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A Tale of Two Cities: The Need for Greater Federal Involvement to Ensure Proper Notification, Medical Monitoring and Treatment, and Successful Relocation for Tallevast, Florida and Other Environmental Justice Communities

Sabrina R. Collins*

Abstract

This article explores the environmental justice battles being waged in two Florida communities. The first is in Pensacola at the site of the infamous “Mount Dioxin” and the second is in Tallevast. The article further examines the treatment of the two communities by the local, state and federal governments. Further insight is also provided regarding the affected communities. The article offers suggestions for fair and effective treatment of environmental justice communities.

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Introduction

Florida is considered by many to be a paradise. Beautiful beaches and foliage combine with mild weather conditions to make Floridians the envy of many. However, for many of its residents, especially those who live in environmental justice communities, life is anything but a leisurely stroll on the beach. Florida's environmental justice communities demonstrate the intersection of race and environmentalism that creates the relatively new phenomenon known as the environmental justice movement.

In the small hamlet town of Tallevast, the residents are currently battling toxic contamination, poor health, and seemingly undefeatable opponents- the state of Florida and multibillion dollar corporation Lockheed Martin. The residents of Tallevast have fought hard against disregard and discrimination. However, they are growing weary after years of battle. There are lessons from within the state of Florida that may be relevant to Tallevast's situation as possible guidance for success.

The case of "Mount Dioxin" was heralded as a major accomplishment which was heralded as a "pilot" for other relocation efforts by the Environmental Protection Agency (EPA). However, the roadmap that could have been referenced for guidance in Tallevast has been blocked. The deference that the EPA has shown to the Florida Department of Environmental Protection (FDEP) has resulted in a level of deference to Lockheed Martin which has granted the corporation wide, if not absolute, discretion in its handling of the cleanup process in Tallevast. The first part of the proposed solution for these environmental justice communities is that the oversight of the cleanup and remediation of contaminated communities should be removed from the hands of the state of Florida and given to the Federal government so as to ensure the most impartial treatment possible.

The second part of the proposal for the Tallevast community involves the use of the information that has been gathered regarding relocation in EJ communities. By the EPA's own label, Mount Dioxin was to be a pilot study. There is no need to "reinvent the wheel." The EPA can take the information that was collected from the formal studies and roundtable discussions to fashion a remedy for the people of

Tallevast and force the responsible party, in this case Lockheed Martin, to follow the plan.

Part I of this article explores the impact of environmental contamination on two environmental justice communities in Florida. First, the background of the environmental justice movement as well as an understanding of the environmental justice framework is considered in order to provide a foundation for the consideration of the social and legal processes at work in environmental justice communities. After considering that framework, the histories of Tallevast and Escambia County and their struggles against environmental racism will be considered.

Part II of the article provides a brief overview of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Part III of the article discusses proposals for proper treatment of environmental justice communities and focuses on the application of the lessons learned from Escambia County to the problems of Tallevast, Florida. Specifically, the article addresses issues of notification, medical monitoring and treatment and successful relocation and calls for specific procedures to be followed so as to ensure the best possible treatment and outcome for the community members. The process of overfiling is suggested as a means by which to limit the power of the local and regional authorities.

I. Environmental Contamination Impacts in Two Environmental Justice Communities

An understanding of the Environmental Justice Movement in the United States necessitates the consideration of the historical trajectory of the movement and its development as a response to intolerable racism and oppression that have been levied at poor and minority communities. In *Environmental Justice in the New Millennium*, Filomina Steady discusses The Dominant Economic Development Paradigm in relation to Environmental Justice.¹ Steady explains how the pursuit of “limitless economic growth and the domination of nature to ensure such growth” has been the prevailing paradigm for development for centuries.²

¹ See FILOMINA STEADY, ENVIRONMENTAL JUSTICE IN THE NEW MILLENNIUM: GLOBAL PERSPECTIVES ON RACE, ETHNICITY, AND HUMAN RIGHTS 5 (Palgrave Macmillian ed., 2009).

² *Id.*

While the origins of the Environmental Justice Movement have often been traced to the Civil Rights Movement of the 1960s.³ Steady connects the contemporary struggles of environmental justice communities to the beginnings of the present-day African Diaspora which came into being as the result of European expansionism “as exemplified by the transatlantic slave trade and the imperialism that greatly shaped the Americas.”⁴

This ideology of domination, exploitation and disregard for life can be traced throughout the history of imperialistic conquest of Africa and the Americas. Accounts of slavery indicate that enslaved people lived in “environmentally dangerous and squalid conditions.”⁵ The historical treatment of Native Americans and Blacks contributed to the ideology of domination and disregard that has persisted, in various forms, to the present where the process continues through “multinational corporations and international financial institutions.”⁶ This paradigm has led to an allocation of benefits and burdens that has been disproportionately unfavorable to poor communities and communities of color.

The environmental justice frame is built upon the examples, actions and rhetoric of past social justice movements, most notably the Civil Rights Movement.⁷ The Civil Rights Movement, of course, was influenced by a host of previous social justice movements, and in turn, provided the foundation for numerous other movements for rights. The movement for environmental justice fits squarely into this frame of reference.

A. Background of the Environmental Justice Movement

³ *See id.*

⁴ *Id.*

⁵ *Id.* at 6.

⁶ *Id.*

⁷ Stella M. Capek, *The “Environmental Justice” Frame: A Conceptual Discussion and an Application*, 40 SOC. PROBLEMS 8 (1993), available at <http://www.jstor.org/stable/3097023>.

The Environmental Justice Movement started in Warren County, North Carolina.⁸ During the summer of 1978, 31,000 gallons of used oil contaminated with hazardous chemicals known as polychlorinated biphenyl (PCBs) were dumped on the side of roadways throughout North Carolina.⁹ Two hundred and ten miles of roadways were affected.¹⁰ PCBs are man-made organic chemicals, the manufacturing of which was banned in 1979.¹¹ PCBs have been demonstrated to cause cancer, as well as a variety of other adverse health effects on the immune system, reproductive system, nervous system, and endocrine system.¹²

Robert J. Burns, the owner and operator of a New York based waste hauling company, had obtained the contaminated oil from the Ward Transfer Company.¹³ Apparently, Mr. Burns has purchased the contaminated oil without having been informed of the proposed ban on PCBs. Rather than face the expense of properly disposing of the toxins, Burns dumped the oil on North Carolina roadsides. The Environmental Protection Agency designated the contaminated roadsides as Superfund sites and worked with the state of North Carolina to devise a plan to collect the PCBs from the 14 counties where they had been dumped and to deposit them in a landfill.

Former Governor James B. Hunt decided that a rural town by the name of Afton, in Warren County, would be the site of the new landfill.¹⁴ Afton was 84% African American and had neither a mayor nor a city council.¹⁵ Of the 100 counties in the state of North Carolina,

⁸ *The Beginning of the Environmental Justice Movement, Environmental Justice in North Carolina*, DUKE UNIVERSITY, http://sites.duke.edu/docst110s_01_s2011_sb211/what-is-environmental-justice/history/ (last visited April 27, 2014); see also Jennifer Wyatt, *The Birth of the Environmental Justice Movement Was In Warren County*, ROADSTOJUSTICE.ORG (May 9, 2011), available at <http://www.roadstojustice.org/the-birth-of-the-environmental-justice-movement-in-warren-county>.

⁹ See *id.*

¹⁰ Robert Bullard, *Environmental Racism PCB Landfill Finally Remedied But No Reparations for Residents*, ENVTL. JUSTICE RES. CENTER (Jan. 12, 2004), available at <http://www.ejrc.cau.edu/warren%20county%20rdb.htm>.

¹¹ *Id.*

¹² *Id.*

¹³ *Basic Information: Polychlorinated Biphenyls*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/epawaste/hazard/tsd/pcbs/pubs/about.htm> (last visited April 27, 2014).

¹⁴ While it is agreed that the site of the landfill was in Warren County, some sources cite the city of Shocco, NC, while others cite the city of Afton, NC.

¹⁵ DUKE UNIVERSITY, *supra* note 8.

Warren County had the highest majority of African Americans and was ranked 97th in Gross Domestic Product (GDP).¹⁶

Rather than quietly accepting the contamination and stigma that had literally been dumped on them, the residents of Warren County organized themselves into a grass-roots force that was not to be ignored. The Warren County citizens were later joined by civil rights leaders, black church groups, and youth and environmental activists that engaged in protests and demonstrations resulting in the arrests of over 500 people.¹⁷

While the protests did not stop the trucks from dumping toxic waste in the community, Warren County gained national attention and prompted the General Accounting Office (GAO) to conduct a study into the siting of hazardous waste sites and the demographics of the communities surrounding those landfills. The 1983 GAO study reported that three of the four communities with hazardous waste landfills in EPA Region IV were located in predominately black communities. Additionally, at least twenty-six percent of the population in all four communities had incomes below the poverty level.¹⁸

The Warren County protests also led to the “Toxic Waste and Race Report” which was produced by the United Church of Christ Commission for Racial Justice in 1987.¹⁹ The Report was the “first national report to comprehensively document the presence of hazardous wastes in racial and ethnic communities throughout the United States.”²⁰ Also, it explored the concept of “environmental racism” and provided the basis for understanding the interplay of civil rights struggles and environmentalism that created the Environmental Justice Movement.

While the specific circumstances of the communities may differ, the call for environmental justice consolidates the “analogous experiences” of many communities into a force with significant mobilizing power at both the local and national levels.²¹ In 1991, the People of

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Bullard, *supra* note 10.

¹⁹ *Id.*

²⁰ *Id.* at ix.

²¹ Capek, *supra* note 7, at 5.

Color Environmental Leadership Summit convened in Washington D.C. with the goal of building an international movement of people committed to fighting the destruction and taking of lands in the communities of color.²² At this summit, the seventeen “Principles of Environmental Justice” were drafted.

The Preamble gives definition and focus to the goals of the movement by stating that the attendees and all those whom they represented sought “to promote economic alternatives which would contribute to the development of environmentally safe livelihoods; and, to secure our political, economic and cultural liberation that has been denied for over 500 years of colonization and oppression, resulting in the poisoning of our communities and land and the genocide of our peoples... .”²³ These principles formed a framework that is comprised of specific claims that reflect the unique character of environmental grievances.

These claims include the right to (1) accurate information about the situation; (2) a prompt, respectful, and unbiased hearing when contamination claims are made; (3) democratic participation in deciding the future of the contaminated community; and (4) compensation from parties who have inflicted injuries on the victims.²⁴ Capek also identifies a fifth component which serves not as a right, but rather an informal expectation, which is the commitment to solidarity with victims of toxic contamination in other communities.²⁵ Additionally, Capek identifies a call to abolish environmental racism as an increasingly significant element of the environmental justice frame.²⁶

Environmental justice movements must contend with numerous obstacles. First, the members are normally of lower socio-economic standing and are usually minorities.²⁷ The members are normally short on time and money. These are often working people with families, or in many cases, older people who are suffering from the effects of the contamination in their community. The time and effort that is necessary to mobilize neighbors, form a community organization, educate themselves

²² FIRST NATIONAL PEOPLE OF COLOR ENVIRONMENTAL LEADERSHIP SUMMIT, PRINCIPLES OF ENVIRONMENTAL JUSTICE (1991), available at <http://www.ejnet.org/ej/principles.html>.

²³ *Id.*

²⁴ *Id.* at 8.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *See id.*

and their community about the contamination, solicit outside help, and wage legal battles is overwhelming and daunting. Moreover, at a social-psychological level, studies of contaminated communities reveal the devastating impact of real or suspected contamination on residents.²⁸

B. Two Affected Environmental Justice Communities

There are approximately seventy Superfund sites in the state of Florida. Three were added in 2012 and one additional site is being proposed for addition to the list.²⁹ Florida is located in the United States Environmental Protection Agency's (USEPA) Region IV, which is comprised of eight Southern states.³⁰ Region IV has particular environmental justice concerns that are the direct result of the region's history of slavery, Jim Crow laws, segregation, and continued racism. Indeed, it is no surprise that the environmental justice movement began in Region IV.³¹

Two Florida environmental justice communities- one located in Pensacola and the other in Tallevast- have gained a great deal of attention due to their environmental justice struggles. Yet, the injustice continues in each of these communities. The respective stories of the communities are characterized by tenacity and inspiration as well as disappointment and frustration. However, both communities provide invaluable lessons for ongoing and future environmental justice battles. This article specifically focuses on the lessons that can be drawn from Escambia County as possible guidance for the problems in Tallevast.

1. The Rough Side of the Mountain: "Mount Dioxin" Escambia County, Florida

²⁸ *See id.*

²⁹ *Superfund Sites*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/region4/superfund/sites/sites.html#fl> (last visited Nov. 17, 2012).

³⁰ Region IV is comprised of Kentucky, Tennessee, North Carolina, South Carolina, Mississippi, Alabama, Georgia and Florida. *Id.*

³¹ Michelle Chen, *The Quest for Environmental Justice in Dixie*, COLORLINES: NEWS FOR ACTION (Oct. 29, 2009), http://colorlines.com/archives/2009/10/the_quest_for_environmental_ju.html.

Escambia County is the westernmost county in the state of Florida. In fact, part of the county is actually inside Alabama state lines. The Escambia county seat, Pensacola, is the site of a remarkable environmental justice community that fought valiantly to obtain permanent relocation away from toxic contamination. The relocation was heralded as a great success by the United States Environmental Protection Agency (EPA). The residents were indeed successful in obtaining relocation away from the main source of toxins. However, closer consideration of the relocation reveals poor handling and lack of consideration in the treatment of the residents. Nevertheless, there are lessons to be learned from the battles waged by the Escambia County environmental justice community that may applied to future environmental justice struggles.

The notorious Mount Dioxin was a literal mountain of contamination that loomed over the community for years, spewing toxins and carcinogens into the community and causing abnormal rates of cancer and other illnesses.³² Escambia County was the site of several heavy polluters. Most notably, and notoriously, were the Escambia Treating Company, a twenty-six acre wood treating facility and the Agrico Chemical Company, a thirty-six acre facility which produced chemical fertilizers.³³ These companies were located within 1,000 feet of each other, with homes nestled between them and surrounding them.³⁴

The Agrico Chemical Company was the site of agrichemical fertilizer production from 1889 until 1975.³⁵ The term agrichemical, a variant of agrochemical, refers to a broad range of chemicals used in agriculture and usually includes pesticides, herbicides, insecticides, and fungicides.³⁶ Agrichemicals also include high concentrations of animal manure. Many agrichemicals are toxic, and agrichemicals in bulk storage may pose significant environmental and/or health risks.³⁷

³² Steve Lerner, *Pensacola, Florida: Living Next Door To Mount Dioxin and a Chemical Fertilizer Superfund Site*, THE COLLABORATIVE ON HEALTH AND THE ENVIRONMENT (Nov. 30, 2007), available at <http://www.healthandenvironment.org/articles/homepage/2628>,

³³ *Id.*

³⁴ *See id.*

³⁵ *Agrico Chemical Company*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/region4/superfund/sites/npl/florida/agricchemfl.html> (last visited Nov. 10, 2012).

³⁶ Wikipedia, *Agrichemical*, <http://en.wikipedia.org/wiki/Agrochemical> (last visited Nov. 17, 2012).

³⁷ *Id.*

Beginning in 1889, the site was used to produce sulfuric acid from pyrite (iron sulfide).³⁸ Various companies used the site to produce chemical fertilizer from 1920 to 1975, including Agrico, which purchased the site in 1972. The site is located just 1.5 miles west of Bayou Texar, which was a discharge site for the contaminated plume that resulted from the activities at the Agrico site and other adjacent Superfund sites.³⁹ The Agrico site also polluted an aquifer that is adjacent to Bayou Texar.⁴⁰

There is not a great deal of information available about the operations at the Agrico site. However, what is known is that industrial wastewater was discharged into low-lying areas and unlined ponds on the property.⁴¹ In 1989, the EPA placed the Agrico site on the National Priorities List because of the contaminated ground water, sludge and soil.⁴² The listed contaminants of concern at the Agrico site included arsenic, chloride, fluoride, lead, nitrate/nitrite, radium-226 and sulfate.⁴³ Two potentially responsible parties, Conoco, Inc. and Freeport McMoRan, Inc., entered into a consent decree with the EPA in 1989.⁴⁴ Per the consent decree, the two companies were legally and financially responsible for the cleanup and remediation of the Agrico property.

The site of the former Escambia Wood Treating Company (ETC) is located just 1,000 feet away from the Agrico Chemical site. Starting in 1944, yellow pine logs were shipped to ETC, where they were debarked, formed, dried, pressure impregnated with preservative, and

³⁸ CARL J. MOHRHERR ET AL., UNIV. OF WEST FLORIDA, PROFILES OF SELECTED POLLUTANTS in BAYOU TEXAR, PENSACOLA, FLORIDA (2005), available at http://uwf.edu/cedb/PERCH_Bayou_Texar_final_report.pdf.

³⁹ *Id.* at 11.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² See Part II *infra* for a discussion of the National Priorities List as a component of CERCLA's regulatory scheme.

⁴³ *Agrico Chemical Company*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/region4/superfund/sites/npl/florida/agricchemfl.html> (last visited Nov. 10, 2012).

⁴⁴ Consent Decree for Settling Defendants, *United States v. Agrico* (N.D. Fla. 1989) (No. 93-23-C) available at http://www.epa.gov/region4/foiapg/readingroom/admin_order_on_consent/agrico_chemical_6.pdf; see also Mohrherr, *supra* note 37, at 11.

stored before being shipped⁴⁵ for use as utility poles, foundation piling and lumber.⁴⁶ From 1944 – 1970, coal-tar creosote was used to treat the wood to make it resistant to insects and weather. In 1963, the company started experimenting with a new wood preservative called pentachlorophenol (PCP), a strong biocide that kills fungi, insects and marine organisms that can destroy untreated wood.⁴⁷ PCP is often contaminated with dioxin which is one of the most highly toxic chemicals in the world.⁴⁸

From the 1940s to the mid-1950s, contaminated wastewater from the plant was sent to an unlined earthen impoundment area- a hole in the ground.⁴⁹ After the mid-1950s, ETC installed a system to recapture some of the preservatives that were being poured into the ground. That process culminated in the water being flushed into the county sewer system and exposed the community to more toxic fumes and overtaxed the sewage treatment plants. This process continued for approximately forty years until the EPA commenced inspections and began to cite ETC for violations in 1985.⁵⁰

Environmental justice activist and community leader Margaret Williams was raised at 27 Pearl Street, Pensacola, Florida, in a house that was situated between ETC and Agrico. Williams recalled:

“Pollution from the plants coated everything. ...The screens on the windows of her childhood home were caked in yellow sulfur released from the fertilizer plant and water from local wells was oily. On some days, while walking to school, Williams had to shield her eyes with her hands and cover her nose and mouth with a kerchief against the dust and odors. Worst of all, her house was like an oven in the summer because her parents closed the windows to keep out the strong chemical fumes.”⁵¹

Williams also remembered flooding from ETC being a problem. The treatment site did not install drainage pipes to divert storm water run-off from carrying pollution from the facility downhill into neighborhood yards and houses.⁵²

⁴⁵ Lerner, *supra* note 32.

⁴⁶ Mohrherr, *supra* note 37, at 12; Lerner, *supra* note 32, at 1.

⁴⁷ Lerner, *supra* note 32, at 1.

⁴⁸ *Id.* at 2.

⁴⁹ Lerner, *supra* note 32, at 1.

⁵⁰ *Id.* at 2.

⁵¹ Lerner, *supra* note 32, at 1.

⁵² *Id.*

Over the years, waste water from the facility seeped into the groundwater contaminating the shallow wells that many residents depended on for water. They recall having to pump the water for several minutes to clear the oily substance and get relatively clean drinking water.⁵³ According to Williams, “No one told us at the time that the reason they capped the wells was that the groundwater was contaminated... We just thought they were improving the system.”⁵⁴ Indeed, it strains credulity to believe that it was mere coincidence that in 1982, the owners of ETC sold the plant to their workers without disclosing the environmental liabilities.⁵⁵ Then the company went bankrupt, which left the financial responsibility for cleanup to the tax-payers.⁵⁶

ETC was abandoned with “leaking and unlabeled drums, a lab full of broken equipment and opened containers, an overturned electrical transformer, crumbling asbestos insulation around a boiler- as well as soil, sludge, and groundwater contamination from the waste pits.”⁵⁷ The level of contaminants found on site was shocking. In some areas, the soil was tested as contaminated with as much as 1.09 ppm of dioxin, which is 545,000 times the acceptable residential limit.⁵⁸ In addition to the dioxin, there were high levels of creosote, pentachlorophenol, furans, naphthalene, PCBs, asbestos, benzene, toluene, xylene, chromium, and dieldrin.⁵⁹

In 1991, nine years after ETC had been abandoned, EPA inspectors found elevated levels of PCPs at up to fourteen feet into the subsoil of the site.⁶⁰ Within a month, the EPA began excavating the contaminated soil. By January 1993, 255,000 cubic yards of soil had been piled up.⁶¹ The excavation continued throughout 1992. The toxic soil was piled into a mound that was sixty feet tall, 1,000 feet long and 30 to 40 feet wide. The EPA made some attempts to incinerate the soil onsite but could not

⁵³ *Id.*

⁵⁴ *Id.* at 1.

⁵⁵ *See id.* at 3.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *See id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 4.

afford to continue the process. Unable to treat this large volume of contaminated soil onsite, EPA officials decided to cover it with a sixty millimeter plastic liner. The residents were initially told that the liner would last for five years.

Later, they were told that the liner would effectively contain the contaminated soil for ten years.⁶² That tarp was allowed to remain in place for over fifteen years. During this time, large holes and tears were discovered in the tarp. Indeed, some residents reported seeing small trees growing through the holes in the plastic. Additionally, the plastic covered mountain was an attractive nuisance which provided a gigantic slide for the neighborhood children. The tarp continued to “cover” the contamination through the severe Florida sun, hurricanes, and downpours. Finally, in 1998, when the United States Army Corps of Engineers (USACE) attempted repairs of the tarp, it was concluded that the plastic was wearing out and had become obsolete.⁶³

One morning, as the community went about its normal daily affairs, people looked out of their windows to find “men in moon-suits.” At that point, the plant had been abandoned for years and they had no idea that the “Big Dig” was about to begin. State officials were also unaware of the EPA’s unannounced excavation. Ed Middleswart, a former district air program administrator for the Florida Department of Environmental Protection, recalls being caught off-guard when he began to receive “blitzes of calls, about people moving around in moon suits, earth moving equipment and creating a lot of dust and odor problems in this little neighborhood.”⁶⁴

The EPA workers conducted their excavation in full protective gear while only fifteen yards away, whereas children played in their yards with no protection.⁶⁵ During the EPA’s initial cleanup efforts, little if any effort was made to notify the community of the severity of the health risks associated with the contamination and cleanup. Throughout the excavation process, residents in the surrounding communities began to experience a significant increase in headaches, nausea, dizziness, breathing problems, nosebleeds, and other acute health problems.⁶⁶

⁶² *Id.* at 5.

⁶³ Lerner, *supra* note 32.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

Dunham was “outraged and horrified that [her] government would treat people this way.”⁶⁷

Finally, on October 3, 1996, the EPA agreed to move all 358 households from the site at an estimated cost of \$18 million. This relocation was the first time that an African American community had been relocated under EPA’s Superfund program. It was hailed as a landmark victory for environmental justice. As of June 2007, building demolition, chemical disposal, and site fencing was completed. The total cost was \$25 million.⁶⁸

2. *The Struggle Continues: Tallevast, Florida*

“Why didn’t anyone tell us?”⁶⁹

“I’m afraid Lockheed Martin will admit its mistake too late. They are just going to let us die.”⁷⁰

Tallevast, Florida is a historic African American community located on the west coast of the state, approximately 45 minutes south of Tampa. This small working class community started as a turpentine camp. At the turn of the 19th century, Tallevast was covered by longleaf-slash pines. Men slashed the 100 foot pine trees to extract the resin that would be boiled and distilled so as to produce turpentine. The turpentine would then be loaded into barrels and shipped north on the Seminole-Gulf railroad line, which was extended into Tallevast to facilitate the lucrative export. The “turp camp” in Tallevast attracted laborers from Georgia and the Carolinas.⁷¹ Thousands migrated to the small town where they built small homes and established themselves while working for the founder of the community, J.H. Tallevast.⁷² Other residents

⁶⁷ Lerner, *supra* note 32, at 8.

⁶⁸ Capek, *supra* note 7.

⁶⁹ See Lerner, *supra* note 32, at 7 (quoting Cassandra “Casey” Brice).

⁷⁰ See Lerner, *supra* note 32, at 9 (quoting Brenda Pinkney).

⁷¹ *Id.*

⁷² Ronnie Greene, *Taking the Law Into Their Own Hands: Fence Line Fighting and Environmental Justice from a Journalist’s Point of View*, 2 *EARTH JURISPRUDENCE & ENVTL. JUST. J.* 60, 73 (2012).

worked in the Florida orange groves, on dairy farms, and for Ringling Brothers Circus, which is headquartered nearby in Sarasota, Florida.⁷³

In 1948, the Visioneering Company opened an engineering plant on Tallevast Road.⁷⁴ Operations at the Visioneering plant generated chemicals and chemical wastes which included oils, petroleum based fuels, solvents, acids and metals.⁷⁵ In 1958, the factory was renamed American Beryllium Company and moved just a few blocks up the road to 1600 Tallevast Road. The Loral Metal Company purchased ABC in 1961 and operated under contract with the U.S. Department of Energy and the U.S. Department of Defense to meet the demand for weapons caused by the accelerating Cold War arms race.⁷⁶ At this point the company was called Loral American Beryllium (LAB). LAB manufactured parts for nuclear weapons, atomic reactors, and space program projects. Morris Robinson, who worked as a janitor at ABC recalls cleaning out tanks that held a colorless solution. In an interview with journalist Ronnie Green, Robinson explained, "I had to hold my breath....And I would have to step out of the room, get fresh air, hold it, and go back in and finish up."⁷⁷

After the plant closed in 1996, Lockheed Martin bought the property as part of a \$9.1 billion purchase of many of the assets of Loral Corporation.⁷⁸ Lockheed Martin did not conduct an environmental assessment until a year later when it was planning to sell the site.⁷⁹ By January 2000, the company discovered leaks of various toxic chemicals of concern when Lockheed Martin employees discovered that a sump pump in one of the buildings had broken and spilled large quantities of industrial solvents and cancer-causing chemicals into the soil and groundwater.⁸⁰ Among those chemicals of concern that contaminated the groundwater in levels that exceeded the Florida Department of Environmental Protection's (FDEP) guidelines were beryllium, chromium, tetrachloroethylene (TCE), and 1,1-dichloroethylene. The soil samples

⁷³ Lerner, *supra* note 32, at 7.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *See id.*

⁷⁷ *Id.*

⁷⁸ *See* Lerner, *supra* note 32, at 8.

⁷⁹ Lerner, *supra* note 32, at 1.

⁸⁰ *Id.*

contained excessive levels of volatile organic compounds (VOCs), total petroleum hydrocarbons and other harmful compounds and metals.⁸¹

As the owner of the property when the leak was discovered, Lockheed Martin was liable for the cleanup process. At some point, Lockheed Martin entered into a consent order with the FDEP, which compels Lockheed Martin to remediate the site and gives the FDEP broad discretion in its oversight of the remediation.⁸² For three years following the discovery of the contamination in 2000, Lockheed Martin conducted a quiet, voluntary clean-up of some of the onsite contamination.⁸³ They hired Tetra Tech, a California-based company, to remove 538 tons of contaminated soils. During its soil samplings, Tetra Tech found trichloroethylene, tetrachloroethylene, dichloroethylene, and vinyl chloride.⁸⁴ Lockheed disclosed its findings with the state of Florida and with Manatee County, informing them that the contaminants were migrating offsite in the groundwater. However, Lockheed Martin stopped short of notifying the residents who lived on the land surrounding the property, many of whom had depended on wells that drew from the groundwater in which the numerous toxins had been found for drinking and bathing.⁸⁵

Similarly, FDEP and Manatee County also failed to notify the surrounding community of the groundwater contamination in their community.⁸⁶ When an FDEP spokeswoman was asked why the state did not inform the residents, she responded “I don’t believe we had a regulation.”⁸⁷ Interestingly, residents learned that a county official had been dispatched to determine if any residents in the community were using their own wells. However, per county records, the official failed to

⁸¹ *Id.*

⁸² Donna Wright, *Patience Wearing Thin in Tallevast*, BRANDENTON HERALD (May 20, 2005), available at http://earthhopenetwork.net/patience_wearing_thin_tallevast.htm; see also *Florida Fines Lockheed Martin \$50,000 for Tainted Water Discharge*, ENVIRONMENT NEWS SERVICE (Oct. 13, 2008), <http://ens-newswire.com/wp-content/uploads/2010/05/2008-10-13-094.html>.

⁸³ See Wright, *supra* note 82.

⁸⁴ *Id.*

⁸⁵ See *id.*

⁸⁶ Lerner, *supra* note 32, at 8.

⁸⁷ Greene, *supra* note 72, at 73.

get out of her car to complete her assigned task because she was afraid of dogs.⁸⁸

One afternoon in September 2003, Tallevast resident Laura Ward looked out her window to find a rig drilling on her land. When she inquired as to their business on her property the worker told her, “You don’t know, but the water is contaminated here. We’re putting in monitoring wells in your community because the water is contaminated.”⁸⁹ When Ward heard this, she “felt the world shift beneath her feet.”⁹⁰ Expressing her anger, Ward stated, “I made baby formula and cooked for my family with that water for years while people at Lockheed Martin and at the county regulatory agencies knew how harmful it was.”⁹¹ A few weeks later, a Lockheed Martin executive told Ward, “There’s some TCE in the water. We don’t think it’s very far off site.”⁹² However, the executive was horribly mistaken. In July 2003, the FDEP approved Lockheed Martin’s Contamination Assessment Report, which indicated that “most” of the contamination was limited to the five-acre property at 1600 Tallevast Road, with a small plume extending northeast of the facility.⁹³ However, a chronology of events compiled by Donna Wright, a Bradenton Herald reporter and Wilma Subra, a renowned chemist, proved the Report to be inaccurate.⁹⁴

According to the timeline that Wright and Subra constructed, Lockheed Martin informed state regulators by 2003 that the plume of toxins had crossed over into the residential community and they had been required to develop a cleanup plan. By May 2003, a report produced by Tetra Tech, the company that Lockheed Martin had hired to perform the assessments, confirmed that the toxic plume had migrated to at least 12 acres off site.⁹⁵ This information was further confirmed in April 2004 when water samples from five out of 17 wells located outside of the established plume boundaries were found to have elevated

⁸⁸ Lerner, *supra* note 32, at 2.

⁸⁹ *Id.*

⁹⁰ Steve Lerner, *Chemical Contamination In Fenceline Communities: Tallevast, Florida: Rural Residents Live Atop Groundwater Contaminated by High-Tech Weapons Company*, THE COLLABORATIVE ON HEALTH AND THE ENVIRONMENT (2008) available at <http://www.healthandenvironment.org/articles/homepage>.

⁹¹ *Id.*

⁹² *Id.*

⁹³ Lerner *supra* note 90, at 5.

⁹⁴ *Id.*

⁹⁵ *Id.* at 6.

solvent levels.⁹⁶ The documented size of the plume continued to grow from “not very far off site” to over 200 acres off site.⁹⁷ In one spot, the TCE concentration was 10,000 times above state standards. In another spot, the state located TCE where Lockheed Martin had not.⁹⁸

In June 2004, Subra reported that a sampling, paid for by the residents, revealed that two homes in the area had 116 times the level of TCE considered to be safe. Testing samples from the site revealed that the solvent trichloroethylene was present at 10,000 times the drinking water standard. In August 21, 2004, Lockheed Martin released a report that showed TCE levels in water beneath the plant at nearly 12,000 times the state standard and in nearby wells at up to 500 times the code.⁹⁹

In July 2004, the FDEP released the Tallevast Community Preliminary Assessment Contamination Report (Report).¹⁰⁰ The Report concluded that the toxic solvents had impacted both the surficial aquifer and the underlying intermediate aquifer system in Tallevast. The plume in the surficial aquifer was found to have carried the solvent north, northeast, south and southeast of the point of origin under the ABC plant. The report called for further investigations detailing the contamination in the intermediate aquifer system.¹⁰¹ Analyses of 129 soil samples collected from the Tallevast community indicate the presence of arsenic, barium, lead, benzo(a)pyrene, benzo(b)fluoranthene, dibenzo(a,h)anthracene, and Total Recoverable Petroleum Hydrocarbons (TRPH) exceeding their respective FDEP Soil Cleanup Target Levels (SCTL) in some of the samples collected. The source of these contaminants is indeterminate. Soil samples were primarily collected from locations where fill dirt from the former American Beryllium Company had

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *See id.*

⁹⁹ *Id.*

¹⁰⁰ ROBERT CILEK, P.G., ET. AL., FLA. DEP'T OF ENVTL. PROT., SIS REPORT NO. 2004-01, TALLEVAST COMMUNITY TALLEVAST, MANATEE COUNTY FLORIDA PRELIMINARY CONTAMINATION ASSESSMENT REPORT (July 2004), *available at* http://www.dep.state.fl.us/waste/quick_topics/publications/wc/Tallevast/TallevastCommunity.pdf.

¹⁰¹ *Id.* at 15.

reportedly been utilized; of these locations, only two residences were within the SCTL.¹⁰²

Even though Lockheed Martin conceded that the chemicals had spread into the groundwater in the surrounding area, the company continued to deny that there was any threat to the health of local residents and firmly proclaimed its ongoing commitment to “doing the right thing” for the residents of Tallevast. However, Subra, who has won the McArthur “genius” award for her work in contaminated communities, explained that people should not be living atop a toxic groundwater plume. Subra warned, “You have to get them out of there.”¹⁰³

There are various possible exposure pathways by which the Tallevast residents were contaminated by the toxins from the Lockheed Martin site. The contaminated groundwater flowed from the aquifer and out through the faucets of the residents’ homes. People drank the water, and cooked and bathed with it. Children played in the water from garden hoses, while adults water their lawns and washed their vehicles. Another possible route of exposure is through the inhalation of toxic gases that may have been released when the faucets, showers, and water hoses were in use. Additionally, residents were exposed to toxins by contact with the dirt from the Lockheed Martin site. Beverly Bradley remembers having three truckloads of dirt from the site, which is across the street from her home, being spread in her backyard. Bradley has been an avid gardener for most of her life and now has dark lesions on her hands, arms, and feet.¹⁰⁴

Another possible route of exposure comes from the fish that were taken from the plant’s pond. A former janitor at the plant reported that when a machinist would make a mistake working on a piece of beryllium, he would ask the janitor to throw it into the pond so that the foreman would not discover the mistake. Plant officials would periodically stock the pond with trout so that the workers and their families could participate in “Fishathons” to catch fish to take home for consumption.¹⁰⁵

Perhaps the most obvious link between the toxins from the plant and the illness in the community is the presence of the rare lung disease berylliosis. The dust from beryllium, a heavy metal, is toxic and can

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ Lerner, *supra* note 32, at 8.

¹⁰⁵ *Id.* at 9.

cause problems with the respiratory, organ, and central nervous systems.¹⁰⁶ Berylliosis has been the subject of considerable litigation, including class action suits by former beryllium workers.¹⁰⁷ Wilma Subra described the dust residue at the plant as “one of the worst” she had ever seen.¹⁰⁸ The majority of the Tallevast residents who were hired to work at the plant were hired for janitorial and maintenance jobs, which involved milling large chunks of beryllium and cleaning the beryllium dust out of the vents and the attic. Many other former ABC plant employees have berylliosis, cancer, and/or need oxygen to help them breathe. Others are reported to have slurred speech and impaired motor abilities. Many of them have already passed away, such as one gentleman, Ernest Smith, who died of throat cancer at the age of 29.¹⁰⁹

Just prior to the discovery of the toxic plume, Tallevast residents Laura Ward and Wanda Washington had started a community-based organization to draw low income housing developments to their community. However, after the news of the toxins was made public, those plans quickly faded. The organization instead became Family Oriented Community United and Strong (FOCUS), which was dedicated to leading the fight for their community to be made whole. In January 2005, Tallevast residents demanded that Manatee county officials relocate them and buyout their properties. Six months later, county commissioners demanded that Lockheed Martin relocate the residents so as to protect their health and to remove them from exposure to the contamination. However, when the county lawyers began to fear that the county may be sued, the commissioners ceased activity.¹¹⁰

In 2011, Tallevast was one of three Florida communities cited in a report by the Natural Resources Defense Council (NRDC).¹¹¹ The NRDC, along with well-known activist Erin Brokovich, presented the report on “disease clusters” to the Senate. The state of Florida, which has known about the problems in Tallevast for over a decade, finally

¹⁰⁶ Lerner, *supra* note 32, at 8.

¹⁰⁷ *Id.*

¹⁰⁸ Lerner, *supra* note 32, at 9.

¹⁰⁹ *Id.* at 9.

¹¹⁰ See Lerner, *supra* note 32, at 10.

¹¹¹ The other cities were Immokalee and Acreage.

sent a doctor to Tallevast to conduct a health study. Dr. Javier Gansana, a specialist in environmental and occupational medicine, conducted interviews of over 130 Tallevast residents. On October 9, 2012, Dr. Gansana stated that he would deliver the report to Wanda Washington in Tallevast.¹¹² It does not appear that the report has been published or otherwise made available to the public at this time. However, the information contained therein is sure to prove invaluable for the people of Tallevast.

The concentration of the chemicals found in the small community is staggering. Some well water in Tallevast was found to contain 250 to 500 parts per billion (ppb) of TCE, a known carcinogen for which the regulatory standard is three ppb. It seems almost common sense to connect the presence of poisons in the community and the decades of exposure and consumption to the devastating number of illnesses in Tallevast. Ms. Washington serves as an example of the ways that poisons devastate lives in environmental justice communities. Her mother has breast cancer, diabetes, skin growths, and a bad cough. Washington, who is “angry as hell” about the contamination in the community as well as the treatment of the residents, “had a child who died at seven months, one who was retarded, and one who survived.”¹¹³ Washington’s sister, Robin, suffered from a stroke while in her thirties. She suffers from migraines and seizures and gave birth to an underweight infant. Her uncle, who worked at ABC, is currently being treated for berylliosis.¹¹⁴

Tallevast resident Helen E. Beyers Worthington, an Air Force veteran who worked as a registered nurse at various military bases around the world, conducted a health study of her community. Worthington was skeptical at first, thinking that she “would likely not find any problem.” However, she quickly found that something was horribly wrong in the community. Upon visiting another family, Worthington found that four of seven brothers had died of various cancers, including cancer of the throat. Next door, she found three men with liver cancer, and their sons also had liver problems.

In another household, eight of the ten children in the family had died at young ages of leukemia, brain, lung and uterine cancer.

¹¹² E-mail from Dr. Javier Gansana, MD, MPH, PhD, Associate Professor, Environmental and Occupational Health, Florida International University (Oct. 9, 2012).

¹¹³ Lerner, *supra* note 32, at 3.

¹¹⁴ Lerner, *supra* note 32, at 3.

Worthington counted that out of 87 households, fifteen members were currently living with cancer. She did not include those residents who are known to have cancer, but have not openly disclosed their illnesses.¹¹⁵ Worthington also noted a suspiciously high occurrence of miscarriages, sterility, low birth rates, neurological disorders, and retardation. She noted that “almost every house in town has people with health problems.”¹¹⁶

Another Tallevast resident, retired postal worker Beverly Bradley, lives across the street from the plant and has had four miscarriages. One child was stillborn, one lived for a few hours, and only one survived. Bradley, who also has dark lesions on her arms, hands and feet, which are likely from her contact with poisonous soil while gardening, remembers playing in the drainage ditches that came from the plant.

“I’m angry. My family worked hard to own property to give me and I want to give it to my son but now, because of the contamination, we can’t even get a loan to fix up the house or build a new one. We are stuck in a bad situation with no solution. An injustice has been done and someone should pay.”¹¹⁷

While Lockheed Martin had already agreed to perform the cleanup of the contaminated community, and was legally bound by its consent decree with the state of Florida, the company refused to honor the residents’ pleas for relocation. Reportedly, Lockheed Martin claimed that the contamination poses no risks to the residents’ health.¹¹⁸ Lockheed Martin has also claimed that relocation efforts would undermine their commitment to remove all contamination from the community.¹¹⁹ The company has created a medical program that provides free examinations, for residents of Tallevast. Also, Lockheed Martin claims to have implemented a property value guarantee program for the residents. Under this program, gap payments are provided to residents and

¹¹⁵ *Id.* at 4-5.

¹¹⁶ *Id.* at 5.

¹¹⁷ Lerner, *supra* note 32 at 8.

¹¹⁸ *Florida Fines Lockheed Martin \$50,000 for Tainted Water Discharge*, ENV’T NEWS SERVICE (Oct. 13, 2008), <http://ens-newswire.com/wp-content/uploads/2010/05/2008-10-13-094.html>.

¹¹⁹ *See id.*

property owners who wish to sell their property but are unable to secure full market value due to the groundwater contamination in the area.¹²⁰

Lockheed Martin officials have vigorously denied that there is any reason to relocate the community because residents were not at risk. Furthermore, the company argues that cleanup efforts should be confined to the plant property because the soil and water samples show that the plume poses no threat to health and does not require remedial measures. Four lawsuits have been filed against Lockheed Martin by the residents of Tallevast including a class action, which 270 Tallevast residents have joined.¹²¹ The class action suit was filed on September 1, 2005 and sought damages for loss of property value and emotional distress. A settlement was reached rather quickly in August of 2010. The terms of the suit were confidential and the parties are not allowed to discuss the terms. However, some information has leaked regarding the settlement. While the accuracy of the information cannot be confirmed, the information seems reasonable. It is claimed that the settlement was in the amount of \$12 million. Reportedly, \$5.6 million went to the lawyers. The other funds were divided among the property owners.

II. An Understanding of CERCLA

The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), enacted in 1980, is the primary federal statute governing the remediation of spills or releases of hazardous substances.¹²² CERCLA is often called “Superfund”. However, the “Superfund” is only one part of CERCLA. Superfund is the trust fund that was established to provide financing for cleanups in some circumstances. However, equally important is the ability of CERCLA to compel responsible parties to contribute to the cleanup of contaminated sites.¹²³ Also, under CERCLA, environmental authorities can undertake a cleanup of contaminated sites and seek reimbursement from potentially responsible parties (PRPs) or compel PRPs to clean up

¹²⁰ *See id.*

¹²¹ Timothy R. Wolfrum, *Tallevast Residents, Lockheed Martin Settle Suit*, BRADENTON.COM (Sept. 4, 2010), available at <http://www.bradenton.com/2010/09/04/2552125/tallevast-residents-lockheed-martin.html>.

¹²² CLIFFORD RECHTSCHAFFEN, ET AL., ENVIRONMENTAL JUSTICE: LAW, POLICY & REGULATION 285 (Carolina Academic Press 2^d ed. 2009).

¹²³ *Id.*

sites.¹²⁴ It is imperative that community groups be aware of the processes involved in CERCLA cleanups so as to ensure their participation in the development and selection of cleanup.

CERCLA imposes strict liability on four categories of PRPs for the cleanup of releases or threatened releases of hazardous substances: (1) the present or former owners of facilities or vessels where the release or threatened release occurs; (2) present and former operators of a facility or vessel; (3) persons who arranged for the disposal, treatment, or transportation of hazardous substances; and (4) persons who accepted hazardous substances for transportation to a waste disposal site.¹²⁵ In order to establish liability under CERCLA, a plaintiff must demonstrate that there has been “a release or threatened release of hazardous substances from a facility that caused the incurrence of response costs and the defendant falls within one of the categories of PRPs identified by the statute.”¹²⁶

Once a site has been identified, the EPA conducts a preliminary assessment and places data into the Comprehensive Environmental Response Compensation and Liability Information System (CERCLIS), a database of all hazardous release sites.¹²⁷ CERCLIS then takes into consideration various factors related to the site, such as the toxicity, quantity and concentration of wastes present at the site, and then gives the site a score under the Hazardous Ranking System (HRS). The higher ranking sites are placed on the National Priorities List (NPL).¹²⁸ The order in which the sites are cleaned up depends upon factors such as the size of the population at risk, potential for contamination of water supplies, potential for public contact, and the possibility that damage to natural resources might affect the human food chain.¹²⁹ Some research suggests that agencies routinely choose less protective cleanups for poor

¹²⁴ See Larry Schnapf, *Cleaning Up Abandoned or Inactive Contaminated Sites*, in *THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS* 522 (Michael B. Gerrard, ed., 1999).

¹²⁵ *Id.* at 523.

¹²⁶ *Id.*

¹²⁷ *Id.* at 527.

¹²⁸ *Id.*

¹²⁹ *Id.* at 529.

and minority communities and notes that such sites generally take longer to achieve NPL listing.¹³⁰

In 2005, the Superfund turned twenty-five. In a report published by the Center for American Progress and the Center for Progressive Reform, Professor Rena Steinzor and Margaret Clune concluded that cleanups were lagging because the provisions for funding had been allowed to lapse.¹³¹ The program lost its “polluter-pays” funding base in 1995. According to the report, “A series of Republican-controlled Congresses allowed the industry taxes that support the program to expire and ignored yearly requests by the Clinton administration to reinstate them... .”¹³² In 2001, the number of Superfund cleanups fell abruptly to 50 percent of previous annual totals.¹³³ In the 2003, 2004, and 2005, only 40 cleanups were completed.¹³⁴

III. Proposal for Tallevast, Florida and Similarly Situated Environmental Justice Communities

The combination of local and state governments with large corporations makes for “odd bedfellows.” The desire and ability of individual states to regulate and remediate may be frustrated by a number of factors that influence state and local officials. First, as is perhaps best manifested in the EPA’s Region IV, continuing legacies of racism and disregard for the health and safety of poor and minority communities presents an elusive and insidious enemy with which environmental justice communities must contend. Additionally, local and state authorities are often engaged in a “race to the bottom,” in which states are forced to lower their standards to retain and attract industry.¹³⁵

Congress has relied on the “race to the bottom” as a rationale for federal action. A House Report on the 1977 amendments to the Clean Water Act warned that “if there was no Federal policy, States may find themselves forced into a bidding war to attract new industry by reducing

¹³⁰ RECHTSCHAFFEN, *supra* note 122, at 285.

¹³¹ *Id.* at 284.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ ROGER W. FINDLEY & DANIEL A. FARBER, ENVIRONMENTAL LAW IN A NUTSHELL 45 (West, 6th Edition 2004).

pollution standards.”¹³⁶ While it is understandable that authorities must make reasonable, even zealous efforts to generate revenue for the state and its residents, it is not acceptable to do so in a manner that makes human life expendable while devastating the environment. Unfortunately, this insidious treatment and conscious disregard usually falls on poor and minority communities who do not have the resources to combat the juggernaut that results from the marriage of government and industry.

Multinational Corporation Lockheed Martin has operated in the Central Florida community for over forty years. A brief review of Lockheed Martin’s relationship with the environment demonstrates its history of disregard and destruction throughout the United States.¹³⁷ In 1996, Lockheed Martin began the process of cleaning up its Central Florida site, which included several landfills that were used by the company to dispose of heavy metals and other hazardous materials. In 1998, Universal Studios purchased 2,000 acres of the site with plans to redevelop the land into a \$10 billion resort and office complex.¹³⁸ Lockheed Martin is the ninth largest employer in Central Florida and brings millions of dollars of revenue and incentives annually.¹³⁹ The FDEP’s deferential posture in dealing with Lockheed Martin’s treatment of the Tallevast community likely reflects its desire to placate the company so as to continue the lucrative relationship that exists between the two. So then, how do environmental justice communities, who are overwhelmingly comprised of low-income households, combat this omnipresent “race to the bottom” and overcome being seen as externalities? The

¹³⁶ Robert L. Glicksman & Richard E. Levy, *A Collection Actions Perspective on Ceiling Preemption by Federal Environmental Regulation: The Case of Global Climate Change*, 102 NW. U.L. REV. 579 (2008).

¹³⁷ *Federal Contractor Misconduct Database*, PROJECT ON GOVERNMENTAL OVERSIGHT (POGO.ORG), <http://www.contractormisconduct.org/index.cfm/1,73,221,html?ContractorID=38&ranking=1> (last visited Nov. 18, 2012).

¹³⁸ *More Protection, Less Process: Common-Sense Environmental Management*, DEP’T OF ENVTL. PROT., <http://www.dep.state.fl.us/secretary/info/pubs/brochure.pdf> (last visited April 27, 2014).

¹³⁹ *Central Florida Top 100 Companies for 2011*, ORLANDO SENTINEL (Nov. 20, 2011), available at <http://www.orlandosentinel.com/orl-cfb-top-100-companies-2011,0,4290703.htmlstory>.

solution must come from the federal government as opposed to the state DEPs.

A. Overfiling as a Remedy for the Problems Facing Environmental Justice Communities

It is necessary to find novel methods of regulation and enforcement to ensure that environmental justice communities receive swift, effective and just treatment. This article proposes that the USEPA should use the method of “overfiling” as a tool to ensure that the federal government maintains oversight of cleanup processes.

Overfiling occurs when the federal government brings an environmental enforcement suit in situations where the state environmental enforcement agency has not sufficiently prosecuted a violator of a federal environmental statute.¹⁴⁰ Overfiling fits squarely into the “cooperative federalism” model that characterizes the United States’ environmental laws. The term “cooperative federalism” refers to the interplay of power between the federal and state sovereigns.¹⁴¹ While Congress has granted initial enforcement and regulatory power to the EPA, once a state can demonstrate that it is capable of enforcing the statutory mandates that EPA has established, then the EPA may then delegate a portion of its regulatory and enforcement powers to the states.¹⁴²

In the event that the EPA disagrees with the state’s handling of an environmental issue, the federal government may then “overfile” against the organization or individual that is responsible for the contamination and/or cleanup. The federal government may bring suit even if the state has already brought an enforcement action or had negotiated a settlement.¹⁴³ The states are often resentful of this type of policy and the “cooperative” relationship is often adversarial. State officials “resent what they believe to be an overly prescriptive federal orientation toward state programs, especially in light of stable or decreasing grant awards.”¹⁴⁴ Additionally, the states have the ability to “underfile” by

¹⁴⁰ Alex P. Abrams, Note, *Why “Underfiling” By States Can and Should Be Used to Enforce Environmental Regulations*, 31 B.C. Evtl. Aff. L. Rev. 403, 403 (2004).

¹⁴¹ See *id.*

¹⁴² *Id.* at 404.

¹⁴³ Abrams, *supra* note 140, at 403.

¹⁴⁴ Jonathan H. Adler, *Judicial Federalism and The Future of Federal Environmental Regulation*, 90 Iowa L. Rev. 377, 385 (2005).

bringing a suit against the EPA, challenging its treatment of the situation.¹⁴⁵

The case of *United States v. Smithfield Foods, Inc.*, demonstrates the complexities of the overfiling process.¹⁴⁶ In 1997, the EPA brought action in federal district court against a Virginia pork processing company, Smithfield Foods, Inc., that had violated its permit by discharging pollutants into a local river at levels which exceeded the limits imposed by its permit.¹⁴⁷ After the EPA brought suit, the State of Virginia instituted an action in state court against Smithfield on the basis of permit violations, the State of Virginia, however, alleged different violations than did the EPA.¹⁴⁸ The state action proceeded concurrently with the federal action. The EPA prevailed in its suit with the district court granted summary judgment on the issue of liability and fined the company \$12.6 million in July 1997.¹⁴⁹ Also in July, the state court issued a decree that allowed Smithfield to make changes that would satisfy the requirements of its permits. After making these changes, Smithfield filed a motion to dismiss or alternatively, for summary judgment in the federal case. However, the district court denied Smithfield's request for reversal. That decision was affirmed by the Fourth Circuit.¹⁵⁰

Ideally states should not have oversight in regards to environmental justice communities. The EPA should maintain and assert its status of primary enforcer of environmental regulation when an environmental justice community files complaints and/or brings suit. Using the process of overfiling would mean that the states' Departments of Environmental Protection would have to be given a standard period of time in which it must assess the damage and the necessary cleanup and remediation procedures, locate the potentially responsible parties (PRPs), enter into consent decrees with the PRPs, and monitor the cleanup activities. If the state's actions do not meet the standards that the EPA has established, then the state should be subject to sanction. The EPA should levy the

¹⁴⁵ Abrams, *supra* note 140, at 403.

¹⁴⁶ *United States v. Smithfield Foods, Inc.*, 965 F. Supp. 769 (1997).

¹⁴⁷ *Id.*

¹⁴⁸ *State Water Control Bd. v. Smithfield Foods*, 542 S.E.2d 766 (2001).

¹⁴⁹ See *Smithfield supra* note 146.

¹⁵⁰ *Id.*

sanctions against the state and overfile against the PRPs and the state to ensure that the cleanup and remediation process continues at a reasonable pace. It is imperative for the EPA to remember that time is of the essence. The litigation should not allow for long gaps in cleanup and remediation.

In order to procure funding for the litigation and oversight, Congress should restore the industry “polluter pays” taxes that were allowed to expire in 1995. Many of the problems and frustrations with the Superfund program have resulted from the expiration of that funding. How can the *Superfund* operate effectively without funds? The revenue generated from the taxes will also allow the EPA to conduct the cleanups that it must due to the absence and/or inability of the potentially responsible parties, thereby decreasing the number of active Superfund sites, some of which have been listed for decades. However, the use of the overfiling method, if administered properly should not impose an undue burden on the Superfund. The potentially responsible parties should be compelled to fund the cleanup and remediation processes.

B. Specific Suggestions for Tallevast, Florida

With respect to specific lessons to be learned from the experience of the Escambia County community, this article focuses on the importance of adequate notification, medical monitoring and treatment, and successful relocation as defined by the community.

1. Proper Notification

The residents of both Escambia County and Tallevast were failed with respect to notification about the toxins in their communities and their exposure to those contaminants. In Escambia County, the EPA was aware of the contamination at the ETC and Agrico sites. It was not until the “men in moonsuits” appeared in the community and started excavating poisonous soil which released additional contaminants into the air that the residents were made aware of the problem. That appearance and emergency cleanup does not suffice as “notice,” however. Likewise, after “men in moonsuits” showed up on Tallevast resident Ward’s lawn and began installing a monitoring well, the residents were not made aware of the contamination. Lockheed Martin, Manatee County and the State of Florida kept the contamination a secret for three years.

Moreover, official notification of contamination did not come until five years after Lockheed Martin had notified the county and state officials. This is unacceptable and should not happen again.

The residents of Tallevast actually procured a great victory in pressing for and achieving the passing of the “Tallevast Bill,” Florida Statute 376.30702 “Contamination Notification”.¹⁵¹ The Tallevast Bill gives specific time frames for notification of the finding of contamination to the FDEP and to the residents in the area of the contaminated site. Those who own or rent property near the contaminated site must be notified by the DEP within 30 days of the DEP having received notification.

It is unclear, however, what consequences exist if the stipulations of the Tallevast Bill are disregarded. There should be specified ramifications for those who discover the contamination, *as well as* for the state offices or officials, who do not comply with the Tallevast Bill. Failure to comply should trigger an automatic sanction from the EPA and should trigger the commencement of an overfiling action against the perpetrator.

2. *The Importance of Properly Administered Medical Monitoring and Treatment Programs*

Environmental Justice Communities are wrought with illness and lack of information regarding the poisons surrounding them and the effects of those contaminants on the health of the community. Therefore, it is necessary to provide community members, not only with medical monitoring and screening, but also with medical treatment. There is no written or unwritten rule that medical monitoring provisions include coverage for the treatment of the illnesses that may be diagnosed as having arisen from exposure. An interview with Francine Ishmael, the current Executive Director of CATE, the community organization in Escambia County, exposed numerous dangers associated with medical monitoring programs that are not controlled by the community or by federal oversight.

¹⁵¹ Fla. Stat. § 376.30702 (2005).

In Escambia County, residents were awarded two million dollars from Conoco-Phillips, the potentially responsible party for the Agrico site, for medical monitoring. CATE wanted to deposit the money in an interest-bearing account while using part of the funds to pay for medical screening and transportation for those who were unable to get to the doctors' offices. However, Conoco-Phillips never released the funds. When CATE brought suit to compel payment, the court found for Conoco-Phillips and returned the money to the company.¹⁵² This loss was a "slap in the face" to the CATE activists, and especially to Ishmael's late mother, Margaret Williams, the founder of CATE. However, the significance of this loss was more than just the insult that it added to the injuries in the community. The people of the community were suffering from abnormal levels of cancer and other illnesses. Many people had no way to get to the doctor and no means to pay for any medical attention. The loss of those funds ended any hopes of receiving medical attention.

As applied to the Tallevast residents, the type of travesty that snatched the meager medical monitoring funds away from the Escambia County residents is also a possibility. In Tallevast, it appears that Lockheed Martin controls the funds and medical monitoring program that it has made available to the residents. If this is true, then Lockheed's handling of the funds and the terms of the medical monitoring program should be reviewed by independent health professionals and actuaries who are able to ensure that the allocated funds and duration of the project as envisioned by Lockheed Martin match the need that has been generated by the exposure.

While medical monitoring and screening is imperative for communities that have been exposed to contamination, medical treatment is the true burden that must be lifted from the shoulders of the affected communities. Ms. Ishmael indicated that in regard to the \$2.6 million¹⁵³ dollars that CATE sought to be compelled from Conoco-Phillips, when that money was to be allocated per community member, the per person allotment amounted to \$500.¹⁵⁴ This is simply not sufficient to monitor and treat a community that suffers from abnormally high rates of cancer and other serious illnesses. Again, the amount of these rewards should

¹⁵² Interview with Francine Ishmael, Executive Director, CATE (Nov. 17, 2012).

¹⁵³ At the time of that CATE brought suit to compel payment, the account had accumulated \$600,000 in interest.

¹⁵⁴ Interview with Francine Ishmael, Executive Director, CATE (Nov. 17, 2012).

be based on professional actuarial predictions that take into account the high cost of health care.

Applying the process of overfiling, states would be given a reasonable period of time to enforce the actual cleanup of the responsible party. That reasonable time would need to be defined at the outset so as to avoid wasting time and resources. A mandate or decree would have to be issued by the federal agency. In that definition of the time period, certain considerations would have to be made such as the size of the project, the relocation efforts, the costs and available funding. Unfortunately, the time to draw up the proposal may create delays.

While it is imperative that communities be removed from exposure and that the cleanup process be completed, it is also necessary to ensure that the lives and health of the residents are not irreparably disrupted. The cleanup in Escambia was initially marked as an emergency cleanup where the EPA came in and began to excavate contaminated soils. While at first glance this seems like an appropriate show of decisive action, the emergency cleanup methods actually caused the contamination to be spread throughout the communities and the residents reported increases in acute illness such as skin rashes, nausea and headaches.¹⁵⁵

Additionally, regarding the medical monitoring, it should be explicitly stated that medical monitoring is only the first step and that medical treatment, when necessary, is included as well. Medical monitoring is important, but is virtually meaningless without treatment for those unable to pay for their treatment. Given the fact that EJ communities are overwhelmingly low income communities, the diagnoses are likely to go untreated without the additional funding for the actual treatment for the diseases that have resulted from the exposure to contamination.

In Tallevast, Lockheed Martin has funded medical monitoring. However, it is unclear as to whether treatment is also offered. In many instances, the residents are aware that they are ill. The true problem is that they are left to determine how they are going to pay for the treatment. For instance, many of the residents in Tallevast suffer from Berylliosis, which come from working with Beryllium at the ABC plant. The dust from beryllium affected the people who worked in the plant, as well

¹⁵⁵ See Lerner, *supra* note 32, at 45; Abrams, *supra* note 140, at 45.

as some of their family members who were exposed to the dust when the workers came home from the plant. These people often need to use oxygen tanks and medication for the rest of their lives.

3. *Successful Relocation*

“Successful relocation occurs when those who have been harmed are happy, not worse off.”¹⁵⁶

Permanent relocations are governed by the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.¹⁵⁷ Relocation is considered as a last resort and will be included in a site remedy only where the contamination poses a risk to human health that cannot be addressed by other remediation activities such as those devised by engineering solutions and restrictions on the polluters or where the homes present an obstacle to the cleanup activities.¹⁵⁸ As of 2000, the EPA estimated that relocations had been included as part of only approximately seventeen sites.¹⁵⁹

Lockheed Martin has told the residents of Tallevast that they will no longer consider the issue of relocation.¹⁶⁰ However, there is some indication in news reports that some residents are still pressing for permanent relocation away from the toxic plume that, by Lockheed Martin’s own calculations, will take fifty years to remediate.¹⁶¹ Health studies conducted on the presence of cancer and other illnesses, as well as on the connection of those illnesses to the contamination and exposure in Tallevast, vary greatly depending on who conducts the survey. This again shows the need for an objective party to conduct and/or oversee the contamination and health assessments that compel the PRPs to relocate the affected communities.

Once relocation is deemed necessary, it should be conducted carefully, yet swiftly so as to remove the residents from exposure while at the same time ensuring that the needs of the community are met by

¹⁵⁶ Interview with Francine Ishmael, Executive Director, CATE (Nov. 17, 2012).

¹⁵⁷ 42 U.S.C. §§ 4601- 4655.

¹⁵⁸ See RECHTSCHAFFEN, *supra* note 122.

¹⁵⁹ *Id.*

¹⁶⁰ Carl Mario Nudi, *With No Relocation, Tallevast Disappointed*, BRANDENTON.COM (Oct. 2, 2009), available at <http://www.brandenton.com/2009/10/02/1749286/with-no-relocation-tallevast-disappointed.html>.

¹⁶¹ Lockheed-Martin, Environmental Testing and Cleanup, LOCKHEED MARTIN, <http://www.lockheedmartin.com/us/tallevast/efforts.html> (last visited Nov. 17, 2012).

providing housing that is safe and secure. Ms. Ishmael discussed myriad problems with the relocation effort that was conducted by the EPA and the USACE. First, the USACE was using methods and standards that had been taken from relocation of military bases.¹⁶² This standard is unfair and unacceptable. The communities that were moved in Escambia County were residential, with many old ailing people. Additionally, many of the residents were moved into homes that were worse than the ones that they left.¹⁶³ Ishmael reported one woman who complained of noises coming from the furnace in her new home. When she had it checked, at her own expense, it was discovered that the furnace was leaking carbon monoxide into the home.¹⁶⁴

The relocation of the Tallevast residents should have occurred long ago. However, if the residents are fortunate enough to achieve relocation at the expense of Lockheed Martin, or any other source, the process should be designed with the lessons of Escambia County in mind. The community should be consulted to determine the resident's desires and needs for housing. There should be multiple appraisals to ensure that fair estimates are being given. Additionally, any relocation packages that are offered in the form of monetary compensation and/or relocation services should be designed to facilitate comfortable transitions that make the residents whole, rather than exacerbate an already difficult time.

Conclusion

In recent years, Environmental Justice communities have rightfully garnered greater attention from the larger civil rights and environmental communities. However, the battles that environmental justice advocates must fight are daunting and seemingly insurmountable. The demographics of most Environmental Justice communities make them susceptible to various forms of discrimination and maltreatment at the hands of local and state governments who are engaged in the business of

¹⁶² Interview with Francine Ishmael, Executive Director, CATE (Nov. 17, 2012).

¹⁶³ *Escambia Wood Treating Company (ETC) Superfund Site Permanent Relocation Focus Group Summary Report*, U.S. ENVTL. PROT. AGENCY, available at <http://www.epa.gov/superfund/community/relocation/etc.pdf>.

¹⁶⁴ Interview with Francine Ishmael, Executive Director, CATE (Nov. 17, 2012).

securing funding and attracting industry to bring revenue and notoriety to the state. This “race to the bottom” has caused the state and local governments to treat people as expendable. The disregard for human life and for the environment is unforgivable and inexcusable. Communities must be protected from the hazards of contamination.

This article has proposed a solution that may help alleviate the suffering in environmental justice communities. The power of oversight should be taken from the hands of state officials and placed back into the Federal government, which delegated the power in the first place. It is only by circumventing the relationship that is created by the interplay of state and local governments and industry that environmental justice communities may find refuge from maltreatment.

The relocation of the communities surrounding Mount Dixoin was touted as a success. The EPA conducted a series of focus groups to assess the effectiveness of the relocation in Pensacola. According to the EPA’s Focus Group Summary Report, the goal of the focus groups “was to learn about the relocation experience from the perspective of the residents, in order to improve future relocations.” This Summary Report and others like it can be used to create roadmaps for community cleanup, remediation and relocation that consider the wishes of the community members, who are in the best position to inform the process. Additionally, the involvement of community members would allow efforts to draw upon the principles of environmental justice, which call for community involvement. The proposal that has been outlined in this article has attempted to incorporate the principles of environmental justice into the existing legal framework to create a solution to some of the problems that plague environmental justice communities.