

# Introduction: Facing the Passaic<sup>†</sup>

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## I.

Newark, New Jersey, is an old, proud, industrial city. As with all such cities, it suffers from a history of industrial contamination. Ongoing efforts to revitalize Newark must address this contamination, both at mildly contaminated sites that are likely redevelopable as brownfields<sup>1</sup> and at severely contaminated sites where cleanup is likely to be complicated.

Newark faces the Passaic River, and this complicates environmental matters. Hazardous materials from sites in Newark and other riverside industrial cities have fouled both the Passaic and Newark Bay, a body of water for which the Passaic is a principal source. In particular, the presence of dioxin-contaminated sediment in Newark Bay recently generated a ferocious controversy over dredging in Port Newark and Port Elizabeth.<sup>2</sup> A six-mile stretch of the lower Passaic

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<sup>†</sup> Editor's note: The symposium that gave rise to this article occurred on March 30, 1998. At that time, the United States Environmental Protection Agency (EPA) was still considering how the dioxin contamination at the Diamond Alkali Superfund Site would be remedied. Prior to the publication of this journal, however, the EPA gave final approval to a 1990 consent decree, which permits the on-site burial of dioxin waste at the Diamond Alkali Site. See Tom Johnson, *Dioxin Site in Newark to be Sealed Underground*, STAR-LEDGER (Newark), Aug. 5, 1998, at 15.

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<sup>1</sup> Brownfields are defined as "abandoned, idled, or underused industrial or commercial sites where expansion or redevelopment is complicated by real or perceived environmental contamination." U. S. GENERAL ACCOUNTING OFFICE, PUB. NO. GAO/RCED-98-87, SUPERFUND, EPA'S USE OF FUNDS FOR BROWNFIELD REVITALIZATION 3 (1998).

<sup>2</sup> See *Clean Ocean Action v. York*, 861 F. Supp. 1203, 1205-06 (D.N.J. 1994), *aff'd in part, rev'd in part*, 57 F.3d 328, 334 (3d Cir. 1995) (holding that the district court properly denied preliminary injunction against ocean disposal of dredge spoil, although it erred in deferring to agency interpretation of regulation that was contrary to the regulation's plain meaning). See generally Kenneth S. Kamlet & Peter Shelley, *Regulatory Framework in the Management and Remediation of Contaminated*

has been under investigation by the United States Environmental Protection Agency (EPA) pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund)<sup>3</sup> for six years now.<sup>4</sup> The EPA's slow pace in completing this study has come under fire by environmental groups.<sup>5</sup> In March of 1998, Seton Hall University School of Law convened a distinguished group of speakers to address the history and status of contaminated sites in Newark and the wider implications of urban land contamination for the Passaic River, Newark Bay, and the Hudson and Raritan estuaries. This collection of papers represents some of the presentations made at the symposium. Part II of this introduction explains the structure and scope of the March symposium and allows the reader of these papers to appreciate better the complex web of issues and tensions underlying the works published here. Part III, based

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*Marine Sediments*, 27 ENVTL. L. REP. 10483 (1997); Gerard C. Keegan, Jr., Note, *The Dredging Crisis in New York Harbor: Present and Future Problems, Present and Future Solutions*, 8 FORDHAM ENVTL. L.J. 351 (1997); Tirza S. Wahrman, *To Dredge or Not to Dredge: Navigating the Shoals of Single-Medium Analysis in the Disposal of Contaminated Sediment*, 28 URB. LAW. 173 (1996).

<sup>3</sup> 42 U.S.C. § 9601-9675 (1994). Superfund authorizes the EPA, the states, or any other party to clean up hazardous waste sites and to compel parties responsible for the contamination to pay the costs. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) § 107(a)(4)(c), (f), 42 U.S.C. § 9607(a)(4)(c), (f). Certain federal and state agencies designated as trustees (and Indian tribes as well, though none are involved here) may also seek to recover "natural resource damages" to restore the resource to its prior state. See *id.* Both types of liability are at issue here.

<sup>4</sup> One of the contributions to this symposium underlines the technical complexities that any such determination of sources of contamination must face. See L. Anthony Wolfskill & Richard P. McNutt, *An Environmental Study of the Passaic River and Its Estuary*, 29 SETON HALL L. REV. 37, 41-43 (1998). As to how much of the dioxin can be attributed to the former Diamond Shamrock facility, there is an ongoing controversy. Compare Richard F. Bopp et al., *A Major Incident of Dioxin Contamination: Sediment of New Jersey Estuaries*, 25 ENVTL. SCI. & TECH. 951 (1991) (tracing the particular dioxin in the estuary to a site at 80 Lister Avenue in Newark) with Hadley Bedbury, *Comment of [sic] "A Major Incident of Dioxin Contamination: Sediments of New Jersey Estuaries,"* 26 ENVTL. SCI. & TECH. 1254, 1254-56 (1992) (criticizing Bopp et al., *supra*, and recommending examination of other potential sources of dioxin within the Passaic basin) and Richard J. Wenning & Dennis J. Paustenbach, Letter, 26 ENVTL. SCI. & TECH. 1257, 1257-58 (1992) (arguing that "dioxin contamination at various locations throughout Newark Bay is almost certainly due to contamination from many sources.") (citations omitted). Dr. Bopp responds to the criticisms of Bedbury, Wenning, and Paustenbach at 26 ENVTL. SCI. & TECH. 1256, 1256-57, (1992) and 26 ENVTL. SCI. & TECH. 1258, 1258-59 (1992).

<sup>5</sup> See, e.g., American Rivers, *America's Most Endangered Rivers of 1998* at 37 (1998) ("The EPA has been slow to conduct its remedial assessment of the Passaic River's contaminated sediments. The assessment has taken more than six years, with no completion date in sight."). The EPA took action on the remediation plan in August of 1998. See Tom Johnson, *Dioxin Site in Newark to be Sealed Underground*, STAR-LEDGER (Newark), Aug. 5, 1998, at 15.

on my opening remarks last March, discusses the underlying phenomenon in which (it would appear) public opinion and governmental regulatory structures have turned their backs on Newark and the Passaic River. Part IV discusses the environmental justice ramifications of disparate treatment for Newark, both in the processing of Superfund cleanups and in the ultimate selection of a cleanup remedy. Part V explores briefly whether giving additional classes of plaintiffs authority to bring natural resource damages actions would speed the cleanup of the Passaic. Finally, Part VI provides brief synopses of the essays included in this collection.

## II.

"Cleaning Up Newark: Rebuilding for the 21st Century" was an ambitious symposium. We sought to include technical, legal, and political analyses of several problems related to the environment of Newark. Tirza Wahrman<sup>6</sup> and I invited the regulatory agencies responsible for cleaning up land and water, the relevant local and regional governmental entities, local and regional environmental groups, academic and professional analysts, and spokespersons for the affected communities.

The enthusiastic response to our invitations was gratifying. It bespoke a widespread recognition that the future of Newark, the Passaic River, and Newark Bay depends on continuing with cleanup and redevelopment. We were honored to have as keynote speaker Senator Robert Torricelli, who chose this occasion to make an important announcement concerning his approach to management of the Passaic's floodplains.<sup>7</sup> Additional federal officials in attendance included five representatives from the Region II office of the EPA, who spoke on every aspect of Newark's environmental situation — from the status of Superfund cleanup at the Diamond Shamrock dioxin site, to the study of Passaic River sediment contamination, to brownfields programs,<sup>8</sup> and to the underlying concerns about envi-

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<sup>6</sup> At the time we began to plan this conference, Ms. Wahrman was teaching as an adjunct professor at Seton Hall as well as working her "day job" at the Port Authority of New York and New Jersey.

<sup>7</sup> See Robert Torricelli, *Remarks by Senator Robert Torricelli at Seton Hall University School of Law*, 29 SETON HALL L. REV. 18 (1998).

<sup>8</sup> See U.S. GENERAL ACCOUNTING OFFICE, *supra* note 1, at 3. Brownfields are a serious environmental issue for cities like Newark because "liability and other concerns have deterred many potential developers from using brownfields . . . instead, they use uncontaminated sites in suburban areas referred to as greenfields." *Id.* (footnote omitted). "Developers' avoidance of brownfields has contributed to a loss of employment opportunities for city residents, a loss of tax revenues for city gov-

ronmental justice.<sup>9</sup> Furthermore, two officials from the National Oceanic and Atmospheric Administration (NOAA)<sup>10</sup> were in attendance.<sup>11</sup>

Representatives of state, regional, and local government agencies participated as well. Lillian Borrone, Director of the Port Commerce Branch of the Port Authority of New York and New Jersey, explained the effect of contamination on Port operations. The New Jersey Department of Environmental Protection's Site Remediation Program sent Steve Kehayes to present its new brownfields initiatives, and Joel Freiser of the Newark Economic Development Corporation described his organization's efforts with regard to this issue. Newark's City Engineer, Howard Lazarus, opened the conference with an overview of land-based contamination in the city. Sheldon Lipke outlined the Passaic Valley Sewerage Commissioners' newly developed program for cleaning the Passaic.

The viewpoint of potentially responsible parties (PRPs)<sup>12</sup> was ably represented by N. Scott Jones for the Diamond Alkali Project Team (Diamond Alkali), which is coordinating the cleanup of a major dioxin-contaminated Superfund site in Newark. Dr. Anthony Wolfskill, an environmental consultant, also attended and addressed the sediment contamination issue. Diamond Alkali provided our initial contact with Carol Dinkins, an eminent environmental attorney with a long history of public service. All three of these speakers have included their remarks in this published symposium.

Environmental voices included Andy Willner, the New York-New Jersey Baykeeper, and Ella Filippone of the Passaic River Coalition, both of whom advocated cleanup of the river and the bay. Cara

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ernments, and an increase in urban sprawl." *Id.* See generally THE BROWNFIELDS BOOK (Jenner & Block & Roy F. Weston, Inc. pubs., 1997).

<sup>9</sup> EPA speakers included Delmar Carlin, Esq., Director of the New Jersey Superfund branch; technical experts Richard Caspe, Kevin Bricke and James Haklar; and Melva Hayden, Esq., who coordinates environmental justice issues for EPA Region II.

<sup>10</sup> The National Oceanic and Atmospheric Administration (NOAA) is the federal agency that would act as trustee in the event of a natural resource damages action concerning the Passaic and Newark Bay. NOAA has been something of a pioneer in bringing natural resource damages actions. See Anthony R. Chase, *Remedying CERCLA's Natural Resource Damages Provision: Incorporation of the Public Trust Doctrine with Natural Resource Damages Actions*, 11 VA. ENVTL. L. REV. 353, 363-71 (1992).

<sup>11</sup> Anton Giedt attended from NOAA Region I in Massachusetts, and Martin McHugh, on detail from New Jersey's Department of Environmental Protection, came in from the NOAA's hazardous materials office in Chicago.

<sup>12</sup> The term is used to refer to entities made liable by CERCLA § 107(a), 42 U.S.C. § 9607(a) (1994), for cleanup costs and natural resource damages.

Lee, the environmental director of Scenic Hudson, Inc.,<sup>13</sup> offered sage advice from an organization whose decades-long struggle over the Hudson River has come to include fights over contaminated sediment.<sup>14</sup>

Two other learned observers also contributed their thoughts. Dr. Michael Gelobter of Rutgers-Newark's Graduate Department of Public Administration is an expert on urban environmental justice issues. He described some of the underpinnings of the land-use practices targeted by the environmental justice movement. Dr. Dennis Suszkowski of the Hudson River Foundation provided detailed information about the sediment contamination in Newark Bay.

Perhaps the most innovative feature of the symposium was including local community groups in what might have otherwise been a fairly traditional environmental summit.<sup>15</sup> In planning this conference, we considered it important to reach out to such Newark community stalwarts as the Ironbound Community Corporation (Ironbound) and La Casa de Don Pedro (La Casa).<sup>16</sup> We invited their representatives and those advocating on behalf of these communities to participate on the same panels as the regulators, the industries, and the traditional environmental groups. Joseph Della Fave participated on behalf of Ironbound and Ricardo Soto-Lopez spoke for La Casa. Arnold Cohen, Michael Gordon, and Paul Lerin

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<sup>13</sup> Scenic Hudson has recently fought to clean the Hudson of polychlorinated biphenyls (PCBs) rather than dioxins.

<sup>14</sup> See generally JOSHUA CLELAND, ADVANCES IN DREDGING CONTAMINATED SEDIMENT: NEW TECHNOLOGIES AND EXPERIENCE RELEVANT TO THE HUDSON RIVER PCBs SITE (1997).

<sup>15</sup> There have been and will continue to be conferences on brownfields redevelopment aimed at developers and on the dredging of contaminated sediment aimed at environmental scientists and policymakers. Similarly, such environmental justice conferences as I have attended typically preach to the converted — a group of activists and occasional academics already on board with the notion that meaningful community participation in environmental decisionmaking from the outset is essential, and that the inequities of land use and environmental enforcement must be redressed.

Although the siting of undesirable land uses is the most familiar example of an environmental justice issue, it is by no means the only situation in which environmental justice concerns should be raised. See generally Robert W. Collin & Robin Morris Collin, *Equity as the Basis of Implementing Sustainability: An Exploratory Essay*, 96 W. VA. L. REV. 1173 (1994); Eileen Gauna, *The Environmental Justice Misfit: Public Participation and the Paradigm Paradox*, 17 STAN. ENVTL. L.J. 3 (1998); Charles Lee, *Developing the Vision of Environmental Justice: A Paradigm for Achieving Healthy and Sustainable Communities*, 14 VA. ENVTL. L.J. 571 (1995).

<sup>16</sup> We also worked with Greater Newark Conservancy, another Newark community group, in identifying speakers. Lisa Hendricks-Richardson, Tiwana Steward, and Ed Lloyd of the Rutgers Environmental Law Clinic were also especially helpful.

also spoke as members of the community or friends of local community residents.<sup>17</sup>

We asked these community groups to help us publicize the event through grass-roots channels in addition to the normal professional mailing lists. We kept costs to a minimum and provided entry and lunch free of charge to any member of the Newark community. As a result of these efforts, local high school and college students, Newark residents, and Mildred Crump, a city councilwoman and then-candidate for mayor, were in the audience, along with environmental activists, members of the bar, and our own law students.<sup>18</sup>

### III.

Public awareness and political participation are important determinants of environmental and land-use policy. Part of the problem in remedying the condition of the Passaic River is that it is largely neglected and ignored by the greater New Jersey community. What the public believes about a resource becomes reality. If members of the public used the Passaic they might see the lack of progress in the cleanup, of both Newark and its river, and express their opinions politically. Conversely, once there is a definitive loss of contact with the river, once we turn our back to it, then the fight is as good as over. The public's lack of connection with the Passaic is illustrated by anecdotes that I related in my opening remarks at the symposium.

Andy Willner is the source of my first anecdote. As the New York-New Jersey Baykeeper (formerly the Raritan Baykeeper) his job is to be a professional busybody, staying informed about what is hap-

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<sup>17</sup> Michael Gordon's contribution to this symposium gives some idea of his legal efforts on behalf of the Ironbound community's environmental concerns. Paul Lerin's roots lie in Newark, and he has spent years advocating on behalf of the Friends of the Passaic River. Arnold Cohen is a longstanding advocate on environmental issues in the Ironbound, and he spoke in his capacity as a representative of the Ironbound Coalition Against Toxic Waste.

<sup>18</sup> The effort to bridge the gap between local communities and those whose profession involves the environment was only partly successful. The administration of Newark's brownfields program, which, if effective, promises to clean up some contaminated sites and bring an economic base back into these communities, seemed more important to community groups than either dioxin fight. For high-pitched or high-priced advocates, the reverse was true, with dioxin drawing more attention than the often dull processes of tweaking land uses to revitalize a community. In any event, Seton Hall University School of Law, as an urban educational institution, must consider what assistance it can offer. See Gerald E. Frug, *Universities and Cities*, 30 CONN. L. REV. 1199 (1998). On the potentials and pitfalls of university/community collaborative efforts, see generally Symposium, *Universities and Urban Revitalization*, 30 CONN. L. REV. 1199 (1998).

pening on the water and goading people into addressing both new and long-standing problems.<sup>19</sup> One day, tired of the Raritan Bay scenery, Willner steered his boat into Newark Bay and up the Passaic. He was stopped by the police, who asked, "What are you doing here?" "I'm a citizen, and I'm taking my boat out along the river," was the general nature of his reply. "You can't do that," the police replied. "This isn't a public river, it's a commercial river."

In this country, navigable rivers are supposed to be open to the public. Yet perceptions are sometimes stronger than the "real" law.<sup>20</sup> In the perception of the police, the Passaic had been written off, consigned to be a waste conduit for the industries along its banks. Willner was not supposed to be there. Someone seeking to use the river for personal transportation, let alone for recreation, was viewed as out of place and suspect.

Physical distancing of the community from the resource is another part of the problem. Willner's story indicates the difficulty of an approach by water. An approach by land is, if anything, more difficult. I was asked to help in setting up a press conference that would coincide with American Rivers' April 6, 1998, announcement that the Passaic was one of the most endangered rivers in the country.<sup>21</sup> We needed a public site overlooking the Passaic in Newark, yet there were few, if any, to choose from. The river is mostly bulk-headed and walled off. Public parks may be planned, but they are not there yet. We settled for the heliport, which does allow access to the river, and even has some grass, but also provides gruesome views of warehouses and factories as far as the eye can see. Why can't one get to the Passaic River from land? Because no one is expected to be interested in fishing or recreation on this particular river. The assumptions about ownership and the neglect feed on themselves.<sup>22</sup>

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<sup>19</sup> For a description of the approach to environmental advocacy of RiverKeepers and similar Bay- and HarborKeepers, see generally JOHN CRONIN & ROBERT F. KENNEDY, JR., *THE RIVERKEEPERS* (1997); Michael R. Lozeau, *Tailoring Citizen Enforcement to an Expanding Clean Water Act: The San Francisco Baykeeper Model*, 28 GOLDEN GATE U. L. REV. 429 (1998).

<sup>20</sup> See generally ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991).

<sup>21</sup> See *American Rivers*, *supra* note 5.

<sup>22</sup> Contributors to this written symposium have provided accounts of the growth and decline of Newark and the Passaic. See Wolfskill & McNutt, *supra* note 4; Michael Gordon & Sal M. Anderton, *Protecting the Passaic: A Call to Citizen Action*, 29 SETON HALL L. REV. 76, 77 (1998). Perhaps out of a sense of decorum, they have underplayed the evident racial issues that became part of the mechanism of Newark's decline. I cannot help but connect the two — the way the river and the urban environment generally were abused, and the way in which race riots of the mid-

Naturally, with such a background perception of the Passaic as essentially non-public, the EPA and the state could spend years waiting for each other to follow through with a politically inexpedient study of the river's contaminated sediment. The EPA could take many years to deal with the final resolution of a highly contaminated Superfund site.<sup>23</sup> There is no incentive for the EPA to prioritize the cleanup of a site that receives little public attention.

In the context of wide-open prairies and mountain ranges, environmental theorists have waxed eloquent about the need to develop policy out of a sense of community involvement with the land.<sup>24</sup> The need for community involvement in developing an environmental policy for a river city like Newark is not that different. Indeed, it may be more complex, given the industrial uses of the land and the temptation of waste disposal by water, through unmanaged runoff, combined sewer overflows, and so on. Senator Torricelli made this point well. He noted that forerunners of modern environmentalism, like Theodore Roosevelt, were concerned about the quality of wilderness and rural life, but that at the end of the twentieth century the environmental movement is about saving Newark, New York, Chicago, and Los Angeles.<sup>25</sup> The Senator described the enormous effort it took to preserve the Sterling Forest in New York and New Jersey, and he credited the resistance to funding this direct land purchase to its status as eastern, almost urban land.<sup>26</sup>

#### IV.

Two legal issues lurking at or near the surface in the published symposium papers deserve further discussion here. Tirza Wahrman's

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1960s capped off the decline. "White flight" resulted in business turning its back on Newark in a way paralleled by subsequent inattention to contaminated sites in Newark and the problems of a river whose environs had been deserted for more appealing venues.

The media's sense of what is and is not newsworthy is also part of the problem. For the March symposium I drafted a press release that noted that consumption of fish and crabs caught in the lower Passaic has been banned by New Jersey since the early 1980s, and ran it by Seton Hall's centralized office of Public Relations. I was advised to take the sentence out, because no one would think of fishing in the Passaic. Yet people do fish in the Passaic, and more would if it were cleaner.

<sup>23</sup> As can be inferred from Tirza Wahrman's essay, the delay could have permitted a better remedy to emerge. See Tirza S. Wahrman, *Agent Orange in Newark: Time for a New Beginning*, 29 SETON HALL L. REV. 89, 92-94 (1998).

<sup>24</sup> See generally ERIC T. FREYFOGLE, *JUSTICE AND THE EARTH: IMAGES FOR OUR PLANETARY SURVIVAL* (1993); DANIEL KEMMIS, *COMMUNITY AND THE POLITICS OF PLACE* (1990).

<sup>25</sup> See Torricelli, *supra* note 7, at 19.

<sup>26</sup> See *id.* at 19-20.



essay indicates that there are dioxin sites where incineration, rather than on-site storage, has been accepted as a remedy.<sup>27</sup> This raises the specter of disparate treatment for Newark. As Lavelle and Coyle's study suggested in 1992, environmental racism can include disparate time frames for Superfund cleanup and disparate treatment in terms of remedy.<sup>28</sup> This Introduction is not the place to compare in detail the remedy selected for Newark with those at other Superfund sites involving dioxin or polychlorinated biphenyls (PCBs), especially since the EPA's decisions concerning the Diamond Alkali site in Newark and one of the sites for comparison, the Vertac site in Pulaski County, Arkansas, were not available as of the date of this symposium.<sup>29</sup>

It should be noted, however, that the EPA has now approved the on-site entombment of a great deal of dioxin-contaminated soil at the Diamond Alkali site.<sup>30</sup> Whatever the basis for its 1988 decision on remedy, and its recent reaffirmation of that approach, the EPA must consider issues of environmental justice for the Diamond Alkali site. President Clinton's Executive Order on Environmental Justice<sup>31</sup> is a directive to the head of each federal agency to make environmental justice an important part of its mission. This can be done by identifying and addressing disproportionately high and adverse human or environmental effects of its programs, policies, and activities on minority and low-income populations.<sup>32</sup> The Executive Order also requires federal agencies, in matters affecting health and the

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<sup>27</sup> See Wahrman, *supra* note 23, at 93.

<sup>28</sup> See Marianne Lavelle & Marcia Coyle, *Unequal Protection — The Racial Divide in Environmental Law*, NAT'L L.J., Sept. 21, 1992, at S1-S12.

<sup>29</sup> See Johnson, *supra* note 5, at 15. A 1996 General Accounting Office report concluded:

Although EPA has taken a number of steps to encourage the development and use of innovative technologies in general, it has not yet identified any technologies it believes to be as effective as incineration for most PCB- or dioxin-contaminated sites. As a result, EPA has relied on incineration for many sites with PCB and dioxin contamination.

U. S. GENERAL ACCOUNTING OFFICE, PUB. NO. GAO/RCED-96-13, SUPERFUND: EPA HAS IDENTIFIED LIMITED ALTERNATIVES TO INCINERATION FOR CLEANING UP PCB AND DIOXIN CONTAMINATION 2 (1996). Although there is often intense public opposition to incineration as a remedy, it is interesting to note that the EPA did not choose the remedy considered most effective for the Diamond Alkali site. See Johnson, *supra* note 5, at 15.

<sup>30</sup> See Johnson, *supra* note 5, at 15.

<sup>31</sup> Exec. Order No. 12,898, 3 C.F.R. 859 (1995).

<sup>32</sup> See *id.* § 1-101.

environment, not to discriminate on the basis of race, color, or national origin.<sup>33</sup>

Although not privately enforceable, as a statute or regulation might be, this Executive Order does control agency action and can have a powerful effect. For example, in *In re Louisiana Energy Services*,<sup>34</sup> an Atomic Safety and Licensing Board of the Nuclear Regulatory Commission (NRC) held the siting process for a uranium enrichment process to be fatally flawed under the Executive Order based on what appeared to be the discriminatory result of the process.<sup>35</sup> The Licensing Board also held inadequate the Environmental Impact Statement<sup>36</sup> produced pursuant to the requirements of the National Environmental Policy Act (NEPA)<sup>37</sup> because impacts on poor African-American communities had not been adequately explored by the NRC staff before issuing the permit.<sup>38</sup> The Licensing Board denied the permit, despite the contrary recommendation of the NRC staff. Surely the EPA's assessment of alternative remedies under CERCLA should be expected to apply an equally stringent test toward disparate effects of its Superfund remedy decisions on racial minorities and the poor.

A second legal avenue for enforcement of environmental justice concerns based on disparate impact was recognized in *Chester Residents Concerned for Quality Living v. Seif*.<sup>39</sup> The case was brought under the EPA's regulations,<sup>40</sup> promulgated pursuant to Title VI of the Civil

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<sup>33</sup> See *id.* § 2-2.

<sup>34</sup> 45 N.R.C. 367 (1997), *aff'd in part, rev'd in part*, 47 N.R.C. 77 (1998).

<sup>35</sup> See *Louisiana Energy*, 45 N.R.C. at 380-97. Although the Nuclear Regulatory Commission held that the Licensing Board had exceeded its authority under NEPA by requiring an inquiry in possible deliberate discrimination in the siting of the facility, the Commission opinion makes clear that disparate impact on the basis of race or poverty is an appropriate basis for inquiry. See *Louisiana Energy*, 47 N.R.C. at 100-06.

<sup>36</sup> See *Louisiana Energy*, 45 N.R.C. at 397-411. This portion of the Licensing Board opinion was affirmed on appeal. See *Louisiana Energy*, 47 N.R.C. at 106-10.

<sup>37</sup> 42 U.S.C. § 4332 (2)(C).

<sup>38</sup> See *Louisiana Energy*, 45 N.R.C. at 397-411.

<sup>39</sup> 132 F.3d 925 (3d Cir. 1997), *cert. dismissed*, No. 97-1620, 1998 WL 477242 (U.S. Aug. 17, 1998). Cf. *Sandoval v. Hagan*, 7 F. Supp. 2d 1234, 1255 (M.D. Ala. 1998) (relying heavily on *Chester Residents* in finding an implied private right of action to enforce agency regulations prohibiting disparate impact discrimination); *Bryant v. New Jersey Dep't. of Transp.*, 998 F. Supp. 438, 445 (D.N.J. 1998) (examining standing for Title VI environmental justice claims in light of *Chester Residents* and the zone of interest test introduced in *National Credit Union Administration v. First National Bank & Trust Co.*, 118 S. Ct. 927 (1998), and reversing an earlier ruling, 987 F. Supp. 343 (D.N.J. 1998), in which the court found no standing and dismissed the case).

<sup>40</sup> 40 C.F.R. § 7.35 (1997).

Rights Act of 1964,<sup>41</sup> that prohibit recipients of federal funds from discriminating on the basis of race, color, national origin, or sex. The EPA's regulations permit proof of discrimination based on disparate impact alone.<sup>42</sup> In *Chester Residents*, the court held that a citizens group could proceed with a suit challenging issuance of a state permit to a soil remediation facility that would be located in a poor, minority community already overburdened with undesirable environmental land uses. The court read Title VI to allow an implied private right of action under implementing agency regulations such as those of the EPA.<sup>43</sup>

The *Chester Residents* case was recently dismissed as moot by the United States Supreme Court, after Pennsylvania reversed its position and denied the soil treatment facility's permit.<sup>44</sup> Despite a request by the EPA to leave the Third Circuit's ruling intact, the Court followed standard practice and required the court below to dismiss.<sup>45</sup> Thus, the important issues addressed in *Chester Residents* are once again open.

## V.

Michael Gordon and Sal Anderton, in their paper published here, raise a question about the ways in which citizens ought to be able to bring suits when relevant federal and state agencies fail to enforce environmental laws to clean up resources.<sup>46</sup> Gordon and An-

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<sup>41</sup> 42 U.S.C. § 2000d (1993). Agencies are authorized to issue implementing regulations under § 602 of Title VI, 42 U.S.C. § 2000d-1.

<sup>42</sup> Agencies implementing Title VI may choose to use a disparate impact standard in their regulations. See *Alexander v. Choate*, 469 U.S. 287, 293-94 (1985) (interpreting *Guardians Ass'n v. Civil Serv. Comm'n of New York City*, 463 U.S. 582 (1983)).

<sup>43</sup> Environmental Justice advocates had speculated that Title VI might provide an avenue for private actions precisely because of the disparate impact standard. See generally Luke W. Cole, *Civil Rights, Environmental Justice and the EPA: The Brief History of Administrative Complaints Under Title VI of the Civil Rights Act*, 9 J. ENVTL. L. & LITIG. 309 (1994); James H. Colopy, Comment, *The Road Less Traveled: Pursuing Environmental Justice Through Title VI of the Civil Rights Act of 1964*, 13 STAN. ENVTL. L.J. 125 (1994); Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787, 834-39 (1993). Challenges grounded on civil rights and constitutional bases typically failed because of the requirement for proof of discriminatory intent. See generally James S. Hoyte, *Disparate Impacts: The Problems of Discriminatory Intent and the Need for Community Activism*, 14 VA. ENVTL. L.J. 757 (1995).

<sup>44</sup> See *Chester Group's Suit Dismissed*, HARRISBURG PATRIOT & EVENING NEWS(Pa.), Aug. 24, 1998, at B18.

<sup>45</sup> See *id.*

<sup>46</sup> See Gordon & Anderton, *supra* note 22, at 82.

derton's model is based upon the citizen suit provisions of various environmental statutes, which typically allow citizens to sue the government for failure to perform nondiscretionary duties and to sue violators of environmental laws directly.<sup>47</sup> Ultimately, Gordon and Anderton reject CERCLA's citizen suit provision<sup>48</sup> as unhelpful because the actions that must be forced to effectuate a cleanup are within the government's discretionary authority.<sup>49</sup> Gordon and Anderton then turn to the New Jersey statutory authority for a citizen suit, and find it workable in its current form.<sup>50</sup>

I want to explore for a moment whether there are other approaches to this problem. Progress in cleaning up Newark and the Passaic has been stymied by what appears to be federal and state reluctance to jump into messy litigation. The argument in favor of citizen suit enforcement of natural resource damages was advanced in 1989 by Barry Breen,<sup>51</sup> who, like Gordon and Anderton, argues that citizen enforcement will increase the likelihood of compliance.<sup>52</sup> Breen recommends that the damages from citizen suits for natural resources should be paid to a designated government agency for use to restore the natural resource.<sup>53</sup> Current federal law, however, probably does not provide for a citizen suit for natural resource damages; therefore, such an approach would require an amendment to the federal statute.

I agree that in the case of the Passaic River something seems to be impeding progress. Perhaps giving federal and state authorities sole control over natural resource cleanups is not wise, especially when dealing with common resource areas that are relatively concen-

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<sup>47</sup> Typical is Clean Water Act § 505(a), 33 U.S.C. § 1365(a) (1990).

<sup>48</sup> CERCLA § 310, 42 U.S.C. § 9659 (1994). Contrast with the Oil Protection Act of 1990, which appears to make assessment of natural resource damages mandatory and allows enforcement by citizen suit. See 33 U.S.C. § 2706(c), (g) (1993).

<sup>49</sup> At least one authority would disagree with them, believing that the CERCLA citizen suit provision could be used to compel action on natural resource damages. See Peter M. Manus, *Natural Resource Damages from Rachel Carson's Perspective: A Rite of Spring in American Environmentalism*, 37 WM. & MARY L. REV. 381, 437 n.239 (1996).

<sup>50</sup> See Gordon & Anderton, *supra* note 22, at 85.

<sup>51</sup> See Barry Breen, *Citizen Suits for Natural Resource Damages: Closing a Gap in Federal Environmental Law*, 24 WAKE FOREST L. REV. 851 (1989); see also Duane Woodard & Michael R. Hope, *Natural Resource Damage Litigation Under the Comprehensive Environmental Response, Compensation, and Liability Act*, 14 HARV. ENVTL. L. REV. 189, 214-15 (1990) (recommending citizen actions for natural resource damages when federal and state trustees fail to act).

<sup>52</sup> See Breen, *supra* note 51, at 854. Presumably, where cleanup cost recovery is concerned, CERCLA provisions are adequate because they allow *anyone* who undertakes cleanup to seek to recover costs from others. See CERCLA § 107(a).

<sup>53</sup> See Breen, *supra* note 51, at 879.

trated. The potential for turning a particular area into a local sacrifice zone is just too great.<sup>54</sup>

We ought to consider (or reconsider) another possibility for expanding the class of parties authorized to bring natural resource damages actions. I refer to local governmental entities.<sup>55</sup> This argument cannot be treated fully within the constraints of this Introduction. However, there have been some recent reflections on this possibility in the academic literature, to which the reader may wish to refer.<sup>56</sup>

Let us begin by noting that prior to the Superfund Amendments and Reauthorization Act of 1986 (SARA),<sup>57</sup> which amended CERCLA, two courts had allowed a municipality to serve as a trustee for natural resource damages under CERCLA.<sup>58</sup> SARA added a provision to the effect that the governor of a state would designate trustees for that state.<sup>59</sup> This has been read to mean that the exclusive method for municipalities and other local governmental entities to become natural resource trustees is through state designation.<sup>60</sup> But even on this point, academic authorities are not in complete agreement, since the language itself is not explicit.<sup>61</sup> At least one case in-

<sup>54</sup> See generally Randall E. Kromm, Note, *Town Initiative and State Preemption in the Environmental Arena: A Massachusetts Case Study*, 22 HARV. ENVTL. L. REV. 241 (1998) (discussing state resistance to local environmental initiatives).

<sup>55</sup> My brief discussion here will focus on municipalities and other political subdivisions that have a traditional authority to address land use through the police power and to address public harms as public nuisances. More specialized and contemporary forms of local and regional governmental entity, such as the Port Authority of New York and New Jersey, have many of the same attributes but may require separate, perhaps individualized, consideration.

<sup>56</sup> See generally Joseph J. Maraziti, Jr., *Local Governments: Opportunities to Recover for Natural Resource Damages*, 17 ENVTL. L. REV. 10036 (1987); Judy C. Tsai, Case Note, *Are Municipalities Entitled to Recover Natural Resource Damages Under CERCLA?*, 7 SANTA CLARA COMP. & INTL. L.J. 193 (1991); Michael J. Wittke, Note, *Municipal Recovery of Natural Resource Damages under CERCLA*, 23 B.C. ENVTL. AFF. L. REV. 921 (1996).

<sup>57</sup> Pub. L. No. 99-499, 100 Stat. 1613 (codified in scattered sections of 42 U.S.C.).

<sup>58</sup> See *City of New York v. Exxon Corp.*, 697 F. Supp. 677 (S.D.N.Y. 1988); 633 F. Supp. 609 (S.D.N.Y. 1986); *Mayor of Boonton v. Drew Chemical Co.*, 621 F. Supp. 663 (D.N.J. 1985).

<sup>59</sup> See CERCLA §107(f)(2)(B), 42 U.S.C. § 9607(f)(2)(B) (1994).

<sup>60</sup> The most influential case here is *Mayor & Council of Rockaway v. Klockner & Klockner*, 811 F. Supp. 1039, 1047-51 (D.N.J. 1993), in which Judge Ackerman overruled his earlier ruling in the *Boonton* case on the basis of the new statutory language. See also, e.g., *City of Toledo v. Beazer Materials & Services, Inc.*, 833 F. Supp. 646, 650-52 (N.D. Ohio 1993); *Bedford v. Raytheon Co.*, 755 F. Supp. 469 (D. Mass. 1991); *Werlein v. United States*, 746 F. Supp. 887, 908-10 (D. Minn. 1990).

<sup>61</sup> See Patrick H. Zaepfel, *The Reauthorization of CERCLA Natural Resource Damages: A Proposal for a Reformulated and Rational Federal Program*, 8 VILL. ENVTL. L.J. 359, 380-

volved a post-1986 state appointment of a municipal natural resource damage trustee.<sup>62</sup>

Allowing a broader class of potential trustees would serve several purposes. As Gordon and Anderton (among others) note, it will mean that enforcement is more likely.<sup>63</sup> A broader class of trustees will also cause a broader range of interests to be represented and addressed in the process of potential and actual litigation.<sup>64</sup> Municipal trusteeship will empower localities and their citizens and constituents, who may be in closest contact with the impaired natural resource<sup>65</sup> and will often serve the participation and community building functions that environmental justice advocates seek.<sup>66</sup> In terms of the public awareness and public participation concerns about Newark and the Passaic discussed in Part III,<sup>67</sup> municipal trusteeship would seem to be a particularly useful device on which to focus political and media attention.

Thus, it seems to me that one or more of the cities along the lower Passaic ought to consider going forward, under CERCLA and whatever common law and state law analogues apply,<sup>68</sup> with a natural resource damage action. The question of whether CERCLA cur-

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82 (1997) (arguing that CERCLA is unclear and should be clarified to exclude municipalities as trustees).

<sup>62</sup> See *City of New York v. Exxon Corp.*, 766 F. Supp. 177, 196-97 (S.D.N.Y. 1991) (noting that the governor of New York designated the New York State Department of Environmental Conservation as trustee; it, in turn, designated the New York City Department of Sanitation as trustee).

<sup>63</sup> See, e.g., Thomas L. Eggert & Kathleen A. Chorostecki, *Rusty Trustees and the Lost Pots of Gold: Natural Resource Damage Trustee Coordination Under the Oil Pollution Act*, 45 BAYLOR L. REV. 291, 308 (1993).

<sup>64</sup> See *id.*

<sup>65</sup> See generally Peter H. Lehner, *Act Locally: Municipal Enforcement of Environmental Law*, 12 STAN. ENVTL. L.J. 50 (1993) (arguing that having municipalities take a larger role in enforcing various environmental laws promotes the beneficial policies of localism and flexibility). Accord, Wittke, *supra* note 56, at 941-45.

<sup>66</sup> See generally Gauna, *supra* note 15; Jonathan Poisner, *A Civic Republican Perspective on the National Environmental Policy Act's Process for Citizen Participation*, 26 ENVTL. L. 53 (1996); William A. Shutkin & Charles P. Lord, *Environmental Law, Environmental Justice, and Democracy*, 96 W. VA. L. REV. 1117 (1994) (analyzing public participation in the cleanup of New Bedford harbor from an environmental justice perspective). To be sure, citizen suits also serve the participation and community-building objectives of environmental justice. See generally Eileen Gauna, *Federal Environmental Citizen Provisions: Obstacles and Incentives on the Road to Environmental Justice*, 22 ECOLOGY L.Q. 1 (1995); Alice Kaswan, *Environmental Justice: Bridging the Gap Between Environmental Laws and "Justice,"* 47 AM U. L. REV. 221 (1997); Gerald Torres, *Environmental Burdens and Democratic Justice*, 21 FORDHAM URB. L.J. 431 (1994).

<sup>67</sup> See Part III, *supra* notes 19-26 and accompanying text.

<sup>68</sup> See Frank B. Cross, *Natural Resource Damage Valuation*, 42 VAND. L. REV. 269, 277 (1989) (noting that CERCLA's natural resource damage provision does not preempt parallel state statutory and common law provisions).

rently authorizes such an action is not a fatal stumbling block to the strategy. A municipality's request to the State of New Jersey to be named trustee would begin the process and would put a much-needed spotlight on the foot dragging that has gone on around this vital resource. Such a request would certainly help to move things forward, whether or not municipal natural trustee status can be won under CERCLA without the cooperation of the state.

## VI.

The papers presented here cover a number of issues raised by the overall problem posed by "Cleaning up Newark and Rebuilding for the 21st Century." However, these papers certainly do not exhaust all of the issues.

Senator Robert Torricelli's keynote remarks begin with the astute observation that it is a mistake to limit environmentalism to remote, rural areas.<sup>69</sup> It seems comparatively easy to find support and funds for western preservation projects, but the Senator insists that at the end of the twentieth century "the environmental movement is about saving Newark, New York, Chicago, and Los Angeles."<sup>70</sup> He discusses the resistance to Federal participation in saving the Sterling Forest watershed in New York and New Jersey.<sup>71</sup> Turning to Newark, Senator Torricelli connects its renaissance to viable parks — not just planned parks along the Passaic, but also to simple, city neighborhood parks.<sup>72</sup> He stresses the importance of brownfields policy to urban redevelopment, highlighting the pilot project in Newark.<sup>73</sup> Finally, he revisits the problem of floods and flood control on the middle Passaic, renouncing his prior support of the ambitious Passaic River Tunnel and advocating the low-tech solution of buying flood-prone properties and returning the wetlands to the river.<sup>74</sup>

N. Scott Jones, a representative of the Diamond Alkali Project Team, provides a history of the Diamond Alkali Superfund Site and an analysis of its current status.<sup>75</sup> He describes the method that was implemented to stabilize the site in the mid-1980s.<sup>76</sup> He also de-

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<sup>69</sup> See Torricelli, *supra* note 7, at 19.

<sup>70</sup> See *id.*

<sup>71</sup> See *id.* at 19-20.

<sup>72</sup> See *id.* at 21.

<sup>73</sup> See *id.* at 23.

<sup>74</sup> See *id.* at 24.

<sup>75</sup> See N. Scott Jones, *The Selected Remedy is the Most Environmentally Protective Solution for the Diamond Alkali Superfund Site*, 29 SETON HALL L. REV. 27, 28-30 (1998).

<sup>76</sup> See *id.* at 29.

scribes the permanent remedy selected by the EPA in 1988, an on-site containment, and argues that this is the best approach to remedy the contamination on the site.<sup>77</sup>

Dr. L. Anthony Wolfskill and Richard P. McNutt analyze the Passaic River and Newark Bay.<sup>78</sup> Their paper describes the work carried out since 1990 by the Diamond Alkali Project Team under the oversight of the EPA and describes the loss of the original wetlands habitat.<sup>79</sup> Wolfskill and McNutt identify several hundred sources of lead, mercury, and dioxins in the Passaic and Newark Bay, and they stress the complexity of determining responsibility for sources of individual discharges.<sup>80</sup>

Carol Dinkins and Kristie Tice call for a public works solution to the problem of contamination of the Passaic and Newark Bay.<sup>81</sup> Dinkins and Tice argue that, given the extraordinarily long and complex history of contamination, neither recovery of the costs of cleanup nor of natural resource damages under CERCLA will be a simple matter.<sup>82</sup> Dinkins and Tice view establishment of background or baseline levels as an obstacle to a CERCLA solution, particularly given the loss of wetlands along the Passaic.<sup>83</sup> Moreover, Dinkins and Tice note that ongoing sources of contamination — from water and air as well as non-point sources on land — need to be addressed in a comprehensive analysis.<sup>84</sup> They argue that even if damages could be established, allocation would be a monumental task.<sup>85</sup> Dinkins and Tice conclude that a public works and public management program would be more manageable, would be more cost effective, and could address ongoing sources of pollution.<sup>86</sup>

Michael Gordon is a veteran of several battles over environmental conditions in the Ironbound section of Newark. Gordon, and his associate, Sal M. Anderton, describe the history of problems both at the Diamond Shamrock site and in the lower Passaic generally, outlining the impact of those problems on commercial, recreational, and subsistence fishing; on the Port of New Jersey; and on the

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<sup>77</sup> See *id.* at 33.

<sup>78</sup> See Wolfskill & McNutt, *supra* note 4, at 37.

<sup>79</sup> See *id.* at 40.

<sup>80</sup> See *id.* at 41-44.

<sup>81</sup> See Carol E. Dinkins & Kristie M. Tice, *New Solutions for Old Problems in Newark Bay*, 29 SETON HALL L. REV. 60, 72 (1998).

<sup>82</sup> See *id.* at 61-62.

<sup>83</sup> See *id.* at 67.

<sup>84</sup> See *id.* at 68.

<sup>85</sup> See *id.* at 69.

<sup>86</sup> See *id.* at 72-74.



revival of Newark's downtown.<sup>87</sup> Gordon and Anderton, noting the fundamental role of citizen legal action brought at the early stages of the response to the Passaic contamination, is suspicious of leaving these kinds of cleanups in the hands of regulatory officials.<sup>88</sup> Gordon and Anderton note that CERCLA does contain a citizen suit provision,<sup>89</sup> but argue that this provision is not likely to provide sufficient leverage to effectuate cleanup because the government's response to natural resource damages is discretionary.<sup>90</sup> Gordon and Anderton turn to New Jersey's analog to CERCLA, the Spill Compensation and Control Act,<sup>91</sup> and to the Environmental Rights Act (ERA).<sup>92</sup> They argue that the ERA allows private citizens to step into the shoes of the state when there is government inaction to seek whatever damages are permitted under New Jersey law.<sup>93</sup>

Tirza Wahrman is an environmental attorney for the Port Authority and a resident of one of Newark's well-to-do suburbs, and she combines these sensibilities to point out the disparity between the Diamond Shamrock site and the posh Short Hills Mall, a mere ten miles away.<sup>94</sup> Wahrman contrasts the rich history of Newark with its troubled recent past, suggesting again the link between lingering contamination and the fact that the larger New Jersey community has turned its back on Newark.<sup>95</sup> Wahrman compares efforts to clean the Passaic with those used on the Hudson and calls for a renewed and stronger interest in cleanup.<sup>96</sup>

"A river is more than an amenity, it is a treasure."<sup>97</sup> Indeed, all the papers presented here are in accord at some level. Despite the differences in methodology, level of cleanup, funding strategy, and timing, all authors agree that it is time to move forward, to face Newark and its industrial past, and to face once again the Passaic River.

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<sup>87</sup> See Gordon & Anderton, *supra* note 22, at 79; see also Ellen Silbergeld et al., *Dioxin at Diamond: A Case Study in Occupational/Environmental Exposure*, in TOXIC CIRCLES 55 (Helen E. Sheehan & Richard P. Weeden eds., 1993).

<sup>88</sup> See Gordon & Anderton, *supra* note 22, at 83-85. See also *Ironbound Health Rights Advisory Comm'n v. Diamond Shamrock Chem. Co.*, 216 N.J. Super. 166, 523 A.2d 250 (N.J. App. Div. 1987).

<sup>89</sup> See CERCLA § 310, 42 U.S.C. § 9659 (1994).

<sup>90</sup> See Gordon & Anderton, *supra* note 22, at 84.

<sup>91</sup> N.J. STAT. ANN. § 58:10-23.11 to .24 (West 1992 & Supp. 1998).

<sup>92</sup> N.J. STAT. ANN. § 2A:35A-1 to -14 (West 1987 & Supp. 1998).

<sup>93</sup> See Gordon & Anderton, *supra* note 22, at 87.

<sup>94</sup> See Wahrman, *supra* note 23, at 91.

<sup>95</sup> See *id.* at 94.

<sup>96</sup> See *id.* at 93-94.

<sup>97</sup> *New Jersey v. New York*, 283 U.S. 336, 342 (1931) (Holmes, J.).