

# Clearinghouse REVIEW

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## Close the Racial Wealth Gap

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Sargent Shriver National Center on Poverty Law

very few controversial pieces of legislation in recent memory. In the space of one day, he managed to convince the Assembly to pass the version of the Wage Theft Prevention Act that had passed the Senate, in spite of the Assembly having a competing version of the bill. Had he failed, the bill would not have become law.



On December 14, 2010, almost exactly nine months after the introduction of the Wage Theft Prevention Act in the New York State Assembly and Senate, Augusto Fernandez, janitor and Make the Road New York member for a decade, stood side by side with Governor Paterson. Flanked by Senator Savino, Assemblyman Heastie, the commissioner of labor, and legislative leaders, Governor Paterson and Fernandez each spoke before the cameras briefly. Then the governor sat down to sign the Wage Theft Prevention Act.

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## Fighting for Environmental Justice Takes Long-Lasting Coalitions

"It's official!" read Theresa Mueller's long-awaited February 2011 e-mail to community activists. A veteran deputy city attorney with the San Francisco City Attorney's Office, Mueller was referring to a Federal Energy Regulatory Commission decision that finally allowed the Potrero power plant, the second of the two dirtiest fossil fuel power plants in the most polluted area of San Francisco, to close.

Power plants do not typically close. Although power plants are designed to operate for thirty to forty years, most power plants continue to operate long beyond their planned life spans. The last step in a long list of agency, corporate, and political decisions that made the closure possible, the Federal Energy Regulatory Commission's decision to accept the plant operator's request to cease supplying energy was thus unusual. The seeming simplicity of the decision also belies the historic moment it represented: it was the culmination of more than a decade of work by a loose, sometimes contentious alliance of grassroots organizers, residents of the community surrounding the power plant, politicians, lawyers (including Mueller herself and professors at the Environmental Law and Justice Clinic at Golden Gate University School of Law), and law students. This is the story of that alliance, why the alliance worked, and the

larger lessons of its success.

## Background

The story begins with the historic residential segregation that pooled low-income people of color—mostly African Americans—in the Bayview-Hunters Point neighborhood, which became the most polluted and economically depressed place in famously progressive San Francisco. Until five years ago this neighborhood and nearby areas hosted a myriad of the city's pollution sources and its only two power plants: Pacific Gas and Electric's Hunters Point plant and Mirant's Potrero plant (Alan Ramo, *Hunters Point: Energy Development Meets Environmental Justice*, 5 ENVIRONMENTAL LAW NEWS 28 (Spring 1996); see also my *Pursuing Environmental Justice: Obstacles and Opportunities—Lessons from the Field*, 31 WASHINGTON UNIVERSITY JOURNAL OF LAW AND POLICY 121, 134 (2009)). The Hunters Point plant closed in 2006, and residents have successfully fought off several proposed power plants slated for the same area over the last decade. Accounts of the community's struggle have been told in newspaper and law review articles (Clifford Rechtschaffen, *Fighting Back Against a Power Plant: Some Lessons from the Legal and Organizing Efforts of the Bayview-Hunters Point Community*, 14 HASTINGS WEST-NORTHWEST JOURNAL OF ENVIRONMENTAL LAW AND POLICY 537, 538 (2008); Dennis Pfaff, *Conquering the Regulatory Jungle, Law School Clinic Emerges with Rare Fruit from Environmental Fight: A Win*, SAN FRANCISCO DAILY JOURNAL, May 24, 2006, at 1; Ramo). Because the residents had a "stick-with-it-ness" to the cause, educated and connected with politicians, and built a broad coalition, the community prevailed.

## Connection to Political Power

Environmental justice struggles are struggles about power (see Luke Cole, *Environmental Justice and the Three Great Myths of White Americana*, 14 HASTINGS WEST-NORTHWEST JOURNAL OF ENVIRONMENTAL LAW & POLICY 573, 576 (2008)). A key ingredient of the power plant campaign was the Bayview-Hunters Point community's connection to political power. Collaboration between city politicians and community representatives would not have been possible without a member of the San Francisco board of supervisors, Sophie Maxwell, who understood the campaign at a visceral level, having first become involved in the campaign as a community activist, and without the San Francisco Office of the City Attorney becoming a partner in the community's struggle. These connections proved invaluable as the decade of struggle went through ups and downs, with the plants' closure uncertain at many times as political winds and energy needs—both perceived and real—shifted.

**The Community's Politician.** Maxwell, who termed out of office in 2011, represented the political district of the neighborhoods surrounding the power plants. The district ranks ninth out of eleven in per capita income, and the district is still where most of the city's African American residents live. Before her entry into politics, Maxwell served on the board of directors of a grassroots coalition group, Southeast Alliance for Environmental Justice, which worked to reduce pollution from the power plants and to clean up the city's only Superfund site, located in the same neighborhood. She understood the community's concerns; Maxwell herself developed asthma

upon moving into the neighborhood and lost her son to cancer, which she believes might have been related to the area's environmental degradation (Rachel Gordon, *Sophie Maxwell Fights for Environmental Justice*, SAN FRANCISCO CHRONICLE, Dec. 12, 2010, <http://bit.ly/mU0vs9>).

From the beginning of her tenure, Maxwell served on a citizen advisory task force on power plants; the city's progressive supervisors established the task force to receive input from the community. With residents who lived near the power plants as members, the task force not only enabled voters to voice their concerns to politicians but also became a conduit for information about relevant decisions and developments. Communities affected by pollution often lack such conduits. Because of the task force, residents and advocacy groups received timely information, enabling community mobilization.

Maxwell also used her position to educate her political peers about the potential environmental impact of their decisions. Maxwell's role was seen most dramatically in her response to Mayor Gavin Newsom's announcement, around the time that the Potrero power plant was originally scheduled to be shuttered in 2007, that his administration would support a retrofit of the Potrero plant and its continued operation over permanent closure. As a supervisor first and then as mayor, Newsom had long supported the plant's closure. But he reneged on the commitment just before running to become governor of California—a bid that he eventually withdrew. He claimed that the retrofit would be a cleaner alternative because it would replace natural gas for diesel, undoubtedly a dirtier fuel. He also claimed that the retrofit would be cheaper for consumers than the previously announced plan for San Francisco to build its own replacement power plants and that the retrofit would be a temporary solution until the city found renewable alternatives.

In response, on October 22, 2008, Maxwell—in a flourish that exemplified government at its best—held a hearing as the chairwoman of the land use and economic development committee of the board of supervisors. She called representatives of Mirant (the plant operator), San Francisco's Public Utilities Commission (the city entity that approved the retrofit plan), and pro bono industry experts to testify: Mirant and the Public Utilities Commission were underestimating the cost of the proposed retrofit at \$78 million. The emissions benefits touted by Newsom and the commission had never been achieved by any power plant operator (Amanda Witherell, *Mayor's Power Plan Flawed*, SAN FRANCISCO BAY GUARDIAN ONLINE (Oct. 26, 2008), <http://bit.ly/lkv3Qm>). Loretta Lynch, a former president of the California Public Utilities Commission, also testified that the power plant, once it spent that kind of money, would not be able to close and that such a postretrofit closure had never occurred. Mirant and commission representatives presented no contrary evidence. The retrofit proposal died.

Over the years Maxwell and other supervisors (particularly Aaron Pestkin) sponsored several resolutions that laid the groundwork for the city's opposition to the continued operation of the power plant and expansion of the Potrero plant through new construction of a major unit (attempted before the retrofit proposal). One such resolution outright opposed the expansion (Opposition to the Proposed Potrero Unit 7 Power Plant, San Francisco Board of Supervisors Res. No. 458-03 (June 30, 2003), <http://bit.ly/mqalnj>). Another resolution

opposed the regional water board's renewal of a water permit to use environmentally harmful once-through cooling (Opposing Renewal of Wastewater Discharge Permit for Potrero Power Plant Unit 3, San Francisco Board of Supervisors Res. No. 465-08 (Oct. 28, 2008), <http://bit.ly/iFHjgc>). The practice withdrew more than 200 million gallons of San Francisco Bay water daily to cool the plant—harming the organisms sucked into the cooling system as well as those affected by discharges of contaminated water. The city's position on the practice allowed supporters of the plant closure to put economic pressure on the plant owner because phasing out the antiquated practice would have been costly.

**The City Attorney's Office.** Political and legal support for the campaign came from two city attorneys' successive administrations. The first was Louise Renne, a progressive advocate known for suing tobacco companies and gun manufacturers on behalf of the people. Dennis Herrera, who succeeded her, lived near the Potrero plant. Throughout the campaign the city attorney's office had the same principal lawyer assigned: Deputy City Attorney Mueller, an energy law and policy expert who navigated the world of the Federal Energy Regulatory Commission, the California Public Utilities Commission, the California Energy Commission, and the nonprofit energy grid manager California Independent System Operator, all of which regulate power plants. Mueller had the tenacity to work on a long campaign and a collaborator's attitudinal attributes: respect for community representatives, integrity, and openness. She managed to work with all of the actors in the plant's closure without ever compromising her duty to her client.

Mueller's technical and strategic advice helped the city attorneys formulate their opposition to the power plant expansions and the renewal of the Potrero plant's water permit. Working behind the scenes to ensure that the politicians could scrutinize information from Mirant and California Independent System Operator, among other energy regulators, she negotiated the fine balance necessary to close the plant without jeopardizing the city's demand for reliable power. Once the city attorney determined that the regulators would not allow the plants to close without improved reliability in power transmission and additional power generation to replace the expected lost power from closure, Mueller made sure that her office, the power plant task force, and interested politicians focused on transmission upgrades by persistently following up with California Independent System Operator to spur the completion of the transmission projects.

Herrera also used creative strategies to ensure closure. In February 2009, after Potrero's promised 2007 closure did not occur, Herrera sued Mirant for violating the city's seismic upgrade ordinance, the city having excused the violation in the expectation of the closure (*San Francisco v. Mirant Potrero Limited Liability Company*, No. CGC -09-487-795 (Cal. Super. Ct. S.F. Cnty. April 27, 2009)). The settlement of this lawsuit in August 2009 required Mirant to close the plant once it was no longer needed for electric reliability and pay \$1 million to the city to redress pediatric asthma in the communities affected by the power plant's pollution (San Francisco, Cal., Settlement of Lawsuit and Disputes and Agreement to Close the Potrero Power Plant, Ordinance 220-09 (Oct. 27, 2009), <http://bit.ly/kMfaPG>). Herrera's office, through Mueller, then continued to ensure that Mirant and its corporate successor sought the ap-

provals necessary from California Independent System Operator and the Federal Energy Regulatory Commission to terminate the plant's agreement to supply power.

### The Community's Stick-to-It-Ness

The stability of the campaign's participants contributed to the community's endurance of more than a decade of aspirations and disappointments and strategizing in multiple corporate, political, and government forums.

**Community Organizing.** In the 1990s community groups nationwide increased as community organizing came to be a tool in the fight for economic and environmental justice. One of the groups formed during that time was Bayview Hunters Point Community Advocates. The group's founders are residents of the Bayview Hunters Point community. Karen Pierce, a group leader, lawyer by training, longtime resident of the neighborhood, and San Francisco Department of Health employee, served on the power plant task force and was the Environmental Law and Justice Clinic's point person during the campaign.

Other key groups also were stable. Greenaction, which mobilized and organized residents for demonstrations, and Communities for a Better Environment, which provided technical and strategic support (Greg Karras being the principal strategist) throughout the struggle, as when we opposed the renewal of the water permit and the retrofit proposal, have both been around since the beginning of the struggle. Indeed, it was Communities for a Better Environment that produced a 2001 report showing that very little replacement power would be needed with system upgrades, renewable energy investments, and efficiency measures (Communities for a Better Environment, *Power and Justice: Electricity, Environment, Race, Class and Health in San Francisco, California* (Nov. 2001); Alan Ramo, *California's Energy Crisis—The Perils of Crisis Management and a Challenge to Environmental Justice*, 7 *ALBANY LAW ENVIRONMENTAL OUTLOOK JOURNAL*, 1, 22 n.81 (2002)). (Similar reports followed later from Pacific Gas and Electric and eventually enabled the Potrero plant's closure.)

**Legal Support.** The stability of the Environmental Law and Justice Clinic both in staffing and funding contributed to the stick-to-it-ness. Founded in 1994, the clinic grew up with this struggle. Virtually all of the lawyers, technical staff, and law students who have worked at the clinic have had some hand in closing the two plants and preventing the use of the Hunters Point neighborhoods for additional energy generation. Master tactician Prof. Alan Ramo was the clinic's director from 1994 to 2007. Professor Ramo worked with law students to create pollution profiles and motivate the city's department of health to do a health survey. These efforts produced information showing disproportionate breast cancer rates in the community, along with disproportionate rates of other diseases, and ultimately swaying politicians to fight on behalf of their constituents (Rechtschaffen at 553–56).

The clinic contributed to community groups being able to retain counsel free of charge to participate in a more than year-long proceeding before the California Energy Commission to fight both a proposal for a new plant and the expansion of the Potrero plant (Ramo, *Hunters Point* at 29). The clinic's philosophy—that the clinic exists to serve communities—also so-

lified the clinic's standing in the community. This philosophy enabled the clinic to work with the many community groups as they formed and disbanded, ranging from a local homeowners' association with members who lived across the street from a proposed power plant, to a coalition of groups. The clinic's work with various groups over the years and its institutional knowledge enabled the homeowners' association to fight off another planned power plant. Working with Southeast Alliance for Environmental Justice, a coalition of tenants, neighborhood organizations, and small businesses, the clinic persuaded Pacific Gas and Electric to agree to shut down its Hunters Point power plant.

**Power Structure.** At the political power level both Maxwell and the city attorney's office were constants in our struggle. Maxwell's longevity on the board of supervisors connected the community to power with institutional stability. She served on the board from November 2000 to January 2011. Fittingly both of the power plants went with her. The city attorney's office had been involved in the struggle even before Maxwell became a supervisor.

### Power from Broad Coalitions

Without stable participants and a community able to marshal political power, there is no telling how successful the fight to close the polluting power plants would have been. To ensure success, the community also built coalitions that extended beyond its borders. Coalition building signaled broad support for the cause and enabled coalition members to tap into one another's expertise.

In 2001, for example, the clinic was informed that the Potrero plant was exceeding the number of hours that it could operate its diesel-powered electricity generating units under a federal air permit. One of the clinic's clients, Our Children's Earth, was interested in enforcing the permit to demand accountability from Mirant and from both federal and local regulators that had entered into agreements to allow the exceedance despite the federal permit issued under the Clean Air Act. But the environmental group also wanted to support the southeast San Francisco community's effort to close down the Potrero plant. Accordingly Our Children's Earth filed a lawsuit with Bayview Hunters Point Community Advocates, also represented by the clinic, and Communities for a Better Environment to enforce the permit limits (*Bayview Hunters Point Community Advocates v. Mirant Potrero Limited Liability Company*, No. C-01-2348-PJH (N.D. Cal. June 19, 2001)). The clinic also supported a similar lawsuit brought by Renne's office (*City and County of San Francisco v. Mirant Potrero Limited Liability Company*, No. C-01-2356-PJH (N.D. Cal. June 19, 2001)). Together the groups availed of the clinic's Clean Air Act expertise and the city attorney's credibility—particularly helpful when challenging the federal and local regulators that had permitted the Clean Air Act violations. The lawsuit successfully compelled the Potrero plant to cease exceeding the permit limit and to pay \$105,000 in lieu of fines to a foundation for projects to benefit air quality in southeast San Francisco (Consent Decree, *Bayview Hunters Point Community Advocates*, No. C-01-2348-PJH (N.D. Cal. Oct. 30, 2001)). This kind of coalition building recognized that ensuring the plant's environmental compliance until the plant could be shut down was pragmatic. Noncompliance could lead to externalizing the true cost of running a company, and

this could contribute to operating the plant far longer than it should be operating without pollution controls.

The clinic and other groups also built coalitions with San Francisco BayKeeper and other organizations interested in phasing out once-through cooling from power plants operating throughout California and in other states. With these collaborators, the clinic submitted several petitions to the California Regional Water Quality Control Board about various water permit compliance issues and supplied student testimony to state regulators.

### Lessons

The clinic's effort on behalf of community groups in the Bayview-Hunters Point neighborhood has produced outcomes that touch the lives of our clients every day: our students, staff lawyers, and professors successfully closed two of the dirtiest power plants in California and have twice prevented more pollution-generating power plants from being sited in the same neighborhood. Some of the power necessary to replace the lost power from the closure of the two plants, however, is now coming to the city from another similarly situated community populated by low-income people of color.

This community in Contra Costa County, across the San Francisco Bay, is home to more than half of the power generated in the bay area. More than fifteen electric generating power plants are within a six-mile radius in Pittsburg and Antioch, and residents are suffering increased rates of disease as in the

Bayview-Hunters Point community. Yet the area, including San Francisco, using the power generated from Contra Costa County has more than an adequate margin to supply energy even during peak needs. Power plants continue to be built in Contra Costa County, however, because of perverse regulations that guarantee a return on these power plant investments.



The results of the Bayview-Hunters Point campaign should raise questions for the energy regulators and groups that worked on the closure. Environmental justice advocates must continue working to change governmental policies that result in inexcusable concentrations of power plants in areas populated by political minorities. Working locally is not enough. Environmental justice advocates must think regionally. We need to find a way to respect both the tenets of environmental justice—that those affected by pollution decide which campaigns to pursue—and to ensure that one community's success is not another's failure. That is our continuing challenge.

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