42 U.S.C. §§ 9601 et seq. (2001). This law created a tax on the chemical and petroleum industries and provided broad federal authority to respond directly to releases or threatened releases of hazardous substances. Only sites that pose serious danger to public health or the environment are eligible for listing on the National Priority List (NPL) as “Superfund sites.” One Superfund site in Camden, New Jersey, is the General Gas Mantle Factory; it contains radioactive thorium, which was used in the manufacture of gas lanterns. See EPA, NPL Site Narrative at Listing: Welsbach & General Gas Mantle (Camden Radiation), Camden and Gloucester Cities, New Jersey (last visited Mar. 11, 2002), www.epa.gov/oerrpage/superfund/sites/npl/nar1460.htm; EPA, Record of Decision System (RODS): Welsbach & General Gas Mantle (Camden Radiation) (last updated Jan. 25, 2002), www.epa.gov/oerrpage/superfund/sites/rodsites/0203580.htm. The other Superfund site is the former location of a company that recycled hazardous waste barrels. See EPA, NPL Site Narrative at Listing: Martin Aaron Inc., Camden, N.J. (last visited Mar. 11, 2002), www.epa.gov/oerrpage/superfund/sites/npl/nar1559.htm; EPA, Superfund Redevelopment Pilots: Martin Aaron Inc., Camden, N.J. (July 2000), www.epa.gov/oerrpage/superfund/programs/recycle/p_facts/r2_12.htm. For information on other contaminated sites, see N.J. Dep’t of Envtl. Prot., Known Contaminated Sites in N.J. (last rev. June 18, 2001), www.state.nj.us/dep/srp/kcs-nj/.
27 Although no comprehensive health statistics of Camden City and Waterfront South are available, an odor study showed that 61 percent of Waterfront South residents experienced some type of respiratory symptoms compared to 35 percent in a different neighborhood in Camden. Pamela Dalton, Monell Chem. Senses Gr., Odor, Annoyance, and Health Symptoms in a Residential Community Exposed to Industrial Odors 6–7 & tbl.3 (Nov. 1997) (unpublished manuscript, on file with Olga D. Pomar).
more blighted, housing values dropped, and, for the remaining residents, moving out of the area became increasingly difficult. Waterfront South now has slightly more than 2,000 residents. Almost half of them are children, who are most vulnerable to pollution.

B. The Plaintiffs—South Camden Citizens in Action

In 1997 a local nonprofit organization in Waterfront South decided to sponsor a grass-roots neighborhood planning project and brought together residents to explore how living conditions could be improved. Camden Regional Legal Services first became involved in working with the residents during this planning effort. Residents formed South Camden Citizens in Action, or SCCIA, to serve as their voice. The group did not define itself as an environmental justice organization and worked on many neighborhood issues. From the beginning, however, environmental problems dominated the discussions. At the first large community meeting, residents decided, by an overwhelming consensus, that the problem they most wanted to tackle was the odor from the sewage plant.

SCCIA organized a campaign to develop a record of odor violations and get local officials’ support. After the Department of Environmental Protection failed to resolve the complaints, the group recruited Jerome Balter of the Public Interest Law Center of Philadelphia to bring a citizen enforcement action. SCCIA obtained a settlement requiring the facility to upgrade its odor controls. While the litigation was pending, an EPA representative came to Camden to inform residents about the Gas Mantle Superfund site in their neighborhood. Many residents learned for the first time that the abandoned warehouse and scattered “hot spots” throughout the residential neighborhood had been emitting low-level radiation for more than eighty years. SCCIA members gave input into the remediation plan, and EPA recommended that all contaminated materials be removed. The warehouse was eventually demolished, but the contaminated soil remains and residents living immediately adjacent to the hot spots have not been relocated.

Meanwhile, SCCIA lost the support of the sponsoring nonprofit organization and began to function as an exclusively volunteer organization. Its leaders—long-time residents, mostly African American, all women, all eligible for legal services, and many in poor health—continued to meet in one another’s living rooms and donated their own money for refreshments and supplies. In 1999 this fragile group had to confront a new major environmental justice struggle: the coming of the St. Lawrence Cement Company to Waterfront South.

Based in Canada and a member of the Swiss Holderbank group, the St. Lawrence Cement Company is one of the world’s largest manufacturers of cement. After choosing Waterfront South as the site for its new cement plant, the company hired a public relations consultant in Camden to assist it in getting its needed approvals; it also paid for lobbyists in Trenton and Washington, D.C. As is typical in environmental justice controversies, a community without any resources became pitted in a David-versus-Goliath struggle against a corporate giant.

C. The Cement-Grinding Facility

In March 1999 the St. Lawrence Cement Company negotiated a lease with the South Jersey Port Corporation, a state agency, to lease twelve acres of land along the Delaware River at the port’s Broadway terminal in Waterfront South. The company proposed to construct a cement-grinding facility on that site. It would ship in blast furnace slag from Italy by barge to a docking facility in Camden, truck it three miles to the facility in Waterfront South, and grind it into a very fine powder for use as a cement additive. The product then would be distributed throughout the northeastern United States.

The cement company’s operations would generate more than 77,000 truck trips and emit 100 tons of pollutants per year. Almost 60 tons would be made up

28 See U.S. Census Bureau, supra note 20.
29 See Record of Decision System, supra note 26.
of fine inhalable particulate, also known as soot, or PM-10. A significant amount would be composed of the very smallest and therefore most dangerous particulates, PM-2.5. PM-10 and especially PM-2.5 are known to aggravate respiratory illnesses such as asthma, emphysema, and bronchitis; trigger cardiovascular symptoms; and cause premature death.

Because its facility is located on state land, the St. Lawrence Cement Company pays no property taxes and has offered no host benefits to Camden. The cement-grinding operations are highly mechanized and produce only fifteen jobs. Although opponents of environmental justice like to point to the need for business investment in communities such as Waterfront South and fault advocates for “discouraging” such investment, the cement company is typical of the type of industry that seeks to locate in these communities. All too often, these polluters supply few jobs and their blighting effect on the area only discourages other, more desirable businesses from locating nearby. The proliferation of waste disposal and recycling facilities, transfer stations, and heavy industry in Waterfront South has not alleviated Camden City’s high unemployment and poverty rates.

D. Seeking Permits

Shortly after executing the lease, the St. Lawrence Cement Company began a series of meetings with the Department of Environmental Protection to discuss the plans for the facility. Because port land is exempt from zoning and planning, the company did not need to obtain any local board approvals or to involve city officials. In August 1999 the company submitted its permit application to the department and made its plans known to the community. Although the department did not require it to do so, the company held several community meetings and organized a community advisory panel. It engaged in an aggressive public relations campaign to obtain the support of local churches, nonprofit organizations, and community groups. It even paid for experts, whom the advisory panel selected, to review the permit application.

However, from the start SCCIA members were suspicious of the cement company’s tactics. Eventually SCCIA refused to participate in the advisory panel because the members saw that the company was trying to use the participation of neighborhood organizations to prove that it had community support. Instead SCCIA engaged in an organizing effort to oppose the cement company through petitions, letters, neighborhood speak-outs, and meetings with the Department of Environmental Protection.

The department evaluated the St. Lawrence Cement Company’s permit in accordance with New Jersey air quality regulations and the federal Clean Air Act. It analyzed the company’s estimated emissions and determined that they would not exceed the National Ambient Air Quality Standards. However, the department did not consider the effects of the diesel truck

---

31 See id. PM-2.5 is particulate matter sized 2.5 microns or smaller.
32 See id. at 461–66 (citing authorities).
34 S. Camden Citizens in Action, 145 F. Supp. 2d at 466. In doing so, the N.J. Department of Environmental Protection applied the PM-10 National Ambient Air Quality Standards, as current law requires. National Primary and Secondary Ambient Air Quality Standards, 42 U.S.C. § 7409(a) (2001); 40 C.F.R. pt. 50 (2001). However, the EPA recognizes that the PM-10 standard is not adequate to protect public health and in 1997 promulgated a new, stricter PM-2.5 standard. National Ambient Air Quality Standards for Particulate Matter, Final Rule, 62 Fed. Reg. 38652 (July 18, 1997). Industry groups challenged the new standard through litigation. The U.S. Supreme Court ultimately upheld the validity of the new PM-2.5 National Ambient Air Quality Standards, Am. Trucking Ass’n v. EPA, 175 F.3d 1027 (D.C. Cir.), modified on reh’g, 195 F.3d 4 (D.C. Cir. 1999), aff’d in part, rev’d in part sub nom., Whitman v. Am. Trucking Ass’n, 531 U.S. 457 (2001). However, the EPA has not implemented the new standards.
fumes on ambient air because the Clean Air Act does not include such “mobile source emissions” in permitting review. The department did not consider the local conditions in Waterfront South, the potential cumulative and synergistic effects of all the pollution in the area, the residents’ poor health, or the facility’s effects on overall quality of life. Most significant, the department did not consider whether it was disproportionately burdening African American and Latino residents with more than a fair share of environmental hazards.

Because of the peculiarities of New Jersey law, the department allowed the St. Lawrence Cement Company to construct the $50 million facility “at risk” while the permit review was pending. By the time the department issued a draft permit and scheduled the first and only public hearing in the summer of 2000, construction was more than 50 percent complete. Some residents, seeing construction of the massive cement plant in progress, viewed SCCIA’s campaign against the facility as futile and the department’s conducting a public hearing as meaningless. Nevertheless, more than 120 persons appeared at the public hearing; most of them testified in opposition to the plant and raised both civil rights and health concerns.

In October 2000 SCCIA filed administrative complaints with both the Department of Environmental Protection and the EPA; the complaints claimed that the issuance of a permit without consideration of the potential discriminatory impact violated the Title VI regulations. Both the department and the EPA ignored these complaints. On October 31, 2000, the department issued the permits to the cement company, and litigation became the only option for continuing the struggle.

E. The Legal Claims

Unlike many other environmental justice cases, this lawsuit rested exclusively on civil rights rather than environmental claims. Given the inadequacy of the PM-10 standard, proving a technical violation of the Clean Air Act seemed impossible. The Department of Environmental Protection had seemingly thoroughly analyzed the permit and used its discretion to impose what appeared to be reasonable permit conditions. What made the department’s actions egregious was not that it permitted a cement-grinding facility at certain emission levels but that, by failing to consider the discriminatory effects of the permit, it knowingly perpetuated the environmental racism to which Waterfront South residents had been repeatedly subjected. Therefore SCCIA’s primary claim was violation of the EPA’s Title VI discriminatory impact regulations. SCCIA also alleged intentional discrimination in violation of both Title VI

---


56 New Jersey law allows the company to construct but not to operate the facility once the application is deemed administratively complete but before the Department of Environmental Protection issues a “permit to construct.” N.J. STAT. ANN. § 26:2C-9.2(f) (West 2001); N.J. ADMIN. CODE tit. 7, § 27-8.24 (2001). Because the developer may not hold the department liable for any losses if the department ultimately denies the permit, the construction is “at risk” to the business. Id.


58 The Department of Environmental Protection imposed some discretionary monitoring and emission control requirements but did not limit the St. Lawrence Cement Company’s emissions or its truck traffic to levels below what the company requested in its application.
and the equal protection clause and violation of Title VIII (the Fair Housing Act). 39

F. Obtaining a Preliminary Injunction

SCCIA filed the case on February 13, 2001, and simultaneously requested a preliminary injunction to prevent the St. Lawrence Cement Company from starting operations. SCCIA based the motion exclusively on the Title VI discriminatory impact claim. 40 To support the motion, SCCIA presented two expert statements—one from a physician who explained the severe health effects of inhalable particulates and diesel fumes and the other from a statistical expert who demonstrated a statewide pattern of discriminatory siting of facilities in communities with a higher than average percentage of nonwhite residents. SCCIA also submitted Department of Environmental Protection officials’ deposition statements that they had made no attempt to assess the permit’s compliance with civil rights.

On April 19, 2001, federal district court Judge Stephen Orlofsky issued his first ruling. In a 140-page published decision, he agreed with SCCIA that the Department of Environmental Protection violated the Title VI regulations by relying exclusively on environmental standards and failing to make a “disparate impact analysis” before issuing a permit. 41 He ordered the department to conduct such an analysis within thirty days; he also enjoined operation of the facility. 42

This decision was the first time that an agency (such as the Department of Environmental Protection) authorized to issue permits had been found to violate civil rights and was a major victory for environmental justice advocacy. It was also one of the rare instances in which plaintiffs succeeded in proving disparate impact in any Title VI case. That a multi-million dollar investment was put at risk drew national attention to the case. Only five days later, however, while SCCIA was just starting to enjoy its victory and appreciate its new fame and notoriety, the U.S. Supreme Court decided Alexander v. Sandoval, holding that there was no private right of action to enforce the Title VI regulations. 43

Before the Sandoval decision even had been posted on the Supreme Court Web site, SCCIA’s lawyers received a call from Judge Orlofsky’s law clerk at 10:45 that morning to schedule a conference call for 3:00 that afternoon with all counsel to discuss the status of the injunction against the St. Lawrence Cement Company. By then plaintiffs’ counsel had read both the Scalia majority and the Stevens dissent in Sandoval and were prepared to argue that plaintiffs should be allowed to amend their complaint to include a claim to enforce the Title VI regulations pursuant to Section 1983. Judge Orlofsky allowed the amendment, kept the injunction in effect, and in May issued a second decision allowing Section 1983 to be used to enforce Title VI regulations. 44 This was the first decision to interpret Sandoval, and it offered a road map for civil rights litigants nationally.

39 See Verified Complaint for Declaratory Judgment and Injunctive Relief, S. Camden Citizens in Action, 145 F. Supp. 2d 446 (No. 01-cv 702) (see complaint, Clearinghouse No. 53,759A).
40 See Memorandum of Law in Support of Plaintiffs’ Motion for Preliminary Injunction, S. Camden Citizens in Action, 145 F. Supp. 2d 446 (No. 01-cv 702) (see motion, Clearinghouse No. 53,759G); see also Reply Brief, S. Camden Citizens in Action, 145 F. Supp. 2d 446 (No. 01-cv 702) (see reply brief, Clearinghouse No. 53,759H).
41 S. Camden Citizens in Action, 145 F. Supp. 2d 446 (see district court decision, Clearinghouse No. 53,759C).
42 Id. at 497–505.
44 S. Camden Citizens in Action, 145 F. Supp. 2d 505 (see district court’s supplemental opinion, Clearinghouse No. 53,759D); see also Amended Verified Complaint for Declaratory Judgment and Injunctive Relief, S. Camden Citizens in Action, 145 F. Supp. 2d 446 (No. 01-cv 702) (see amended complaint, Clearinghouse No. 53,759B).
G. The Third Circuit

Many environmental justice battles are won when a company decides that the legal and political struggles are not worth it and leaves town. Because the St. Lawrence Cement Company already had invested so much money in constructing its cement-grinding facility in Camden, SCCIA had no illusions that it would walk away from the facility. Both the cement company and the Department of Environmental Protection appealed the two trial court decisions to the Third Circuit Court of Appeals. In June, in a severe blow to the community’s morale, a motions panel stayed the injunction and allowed the cement company to start operations.45 In December a divided panel reversed Judge Orlofsky's second decision and held that Title VI regulations were not enforceable through Section 1983.46 SCCIA requested an en banc rehearing, but the court denied its request.

The Third Circuit’s decision placed SCCIA in the ironic position of having obtained a ruling, still in effect, that the state enforcement agency’s practices violate civil rights but having no ability to have that ruling enforced. SCCIA’s intentional discrimination and Fair Housing Act claims remain, and plaintiffs’ counsel plan to seek leave to amend the complaint to include state law claims against the St. Lawrence Cement Company. They expect to proceed with discovery in the coming months and to go to trial by early 2003.

H. Out-of-Court Community Activities

Despite the legal setbacks, the South Camden litigation has significantly furthered environmental justice advocacy on the local and state levels. The high profile of the case generated a great deal of media attention and helped raise public awareness of the plight of Waterfront South and similar communities. SCCIA members emerged as community spokespeople and leaders.

Realizing that environmental justice problems extended beyond their neighborhood, they banded together with local supporters and activists and formed the citywide Camden Environmental Justice Coalition. Together with the coalition members, SCCIA organized community events, education and outreach efforts, and protests. They gained the support of some local officials, and the Camden City Council passed a resolution opposing the cement company’s operations. The county, state, and national NAACP (National Association for the Advancement of Colored People) publicly expressed support for SCCIA’s struggle.

Working with environmental and civil rights groups from around the state, the Camden groups organized a rally at the Department of Environmental Protection office protesting the department’s refusal to address civil rights. The coalition has been a catalyst in preparing public comments on the department’s proposed “environmental equity” regulations and working with advocates from around the state to try to formulate joint recommendations. The newly appointed department commissioner accepted SCCIA’s invitation to take a comprehensive tour of Camden and met with SCCIA and coalition members to discuss how the department can address residents’ concerns.47

As a result of the litigation and the organizing efforts, SCCIA and the coalition also have become part of the national environmental justice network. SCCIA

---

46 S. Camden Citizens in Action, 274 F.3d 771 (3d Cir. 2001) (see opinion, Clearinghouse No. 53,759F).
leaders participated in the tenth anniversary of the National People of Color Leadership Summit in Washington, D.C. Coalition members presented testimony at the U.S. Commission on Civil Rights’ environmental justice hearings.

This connection with national leaders has increased awareness among Camden residents of environmental racism and strengthened their commitment to continue the fight. As new environmental justice problems come to light in Camden, residents have been able to take on these struggles with greater unity and strength. Unfortunately, because of their continued lack of resources, SCCIA and the coalition could not take full advantage of the advocacy opportunities that the litigation presented to advance an environmental justice agenda.

III. Camden Lessons and Environmental Justice Advocacy Today

The Camden struggle illustrates how simultaneous litigation and community advocacy can advance environmental justice and how legal services advocates can assist community groups engaged in these struggles on both fronts. At the same time the Camden situation evinces the obstacles that neighborhood groups face because of the limited legal handles available to advocates and the community’s lack of resources and bargaining power.

A. The Law

_South Camden_ illustrates both the severity of the problem of discriminatory siting of polluting facilities in communities such as Waterfront South and the lack of legal tools to address the problem. _Sandoval_ and _South Camden_ have made Title VI disparate impact regulations—in many advocates’ view, potentially the strongest legal basis for enforcing environmental justice—unenforceable by private citizens. Lawyers are left with continuing to use environmental laws, revisiting intentional discrimination claims, and continuing to search for new legal handles.

B. Environmental Challenges

State and federal environmental laws will continue to be fertile grounds for challenging some permits. The National Environmental Policy Act and state statutes modeled on this Act are useful because they create a mechanism for public participation in and input into permit decisions and require an evaluation of all environmental impact; the Act and state statutes allow for consideration of local conditions and cumulative effects of pollution. Common-law nuisance claims may be an avenue in some states. Environmental enforcement suits are also an effective way to deal with a polluting facility.

However, environmental litigation is costly and highly technical, and many communities lack the resources to pursue it. The standard for challenging an agency’s decision to issue a permit is a difficult one to meet. Most important, environmental laws alone cannot address the disparity in siting. Without civil rights remedies, a hundred more businesses could be sited in a community such as Waterfront South, all polluting facilities in a state could be located in communities of color, and even such extreme disparity in apportioning the burdens of pollution would not be a legal basis to stop an agency from continuing to grant permits under environmental laws.

C. Civil Rights Challenges

Filing administrative civil rights complaints with the EPA continues to be an option for advocates. However, they hold out little hope that such complaints will prove effective in challenging the disproportionate burdening of communities.

48 Of course, other circuits may choose not follow the Third Circuit’s reasoning and may hold that Section 1983 remains available as a tool for enforcing Title VI regulations. However, few civil rights lawyers are optimistic that the U.S. Supreme Court would uphold such an interpretation.

because, as noted above, the EPA to date has failed to resolve any of these complaints in a way that is favorable to the community. Nevertheless, in some instances, the publicity and political pressure that accompany the filing of such complaints have resulted in developers withdrawing their proposals.

Community groups’ discrimination claims taken to court under Title VI and the U.S. Constitution now require proof of intent. To make such claims more viable, advocates need to try to broaden the definition of what constitutes intentional discrimination and look for more ways to prove intent through circumstantial evidence. In some cases the Fair Housing Act may offer an additional mechanism for challenging projects that cause loss of housing units or perpetuate housing segregation.

However, the federal courts have become a difficult environment for innovative civil rights litigation, especially at the appellate and U.S. Supreme Court levels. The Supreme Court in recent years has demonstrated consistent hostility to civil rights plaintiffs and protections. During the last term, in addition to the Sandoval case, the Supreme Court dramatically increased state immunity from civil rights cases as well as construed attorney-fees law narrowly to bar public interest lawyers’ recovery in cases that achieve a successful outcome but not a final judgment for plaintiffs. While the political value of civil rights cases should not be underestimated—they allow a community to name publicly the disparate environmental impact as a civil rights violation—federal civil rights suits clearly have less utility in 2002 than they did in 1968.

Many state constitutions include equal protection as a constitutional right, and many states have enacted civil rights–protecting statutes modeled on the federal Civil Rights Acts. In light of the direction the U.S. Supreme Court and several federal courts of appeals have taken, savvy environmental justice advocates will continue to use state court litigation as an alternative to the federal courts.

Environmental justice and other civil rights and environmental advocates need to continue to push federal and state legislators, administrative agencies, and elected officials to create additional legal tools for environmentally overburdened communities and other groups suffering from discrimination. Such tools need to be definitive enough for the community and its advocates and technical experts to use. Initiatives may include seeking amendments to the Civil Rights Acts, such as a legislative “fix” to Sandoval, more protective environmental regulations that consider the existing health conditions of a community or the cumulative and syner-

---

50 See Theodore Eisenberg & Sheri Lynn Johnson, The Effects of Intent: Do We Know How Legal Standards Work?, 76 CORNELL L. REV. 1151 (1991). Eisenberg and Johnson, in an empirical study of the 316 published discriminatory intent cases following Washington v. Davis through early 1988, show that the success rate (40 percent in district court cases) is higher than commentators expected. Id. The subtle and multiple reasons behind the higher than expected success rate make fascinating reading—and required reading for those bringing discriminatory intent cases.


gistic effects of pollutants, new permit requirements that reflect civil rights concerns, or even zoning-type regulations.54

D. Community Struggle

Given the very real limitations of what can be achieved in the courts, lawyers must be especially aware of the importance of community-based organizing and advocacy in achieving environmental justice. Legal services programs can assist local groups in environmental justice initiatives in many ways in addition to, or in combination with, litigation.

For example, legal services lawyers can help strengthen the capacity of groups to take on environmental justice efforts; this increases the groups’ influence over decisions affecting their communities. Lawyers can help client groups with organizational development issues, such as incorporation, bylaws, elections, and board training. They can offer community legal education on matters such as right-to-know laws, environmental regulations, enforcement procedures, and land-use laws. They can instruct the group on how to obtain documents through freedom of information requests and can help recruit technical experts to analyze the documents.

Permit decisions and environmental cleanup initiatives usually offer opportunities for public input. Advocates can help community residents prepare testimony for public hearings and draft written comments. Some environmental siting decisions are made at the local level, and representation is needed before municipal planning and zoning boards.

As agencies authorized to issue permits begin to take small steps to address environmental justice, they may propose new regulations and policies. Communities may need legal help in analyzing the strengths and weaknesses of such policies and in formulating proposals for stronger measures. The agencies’ public participation requirements create opportunities for negotiations with companies and government officials, and lawyers can help community organizations in such

54 After an organizing effort by Chester Residents Concerned for Quality Living, the Chester City Council amended its zoning ordinances to prohibit waste processing and incineration facilities in the area except in limited circumstances.
negotiations. Legal services attorneys also can represent clients in filing administrative grievances and complaints.

Camden Regional Legal Services’ commitment to giving this full range of services to SCCIA and other environmental justice advocates made a significant difference in helping community members use the litigation as a springboard for broader advocacy. Regardless of the ultimate legal outcomes and even despite making “bad law,” the South Camden case helped the environmental justice movement by enhancing awareness of environmental racism and increasing the community’s ability to advocate its rights.

The future success of the environmental justice movement depends on fundamental social change, including investing affected communities with greater decision-making power. Relying on lawyers to wage the battle in the courts is too easy for community groups, and “taking charge” and trying to be the saviors of the community is too easy for lawyers. We all need to remind ourselves, in doing this work, that the lawyer’s role must include helping residents increase their capacity to engage in environmental justice struggles by creating stronger neighborhood institutions, building leadership, and acquiring needed resources and technical tools, and we all need to avoid relying exclusively on litigation, which can undermine these efforts.

Environmental justice issues offer the legal services practitioner challenging but rewarding cases. Environmental issues, because they cut across historical divisions of race and class, are excellent organizing tools—vehicles to bring people together to realize, then exercise, their collective power. Only through building such power in low-income communities will legal services lawyers ultimately help their clients break the cycle of powerlessness. Litigation is one tool in that broader strategy but must be seen in light of the serious limitations that the federal courts have imposed on it.

Note on the Authors

Olga D. Pomar is coordinator of community development work, Camden Regional Legal Services, 745 Market St., Camden, NJ 08102; 856.964.2010 ext. 232; OPomar@lsnj.org. She is the lead attorney in the South Camden case described in this article. Luke W. Cole is director of the Center on Race, Poverty and the Environment, California Rural Legal Assistance Foundation, 631 Howard St., San Francisco, CA 94105; 415.495.8990 ext. 1; luke@igc.org. He is cocounsel (with Jerome Balter and Michael Churchill of the Public Interest Law Center of Philadelphia) in the South Camden case.

Authors’ Acknowledgment

We thank Michael Churchill of the Public Interest Law Center of Philadelphia for reviewing and commenting on this article.