Volume 96 | Issue 4 Article 15

June 1994

Environmental Law, Environmental Justice, and Democracy

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I. INTRODUCTION

The rise of environmental justice, both as a form of practice and of discourse, signals a basic shift in the way we conceive environmental law. Traditionally, environmental law has been viewed as exceptionally technical and scientific,[1] demanding from lawyers and

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1. A testament to the purported technical nature of environmental statutes is the opinion issued by the Office of General Counsel soon after the United States Environmental Protection Agency was established in 1970. The opinion held that, due to the scientific bent of environmental law, civil rights laws and other policies addressing social and political equality are inapplicable. Further, in testimony before the United States Commission on Civil Rights in 1971, then EPA Administrator William Ruckelshaus argued that the EPA's scientif-

laypersons a modicum of familiarity with esoteric notions such as risk analysis, point sources, best available technology, and the like. Environmental law, we have been told, is the domain of the expert, the scientist, the specialist. Indeed, the infamous array of acronyms, from CERCLA and SIPs to NPDES and NAAQS, is a metaphor that underscores the opaque, if not incomprehensible, nature of environmental laws and regulations.

As a result of this conception of environmental law, debate and decisionmaking on environmental matters typically have been confined to those who can claim some expertise in the field—attorneys, scientists, engineers, and planners. Often underwriting this expertise, of course, have been the businesses and industries with so much at stake in the campaign to regulate environmental harms.[2] Left out, however, have been the people least able to obtain access to, let alone expertise in, environmental policymaking: individuals from low-income communities and communities of color. At the same time, these communities have had a substantial stake in the shape and content of environmental policy because historically they have borne the brunt of environmental harms.[3]

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ic role in setting environmental standards precluded the application of civil rights law to environmental programs. *See* Recommendations to the Presidential Transition Team for the U.S. Environmental Protection Agency on Environmental Justice Issues Submitted by the Environmental Justice Transition Group, The Lawyers' Committee for Civil Rights Under Law, The Environmental Justice Project (Dec. 21, 1992) (on file with authors).

From the start, then, environmental law has been seen as incompatible with social and political concerns such as due process and equal protection. On one side stood science, on the other, fairness and equality.

2. PACs and other lobbying groups representing industry and business typically wield tremendous influence on legislators struggling to strike a balance between economic growth and environmental protection. Of course, high-powered environmental groups, such as the Natural Resources Defense Council and the Environmental Defense Fund, also do their part to ensure that environmental concerns are taken seriously by legislators. None of these interests, however, has historically been responsive to the communities most often in need of protection. *See infra* note 3.

3. *See, e.g.*, CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS (Robert D. Bullard ed., 1993); PAUL MOHAI & BUNYAN BRYANT, RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS (1992); Richard Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787 (1993). It should also be noted that these communities have not been represented within the mainstream environmental movement. As a result, policies and practices called for by tradi-

This is not to say that citizens, especially those able to afford legal representation, have been excluded entirely from participating in matters affecting their health and environment. Citizen suits, for instance, allow individuals and groups to bring legal actions against government or private actors after filing notice of intent to sue.[4] Such suits have proved to be highly effective in engaging local citizens in the process of environmental protection.[5] Yet, citizen suits are essentially ex post facto remedies. That is, they typically occur after some environmental law or set of laws has already been broken and the harm to the environment and the public health *a fait accompli*.[6] Moreover, these suits require that citizens be able to obtain substantial legal assistance. The mere drafting of a two- or three-page notice letter, for instance, often demands countless hours of difficult legal research.[7] Consequently, communities that cannot afford even low-cost attorney fees are without recourse to citizen suits.

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tional environmental groups have not accounted for the needs of low-income communities and communities of color. *See* Charles Jordan & Donald Snow, *Diversification, Minorities, and the Mainstream Environmental Movement, in* VOICES FROM THE ENVIRONMENTAL MOVEMENT: PERSPECTIVE FOR A NEW ERA (Donald Snow ed., 1991); ROBERT GOTTLIEB, FORCING THE SPRING: THE TRANSFORMATION OF THE AMERICAN ENVIRONMENTAL MOVEMENT (1993).

4. *See, e.g.*, Toxic Substances Control Act, 15 U.S.C. §§ 2618(d), 2619 (1988); Clean Water Act, 33 U.S.C. § 1365(d) (1988); Clean Air Act, 42 U.S.C. §§ 7604, 7607(f) (1988).

5. *See* Zygmunt J.B. Plater, *Environmental Law as a Mirror of the Future: Tracing the Consequences of a Fundamental Shift of Paradigms*, 22 B.C. ENVT'L AFF. L. REV. (forthcoming 1994).

6. Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund), 42 U.S.C. §§ 9601-9675 (1988 & Supp. 1990), for instance, a citizen suit challenging an EPA remedial action decision cannot be brought until that action has been "taken." 42 U.S.C. § 9613(h)(4) (1988). Some courts have defined "taken" to mean completed, thus precluding pre-implementation judicial review. *See* Alabama v. United States Environmental Protection Agency, 871 F.2d 1548, 1557 (11th Cir. 1989); Schalk v. Thomas, 28 Env't Rep. Cas. (BNA) 1655, 1657 (S.D. Ind. 1988); Frey v. Thomas, 28 Env't Rep. Cas. (BNA) 1660, 1662 (S.D. Ind. 1988).

Others have concluded that the plain language of the statute does not provide an answer as to when review is available. *See, e.g.*, Neighborhood Toxic Cleanup Emergency v. Reilly, 716 F. Supp. 828 (D.N.J. 1989) (language of Section 310 is not entirely clear about what constitutes action taken). However, no court has in fact allowed a pre-implementation challenge by citizens to a remedial action decision.

7. A notice letter drafted by the authors and another attorney on a Superfund case, for example, required as much as thirty hours of research and writing, a sizable workload by any account.

Environmental justice is principally about opening up discussion and the practice of environmental law and policy to traditionally underrepresented communities. It is about ensuring that the same processes that so seriously affect the health and welfare of these communities also include them in a meaningful, democratic way. In this essay, we attempt to view the process-dimension of environmental justice through a broad, cultural lens. That is, we seek to situate the turn toward grassroots participation in environmental law within the larger cultural matrix in which it occurs. To this end, we set forth below an example of environmental justice in process: a New Bedford, Massachusetts community's struggle to cleanup a polluted harbor while making sure that the cure is not worse than the disease. Next, we suggest that environmental justice fits well with a postmodernist/pragmatist approach to social reform, discussing the tell-tale features of postmodernism and pragmatism. We conclude by urging that the system of environmental law heed the call of environmental justice activists and become, in essence, postmodernist/pragmatist.

II. ENVIRONMENTAL JUSTICE AND THE PRIMACY OF PROCESS: HANDS ACROSS THE RIVER AND THE NEW BEDFORD HARBOR HOT SPOT

In New Bedford, Massachusetts, the Acushnet River flows into the Atlantic Ocean. Once a mighty seaport and center of the whaling industry in the early 1800s, New Bedford resembles most old New England cities—vestiges of former prosperity in its vacant brick factories, and its handsome, though diminished, dwellings. The New Bedford Harbor, still home to one of the largest commercial fishing fleets in the United States, sits in a strange silence. Beneath the uneasy surface, some of the highest concentrations in the world of polychlorinated biphenyls (PCBs) and other heavy metals lurk in the sediment.[8]

As is often the case, past prosperity has its price, for the same businesses that had brought jobs and wealth to New Bedford following the decline of the whaling industry also transformed the Acushnet

8. Record of Decision Summary, New Bedford Harbor/Hot Spot Operable Unit, New Bedford, MA, U.S. Environmental Protection Agency, Region I, 2-4 (Apr. 1990).

River from a dynamic ecosystem into a flowing sarcophagus. For instance, adjacent to an electrical capacitor manufacturing facility located along the western bank of the river estuary, sediment concentrations of PCBs range from 4,000 parts per million (ppm) to over 200,000 ppm.[9] The United States Food and Drug Administration has set a tolerance limit of 5 ppm for PCBs in edible tissue.[10]

In 1977, following an Environmental Protection Agency (EPA) survey documenting PCB contamination in New England, the Massachusetts Department of Public Health issued a public warning against consumption of shellfish or bottom fish from within the New Bedford Harbor. In July 1982, the New Bedford Harbor was added to the EPA Superfund National Priorities List. Over the course of the next two years, a Remedial Action Master Plan and Feasibility Study were conducted, pursuant to the process spelled out in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). In 1989, an Engineering Feasibility Study, Pilot Dredging and Disposal Study, and Hot Spot Feasibility Study were also conducted pursuant to CERCLA.[11]

The Hot Spot Area is located along the western bank of the Acushnet River estuary next to the electrical capacitor manufacturing facility formerly owned and operated by Aerovox, Inc. It is deemed a Hot Spot because of the particularly high levels of PCBs detected in the sediment; it poses a serious threat not only to human health but also to the health of marine organisms.[12]

On April 6, 1990, the Record of Decision (ROD), which presented the selected remedial action for the Hot Spot Area, called the Hot Spot Operable Unit, was signed by Julie Belaga, then Regional Administrator.[13] The major components of the Operable Unit included dredging

9. *Id.* at 1-2. The two principal facilities responsible for the PCBs and other heavy metals deposited in the river sediment were operated by Aerovox, Inc. and Cornell-Dubilier Electronics, Inc., respectively. Each was a major user of PCBs from the time their operations commenced in the 1940s until 1978, when EPA banned the use of PCBs.

10. *Id.*

11. *Id.* at 3-4.

12. *Id.* at 7-8.

13. *Id.*

of the river sediment, transportation and dewatering of the sediment, incineration of the sediment PCBs, and stabilization of the residual ash.[14] The Operable Unit was to be placed on Sawyer Street, on a lot abutting the shoreline some distance downstream from the Hot Spot Area. The Sawyer Street site is located in a densely populated, ethnically diverse neighborhood; many of the neighborhood residents are unemployed, elderly, or very young. The site lies within seventy-five yards of a playground.

In the ROD, the Regional Administrator declared that the chosen remedial action

> is protective of human health and the environment, complies with Federal and State applicable or relevant and appropriate requirements directly associated with this action, and is cost-effective. This action utilizes permanent solutions and alternative treatment technologies to the maximum extent practicable, and this action satisfies the statutory preference for treatment as a principal element of the remedy.[15]

"Community relations" is a required component of the CERCLA process and is the principal means by which the EPA keeps the local community and other interested parties apprised of cleanup activities. In the ROD for the New Bedford Hot Spot, the EPA claimed that it met its statutory community relations obligations. The statute requires that the EPA develop procedures to ensure notice to potentially affected persons and the public (including a brief analysis of the remedial plan and alternatives that were considered) and provide a reasonable opportunity to comment, a public meeting in the affected area, and a response to "each of the significant comments, criticisms, and new data submitted in written or oral presentations."[16]

During the course of the planning process, the EPA presented the plans for and the results of various investigations and feasibility studies at a series of public meetings. The EPA also awarded a Technical Assistance Grant to a Community Work Group. In June 1989, the EPA made the Administrative Record available for public review in the

14. *Id.* at 26-28.
15. *Id.* at iii.
16. 42 U.S.C. § 9617 (1988).

EPA's regional offices in Boston and at the New Bedford Public Library and published a notice and analysis of the Proposed Plan in two local newspapers, including a Portuguese-language paper. On August 3, 1989, the EPA held an informational meeting. That meeting marked the beginning of the public comment period. The EPA then held an informal public meeting on August 16, 1989, extended the public comment period to October 2, 1989, and held two more public meetings at which the Potentially Responsible Parties (PRPs) outlined an alternative cleanup plan. The Community Work Group and the general public sought comments from the EPA and the PRPs about each alternative.[17]

Thus, the EPA apparently complied with its statutory duty of community relations, fulfilling and even exceeding the requirements for public comment. In addition, the EPA complied with the requirement that it address "significant criticisms." Thus, in outlining the community relations program at the site, the ROD noted that "community concern and involvement have been and continue to be high."[18] Further, the EPA noted that while the public's initial concerns "focused on potential health impacts as a result of living near the Harbor or eating fish caught in the Harbor, potential impacts on the local fishing industry and potential limitations on waterfront development activities," the community concerns had changed over time and "now also include the environmental, economic and health impacts of remedial alternatives evaluated for the Hot Spot."[19]

In discussing its choice of incineration over the other alternatives, the EPA again noted the community's concerns over the health impacts of the various remedial options. Specifically, the ROD indicated that "[c]ommunity concerns over the selected remedy are focused on the operation of the incinerator, the impacts of dredging, and storage of the treated material."[20] These concerns "are addressed," according to the ROD, "by specifying compliance with the RCRA and TSCA incinerator standards."[21]

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17. Record of Decision, *supra* note 8, at 6-7.
18. *Id.* at 6.
19. *Id.*
20. *Id.* at 32.
21. *Id.*

A closer look at the community relations plan indicates that nominal compliance with the statutory duty and a truly engaging process are two different matters. The gap between compliance and "due process" may explain the explosion of public concern over the health effects of incineration that developed after the EPA signed the Record of Decision.

It should be noted that, according to the ROD, the EPA generally considers "community acceptance" of a proposed alternative *after* it has "received public comment on the RI/FS and the Proposed Plan."[22] In other words, the community's concerns are incorporated into the ROD after the EPA has chosen an alternative. This process constitutes agenda-setting of the first order. The public comment is not addressed to which alternative is "better," but rather must attack a remedy that has already been chosen. Thus, the EPA does not incorporate the public's input into the decisionmaking process itself. Furthermore, given the timing of the public comment, the EPA does not have to choose an alternative that addresses the community's concerns. Rather, the timing encourages the EPA to treat the public's questions as issues to be dealt with at some future date or to be explained away.

Further, as a substantive matter, the EPA's "response" did not truly address the public's concerns. Though the EPA has suggested that requiring compliance with RCRA and TSCA incinerator standards addresses the public's concerns, Hands Across the River (HAR) received information from grassroots groups from around the country that indicates that the citizens' concern with regard to incineration is not the legal limits themselves, but whether incinerators actually meet those standards. HAR's main argument was that incinerators are dangerous even if they meet legal limits in test burns, an argument that derived from the information HAR learned from other organizations facing similar remedial action decisions. For example, the January 1, 1993, issue of "Hazardous Materials Intelligence Report" reported that

> [h]azardous waste incinerators that meet the requirements under the Resource Conservation and Recovery Act (RCRA) for burning the chemical compounds that serve as dioxin "surrogates" in trial burns may have difficulty in achieving high destruction removal efficiencies "on dioxin itself due to the low levels at which the dioxin is normally present."[23]

22. *Id.* at 30. RI/FS stands for the Remedial Investigation/Feasibility Study.

23. Hazardous Materials Intelligence Report, Jan. 1, 1993, at 1 (on file with the au-

Similarly, grassroots organizations sent HAR internal EPA memos indicating that incinerators around the country had failed to meet the required levels for dioxin destruction.[24]

Compliance with the statutory requirements for public participation, then, does not mean that the public has participated in the decision. In the New Bedford case, because the public's comments were "answered" only late in the game, the EPA failed both as a procedural matter and as a substantive matter to engage the "significant concerns" raised by the citizens groups. The result was an uprising after the ROD was signed.

HAR orchestrated a formidable campaign against the ROD. By the fall of 1993, HAR had enlisted the New Bedford City Council in the fight to stop the proposed incineration. The Council passed ordinances that prohibited the transportation of incineration equipment through New Bedford and prevented water hook up to the site. By its actions, the Council risked $25,000 a day fines threatened by the EPA. Though the city ultimately settled the dispute without incurring the fines, the controversy brought national attention to New Bedford.[25] In addition, HAR orchestrated an effective publicity campaign using local cable access and other sources to spread its message. Finally, HAR filed a notice of intent to sue the EPA, alleging, among other claims, that the incinerator would violate state environmental law that the EPA had agreed to abide.[26]

The EPA eventually consented to a mediation process. HAR, other concerned citizens, the EPA, the Massachusetts Department of Environmental Protection, members of the City Council, and other local politicians formed a review board to consider alternative technologies. Through this remarkable process, each side articulated its interests in the dispute, put together a list of alternatives to incineration, and then

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24. Interview with David Hammond, Hands Across the River (Dec. 22, 1992).

25. *The EPA's dirty secret*, BOSTON GLOBE, Feb. 13, 1994, at 74; Natalie White, *City, EPA Strike Deal on PCB Site Planning*, NEW BEDFORD STANDARD TIMES, Oct. 15, 1993, at 1.

26. HAR Notice of Intent to Sue the EPA (on file with the authors).

listened to presentations from vendors of various cleanup technologies. Although HAR has the support of technical and legal advisors, the group speaks for itself and is fully engaged in the highly technical process.

III. ENVIRONMENTAL LAW AND A BETTER DEMOCRACY: FROM MODERNISM TO POSTMODERNISM

The mediation process at New Bedford is a model of the decisionmaking process envisioned by environmental justice advocates. Citizens' interests are considered at the outset, and most importantly, during the comparison of alternatives. Further, the process proves that there is no decision or process "too technical" for concerned citizens. In sum, citizens have a seat at the decisionmaking table. They are involved face to face with the EPA, as equals, and thus are a part of an ongoing dialogue, rather than an adjunct to the process.

The traditional model of environmental law discussed in the introduction and the approach represented by the New Bedford case fit well into a larger cultural framework. Looking at this framework helps to explain the shift from science and technology to community participation represented by the New Bedford case. By situating the New Bedford case in a larger cultural matrix, we can better understand the rightness or propriety of the turn to community participation in the light of the democratic values underlying not only our federal environmental laws but all laws.

In its commitment to science, technology, and rational bureaucracy as the essential tools of environmental protection, the traditional environmental law model embodies a modernistic approach to social problems. Modernism privileges technology and rationality; it celebrates bureaucratic power and the rational planning of ideal social orders based on standardized knowledge and production.[27]

27. The characterizations of modernism and postmodernism which are presented in this essay derive largely from our reading of DAVID HARVEY, THE CONDITION OF POSTMODERNITY (1989). *See infra* note 29. For didactic purposes, his interpretations are helpful because they are cogent and straightforward. As heuristic tools, however, they are inadequate in that they not only present a problematically seamless picture of modernism

Thus, for instance, Superfund is modernist because it conspicuously privileges science and technology—remedial investigations, feasibility studies, technology assessments, and the like—over community participation as the approach to cleaning up hazardous waste sites. Invariably, environmental laws privilege science and technology over community involvement. Also, while science and technology are viewed as embodying rationality, community participation is typically seen as representing emotionalism and alarmism. The two are thus taken to be opposites.

The modernist cast of Superfund is arguably a central part of its shortcomings. There is a general consensus that Superfund's primary flaw is the delay that occurs between the listing of a site on the National Priorities List and its final clean up.[28]

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and postmodernism but clearly serve his admittedly Marxist politics.

The definition of both modernism and postmodernism is highly contested. While most scholars agree that both conditions are oppositional to, say, nineteenth century Victorianism (itself an ambiguous concept), there is no clear consensus on the conceptual make-up of modernism and postmodernism. On modernism, *see* MODERNISM CULTURE IN AMERICA (Daniel Singal ed., 1991) (the essays by Daniel Singal, Malcolm Bradbury, and David Hollinger are particularly helpful in illuminating the epistemological problems associated with modernism); CECELIA TICHI, SHIFTING GEARS: TECHNOLOGY, LITERATURE, CULTURE IN MODERNIST AMERICA (1987); MODERNISM, 1890-1930 (M. Bradbury & J. McFarlane eds., 1976); HUGH KENNER, A HOMEMADE WORLD: THE AMERICAN MODERNIST WRITERS (1975).

On postmodernism, *see* EDWARD SOJA, POSTMODERN GEOGRAPHIES: THE REASSERTION OF SPACE IN CRITICAL SOCIAL THEORY (1989); ALLAN MEGILL, PROPHETS OF EXTREMITY: NIETZSCHE, HEIDEGGER, FOUCAULT, DERRIDA (1985); Frederic Jameson, *The Politics of Theory: Ideological Positions in the Postmodern Debate*, 33 NEW GERMAN CRITIQUE 53 (1984); Frederic Jameson, *Postmodernism, Or the Cultural Logic of Late Capitalism*, 146 NEW LEFT REV. 53 (1984); JEAN LYOTARD, THE POSTMODERN CONDITION (1984).

Further, concerning the meaning of modernism alone, while there is no agreement on exactly what it is, there does appear to be consensus on what it is not. A common misconception is the practice of equating modernism with modernization, and modernist with modern. Modernism should properly be viewed as a culture of related ideas, beliefs, values, and aesthetics, originating in the mid to late nineteenth century. A modernist is someone or something which partakes of this culture. Modernization, however, denotes a process of social and economic development, involving the emergence and growth of industry, technology, urbanization, and bureaucratic institutions, that can be traced back to the seventeenth century. Modern is someone or something which participates in this process. Thus, regardless of the etymological similarity, modernism and modernization, and modernist and modern, must be differentiated.

28. Alliance for a Superfund Action Partnership, Eight Point Plan of Action 2 (Jan. 1994) (on file with the authors).

As the New Bedford case illustrates, some of the delay can be attributed to community resistance to cleanup decisions and to conflict between the EPA, the PRPs, and the community. The failure of Superfund to adequately incorporate and engage community concerns therefore largely accounts for Superfund's limited success. In other words, Superfund's reliance on expertise and rejection of community input—its modernist stance—is a substantial part of the problem with Superfund.

Clearly, science and technology are significant when it comes to environmental protection. To be sure, they are elemental. However, in a democracy such as ours, so too is community participation. What makes environmental law of the sort conceived in the early 1970s decidedly modernist, and thus problematic, is its eclipsing embrace of science and technology at the expense of meaningful community involvement.

The environmental justice movement's push for greater community participation in environmental decisionmaking, as in New Bedford, is in many ways a call for a postmodern environmental law. Since the late 1960s, "a noticeable shift in sensibility, practices, and discourse formations which distinguishes a post-modern set of assumptions, experiences and propositions from that of a preceding period" has occurred.[29] Across diverse fields and disciplines, postmodernism has produced a "rage against humanism and the Enlightenment legacy"—the primacy of rationality and science.[30]

At its most elemental, postmodernism denotes a rejection of abstract reason and an aversion to the idea that human emancipation can be achieved through the enlistment of the powers of technology, science, and rationality. Unlike modernism, postmodernism accepts the fleeting and chaotic, rejecting claims to universal truth or transcendence. In other words, postmodernism devalues modernism's meta-narratives, -languages, and -theories regarding science and rationality; they are seen as totalizing and hegemonic. Instead, postmodernism embraces plurality, heterogeneity, multiplicity, and "otherness."[31] Indeed, a de-

29. DAVID HARVEY, THE CONDITION OF POSTMODERNITY 39 (1989).

30. HABERMAS AND MODERNITY 25 (Richard J. Bernstein ed., 1985).

31. *See* MICHEL FOUCAULT, POWER/KNOWLEDGE (1972); MICHEL FOUCAULT, THE

fining feature of postmodern practice is a commitment to listening to the voices of the oppressed, the marginalized.

Moreover, postmodernism problematizes the relation of language to reality and views cultural life as a series of perpetually interweaving texts and meanings. Thus, on a postmodernist view, we can never understand the way the world "really is" nor should we aspire to such knowledge. Accordingly, pragmatism becomes the only valid philosophy of action because it is committed exclusively to "some local determinism" or "some interpretive community" and not to *a priori* truths or transcendent values.[32]

Pragmatism stands as a conspicuously anti-foundationalist, distinctively American,[33] approach to such traditional philosophical concepts as truth, justice, and reason. Pragmatism holds that no single theory can ever function as a complete guide to the realization of these or any other philosophical ideals.

Pragmatism privileges above all else democratic decisionmaking, or inquiry, as a means by which citizens solve problems. For example, John Dewey argued that "[A]ll knowledge is the product of special acts of inquiry."[34] "The essential need," he wrote, " . . . is the improvement of the method and conditions of debate, discussion and persuasion . . . We have asserted that this improvement depends essentially upon freeing and perfecting the processes of inquiry and of dissemination of their conclusions."[35]

Inquiry and knowledge together constitute what Dewey called "intelligence." The alternatives to intelligence, he warned, "are either drift and casual improvisation, or the use of coercive force stimulated

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FOUCAULT READER (1984); LYOTARD, *supra* note 27; RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY 3 (1989). Postmodernism purports to attend to the many voices silenced or marginalized by the imperialism of enlightened modernity that presumed to speak for them. Thus, in much of Foucault's work, for instance, we see a concern for interstitial, marginalized groups and a desire to reconstruct and represent their voices and experiences.

32. HARVEY, *supra* note 29, at 52.

33. CORNEL WEST, THE AMERICAN EVASION OF PHILOSOPHY: A GENEALOGY OF PRAGMATISM (1989).

34. JOHN DEWEY, THE QUEST FOR CERTAINTY 193-94 (1929).

35. JOHN DEWEY, THE PUBLIC AND ITS PROBLEMS 208 (1927).

by unintelligent emotion and fanatical dogmatism."[36] Thus, Dewey wrote: "Faith in the power of intelligence to imagine a future which is the projection of the desirable in the present, and to invent the instrumentalities of its realization, is our salvation. And it is a faith which must be nurtured and made articulate . . . ."[37]

In turn, intelligence must serve democracy. For Dewey, democracy is the idea of communal life itself which, in practice, provides the framework for individuals to express their interests, to take seriously the consequences of those interests, and ultimately, to develop ways of promoting attractive consequences and preventing obnoxious ones. Thus, the ideal community is one in which citizens can plan conduct, learn relevant facts, and make experiments in order that they may come up with better resolutions to human predicaments.

Mari Matsuda also extols the democratic virtues of pragmatism. She argues that "pragmatism is attractive to subordinated people because it is often their indigenous method. Pragmatism recognizes multiple consciousness, experimentation, and flexibility as tools of inquiry."[38] Thus, pragmatism signals a commitment not only to democratic principles, but also social justice.

In sum, pragmatism, as a component of postmodernism, embraces participation and inquiry. Yet pragmatism does not discountenance science or rationality. To be sure, pragmatism is grounded in a belief in the primacy of the scientific method. Pragmatism merely asserts that the method itself must be inclusive, flexible, and democratic.

The claims for inclusion made by citizens such as those in the New Bedford case go to the core of the problem of modernist environmental law. They challenge the traditional reliance on science and technology as the only valid means by which environmental protection can be achieved. They assert vigorously that more community participation in environmental decisionmaking will improve the system by

36. JOHN DEWEY, LIBERALISM AND SOCIAL ACTION 51 (1935).

37. John Dewey, *Need for a Recovery of Philosophy*, *in* ON EXPERIENCE, NATURE, AND FREEDOM: REPRESENTATIVE SELECTIONS 69 (Richard J. Bernstein ed., 1960).

38. Mari Matsuda, *Pragmatism Modified and the False Consciousness Problem*, 63 SO. CAL. L. REV. 1763, 1764 (1990).

reducing conflict between communities and government and by enriching the process. Moreover, the claims of environmental justice advocates for better environmental laws speak to the needs of traditionally marginalized communities. In this way, the claims for inclusion are claims for a better democracy.

IV. CONCLUSION

As a result of conflicts such as in the New Bedford case, the EPA itself has come to recognize that its processes must change. In an internal memo regarding the permitting of hazardous waste incinerators, the EPA indicated that it would provide for greater public participation in the future. Specifically, the EPA stressed that citizens ought to be involved earlier in the decisionmaking regarding hazardous waste siting and that citizens ought to participate in the risk assessment process.[39]

In addition, there is a general agreement both inside and outside the Federal government that as Congress considers reauthorizing Superfund during the 1994 session, it must provide for better public participation in the Superfund process. For example, the Alliance for a Superfund Action Partnership believes that community leaders and concerned citizens should be involved at the beginning and throughout the Superfund process and calls for public meetings before every decision in the process, formation of Community Work Groups as soon as a site is listed as a Superfund site, reform and simplification of the Technical Assistance Grant process that provides funds to Community Work Groups, and funding to underprivileged communities.[40] Though the Alliance does not agree with other aspects of the Clinton Administration's version of the Reauthorization, it does feel that the Administration's plan "calls for very positive new provisions to involve the public in Superfund decision making."[41]

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39. United States Environmental Protection Agency, Draft Strategy for Combustion of Hazardous Waste 11 (May 1993).

40. Alliance for Superfund Action Partnership, *supra* note 28, at 15-16.

41. *Id.* at 29. The Alliance's main concern with the Administration proposal is that the funding for these reforms is not established in the bill. In addition, the Administration proposal does not address what the Alliance calls the community empowerment agenda: training citizens and involving minority business in cleanup. *Id.*

Environmental justice advocates in New Bedford have done more than stop an incinerator. They have highlighted the crucial distinction between public participation in the books and public participation in a democracy. The New Bedford mediation debunks the traditional "experts only" myth in environmental law and serves as an example of the type of process in which the EPA ought to engage in every case.

Perhaps, then, environmental law is beginning to shed its modernist garb. Without having to abandon either science or technology, a postmodern environmental law will better reflect the conditions and needs of the moment. Realizing that the traditional model of environmental law has failed in large part because it has ignored the distributional effects of environmental regulation, relied too much on the power of science to cure environmental ills, and discounted the influence of power on environmental decisionmaking, we should make community involvement a central feature of every environmental law. Simply put, we should make our regime of environmental laws robustly democratic.