

From Wood Treatment to Unequal Treatment: The Story of the St. Regis Superfund Site

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The occupants of a neighborhood in Cass Lake, Minnesota await a cleanup of contamination left by the St. Regis Paper Company wood treatment plant (the St. Regis Site), which was closed over twenty years ago.¹ Residents close to the plant are exposed to an increased risk of cancer and other diseases due to unsafe levels of pentachlorophenol, dioxin, and creosote.² Despite the fact that the plant has been on the Environmental Protection Agency's³ (EPA or Agency) National Priorities List⁴ (NPL) under the Comprehensive Environmental Response, Compensation, and Liability Act⁵ (CERCLA) since 1984,⁶ EPA has not yet developed a final plan for effective cleanup of contaminated residential land surrounding the former plant, and interim measures have fallen far short of the pressing need for a more thorough remediation.⁷

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1. Tom Robertson, *EPA Seeks Final Cleanup Plan for Cass Lake Superfund Site*, MINN. PUB. RADIO (June 18, 2008), <http://minnesota.publicradio.org/display/web/2008/06/17/casslksuperfund/> [hereinafter Robertson, *Final Cleanup*].

2. *St. Regis Paper Company: Community Concerns and Health Outcome Data Review—Health Consultation*, MINN. DEP'T OF HEALTH (Sept. 2007), <http://www.health.state.mn.us/divs/eh/hazardous/sites/cass/stregis/community.html> [hereinafter *Health Consultation*].

3. This area of law has many acronyms. A list of acronyms used in this Article is attached as an Appendix.

4. *National Priorities List (NPL)*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/superfund/sites/npl/index.htm> (last updated Oct. 1, 2010) ("The [NPL] is the list of national priorities among the known releases or threatened releases of hazardous substances, pollutants, or contaminants throughout the United States and its territories. The NPL is intended primarily to guide the EPA in determining which sites warrant further investigation.").

5. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601–9675 (2006).

6. *Region 5 Cleanup Sites: St. Regis: Background*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/region5/sites/stregis/background.htm> (last updated Sept. 3, 2009) [hereinafter *St. Regis Background*].

7. See U.S. ENVTL. PROT. AGENCY, RISK ASSESSMENT COMPLETED; CLEANUP

EPA's Environmental Justice program, which was designed to address inequalities due to factors including race and income,⁸ has failed to resolve this problem in Cass Lake, a city on the Leech Lake Indian Reservation, where over sixty-four percent of the city's population is American Indian and twenty-nine percent of the population is below poverty level.⁹ The residents close to the plant cannot sell their homes—which have little market value due to the contamination—and cannot afford to move.¹⁰ The Leech Lake Band of Ojibwe wants the residents relocated, but EPA claims that the estimated cost of over \$2.5 million would be too great.¹¹ Instead, EPA has preferred interim measures such as vacuuming and replacing the carpeting in homes, and has yet to deliver the final plan for cleanup that it has promised for several years.¹² Frustrated by a lack of other options, some of the residents filed suit against International Paper (IP), Burlington Northern Santa Fe Railway Company (BNSF), and other companies they blame for the contamination.¹³ One action

PLANS BEING DEVELOPED: ST. REGIS PAPER CO. SUPERFUND SITE (2009), http://www.epa.gov/region5/sites/stregis/pdfs/stregis_fs_200909.pdf [hereinafter U.S. ENVTL. PROT. AGENCY, RISK ASSESSMENT] (announcing a feasibility study and noting "the site still poses health risks to people. While some temporary measures have been taken . . . the feasibility study will outline more permanent options.").

8. *Environmental Justice*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/compliance/environmentaljustice/index.html> (last updated Oct. 5, 2010) [hereinafter *Environmental Justice*].

9. See *Cass Lake City, Minn.—Fact Sheet*, BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE (2000), <http://factfinder.census.gov> (under "Fast Access to Information," enter "Cass Lake" for "city/town, county, zip" and "Minnesota" for "state"). Though about sixty-four percent of the city's population is American Indian, seventy-three percent of families living below poverty level and eighty percent of individuals living below poverty level are American Indian. See *id.* (after following the instructions above, click on "Fact Sheet for a Race, Ethnic, or Ancestry Group" and then select "AIAN—alone").

10. See Tom Robertson, *EPA Postpones Soil Removal at Cass Lake Superfund Site*, MINN. PUB. RADIO (Nov. 5, 2003), http://news.minnesota.publicradio.org/features/2003/11/05_robertsont_epastregis/ (describing residents who cannot afford to move despite suffering from serious health problems, such as cancer, which they believe to be a result of the contamination).

11. Tom Robertson, *Toxic Dust Cleaned from Cass Lake Homes*, MINN. PUB. RADIO (Apr. 3, 2006), <http://minnesota.publicradio.org/display/web/2006/03/28/casslakecleanup/> [hereinafter Robertson, *Toxic Dust Cleaned*].

12. Tom Robertson, *EPA Plan Tackles Toxic Dust in Cass Lake Homes*, MINN. PUB. RADIO (June 15, 2005), http://news.minnesota.publicradio.org/features/2005/06/17_robertsont_casslakeclean/ [hereinafter Robertson, *Tackling Toxic Dust*].

13. International Paper is the successor in interest and responsibility to the St. Regis Paper Company. *Bennett v. Int'l Paper Co.*, No. Civ. 05-38RHKRLE, 2005 WL 1459656, at *1 (D. Minn. June 21, 2005) (order granting a stay of proceedings). BNSF is the owner and lessor of the property. *Id.* The other companies are Dow Chemical Company and Pharmacia Corporation, manufacturers of the products used at wood treatment plants, which contain toxic chemicals. *Id.*

(*Bennett v. International Paper Co.*) was for property damage allegedly caused by contamination¹⁴ and the other (*Bredemus v. International Paper Co.*) was for personal injury due to illness plaintiffs alleged was caused by the contaminants.¹⁵ While both cases survived preliminary motions to dismiss,¹⁶ the *Bennett* parties stipulated to dismissal with prejudice in September 2009,¹⁷ and the *Bredemus* parties also stipulated to dismissal with prejudice in February 2010.¹⁸ These matters were resolved under confidential settlement agreements.¹⁹

Congress enacted CERCLA in order to protect public health and the environment,²⁰ and EPA should administer the law without respect to the race or income level of those impacted. Yet there is a pattern of discrimination against areas with higher percentages of racial minorities and lower income levels,²¹ while communities with higher incomes and fewer minorities receive

14. No. 05-CV-00038 (PJS/RLE), 2009 WL 1955216, at *1 (D. Minn. July 6, 2009) (“Plaintiffs bring claims against IP and BNSF, alleging that their property was contaminated by hazardous waste released by IP during its operation of the plant.”).

15. 252 F.R.D. 529, 531 (D. Minn. 2008) (“The Plaintiffs have claimed several distinct injuries comprising eleven (11) forms of cancer, as well as neuropsychological impairments.”).

16. *Bennett v. Int’l Paper Co.*, No. 05-CV-0038 (PJS/RLE), 2009 WL 1470692, at *9 (D. Minn. May 27, 2009) (denying defendants’ motion for summary judgment); *Bredemus v. Int’l Paper Co.*, Civil No. 06-1274 (DWF/RLE), 2009 WL 3126451, at *2 (D. Minn. Sept. 24, 2009) (granting defendants’ motions for summary judgment “on all of Plaintiffs’ claims against [them] except for those parts of Counts III and XVII premised on [BNSF] being an owner of land on which [IP] allegedly released hazardous materials”).

17. *Bennett v. Int’l Paper Co.*, No. 05-cv-0038-PJS/RLE, 2009 WL 5187778 (D. Minn. Sept. 22, 2009).

18. *Bredemus v. Int’l Paper Co.*, No. 06-cv-1274-DWF/RLE (D. Minn. Feb. 19, 2010); see also *Bredemus v. Int’l Paper Co.*, No. 06-CV-01274-PJS/RLE, 2009 WL 5716625 (D. Minn. Dec. 14, 2009).

19. E-mail from Sheri Strozewski, Paralegal, Sieben, Grose, Von Holtum & Carey, LTD., to author (Nov. 8, 2010, 1:08 CST) (on file with author).

20. H.R. REP. NO. 96-1016 (II), at 1 (1980) (proposing the Hazardous Waste Containment Act of 1980 as a means of “respond[ing] to releases of hazardous waste from inactive hazardous waste sites which endanger public health and the environment”). CERCLA was “a compromise among three competing bills,” including the Hazardous Waste Containment Act of 1980. Shelby D. Green, *Understanding CERCLA Through Webster’s New World Dictionary and State Common Law: Forestalling the Federalization of Property Law*, 44 NEW ENG. L. REV. 835, 839 (2010).

21. See UNITED CHURCH OF CHRIST COMM’N FOR RACIAL JUSTICE, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES xiii (1987), <http://www.ucc.org/about-us/archives/pdfs/toxwrace87.pdf> (stating that race is the most important factor, though socio-economic factors are also important).

faster and more effective attention.²² CERCLA and its implementation methods should be revised to address the needs of the disenfranchised to ensure that environmental quality is afforded to everyone, regardless of race or income.

This Article uses the example of Cass Lake as the focus for a discussion of CERCLA and environmental justice, and, in particular, how they relate to American Indian tribes. Part I provides a background of CERCLA and its administration. Part II describes the history of the St. Regis Site, from original contamination to current status. Part III gives an overview of the lawsuits the residents of Cass Lake filed against IP and other parties under common law and state law because CERCLA does not provide relief for personal injury and property damages. Part IV reviews the history of the Environmental Justice movement to demonstrate that the lack of adequate action in response to this community of low-income racial minorities is not an isolated case. Part IV proceeds by describing the government response to the Environmental Justice movement and briefly describes how American Indians, in particular, are impacted by environmental justice issues, as tribal status separates them from other racial minorities. It concludes by focusing on how the St. Regis Site shares in the problems of environmental justice and has benefitted from government actions, but more remains to be done. Part V of this Article discusses possible remedies and recommendations to alleviate inequality. Specifically, it argues for EPA to implement procedures to decrease the chance for bias or perceived bias in risk assessment; recommends that Congress pass legislation to improve remedies contained in CERCLA and bring two executive orders into the full force of law; and calls for more meaningful participation between the federal government and tribal nations.

I. CERCLA's Current State and Administration

Congress enacted CERCLA in 1980 and amended it under the Superfund Amendments and Reauthorization Act (SARA) in 1986.²³ The enactment process was long and difficult, but

22. Jill Evans, *Challenging the Racism in Environmental Racism: Redefining the Concept of Intent*, 40 ARIZ. L. REV. 1219, 1249 (1998).

23. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified at 42 U.S.C. §§ 9601-9675 (1980)), amended by Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986); *Summary of the Comprehensive Environmental Response, Compensation, and Liability Act (Superfund)*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/lawsregs/laws/cercla.html> (last updated Sept. 27, 2010) [hereinafter *Superfund Summary*].

necessary given the hole in previously enacted legislation such as the Resource Conservation and Recovery Act²⁴ (RCRA), which did not address abandoned sites that had been contaminated in the past.²⁵ CERCLA imposes liability for cleanup and remediation on the Responsible Party (RP, used interchangeably with the term Potentially Responsible Party, or PRP) that either released the contaminants into the environment, was the successor to the releasing party, or currently owns the property.²⁶ Because the parties responsible for pollution cannot always be identified or located, Congress established the Hazardous Substance Superfund to pay for cleanup activities at sites where there is no RP.²⁷ All sites on the NPL are commonly called “Superfund” sites as shorthand, even if the Superfund itself is not used to pay the costs because an RP has been identified.²⁸

Superfund sites go through a nine-stage remediation process; at step three, EPA orders a Remedial Investigation and Feasibility Study (RI/FS), which is of primary importance in this Article.²⁹ The RI/FS involves a complex risk assessment that takes into account factors such as the type of contaminant, type of soil, and area geology to determine pathways of exposure and to inform those making decisions about what type of remediation is appropriate for a particular site.³⁰ CERCLA was passed at a time

24. Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795 (codified at 42 U.S.C. §§ 6901–6992k (2006)) (regulating municipal and industrial hazardous waste currently generated, particularly the transport, storage, and disposal of the waste).

25. Cf. Robert T. Stafford, *Why Superfund Was Needed*, 7 EPA J. 9, 9 (1981) (“The legacy of past haphazard disposal of chemical wastes and the continuing danger of spills and other releases of dangerous chemicals pose what many call the most serious health and environmental challenges of the decade.”).

26. 42 U.S.C. § 9607(a) (2006).

27. 42 U.S.C. § 9611 (2006).

28. See Alexandra B. Klass, *From Reservoirs to Remediation: The Impact of CERCLA on Common Law Strict Liability Environmental Claims*, 39 WAKE FOREST L. REV. 903, 920–21 (2004) (“As enacted in 1980 and as amended in 1986, CERCLA, also known as ‘Superfund,’ creates a federal framework for addressing the problems associated with the existence of hazardous substances in the environment.”).

29. For all nine stages, see *Cleanup Process*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/superfund/cleanup/index.htm> (last visited Oct. 16, 2010) [hereinafter *Cleanup Process*].

30. See *Site Characterization*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/superfund/cleanup/schar.htm> (last visited Oct. 16, 2010) (“Field sampling and laboratory analyses are initiated during the site characterization phase of the [RI/FS]. A preliminary site characterization summary is prepared to provide the lead agency with information on the site early in the process before preparation of the full remedial investigation (RI) report. This summary is useful in determining the feasibility of potential technologies and in assisting both the lead and support

when knowledge of contaminants and the risks posed by exposure to hazardous materials was in its infancy.³¹ Though the field of risk assessment has developed significantly since 1980, it remains inexact and subject to interpretation.³² It is difficult, for example, to separate variables that increase cancer risk to determine how much each chemical contributes to the chance that someone will be stricken with cancer.³³ At the St. Regis Site in particular, researchers must also take into account the higher incidence and rates of death from cancers among American Indians, as compared to Whites.³⁴ These issues are important in the RI/FS stage, because the feasibility study must be site-specific, include numerous factors, and propose multiple alternatives for remediation.³⁵

As one study notes, "[d]espite highly developed federal and regional guidelines on performing Superfund risk assessments, the uncertainty currently inherent in health risk assessment has led to considerable variation in how various regional and local EPA officials, as well as PRPs, interpret these guidelines."³⁶ Slight variations in risk calculation could mean large differences in cost,³⁷ and therefore an RP can seek to minimize costs by arguing

agencies with the initial identification of Applicable or Relevant and Appropriate Requirements (ARARs)."). Under certain circumstances, EPA allows RPs to conduct all stages of the RI/FS process, including risk assessment. 42 U.S.C. § 9603(a)(1) (2006); U.S. ENVTL. PROT. AGENCY, OSWER DIRECTIVE NO. 9340.1-02, REVISED POLICY ON PERFORMANCE OF RISK ASSESSMENTS DURING REMEDIAL INVESTIGATION/FEASIBILITY STUDIES (RI/FS) CONDUCTED BY POTENTIALLY RESPONSIBLE PARTIES 2 (1996), <http://www.epa.gov/oswer/riskassessment/pdf/rifsmemo.pdf> (explaining EPA's policy of allowing PRPs to conduct risk assessments in the RI/FS process).

31. See JAMES T. HAMILTON & W. KIP VISCUSI, CALCULATING RISKS? THE SPATIAL AND POLITICAL DIMENSIONS OF HAZARDOUS WASTE POLICY 1-2 (1999).

32. See *id.*

33. See MINN. DEPT OF HEALTH, ST. REGIS SUPERFUND SITE COMMUNITY HEALTH CONCERNS 3-4 (2005), <http://www.health.state.mn.us/divs/eh/hazardous/sites/cass/stregis/community.pdf> [hereinafter MINN. DEPT OF HEALTH, HEALTH CONCERNS] (explaining how certain factors, such as the prevalence of cancer among the general population, make "linking disease with exposure difficult").

34. *Id.* at 4.

35. See 40 C.F.R. § 300.430(a) (2010).

36. HAMILTON & VISCUSI, *supra* note 31, at 257.

37. If a higher concentration of a contaminant is considered an acceptable risk level, then the RP may not have to clean up more of the site if it falls below that level. Cf. OFFICE OF TECH. ASSESSMENT, COMING CLEAN: SUPERFUND'S PROBLEMS CAN BE SOLVED 38 (1989) ("From a long-term perspective, reducing cleanup costs through the lowering of cleanup levels is not consistent with the basic environmental mission of Superfund. When circumstances exist to use a higher level of acceptable risk, then they should be articulated by the government and defended on technical or fund-balancing grounds."). Conversely, a lower tolerance for a contaminant will force the RP to clean up more of the site or use more

that the risks are on the lower end of the range and that one of the less expensive alternatives will suffice to make the site adequately safe.³⁸ EPA must also consider cost effectiveness when reviewing alternatives by evaluating “long-term effectiveness and permanence, reduction of toxicity, mobility, or volume through treatment, and short-term effectiveness” against the cost of the alternative,³⁹ but it is also required to act in the public’s best interest.⁴⁰ In addition to EPA’s review of the RP’s feasibility study, EPA must allow the public to comment on EPA’s proposed plan, and those comments must be addressed in EPA’s Record of Decision.⁴¹

Due to the competing interests and costs involved, there is some subjectivity and discretion to be utilized strategically by any party with the power and will to do so. Residents neighboring a site may lobby their elected representatives and EPA to have the site listed on the NPL in order to have it cleaned up.⁴² Elected officials and developers might fear a Superfund designation due to the chilling effect it could have on the local economy.⁴³ The companies identified as RPs likely seek to minimize costs as they commission reports and plan remediation.⁴⁴ EPA or the overseeing governmental unit itself might be pressured by any of these parties and by presidential orders to administrative agencies.⁴⁵

II. St. Regis Site History

St. Regis Paper Company operated a wood treatment facility

stringent cleanup methods. *See id.* Therefore, what is considered an acceptable risk or a “safe” level of contamination defines the amount of remediation necessary. *See id.*

38. *See id.* at 52 (explaining how one study showed that cleanup site managers believe that PRPs choose the cheapest, rather than the most effective, cleanup processes).

39. 40 C.F.R. § 300.430(f)(1)(ii)(D).

40. *See Our Mission and What We Do*, U.S. ENVTL. PROT. AGENCY <http://www.epa.gov/aboutepa/whatwedo.html> (last updated Oct. 11, 2010) [hereinafter *Our Mission*] (stating that it is EPA’s mission to “to protect human health and the environment”).

41. 40 C.F.R. § 300.430(f)(2).

42. HAMILTON & VISCUSI, *supra* note 31, at 158.

43. *See, e.g.*, Andrew Rice, *On the Waterfront*, N.Y. TIMES MAG., Oct. 21, 2009, at 66 (describing New York City officials’ fear that the designation of the Gowanus Canal as a Superfund site “could halt economic improvement indefinitely”).

44. *See* OFFICE OF TECH. ASSESSMENT, *supra* note 37, at 39.

45. *See infra* notes 95–98 and accompanying text for a discussion of presidential influence on EPA.

in Cass Lake from 1958 to 1985.⁴⁶ Chemicals used to treat the wood deposited pentachlorophenol, dioxin, and polycyclic aromatic hydrocarbons in the soil and water at levels considered unsafe for human and ecological health.⁴⁷ Dioxin is a known human carcinogen, and pentachlorophenol and polycyclic aromatic hydrocarbons are suspected to cause cancer in humans.⁴⁸ In 1984, shortly after Congress enacted CERCLA, EPA placed the St. Regis Site on the NPL, thereby designating it as a site that seriously threatens public health and the environment.⁴⁹ The Minnesota Pollution Control Agency (MPCA) was initially designated as the governmental unit responsible for oversight and approval of cleanup activities.⁵⁰ EPA identified the RP as St. Regis Paper Company, which was succeeded by Champion International Corporation in 1985 and later by IP.⁵¹ Early testing and cleanup activities, conducted according to the nine-stage process described above, were focused on the ground underlying the facility, the city dump where toxic waste had been disposed of, and groundwater under and near the facility.⁵² At that time, EPA and MPCA employees did not appear to be concerned about neighboring properties, other than groundwater contamination that could affect neighbors using water from wells.⁵³ Cleanup crews excavated contaminated soil and toxic sludge and placed the waste in a containment vault on the property.⁵⁴ The workers also pumped and treated the groundwater, and connected those nearby residents who relied on well water to the municipal water supply.⁵⁵ In 1994, EPA took over as the governmental unit responsible for oversight at the request of the Leech Lake Band of Ojibwe.⁵⁶ Additional testing required by five-year follow-up reports in 1995, 2000, and 2005 indicated that the initial cleanup did not effectively remediate the problem and that there was a need for a permanent solution to address the contamination in

46. *St. Regis Background*, *supra* note 6.

47. *See id.*

48. MINN. DEP'T OF HEALTH, HEALTH CONCERNS, *supra* note 33, at 3.

49. *St. Regis Background*, *supra* note 6.

50. *See id.*

51. *Id.*

52. *See* U.S. ENVTL. PROT. AGENCY, CLEANUP PLANS BEING DEVELOPED FOR ST. REGIS SUPERFUND SITE 2 (2009), http://www.epa.gov/region5/sites/stregis/pdfs/stregis_fs_200906.pdf [hereinafter U.S. ENVTL. PROT. AGENCY, CLEANUP PLANS].

53. *See* Bennett v. Int'l Paper Co., No. 05-CV-0038 (PJS/RLE), 2009 WL 1470692, at *2, *6 (D. Minn. May 27, 2009).

54. U.S. ENVTL. PROT. AGENCY, CLEANUP PLANS, *supra* note 52, at 2.

55. *See id.*

56. *Id.*

areas surrounding the facility.⁵⁷ Several rounds of cleanings, including some soil removal and the cleaning of homes' interiors, were made in an attempt to remedy the situation, but they were insufficient to placate the residents and effectively reduce the contaminants to safe levels.⁵⁸ In 2008, EPA reached an agreement with IP and BNSF to conduct a feasibility study, as required in the RI/FS stage discussed above, in order to develop a list of possible cleanup plans that would effectively mitigate the risks posed by contamination.⁵⁹ EPA is currently reviewing the results of the feasibility study and recently completed a five-year review.⁶⁰ A spokesperson for EPA stated that remediation would likely consist of extensive soil removal, but that the cleanup would probably not begin until 2012, nearly twenty-eight years after the site was placed on the NPL.⁶¹

III. Remedies Sought in Court

Some residents of Cass Lake filed two cases in federal court as a result of the contamination. The first was a property damage suit filed in January 2005 by Michael Bennett and twenty-seven of his neighbors against IP, BNSF, Dow Chemical Company (Dow), and Pharmacia Corporation.⁶² Gail Bredemus and sixteen other residents filed a personal injury suit in 2006 against the same defendants.⁶³ IP was a defendant because of its predecessors' role as operator of the plant.⁶⁴ BNSF owns the land underlying the plant and leased it to IP and its predecessors for operation of the facility.⁶⁵ The plaintiffs alleged that Dow and Pharmacia Corporation manufactured chemicals that were used at the

57. U.S. ENVTL. PROT. AGENCY, FOURTH FIVE-YEAR REVIEW REPORT: ST. REGIS PAPER COMPANY SUPERFUND SITE: CASS LAKE, MINNESOTA 8 (2010), http://www.epa.gov/region5/sites/stregis/pdfs/stregis_5yr_201009.pdf [hereinafter U.S. ENVTL. PROT. AGENCY, FIVE-YEAR REVIEW].

58. Robertson, *Tackling Toxic Dust*, *supra* note 12.

59. U.S. ENVTL. PROT. AGENCY, CLEANUP PLANS, *supra* note 52, at 1.

60. See U.S. ENVTL. PROT. AGENCY, FIVE-YEAR REVIEW, *supra* note 57, at 26.

61. Tom Robertson, *Cass Lake Residents Continue Waiting for Superfund Cleanup*, MINN. PUB. RADIO (June 24, 2009), http://minnesota.publicradio.org/display/web/2009/06/24/cass_lake_superfund/ [hereinafter Robertson, *Cass Lake Residents Continue Waiting*].

62. *Bennett v. Int'l Paper Co.*, No. 05-CV-0038 (PJS/RLE), 2009 WL 1470692, at *1 (D. Minn. May 27, 2009).

63. *Bredemus v. Int'l Paper Co.*, Civil No. 06-1274 (DWF/RLE), 2009 WL 3126451, at *1 (D. Minn. Sept. 24, 2009).

64. *Bennett v. Int'l Paper Co.*, No. Civ. 05-38 RHKRLE, 2005 WL 1459656, at *1 (D. Minn. June 21, 2005).

65. *Id.*

plant.⁶⁶

The bases for the claims in both suits were similar and follow the typical pattern of environmental damage suits of recent years.⁶⁷ Because CERCLA does not include a private right of action to recover damages other than the cost of response and cleanup,⁶⁸ these cases relied on the common law claims of private and public nuisance, trespass, ultra-hazardous activity, and negligence.⁶⁹ In addition, these particular suits included claims under the Minnesota Environmental Response and Liability Act (MERLA), which was modeled after CERCLA, although it contains some remedies, such as damages for personal and economic injury, that CERCLA does not contain.⁷⁰ Section 115B.05 of MERLA imposes strict liability on “any person who is responsible for the release of a hazardous substance from a facility” that results in “damages for actual economic loss” including property damage, personal injury damage, and “any loss of past or future income” due to the property or personal injury damage.⁷¹

In *Bennett*, since the complaint was filed, a public nuisance claim was dismissed⁷² and the plaintiffs withdrew claims for injunctive relief requiring the defendants perform the cleanup.⁷³ Though the plaintiffs had to drop some of their claims, they won a temporary victory in May 2009 when the property damage claim survived defendants’ motion for summary judgment, which argued that the statute of limitations had run on the plaintiffs’ claims.⁷⁴ The *Bennett* parties later stipulated to a dismissal of all claims in September 2009, in light of a confidential settlement agreement

66. *Id.*

67. See Steven Patrick, *As Common Law Tort Claims Prosper, Plaintiffs’ Bar Takes Environmental Cases*, 78 U.S.L.W. 2337, 2337 (2009) (“Whether the contaminant is in the air, in the water, on the walls, or between them, common law tort claims are among the top legal tactics of plaintiffs’ attorneys as they litigate everything from climate change and water pollutants to diesel exhaust exposure and Chinese drywall.”).

68. See Klass, *supra* note 28, at 923.

69. See Rory A. Valas, *Toxic Palsgraf: Proving Causation When the Link Between Conduct and Injury Appears Highly Extraordinary*, 18 B.C. ENVTL. AFF. L. REV. 773, 778 (1991).

70. See *State v. Emp’rs Ins. of Wausau*, 644 N.W.2d 820, 826, 830 (Minn. Ct. App. 2002).

71. MINN. STAT. § 115B.05, subdiv. 1 (2009).

72. *Bennett v. Int’l Paper Co.*, No. 05CV0038, 2008 WL 5558847 (D. Minn. Oct. 30, 2008) (stipulation to dismissal).

73. *Bennett v. Int’l Paper Co.*, No. 05CV00038, 2007 WL 5355684 (D. Minn. Mar. 16, 2007) (stipulation to dismissal without prejudice of plaintiffs’ injunctive relief claims).

74. *Bennett v. Int’l Paper Co.*, No. 05-CV-0038 (PJS/RLE), 2009 WL 1470692 (D. Minn. May 27, 2009).

reached by the parties.⁷⁵ It is unfortunate that the residents should have to resort to costly and uncertain litigation in order to seek relief that should be granted under CERCLA.⁷⁶

IV. Environmental Justice, Government Action, and the Impacts on American Indians

A. *Development of the Environmental Justice Movement*

The Environmental Justice movement grew out of increasing awareness that some of the nation's poorest, predominantly minority communities were exposed to a disproportionate share of environmental hazards.⁷⁷ Beginning in the early 1980s, the movement has inspired a great deal of research and scholarship,⁷⁸ much of which focused primarily on sites regulated under RCRA.⁷⁹ Studies including information about sites regulated under CERCLA, however, showed similar patterns. The National Law Journal conducted a study in 1990⁸⁰ that showed that "agency penalties were discovered to be five hundred percent higher in communities with the largest percentages of whites than [in] those with the largest percentages of minorities for violations of environmental laws such as CERCLA."⁸¹ In an analysis focused specifically on Superfund sites, James Hamilton and Kip Viscusi confirmed that "minority groups, low-income residents, and those with less education do bear a disproportionate risk from living near Superfund sites."⁸² Hamilton and Viscusi indicated that "[m]inorities have a higher probability of living within one mile or four miles of [Superfund] sites" and, similar to the National Law

75. *Bennett v. Int'l Paper Co.*, No. 05-cv-00038-PJS/RLE, 2009 WL 5187778 (D. Minn. Sept. 22, 2009); see also E-mail from Sheri Strozewski, *supra* note 19.

76. See Suzanne Smith, *Current Treatment of Environmental Justice Claims: Plaintiffs Face a Dead End in the Courtroom*, 12 B.U. PUB. INT. L.J. 233, 250 (2002) ("Many environmental justice plaintiffs may be unable to bear the potentially exorbitant litigation costs . . .").

77. Kyle W. La Londe, *Who Wants to Be an Environmental Justice Advocate?: Options for Bringing an Environmental Justice Complaint in the Wake of Alexander v. Sandoval*, 31 B.C. ENVTL. AFF. L. REV. 27, 29–30 (2004).

78. For a detailed history of the development of the Environmental Justice movement, see *id.* at 29–31; see also Evans, *supra* note 22, at 1246–52 (1998) (discussing "the convergence of civil rights and environmental rights" during the protests in Warren County, North Carolina in response to contaminated soil in a "predominantly African-American community").

79. See HAMILTON & VISCUSI, *supra* note 31, at 161.

80. See Marianne Lavelle & Marcia Coyle, *Unequal Protection: The Racial Divide in Environmental Law*, NAT'L L.J., Sept. 21, 1992, at S2.

81. Evans, *supra* note 22, at 1249.

82. HAMILTON & VISCUSI, *supra* note 31, at 159.

Journal study, found discrepancies in enforcement.⁸³ Specifically, “sites considered for NPL listing but rejected by the agency have a higher percentage of minorities and lower mean household incomes than sites that are accepted into the remediation program,” even when controlling for the extent of pollution in the neighborhood.⁸⁴ Furthermore, “EPA is less likely to invoke the strictest cleanup standards, is more likely to choose the cheapest remedy if several alternatives were available, and spends less per cancer case avoided at sites with higher minority percentages.”⁸⁵ These findings point to the need for greater equality in the administration of CERCLA.

B. Governmental Response to Environmental Justice

The Environmental Justice movement inspired scholarship and more localized research on the topic, but also forced the federal government to respond to this serious matter.⁸⁶ Under pressure from activists, EPA created the Environmental Equity Workgroup in 1990 which held meetings about environmental justice with community leaders and evaluated the disproportionate environmental risks faced by racial minorities and people with low income.⁸⁷ The Agency for Toxic Substances and Disease Registry⁸⁸ held the National Minority Environmental Health Conference the following year.⁸⁹ EPA created its Office of Environmental Justice in 1992⁹⁰ to strive for “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.”⁹¹ Not long after the creation of the Office of Environmental Justice, EPA published a study,

83. *Id.* at 159–60.

84. *Id.* at 160.

85. *Id.*

86. See Evans, *supra* note 22, at 1249–52.

87. See *id.*; Robert D. Bullard et al., *Toxic Wastes and Race at Twenty: Why Race Still Matters After All of These Years*, 38 ENVTL. L. 371, 380 (2008).

88. The Agency for Toxic Substances and Disease Registry is a federal agency charged with providing information about, responding to, and preventing exposure to toxic substances and related diseases. *About ATSDR: Vision, Mission, Goals, & Core Values*, AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY, http://www.atsdr.cdc.gov/about/mission_vision_goals.html (last updated July 16, 2009).

89. Bullard et al., *supra* note 87, at 380.

90. *National Environmental Justice Advisory Council*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/compliance/environmentaljustice/nejac/index.html> (last updated Sept. 17, 2010).

91. *Environmental Justice*, *supra* note 8.

*Environmental Equity: Reducing Risks for All Communities.*⁹² The study showed, as previous reports had indicated, that minorities and lower income communities are disproportionately exposed to dangerous pollutants, and noted opportunities for EPA to “improve communication about environmental problems with members” of those groups.⁹³ A year later, EPA formed the National Environmental Justice Advisory Council, bringing together “representatives from the community, academia, industry, environmental and indigenous groups, as well as state, local, and tribal governments” to address the problems of environmental justice.⁹⁴ President Bill Clinton also sought to address these problems with Executive Order 12,898, issued in 1994, which directed EPA and other agencies to “identify[] and address[] . . . disproportionately high and adverse human health or environmental effects of [the agencies’] programs, policies, and activities on minority populations and low-income populations.”⁹⁵ Also, “[t]he Clinton Administration continued and expanded many of the policies, programs, and initiatives that began under the first Bush Administration.”⁹⁶

The minimal progress that was made by the federal government slowed, if not stopped, under President George W. Bush’s leadership.⁹⁷ Overall funding for EPA’s programs was cut and there were many complaints that EPA was not enforcing environmental laws.⁹⁸ Environmental justice “met intense resistance inside the EPA through proposed budget and program cuts.”⁹⁹ It was not surprising, then, that the United Church of

92. Bullard et al., *supra* note 87, at 381; see also U.S. ENVTL. PROT. AGENCY, ENVIRONMENTAL EQUITY: REDUCING RISKS FOR ALL COMMUNITIES (1992), http://www.epa.gov/compliance/ej/resources/reports/annual-project-reports/reducing_risk_com_vol1.pdf.

93. Bullard et al., *supra* note 87, at 381.

94. *Id.*

95. Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994).

96. Bullard et al., *supra* note 87, at 382.

97. See *id.* (describing the change in policies that occurred after 2000).

98. See, e.g., *Bush Budget Proposal Slashes Funding for Environmental Programs*, NATURAL RES. DEF. COUNCIL (Feb. 7, 2005), http://www.nrdc.org/BushRecord/articles/br_1897.asp?t=t (“In his budget proposal for fiscal year 2006, President Bush has singled out environmental programs for the most devastating cuts.”); *Smart Enforcement or No Enforcement? Bush Lets Polluters off the Hook*, NATURAL RES. DEF. COUNCIL (Dec. 9, 2003), http://www.nrdc.org/BushRecord/articles/br_1516.asp?t=t (“Under the Bush Administration, environmental enforcement is no longer ‘Job One’ at the EPA,” said Greg Wetstone, director of NRDC’s advocacy center.”).

99. Bullard et al., *supra* note 87, at 382. For a detailed history of cuts and barriers to environmental justice during the George W. Bush administration, see *id.* at 382–85.

Christ's (UCC) report in 2007, *Toxic Wastes and Race at Twenty: Grassroots Struggles to Dismantle Environmental Racism in the United States*, showed that "[r]ace continues to be the predominant explanatory factor in [hazardous waste] facility locations and clearly still matters."¹⁰⁰

C. American Indians and Environmental Justice

American Indians have received less attention than other minorities in environmental justice scholarship for many reasons. Those working on the 2007 UCC report stated that, although individual sites may have high percentages of American Indians, "any site-specific disparities that exist for Native Americans appear to be masked in [the UCC's] nationwide study."¹⁰¹ The report acknowledged, however, that "[e]nvironmental injustices in Indian Country . . . have been well-documented."¹⁰² Though approximately "317 Indian reservations currently face serious environmental threats" including toxic waste,¹⁰³ reservations are chiefly in rural areas with lower population densities.¹⁰⁴ Superfund sites in dense urban areas, on the other hand, necessarily affect more people, and cities tend to have higher percentages of minorities.¹⁰⁵ The unique legal relationship between American Indian tribes and the federal government¹⁰⁶

100. *Id.* at 372; see BULLARD ET AL., UNITED CHURCH OF CHRIST JUSTICE & WITNESS MINISTRIES, *TOXIC WASTE AND RACE AT TWENTY: 1987-2007* (2007), <http://www.ucc.org/justice/environmental-justice/pdfs/toxic-wastes-and-race-at-twenty-1987-2007.pdf>.

101. Bullard et al., *supra* note 87 at 398 n.117. On September 22, 2010, the Interagency Working Group on Environmental Justice, "meeting for the first time in more than a decade," issued an order requiring eleven agencies "to review their environmental justice plans, which were written 15 years ago." Andrew Childers, *Reactivated Environmental Justice Group Orders Federal Agencies to Review Strategies*, 79 U.S.L.W. 1382, 1382 (2010). Revisions must be completed by September 2011. *Id.*

102. Bullard et al., *supra* note 87, at 398 n.117.

103. Scott Richard Lyons, *The Left Side of the Circle: American Indians and Progressive Politics*, in *RADICAL RELEVANCE: TOWARD A SCHOLARSHIP OF THE WHOLE LEFT* 69, 72 (Laura Gray-Rosendale & Steven Rosendale eds., 2005).

104. See Laura J. Smith, *Native American Trust Land Transfers in Minnesota*, CURA REP., Spring 2004, at 19, available at <http://www.cura.umn.edu/reporter/04-Spr/Spr-04-Issue.pdf> ("Most Native American Indian reservations in Minnesota are geographically isolated from urban centers . . .").

105. See Krista J. Ayers, *The Potential for Future Use Analysis in Superfund Remediation Programs*, 44 EMORY L.J. 1503, 1511 (1995) ("[M]any contaminated sites are located near the inner cities where minority populations are often concentrated . . .").

106. Sarah Krakoff, *Tribal Sovereignty and Environmental Justice*, in *JUSTICE AND NATURAL RESOURCES: CONCEPTS, STRATEGIES, AND APPLICATIONS* 161, 162 (Kathryn M. Mutz et al. eds., 2002) ("The United States Supreme Court has defined

further complicates the matter because the tribal nations are considered inherently sovereign, but are dependent upon the United States for protection.¹⁰⁷

This relationship between tribal nations and the United States has been treated differently throughout history, ranging from total federal control over American Indian life to breaking up traditional tribal governing structures, and from tribal control exercised by non-traditional Euro-American-type government to termination of the tribes' political existence.¹⁰⁸ Though some efforts have been made to rectify the harm caused by the various policies, it is a difficult task not only because of the lack of trust created by prior diplomatic failures, but also due to the extreme troubles facing many American Indian tribes today, such as poverty, unemployment, lack of education, and disease.¹⁰⁹

Near the end of his second term, President Clinton issued Executive Order 13,175 "to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, to strengthen the United States' government-to-government relationships with Indian tribes, and to reduce the imposition of unfunded mandates upon Indian tribes."¹¹⁰ The order required agencies to consider tribal treaty and other rights and grant tribal governments the "maximum administrative discretion possible."¹¹¹ In particular, when making policies that have tribal implications, agencies must work with tribal governments to allow the tribes to develop their own policies, defer to the tribes to establish standards, and consult tribal officials on the need for federal

Indian tribes as 'dependent sovereigns,' meaning, in short, that their sovereignty predates that of the United States, but that it is nonetheless internal to, and dependent upon, the federal government. Tribes therefore have the authority to govern their members and their territory (with various complicated exceptions), but they cannot engage in diplomatic relations with other countries.").

107. *Cherokee Nation v. Georgia*, 30 U.S. 1, 16-17 (1831) (explaining that, while tribal nations possess sovereignty with respect to the United States as "foreign nations," "[t]heir relation to the United States resembles that of a ward to its guardian"); see CONFERENCE OF WESTERN ATTORNEYS GENERAL, AMERICAN INDIAN LAW DESKBOOK 4 (Julie Wrend & Clay Smith eds., 1998).

108. See JAMES M. GRIJALVA, CLOSING THE CIRCLE: ENVIRONMENTAL JUSTICE IN INDIAN COUNTRY 15-19 (2008).

109. Lyons, *supra* note 103, at 71. This list is not by any means exhaustive but includes some of the major problems confronting American Indians at much higher rates than Caucasian Americans. See Sarah Palmer et al., *Strategies for Addressing Native Traditional Cultural Processes*, 20 NAT. RESOURCES & ENV'T 44, 49 (2005) (describing the potential for a lack of trust between tribes and the federal government).

110. Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 9, 2000).

111. *Id.*

standards.¹¹² The order also required agencies to develop a consultation process to “ensure meaningful and timely input by tribal officials” on matters with tribal implications.¹¹³ Nine years later, President Barack Obama recognized that “only a few agencies have made an effort to implement that executive order.”¹¹⁴ To revitalize the order, he signed a memorandum directing the cabinet agencies, including EPA, to create a “plan of actions the agency will take to implement the policies and directives” of Clinton’s executive order.¹¹⁵

President Obama signed the memorandum at the Tribal Nations Conference and followed the ceremony by accepting questions and comments from the tribal leaders in the audience.¹¹⁶ Significantly, one of the chief concerns raised by leaders was the poor environmental quality of their reservations.¹¹⁷ John Berrey, chairman of the Quapaw Tribe, petitioned Obama for help in addressing a Superfund site on the Tribe’s reservation in Oklahoma, stating that it is the largest Superfund site in the nation.¹¹⁸ While the President acknowledged that the primary focus of his administration’s environmental agenda is climate change, especially in relation to energy issues, he promised to have someone follow up on the Superfund site in Oklahoma.¹¹⁹ He also expressed faith in the Secretary of the Interior and EPA’s Administrator and their commitment to environmental and natural resource issues, and indicated that improved coordination with tribal governments would be beneficial for all parties.¹²⁰ The tribal leaders who spoke expressed hope and faith in Obama’s

112. *Id.*

113. *Id.*

114. Remarks at the Opening of the American Indian and Alaska Native Tribal Nations Conference and a Discussion with Tribal Leaders, 2009 DAILY COMP. PRES. DOC. 886, at 2 (Nov. 5, 2009) [hereinafter Remarks].

115. Memorandum on Tribal Consultation, 2009 DAILY COMP. PRES. DOC. 887, at 1 (Nov. 5, 2009) [hereinafter Memorandum].

116. Remarks, *supra* note 114, at 4–11.

117. *Id.* Environmental issues raised by tribal leaders included erosion due to climate change, basic services such as sewers, mining waste, offshore drilling, and a mining discharge pipeline. *Id.*

118. *Id.* at 9. For more information about the Tar Creek Superfund site on Quapaw land, see U.S. ENVTL. PROT. AGENCY, TAR CREEK OKLAHOMA CURRENT STATUS (2009), <http://www.epa.gov/earth1r6/6sf/pdf/files/0601269.pdf>.

119. Remarks, *supra* note 114, at 9. The Obama administration’s attention to climate change is reflected in a recent call for proposals for Environmental Justice grants focusing on climate change. See U.S. ENVTL. PROT. AGENCY, ENVIRONMENTAL JUSTICE SMALL GRANTS PROGRAM FACT SHEET (2010), <http://www.epa.gov/compliance/ej/resources/publications/factsheets/fact-sheet-ej-small-grant-9-2010.pdf>.

120. See Remarks, *supra* note 114, at 9.

commitment to improving relations,¹²¹ but the proof will be in the execution of those promises.

D. St. Regis Through the Lens of Environmental Justice

The St. Regis Site fits the profile for many of the issues raised in the previous section. The site is located in Cass Lake, where over sixty-four percent of the city's population is American Indian and twenty-nine percent of the population is below the poverty line,¹²² as compared to the statewide figures of 1.1% American Indian and 7.9% below poverty level.¹²³ Consistent with Hamilton and Viscusi's findings that less stringent remedies are employed at sites with higher percentages of minorities,¹²⁴ the cleanup thus far at the St. Regis Site has left the contaminated soil in a containment vault on-site, and further remediation is required to bring the site to safe levels.¹²⁵ Since the site was put on the NPL shortly after CERCLA was enacted, its remediation has evolved with the progress of the statute's administration.¹²⁶ The Leech Lake Tribal Council received a grant from EPA's Environmental Justice Program to evaluate the site, publishing the results in 2002.¹²⁷ This report showed that cultural practices should be taken into account when assessing risk to human health,¹²⁸ and that, despite EPA's efforts to inform the community, there were lingering concerns regarding the risk assessment and remediation process.¹²⁹ EPA has held several community meetings since the report was published, and yet there remains a question even today as to why the RP—the party seeking to minimize remediation costs—performs the risk assessment, as opposed to EPA.¹³⁰ Despite the community meetings, the grant

121. *Id.* at 4–11.

122. *Cass Lake City, Minn.—Fact Sheet*, *supra* note 9.

123. See *Minnesota—Fact Sheet*, BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE (2000), <http://factfinder.census.gov/> (under “Fast Access to Information” leave “city/town, county, zip” blank and enter “Minnesota” for “state”).

124. HAMILTON & VISCUSI, *supra* note 31, at 160.

125. See U.S. ENVTL. PROT. AGENCY, CLEANUP PLANS, *supra* note 52, at 2 (describing the need for a feasibility study).

126. See *id.* (noting that “St. Regis was listed on the National Priorities List in 1984, making it eligible for cleanup under EPA’s Superfund program” and tracing its remediation progress over the years).

127. See CARL RICHARDS ET AL., UNIV. OF MINN. SEA GRANT PROGRAM, ASSESSING AND COMMUNICATING RISK: A PARTNERSHIP TO EVALUATE A SUPERFUND SITE ON LEECH LAKE TRIBAL LANDS (2002).

128. *Id.* at Executive Summary 5.

129. *Id.* at Human Health Risk Assessment Panel 4.

130. Chris Haugene, *Cass Lake Superfund Site Part II: Where We Are Now*, DEBAHJMON, Apr. 2009, at 1, available at <http://www.llojibwe.com/news/deb2009/>

funding, and the tribe's own Division of Resource Management with its own staff,¹³¹ the simple fact is that the remediation is incomplete, residents are still at risk for adverse health effects, and there remains a lack of trust between the parties at a site that has been on the NPL since 1984.¹³² Clearly, there is room for improvement in this process.

V. Addressing the Challenges of Environmental Justice

The Environmental Justice movement has established that there is often inequality in the way minorities and lower-income populations are treated when it comes to environmental hazards.¹³³ In order to combat this injustice, Congress and EPA must enact laws and regulations that lessen the potential for actual or perceived bias, improve legal remedies available under CERCLA, provide consistency and progress towards the goal of equal treatment regardless of the presidential administration in power, and gain the trust of the affected populations to ensure better communication and cooperation. To achieve these results, EPA should try, to the extent possible, to standardize some aspects of the RI/FS phase of CERCLA so that information is easier to obtain and comparisons may be made across sites with similar contamination problems.¹³⁴ Congress should amend CERCLA to provide remedies similar to those in MERLA for personal injury and property damage, so that affected parties may seek relief from and put pressure on PRPs that may be using ambiguity in risk assessment to delay cleanups.¹³⁵ Congress and President Obama should enact both of President Clinton's executive orders as law, updating and expanding them as necessary, so that they have greater force and specific guidelines.¹³⁶ EPA should approach

debApril09.pdf.

131. See LEECH LAKE DIV. OF RES. MGMT., <http://lldrmenvironmental.org/> (last visited October 27, 2010).

132. See U.S. ENVTL. PROT. AGENCY, CLEANUP PLANS, *supra* note 52 (noting that "human health risks remain at the site" and discussing the "[n]ext steps" for remediation); see also Robertson, *Toxic Dust Cleaned*, *supra* note 11 (demonstrating distrust between parties at the site through an interview with a Leech Lake resident who called EPA's cleanup efforts a "waste of time").

133. See *supra* Part IV.

134. The RI/FS phase requires an assessment of factors to determine what type of remediation is appropriate for a particular site, and there is currently wide variation in how these factors are interpreted and evaluated. See *supra* notes 29–35 and accompanying text; HAMILTON & VISCUSI, *supra* note 31, at 257 (highlighting the varying interpretations of guidelines in the RI/FS phase).

135. See MINN. STAT. § 115B.05 (2009); HAMILTON & VISCUSI, *supra* note 31, at 257.

136. See Memorandum, *supra* note 115, at 1 (expressing President Obama's

American Indian tribes as sovereign nations, with the respect and appropriate procedures accorded to nation-to-nation interactions, in order to produce a more effective and collaborative solution to Superfund sites.¹³⁷

A. *Revision of Remedial Investigation and Feasibility Study*

EPA's objective is to serve the people of the United States and work for the nation's best interests.¹³⁸ A private company liable for its own or its predecessor's pollution of the environment, however, has the company's best interests in mind, typically to preserve its profit margin by keeping costs low while satisfying CERCLA's requirements to avoid costly litigation.¹³⁹ Because the science of contamination—what constitutes an acceptable risk and how best to mitigate exposure—is still developing, there is room for argument when EPA and RPs, pursuing divergent interests, try to reach a solution.¹⁴⁰ The RI/FS has been criticized as being too slow, in part due to RPs challenging costly remedies.¹⁴¹ Indeed, disagreement between IP and EPA as to these very issues appears to be a factor at Cass Lake, as evinced by the fact that

intent to revive President Clinton's executive orders); HAMILTON & VISCUSI, *supra* note 31, at 257 (acknowledging the need for consistency in the interpretation of federal and regional guidelines).

137. See Krakoff, *supra* note 106, at 177 (concluding that the problems with environmental justice on American Indian tribal lands "can only be solved by recognizing and promoting tribal self-governance in the broadest sense"). Since this Article was drafted, EPA has taken numerous steps to address environmental justice concerns. The author commends EPA for making environmental justice a priority, and acknowledges that some of the recommendations made herein are similar to those announced in *EPA's Action Development Process: Interim Guidance on Considering Environmental Justice During the Development of an Action*, released in July 2010. U.S. ENVTL. PROT. AGENCY, EPA'S ACTION DEVELOPMENT PROCESS: INTERIM GUIDANCE ON CONSIDERING ENVIRONMENTAL JUSTICE DURING THE DEVELOPMENT OF AN ACTION (2010), <http://www.epa.gov/environmentaljustice/resources/policy/considering-ej-in-rulemaking-guide-07-2010.pdf>.

138. See *Our Mission*, *supra* note 40.

139. See OFFICE OF TECH. ASSESSMENT, *supra* note 37, at 39. CERCLA limits relief available under the statute to recovery of response costs and damages to natural resources and human health, and strongly encourages parties to settle, rather than litigate. 42 U.S.C. § 9611 (2006) (defining the grounds of liability created under the statute); 42 U.S.C. § 9621 (2006) ("Whenever practicable and in the public interest, as determined by the President, the President shall act to facilitate agreements under this section that are in the public interest and consistent with the National Contingency Plan in order to expedite effective remedial actions and minimize litigation.").

140. See HAMILTON & VISCUSI, *supra* note 31, at 257.

141. MATTHEW BENDER & CO., 3-13 LAW OF HAZARDOUS WASTE: MANAGEMENT, CLEANUP, LIABILITY, AND LITIGATION § 13.01(4)(e)(iv)(B) (Susan M. Cooke & Christopher P. Davis eds., 2009).

EPA in 2010 is continuing to seek remediation for the risks it feels are still present at the site, despite IP's 2006 risk assessment report that identified "no adverse risks for residents, long-term onsite workers, or individuals engaged in recreational activities."¹⁴² Because the science and resulting technology is relatively new, EPA wants to encourage advancements in the field by allowing for flexibility in risk assessment conclusions and remedies.¹⁴³ EPA also may have difficulty in promulgating absolute rules in the absence of scientific certainty.¹⁴⁴ Thus, EPA should work to correct the potential for actual or perceived bias through better data-sharing practices that allow nearby residents to compare the assessments and remedies provided for their site with those at similar sites. The sharing of information may bring some disparities to light, which can then be corrected, and, in the absence of disparities, may convince affected residents that the remediation plan developed for their community is effective and similar to how other sites have been remediated.¹⁴⁵

As described in Part I, PRPs are allowed to complete the RI/FS work under supervision of EPA.¹⁴⁶ This strategy saves money and time but can also create a perception of conflicting interests, if not an actual conflict of interest.¹⁴⁷ EPA attempts to mitigate this potential bias by supervising the PRP's field work and reviewing its reports.¹⁴⁸ Though EPA has final say in the solution to be applied, the PRP and EPA have to compare various

142. *Bennett v. Int'l Paper Co.*, No. Civ. 05-38RHKRLE, 2006 WL 1116124 at *2 n.6 (D. Minn. Apr. 25, 2006) (citation omitted).

143. *See, e.g.*, 40 C.F.R. § 300.430(a)(iii)(E) (2010) ("EPA expects to consider using innovative technology when such technology offers the potential for comparable or superior treatment performance or implementability, fewer or lesser adverse impacts than other available approaches, or lower costs for similar levels of performance than demonstrated technologies.").

144. *See supra* notes 31–36 and accompanying text.

145. *See* Ted Fellman, *Collaboration and the Beaverhead-Deerlodge Partnership: The Good, the Bad, and the Ugly*, 30 PUB. LAND & RESOURCES L. REV. 79, 84 (2009) (praising information sharing because it "allows agencies to learn from and educate the public and manage uncertainty through joint research and fact-finding").

146. *See supra* note 30 and accompanying text.

147. *See* U.S. ENVTL. PROT. AGENCY, GUIDANCE FOR CONDUCTING REMEDIAL INVESTIGATIONS AND FEASIBILITY STUDIES UNDER CERCLA app. A at A-1 (1988), <http://www.epa.gov/superfund/policy/remedy/pdfs/540g-89004-s.pdf> [hereinafter U.S. ENVTL. PROT. AGENCY, GUIDANCE FOR CONDUCTING REMEDIAL INVESTIGATIONS] (emphasizing that allowing PRPs to conduct the RI/FS will facilitate agreement and implementation of remedies and conserve funds); Haugene, *supra* note 130 (addressing resident concerns as to why BNSF and IP are allowed to conduct the risk assessment rather than EPA).

148. *See* Haugene, *supra* note 130 ("If the work is done by the companies it is done under the purview of the EPA. There is very aggressive oversight regarding this process.").

alternatives to reach a decision.¹⁴⁹ This takes time and can be adversarial if the PRP prefers a cheaper but less effective alternative, forcing EPA to fight for and defend the alternative it prefers.¹⁵⁰ In addition, when the proposed solution is presented to the public for comment,¹⁵¹ even if a cheaper alternative is just as effective as a more expensive treatment, the people affected may lack expertise in the area and feel that they are not receiving the best possible treatment.¹⁵² Additionally, many affected residents, including those at Cass Lake, are generally suspicious of the statutory scheme because it puts the PRPs in charge of the assessment and cleanup.¹⁵³ Thus, EPA may be put in the position of defending the people's stance to the PRP, and subsequently defending the PRP's stance to the people.¹⁵⁴

Greater transparency may help ease some of these problems and fears. If EPA improved its data-sharing practices within the Agency, it would be easier for sites to be examined as a whole, rather than site-by-site, or by state or region.¹⁵⁵ St. Regis is not the only wood treatment plant with contamination problems, and many wood treatment facilities have been operated in a similar manner, though local conditions may vary somewhat due to factors such as geology, the extent of contamination, and community exposure.¹⁵⁶ If those results were compiled and available for comparison, the Agency could look back at the risk assessment, remediation plans, and subsequent reviews of the sites to

149. See 40 C.F.R. § 300.430(f)(1)(ii) (2010) (recognizing that EPA will make the final remedy selection decision). EPA obtains PRP input as it analyzes possible remedies. U.S. ENVTL. PROT. AGENCY, GUIDANCE FOR CONDUCTING REMEDIAL INVESTIGATIONS, *supra* note 147, at ch. 6, at 15. The PRP's RI/FS report "documents the development and analysis of alternatives" and EPA uses the report as a "basis for remedy selection." *Id.*

150. See OFFICE OF TECH. ASSESSMENT, *supra* note 37, at 39.

151. 40 C.F.R. § 300.430(f)(1)(ii).

152. See *Superfund Breakout Group*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/superfund/policy/ic/work/superapp.htm> (last updated Oct. 1, 2010) (discussing various barriers EPA has identified to Superfund enforcement, including the public's lack of confidence that institutional controls will be effective).

153. See *supra* notes 130–131 and accompanying text.

154. See 40 C.F.R. § 300.430(f)(1)(ii) (requiring EPA to review public comments when selecting a remedy); 40 C.F.R. § 300.430(c) (stressing the importance of community relations in the Superfund cleanup process).

155. See Fellman, *supra* note 145, at 84 (highlighting the advantages of collaboration and information sharing).

156. See U.S. ENVTL. PROT. AGENCY, SUPERFUND ACCELERATED CLEANUP BULLETIN: PRESUMPTIVE REMEDIES FOR WOOD TREATMENT FACILITIES 1–2 (1992), <http://www.epa.gov/superfund/policy/remedy/presump/finalpdf/wood.pdf> (indicating that, by 1992, EPA had "worked at almost 90 wood-treatment sites" and discussing the individual site assessments).

determine what worked well, and what did not.¹⁵⁷ It would be important to include data on the communities surrounding the sites to ensure that environmental justice problems do not continue to be a factor in the stringency of the cleanup.

Further, although much of this information (such as feasibility studies, records of decision, five-year reviews, and press releases) is available publicly on EPA's website,¹⁵⁸ it is not easily found for comparison and evaluation by residents and other interested citizens. If it were organized and summarized to allow for user-friendly comparison across similar sites, residents could investigate whether the proposed solution for their nearby site was similar to that of other sites, whether the solution was determined to be effective in follow-up reviews, and what they could expect to be long-term, recurrent problems for which no effective remedy has yet been developed. This could empower the residents to lobby for a different remedy or help convince them that the proposed solution is the best one for their situation.¹⁵⁹

B. Improving the Remedies Available Under CERCLA

"CERCLA does not provide a vehicle for private parties to recover damages associated with personal injury, diminution in property value . . . or other damages that are typically associated with contaminated property," which is why plaintiffs, such as Bredemus and Bennett, must rely on common law causes of action for this type of relief.¹⁶⁰ Enforcement mechanisms available to affected residents currently include citizen suits brought against the Agency to compel enforcement against the PRP if the Agency

157. See 40 C.F.R. § 300.430(a)(1) (articulating CERCLA's reliance on site data in selecting and implementing a remedy).

158. See, e.g., *St. Regis Paper Company Site*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/region5/sites/stregis/index.htm> (last updated Sept. 10, 2010). EPA has recently made many improvements to its website, including a search function that allows the public to find sites based on, among other things, the "Contaminated Media" type and "Contaminant Group." This is a good improvement, though it could be made more accessible by changing or better explaining some search terms. For example, for "Contaminated Media" types, the choices include "soil," "surface soil," and "subsurface soil." It is not clear whether a search for "soil" would yield results of both surface and subsurface soil categories, or if there is a significant difference in meaning. A search for "PAH" (polycyclic aromatic hydrocarbons) in "soil" did not list St. Regis in its results. *Search Superfund Site Information*, U.S. ENVTL. PROT. AGENCY, <http://cfpub.epa.gov/supercpad/cursites/srchsites.cfm> (last updated Nov. 5, 2010) (under the "Contaminants" tab).

159. See HAMILTON & VISCUSI, *supra* note 31, at 158.

160. Klass, *supra* note 28, at 923.

has not yet commenced such action, discussed below,¹⁶¹ and civil suits to recover only the cost of cleanup of contamination at a site if the residents take it on themselves and follow precise National Contingency Plan (NCP) regulations.¹⁶² Environmental justice communities are not likely to have the funds necessary to complete a remediation of a Superfund site, and even if they did, they probably would not have the legal access requisite to enter the property and undertake a cleanup.¹⁶³ Thus, once EPA has started working with the PRP to address contamination, residents often have no choice but to wait for its resolution.¹⁶⁴ Common law claims, discussed above, may provide some relief, but the availability of a statutory cause of action may simplify claims and place more pressure on PRPs and EPA to come to an agreement regarding remediation, as well as provide a mechanism for residents to recover non-cleanup-related costs.¹⁶⁵

Minnesota Statutes, section 115B.05, part of MERLA, provides for such claims against PRPs:

Except as otherwise provided in subdivisions 2 to 10, and notwithstanding any other provision or rule of law, any person who is responsible for the release of a hazardous substance from a facility is strictly liable for the following damages which result from the release or to which the release significantly contributes:

- (1) all damages for actual economic loss including:
 - (i) any injury to, destruction of, or loss of any real or personal property, including relocation costs;
 - (ii) any loss of use of real or personal property;
 - (iii) any loss of past or future income or profits resulting from injury to, destruction of, or loss of real or personal property without regard to the ownership of the property; and

161. 42 U.S.C. § 9659(a)(1), (d)(2) (2006).

162. Klass, *supra* note 28, at 923.

163. See Evans, *supra* note 22, at 1256–57 (describing how low-cost land attracts polluting industries to locate their facilities in low-income communities which lack resources to demand action).

164. See, e.g., Robertson, *Cass Lake Residents Continue Waiting*, *supra* note 61 (describing the residents' frustration with failed cleanups and the ongoing health problems they attribute to the site); Evans, *supra* note 22, at 1249 (noting that cleanups for minority communities are slower and less effective for residents).

165. Cf. Klass, *supra* note 28, at 923 (“[T]o obtain full recovery of those damages not covered by the federal statute, CERCLA’s role has been, and can be, to serve as a model for courts to expand the doctrine of common law strict liability for cases involving environmental contamination in order to provide full and complete relief.”). A federal cause of action would eliminate the need for private parties to rely upon state common law to obtain adequate remedies.

(2) all damages for death, personal injury, or disease including:

- (i) any medical expenses, rehabilitation costs or burial expenses;
- (ii) any loss of past or future income, or loss of earning capacity; and
- (iii) damages for pain and suffering, including physical impairment.¹⁶⁶

CERCLA should be amended to impose similar liability nationwide so that the availability of a civil suit against PRPs is not limited to cleanup costs.¹⁶⁷ As Minnesota's statute shows, there are many other costs that affected residents may face, for which there is currently no relief under CERCLA.¹⁶⁸ Although, due to many variables, it may be difficult to prove that death, injury, or disease was solely or primarily caused by certain contaminants, developments in the field of risk assessment may one day make it easier to calculate.¹⁶⁹ Injury to real or personal property may be easier to prove, as pre- and post-contamination values could be compared.¹⁷⁰ Ultimately, however, even if claims brought under a statute modeled after MERLA are unsuccessful in providing full and accurate compensation, they will serve as a bargaining chip for the community in the remediation process. Instead of being primarily limited to public comment periods to voice concern over remediation plans,¹⁷¹ citizens could bring suits that would increase their legal stake in the process, forcing PRPs to respond directly to the residents and thereby providing an incentive for PRPs to work with EPA to hasten the remediation.

166. MINN. STAT. § 115B.05, subdiv. 1 (2009).

167. See Klass, *supra* note 28, at 905 ("[P]rivate parties are limited to recovering 'response costs' (monies paid toward a cleanup) under CERCLA and cannot recover any damages associated with diminution in property value, lost profits, lost rents, personal injury, punitive damages, or other damages that are often associated with environmental contamination.").

168. See note 166 and accompanying text.

169. Cf. HAMILTON & VISCUSI, *supra* note 31, at 256–57 (describing the need for further standardization in the risk assessment process in order to better identify environmental risks to human health).

170. See, e.g., Gyula Lakatos et al., *Ecotoxicological Studies and Risk Assessment on the Cyanide Contamination in Tisza River*, 140-141 TOXICOLOGY LETTERS 333, 340 (2003) ("A realistic notion on the actual ecological conditions prevailing before the contamination, as well as on the occurring changes can be analyzed in the framework of a risk assessment system . . .").

171. See 40 C.F.R. § 300.430(f)(1)(ii) (2010).

*C. New Legislation Following the Example of Clinton's
Executive Orders*

President Clinton signed two executive orders that, had they been heeded, may have made a difference in Cass Lake, but the orders were largely ignored by President Bush.¹⁷² Executive orders may be influential within one administration, but in order to achieve consistency and steady progress towards the goals, Congress should pass legislation that clearly delineates the rights of the people and the responsibilities of agencies.¹⁷³ Though it may be necessary to leave some discretion to agencies in carrying out the law, a congressional act requires agencies to follow the mandate regardless of how much an administration values the goals of environmental justice.¹⁷⁴

1. Executive Order 12,898 Concerning
Environmental Justice

Executive Order 12,898 required EPA and several other agencies and offices to work together to address the environmental inequities brought to light by the Environmental Justice movement.¹⁷⁵ In particular, the agencies were to create a working group, develop strategies, collect data, and make periodic reports to the President.¹⁷⁶ The order was broad and left a fair amount of discretion to the agencies as to how to define the problem and apply the solutions. The last provision expressly stated that the order was meant “only to improve the internal management of the executive branch” and did not create any rights that may be

172. Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994); Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 6, 2000); *see also supra* notes 95–99 and accompanying text.

173. *See* Amanda K. Franzen, *The Time is Now for Environmental Justice: Congress Must Take Action by Codifying Executive Order 12898*, 17 PENN ST. ENVTL. L. REV. 379, 392 (2009) (“[T]he solution should include changing policy at the federal level by codifying Executive Order 12898 in part and providing judicial remedies and private causes of action for those who are disproportionately impacted by environmental hazards because federal agencies failed to fully consider their policies and programs’ costs and the distribution of those costs across society.”).

174. *Id.* at 405 (“[I]f the current President is not enforcing the executive order and forcing the EPA to consider the impact of their programs on specific populations, the EPA is able to pay little attention to those communities which carry the greatest burden of environmental hazards. However, this bill, if passed into law, could finally serve as the mechanism for truly lifting the burden placed on low-income and minority communities and as the long overdue tool needed to ensure that all communities are protected from environmental harms and hazards.”).

175. Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994).

176. *Id.*

enforced against the United States or any right to judicial review.¹⁷⁷ While the order may have been appropriate in 1994, when knowledge of environmental inequities was relatively new and developing, the lack of progress in the ensuing fifteen years indicates that a stricter, legally binding mandate would be more appropriate.¹⁷⁸ Congress should fill in the gaps and pass legislation to create a legally binding requirement that agencies address environmental justice.

One criticism of the order is that it did not indicate how an "environmental justice community" should be defined in order to identify groups that require additional protection or support.¹⁷⁹ This lack of guidance has led to differences across regions and allows regional offices to define protected groups so narrowly as to ignore many who are suffering.¹⁸⁰ While one flat definition cannot possibly fit every community in the United States, Congress should at the very least give more guidance for determining who falls into the category.¹⁸¹ Numerous studies have shown that environmental degradation disproportionately affects certain groups of people.¹⁸² Congress should compare those studies and look at how the group classifications impact outcomes to get a better sense of what the guiding principle should be for agencies to follow.¹⁸³ Additionally, classes of protected persons have already been defined in other civil rights contexts, such as employment and housing.¹⁸⁴ Congress could use those defined categories as a starting point to adopt similar protections for those groups of people disproportionately impacted by environmental hazards.

In addition, those people suffering because of environmental injustice should be empowered to hold agencies accountable for

177. *Id.*

178. Franzen, *supra* note 173, at 381–86 (describing the origins of the Environmental Justice movement and growing evidence of the racial and socioeconomic inequalities underlying the cleanup of environmental hazards). "The most current research proves that environmental injustice in minority communities is as much or more prevalent today then [sic] twenty years ago. As a result, there should be serious concern about the ability of current policies and institutions to adequately protect minorities and the poor from toxic threats." *Id.* at 385.

179. *Id.* at 388.

180. *Id.* at 398.

181. *Id.* at 397–400.

182. See, e.g., Evans, *supra* note 22, at 1247–52; Lavelle & Coyle, *supra* note 80 (documenting the results of studies showing the correlation between areas with environmental hazards and low-income areas).

183. Cf. HAMILTON & VISCUSI, *supra* note 31, at 161–63 (summarizing "[r]esearch on Superfund and Environmental Equity").

184. See Equal Employment Opportunities Act of 1972, 42 U.S.C. § 2000e-2 (2006); Fair Housing Act of 1968, 42 U.S.C. §§ 3604 (2006).

their actions or inaction.¹⁸⁵ CERCLA and some other environmental protection statutes contain provisions for citizen suits, but they are limited in availability and remedies.¹⁸⁶ CERCLA specifies that “[n]o action may be commenced . . . if the President has commenced and is diligently prosecuting an action under this chapter.”¹⁸⁷ Although litigation should not necessarily be the first response to perceived or actual inequality, an expanded citizen suit provision or other cause of action should be available if citizens have exhausted their remedies and the government still lacks an adequate response to the problem.¹⁸⁸ Without the possibility of a lawsuit, the agencies may continue their usual practices without addressing the issues of environmental justice.¹⁸⁹ Because agency employees are not elected, this form of accountability would provide an important check on the agency’s actions.¹⁹⁰

2. Executive Order 13,175 Regarding Consultation and Coordination with Tribal Governments

President Clinton issued Executive Order 13,175 in the last two months of his presidency to encourage agencies to improve consultation and collaboration with tribal nations as befitting a government-to-government relationship.¹⁹¹ Enforcing the order was not one of President Bush’s priorities.¹⁹² President Obama’s memorandum signified a revival of the order,¹⁹³ but its impacts remain to be seen. Many American Indians have been frustrated by political lip service that does not yield results,¹⁹⁴ in part because of orders like this one, issued in the final months of Clinton’s second term, when little enforcement could be expected.¹⁹⁵ At the Tribal Nations Conference, one leader

185. See Franzen, *supra* note 173, at 402.

186. See 42 U.S.C. § 9659 (2006); *supra* notes 160–165 and accompanying text.

187. 42 U.S.C. § 9659(d)(2).

188. Franzen, *supra* note 173, at 392, 402–05.

189. *Id.* at 402 (“Environmental justice advocates are [currently] not able to bring a cause of action against the EPA when the EPA does not consider environmental concerns during the rule making process and this results in policies, regulations or rules that disproportionately and adversely impact minority and low-income communities.”).

190. See *id.* at 402–05.

191. Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 6, 2000); see *supra* notes 95–99 and accompanying text.

192. See *supra* notes 95–99 and accompanying text.

193. See Memorandum, *supra* note 115, at 1.

194. See Remarks, *supra* note 114, at 4–11.

195. See Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 6, 2000).

specifically asked Obama to work with Congress to put something more permanent in place to lend greater consistency to the relationship between tribal nations and the United States.¹⁹⁶ In addition, developments in both domestic and international law indicate a greater emphasis on the self-determination of indigenous peoples.¹⁹⁷ Congress should bring Clinton's order and current international law principles together to make a domestically binding requirement for agencies to involve tribal nations and treat the tribes as equals instead of subordinates.

D. Greater Community Involvement and Building Trust

*"Tell me and I'll forget. Show me, and I may not remember.
Involve me, and I'll understand."*¹⁹⁸

The problem of institutional racism and neglecting low-income people goes beyond the scope of environmental justice and is one of the great challenges of modern American society.¹⁹⁹ One cannot address environmental justice needs without acknowledging that this is a broad problem with no easy answer. Rather, equality among races and across class lines is a goal that must be pursued across disciplinary and policy-based lines in order to take real effect.²⁰⁰ This is a daunting task requiring a great amount of effort and time, but until society reaches that utopia of equality, measures should be taken to account for and address the inequality still present today. Much like some educational institutions employ affirmative action criteria to

196. Remarks, *supra* note 114, at 5. The Vice President of the Navajo Nation expressed concern that without congressional action, future administrations would be able to ignore Obama's pledge to work with tribal nations, stating that "the thing I'm worried about is the end of the term and what happens with all the plans that we're going to be putting together with your administration." *Id.*

197. GRIJALVA, *supra* note 108, at 19 (describing the movement for "tribal self-determination"); see also, e.g., Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), U.N. GAOR, 15th Sess., U.N. Doc. A/4494, at 66 (Dec. 14, 1960) (recognizing the importance of "equal rights and self-determination of all peoples").

198. *Minnesota DFL Indian Caucus: About Us*, NATIVE DEMOCRATS, <http://natedemocrats.org/aboutus.aspx> (last visited Oct. 22, 2010) (Native American saying).

199. See, e.g., EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES* 1-3 (2003) (providing examples of economic inequality and describing the challenge of confronting institutional racism in contemporary society).

200. See Rhona J. Kisch, *Putting Environmental Racism on the National Agenda? A Review of Race and the Incidence of Environmental Hazards: A Time for Discourse*, 24 ENVTL. L. 1171, 1174 (1994) (book review) (discussing an interdisciplinary approach to addressing racism and environmental justice).

account for disparities in education and available resources,²⁰¹ EPA can address environmental justice needs by applying a version of affirmative action to hazardous contamination remediation.²⁰²

To determine how environmental affirmative action should work, it is first necessary to identify the reasons why responses are different depending on the makeup of the community. Experts Hamilton and Viscusi have pointed out that “[a] great deal depends on the source of the inequity” in attempting to reform EPA policy.²⁰³ They suggest that, beyond market forces, political influence is likely an important factor.²⁰⁴ Different communities vary in the extent to which they are involved in the political process in general.²⁰⁵ If administrative agencies are more likely to respond to the people who complain the most, then “minority areas may enjoy less stringent cleanups if they are less likely to translate their demands through collective action.”²⁰⁶

If political influence and collective action are important factors in achieving a fair and equitable result, then the solution to environmental injustice should include mechanisms to level the field in these areas.²⁰⁷ EPA has taken some steps in this direction already: it provides technical assistance grants to applicants who want to get another expert opinion on their situation;²⁰⁸ requires EPA employees to develop and implement a community relations plan;²⁰⁹ and has created both the Office of Environmental Justice, which addresses general issues related to race, income, and other factors,²¹⁰ and the American Indian Environmental Office, which collects tribal information involving the environment.²¹¹ These steps are helpful in collecting and transferring information, but they focus on each party learning more about the other: the residents learn more about EPA’s activities through the grants

201. See, e.g., Erwin Chemerinsky, *Making Sense of the Affirmative Action Debate*, 22 OHIO N.U. L. REV. 1159, 1170–75 (1996) (discussing the need for affirmative action in schools).

202. Franzen, *supra* note 173, at 406.

203. HAMILTON & VISCUSI, *supra* note 31, at 158.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Cf. id.* (suggesting that increasing community engagement and collective action would trigger a faster and more thorough response from EPA).

208. 40 C.F.R. § 300.430(c) (2010).

209. *Id.*

210. See *Environmental Justice*, *supra* note 8.

211. See *American Indian Tribal Portal*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/tribalportal/index.htm> (last updated Oct. 22, 2010).

and community relations, and EPA learns more about the difficulties facing residents through the work of the Office of Environmental Justice and the American Indian Environmental Office. In addition, everything is on EPA's terms: EPA has the discretion to grant funds for technical assistance, EPA develops the community relations plan, and EPA studies environmental justice and American Indians.²¹²

A dialogue between the federal government and tribal nations as equals would better serve the needs and interests of the community. Many tribal nations complain that their interactions with the United States have not been on a "nation-to-nation" basis,²¹³ even though the United States recognizes these tribal nations as being sovereign and having a right to self-determination.²¹⁴ To address this perceived inequality, EPA must treat the tribal nations with fairness and respect by working *with* them to create plans to cover relations between the community, the tribe, and the agency.²¹⁵ These plans must address cultural differences and outline the specific expectations of each party involved.²¹⁶ One possible approach would require EPA to route any information it wished to disseminate publicly through the tribal government first, just as foreign nations interact primarily through their governments and heads of state.²¹⁷ This would give the tribal nations a chance to look over the information and negotiate changes as needed, and would not interfere with the important relationship between the tribal nation and its members.²¹⁸

212. See 40 C.F.R. § 300.430(c); *Environmental Justice*, *supra* note 8; *American Indian Tribal Portal*, *supra* note 211.

213. See Remarks, *supra* note 114, at 8. President Obama addressed the historical concerns of tribal communities' interactions with the U.S. government, stating, "Washington thought it knew what was best for you. There was too little consultation *between governments*." *Id.* at 1 (emphasis added).

214. See CONFERENCE OF WESTERN ATTORNEYS GENERAL, *supra* note 107, at 4 (citing *Worcester v. Georgia*, 31 U.S. 515, 561 (1832)).

215. The enforcement of President's Clinton's 2000 Executive Order, would achieve the goals of effective communication between tribal nations and federal agencies. See Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 6, 2000); Memorandum, *supra* note 115, at 1 (Nov. 5, 2009) ("[President Obama's] Administration is committed to regular and meaningful consultation and collaboration with tribal officials in policy decisions that have tribal implications including, as an initial step, through complete and consistent implementation of Executive Order 13175.").

216. Pursuant to Executive Order No. 13,175, agencies are required to work with tribal nations regarding federal standards that might enhance or interfere with tribal rights. See Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 6, 2000).

217. See Fellman, *supra* note 145, at 84.

218. Tribal nations favor Congress's recommendation for local implementation of

Because many tribes are relatively small and lack budgets comparable to state governments, the technical assistance grants will continue to be important.²¹⁹ A more effective plan, however, might instead give funds to the tribe to hire an independent environmental professional for ongoing consultation and advocacy throughout the process, from preliminary assessment to removal from the list and perhaps even reuse of the property.²²⁰ There is sometimes a perception that even tribe members who are hired by the federal government are loyal to the federal government instead of the tribe because the federal government has the power to remove them from their positions.²²¹ Therefore, even though the federal government would provide funding for the professional's salary, it would be critical for the tribe itself to select and hire the professional in order to build trust.²²²

By working together and reviewing the results of interactions with tribal nations and environmental actions on tribal land, EPA should be able to build agency-wide knowledge and experience working with tribal nations and other disadvantaged communities. This knowledge must be shared so that more EPA staff members are trained in and aware of best practices for working with environmental justice communities.²²³ In addition, there is a great opportunity for EPA to learn from the American Indians

federal programs over direct federal implementation because it is "better attuned to local needs and priorities [of tribal communities], and tribes [are] obviously more familiar with the cultural needs of the community than the federal government." GRIJALVA, *supra* note 108, at 189.

219. See 40 C.F.R. § 300.430(c)(2)(iv) (2010) (requiring the EPA to "[inform] the community of the availability of technical assistance grants"); Padraic I. McCoy, *Sovereign Immunity and Tribal Commercial Activity: A Legal Policy and Summary Check*, 57 FED. LAW. 41, 44 (2010) ("A related and practical point is that many tribal governments are small and have minuscule budgets that could be wiped out by one lawsuit—even a frivolous one—shutting down the government, ceasing operations, and disabling essential services for tribal members and their families.").

220. Cf. Jody Freeman, *Collaborative Government in the Administrative State*, 45 UCLA L. REV. 1, 80 (1997) ("While there is some precedent for providing technical assistance grants to community groups in environmental dispute resolution, and while the EPA's Region 9 announced that it would provide \$25,000 grants for the Intel project, the EPA denied technical assistance to the lone [community advisory panel] member who requested it. Neither the EPA nor industry appears to have seriously considered the need to provide community representatives with independent advisors.").

221. See, e.g., Lyons, *supra* note 103, at 77 (discussing tribes' lack of trust in councils comprised of tribal members appointed by the federal government).

222. See *id.*

223. EPA does already provide some training in this area. See, e.g., *Cultural Sensitivity Training: Opportunities to Connect with Native American Communities*, U.S. EPA COMMUNITY INVOLVEMENT TRAINING CONF. (Aug. 20, 2009), www.epa.gov/ciconference/2009/download/presentations/cultural_sensitivity_training.pdf.

themselves, as many tribal groups are more aware of their natural surroundings than EPA staff members, both because there is a long tradition of environmental sustainability in tribes and because many tribe members rely partially on natural resources for subsistence.²²⁴ Information that tribe members share with EPA as a result of a better relationship may prove helpful not only for EPA's work, but also for other agencies dealing with various environmental issues.²²⁵

Conclusion

Environmental justice for all is an important goal because it has the potential to correct previous wrongs, and allows us to learn from society's mistakes and plan for a better future. The United States has benefitted greatly from technology and innovation, but at the country's rapid pace of development, it neglected to take care of the natural resources that inspired and sustained its progress.²²⁶ The nation did not realize until it was too late that it was polluting the environment and leaving dangerous chemicals behind that posed serious threats to human and ecological health.²²⁷ Congress passed CERCLA in an attempt to reverse the damage and restore the environment to its former glory.²²⁸ Similarly, those historically in power benefitted from exploiting American Indians and other racial minorities, and even though overt discrimination has decreased substantially, inequality still exists.²²⁹ Just as EPA works to restore the environment, federal

224. See *Public Health Assessment Guidance Manual: Appendix A: Tribal-Specific Resources and Considerations*, AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY, <http://www.atsdr.cdc.gov/HAC/PHAManual/appa.html> (last visited Oct. 26, 2010) ("The relationship Tribal populations' [sic] have with the environment is often different from that of other communities. Tribal lifestyle, cultural, ceremonial and religious practices are intertwined with the environment. These interactions can result in environmental exposure scenarios that are unique to individual tribes.").

225. *Id.*

226. Laura C. Bickel, *Baby Teeth: An Argument in Defense of the Commission for Environmental Cooperation*, 37 NEW ENG. L. REV. 815, 818 n.28 (2003) ("The United States, for example, despite having enjoyed a more vast quantity and quality of natural resources than Canada or Mexico, had already destroyed about four-fifths of its wildlife, cut over half of its timber, and used up two-thirds of its iron ore by the mid-twentieth century.").

227. Cf. *Letter to U.S. President Obama on Climate Change*, POLARIS INST. (Sept. 24, 2009), http://www.polarisinstitute.org/letter_to_us_president_obama_on_climate_change (urging President Obama to take measures to stop the United States' disproportionate contribution to global warming).

228. See Klass, *supra* note 28, at 920.

229. See BONILLA-SILVA, *supra* note 199, at 3 (explaining that the overt racism of the Jim Crow era is now replaced with societal practices used to disenfranchise

and state governments must work to restore and improve race relations. In order to correct the problems of yesterday and to achieve equality, historically disadvantaged people must be given advantages that make up for the differences between minorities and Whites, between low-income and more affluent communities, and between less politically involved and more politically influential groups.²³⁰ Just as contaminants dumped long ago have not disappeared simply because they are no longer being dumped, long-standing barriers to equality for all people continue to affect certain groups even after the barriers have been removed.

To address these issues, it is necessary to minimize actual and perceived biases by expanding the sharing of data and improving access to data.²³¹ Actual bias is clearly harmful, but perceived bias is also important to eradicate because a long history of broken promises has established a great deal of distrust that must be overcome.²³² By making it easier to compare data from various sites, EPA may find some efficiencies to promote and discrepancies to address, and affected residents will gain either ammunition for their fight for more effective remediation measures or reassurance that the plan selected for their community is effective and fair.

To give affected residents a greater voice in the process, CERCLA should be amended to include liability provisions similar to those in MERLA that create a cause of action for personal injury and property damages.²³³ This will give residents greater leverage in the discussions on remediation, encourage PRPs and EPA to speed up the process, and potentially compensate residents for costs not currently covered under CERCLA.

Further, Congress must work to pass legislation that provides for consistency across administrations and accountability to ensure that appointed agencies are both following and enforcing the law. Although the current president's views support greater enforcement of past legislation on these issues, codifying Executive Orders 12,898 and 13,175 would force agencies to actually follow

people of color).

230. Cf. Christine M. Foot, *Scrutinizing Strict Scrutiny: Environmental Justice after Adarand Constructors, Inc. v. Peña*, 11 BERKELEY J. AFR.-AM. L. & POL'Y 123, 147 (2009) ("Attempts to achieve equity in regulatory administration do not equate to preferential treatment based on race. Because the EPA's attempts to eliminate on-going institutionalized discrimination do not reach beyond providing equal protection to all, they should not be viewed as remedial affirmative action because they do not attempt to *compensate* anyone for *past* discrimination.").

231. See *supra* note 145 and accompanying text.

232. See *supra* note 109 and accompanying text.

233. See *supra* Part V.B.

their mandates.²³⁴ People aggrieved by violations of these laws would have the right to judicial review.²³⁵

Finally, it is essential not to overlook the human element of working together. In order to create productive collaborations, EPA must work to establish trust and respect befitting a nation-to-nation relationship by recognizing tribal nations' sovereignty and right to self-determination.²³⁶ The federal government should also pay for the tribes to hire an environmental expert if they do not have enough funds to pay the required salary.²³⁷ By forming a strong relationship based on mutual respect, the parties may be able to make important advances in environmental sciences with the potential of benefitting many generations to come.

For the residents of Cass Lake, the struggle for environmental equality continues as EPA has yet to finish the cleanup project.²³⁸ Since it has already taken over twenty-five years to get to this point, one can only guess how much longer they will have to wait.²³⁹ The problems with the site should have been identified and resolved long ago. These solutions may come too late for Cass Lake, and hopefully are rendered unnecessary if EPA acts quickly to proceed to the next stage of remediation, but as the studies and reports on environmental justice have shown, this is an ongoing problem. If Cass Lake cannot benefit from these changes, it at least provides an example from which the federal government may learn so as to avoid similar problems in the future.

234. See *supra* Part V.C.

235. See Klass, *supra* note 28, at 923, 928.

236. See *supra* Part V.D.

237. Cf. Freeman, *supra* note 220, at 80 (pointing out the "need to provide community representatives with independent advisors").

238. See Robertson, *Final Cleanup*, *supra* note 1.

239. EPA has stated that the remediation is *supposed* to begin in 2012, twenty-eight years after the site was put on the NPL. See Robertson, *Cass Lake Residents Continue Waiting*, *supra* note 61.

Appendix: Table of Acronyms

Acronym	Meaning
BNSF	Burlington Northern and Santa Fe Railway Company
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act
EPA	Environmental Protection Agency
IP	International Paper Company
MERLA	Minnesota Environmental Response and Liability Act
MPCA	Minnesota Pollution Control Agency
NCP	National Contingency Plan
NPL	National Priorities List
PRP	Potentially Responsible Party (also referred to as RP)
RCRA	Resource Conservation and Recovery Act
RI/FS	Remedial Investigation and Feasibility Study
RP	Responsible Party (also referred to as PRP)
SARA	Superfund Amendments and Reauthorization Act
UCC	United Church of Christ

